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

45 I. L. R., ALLAHABAD SERIES, FOR SEPTEMBER OCTOBER, 1923.

Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	Page.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
478	Gopi Ram v. Jeot Ram ..	*To be printed.*	535	Tirmal Singh v. Kanhaiya Singh ..	*To be printed.*
482	Raghubir Singh v. Jodha Singh ..	73 646	537	Ishdat Tiwari v. Tameshwar Tiwari ..	*To be printed.*
485	Emperor v. Sheo Charan ..	73 520			
487	Ziaud-din v. Abul Hasan ..	77 27	541	Emperor v. Zawar Husain ..	73 929
490	Sita Ram Tiwari v. Faujdar Rai ..	74 315	545	Ram Chandar v. Muhammad Nur ..	78 656
492	Balli Singh v. Raghubar Singh ..	*To be printed.*	548	Shauran Bibi v. Abdus Samad	78 538
			553	Aziz Ahmad v. Buddhu Khan	78 773
495	Emperor v. Shimbhu Narain ..	73 526	554	Devi Prasad v. The Secretary of State for India in Council	74 746
497	Nandan Prasad v. Abdul Aziz	74 367			
501	Ram Chand Khanna v. Goswami Ram Puri ..	74 379	557	Emperor v. Nanhu ..	75 361
			559	Alam Chan l v. Chhajju ..	74 339
503	Bidhi Chand v. Kachhu Mal ..	73 477	561	Sri Thakur Radhika Raman Bihariji Maharaj v. Bohra Shiam Sundar Lal ..	74 382
506	Ghansham Singh v. Bhola Singh ..	74 411			
515	Kedar Nath Singh v. Sheo Shankar ..	78 370	563	Muhammad Siddiq Ali Khan v. Anwar-ul-Hasan ..	74 389
518	Ram Dayal v. Sher Singh ..	74 358			
520	Mul Raj v Fazal Imam ..	74 307	565	Abdullah Khan v. Muhammad Maqbul Husain ..	74 822
524	Ali Jan Khan v. Majid-ud-din	*To be printed.*	567	Adya Saran v. Kali Charan ..	75 280
			569	Jugal Kishore Girdhari Lal v. Achal Singh, Takhat Singh	74 64
526	Emperor v. Bhure Mal ..	73 801			
529	Emperor v. Masud Husain ..	73 935	571	Kundan Lal v. Mokundi Kunwar	77 609
530	East Indian Railway Company v. Kishan Lal Tirkha Mal ..	73 986	575	B. I. Ry. Co. v. Makhan Lal ..	74 814
			576	Sahib Singh v. Girdhari Lal ..	73 1024
534	East Indian Railway Company v. Gopi Krishna Kashi Prasad ..	*To be printed.*	581	Bishambhar Nath v. Muhammad Ubaidullah Khan ..	77 572
			588	Emperor v. C. J. Cadd ..	73 508
			592	Ahmad-Ullah v. Abdul Rahim	74 763
			594	Emperor v. Muhammad Yakub Ali ..	76 1032

21 ALLAHABAD LAW JOURNAL, FROM JUNE TO AUGUST, 1923.

465	Ghansham Singh v. Bhola Singh ..	74 411	478	Ballo v. Ram Kishun ..	*To be printed. Not reportable.*
474	Lachmi Narain v. B. B. & C. I. Ry. Co. ..	74 248	480	Jarbandhan v. Badri ..	
476	Tota v. Jaggu ..	*To be printed.*	481	Emperor v. Zawar Husain ..	78 929

485	Ram Chander v. Muhammad Nur ..	73	656
488	Radha Krishun Shukul v. Nokhlal Shukul ..	74	964
490	Jai Barham v. Kedar Nath Matwari ..	69	278
495	Ram Charan Lal v. Raghubir Singh ..	75	387
498	Mathura Prasad v. Anandi Kunwar ..	74	911
500	Krishna Dass v. Ram Ugrah Singh ..	74	845
503	Bishambhar Nath v. Muhammad Ubaidullah Khan ..	77	572
510	Cadd v. Emperor ..	73	508
513	Ashiq Ali v. Emperor ..	73	337
515	East Indian Railway v. Makhan Lal Bindasri Prasad	74	814
516	Saiikh Muiz-ud-Din v. Mohammad Ikhlaq ..	74	756
518	Sri Thakur Radhika Raman Bihariji Maharaj v. Bohra Shiam Sunder Lal ..	74	382
521	Muhammad Siddiq Ali Khan v. Anwarul Hasan ..	74	389
522	Girdhari Lal v. Achal Singh Thakat Singh ..	74	64
524	Adya Saran v. Kali Charan ..	75	280
526	Mahabir Prasad v. Kanhaiya Lal ..	74	372
527	Pahlam Singh v. Umrao Singh ..	75	104
529	Abdul Wahid Khan v. Abdullal Khan ..	74	849
538	Abdullah Khan v. Muhammad Maqbul Husain ..	74	822
541	Har Prasad v Raghubar Dayal ..	74	817
544	Balwant Singh v. Mare Singh	74	322
545	Ahmadullah v. Abdul Rahim	74	765
548	Ram Adhar Singh v. Ram Manohar Singh ..	73	990
551	Hargobind Singh v. Hukum Chand ..	75	351
554	Raja Indra Jit Bahadur Sahi v. Amar Singh ..	74	747
563	Jhari Koeri v. Bijai Singh ..	74	865
567	Gupta Nand v. Behari Lal ..	74	827
569	Sri Ram v Mani Ram ..	74	922
571	Gauri Shankar v. Manki Kunwar ..	74	466
576	Kesho Dass v. Hanuman Panday ..	74	924
578	Balgobind v. Badri Prasad ..	74	449
582	Jatti v. Banwari Lal ..	74	462
585	Tara v. Emperor ..	74	529
591	Bhagelu v. Dharma ..	75	898
593	Chuni Lal v. Baldeo ..	75	730
595	Muhammad Afzal v. Muhammad Mahmood ..	74	343
596	Muhammad Said v. Bishambhar Nath ..	*To be printed.*	
602	Jamna Prasad v. Emperor ..	73	518
604	Beti Mahalakshmi Bai v. Chandhari Badan Singh ..	74	927
607	Aftab Begam v. Muhammad Ayub ..	74	345
608	Jagesar Pande v. Deo Dat Pande ..	74	931
610	Inayat Ilahi v. Hardeo Sahai	74	325
617	Mohd. Iftikharullah v. Banke Lal ..	73	953
619	Bansi v. Lakshmi Das ..	75	984
621	Girdhar Das v. Emperor ..	75	353
622	Abdul Rashid Khan v. Haji Nisar Mohl Khan ..	77	448
623	Ummed v. Emperor ..	74	858
626	Ruhul Amin v. Shankar Lal ..	77	30
634	Hawal Rai v. Har Prasad ..	75	835
637	Mithu Lal v. Sri Lal ..	74	918
639	Sultan Bakhsh v. Abdul Hamid ..	74	24
641	Kapur Chand v. Kanhaiya Lal ..	74	513
646	Rabi Partab Narain Singh v. Mahanth Ram Prasad Bharthi ..	74	502
648	Baldeo Misir v. Ramlagan Shukul ..	77	694
650	Mohammad Zain Khan v. Nurul Hasan Khan ..	74	142
651	Mahadeo Prasad v. Emperor	75	159
656	Sham Bihari Lal v. Ram Kali	74	495
659	Bijnath Rai v. Gokul Rai ..	74	498
660	Muhammad Bakhsh v. Muhammad Abdul Baqi Khan ..	74	490
665	Bu Ali Khan v. Sujan Kuar ..	75	100
667	Nasir Khan v. Itwari ..	74	905
669	Lallu Mal v. Rooti Ram ..	74	353
671	Kashi Nath v. Emperor ..	74	11
673	Maharaj Prasad v. Emperor ..	74	443
675	Tata Iron and Steel Company, Limited v. Chief Revenue Authority of Bombay ..	74	469
683	Sitla Prasad v. Chameli Bahu	75	316
686	Santi Lal v. Raj Narain ..	*To be printed.*	
689	Alcock, Ashdown and Company, Limited v. The Chief Revenue Authority of Bombay ..	75	392
697	Sheo Nandan v. Balgobind Misra ..	74	647
701	Parshadi Lal v. Laiq Singh ..	74	943
703	Lalla Mal Hardeo Das Cotton Spinning Mills, *In the matter of* ..	75	339
713	Bansidhar v. Babu Lal ..	75	309
718	Annada Mohan Roy v. Gour Mohan Mullick ..	74	499
723	The Midnapur Zamindary Company, Limited v. Uma Charan Mandal ..	74	482
726	Sri Raja Bommadevara Naganna Naidu Bahadur Zemindar Garu v. Ravi Venkatappayya ..	76	594

21 ALLAHABAD LAW JOURNAL, FROM JUNE TO AUGUST, 1923—concld.

730	A. S. S. Subbaiya Pandaram v. Mahamad Mustapha ..	74	492	763	Ram Govind v. Panna Lal ..	77	35
734	Bhairo Tewari v. Ramanuh ..	75	404	765	Umed Singh v. Emperor ..	77	183
737	Mahrana Kunwar v. E. V. David	77	57	770	Rati Ram v. Brahmajit ..	77	82
750	Amrit Bibi v. Mustafa Husain	77	66	772	Lalu Ram v. Emperor ..	77	188
754	Teja v. Tika Ram ..	77	37	774	Nihal Muhammad v. Emperor	*To be printed.*	
757	Raja Mohammad Mumtaz Ali Khan v. Mohan Singh ..	74	476	776	Chandu Lal v. Emperor ..	77	236

47 I. L. R., BOMBAY SERIES, FOR SEPTEMBER OCTOBER, 1923.

657	Hill v. Hill ..	73	304	721	Chimanbhai v. Keshavlal ..	78	464
664	Codd v. Codd ..	*To be printed.*		724	Tata Iron and Steel Company Limited v. Chief Revenue-Authority of Bombay ..	74	469
674	Bombay Sizing and Stores Supplying Co. v. Kusumgar & Co. ..	*To be printed.*		742	Alcock, Ashdown and Company, Limited v. Chief Revenue Authority of Bombay ..	75	892
678	Rama Nana v. Dhondi Murari	76	607	756	Mathuradas Maganlal v. Nathubhai Vithaldas ..	70	920
692	Hanmant Anant v. Shidu Shambhu ..	72	556	764	Venkapaiya v. Nazerally Tyabally ..	*To be printed.*	
696	Shiddappa v. Pandurang Vasudev ..	72	626	773	Dagadu Govind v. Sakhubai ..	78	369
699	Balkrishna Daji v. The Collector, Bombay Suburban ..	73	354	778	Yusuf Alli v. Papa Miya ..	78	233
707	Bapuji Narso v. Dattu Antaji	73	279	783	Govinddas Rajaramdas v. Ganpatdas Narotamdas ..	78	1030
712	Lala Miya v. Manubibi ..	73	246	785	Saraspur Manufacturing Company, Limited v. B. B. & C. I. Railway Company ..	78	1027
716	Motilal v. Harnarayan ..	73	365				
719	Hirachand Amichand v. Nemchand Fulchand ..	73	469				

2 BURMA LAW JOURNAL, FOR JUNE 1923.

134	Phomon Singh v. A. J. Wells	76	677	149	Nga E v. Emperor ..	76	697
136	Mau. g Po Thaung v Ma Gyi	76	812	150	Nga San Ba v. Emperor ..	76	704
138	Ma Hla U v. Maung Shwe Yin ..	76	814	151	Maung Lun Bye v. Maung Po Nyun ..	76	679
139	Maung Po Lu v. Emperor ..	76	700	153	Nga Pan Yin v. Emperor ..	76	709
142	Nga Maung Gyi v. Emperor ..	76	705	154	Valab Das v. Maung Ba Than	*To be printed.*	
146	J. R. Das v. Emperor ..	76	693				

50 I. L. R., CALCUTTA SERIES, FROM MAY TO OCTOBER 1923.

329	Abdur Rahim v. Narayan Das Aurora ..	71	646	426	Mathura Nath Mukherjee v. Lakhi Narain Ganguly ..	75	435
338	Subramonian v. Lutchman ..	71	650	439	Rajani Kanta Pal v. Jaga Mohan Pal ..	73	252
347	Secretary of State for India v. Raj Kumar Mukherjee ..	77	1025	446	Naresh Narayan Roy v. Secretary of State for India ..	*To be printed.*	
356	Tinkowri Pathak v. Ram Gopal Pathak ..	70	663	461	Kali Singh v. Emperor ..	75	533
367	Dehu Sonar v. King Emperor	77	991	468	Mukanda Lal De v. Bansidhar Marwari ..	76	311
370	Saroda Prasanna Roy v. Uma Kanta Hazari ..	77	450	475	Anantram Bhattacharjee v. Hem Chandra Kar ..	72	1041
394	Darapli Sodagar v Najir Ahamed ..	77	1030	482	Hari Satya Bishnu v. Emperor	73	934
399	Rash Behari Karuri v Narain Das Dorilal ..	*To be printed.*		487	Bhairabendra Narain Roy v. Rajendra Narain Roy ..	74	193
419	Ram Kissendas v. Brijraj Chowdhury ..	77	910	491	Saleh Abraham v. Manekji Cowasji ..	75	521
423	Abdul Matlab v. Nanda Lal Khatil ..	77	990	503	Kenaram Pal v. Kinu Mandal	75	379

518	Pramatha Nath Mukerjee v. Emperor ..	71	792
526	Ramani Kanta Ray v. Bhimnandan Singh ..	*To be printed.*	
531	Corporation of Calcutta v. The Calcutta Improvement Trust	75	346
549	Seodoyal Khemka v Johar Mull Manmull ..	75	81
564	Tulsi Telini v. Emperor ..	72	372
572	Prabhat Chandra Chatterji v Bijoy Chand Mahatap ..	75	89
577	Nagendrabala Chaudhurani v B joy Chand Mahatap ..	74	153
585	Tulsi Telini v Emperor ..	72	302
594	Ganesh Sahu v. Emperor ..	73	931
597	G T Williams, *In the goos of*	75	466
604	Karali Charan Pal v. Ashutosh Nandi ..	75	474
610	Ahidannessa Bibi v Isuf Ali Khan ..	74	1010
615	Nursing Dass Kothari v Chuttoo Lall Misser ..	74	996
626	Sasi Kanta Acharjya v Sahim Sheikh ..	74	1001
632	Nagendra Nath Bose v. Emperor ..	76	300
639	Ram Kumar Das v Nanda Kumar Shaha ..	75	27
650	Himendra Lal Singh Deo v. Fakir Chandra Datta ..	74	929
658	Eran Khan v Emperor ..	74	950
664	Baisnab Charan Das v. Amin Ali ..	72	953
667	Sundermull v. Ladhuram Kalu Ram ..	*To be printed.*	
680	Surapati Roy v. Ram Narayan Mukerji ..	73	193
689	Makbul Ahmad v. Allen ..	74	1041
694	Barada Prasad Banerjee v. Bhupendra Nath Mukherjee	75	55
700	Krishna Chandra Dey v. W. Graham ..	75	421
718	Chand Mull Babu v. Bau Behari Bose ..	74	1021
727	Santala Bewa v. Badaswari Dasi ..	75	11
737	Abinash Chandra Roy v. Fulchand Chaudhuri ..	74	1032
743	Hayatunnessa Chowdhurani v. Achia Khatun ..	74	1017
749	Roshan Ali v. Chandra Mohan Das ..	75	447
756	Chowdhury Muhammad Amin v. Bejoy Chand Mahatab ..	75	20
762	Imperial Tobacco Company Ltd. v. Albert Bonnan ..	77	193
807	Krishna Kumari Basu v. Nagendra Prosad Basu ..	77	10
813	Corporation of Calcutta v. Bejoy Kumar Addy ..	77	529
822	Sudamini Dassya v. The Secretary of State for India	*To be printed.*	
849	Raman Behari Roy v. Emperor ..	73	780

139	Krishnadas v Sam an Ali ..	74	925
141	Rajendra v. Abu Naser Ahiya	71	327
145	Bireswar v Panchcouri ..	74	975
171	Sarat Chandra v. Emperor ..	74	1043
173	Emperor v. Satyendra ..	71	657
180	Parul Bala Debi v. Satish Chandra Bhattacharj e ..	75	529
184	I up Ali v. Gour Chandra Deb	74	591
191	Rajendra Kumar Bose v. Brojendra Kumar Bose ..	77	790
199	Sivaprakasa v. Veeramareddi	68	538
219	Pirthipal Singh v. Ganesh Din Singh ..	71	641
222	Behari Lal Biswas v. Nasimannissa Bibi ..	73	482
233	Sarada Prasanna Roy v. Uma Kanta Hazari ..	77	450
253	Fazar Pramanik v. Emperor..	76	293
254	Shib Chandra v. Rabbani Mandal ..	73	322
256	Akhoy Mondal v. Basu Rai ..	73	53
257	Imperial Tobacco Company of India Limited v. Secretary of State for India in Council	67	902
263	Songsor Ali v. Jagannath Pal	76	252
265	Raja Jagadish Chandra Deo v. Bhubaneswar Mitra ..	76	241
281	Manadananda Jha v. Tarakananda Jha ..	76	220
287	Rani Jagadamba Kumari v. Wazir Narain Singh ..	*To be printed.*	
292	Rajendra Lal Saha v. Abdul Karim ..	76	455
298	Ishan Chandra Sarkar v. Manmatha Nath Dutta ..	71	611
302	A. E Salayje v. Fatima Bibi	71	753
305	Badri Narain Singh v. Harnam Kuar ..	68	1000
314	Debi Prosad Bhakat v. Official Trustee of Bengal ..	72	1013
319	Chandrakisor Datta v. Kumar Upendra Chandra ..	74	612
326	Ganesh Sahu v. Emperor ..	73	931
327	Hari Satya Bishnu v. Emperor	73	934
329	Darajuddin Akanda v. Emperor	73	936
331	Giridhar Sarkar v. Harish Chandra ..	73	328
333	Annadamoyi Debi v. Saudamini Debya ..	72	719
336	E. D. Sassoon and Company v Ramdutt Ramkissen Das ..	70	777
343	Ma Shwe Mya v. Maung Ho Hnaung ..	70	937

37 CALCUTTA LAW JOURNAL., FROM 16TH FEBRUARY TO JUNE, 1923—concld.

346	Harnath Kuar v. Indar Bahadur Singh ..	71	629
351	Jai Behram v. Kedar Nath ..	69	278
356	Ramsumran Prasad v. Shyam Kumari ..	69	73
363	Kamulammal v. Visvaratha-swami ..	71	643
369	Sahdeo Narain v. Kusum Kumari ..	71	769
377	Chhotey Lal v. The Collector of Moradabad ..	69	44
383	Sardar Singh v Kunj B hari Lal ..	69	36
391	Mukunda Lal, *In re* ..	62	831
394	Nanibala Dassya v Jamini Sundari ..	70	919
395	Khajah Habibulla v. Gola Asmoter Khatun ..	74	575
399	Rakhal Chandra v. Rohini Kumar ..	74	601
403	Saradindu v. Gosta Behari ..	75	196
406	Pramatha Nath v. Abdul Aziz	75	443
409	Prasanna Chandra v Upendra Nath ..	75	362
410	Samir v. Beni Madhab ..	75	364
413	Hamid Ali v Srikissen Gossain ..	75	367
415	Nalabar Ghose v Adya Nath Biswas ..	75	541
417	Pratab Chandra v. Jagadish Chandra ..	75	417
421	Dinbai v. K. B. Nusserwanji	69	323
426	Subramania Pillai v. Venkata Perumal ..	68	172
430	Radha Krishna v Bishesi ar Sahay ..	67	914
435	Rajangam Ayyar v. Rajangam Ayyar ..	69	123
440	Harichand v. Govind ..	71	763
447	Rajani Kanta Ghose v. Rahaman Gazi ..	*To be printed.*	
452	Uma Charan v Nibaran Chandra ..	75	2
457	Narain Das v. Abinash Chandar ..	69	273
461	Hafizan Bibi v. Suba Bibi ..	76	948
464	Secretary of State for India v. Laxmibai ..	72	898
469	Gopal Lall v. Tarincy Chand	*To be printed.*	
473	Gora Chand Holdar v. Rakhal Chandra ..	72	37
475	Faiz-ud-Din v. Asrab Ali ..	70	570
478	Kedar Nath v. Madhu Sudan Das ..	75	105
482	Ramkamal v. Syam Sundar ..	75	41
489	Janaki Ballav Roy v. Enat Mandal ..	72	136
491	Bhairab Chandra v. Kali Kumar ..	74	1038
494	Abdul Aziz v. Lakhmi Chandra ..	74	545
496	Umapati v Masiet nlla ..	72	475
499	Umarannessa Bibi v. Jamiran-nessa Bibi ..	76	418
501	Saratkumari Dasi v. Amul-lyadhan ..	71	632
515	Rajanikanta Pal v. Jagamohan Pal ..	73	252
521	Birendra Kishore v Traila-khya Nath Roy ..	74	547
524	Giris Chandra v Bhabataran	74	552
526	Priya Nath Gupta v. Lalji ..	72	508
535	Krishna Chandra v. Emperor..	74	542
538	Saradakripa Lala v. Bepin Chandra Pal ..	74	555
542	Baidya Nath v. Panchanani Dasi ..	72	128
545	Kulada Prasad v. Khudiram..	70	187
548	Puran Chandra Das v Ali Mahammad ..	70	999
552	Annada Charan v. Hara-gobinda ..	75	557
556	Bhupendra Narayan v. Midna-pur Zamindary Company ..	68	937
561	Mahomed Solaiman v. Birendra Chandra Singh ..	74	906
569	P M. Sadasiva v. A. R. Hajee Fakeer ..	72	48
580	Pran Krishna v. Prasanna Kumar ..	72	55
585	Arun Chandra v. Manmohan Sinha ..	70	784
589	Akshay Kumar Chand v The Commissioners of Bogra Municipality ..	75	506
592	Ahmed Ali v. Emperor ..	75	537
595	Rahim Sheikh v. Emperor ..	73	773
598	Satis Chandra v. Nil Madhab..	73	77

4 I. L. R., LAHORE SERIES, FOR SEPTEMBER-OCTOBER, 1923.

295	Ganga Puri v. Mohan Lal ..	73	645
297	Ram Narain v. Har Narinjan Kaur ..	76	535
323	Piara Singh v. Mula Mal ..	75	915
327	Sadiq Hussain v. Anup Singh	76	91
334	Sain Das v. Ram Chand ..	*To be printed.*	
336	Munshi Lal v. Shiv Devi ..	*To be printed.*	
344	Gansham v. Ramji Lal ..	73	441
346	Ram Saran Das v. Mula ..	*To be printed.*	
350	Jatti v. Banwari Lal ..	74	462
354	Asad Ullah Khan v. Karam Chand ..	76	605
356	Ishar Singh v. Surat Singh ..	74	294
359	Chiragh Din v. Emperor ..	76	189
364	Harji Mal v. Devi Ditta Mal	77	398
367	Gobind Das v. Rup Kishore..	77	409
373	Wallu v. Emperor ..	77	433
376	Allu v. Emperor ..	75	980
382	Lyme v. Emperor ..	77	425

5 LAHORE LAW JOURNAL, FROM JULY TO SEPTEMBER, 1923.

279	Benari Das v. Gopi Chand ..	76	529	351	Kishan Das v. Lachhman Singh ..	75	94
287	Bulaqi Mal v. Shamas Din ..	*To be printed.*		355	Muhammad Hafizullah Khan v. Bulaqi Mal ..	75	99
289	Chanda Singh v. Jai Kishen Das ..	*To be printed.*		357	Nihal Devi v. Rai Chuni Lal	73	767
				361	Rahmat Ali v. Deva Singh ..	75	827
292	Hassan Muhammad v. Mahanda ..	*To be printed.*		366	Wali v. Khuda Bakhsh ..	72	480
				370	Kadda Singh v. Moti Singh ..	*To be printed.*	
296	Jaimal v. Ganeshi Mal ..	75	528	372	Khazan Singh v. Kirpa Singh	73	779
298	Jita v. Har Chand ..	72	403	375	Maula Bakhsh v. Emperor ..	73	27
300	Kidri Prasad v. K. R. Khosla	75	590	377	Sher v. Emperor ..	77	606
304	Muhammad Usman Khan v. Ata Mohy-ud-din ..	73	871	381	Amir Khan v. Minh Mal ..	73	370
				384	Bhup Singh v. Prem Singh ..	76	496
307	Sher Singh v. Udham Singh	72	586	389	Chanda Singh v. Bishen Singh	76	501
310	Walaiti Ram v. Ram Kishun	72	385	392	Chando v. Miran Bakhsh ..	73	650
317	Chauhar Singh v. Emperor ..	*Not reportable*		394	Faujdar Khan v. Abdul Samad Khan ..	76	445
322	Nawab v. Emperor ..	76	824	398	Jhamman Lal v. Daulat Ram ..	73	461
325	Rullia Ram v. Emperor ..	*To be printed.*		401	Jhandu v. Husain Bibi ..	73	590
329	Emperor v. Sarwan Singh ..	73	691	404	Kala v. Mam Chand ..	73	988
332	Bhagat Ram v. Ram Sarup	76	589	406	Salig Ram v. Barkat Ali ..	73	442
335	Dasondi v. Badar Bakhsh ..	73	673	407	Emperor v. Waryam Singh ..	76	598
338	Ghulam Qutab-ud-Din Khan v. Sardara ..	73	209	412	Emperor v. Puran Singh ..	73	699
341	Iftikhar Ali Khan v. Risalat Khan ..	76	10	414	Gandu v. Emperor ..	*To be printed.*	
345	Jai Gopal Singh v. Muna Lal	73	655	417	Jagtu v. Emperor ..	76	397
347	Jaswant Kaur v. Wasawa Singh ..	76	592	420	Khushi Ram v. Emperor ..	72	617
				429	Raja Ram v. Emperor ..	73	521

46 I. L. R., MADRAS SERIES, FOR SEPTEMBER-OCTOBER, 1923.

685	Court Fees, *In re* ..	76	721	751	Subbaiya Pandaram v. Mahammad Mustapha Marcayar ..	74	492
706	The Secretary, Board of Revenue, Income-tax, Madras, v. Ripon Press ..	77	621	758	Ponnusamy Odayar v. Ramaswamy Thathan ..	74	945
712	Chokkalingam Chettiar v. Palani Ambalam ..	73	926	766	Dharma Singh v. Emperor ..	74	959
715	Emperor v. Virammal ..	69	374	768	Chimdambram Chetti v. Thiruvenai Ammal ..	74	153
719	Ramanathan Chettiar v. Emperor	71	608	782	Rajagopala Naidu v. Ramasubramania Ayyar ..	74	198
721	Maddu Venkayya v. Kamireddi Padamma ..	73	944	791	Konqal Rayal Reddiar v. Ranganayaki Ammal ..	74	166
723	Ramamma v. Gurunatham ..	72	881	808	The President of the District Board, South Kanara v. Gopalakrishna Bhatta ..	74	223
726	Maharajah of Jeypore v. Rajah Gangaraju ..	72	745	811	Dharmaraja v. Pethu Raja ..	74	4
734	Sankaran Nair v. Atchuthan	73	793	815	Ramasami Aiyar v. Venkatarama Ayyar ..	75	406
736	Ganamma v. Ketireddi ..	75	369				

45 MADRAS LAW JOURNAL, FOR SEPTEMBER-OCTOBER, 1923.

321	Pakkiri Kannai v. Manjoor Saheb ..	75	334	346	Chidambaram Chetti v. Kandasami Goundan ..	74	155
323	Neelakandhan v. Vasudevan	73	1041	355	Jatti v. Banwari Lal ..	74	462
324	Karri Bapanna v. Yerramma	74	218	359	Bibi Akhtari Begam v. Diljan Ali ..	71	621
327	Pritchard v. Pritchard ..	74	139	363	Satish Chandra v. Kumar Satish Kantha Roy ..	73	391
329	Kanniappa Mudaliar v. Chinnaswami Chettiar ..	73	540	385	Narayana Sa v. Balagurusw mi Nadar ..	75	838
333	Taluk Board, Dindigul v. Venkatarama Aiyar ..	75	38	389	Visvanatl an Chetty v. Ethirajulu Chetty ..	76	467
339	Thareesamma v. The Deputy Collector Cochin ..	77	347				

45 MADRAS LAW JOURNAL, FOR SEPTEMBER-OCTOBER, 1923—concld.

399	Sarjimull v. Ananta Lal ..	74	1029	514	Kesava Mudaliar v. Govindachari ..	76	811
403	Baliram Singh v. Seth Narsingdas ..	75	546	516	Sinnam Chetty v. Alagiri Aiyar ..	77	580
406	Nanni Kudumban, *In re* ..	76	289	528	Vizagapatam Sugar Development Co. Ltd. v. Muthurama Reddi ..	76	886
409	Ayyannah Chetty v. Subramania Iyer ..	76	756	533	Subraya Sampigethaya v. Krishna Baipadithaya ..	73	584
413	Doraiswami v. Chidambaram Pillai ..	75	46	543	Rajabbhaday Mudaliar v. Visvanatha Reddi ..	75	620
424	Mack v. The Madras Southern Mahratta Railway Company	75	250	543	Arunachalam Chetty, *In re* ..	47	949
431	Sundara Ramanujam Naidu v. Sivalingam Pillai ..	77	542	545	Jayammal v. The Southern Mahratta Railway, Co. Ltd.	76	992
438	Nabu Kumar Das v. Rudra Narayan Jana ..	77	141	551	Kandaswami Goundan v. Narayanaswami Goundan ..	76	306
444	Narsh Narayan Roy v. Secretary of State for India ..	*To be printed.*		553	Pallikudathan v. Buddu Goundan ..	76	647
453	Sourindra Nath v. Heramba Nath ..	*To be printed.*		555	Ramachandra Rao, *In re* ..	75	691
				557	Court Fees, *In re* ..	76	721
460	Jagdeo Narain Singh v. Baldeo Singh ..	71	984	572	Dinbai v. Nusserwanji Rustomji ..	69	323
471	Janoo Hassan v. Batchu Kumandu ..	76	752	578	Raja Indrajit Pratap Sahi v. Amar Singh ..	74	747
473	Etakandan Kunhokker, *In re*	76	187	588	Subbayya Pandaram v. Muhammad Mustapha Maracayar ..	74	492
476	Rajagopala Aiyangar v. Soundararaja Aiyangar ..	74	1018	592	Alcock Ashdown & Co., Ltd. v. Chief Revenue Authority of Bombay ..	75	392
478	Vedaviasa Aiyar v. The Madura Hindu Sabha Nidhi Ltd. ..	77	148	602	Peda Somadu v. Appigadu ..	*To be printed.*	
481	Konthalathammal v. Soundararachi ..	74	896	611	Tawker v. Harsookdoss Choughmull ..	76	124
497	Kanhaya Lal v. National Bank of India ..	75	7	613	Basireddi Narappa, *In re* ..	76	642
505	Imperial Bank of India v. Rai Gyaw Thu and Co. Ltd.	76	910				

(1923) MADRAS WEEKLY NOTES, FROM 16TH SEPTEMBER TO 30TH SEPTEMBER.

633	Aisamma v. Moidin Kunhi Beari ..	77	264	672	Mamillayya v. Venkataratnam ..	77	12
634	Deenabandu Rajaguru v. Visvasarayi Lachauna Dora ..	74	862	675	Ayyannah Chetty v. Subramania Iyer ..	76	756
636	Rajagopala Iyengar v. Soundararaja Iyengar ..	74	1018	677	Dharmaraja v. Pethur Raja..	74	4
638	Maharaja of Kohlapur v. Shri Bala Mahraj ..	77	100	679	Kotaya v. Veeraya ..	*To be printed.*	
647	Rosa Maria v. Jacob Souza..	75	881	681	Krishna Reddi v. Thanikachala Mudali ..	73	1054
652	Ammini Ammal v. Periasami Udayan ..	74	58	682	Thareesamma v. Deputy Collector, Cochin ..	77	347
657	Meenakshi Nethiar v. Parvati Nethiar ..	74	1012	687	Jati v. Ban Wari Lal ..	74	462
660	Lakshmi Narasa Raju v. Ganganna ..	76	769	689	Madhavarao v. Ragunath Venkatesh ..	74	362
662	Vedaviasa Aiyar v. Madura Hindu Sabha Nidhi Co. Ltd.	77	148	695	Nanni Kudumban v. Emperor	76	289
664	Runganatha v. Krishnasami..	75	189	697	Basirareddi Narappa v. Emperor ..	76	642
668	Veeraprasada Rao v. Lakshmi Narasama ..	73	948	699	Perianan Chetty v. Muriappan Asari ..	77	48
670	Ayissa Umma v. Puthiyapurayil ..	76	126	702	Raja Srinath v. Maharaja Pratap Udai Nath Sahi ..	*To be printed.*	

19 NAGPUR LAW REPORTS, FOR OCTOBER-NOVEMBER, 1923.

150	Gulsher Khan v. Ramaswarup ..	77	620	162	Sitaram v. Asaram ..	*To be printed.*	
151	Nanhelal v. Mangilal ..	*To be printed.*		164	Chunilal v. Gulzarilal ..	75	752
154	Husanb g v. Emperor ..	*To be printed.*		165	Achalsingh v. Jiwandas ..	75	993
160	Shamr o v. Emperor ..	75	979	170	Keshcorao v. Suklia ..	76	122
				172	Maganmal v. Raghunathrao	75	749
				176	Yasinkhan v. Emperor ..	75	544

26 OUDH CASES, FOR JULY-AUGUST, 1923.

191	Jagat Singh v. Achhaibar Singh ..	77	697	216	Abid Husain Khan v. Ahmad Husain ..	75	502
194	Babu Ram v. Ram Dulari Debi ..	77	701	217	Balgobind v. Fadii Prasad	74	449
196	Sidh Gopal v. Avadh Bihari Lal	77	749	223	Harnath Kuar v. Indar Bahadur Singh ..	71	609
197	Gomti Misra v. Deota Din Singh ..	77	737	228	Bishwa Nath Singh v. Jugal Kishore ..	73	244
200	Uttam Prasad v. Kodai ..	72	916	231	Mohammad Mumtaz Ali Khan v. Mohan Singh ..	74	476
201	Ram Singh v. Raghubansa ..	72	877	239	Lal Mohammad Khan v. Amatul Fatima ..	76	534
203	Abida Begam v. Ram Charan	74	316	242	Shakur v. Emperor ..	73	261
206	Akhtar Husain v. Qudrat Ali	*To be printed.*		244	Akhtar Husain v. Qudrat Ali	73	215
209	Abdul Hakim v. Sajjad Husain ..	74	304	245	Ram Ratan v. Ganga Bakhsh Singh ..	71	581

10 OUDH LAW JOURNAL, FOR MAY, 1923.

157	Raza Husain v. Mehdi Hasan ..	[69]	268	193	Ram Ratan v. Ganga Bakhsh Singh ..	71	581
159	Ram Nath v. Raggha Sah ..	68	892	205	Binda Prasad v. Banarsi Das	77	115
166	Mohamma Mumtaz Ali Khan v. Altafur Rahman ..	69	789	206	Banda Prasad v. Banarsi Das	77	116
178	Gava Din Singh v. Chauharja Pande ..	73	238	208	Emperor v. Sarju Prasad ..	77	192
180	Ram Narayan v. Nand Kumar	69	786	209	Bhagwan Bakhsh Singh v. Surendra Bikram Singh ..	74	335
185	Bhagirathi v. Onkar Nath ..	72	142	216	Jai Gobind Singh v. Abhairaj Singh ..	77	125
191	Kali Bakhsh Singh v. Bhagwan Das ..	72	1023				

(1923) PATNA CASES, FROM AUGUST TO DECEMBER.

258*	Kesho Prasad Singh v. Lakhu Rai ..	75	305	293	Waziri Begum v. Shashi Bhushan Roy ..	74	820
263	Shyam Sunder Rai v. Jagannath Misra ..	74	758	298	Kishundeo Narayan Mahta v. Ramrejhan Singh ..	*To be printed.*	
266	Jhobali Rai v. Sakhi Rai ..	*To be printed.*		300	Triloke Nath Jha v. Bansman Jha ..	72	938
269	Ramparichan Singh v. Biranji Prasad Singh ..	72	157	305	Shoraji Kuer v. Dhani Mian	75	794
271	Sheikh Akhaj Khalifa v. Ramlal Marwari ..	*To be printed.*		329	Narendra Nath Roy, *In the matter of* ..	75	728
273	Hazari Lal Sahu v. Ambika Gir	*To be printed.*		332	Ajti Chandhri v. Jarak Lal ..	75	946
276	K. V. Limaya v. J. K. Watve	76	950	336	Maharani Janki Kuer v. Thakur Rai ..	75	343
280	K. B. Dutt v. Taraprasanna Roy ..	74	753	339	Nand Lal Chaube v. Kesho Prasad Singh ..	*To be printed.*	
283	Mahadeo Singh v. Dhobi Singh	74	838	342	Radha Kishun Lal v. Kashi Lal ..	76	927
284	Durga Prasad v. G. I. P. Ry.	74	993	345	Ramji Ram v. Ram Kumar Singh ..	75	411
287	Umar Bahadur v. Mohammad Karim ..	*To be printed.*		353	Ranglal Sahu v. Kali Shanker Sahai ..	77	73
290	Gopal Saran Narayan Singh of Tikari v. Sita Devi ..	*To be printed.*		357	Chandrika Prasad v. Hira Lal	75	433

(1923) PATNA CASES, FROM AUGUST TO DECEMBER—concld.

361	Garabini Kumarin v. Surja Narain Singh ..	75	177
369	Sant Lal Singh v. Nanku Lal Singh ..	75	96
372	Tikait Damodar Narain Singh v. Ganga Ram Marwari ..	76	8
374	Bhaya Jagdeo Nath Sah Deo v. Pratap Udai Nath Sah Deo	75	341

I. L. R., RANGOON SERIES, FROM JULY TO OCTOBER, 1923.

402	H. G. Hoosein v. Asha Bibi ..	76	639
405	Maung Po Kin v. Maung Shwe Bya ..	76	855
419	Ma Min Byu v. Maung Chit Pe	76	665
427	Mokoodali v. Ma Hli ..	76	729
430	Ma Shwe The v. Maung Kan ..	76	672
433	L. W. Nasse, *In the matter of*	76	659
436	On Shwe v. Emperor ..	76	711
447	Pan Yin v. Emperor ..	76	709
449	Nga E. v. Emperor ..	76	697
451	Ma Than Than v. Ma Pwa Thit ..	77	63
460	P. C. Pal v. K. A. L. R. Firm	76	835
463	Maung San U. v. Maung Kyaw My. ..	76	802
472	Maung Wala v. Shwe Gon ..	*To be printed.*	
481	Maung Pya v. Ma Hla Kyu ..	76	841
487	Ma Toke v. Ma U Le ..	76	836
492	Ma Shan Ma v. L. S. M. Somasundram Chetty ..	*To be printed.*	
494	U. M da v. U. Sandima ..	76	807
500	K. E. Musthan v. Mohendra Nath Singh ..	76	794
510	Court Fees Act, *In re* ..	76	860
512	Maung Nyo v. Emperor ..	76	817
517	Gopi Chand v. Emperor ..	76	865
520	Maung E Gyi v. Emperor ..	*To be printed.*	
526	Mahomed Moidin v. Emperor	76	821
533	Ma Pwa v. Mahomed Tambi	77	308
545	Heng Moh & Co. v. Lim Saw Yein ..	75	287
549	J. R. Das v. Emperor ..	76	693
555	Saw Hla Aung v. Ma Ma Nyo	77	402
557	Aung Rhi v. Ma Aung Krwa	77	362
562	Ko Po Maung v. Ma M in	77	3 0
565	U. Pe Gyi v. Maung Thein Shi ..	77	372
580	S. P. R. M. Firm v. Maung Po Kya ..	77	3 2
584	Tin Tin Nyo v. Maung Ba Saing ..	77	385
600	Mahomed Surty v. Emperor	76	564
604	Emperor v. Maung Aung Gyaw ..	76	830
609	Maung Lay v. Emperor ..	77	429
618	Maung Mu v. Maung Kan Gyi	77	393
629	U. Tiloka v. Emperor ..	76	719
632	Ashu v. Maung Po Kha ..	77	5 5
634	M. J. Issacs v. E. Y. Mamsa Brothers ..	*To be printed.*	
637	Imperial Bank of India v. U. Rai Gyaw Thu & Co. Ltd.	76	910

24 CRIMINAL LAW JOURNAL, FOR SEPTEMBER-OCTOBER, 1923.

593	Ashiq Ali v. Emperor ..	73	337
594	Mu u Ram v. Emperor ..	73	338
595	Moti Singh v. Dhanukhari Singh ..	73	339
597	Chaoray Lal v. Chhe i Lal ..	73	341
599	Gopal Naidu, *In re* ..	73	343
608	Sanau v. Emperor ..	73	352
609	Sukhia v. Emperor ..	73	407
615	Mu n Chan v. Emperor ..	73	503
616	Emperor v. Bhwant Singh ..	73	504
618	Jhuna v. Emperor ..	73	506
620	Child v. Emperor ..	73	508
622	Bisha pur Ali v. Emperor ..	73	510
625	Sa ha Singh v. Emperor ..	73	513
627	Mohmohan Dass v. Baba Lall ..	73	515
629	Bishna v. Emperor ..	73	517
630	Jamna Prasad v. Emp ror ..	73	518
631	Ganga Ram v. Mura Shah ..	73	519
632	Sheo Charan v. Emperor ..	73	520
633	Raja Ram v. Emperor ..	73	521
635	Rajhika Natha Saha v. Jogish Chandra Sadhu ..	73	523
635	Bhagwan Das v. Emperor ..	73	523
636	Nadar v. Emperor ..	73	524
638	Saimbhu Narain v. Emperor	73	526
639	Lakhmi Das v. Emperor ..	73	527
640	Yadavarty Ankanna v. Pillameri Adribhotlu ..	73	528
641	Gansa Oraon v. Emperor ..	73	561
649	Thibu Bhogta v. Emperor ..	73	569
656	Chander Son v. Emperor ..	73	576
657	Emperor v. Inayat ..	73	689
658	Sita Ram v. Emperor ..	73	690
659	Emperor v. Sarwan Singh ..	73	691
661	Nageshar Prasad v. Emperor	73	693
662	Ram Chandar v. Emperor ..	73	694
663	Allah Din v. Emperor ..	73	695
664	Douglas Donald, *In the matter of* ..	73	696
667	Emperor v. Puran Singh ..	73	699
668	Hamiri v. Emperor ..	73	700
670	Chuni Lal v. Ishar Das ..	73	702
673	Ghulam Hussain v. Emperor	73	769
674	Emperor v. Hari Das Mitra ..	73	770
677	Aziz Ahmad v. Bhuddhu Khan ..	73	773
677	Rahim Sheikh v. Emperor ..	73	773
679	Jhagru v. Emperor ..	73	775
680	Supdt. and Remembrancer Legal Affairs, Bengal v. Narayan Chandra Banerjee	73	776

683	Khazan Singh v. Kirpa Singh	73	779	720	Maddu Venkayya v. Madou Paidamma	73	944
684	Raman Behari Roy v. Emperor	73	780	721	Marimuthu, *In re*	73	961
686	Ganpat Rai v. Emperor	73	782	723	Madan Guru v. Emperor	73	963
688	Ganoda Dassya v. Srimanta Ghosh	73	784	732	Kalloo Khan v. M. A. Rahim	73	972
689	Bhure Mal v. Emperor	73	801	734	Joita Bechar v. Pershottam Sankalchand	73	974
690	Chandrika Koeri v. Bhudhu Dusadh	73	802	735	Pan Zyaw v. Emperor	73	975
693	Hukam Chand v. Emperor	73	805	735	Radhey v. Emperor	73	975
693	Devi Dial v. Emperor	73	805	736	Guta v. District Judge, Akyab	73	976
695	Kedar Nath Dey v. Mohamed Sidik	73	807	737	U Thudamawara v. Emperor	74	65
696	Chaprolia v. Emperor	73	808	738	Baba v. Emperor	74	66
700	Emperor v. Shivlingappa Basappa	73	812	740	Nga Po Tin v. Nga Pa Saung	74	68
701	Ghasita v. Emperor	73	813	741	Bhagwati Prasad v. Emperor	74	69
702	Hatemali Chaprasi v. Osimaddy	73	814	744	Mrs. May Boudville v. Emperor	74	72
703	Pir Bakhsh v. Emperor	73	815	745	Jasuram Marwari v. Emperor	74	73
705	Emperor v. Zawar Hussain	73	929	746	Ahmed Ibrahim v. A. A. Ganny	74	74
707	Ganesh Sahu v. Emperor	73	931	747	Dina Nath v. Nek Ram	74	75
708	Indar Singa v. Emperor	73	932	748	H. K. Bhedwar v. C. S. R. Rao	74	76
710	Harisatya Bishnu v. Emperor	73	934	750	Kyaw Dwe v. Emperor	74	78
711	Maqsud Husain v. Emperor	73	935	751	Hakam v. Ralia Ram	74	79
712	Darajuddin Akanda v. Emperor	73	936	753	Emperor v. Umrao	74	257
713	Kanshi Ram v. Emperor	73	937	754	Wayezul Huq v. Shobrati Jolaha	74	258
714	Bhabani Prosad Moitra v. Hari Charan Bhattacharjee	73	938	755	Nagappan Mudaliar v Emperor	74	259
715	Teja Singh v Emperor	73	939	756	Allu v. Emperor	74	260
716	Nityananda Koer v. Rakhahari Misra	73	940	757	Suresh Chandra Ghose v. Emperor	74	261
717	Kaliarumal Naidu v. Bavaji Sahib	73	941	758	Emperor v. J John	74	262
719	Pancham v. Emperor	73	943	760	Emperor v. Ganesh Chandra Goldar	74	264
				763	Emperor v. Profulla Kumar Mazumdar	74	267
				766	Emperor v. Kale	74	270
				767	Gineshi Lal v. Emperor	74	271

Alphabetical List of Cases reported in Volume 75 of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

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

Names of cases reported.	Where reported.	Page.
Abdul Aziz v. Maung Tin ..	2 Bur. L. J. 48; (1923) A. I. R. (R.) 225; 24 Cr. L. J. 874 ..	74
Abdul Aziz Khan v. Bhairodan ..	*Nagpur Judicial Commissioner's Court ..	925
Abdul Hafiz v. Rashida Khatun ..	(1923) A. I. R. (L.) 288 ..	662
Abdul Hakeim v. Nga Ni Gri ..	2 Bur. L. J. 54; (1923) A. I. R. (R.) 154 ..	343
Abdul Hamid v. Emperor ..	(1923) Pat. 239; 2 Pat 793; 24 Cr. L. J. 872; 2 P. L. R. 1 Cr.; (1924) A. I. R. (Pat) 40	72
Abdul Rauf v Rajju Muhammad Shah ..	(1923) A. I. R. (A.) 340 ..	655
Abid Husain v. Ahmed Husain ..	18 L. W. 146; (1923) A. I. R. (P. C) 102; 26 O. C. 216, 45 M L J. 253; (923) M W. N. 599; 33 M. L T 232; 9 O. & A. L. R. 484; 10 O. L. J. 288; 28 C. W. N. 289 P. C. ..	512
Achal Singh v. Seth Jiwandas ..	19 N. L. R. 165; (1924) A. I. R. (N.) 14 ..	993
Adya Saran v. Kali Charan ..	21 A. L. J 524; 45 A 577; (1923) A. I. R. (A.) 580 ..	280
Ah Lin v. Emperor ..	2 Bur L J 5; (1923) A. I. R. (R.) 141; 24 Cr. L. J. 871 ..	71
Ahilyabai v. Vithabai ..	*Nagpur Judicial Commissioner's Court ..	595
Ahmad Husain v. Sirajuddin ..	(1923) A. I. R. (A.) 372 ..	616
Ahmadji Khan v. Gulmir ..	*Peshawar Judicial Commissioner's Court	271
Ahmed A i Sardar v. Emperor ..	37 C. L. J. 532; (1923) A. I. R. (C.) 723; 50 C. 96; 24 Cr. L. J. 953 ..	537
Aishia Bi v. Sughra Jan ..	(1923) A. I. R. (L.) 658 ..	1013
Ajti Chaudhuri v. Janak Lal Chaudhuri ..	(1923) Pat. 332 ..	946
Akal Mahton v. Mahabir Mahto ..	1 P. L. R. 223 Cr.; 24 Cr. L. J. 947; 5 P. L. T. 90 ..	531
Akshay Kumar Chand v. Commissioners of Bogra Municipality ..	37 C. L. J. 583; (1923) A. I. R. (C.) 675 ..	506
Alcock, Ashdown and Co. v. Chief Revenue Authority of Bombay ..	21 A. L. J. 689; 25 Bom. L. R. 920; (1923) M. W. N. 557; (1923) A. I. R. (P. C.) 138; 33 M. L. T. 267; 45 M. L. J. 592; 47 B. 742; 18 L. W. 918 P. C. ..	392
Ali Abbas v. Kunwar Sher Bahadur Singh ..	9 O. & A. L. R. 815 ..	267
Ali Ahmad v. Abdul Ghani ..	*Lahore High Court ..	880
Ali Ahmad v. Said Mian ..	4 L. 390 ..	1028
Allah Dad v. Emperor ..	25 Cr. L. J. 43 ..	731
Allu v. Emperor ..	4 L. 376; (1924) A. I. R. (L.) 104; 6 L. L. J. 103; 25 Cr L. J. 63 ..	980
Altafan v. Ibrahim ..	21 A. L J 811; (1924) A. I. R. (A.) 116 ..	502
Ambi v. Puthia Kovilakath Viathan Sridevi ..	(1923) M. W. N. 753; 18 L. W. 686; 45 M. L. J. 687; (1924) A. I. R. (M.) 102 ..	566
Amjad Ali v. Emperor ..	P. L. T. 129; 2 P. L R. 79 Cr.; 25 Cr. L. J. 35 ..	723
Ananthachari v. Ratnam	45 M. L J. 81; 18 L W 674; (1923) A. I. R. (M.) 713 ..	161
Annada Charan Sil v. Hargobinda Sil ..	37 C. L. J. 552; 27 C. W. N. 496; (1923) A. I. R (C.) 570 ..	557
Annaji v. Laxman ..	*Nagpur Judicial Commissioner's Court ..	622
Anup Chand v. Kawal Kaur ..	*Lahore High Court ..	784
Apalu v. Emperor ..	2 Bur. L. J. 94; 1 R. 225; (1923) A. I. R. (R.) 174; 24 Cr. L. J. 919 ..	295
Arbitration Act, *In the matter of the* ..	17 L. W. 648 ..	850

Arjun Das Gulab Rai v. E. I. Railway Co. ..	*Patna High Court ..	18
Ata Muhammad v. Pir Khan ..	*Lahore High Court ..	1055
Babo v. Jehangir ..	*Peshawar Judicial Commissioner's Court	479
Babu Lal v. Municipal Board, Farukhabad ..	21 A. L. J 28; 9 O. & A. L. R. 1053; (1924) A. I. R. (A) 157 ..	777
Badri Prasad v. Mukandi ..	9 O. L. J. 505; (1923) A I. R (O.) 109; 26 O. C. 66 ..	331
Badri Prasad v. Raj Kunwar ..	(1923) A. I R. (A.) 337 ..	686
Bagh v. Emperor ..	2 Bur. L J. 101; I R. 301; (1923) A. I. R. (R.) 188; 24 Cr. L. J. 920 ..	295
Bagh Singh v. Bhagwan Das ..	*Lahore High Court ..	101
Bajrang Das v. Dongarsee Das ..	(1923) A I R. (L.) 446 ..	793
Bakhshi v. Hyder Khan ..	(1923) A I. R (A) 571 ..	270
Bal Kaur v. Devki ..	4 L. 236; (1923) A. I. R (L.) 579; 6 L. L. J. 69 ..	109
Baliram Piraji v. Yeswanta ..	*Nagpur Judicial Commissioner's Court ..	829
Baliram Sinha v. Narsingdas Prayag Das Mohta ..	18 L W. 137; (1923, A. I. R. (P. C.) 93; 45 M. L. J. 403 P C ..	546
Ba usami Iyer v. Venkatasami Naicken ..	32 M L. T 219 (1924) A. I. R. (M.) 95 ..	219
Balwant Singh v. Laiqa Begam ..	*Allahabad High Court ..	238
Bansi v. Lakshmi Das ..	(1923) A. I R (A.) 70; 45 A. 700; 25 Cr. L. J 72 ..	984
Bansi v. Ram Baran ..	21 A. L. J. 60; (1923) A. I. R. (A.) 150; 45 A. 185 ..	751
Bansidhar v. Babu Lal ..	21 A L. J 713; (1924) A. I. R. (A.) 12 ..	309
Bansidaar Marwari v. Indar Narain Singh ..	24 Cr L. J. 865 ..	65
Barada Prasad Banerjee v. Bhupendra Nath Mukherjee ..	50 C. 604; (1924) A I. R. (C.) 56 ..	55
Bario Santhal v. Fakir Santhal ..	*Patna High Court ..	601
Baro Bahadur Man Singh v. Nawlakhbati ..	5 P L. T. 17; 2 P. L. R. 48 ..	58
Bashu Ram v. Piara Chand ..	4 L 134 ..	938
Begum Bibi v. Rahmat Khan ..	*Lahore High Court ..	892
Benares Bank Ltd. v. Surendra Narain Singh ..	*Patna High Court ..	469
Bera Chandramma v. Chandram Naganna ..	45 M. L. J. 228; (1923) M. W. N. 567; 18 L. W. 309 (1924) A I. R (M) 94 ..	170
Bhagelu v. Dharma ..	21 A L. J. 591; 45 A 623; (1924) A. I. R. (A) 79 ..	898
Bhagwan Das v. Mahmud Bano ..	*Allahabad High Court ..	1053
Bhagwan Das v. Maula Dad Khan ..	25 Cr. L J. 8 ..	990
Bhagwan Das v. Sukhdeo Kurie ..	*Allahabad High Court ..	953
Bhagwan Dut v. Brij Bhukhan ..	9 O & A L R 885. ..	808
Bhairo Tewari v. Ramnath Rai ..	21 A. L. J 731; (1924) A. I. R. (A) 60 ..	404
Bhaya Jagdeo Nath Sah Deo v. Partap Udainath Sah Deo ..	(1923) Pa . 374 ..	321
Bhayaram v. Nathu ..	*Nagpur Judicial Commissioner's Court ..	902
Bhikhu Mandal v. Bhikehakar Dutta ..	(1923) A. I R (Pat) 27; 2 P. L. R 32 ..	780
Bhogilal Karpashankar v. Darasha Kooverji ..	25 Bom L. R. 308 (1923) A I R. (B.) 303	743
Bhonajee v. Saraswati ..	*Nagpur Judicial Commissioner's Court ..	833
Bhulai Raut v. Kumar Raj ..	24 Cr L J 901; 5 I. L. R. 69; 2 P. L. R. 104 Cr. ..	535
Bibi Hafizunnissa v. Imamuddin Khan ..	*Patna High Court ..	123
Bibi Zainab v. Paras Nath ..	4 P. L T 491; 1 P L R. 361; 2 Pat. 800; (1924) A. I. R. (Pat) 37 ..	430
Bijai Shanker Selher v. Ram Chritra Singh ..	21 A. L. J 49; (1923) A. I R. (A.) 500; 45 A. 411 ..	35
Birinchi Singh v. Saroda Prasad Mukerji ..	3 P. L T 95 ..	942
Bisheshar Nath v. Abdul Wahid ..	(1923) A. I. R. (A.) 382 ..	642
Bisheshar Nath v. Kundan ..	14 A 503; 20 A. L. J. 593; (1922) A. I. R. (A) 318 ..	454
Brito v. Brito ..	20 L. W. 532 ..	888
Bu Ali Khan v. Sujan Kuar ..	21 A. L J. 66; (1924) A. I. R. (A.) 66; 45 A. 67 ..	100
Budhu Ram v. Niamat Rai ..	(1923 A. I. R. (L.) 632, 6 L. L. J. 72; 4 L. 406 ..	375
Bulaqi Mal v. Abdul Rahim ..	923) A. I R. (L) 638. ..	950
C. C Macdonald v. Teknarain Rai ..	*Patna High Court ..	997

Chan Pyu v. Chan Chor Khine ..	2 Bur. L. J. 42; (1923) A I R (R.) 238 ..	225
Chandan v. Bibi ..	*Peshawar Judicial Commissioner's Court	198
Chandrabhaga v. Ganesh Kesheo ..	*Nagpur Judicial Commissioner's Court ..	932
Chandrika Prasad v. Hira Lal ..	(1923) Pat. 357; 5 P. L. T. 49; 2 P. L. R. 82	433
Chanmulal v. Puna ..	(1923) A. I. R. (N) 169 ..	660
Chelaram v. Official Receiver ..	(192) A. I. R. (S) 20; 16 S. L. R. 226 ..	497
Chevraya Goundan v. Athappa Goundan ..	(1923) M. W. N. 515; (1924) A. I. R. (M) 83 ..	336
Chet Kaur v. Gurmukh Singh ..	(1923) A. I. R (L) 459 ..	940
Cahajju v. Gokul ..	(1923) A I. R (A) 338 ..	593
Chikhuri Ram v. Gopal Narain Ram ..	*Patna High Court ..	1002
Chiragh Din v. Ghulam Muhammad ..	*Lahore High Court ..	608
Chotalal Lallubhai v. Champsey Umersa & Sons	24 Bom. L. R. 877; (1923) A. I. R (B) 75	233
Chuni Lal v. Gulzari Lal ..	19 N. L. R 164; (1924) A I R N. 46 ..	752
Chunni Lal v. Baldeo ...	21 A. L. J. 593; (1924) A. I. R. (A.) 84; 25 Cr. L J 42 ..	730
Corporation of Calcutta v. The Calcutta Improvement Trust ..	50 C. 531; (1924) A. I. R. (C) 85 ..	346
D. K. Kannisa v. Devichand ..	18 L. W. 414; (1923) M W. N. 750; 45 M. L. J. 699; 45 M. 847; (1924) A. I. R. (M) 46 ..	390
Dakshina Ranjan Ghose v. Omar Chand Oswal..	38 C. L J. 104; 50 C. 992; 28 C W N. 10, (1924) A I R (C.) 145 ..	173
Dal Chand v. Ram Lal ..	25 Cr L. J. 39 ..	727
Daraz v. Emperor ..	(1923) A. I. R. (L) 317; 25 Cr. L. J. 1 ..	689
Daryai Singh v. Kunj Lal ..	*Lahore High Court ..	995
Daulat Ram v Deoki Nandan ..	*Lahore High Court ..	861
Debendra Kumar v. The Fyzabad Bank, Ltd. ..	4 P. L. T. 500; (1924) A. I. R. (Pat.) 94 ..	58
Debi Lal v. Jai Prakash Narain Singh ..	*Patna High Court. ..	1
Des Raj Sawhney v Fray's Motor Works ..	(1923) A I. R. (L.) 302 ..	64
Devi Deen & Sons v. Rohilkhand & Kumaon Railway ..	(1923) A. I. R. (A.) 342 ..	669
Dewan Chand v. Nizam Din ..	(1923) A. I. R. (L) 443 ..	610
Dhani Singh v. Chandra Choor Deo ..	*Patna High Court ..	570
Dhania Kunbi v. Emperor ..	25 Cr. L J. 63 ..	767
Dhanna Mal v. Moti Sagar ..	(1923) A. I. R. (L) 286; 6 L. L. J. 78 ..	654
Dhanraj v. Firm Sanchi Ram-Panna Lal ..	*Patna High Court ..	928
Dhauntal Khan v. Ram Lal Kalwar ..	10 O L. J 412 ..	227
Dolat Kuar v Matnura Singa ..	(1923) A. I. R. (A.) 341 ..	657
Dibakanta Chatterjee v. Gour Gopal Mukerjee ..	27 C. W.N. 43; (1923) A. I. R. (C.) 727, 50 C. 939, 25 Cr. L. J. 27 ..	715
Dinkar Rao v. Ayub ..	(1923) A I R. (N) 37 ..	889
Doraisami v. Chidambaram Pillai ..	45 M L J 413; 18 L W. 577; 33 M. L. T 25 (1923) M. W. N. 817; (1924) A I. R. (M) 3 ..	46
Doraiswami Ulayan v. Emperor ..	(1923) M W. N 782; 45 M. L. J. 846, 33 M L T. 213, 25 C L. J. 75 ..	987
Durga v. Babu Ram ..	(1923) A I. R. (A) 403 ..	596
Dwijendra Narain Bagchi v Emperor ..	38 C. L J. 9; 24 Cr. L. J. 902 ..	150
East Indian Railway Co., Ltd. v. Netram Ganesh Lal ..	*Patna High Court ..	261
Emperor v. Hasrat Mohani ..	24 Bom. L. R. 785; (1922) A. I. R. (Bom.) 24; 24 Cr. L. J 923 ..	299
— — — v. Jagmohan Das ..	3 O. & A. L. R. 102; 24 Cr. L. J. 916 ..	292
——— v. Nritya Gopal Roy ..	38 C. L. J. 1; 24 Cr. L. J. 897 ..	145
——— v. Saer Mahomed ..	49 B. 918, 25 Bom. L. R. 214; (1923) A. I R. (B.) 71, 24 Cr. L. J. 807 ..	67
——— v. Sher Mahomed ..	46 B. 901, (1923) A. I. R. (B.) 65, 24 Cr. L. J 670 ..	70
Faiz Muhammad v. Muhammad Ismail ..	*Lahore High Court ..	843
Fanindra Nath Roy v. Bhola Dassi Debi ..	3 C. L. J. 21 ..	402
Fajir Canal v. Baij Nath ..	9 O & A. L. R. 873 ..	888
Fajir Muhammad Khan v. Pirdad Khan ..	*Lahore High Court ..	844
Fattu v. Emperor ..	(1923) A. I. R (L.) 286; 24 Cr. L. J. 944; 6 L. L. J. 10 ..	368
Fattu v. Nanak Chand ..	*Lahore High Court ..	1029

Fiaz Ahmad Shah v. Church Missionary Trust Association, London ..	*Lahore High Court ..	910
Firm Gokal Mal-Ramchand v. Firm Nath Mal-Gulzari Mal ..	(1923) A. I. R. (L) 431 ..	812
Firm Gopal Mal-Ganda Mal v. Hara Chand ..	(1923) A. I. R. (L.) 303 ..	656
Firm Hazari Lal Chhanga Mal v. Sohan Lal ..	(1923) A. I. R. (A) 407 ..	609
Firm Mul Chand-Hut Chand v. Firm Ganda Mal-Rallia Ram ..	*Lahore High Court ..	1039
Firm of Narain Das-Jaini Lal of Delhi v. Firm of Jai Narain-Bain Lal of Delhi ..	(1923) A. I. R. (L.) 24; 5 L. L. J. 210 ..	786
Firm Phaggu Mal-Mata Din v. Benarsi Das ..	*Lahore High Court ..	1001
Firm Phallu Mal-Hira Lal v. Banarsi Das ..	*Lahore High Court ..	615
Firm Pirthi Singh-Jamayat Rai v. Firm Harsukh-Das-Jhog Mal ..	*Lahore High Court ..	849
Fitzholmes v. Waryam Singh ..	(1923) A I R. (L) 514 ..	419
Fleming Shaw & Co., v. Mangal Chand Dwarka Das ..	*Sind Judicial Commissioner's Court ..	1035
Forbes Forbes Campbelll & Co., Ltd. v. Vershimal Dewanmal ..	*Sind Judicial Commissioner's Court ..	1041
G. Abdoolla v. I. A. Mohamed ..	*Rangoon High Court ..	171
G. T. Williams, *In the goods of* ..	50 C. 597, 27 C. W N. 812; (1924) A. I. R. (C.) 115 ..	466
Ganga Ram v. Natha Ram ..	*Lahore High Court ..	858
Ganu Gopal Sonar v. Dattatraya Laxman Potdar	24 Bom. L. R. 815; (1922) A. I. R (B.) 335 ..	128
Garabini Kumarin v. Surja Narain Singh ..	(1923) Pat. 361; 5 P. L. T. 52 ..	177
Garapati Kotayya, *In re* ..	32 M L. T. 248; (1923) M. W. N. 444; 45 M. L J. 741 (1923) A. I. R (M.) 687, 25 Cr. L. J. 64 ..	768
Garudappa Peria Thiruvadi v. Pookutti Janaki..	18 L. W. 530; 45 M. L. J. 693; (1924) A. I. R. (M) 103 ..	1016
Gauran v. Chandu Lal ..	*Lahore High Court ..	747
Gaya Prasad v. Methai Lal ..	(1923) A I. R. (A.) 404 ..	624
Gaya Singh v. Surajbali Singh ..	*Allahabad High Court ..	931
Ghasi Ram v. Malony Club ..	(1923) A. I. R. (A.) 382 ..	603
Ghulam Husain v. Ganesh Lal ..	(1923) A I.R. (A.) 373 ..	619
Ghulam Khan v. Ghulam Haider Khan ..	*Peshawar Judicial Commissioner's Court..	214
Ghulam Muhammad v. Mehraj Din ..	(1923) A. I. R. (L.) 679 ..	746
Ghulam Mustafa Khan v. Ghulam Nabi ..	(1923) A. I. R. (L) 581; 4 (L) 263 ..	461
Ghualm Sabir v. Taba Hussain ..	*Lahore High Court ..	779
Ghulam Yusuf v. Emperor ..	24 Cr. L. J. 921 ..	297
Girdhar Das v. Emperor ..	24 Cr. L. J. 929; (1924) A I. R. (A) 77 ..	353
Giris Chandra Gangopadhyay v. Krishna De Nag	38 C L. J. 266; (1924) A. I. R (C.) 168 ..	325
Girja Nand v. Parbhu Narain Singh Kashi Naresh	(1923) A. I. R. (A) 398 ..	605
Gopal Das v. Banmali Lal ..	*Allahabad High Court ..	1004
Gopal Ganesh v. Balabdas Santukiram ..	*Nagpur Judicial Commissioner's Court ..	878
Gopali Ram v. Dewak Ram ..	(1923) A I. R. (L) 694 ..	743
Government Advocate, Behar and Orissa v. Ganga Prasad ..	3 P. L. T. 559; (1922) A. I. R. (Pat.) 532; 1 Pat. 423; 25 Cr. L. J. 31 ..	719
Government of Assam v. Sahebulla ..	38 C. L. J. 77; 27 C. W. N. 857; 24 Cr. L. J. 881; (1924) A. I. R. (C) 1 F. B. ..	129
Govindrao v. Rukhmanand ..	*Nagpur Judicial Commissioner's Court ..	899
Govindu Kaviraj Purohito v. Gauranga Saw ..	(1923) M. W. N. 408; 18 L. W. 54; 45 M. L. J. 231; (1924) A. I. R. (M.) 56 F. B...	739
Gulab v. Emperor ..	(1923) A. I. R. (L.) 315; 6 L. L. J. 54; 25 Cr. L. J. 5 ..	693
Guman Singh v. Umrao Singh ..	19 N. L. R. 191 ..	559
Gunnan Akkamma v. Nune Venkatapathi ..	*Madras High Court ..	623
Gurbakhsh Singh v. Bhagwan Singh ..	*Lahore High Court ..	934
Haider Khan v. Emperor ..	9 O & A L. R. 869 25 Cr. L J. 63 ..	978
Haimabati Devi v. Pran Krishna Banerjee ..	27 C. W. N. 193 ..	262
Hamid v. Emperor ..	2 Bur. L. J. 96; 24 Cr. L. J. 918; (1924) A I. R. (R.) 16 ..	294
Hamid Ali v. Srikissen Gossain ..	37 C. L. J. 413; 28 C. W. N. 115; 24 Cr. L. J. 943 ..	367

Hargobind Singh v. Hukum Chand ..	21 A. L. J. 551; 45 A. 608; (1924) A. I. R. (A.) 94 ..	351
Hari Ram Singh Choudhury v. Ram Ram Singh Choudhury ..	27 C. W. N. 285; (1923) A. I. R. (C) 444 ..	218
Harnarayan Jodhraj v. Radhakisan Chandrabhan	(1923) A. I. R. (N.) 324 ..	906
Harphul v. Emperor ..	(1923) A. I. R. (L.) 429, 25 Cr. L. J. 58 ..	762
Hawal Rai v. Har Prasad Rai ..	(1924) A. I. R. (A.) 57; 45 A. 711 ..	835
Hemangini Dassi v. Bhagwati Sundari Dassi ..	27 C. W. N. 792; (1923) A. I. R. (C) 685	682
Heng Moh & Co. v. Lim Saw Yean ..	18 L. W. 92; (1923) A. I. R. (P. C.) 87; (1923) M. W. N. 614; 45 M. L. J. 776; 33 M. L. T. 430; 1 R. 545 P. C. ..	287
Hira Singh v. Madho ..	*Lahore High Court ..	870
Hiria v. Ram Adhin Singh ..	(1923) A. I. R. (A.) 335 ..	553
Hit Lal Mahton v. Jiboo Mahton ..	5 P. L. T 142 ..	378
Ibrahim v. Jiwan Das ..	*Lahore High Court ..	1043
Ibrahim v. Sugrabai ..	7 N. L. J. 4 ..	664
Ijaz Hussain v. Lachman Das ..	9 O. & A. L. R. 796 ..	790
Irshad Muhammad Khan v. Jwala Prasad ..	(1923) A. I. R. (A.) 344 ..	663
Islam Fatima v. Tamiz Ali ..	*Allahabad High Court ..	111
Jabedali v. Prasanna Kumar Nag ..	27 C. W. N. 433; (1923) A. I. R. (C.) 423 ..	281
Jadubir v. Gajadhar ..	21 A. L. J. 809 ..	785
Jagan Nath v. Basant Ram ..	(1923) A. I. R. (L.) 595 ..	24
Jagannath Singh v. Sardar Singh ..	(1923) A. I. R. (A.) 448 ..	614
Jagat Chandra Ghose v. Emperor ..	(1923) A. I. R. (C.) 484; 25 Cr. L. J. 34 ..	722
Jagdhari Rai v Langat Gope ..	4 P. L. T. 495; (1923) A. I. R. (Pat.) 572..	676
Jagdip Prasad v. Rajo Kuer ..	(1923) Pat. 177; 4 P. L. T. 531; (1923) A. I. R. (Pat.) 464 ..	1022
Jaggan Nath v. Daud ..	4 L. 243 (1923) A. I. R. (L.) 592 ..	103
Jailalsao v. Lal Fatehsingh ..	*Nagpur Judicial Commissioner's Court ..	826
Jaimal v. Ganeshi Mal ..	4 L. 187; 5 L. L. J 296 ..	528
Jaini Lal v. Firm Messrs. Durga Prasad Dau Dayal	(1923) A. I. R. (A) 334 ..	527
James Mackintosh v. Scindia Steam Navigation Co. Ltd. ..	24 Bom. L. R. 853; (1922) A. I. R. (B.) 444; 47 B. 250 ..	221
Jamini Nath Mullick v. Midnapur Zemindary Co.	27 C. W. N. 772; (1923) A. I. R. (C.) 716	231
Janki Kuer v. Thakur Rai ..	(1923) Pat. 336; 5 P. L. T. 37 ..	343
Jari Lal Pal v. Lal Behari Hazra ..	(1923) A. I. R. (C) 499 ..	625
Jawahar Singh v. N. D. Sassoon and Co., Karachi	(1923) A. I. R. (L) 290 ..	165
Jhandu Singh v. Emperor ..	(1924) A. I. R. (A.) 142; 25 Cr. L. J. 45 ..	733
Jiwan v. Wadhawa ..	*Lahore High Court ..	855
Josyula Ramachandra Rao, *In the matter of* ..	(1923) M. W. N. 768; 18 L. W. 689; 45 M. L. J. 684; (1924) A. I. R. (M.) 129; 25 Cr. L. J. 65 ..	977
K. C. Mehta v. Cassumbhai Keshavji ..	24 Bom. L. R. 847; (1922) A. I. R. (B.) 433 ..	193
Kali Singh v. Emperor ..	50 C. 461; 24 Cr. L. J. 949; (1924) A. I. R. (C) 53 ..	533
Kalicharan v. Ratansingh ..	19 N. L. R. 119; (1923) A. I. R. (N.) 293..	589
Kamal Narayan v. Bani Ram ..	(1923) A. I. R. (N.) 332 ..	449
Kamruddin v. Indrani ..	19 N. L. R. 179; (1924) A. I. R. (N.) 17 ..	769
Kandhaya v. Raj Rup Kunwar ..	(1923) A. I. R. (A.) 367 ..	681
Kanhaya Lal v. National Bank of India, Ld. ..	(1923) A. I. R. (P. C.) 114; 45 M. L. J. 497; 33 M. L. T. 349; 25 Bom. L. R. 1248; 4 L. 284 P. C. ..	7
Kanshi Ram v. Jaimal Singh ..	(1923) A. I. R. (L.) 590; 6 L. L. J. 31 ..	562
Kapura v. Arjun Singh ..	(1923) A. I. R (L.) 511 ..	269
Kapura v. Hardit Singh ..	(1923) A. I. R. (L.) 510 ..	261
Karali Charan Pal v. Ashutosh Nandi ..	50 C. 604; (1923) A. I. R. (C.) 331; 27 C. W. N. 959 ..	474
Karim Bakhsh v. Gauhar Ali ..	*Lahore High Court ..	837
Kartorimal v. The E. T. and Lighting Co. Ltd. ..	4 L. 182; 6 L. L. J. 86 ..	456
Karu v. Pandia ..	*Nagpur Judicial Commissioner's Court ..	874
Kaveribai Ammal v. B. Mehta & Sons ..	18 L. W. 615; (1923) M. W. N. 894; 46 M. L. J. 71 ..	901
Kedar Nath Sadhukhan v. Madhu Sudan Das ..	37 C. L. J 478; (1923) A. I. R. (C.) 682 ..	105
Kenaram Pal v. Kinu Mandal ..	50 C. 508; (1924) A. I. R. (C.) 52 ..	379

Kenath Puthen Veetil v. Karumathil ..	18 L. W. 203; 45 M. L. J. 258; (1923) M. W. N. 807; (1923) A. I. R. (M.) 500 ..	476
Kennoth Arthur Hill v. Ranjan Bardhan ..	5 P. L. T. 196 ..	859
Keshav Manja Bhat v. Govind Naga Bhat ..	24 Bom. L. R. 843; (1923) A. I. R. (B.) 32 ..	188
Kesho Prasad Singh v. Bhagwat Saran Pande ..	(1924) Pat. 18; 5 P. L. T. 98 ..	670
Kesho Prasad Singh v. Lakhu Rai ..	4 P. L. T. 575 (1923) Pat. 258; (1923) A. I. R. (Pat.) 581 ..	305
Kidar Nath v. Wazir Chand ..	*Lahore High Court ..	903
Kidri Prasad v. K. R. Khosala ..	(1923) A. I. R. (L.) 425; 5 L. L. J. 300 ..	590
Kisenlal v. Chendba ..	*Nagpur Judicial Commissioner's Court ..	917
Kishan Das v. Lachhman Singh ..	(1923) A. I. R. (L.) 544; 5 L. L. J. 351 ..	94
Kishori Mal v. Jagdish Narain Singh ..	*Patna High Court ..	312
Krishna Chandra Dey v. Graham ..	50 C. 0; 27 C. W. N. 693; (1923) A. I. R. (C.) 694 ..	421
Krishna Iyer v. The Official Receiver of Trinchinopoly ..	*Madras High Court ..	445
Kshetrabashi Mahanti v. Ratnakar Mahapatra ..	28 C. L. J. 229 P. C. ..	278
Kudrat Nath v. Emperor ..	(1923) A. I. R. (L.) 295; 24 Cr. L. J. 879; 6 L. L. J. 125 ..	79
Kuldip Sahay v. Harihar Prasad Jha ..	4 P. L. T. 638. ..	871
Kuldip Sahay v. Rajkumar Singh ..	1 P. L. R. 386; 4 P. L. T. 633 ..	1046
Kumar Prasanna Deb Raikat v. Uddhab Chandra Shaha ..	18 L. W. 147; (1923) A. I. R. (P. C.) 86; 45 M. L. J. 729; 33 M. L. T. 432 P. C. ..	556
Kumaram Uni Achan v. Kunhikrishnan Nair ..	16 L. W. 304 ..	814
Kundan Lal v. Bassant Rai ..	*Allahabad High Court ..	330
Kundan Lal v. Jagat Ram ..	*Allahabad High Court ..	108
Kunj Lal v. Hari Ram ..	(1923) A. I. R. (L.) 438 ..	781
Kuppusami Chetty v. Singaravelu Chetty ..	18 L. W. 99 45 M. L. J. 233; (1923) A. I. R. (M.) 679; (1923) M. W. N. 867 ..	848
Kurshit Kathum v. Hyder Khan ..	(1923) M. W. N. 564 ..	93
Labh Singh v. Emperor ..	(1923) A. I. R. (L.) 291; 24 Cr. L. J. 877; 6 L. L. J. 111 ..	77
Labhu Ram v. Abdulla ..	(1923) A. I. R. (L.) 587 ..	183
Ladha Singh v. Hukum Devi ..	4 L. 233 6 L. L. 97 ..	57
Lakhpat Rai v. Mayya Mal ..	*Lahore High Court ..	824
Lakshmibai Jagannath Joshi v. Yeshwant Vithal Bagkar ..	24 Bom. L. R. 969; (1922) A. I. R. (B.) 449; 47 B. 92 ..	283
Lakshmichand v. Dulichand ..	(1924) A. I. R. (N.) 12 ..	787
Lalla Mal-Hardeo Das, *In the matter of* ..	21 A. L. J. 703; (1924) A. I. R. (A.) 137 ..	339
Lalsa Rai v. Udit Rai ..	*Allahabad High Court ..	114
Local Government v. Hanmant Rao ..	(1924) A. I. R. (N.) 19; 25 Cr. L. J. 60 ..	764
Ma Hla Kyu v. Maung Nyun ..	2 Bur. L. J. 45 ..	237
Ma Mi v. Emperor ..	2 Bur. L. J. 10; (1923) A. I. R. (R.) 152 24 Cr. L. J. 934 ..	358
Ma Mi v. Hadji Mahomed ..	1 R. 176; (1923) A. I. R. (R.) 261 ..	31
Ma Saw v. Maung Shwe Gon ..	2 Bur. L. J. 38. (1923) A. I. R. (R.) 244 ..	309
Ma Sha Ma v. Samasundram Chetty ..	2 Bur. L. J. 50; 1 R. 492, (1923) A. I. R. (R.) 246 ..	217
Ma Thein Tin v. Ma Htoo ..	2 Bur. L. J. 60; (1923) A. I. R. (R.) 156 ..	322
Ma Thin Myaing v. Maung Gyi ..	1 R. 351; (1924) A. I. R. (R.) 13. ..	166
Mack v. Madras and Southern Maharatta Railway Co., Ltd., ..	45 M. L. J. 421; 33 M. L. T. 66; (1924) A. I. R. (M.) 154 ..	250
Maganmal v. Raghunath Rao ..	19 N. L. R. 172; (1924) A. I. R. (N.) 39 ..	749
Maghi Mal-Khara ti Ram v. Gopi Ram-Ram Chand ..	*Lahore High Court ..	1020
Mahadeo v. Ram Bharose ..	(1923) A. I. R. (A.) 365 ..	679
Mahadeo Prasad v. Emperor ..	21 A. L. J. 654; 24 Cr. L. J. 911; 45 A. 680; (1924) A. I. R. (A.) 131 ..	159
Mahadu v. Emperor ..	24 Cr. L. J. 959 ..	143
Maharaj Rai v. Janki Kuer ..	*Patna High Court ..	1031
Maharaja of Jaipur v. Surjan Singh ..	20 A. L. J. 615; (1922) A. I. R. (A.) 333; 44 A. 671 ..	495
Mahla Ram v. Crown ..	25 Cr. L. J. 74 ..	986

Mahomed Hasham & Co., *In re*	..	24 Bom. L. R. 861; (1923) A. I. R. (B.) 107	203
Mahtab Kuer v. Brhmo	..	21 A. L. J. 817; 90 & A. L. R. 1917	.. 254
Majeti Subbiah & Co. v. Tetley and Whitley	..	32 M. L. T. 380, 45 M. L. J. 39; 1 L. W. 77; (1923) M. W. N. 445; (1923) A. I. R. (M.) 593	.. 673
Man Singh v. Ram Nath	..	*Allahabad High Court	.. 922
Maneck Chand Virchand Patni, *In re*	..	24 Bom. L. R. 872; (1922) A. I. R. (B.) 390; 47 B. 275	.. 61
Manikonda Lingayya, *In re*	..	45 M. L. J. 683; 18 L. W. 960; (1924) M. W. N. 51; 33 M. L. T. 224; 25 Cr. L. J. 73	.. 985
Manna Lal v. Emperor	..	90. & A. L. R. 947 25 Cr. L. J. 49	.. 753
Manohardas v. Ra das	..	(1923) A. I. R. (S.) 17	.. 549
Mathura Nath Mukherjee v. Lakhi Narain Gangu-ly	..	50 C. 426; (1924) A. I. R. (C.) 68	.. 435
Maung Chit U v. Bansi Dhar Bazaz	..	2 Bur. L. J. 63; (1923) A. I. R. (R.) 153	.. 328
Maung Po Han v. Ma So Yi	..	2 Bur. L. J. 65; (1923) A. I. R. (R.) 160	.. 6
Maung Shwe Ku v. Emperor	..	2 Bur. L. J. 55; (1923) A. I. R. (R.) 157; 24 Cr. L. J. 929	.. 353
Maung Maung Tin v. Ma Hla U.	..	2 Bur. L. J. 58 (1923) A. I. R. (R.) 150	.. 210
Maung Tun Yin v. Ma Thein Shin	..	2 Bur. L. J. 6; (1923) A. I. R. (R.) 159; 24 Cr. L. J. 28	.. 304
Maziuddin v. Hassan Khan	..	*Peshawar Judicial Commissioner's Court	397
Mehan Singh v. Kehar Singh	..	(1923) A. I. R. (.) 523, 6 L. L. J. 39	.. 317
Meyrick v. Dipa Pandey	..	*Patna High Court	.. 22
Mohammad Amin v. Bijoy Chand Mahatab	..	50 C. 50; 38 C. L. J. 192; (1923) A. I. R. (C.) 732	.. 20
Mohammad Moiddin Ashraf v. Mohammad Ishaq Ashraf	..	(1923) A. I. R. (Pat.) 525; 1 P. L. R. 459	.. 265
Mohammad Qasim v. Municipal Board, Saharanpur		(1923) A. I. R. (A.) 371	.. 607
Mohan Singh v. Sewa Ram	..	10 O. & A. L. R. 217; 10 O. L. J. 424	.. 579
Moti Ram v. Emperor	..	24 Cr. L. J. 904	.. 152
Muhammad Abdulla v. Jiwan Mal	..	*Lahore High Court	.. 945
Muhammad Hafizullah Khan v. Bulaqi Mal	..	(1923) A. I. R. (L.) 209; 4 L. 156; 5 L. L. J. 355 and 6 L. L. J. 42	.. 99
Muhammad Khan v. Sultan Ahmad	..	*Lahore High Court	.. 1040
Muhammad Shafi v. Bindeshri Saran Singh	..	*Allahabad High Court	.. 266
Mukabar v. Karim Bakhsh	..	(1923) A. I. R. (L.) 383	.. 496
Mukambika Shettithi v. Shiddaya Shetti	..	8 L. W. 553; (1924) A. I. R. (M.) 116	.. 613
Mundo Singh v. Krishna Dayal Gir	..	(1924) Pat 67	.. 98
Municipal Committee, Bhera v. Shiv Ram	..	(1923) A. I. R. (L.) 503	.. 90
Municipal Committee, Pind Dadan Khan v. Bhagwan Singh	..	*Lahore High Court	.. 737
Munshi v. Emperor	..	25 Cr. L. J. 4	.. 692
Nagier v. Krishna Chettiar	..	(1923) M. W. N. 770	.. 830
Nanak Chand v. Muhammad Khan	..	*Lahore High Court	.. 1048
Nand Kishore Missar v. Kalika Missir	..	(1923) A. I. R. (Pat.) 546; 24 Cr. L. J. 869; 5 P. L. T. 45	.. 69
Nanha v. Kanhaiya Lal	..	25 Cr. L. J. 71	.. 983
Nanhu v. Emperor	..	45 A. 557; (1923) A. I. R. (A.) 608; 24 Cr. L. J. 637	.. 361
Narayana Iyer v. South Indian Ry., Co.	..	18 L. W. 312; (1923) M. W. N. 731	.. 260
Narayana Sah v. Balaguruswamy Nadar	..	45 M. L. J. 385, 18 L. W. 918; (1924) M. W. N. 48, 33 M. L. T. 227	.. 838
Narendra Nath Roy, *In the matter of*	..	(1923) Pat. 349; (1924) A. I. R. (Pat.) 131; 25 Cr. L. J. 40	.. 728
Narsingh Thakur v. Bishunpergash Singh	..	4 P. L. T. 929; (1924) Pat 21	.. 1036
Natabar Ghose v. Adya Nath Biswas	..	37 C. L. J. 415; 27 C. W. N. 675; (1923) A. I. R. (C.) 690; 24 Cr. L. J. 957	.. 541
Nathu Ram v. Dogar Mal	..	4 L. 198	.. 555
Nawaz Ali v. Allu	..	4 L. 185; 6 L. L. J. 44; (1924) A. I. R. (L.) 82	.. 520
Nena Ojha v. Parbhu Dutt Ojha	..	*Patna High Court	.. 508
Nga San Dun v. Emperor	..	2 Bur, L. J. 8; (1923) A. I. R. (R.) 144; 24 Cr. L. J. 933	.. 357
Nilkanth v. Suryabhan	..	(1923) A. I. R. (N.) 297; 24 Cr. L. 880	.. 80
Nizamuddin v. Emperor	..	4 L. 179; 24 Cr. L. J. 958	.. 512

Notified Area Committee, Una v. Amar Singh ..	4 L. 442 ..	908
Nripendra Nath v. Jhumak Mander ..	4 P. L. T. 522 ..	681
Nur Ahmad Khan v Municipal Committee, Amritsar ..	*Lahore High Court ..	896
Orient Bank of India Ltd. v. Habibullah Khan ..	*Lahore High Court ..	745
Padam Singh v. Umrao Singh ..	21 A. L. J. 527, (1924) A I. R. (A.) 48 ..	104
Pakkim Soloman v. Chelliah Pillai ..	45 M. L. J. 208, 46 M. 839; (1924) A. I. R. (M.) 18, 33 M. L. T 231 F. B. ..	17
Pakkiri Kanni v. Mohammad Manjoor Sahib ..	(1923) M. W. N. 565, 45 M. L. J. 321; 18 L. W. 345 ; 33 M. L. T. 44 . 46 M. 844 ; (1924) A. I. R. (M.) 124 ..	334
Palu v. Rasilu ..	(1923) A. I R. (L.) 675 ..	740
Pamidimarri Gnamma v. Kettireddi Krishna Reddi ..	45 M. L. J. 262; 46 M. 736, (1923) M. W. N. 463 ..	369
Panna Lal v. Hussain Beg ..	21 A. L. J. 428 ..	460
Parabh Dayal v. Radho ..	*Lahore High Court ..	818
Parmanand Parwar v. Kartar Nath ..	(1921) A. I. R. (N.) 35; 25 Cr. L. J. 15 ..	703
Parmeshur Lal v. Rukmin ..	9 O. & A. L. R. 871 ..	875
Partap Singh v. Hakim Singh ..	4 L. 171, (1923) A I. R. (L.) 480; 6 L. L. J 99 ..	87
Parthasarathi Chetti v. Abdul Rahim Sahib ..	18 L. W. 109; (1923) A. I. R. (M.) 686; (1923) M. W. N. 871 ..	489
Parul Bala Debi v. Satish Chandra Bhattacharjee ..	37 C. L. J. 180; (1923) A. I. R. (C.) 456; 24 Cr. L. J 945 ..	529
Peary Lal v. Emperor ..	21 A L. J. 399 ; (1923) A. I. R. (A.) 601 : 24 Cr. L. J. 900 ..	148
Pendekkallu Thimmayya v. Pendekkallu Siddappa	*Madras High Court ..	112
Phul Kuer v. Rambhanjan Singh ..	*Patna High Court ..	975
Phulli v Debi Parshad ..	(1923) A I R. (L.) 575 ..	449
Phulwanti Kumari v. Maheshwari Prosad Singh	*Patna High Court ..	909
Piara Singh v. Mula Mal ..	(1923) A I. R. (L.) 65, 4 L. 323; 5 L. L. J. 551 ..	915
Pokhar Das v. Radha Kishen ..	*Lahore High Court ..	927
Prabhat Chandra Chatterji v. Bijoy Chand Mahatap ..	50 C. 572; (1924) A. I. R. (C.) 84 ..	89
Pramatha Nath Sen Gupta v. Abdul Aziz Meah ..	37 C. L. J. 406; 27 C. W. N. 430 ; (1923) A. I. R. (C.) 436 ..	443
Prasanna Chandra v. Upendra Nath ..	37 C L. J 409; 27 C. W. N. 555 ; (1923) A. I. R. (C.) 658; 24 Cr. L. J. 938 ..	362
Pratab Chandra Deo v. Jagadish Chandra ..	37 C. L. J. 417 ..	417
Premchand Indoji v. Soleti Gopalappa ..	(1923) M. W. N. 754; 18 L. W. 685; 45 M. L. J. 689 ..	876
Pritam Singh v. Sobha Singh ..	*Lahore High Court ..	866
Promode Chandra Roy Chaudhury v. Binayakdas Acharjya Chaudhury ..	27 C. W. N. 548; (1923) A. I. R. (C.) 611 ..	201
Public Prosecutor v. Pachappa Mudalia ..	18 L. W. 694; 25 Cr. L. J. 56 ..	760
Punjab Banking Co. Ltd. v. Dhanpat Rai ..	(1923) A. I. R. (L.) 506 ..	487
Puran Chand v. Puran Chand ..	(1923) A. I. R. (L.) 652 ..	441
Radha Dulaiya v. Rashik Lal ..	20 A L. J. 814; (1923) A. I. R. (A.) 85; 45 A. I ..	14
Radhi v. Emperor ..	(1924) A. I. R. (N.) 27; 25 Cr. L. J. 13 ..	701
Raghbir Singh v. Singh Ram ..	*Lahore High Court ..	928
Raghunandan Singh v. Tulshi Singh ..	*Allahabad High Court ..	244
Raghunath v. Ganga Ram ..	25 Bom. L. R. 474; 47 B. 643; (1923) A. I. R. (B.) 404 ..	893
Raghunath Misra v. Ram Behera ..	1 Pat. 167; (1922) A. I. R. (Pat.) 548; 5 P. L. T. 130 ..	427
Ragunath Prasad Singh v. Sadhu Saran Prosad Singh ..	*Patna High Court ..	821
Rahmad Ullah-Fakhar-ud-Din v. Firm Rahim Bakhsh-Qumar-ud-Din ..	(1923) A. I. R. (L.) 301 ..	107
Rahmat Ali v Shadi Ram ..	*Lahore High Court ..	877
Rahmat Ali-Muhammad Faizi v. Dewa Singh-Man Singh ..	(1923) A. I. R. (L.) 396; 4 L. 151 ; 5 L. L. J. 361 ..	827

Rajani Kanta Roy v. Jyot Prosad Singh Deo ..	27 C. W. N. 710; (1924) A. I. R. (C.) 90 ..	255
Rajbans Sahay v. Askaran Baid ..	1 Pat. 214; (1922) A. I. R. (Pat.) 550 ..	185
Rakhi v. Baza ..	(1923) A. I. R. (L.) 305 ..	659
Ram Chand v. Kaura ..	*Lahore High Court ..	885
Ram Chander v. Chhabbu Lal ..	21 A. L. J. 358; (1923) A. I. R. (A.) 350; 45 A. 445 ..	323
Ram Charan Lal v. Raghubir Singh ..	21 A. L. J. 495; (1923) A. I. R. (A.) 551; 45 A. 618 ..	387
Ram Gopal v. Manphul Singh ..	(1923) A. I. R. (L.) 445 ..	791
Ram Kishun Singh v. Damodar Prasad ..	*Patna High Court ..	856
Ram Kumar Das v. Nanda Kumar Saha ..	50 C. 639 ..	27
Ram Lal Mander v. Kuldip Narayan Tewari ..	*Patna High Court ..	841
Ram Lal Rai v. Murta Kuer ..	(1923) A. I. R. (A.) 361 ..	676
Ram Nath v. Ram Harakh ..	10 O. L. J. 245; 9 O. & A. L. R. 857; (1924) A. I. R. (O.) 49 ..	770
Ram Saran Das v. Harphul ..	*Lahore High Court ..	913
Ram Sarap v. Mohan Lal ..	*Allahabad High Court ..	816
Ram Sarup v. Ram Lal ..	20 A. L. J. 596; (1922) A. I. R. (A.) 394; 44 A. 659 ..	472
Ram Uraon v. Doman Kalal ..	4 P. L. T. 562; 2 Pat. 898; (1924) A. I. R. (Pat.) 100; (1924) Pat. 117 ..	209
Rama Chandra Rao, *In re* ..	45 M. L. J. 555; (1923) M. W. N. 767; 18 L. W. 618; 33 M. L. T. 234; 25 Cr. L. J. 3	691
Ramanand Sinha v. Bajit Jha ..	5 P. L. T. 233 ..	863
Ramaswami Iyer v. Venkatarama Iyer ..	45 M. L. J. 203; 18 L. W. 183; (1923) M. W. N. 786; 46 M. 815; (1924) A. I. R. (M.) 81 ..	406
Rambarai Rai v. Sagina Rai ..	4 P. L. T. 333; (1923) A. I. R. (Pat.) 437; 24 Cr. L. J. 939 ..	363
Rameshwar Das v. Yakin-ud-Din Khan ..	*Lahore High Court ..	428
Rameshwar Singh v. Kumar Ganganand Singh ..	1 P. L. R. 462; 5 P. L. T. 121 ..	381
Rameshwardhari Singh v. Sadho Saran Singh ..	*Patna High Court ..	91
Ramji Lal v. Shibba ..	(1923) A. I. R. (L.) 309 ..	667
Ramji Ram v. Ram Kumar Singh ..	(1923) Pat. 345; 5 P. L. T. 77; 2 P. L. R. 113 ..	411
Ramkamal Banik Saha v. Syam Sundar Banik Saha ..	37 C. L. J. 482 ..	41
Ramman Bibi v. Mathra Prasad ..	(1923) A. I. R. (A.) 374 ..	621
Ramnandan Sahay v. Jaogovind Pandey ..	2 Pat. 839 ..	955
Ramrao Gurao v. Emperor ..	6 N. L. J. 202; (1923) A. I. R. (N.) 313; 24 Cr. L. J. 910 ..	158
Ramsunder Kuer v. Satruhan Prasad Chaudhuri ..	*Patna High Court ..	846
Raoji Thakaram Patel Niharkar v. Hemraj Sadaram Marwadi ..	(1923) A. I. R. (B) 213 ..	561
Rasul Khan v. Hawas ..	(1923) A. I. R. (L.) 284 ..	458
Ratanlal v. Jaideo ..	*Nagpur Judicial Commissioner's Court ..	820
Rosa Maria Bai v. Jacob Souza ..	(1923) M. W. N. 647; 18 L. W. 588; (1924) A. I. R. (M.) 151 ..	881
Roshan Ali v. Chandra Mohan Dass ..	50 C. 749; 27 C. W. N. 759; (1923) A. I. R. (C.) 701 ..	447
Runganatha Thathachariar v. Krishnaswami Thathachariar ..	18 L. W. 237; (1923) M. W. N. 664 ..	189
Rup Chand Ghose v. Khirodamayi Dasi ..	27 C. W. N. 457; (1923) A. I. R. (C.) 329	567
Rupibai v. Sadashiv ..	*Nagpur Judicial Commissioner's Court ..	744
Rure Khan v. Ghulam Muhammad ..	*Lahore High Court ..	1034
Sagarmal Marwari v. Lachmisaran Misir ..	1 Pat. 771; (1923) A. I. R. (Pat.) 129 ..	879
Sahib Dayal v. Dhanpat Rai ..	(1923) A. I. R. (L.) 281 ..	490
Sakharam v. Gitabai ..	(1923) A. I. R. (N.) 333 ..	823
Sakharam v. Ramchandra ..	(1923) A. I. R. (N) 326 ..	914
Saleh Abraham v. Manekji Cowasji ..	50 C. 491; (1924) A. I. R. (C.) 57 ..	521
Samasul Hasan v. Hasan ..	(1923) A. I. R. (A.) 430 ..	612
Samir v. Beni Madhab Gope ..	37 C. L. J. 410; 27 C. W. N. 700; (1923) A. I. R. (C.) 644; 24 Cr. L. J. 940 ..	364
Sandu Valji v. Bhikchand Surajmal ..	25 Bom. L. R. 381; 47 B. 621; (1923) A. I. R. (B.) 473 ..	118
Sant Lal Singh v. Nanku Lal Singh ..	(1923) Pat. 369 ..	96

Sant Ram v. D wan Chand ..	24 Cr. L. J. 913 ..	289
Sant Ram v. Gurdas Mal ..	*Peshawar Judicial Comm ssioner's Court ..	239
Santa Singh v. Vir Singh ..	4 L. L. 5; (1923) A. I R. (L.) 50; 6 L. L. J 47 ..	515
Santala Bewa v. Budaswari Dasi ..	50 C 727; 27 C. W. N. 69; (1924) A. I R (C.) 98 ..	11
Saradindu Chakravarti v. Gosta Behari Pramanick	37 C. L. J. 403; 27 C. W. N. 208; (1923) A I. R. (C.) 302 ..	196
Sasi Kanta Acharya v. Abdur Rahman ..	38 C. L. J. 265. (1924) A. I. R (C.) 158 ..	203
Satyanarayana Varadaprasada v. Venkata Bhas-yakaralu ..	18 L. W. 652; 46 M. 952; 46 M. L. J. 117..	604
Seodoyal Khemka v. Joharmull Manmull ..	50 C. 549; (1921) A. I R. (C.) 74 ..	81
Sewa Singh v. Ranjna ..	(1923) A I. R (L.) 660; 4 Cr. L. J 932 ..	356
Shahabaj Mandal v. Bhajahari Nath ..	5 C W N 74; 40 C 177; (1922) A. I. R. (C.) 364; 24 Cr. L. J. 175 ..	75
Shambhu v. Kanhaya ..	44 A. 619; 20 A. L. J. 599; (1922) A. I. R. (A.) 332 ..	457
Shambhu Diyal Singh v. Iswar Saran ..	(1923) A. I R. (A.) 306 ..	597
Shamrao v. Emperor ..	19 N. L R 160; 25 Cr. L. J. 67 ..	979
Shamsuddin Khan v. Fateh Shah ..	9 O & A L. R 1041 ..	936
Shankar Das v. Kasturi Lal ..	*Lahore High Court ..	789
Shankar Ganpat Lele v. Damodar Bhukandas ..	(1922) A I. R. (B.) 216 ..	501
Shankarrao v. Khushalrao ..	(1923) A. I R. (N.) 329 ..	999
Sheo Badan Tewari v. Sahebzadi Kuer ..	21 A. L. J 378; 25 A. 459; (1923) A. I.R (A.) 523 ..	792
Sheo Dan Singh v. Habib Ullah Khan ..	*Allahabad High Court ..	872
Sheo Ram v. Emperor ..	(1923) A. I. R. (L.) 436; 25 Cr. L. J. 45 ..	733
Sheoraji Kuer v. Dhani Mian ..	4 P. L. T. 581; 1 P. L. R. 402; (1923) Pat 305; (1924) A I R Pat) 1 F. B ..	794
Sher Bahadur Singh v. Fazal Ali ..	9 O. & A. L R. 865 25 Cr. L J 38 ..	736
Sher Muhammad v. Emperor ..	3 L. 431; (1923) A. I. R. (L.) 270; 24 Cr. L J. 941 ..	365
Shrinath v. Kanhaiyalal ..	*Nagpur Judicial Commissioner's Court ..	817
Shyam Lal v. Badri ..	*Allahabad High Court ..	784
Singa Ram v. Bhagwana ..	*Lahore H gh Court ..	1056
Sita Ram v. Emperor ..	24 Cr. L J. 934; 45 A 671 ..	358
Sital Singh v. Baijnath Prasad ..	20 A. L J. 612; (1922) A. I. R. (A.) 383; 44 A. 665 ..	485
Sitla Prasad v. Chameli Bahu ..	21 A. L. J 783; 9 O. & A. L. R. (A.) 766; (1923) A. I. R. (A.) 111 ..	316
Sivasubramania Pillai v. Theethiappa Pillai ..	45 M. L. J. 66. 18 L. W. 636; (1923) M. W. N. 895; (1924) A. I. R. (M.) 153 ..	571
Sonaji v. Daulat ..	*Nagpur Judicial Commissioner's Court ..	782
Srinivasa Naicker v. Official Receiver of South Canara ..	*Madras High Court ..	172
Suka Raut v. Emperor ..	4 P. L. T. 505; 25 Cr L. J 17 ..	705
Sumitribai v. Subhadrabai ..	*Nagpur Judicial Commissioner's Court ..	564
Sundar Singh v. Raghbir Singh ..	*Peshawar Judicial Commissioner's Court ..	384
Sunka v. Jharu ..	(1923) A I. R. (L.) 680 ..	919
Surajdeo Narain Singh v. Partap Rai ..	4 P. L. T. 405; (1923) Pat. 213; (1923) A. I. R. (Pat.) 514; 2 Pat. 739 ..	284
Taluk Board, Dindigul v. Venkatarama Aiyar ..	45 M. L. J. 333; 18 L. W. 566; 33 M. L. T. 40; 46 M. 866 ..	38
Tara Chand v. Rahman Shah ..	*Lahore High Court ..	674
Taraprasanna Sarkar v. Kalikamohan Sarkar ..	38 C. L. J. 111; (1924) A. I. R. (C.) 80 ..	319
Thackroth Hydross, *In re* ..	18 L. W. 113; 45 M. L. J. 279; (1923) M. W. N. 860; (1923) A. I. R. (M.) 694; 25 Cr. L. J. 7 ..	695
Thakoredas Tribhavandas v. Lalubhai Tribhovan-das ..	25 Bom. L. R. 452; (1923) A. I. R. (B.) 401 ..	102
Thakurji v. Hira Lal ..	44 A. 634; 20 A. L. J. 609; (1922) A. I. R. (A) 408 ..	335
Tirbeni Sahu v. Lachmi Pande ..	(1923) A I. R. (A.) 346 ..	666
Topan Harji and Co. v. Singhai Dalchand ..	*Nagpur Judicial Commissioner's Court ..	548

Tota Varahaliah v. Vatsavaya Venkata ..	18 L. W. 314; (1923) M. W. N. 734; (1924) A. I. R. (M) 117 ..	465
Tulsai v. Tulsai ..	*Nagpur Judicial Commissioner's Court ..	92
Udal v. Gulab Rai ..	*Allahabad High Court ..	813
Uma Charan Chakrabarti v. Nibaran Chandra Chakrabarti ..	37 C. L. J. 452; (1923) A. I. R. (C.) 389 ..	2
Uttam Devi v. Dina Nath ..	(1923) A. I. R. (L) 359 ..	774
V. E. Rajahbather Mudaliar v. A. M. Viswanadha Reddi ..	45 M. L. J. 543 ..	620
Varadarajan v. Srinivasa Rao ..	*Madras High Court ..	471
Venkatachelam Pillai v. Srinivasa Aiyar ..	18 L. W. 394; (1923) M. W. N. 747; (1924) A. I. R. (M.) 84 ..	115
Venkiteswarayyan v. Aswatha Narayan ..	(1923) M. W. N. 509; 45 M. L. J. 315; (1923) A. I. R. (M) 703 ..	491
Vishen Das v. Nazarali ..	(1924) A. I. R. (S.) 9 ..	1014
Vithal Dhondji Devli v. Suryaji Ramchandra Naik ..	24 Bom. L. R. 902; (1922) A. I. R. (B.) 438 ..	617
Wahidunnissa v. Pichit Lal Missir ..	24 Cr. L. J. 954 ..	538
Wali Muhammad v. Fateh Khan ..	(1923) A. I. R. (L) 367 ..	680
Waryam Singh v. Emperor ..	(1923) A. I. R. (L) 598; 24 Cr. L. J. 937; 6 L. L. J. 62 ..	359
Wasaki Ram v. Hussain Khan ..	*Lahore High Court ..	1027
Yasinkhan v. Emperor ..	19 N. L. R. 176; 24 Cr. L. J. 960; (1924) A. I. R. (N) 48 ..	541
Zabta Khan v. Said Habib ..	*Peshawar Judicial Commissioner's Court	246
Zarif-un-Nisa v. Shafiq-uz-Zaman ..	20 O. C. 133; (1923) A. I. R. (O) 185 ..	687
Zuglai v. Ratan ..	*Nagpur Judicial Commissioner's Court ..	

Table showing seriatim the pages of Volume 75 of Indian Cases and the corresponding pages of other Law Journals and Reports.

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

Page.	Names of cases reported.	Where reported.
1	Debi Lal v. Jai Prakash Narain Singh ..	*Patna High Court.
2	Uma Charan Chakrabarti v. Nibaran Chandra Chakrabarti ..	37 C. L. J. 452; (1923) A. I. R. (C.) 389.
6	Maung Po Han v. Ma So Yi ..	2 Bur. L. J. 65; (1923) A. I. R. (R.) 160.
7	Kanhaya Lal v. National Bank of India, Ld. ..	(1923) A. I. R. (P. C.) 114; 45 M. L. J. 497; 33 M. L. T. 349; 25 Bom. L. R. 1248; 4 L. 284 P. C.
11	Santala Bewa v. Budaswari Dasi ..	50 C. 727; 27 C. W. N. 669; (1924) A. I. R. (C.) 98.
14	Radha Dulaiya v. Rashik Lal ..	20 A. L. J. 814; (1923) A. I. R. (A.) 251 45 A. I.
17	Pakkim Soloman v. Chelliah Pillai ..	45 M. L. J. 208; 46 M. 839; (1924) A. I. R. (M.) 18; 33 M. L. T. 231 F. B.
18	Arjun Das-Gulab Rai v. E. I. Railway Co. ..	*Patna High Court.
20	Mohammad Amin v. Bijoy Chand Mahatab ..	50 C 756; 38 C. L. J. 192; (1923) A. I. R. (C.) 732.
22	Meyrick v. Dipa Pandey ..	*Patna High Court.
24	Jagan Nath v. Basant Ram ..	(1923) A. I. R. (L.) 595.
26	East Indian Railway Co., Ltd. v. Netram-Ganesh Lal ..	*Patna High Court.
27	Ram Kumar Das v. Nanda Kumar Saha ..	50 C. 639.
31	Ma Mi v. Hadji Mahomed ..	1 R. 176; (1923) A. I. R. (R.) 261.
35	Bijai Shanker Selher v. Ram Chritra Singh ..	21 A. L. J. 409; (1923) A. I R. (A.) 500; 45 A. 461.
38	Taluk Board, Dindigul v. Venkatarama Aiyar ..	45 M. L. J. 333; 18 L. W. 366; 33 M. L. T. 40; 46 M. 866.
41	Ramkamal Banik Saha v. Syam Sundar Banik Saha ..	37 C. L. J. 482.
46	Doraisami v. Chidambaram Pillai ..	45 M. L. J. 413; 18 L. W. 577; 33 M. L. T. 25; (1923) M. W. N. 817; (1924) A I. R. (M.) 130.
53	Debendra Kumar v. The Fyzabad Bank, Ltd. ..	4 P. L. T. 516; (1924) A. I. R. (Pat.) 94.
55	Barada Prasad Banerjee v. Bhupendra Nath Mukherjee ..	50 C. 694; (1924) A. I. R. (C.) 56.
57	Ladha Singh v. Hukum Devi ..	4 L. 233; 6 L. L. J. 97.
58	Baro Bahadur Man Singh v. Nawlakhbati ..	5 P. L. T. 17; 2 P. L. R. 48.
61	Maneck Chand Virchand Patni, *In re* ..	24 Bom. L. R. 872; (1922) A. I. R. (B.) 390; 47 B. 275
64	Des Raj Sawhuny v. Fray's Motor Works ..	(1923) A. I. R. (L.) 302.
65	Bansidhar Marwari v. Indar Narain Singh ..	24 Cr. L. J. 865.
67	Emperor v. Sher Mahomed ..	46 B 958; 25 Bom. L. R. 214; (1923) A. I. R. (B.) 71; 24 Cr. L. J. 867.
69	Nand Kishore Missar v. Kalika Missir ..	(1923) A. I. R. (Pat.) 546; 24 Cr. L. J. 869; 5 P. L. T. 45.
70	Emperor v. Sher Mahomed ..	46 B. 961; (1923) A. I. R. (B.) 65; 24 Cr L. J. 870.
71	Ah Lin v. Emperor ..	2 Bur. L. J. 5 (1923) A. I. R. (R.) 141; 24 Cr. L. J. 871.
72	Abdul Hamid v. Emperor ..	(1923) Pat. 239; 2 Pat. 793; 24 Cr. L. J. 872; 2 P. L. R. 1 Cr.; (1924) A. I. R. (Pat.) 40.
74	Abdul Aziz v. Maung Tin ..	2 Bur. L. J. 48; (1923) A. I. R. (R.) 225; 24 Cr. L. J. 874.
75	Shahabaj Mandal v. Bhajahari Nath ..	25 C. W. N. 743; 49 C. 177; (1922) A. I. R. (C.) 364; 24 Cr. L. J. 875.

77	Labh Singh v. Emperor ..	(1923) A. I. R. (L.) 291; 24 Cr. L. J. 877; 6 L. L. J. 111.
79	Kudrat Nath v. Emperor ..	(1923) A. I. R. (L.) 295; 24 Cr. L. J. 879; 6 L. L. J. 125.
80	Nilkanth v. Suryabhan ..	(1923) A. I. R. (N.) 297; 24 Cr. L. J. 881.
81	Seodoyal Khemka v. Joharmull Manmull ..	50 C. 549; (1924) A. I. R. (C.) 74.
87	Partap Singh v. Hakim Singh ..	4 L. 171; (1923) A. I. R. (L.) 480; 6 L. L. J. 99.
89	Prabhat Chandra Chatterji v. Bijoy Chand Mahatap ..	50 C. 572; (1924) A. I. R. (C.) 84.
90	Municipal Committee, Bhera v. Shiv Ram ..	(1923) A. I. R. (L.) 503.
91	Rameshwardhari Singh v. Sadho Saran Singh ..	*Patna High Court.
93	Kurshit Kathum v. Hyder Khan ..	(1923) M. W. N. 564.
94	Kishan Das v. Lachhman Singh ..	(1923) A. I. R. (L.) 544; 5 L. L. J. 351.
96	Sant Lal Singh v. Nanku Lal Singh ..	(1923) Pat. 369.
98	Mundo Singh v. Krishna Dayal Gir ..	(1924) Pat. 67.
99	Muhammad Hafizullah Khan v. Bulaqi Mal ..	(1923) A. I. R. (L.) 299; 4 L. 156; 5 L. L. J. 355 and 6 L. L. J. 42.
100	Bu Ali Khan v. Sujan Kuar ..	21 A. L. J. 665; (1924) A. I. R. (A.) 66 45 A. 667.
101	Bagh Singh v. Bhagwan Das ..	*Lahore High Court.
102	Thakoredas Tribhavandas v. Lalubhai Tribhovandas ..	25 Bom. L. R. 452; (1923) A. I. R. (B.) 401
103	Jaggan Nath v. Daud ..	4 L. 243; (1923) A. I. R. (L.) 592.
104	Padam Singh v. Umrao Singh ..	21 A. L. J. 527; (1924) A. I. R. (A.) 48.
105	Kedar Nath Sadhukhan v. Madhu Sudan Das ..	37 C. L. J. 478; (1923) A. I. R. (C.) 682.
107	Rahmad Ullah-Fakhar-ud-Din v. Rahim Bakhsh-Qumar-ud-Din ..	(1923) A. I. R. (L.) 301.
108	Kundan Lal v. Jagat Ram ..	*Allahabad High Court.
109	Bal Kaur v. Devki ..	4 L. 236; (1923) A. I. R. (L.) 579; 6 L. L. J. 69.
111	Islam Fatima v. Tamiz Ali ..	*Allahabad High Court.
112	Pendekkallu Thimmayya v. Pendekkallu Siddappa ..	*Madras High Court.
114	Lalsa Rai v. Udit Rai ..	*Allahabad High Court.
115	Venkatachelam Pillai v. Srinivasa Aiyar ..	18 L. W. 399; (1923) M. W. N. 747; (1924) A. I. R. (M.) 84.
118	Sandu Valji v. Bhikchand Surajmal ..	25 Bom. L. R. 381; 47 B. 621; (1923) A. I. R. (B.) 473.
123	Bibi Hafizunnissa v. Imamuddin Khan ..	*Patna High Court.
128	Ganu Gopal Sonar v. Dattatraya Laxman Potdar	24 Bom. L. R. 845; (1922) A. I. R. (B.) 335.
129	Government of Assam v. Sahebulla ..	38 C. L. J. 77; 27 C. W. N. 857; 24 Cr. L. J. 881; (1924) A. I. R. (C.) 1 F. B.
145	Emperor v. Nritya Gopal Roy ..	38 C. L. J. 1; 24 Cr. L. J. 897.
148	Peary Lal v. Emperor ..	21 A. L. J. 399; (1923) A. I. R. (A.) 601; 24 Cr. L. J. 900.
150	Dwigendra Narain Bagchi v. Emperor ..	38 C. L. J. 9; 24 Cr. L. J. 902.
152	Moti Ram v. Emperor ..	24 Cr. L. J. 904.
158	Ramrao Gurao v. Emperor ..	6 N. L. J. 202; (1923) A. I. R. (N.) 313; 24 Cr. L. J. 910.
159	Mahadeo Prasad v. Emperor ..	21 A. L. J. 654; 24 Cr. L. J. 911; 45 A. 680; (1924) A. I. R. (A.) 131.
161	Ananthachari v. Ratnam ..	45 M. L. J. 83; 18 L. W. 674; (1923) A. I. R. (M.) 713.
165	Jawahar Singh v. N. D. Sassoon and Co., Karachi	(1923) A. I. R. (L.) 290.
166	Ma Thin Myaing v. Maung Gyi ..	1 R. 351; (1924) A. I. R. (R.) 13.
170	Bera Chandramma v. Chandram Naganna ..	45 M. L. J. 228; (1923) M. W. N. 567; 18 L. W. 309; (1924) A. I. R. (M.) 94.
171	G. Abdoolla v. I. A. Mohamed ..	*Rangoon High Court.
172	Srinivasa Naicker v. Official Receiver of South Canara ..	*Madras High Court.
173	Dakshina Ranjan Ghose v. Omar Chand Oswal ..	38 C. L. J. 104; 50 C. 992; 28 C. W. N. 10; (1924) A. I. R. (C.) 145.
177	Garabini Kumarin v. Surja Narain Singh ..	(1923) Pat. 361; 5 P. L. T. 52.
183	Labhu Ram v. Abdulla ..	(1923) A. I. R. (L.) 587.
185	Rajbans Sahay v. Askaran Baid ..	1 Pat. 214; (1922) A. I. R. (Pat.) 550.

188	Keshav Manja Bhat v. Govind Naga Bhat ..	24 Bom. L. R. 843; (1923) A. I. R. (B.) 32.
189	Runganatha Thathachariar v. Krishnaswami Thathachariar ..	18 L. W. 237; (1923) M. W. N. 664.
193	K. C. Menta v. Cassumbhai Keshavji ..	24 Bom. L. R. 847; (1922) A. I. R. (B.) 433.
196	Saradindu Chakravarti v. Gosta Behari Pramanick	37 C. L. J. 403; 27 C. W. N. 208; (1923) A. I. R. (C.) 302.
198	Chandan v. Bibi ..	*Peshawar Judicial Commissioner's Court.
20	Maung Maung Tin v. Ma Hla U. ..	2 Bur. L. J. 58; (1923) A. I. R. (R.) 150.
201	Promode Chandra Roy Chaudhury v. Binayakdas Acharjya Chaudhury ..	27 C. W. N. 548; (1923) A. I. R. (C.) 611.
203	Sasi Kanta Acharya v. Abdur Rahman ..	38 C. L. J. 265; (1924) A. I. R. (C.) 158.
203	Mahomed Hasham & Co., *In re* ..	24 Bom. L. R. 861; (1923) A. I. R. (B.) 107.
209	Ram Uraon v. Doman Kalal ..	4 P. L. T. 562; 2 Pat. 858; 1924) A. I. R. (Pat.) 100 (1924) Pat. 117.
214	Ghulam Khan v. Ghulam Haider Khan ..	*Peshawar Judicial Commissioner's Court.
217	Ma Sha Ma v. Samasundram Chetty ..	2 Bur. L. J. 39; 1 R. 492; (1923) A. I. R. (R.) 246.
218	Hari Ram Singh Choudhury v. Ram Ram Singh Choudhury ..	27 C. W. N. 285; (1923) A. I. R. (C.) 444.
219	Balusami Iyer v Venkatasami Naicken ..	32 M. L. J. 240; (1924) A. I. R. (M.) 95.
221	James Mackintosh v. Scindia Steam Navigation Co., Ltd., ..	24 Bom. L. R. 853; (1922) A. I. R. (B.) 444; 47 B. 250.
225	Chan Pyu v. Chan Chor Khine ..	2 Bur. L. J. 42; (1923) A. I. R. (R.) 238.
227	Dhauntal Khan v. Ram Lal Kalwar ..	10 O. L. J. 112.
231	Jamini Nath Mullick v. Midnapur Zemindary Co	27 C. W. N. 772; (1923) A. I. R. (C.) 716.
233	Chotalal Lallubhai v. Champsey Umersa & Sons	24 Bom. L. R. 77; (1923) A. I. R. (B.) 75.
237	Ma Hla Kyu v. Maung Nyun ..	2 Bur. L. J. 45.
238	Balwant Singh v. Laiqa Begam ..	*Allahabad High Court.
239	Sant Ram v Gurdas Mal ..	*Peshawar Judicial Commissioner's Court.
244	Raghunandan Singh v Tulshi Singh ..	*Allahabad High Court.
246	Zabta Khan v Sa'd Habib ..	*Peshawar Judicial Commissioner's Court.
250	Mack v. Madras and Southern Maharatta Railway Co., Ltd., ..	45 M. L. J. 424; 33 M. L. T. 66; (1924) A. I. R. (M.) 151.
254	Mahtab Kuer v. Birhmo ..	21 A. L. J. 817; 9 O. & A. L. R. 1017
255	Rajani Kanta Roy v. Jyoti Prosad Singh Deo ..	27 C. W. N. 706; (1924) A. I. R. (C.) 90.
20	A. R. Narayana Iyer v. South Indian Ry., Co. ..	16 L. W. 322; (1923) M. W. N. 731.
261	Kapura v. Hardit Singh ..	(1923) A. I. R. (L.) 510.
262	Haimabati Devi v Pran Krishna Banerjee ..	27 C. W. N. 1 3.
265	Mohammad Moiddin Ashraf v. Mohammad Ishaq Asmaf ..	(1 2) A. I. R. (Pat.) 52; 1 P. L. R. 459.
266	Muhammad Shafi v. Bindeshri Saran Singh ..	*Allahabad High Court.
267	Ali Abbas v. Kunwar Sher Bahadur Singh ..	9 O. & A. L. R. 8 5.
269	Kapura v. Arjun Singh ..	(192) A. I. R. (L.) 511.
270	Bakhshi v. Hyder Khan ..	(1923) A. I. R. (L.) 371.
271	Ahmadji Khan v. Gulmir ..	*Peshawar Judicial Commissioner's Court.
278	Kshetrabashi Mahanti v. Ratnakar Mahapatra ..	38 C. L. J. 2 9.
280	Adya Saran v. Kali Charan ..	21 A. L. J. 524; 45 A. 567; (1923) A. I. R. (A.) 580.
281	Jabedali v. Prasanna Kumar Nag ..	27 C. W. N. 43 ; (192) A. I. R. (C.) 423.
283	Laksmibai Jagannath Joshi v. Yeshwant Vithal Bagkar ..	24 Bom. L. R 909; (1922) A. I. R (B.) 449 ; 47 B 92.
284	Surajdeo Narain Singh v. Partap Rai ..	4 P. L. T. 405; (1923) Pat. 21.; (1923) A. I. R. (Pat.) 13; 2 Pat. 739
287	Heng Moh & Co. v. Lim Saw Yean ..	18 L. W. 92; (1923) A. I. R (P. C.) 87; (1923) M. W. N. 614; 45 M. L. J. 776; 32 M. L. T 430; 1 R. 545 P. C.
289	Sant Ram v. Diwan Chand ..	24 Cr. L. J. 913.
292	Emperor v. Jagmohan Das ..	9 O. & A. L. R. 1031, 24 Cr. L. J. 916.

294	Hamid v. Emperor	..	2 Bur. L. J. 96; 24 Cr. L. J. 918; (1924) A. I. R. (R.) 16.
295	Apalu v. Emperor	..	2 Bur. L. J. 94; 1 R. 2 5; (1923) A. I. R. (R.) 174; 24 Cr. L. J. 919.
296	Bagh v. Emperor	..	2 Bur. L. J. 101; 1. R 301; (1923) A. I. R. (R.) 188; 24 Cr. L. J. 920.
297	Ghulam Yusuf v. Emperor	..	24 Cr. L. J. 921.
299	Emperor v. Hasrat Mohani	..	24 Bom. L. R. 885; (1922) A. I. R. (B.) 284; 24 Cr. L. J. 923.
304	Maung Tun Yin v. Ma Thein Shin	..	2 Bur. L. J. 61; (1923) A. I. R. (R.) 159; 24 Cr. L. J. 928.
305	Kesho Prasad Singh v. Lakhu Rai	..	4 P. L. T. 525; (1923) Pat. 258; (1923) A. I. R. (Pat.) 581.
309	Ma Saw v. Maung Shwe Gon	..	2 Bur. L. J. 78; (1923) A. I. R. (R.) 244.
309	Bansidhar v. Babu Lal	..	21 A. L. J. 713; (1924) A. I. R. (A.) 12.
312	Kishori Mal v. Jagdish Narain Singh	..	*Patna High Court.
316	Sitla Prasad v. Chameli Bahu	..	21 A. L. J. 683, 9 O. & A. L. R. (A.) 766; (1924) A. I. R. (A.) 111.
317	Mehan Singh v. Kehar Singh	..	(1923) A. I. R. (L.) 543; 6 L. L. J. 39.
319	Taraprasanna Sarkar v. Kalikamohan Sarkar	..	38 C. L. J. 111; (1924) A. I. R. (C.) 50.
321	Bhaya Jagdeo Nath Sah Deo v. Partap Udainath Sah Deo	..	(1923) Pat. 374.
322	Ma Thein Tin v. Ma Htoo	..	2 Bur. L. J. 66; (1923) A. I. R. (R.) 156.
323	Ram Chander v. Chhabbu Lal	..	21 A. L. J. 358; (1923) A. I. R. (A.) 350; 45 A. 445.
325	Giris Chandra Gangopadhyay v. Krishna De Nag		38 C. L. J. 266, (1924) A. I. R. (C.) 168.
328	Maung Chit U v. Bansi Dhar Bazaz	..	2 Bur. L. J. 63; (1923) A. I. R. (R.) 153.
330	Kundan Lal v. Basant Rai	..	*Allahabad High Court
331	Badri Prasad v. Mukandi	..	9 O. L. J. 505; (1923) A. I. R. (O.) 109; 26 O. C. 66.
334	Pakkiri Kanni v. Mohammad Mangoor Sahib	..	(1923) M. W. N. 565; 45 M. L. J. 321; 18 L. W. 345; 33 M. L. T. 44; 46 M. 844; (1924) A. I. R. (M.) 124.
335	Thakurji v. Hira Lal	..	44 A. 634; 20 A. L. J. 609, (1922) A. I. R. (A.) 108.
336	Chevraya Goundan v. Athappa Goundan	..	(1923) M. W. N. 545; (1924) A. I. R. (M.) 88.
339	Lalla Mal-Hardeo Das, *In the matter of*	..	21 A. L. J. 703; (1924) A. I. R. (A.) 137.
343	Abdul Hakeim v. Nga Ni Gri	..	2 Bur. L. J. 54; (1923) A. I. R. (R.) 154.
343	Janki Kuer v. Thakur Rai	..	1924) Pat. 30; 5 P. L. T. 37
340	Corporation of Calcutta v. The Calcutta Improvement Trust	..	50 C. 531; (1924) A. I. R. (C.) 95.
351	Hargobind Singh v. Hukum Chand	..	21 A. L. J. 556; 45 A. 608, (1924) A. I. R. (A.) 41.
353	Girdhar Das v. Emperor	..	4 Cr. L. J. 329; (1924) A. I. R. A.) 77.
353	Maung Saw Ku v. Emperor	..	2 Bur. L. J. 55; (1923) A. I. R. (R.) 157; 24 Cr. L. J. 929.
356	Sewa Singh v. Ranjha	..	1 23 A. I. R. (L.) 600; 4 Cr. L. J. 932.
357	Nga San Dun v. Emperor	..	2 Bur. L. J. 8 (1923) A. I. R. (R.) 144; 24 Cr. L. J. 933.
358	Ma Mi v. Emperor	..	2 Bur. L. J. 10; (1923) A. I. R. (R.) 152; 24 Cr. L. J. 934.
358	Sita Ram v. Emperor	..	24 Cr. L. J. 934, 45 A. 671.
359	Waryam Singh v. Emperor	..	(1923) A. I. R. (L.) 590; 24 Cr. L. J. 935; 6 L. L. J. 60.
361	Nanhu v. Emperor	..	45 A. 557; (1923) A. I. R. (A.) 60; 24 Cr. L. J. 937.
362	Prasanna Chandra v. Upendra Nath	..	37 C. L. J. 09; 27 C. W. N. 555; (1923) A. I. R. (C.) 655; 24 Cr. L. J. 939.
363	Rambarai Rai v. Sagina Rai	..	4 P. L. T. 356; (1923) A. I. R. (Pat.) 437; 24 Cr. L. J. 939.
364	Samir v Beni Madhab Gope	..	37 C. L. J. 410; 27 C. W. N. 70; (1923) I. R. (C.) 644; 24 Cr. L. J. 940.
365	Sher Muhammad v. Emperor	..	3 L. 431, (1923) A. R. (L.) 270, 24 Cr. L. J. 941.

367	Hamid Ali v. Srikissen Gossain ..	37 C. L. J. 413; 28 C. W. N. 118; 24 Cr L. J. 943
368	Fattu v. Emperor ..	(1923) A. I. R (L.) 286; 24 Cr. L. J. 944; 6 L. L. J. 110.
369	Pamidimarri Gnamma v. Kettireddi Krishna Reddi ..	45 M. L. J. 263; 46 M. 736; (1923) M. W. N. 463.
375	Budhu Ram v. Niamat Rai ..	(1923) A. I. R. (L.) 632; 6 L. L. J. 72; 4 L. 406.
378	Hit Lal Mahton v. Jiboo Mahton ..	5 P. L. T. 142.
379	Kenaram Pal v. Kinu Mandal ..	50 C. 508; (1924) A. I. R (C.) 52.
381	Rameshwar Singh v. Kumar Ganganand Singh ..	1 P. L. R. 462: 5 P L. T. 121.
384	Sundar Singh v. Raghbir Singh ..	*Peshawar Judicial Commissioner's Court.
387	Ram Charan Lal v. Raghubir Singh ..	21 A. L. J. 495; (1923) A. I. R. (A.) 551; 45 A. 618
390	D. K. Kannisa v. Devichand ..	18 L. W. 414; (1923) M. W. N. 750; 45 M. L. J. 699; 46 M 847; (1924) A. I. R. (M.) 46.
392	Alcock, Ashdown and Co. v. Ch ef Revenue Authority of Bombay ..	21 A. L. J 689; 25 Bom. L. R. 920; (1923) M. W. N. 557; (1923) A. I. R. (P. C.) 138; 33 M. L. T. 267; 45 M. L J. 592; 47 B. 742; 18 L. W. 918 P. C.
397	Maziuddin v. Hassan Khan ..	*Peshawar Judicial Commissioner's Court.
402	Fanindra Nath Roy v. Bhola Dassi Debi ..	38 C. L. J. 21.
404	Bhairo Tewari v. Ramnath Rai ..	21 A. L. J. 734; (1924) A. I. R. (A) Co.
406	Ramaswami Iyer v. Venkatarama Iyer ..	45 M. L. J. 203; 18 L. W. 183; (1923 M. W. N. 786; 46 M. 815; (1924) A I. R. (M.) 81.
411	Ramji Ram v. Ram Kumar Singh ..	(1923) Pat. 345; 5 P. L. T. 77; 2 P. L. R. 113.
417	Pratab Chandra Deo v. Jagadish Chandra ..	37 C. L. J. 417.
419	Fitzholmes v. Waryam Singh ..	(1923) A. I. R. (L.) 514.
421	Krishna Chandra Dey v. Graham ..	50 C. 700; 27 C. W. N. 693; (1923) A. I. R; (C.) 694
427	Raghunath Misra v. Ram Behera ..	1 Pat. 167; (1922) A. I. R. (Pat.) 548; 5 P. L. T. 140.
428	Rameshwar Das v. Yakin-ud-Din Khan ..	*Lahore High Court.
430	Bibi Zainab v. Paras Nath ..	4 P. L. T. 491; 1 P. L. R. 361; 2 Pat. 800; (1924) A I. R. (Pat.) 37.
433	Chandrika Prasad v. Hira Lal ..	(1923) Pat. 357; 5 P. L. T. 49; 2 P. L. R. 82.
435	Mathura Nath Mukherjee v. Lakhi Narain Ganguly ..	50 C. 426; (1924) A. I R. (C.) 68.
440	Kamal Narayan v. Bani Ram ..	(1923) A. I. R. (N.) 332.
441	Puran Chand v. Puran Chand ..	(1923) A. I. R. (L.) 652.
443	Pramatha Nath Sen Gupta v. Abdul Aziz Meah ..	37 C. L. J. 405; 27 C. W. N. 430; (1923) A. I. R. (C.) 436.
445	Krishna Iyer v. The Official Receiver of Trinchinopoly ..	*Madras High Court.
447	Roshan Ali v. Chandra Mohan Dass ..	50 C. 749; 27 C. W. N. 759; (1923) A. I. R. (C.) 701.
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457	Shambhu v. Kanhaya ..	44 A. 619; 20 A. L. J. 599; (1922) A. I. R. (A.) 332.
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561	Raoji Thakaram Patel Niharkar v. Hemraj Sadaram Marwadi ..	(1923) A. I. R. (B.) 213.
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590	Kidri Prasad v. K. R. Khosala ..	(1923) A. I. R (L.) 425; 5 L. L. J. 300.
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620	V. E. Rajahbather Mudaliar v. A. M. Viswanadha Reddi ..	45 M. L. J. 543.
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673	Majety Subbian & Co. v. Tetley and Whitley ..	32 M. L. T. 380; 45 M. L. J. 39; 18 L. W. 771 (1923) M. W. N. 445; (1923) A. I. R. (M.) 693.
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687	Zuglai v. Ratan ..	*Nagpur Judicial Commissioner's Court.
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813	Udal v. Gulab Rai ..	*Allahabad High Court.
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855	Jiwan v. Wadhawa ..	*Lahore High Court.
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903	Kidar Nath v. Wazir Chand ..	*Lahore High Court.
906	Harnarayan Jodhraj v. Radhakisan Chandrabhan	(1923) A. I. R. (N) 324.
908	Notified Area Committee, Una v. Amar Singh ..	4 L. 442.
909	Phulwati Kumari v. Maheshwari Prosad Singh ..	*Patna High Court.
910	Fiaz Ahmad Shah v. Church Missionary Trust Association, London ..	*Lahore High Court.
913	Ram Saran Das v. Harphul ..	*Lahore High Court.
914	Sakharam v. Ramchandra ..	(1923) A. I. R. (N.) 326.
915	Piara Singh v. Mula Mal ..	(1923) A. I. R. (L.) 655. 4 L. 323; 5 L. L. J. 551.
917	Kisenlal v. Chendba ..	*Nagpur Judicial Commissioner's Court.
919	Sunka v. Jharu ..	(1923) A. I. R. (L.) 680.
922	Man Singh v. Ram Nath ..	*Allahabad High Court.
925	Abdul Aziz Khan v. Bhairodan ..	*Nagpur Judicial Commissioner's Court.
927	Pokhar Das v. Radha Kishen ..	*Lahore High Court.
928	Raghbir Singh v. Singh Ram ..	*Lahore High Court.
928	Dhanraj v. Firm Sanehi Ram-Panna Lal ..	*Patna High Court.
931	Gaya Singh v. Surajbali Singh ..	*Allahabad High Court.
934	Chandrabhaga v. Ganesh Kesheo ..	*Nagpur Judicial Commissioner's Court.
934	Gurbakhsh Singh v. Bhagwan Singh ..	*Lahore High Court.
936	Shamsuddin Khan v. Fateh Shah ..	9 O. & A. L. R. 1041.
938	Bashu Ram v. Piara Chand ..	4 L. 434.
940	Chet Kaur v. Gurmukh Singh ..	(1923) A. I. R. (L) 459.
942	Birinchi Singh v. Saroda Prasad Mukherji ..	5 P. L. T. 95.
945	Muhammad Abdulla v. Jiwan Mal ..	*Lahore High Court.
946	Ajti Chaudhuri v. Janak Lal Chaudhuri ..	(1923) Pat. 332.
950	Bulaqi Mal v. Abdul Rahim ..	(1923) A.I. R (L) 638.
953	Bhagwan Das v Sukhdeo Korie ..	*Allahabad High Court.
955	Ramnandan Sahay v. Jaogovind Pandey ..	2 Pat. 839.
975	Phul Kuer v. Rambhanjan Singh ..	*Patna High Court.
977	Josyula Ramachandra Rao, *In the matter of* ..	(1923) M W. N. 768; 18 L. W. 689; 45 M. L. J. 684; (1924) A. I. R. (M) 129; 25 Cr. L. J. 65.
978	Haider Khan v. Emperor ..	9 O. & A. L. R. 869; 25 Cr. L. J. 66.
979	Shamrao v. Emperor ..	19 N. L. R. 160; 25 Cr. L. J. 67.
980	Allu v. Emperor ..	4 L. 376; (1924) A. I R. (L.) 104; 6 L. L. J. 103; 25 Cr. L. J. 68.
983	Nanha v. Kanhaiya Lal ..	25 Cr. L. J. 71.
984	Bansi v. Lakshmi Das ..	(1924) A. I. R. (A.) 76; 45 A. 700; 25 Cr. L. J. 72.
985	Manikonda Lingayya, *In re* ..	45 M. L. J. 683. 18 L. W. 969 (1924) M. W. N. 51; 43 M. L. T. 224; 25 Cr. L. J. 73.
986	Mahla Ram v. Crown ..	25 Cr L. J. 74.
987	Doraiswami Udayan v. Emperor ..	(1923) M. W. N. 782; 45 M. L. J. 846; 33 M. L. T. 213; 5 Cr. L. J. 75.
990	Bhagwan Das v. Maula Dad Khan ..	25 Cr. L J. 78.
993	Achal Singh v. Seth Jiwandas ..	19 N. L R 65 (1924) A. I R (N.) 44.
995	Daryai Singh v. Kunj Lal ..	*Lahore High Court.
997	C. G. Macdonald v. Teknarain Rai ..	*Patna High Court.
999	Shanka. Rao v. Khushal Rao ..	(1923) A. I R (N) 329.
1001	Firm Phaggu Mal-Mata Din v. Benarsi Das ..	*Lahore High Court.
1002	Chikhuri Ram v. Gopal Narain Ram ..	*Patna High Court.

1004	Gopal Das v. Banmali Lal ..	*Allahabad High Court.
1013	Aishia Bi v. Sughra Jan ..	(1923) A. I. R (L.) 658.
1014	Vishendas v. Nazarali ..	(1924) A. I. R. (S.) 9.
1015	Garudappa Periа Thiruvadi v. Pookutti Janaki ..	18 L. W. 530; 45 M. L. J. 693; (1924) A. I. R. (M.) 103.
1020	Maghi Mal-Kharaiti Ram v. Gopi Ram-Ram Chand	*Lahore High Court.
1022	Jagdip Prasad v. Rajo Kuer ..	(1923) Pat. 177; 4 P. L. T. 531; (1923) A. I. R. (Pat) 464.
1027	Wasaki Ram v. Hussain Khan ..	*Lahore High Court.
1028	Ali Ahmad v. Said Mian ..	4 L. 390.
1029	Fattu v. Nanak Chand ..	*Lahore High Court.
1031	Maharaj Rai v. Janki Kuer ..	*Patna High Court.
1034	Rure Khan v. Ghulam Muhammad ..	*Lahore High Court.
1035	Fleming Shaw & Co., v. Mangal Chand-Dwarka Das ..	*Sind Judicial Commissioner's Court.
1036	Narsingh Thakur v. Bishunpergash Singh ..	4 P. L. T. 629; (1924) Pat. 21.
1039	Firm Mul Chand-Hut Chand v. Firm Ganda Mal-Rallia Ram ..	*Lahore High Court.
1040	Muhammad Khan v. Sultan Ahmad ..	*Lahore High Court.
1041	Forbes Forbes Campbell & Co., Ltd. v. Vershimal Dewanmal ..	*Sind Judicial Commissioner's Court.
1043	Ibrahim v. Jiwan Das ..	*Lahore High Court.
1046	Kuldip Sahay v. Rajkumar Singh ..	1 P. L. R 386; 4 P. L. T. 633.
1048	Nanak Chand v. Muhammad Khan ..	*Lahore High Court.
1053	Bhagwan Das v. Mahmud Bano ..	*Allahabad High Court.
1055	Ata Muhammad v. Pir Khan ..	*Lahore High Court.
1056	Singh Ram v. Bhagwana ..	*Lahore High Court.

TABLE

OF

Cases Applied, Approved, Considered, Disapproved, Dissented from, Distinguished, Explained, Followed, Not Followed, Overruled and Relied upon in Volume 75 of Indian Cases, 1923.

A.

Page.

A. v. B., 21 B. 77; 11 Ind. Dec. (N. S.) 54. (*Relied upon*) .. 502

Aba v. Dhondu Bai, 19 B. 276; 10 Ind. Dec. (N. S.) 187. (*Considered*) .. 46

Abdul Aziz Khan v. Appayasami, 27 M. 131; 8 C. W. N. 186; 31 I. A. 1; 6 Bom. L. R. 7; 8 Sar. P. C. J. 568 (P. C.). (*Relied upon*) .. 823

Abdul Gaffar v. Nur Jahan Begum, 29 Ind Cas. 347; 37 A. 434; 13 A. L. J. 686. (*Followed*) .. 953

Abdul Hai v. Nathua, 1 A. L. J 537. (*Followed*) .. 270

Abdul Hamid v. Sarbuland Khan, 78 P. R. 1902; 137 P. L. R. 1902 (*Relied on*) .. 837

Abdul Karim Abu Ahmed Khan Ghaznavi v Allahabad Bank, Limited, 41 Ind Cas 598; 44 C 929; 21 C. W. N 877; 26 C L J. 49 (*Distinguished*) .. 198

Abdul Majid v Haricharan Haider, 53 Ind. Cas. 17. (*Relied on*) .. 601

Abdul Majid v Jawahir Lal, 23 Ind Cas. 649; 36 A. 350; 12 A. L J 624; 16 Bom. L R. 395; 18 C. W N. 963; 19 C L. J. 626; 27 M. L. J. 17; (1914) M. W N. 485; 16 M. L. T. 44; 1 L. W. 483 (P C). (*Distinguished*) .. 2

Abdul Majid v. Jawahir Lal, 23 Ind. Cas. 649; 36 A 350; 12 A L J. 624; 16 Bom. L R. 395; 18 C. W N 963; 19 C L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; (P C.). (*Followed*) .. 284

Abdul Razak Kewal v. Mahomed Hosein Dalvi, 38 Ind. Cas 771; 19 Bom. L. R. 164; 42 B. 499. (*Relied on*) .. 746

Abdulla v. Pannu Ram, 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R 1906. (*Followed*) .. 610

Abdullah Haroon v. Messrs, E D. Sassoon & Co., 56 Ind. Cas. 76; 13 S L R. 201. (*Followed*) .. 1041

Abeda Khatun v. Majubali Chowdhury, 59 Ind Cas. 760; 48 C. 157; 24 C W N. 1020; 33 C. L. J. 304 (*Distinguished*) .. 284

Abu Bakar Abdul Rahman & Co. v. Rambux, 40 Ind. Cas. 393; 13 N. L R. 81. (*Followed*) .. 548

A—contd.

Page.

Administrator-General of Bengal v, Prem Lall Mullick, 22 C. 1011 at p. 1012; 22 I A. 203; 5 M L. J 157; 6 Sar P. C. J 660; 11 Ind. Dec. (N. S.) 672 (P C). (*Relied on*) .. 858

Ahamuddin Tamijuddin v. Amiruddin, 44 Ind Cas 216 (*Followed*) .. 93

Ahmad Sahib Shutari v Magnesite Syndicate Limited, 29 Ind. Cas 60; 39 M 501; 2 L. W 460; 17 M L T. 387; 28 M. L. J. 598. (*Followed*) .. 112

Ahmad Said Khan v. Masi Ullah Khan, 13 Ind. Cas 975 34 A. 250; 9 A. L. J. 152. (*Relied on*) .. 663

Aiyyagari Venkataramanayya v Aiyyagari Ramayya, 25 M 690 (F. B). (*Considered*) 406

Ajiuddin Ahamed v. Khoda Bux Khonkar, 50 Ind. Cas 5. (*Dissented from*) .. 430

Akbar Ali Khan v. Shah Muhammad, 40 Ind Cas 443; 39 A. 621; 15 A L. J. 592. (*Followed*) .. 596

Akhi v Hazratgul, 71 Ind Ca. 1009. (*Distinguished*) .. 479

Alia Rai v. Jhingur Tewari, 13 Ind. Cas. 844; 39 C. 476; 16 C.W.N. 424; 15 C. L. J 403; 13 Cr L. J. 156 (*Considered*) 695

Allah Ditta v. Muhammad Nazir, 7 Ind Cas 716; 84 P. L R 1910; 102 P.W.R. 1910. (*Distinguished*) .. 910

Aman Ali v Imambi, 22 Ind. Cas. 89; 9 N L. R. 188. (*Distinguished*) .. 999

Amina Bibi v Najmunnissa Bibi 27 Ind. Cas. 712; 37 A. 233; 13 A. L. J. 255. (*Followed*) .. 953

Amir Ali v. Iqbal Ali, 61 Ind Cas 312 at p. 314; 24 O. C 22; 8 O. L. J. 287. (*Relied on*) .. 261

Amrit Lal v. Murlidhar, 67 Ind. Cas. 538; 3 P. L T. 422; (1922) Pat. 229; (1922) A. I R. (Pat.) 188; 1 Pat. 651. (*Distinguished*) .. 312

Ananta v. Ramabai, 1 B. 554; 1 Ind. Dec. (N. S.) 367. (*Relied on*) .. 474

Anderson v. Wallace, (1835) 3 Cl. & F. 26; 6 E. R. 1347. (*Followed*) .. 850

Annamalay Chetty v. Mahomed Ismail, 23 Ind. Cas. 903; 7 L. B. R 123; 7 Bur. L. T. 75. (*Relied on*) .. 166

A—concld.

Page.

Anund Coomar Mookerjee v. Bissonath Banerjee, 17 W R 416, (*Distinguished*) .. 55
Arlidge v. Islington Corporation, (1909) 2 K B. 127; 78 L J. K. B. 553; 100 L T. 903; 7 L. G R. 649; 73 J P. 301; 25 T. L. R. 470 (*Considered*) .. 390
Arun Chandra Singh v. Kamini Kumar, 22 Ind. Cas. 317; 19 C L J. 272; 18 C. W N. 369; (1914) M W. N. 175; 15 M L T 182; 26 M. L J. 251; 12 A. L. J. 243; 16 Bom. L. R 323; 41 C. 683; 41 I. A 32 (P. C.). (*Followed*) .. 955
Arunachella v. Veludayan, 5 M. H. C R. 215. (*Followed*) .. 2
Asarfi Singh v. Ram Khelawan Sinha, 49 Ind Cas 85; 4 P L. J 115; (1919) Pat. 49 (F B.). (*Distinguished*) .. 177
Asgar Ali v Amina Begam, 24 Ind. Cas. 50. 39 A. 280; 12 A. L J 392. (*Dissented from*) .. 595
Asher v. Whitlock; (1866) 1 Q. B. 1; 35 L J. Q B. 17; 11 Jur. (N S.) 25; 13 L T. 251; 14 W. R 26, 148 R. R. 598. (*Relied on*) .. 579
Atar Singh v. Thakar Singh, 6 Ind Cas. 721; 42 P. R. 1910; 12 C W. N, 1040; 35 C 1039; 35 I A 206; 8 C. L. J. 359; 18 M L J. 379. 128 P. W. R. 1908; 4 M. L T 267; 10 Bom. L. R. 790 (P. C.). (*Followed*) .. 913
Attan Kutti v. Matavil Illoth Sata junam, 37 Ind. Cas. 756; (1917) M. W. N. 9. 5 L. W. 461; 32 M. L. J. 317. (*Distinguished*) .. 472
Atkinson v. Deneby, (1861) 6 H. & N. 778 123 R R. 824; 30 L. J. Ex. 361; 7 Jur. (N. S.) 1205 4 L T. (N. S.) 252; 9 W. R. 539; 158 R. R. 321. (*Relied on*) .. 27
Aziz Khan v. Duni Chand, 20 Ind. Cas. 8.2; 305 P. L. R. 1913; 195 P. W. R. 1913. (*Followed*) .. 877

B.

Babaldas Khemchand, *In re*, 57 Ind. Cas. 997; 22 Bom. L. R. 842; 45 B. I. (*Explained*) .. 221
Babbon Shaikh v. Empetor, 5 Ind. Cas. 365, 37 C. 340; 14 C. W. N 422; 11 Cr. L. J. 121; 11 C. L. J. 335. (*Considered*) .. 695
Bairi Narain Singh v. Sibhkaran Misser, 61 Ind. Cas. 90; 6 P. L. J. 41; 2 P. L. T. 130. (*Overruled*) .. 1046
Bai Atrani v. Thakur Kunwar, 33 Ind. Cas. 858; 40 B. 86; 17 Bom. L. R. 1097. (*Followed*) .. 1041
Baijnath Singh v. Paltu. 30 A. 125; 5 A L. J. 96; A. W. N. (1908) 38. (*Relied on*) .. 111
Baikal Parida v. Jogendra Nath Bose, 11 Ind. Cas. 239; 14 C. L. J. 168; 16 C. W. N. 511. (*Approved*) .. 278

B—contd.

Page.

Balak Ram v Dadu, 7 Ind. Cas. 1000; 76 P. R 1910, 121. W. R. 1910; 98 P. L. R. 1910. (*Followed*) .. 251
Balakrishna Udayar v. Vasudeva Aiyar, 40 Ind. Cas. 650; 19 Bom. L. R. 715; 15 A. L. J. 645 2 P. L W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W N 628; 49 M. 793; 6 L W. 501; 22 C. W N 50; 11 Bur L. T 48; 44 I. A. 261 (P. C.). (*Followed*) 487, 1041
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. 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.) (*Relied on*) .. 189
Balambal Ammal v. Arunachala Chetti, 18 M. 255 6 Ind. Dec. (N. S.) 327. (*Relied upon*) .. 664
Baldeo Rai v. Murli Rai, 6 Ind. Cas. 638; 10 A. L. J 20 (*Distinguished*) .. 931
Bandiram Mookerjee v. Purna Chandra Roy, 43 Ind. Cas. 758, 45 C. 926; 27 C. L J. 115. (*Followed*) .. 1053
Bansidhar v. Sun Lal, 10 A. 133 A. W. N. (1888) 35, 6 Ind. Dec. (N. S.) 90. (*Relied upon*) .. 816
Barkat-un-nissa Begam v. Mahboob Ali Mian, 52 Ind. Cas. 684 at p. 685; 17 A. L J. 1068, 1 U. P. L. R. (A.) 187. 42 A. 70 (*Distinguished*) .. 590
Barkhurdar v Chhat a Mal, 48 Ind. Cas. 798; 119 P R 1918 (*Distinguished*) .. 528
Barlee v Wood (1869) 8 Eq 42., 38 L. J Ch 683, 17 W R. 1080. (*Relied on*) .. 421
Basanta Kumar Roy v Secretary of State, 40 Ind. Cas. 337; 44 C 858; 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, 44 I. A. 104 (P C.), (*Distinguished*) .. 35
Basanta Kumar Singha v. Jogendra Nath Sinha 33 C. 371; 3 C. L. J. 98, 10 C. W. N. 236 (*Followed*) .. 508
Basawantapa v. Rani, 9 B. 86, 5 Ind. Dec. (N. S.) 58 (*Distinguished*) .. 46
Batuk Nath v. Munri Dei, 23 Ind. Cas. 644, 41 I A. 104, 19 C. L J. 574; 36 A. 284, 18 C. W N. 740, 12 A. L. J 596; 16 Bom. L. R. 360. 27 M. L. J. 1; 1 L W. 729; (1914) M. W. N. 437 (P. C.). (*Distinguished*) .. 2
Bawan Das v. Bishnath, A. W. N. (1899) 203. (*Relied on*) .. 457
Bayyana Ramayya v. Nidamarthi Krishnamurthi, 32 Ind. Cas, 952; 40 M. 296; 3 L. W 186; 9 M L. T 124 (9 6) 1 M. W. N. 133. (*Followed*) .. 893
Beattie v Jet a. 5 B. H C. R. (O. C. J.) 152 at pp 155. 157. (*Relied upon*) .. 193
Bechan Sahu v. Syed Ali Rasul, 16 Ind. Cas. 614. (*Relied upon*) .. 664

B—contd.

Page.

Beni Ram Bhutt v. Ram Lal Dhukri, 13 C. 189 at p 191; 6 Ind. Dec. (N. S). 625. (*Relied on*) .. 1028

Benson, *In re*, Bower v. Ch twynd, (1914) 2 Ch. 68; 83 L. J. Ch. 658, 110 L T. 926 21 Manson 8; 58 S. J 430; 30 T. L. R. 435. (*Relied on*) .. 572

Bepin Behari Bera v. Sashi Bhushan Datta, 22 Ind. Cas. 95; 18 C. W. N. 766; 18 C. L. J. 628. (*Followed*) .. 46

Bepin Behary Mozumdar v. Jogendra Chandra Ghosh, 36 Ind. Cas. 641; 24 C. L. J. 514. (*Followed*) .. 231

Bhagaban Ramanuj Das v. Ram Praparna Ramanuj Das, 22 C. 843; 22 I. A. 94; 6 Sar P C. J. 536 11 Ind. Dec. (N. S.) 538 (P.C.). (*Relied on*) .. 474

Bhagat Singh v. Ram Parkash, 69 Ind. Cas. 602. (*Followed*) .. 239

Bhagwant Appaji v. K dari Kashinath, 25 B 202; 2 Bom L. R 986. (*Relied on*) . 1043

Bhagwa i v. Chaoli, 55 Ind. Cas 698, 2 U P L R. (L) 79, 2 L. L. J. 689. (*Followed*) .. 246

Bhallu Singh v. Queen-Empress, 3 P. R 1897 Cr (*Followed*) .. 365

Bhattu Ram v. Ganga Prasad Gupe. 47 Ind. Ca . 37; 3 P. L. J. 358. (*Relied on*) .. 562

Bhiram Ali v. Gopi Kanth, 24 C 355; 1 C W. N 396; 12 Ind. Dec. (N. S) 904. (*Dissented from*) .. 379

Bholu v. Ram Lal, 60 Ind. Cas. 720; 2 L. 66; 3 U. P. L. R. (L.) 29 (*Distinguished*) .. 487

Bhuwani Churn Mitr v. Jykishen Mitr, (1847) S D A 354 8 Ind. Dec (O. S.) 326. (*Distinguish d*) .. 7

Bihari Lal v. Sat . arain, 69 Ind. Cas 486; 3 L 329; (1923) A. I. R. (L.) 1 (F B.). (*Referred to and not foll wed*) .. 471

Bilas Kunwar v. Desraj Ra.jit Singh, 30 Ind Cas. 299; 37 A. 557; 19 C. W. N 1207; 29 M. L. T. 235; 2 L. W. 830; 18 M. L T. 24 ; 13 A. L. J 991; 17 Bom. L. R 1006; 22 C. L J. 5 6; (191) M W. N. 757. 42 I. A. 202 (P. C.) (*Followed*) 451, 936

Bi.in Bihari Bejali v. Kanti Chandra Manlal, 18 I d. Cas 7 5. (*Followed*) .. 103

Birchall, *In re*, Wilson v Birchall (1882) 16 Ch. D. 41; 44 L. T. 113; 29 W. R. 27. (*Followed*) .. 682

Bishambhar Nath v. Bhola, 12 Ind. Cas. 920; 34 A 9 ; A. L. J. 1245. (*Dissented from*) .. 330

Bisheshar Bakhsh Singh v. Rameshar Bakhsh Singh, 44 Ind. Cas. 368; 21 O C. 1; 4 O. L. J. 648 (*Followed*) .. 626

Bisu Hildar v Emperor, 11 C W. N 836; 6 C. L J 127. 6 Cr L. J. 38. (*Relied on*) .. 731

Bis vanath Mahapatra v. S ivanand Saraswati, 61 Ind. Cas. 718; 2 P. L. T. 330; 22 Cr. L. J. 430. (*Distinguished*) .. 538

B—concld.

Page.

Biyyakka v. Fakira; 12 M. 211; 4 Ind. Dec. (N. S) 497. (*Distinguished*) .. 46

Bloomenthal v. Foord, (1897) A. C. 156 at p. 62 66 L. J. Ch. 253. 76 L T. 205; 4 W. R. 449, 4 Manson 156. (*Relied on*) .. 579

Boddam *Ex parte*, Taylor, *In re*, (1860) 45 E. R. 763 at p. 705; 2 De. G. F. & J. 425; 29 L. J Bk. 20; 6 Jur (N. S.) 570; 2 L T. 343; 8 W. R. 457; 129; R. B 224. (*Followed* .. 572

Brij Lal v. Inda Kunwar, 23 Ind. Cas. 715; 36 A. 1 7, 2 M L. T. 442; 18 C W. N. 6 9; (1911) M. W. N. 405. 12 A. L. J. 495; 15 M L. T 395; 16 Bom. L. R. 3 2; 1 L. W 794; 19 C. L J. 479 (P. C). (*Referred to and relied upon*) .. 770

B i i h India Steam Navigation Company, Limited v. Shar.fally, 70 I.d. Ca. 888; 41 M. L. J. 100; 17 L. W. 705, (1923) A I R M 435. (*Considered*) .. 390

Browing v. Morris, (1778) 2 Cowp. 790; 98 E. R 1364 (*Relied on*) .. 27

Budh o L l v. Mewa Ram, 63 Ind. Cas 15; 43 A. 56; 19 A. L. J. 558. (*Distinguished*) .. 993

Buddhoo Lal v. Mewa Ram, 63 Ind. Cas. 15. 43 A. 56; 19 A. L. J. 558 (F. B.). (*Relied on*) .. 101

Budhu v. Dewan, 28 Ind. Cas. 205; 37 A. 207. 13 A. L. J. 285. (*Relied upon*) .. 254

Budhu L l v Chuttu Gupe, 9 Ind Cas. 465 21 C. W. N. 269 t pp. 279, 280; 25 C. L J. 193. 18 Cr. L J. 497; 44 C. 816. (*Relied on*) .. 703

B.ll v. Faulkner, (1848 2 De. G. & Sm. 772; 13 Jur. 93; 79 R. R. 367; 64 E. R. 340. (*Followed*) .. 579

Burn v. Carvalho, (839) 4 My & Cr. 690; 9 L J. N S. Ch. 65; 3 Jur. 114; 48 R. R 213 41 E R. 265. (*Relied on*) .. 161

Byk nt N th Sh.ha v. Rajendra Narain Rai, 12 C 333, 6 Ind. Dec. (N. S.) 227. (*Relied on*) .. 325

C.

Chajmal Das v. Brij Bhukan Lal, 17 A. 511; 22 I. A. 193; 6 Sar. P. C. J 624; 8 Ind. Dec (N S.) 65 (P. C.). (*Followed*) 375

Chalavadi Kottiah v. Polloori Alimemmah, 31 M. 71; 1 M. L. J. 46; 3 M. L. T. 329 (*Distinguished*) .. 489

Champo v. Shankar Das, 14 Ind. Cas. 232; 74 P. R 1912; 165 P. L. R. 1912; 148 P W. R 1912. (*Followed*) .. 1043

Chandra Benode Kundu v Sheikh Alla Bux, 58 Ind. Cas. 353; 48 C. 184; 24 C W N 818; 31 C. L. J. 510 (S. P.). (*Followed*) .. 379

Charu Chandra v. Emperor, 37 Ind. Cas. 115. 44 C. 595; 21 C W. N. 720; 25 C. L. J. 6; 18 Cr. L. J. 1. (*Followed*) .. 353

Chatarbhuj v. Gobind Ram, 74 Ind. Cas. 571; 21 A.L. J. 348; 45 A. 407. (*Followed*) .. 872

C—contd.

	Page.
Chatenay v. Brazilian Submarine Telegraph Co., (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65. (*Relied on*) ..	686
Chattarpal Singh v. Raja Ram, 7 A. 661 at p. 665; A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854. (*Distinguished*) ..	993
Cherakuddin v. Ram Siraman, 62 Ind Cas. 432; 48 C. 879; 25 C. W. N. 256. (*Relied on*) ..	928
Chet Ram v. Ram Singh, 67 Ind. Cas. 559; 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; (1922) A. I. R (P. C.) 247; 3 P. L R. 1922; 24 Bom. L R. 1231; 27 C. W. N. 150; 40 I. A. 228; 21 A L. J. 114; 37 C. L. J. 79 (P. C) (*Discussed*) .	53
Chhabraji Kuar v Ganga Singh, 60 Ind. Cas. 643; 43 A. 29; 18 A. L. J. 863, 2 U. P L. R. (A.) 272. (*Relied on*) .	553
Chhaganlal v. Fazarali, 13 B. 154; 7 Ind. Dec. (N. S.) 103. (*Followed*) ..	749
Chhajju Ram v. Neki, 72 Ind. Cas. 560; 26 C. W. N. 697; 30 M. L. T. 205; 41 P L. R. 1922; 3 P. L T. 435; (1922) A. I. R. (P C) 112; 16 L. W 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R 1238; 4 U. P. L R (P C. 99; 36 C. L J. 459 (P. C). (*Followed*) ..	177
Chidambara Nadan v. Musuvathi Muni Nagendrayyan, 58 Ind Cas. 813; 39 M. L. J. 445; (1920) M. W. N. 534; 12 L. W. 393; 28 M. L T. 300. (*Relied on*) ..	1016
Chidambaram Chetti v. Ramaswami Chettiar, 26 Ind. Cas. 911; 27 M. L. J. 631. (*Relied upon*) ..	1004
Chidambaram Pillai v. Sivethasamy Thevar, 15 M. L. J. 396. (*Relied on*) ..	562
Chief Commissioner of Income Tax, Madras v. Northern Anantapur Gold Mines, Limited, 64 Ind Cas. 682; 44 M. 718; 14 L. W. 108; (1921) M. W. N. 502; 41 M. L. J. 177. (*Overruled*) ..	392
Chinnu Pillai v. Kalimuthu Chetti, 9 Ind. Cas 596; 35 M 47; (1911) M. W. N. 238; 9 M L. T. 389; 21 M. L. J. 246. (*Considered*) ..	406
Chockalingam Pillay, *In re*, 13 Ind. Cas. 819; (1912) M. W. N. 119; 11 M. L T. 162; 13 Cr. L. J. 131. (*Followed*) ..	159
Chukkun Lal Roy v. Lolit Mohan Roy, 20 C. 905; 10 Ind. Dec. (N. S) 609. (*Followed*) ..	41
Churamoni Mondal v. Rajendra Kumar Singh, 42 Ind. Cas. 390. (*Applied*) ..	817
Collector of Godavari District v. Jannavula Pedda Rangayya, 4 M. L. T. 440. (*Followed*) ..	38
Committee of Notified Area, Una v. Chatar Behari Narain, 44 Ind. Cas. 910; 74 P. L. R. 1918; 74 P. W. R. 1918. (*Followed*) ..	737
Cooverji Harji v. Dewsey Bhojja, 17 B. 718; 9 Ind. Dec. (N. S.) 471. (*Dissented from*) ..	856

C—concld.

	Page.
Crowfoot v. Gurney, (1832) 9 Bing. 372; 2 M. & Sc. 473; 2 L. J. (N. S.) C. P. 21; 35 R. R. 557, 131 E. R. 655. (*Relied on*) ..	161
Curran v. Midland Great Western Railway Company of Ireland, (1896) 2 Ir. R. 183; 2 Ir. L R. 739. (*Not followed*) ..	260
Cuthbertson v. Irving, (1859) 4 H. & N. 742; 28 L. J. Ex. 306; 5 Jur. (N. S.) 740; 157 R. R. 1034; 33 L T. (O. S.) 328; 118 R. R. 726 (*Followed*) ..	579

D

D. N. Shah & Co. v. Bengal National Bank, Ltd., 60 Ind. Cas. 940; 47 C. 861; 33 C. L. J 511. (*Relied on*) ..	950
Damodarbhat v. Bhogi Lal, 24 B 5; 1 Bom L R. 5 9. 12 Ind. Dec (N. S.) 567. (*Referred to and distinguished*) ..	189
Davud Beevi Ammal v Ramakrishna Aiyar, 72 Ind Cas. 81; 17 L. W. 332; 44 M. L J 309, (1923) M. W. N. 202; 32 M. L T. 263; (1923) A. I. R (M) 467. (*Considered*) ..	406
Daya Kishen v Mohammad Wazir Ahmad, 30 Ind. Cas. 565; 13 A. L. J. 833. (*Relied on*) ..	655
Debendra Nath Sen v. Mirza Abdul Sema Soroji, 1 Ind. Cas. 264; 10 C. L. J. 150. (*Relied upon*) ..	821
Debo Das v Mohunt Ram Charan Das, 2 C W N. 74. (*Relied upon*) ..	993
Deendyal 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.). (*Considered*) ..	406
Dhanpat Mal v. Jhaggar Singh, 93 P. R. 1908; 164 P. L. R. 1908; 133 P. W. R. 1908 (F. B.). (*Followed*) ..	919
Dhanwanti Kuer v. Sheo Shankar Lal, 51 Ind. Cas 873; 4 P. L. J. 340; (1921) Pat. 364. (*Followed*) ..	856
Dharam Kunwar v. Fakira, A. W. N. (1901) 157 (*Followed*) ..	596
Dhunno Kazi v. Empress, 8 C. 121; 10 C. L. R. 151; 6 Ind. Jur. 251; 4 Ind. Dec. (N. S) 77. (*Distinguished*) ..	987
Dildar Husain v. Sheo Narain, 49 Ind. Cas. 113; 41 A. 197; 17 A. L. J; 52. (*Relied on*) ..	824
Dixon v. Winch, (1900) 1 Ch. 736; 69 L. J. Ch. 465; 48 W. R. 612; 82 L. T. 437; 16 T. L. R. 276. (*Relied on*) ..	579
Dulloo Singh v. Deputy Inspector General of Police, C. I. D., Bengal, 65 Ind, Cas. 570; 49 C. 551; 23 Cr. L. J. 138; (1922) A. I. R. (C.) 412. (*Followed*) ..	533
Durga Parshad v. Hajari Singh, 11 Ind. Cas 116; 33 A. 790; 8 A. L. J. 1025. (*Relied on*) ..	663
Dyal v. Narain Das, 64 P. R. 1884. (*Distinguished*) ..	24

E

Page.

East Indian Railway Company v. Nathmal Behari Lal, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321. (*Followed*) .. 262

East Indian Railway Company v. Nilkanta, Roy, 22 Ind. Cas. 679; 41 C. 576; 19 C. W. N. 95; 19 C. L. J. 142. (*Followed*) .. 260

Edulji & Co. v. Mc. Donald, 55 P. R. 1901 (*Followed*) .. 64

Emperor v. Debendra Parshad, 2 Ind. Cas. 601; 36 C. 573; at p 584; 13 C. W. N. 973; 9 C. L. J. 610; 10 Cr. L. J. 91. (*Relied on*) .. 67

——— v. Ganesh Damodar Savarkar, 5 Ind. Cas. 854; 34 B. 394 at p. 408; 12 Bom. L. R 105; 11 Cr. L. J. 264. (*Followed*) .. 299

——— v. Kehri, 39 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360. (*Followed*) .. 701

——— v. Manik Rai, 11 Ind. Cas. 589; 83 A. 771; 8 A. L. J. 925; 12 Cr. L. J. 405. (*Followed*) .. 983

——— v. Mawaz, 18 Ind. Cas. 403; 13 P. R. 1913 Cr., 7 P. W. R. 1913 Cr; 14 Cr. L. J. 67; 39 P. L. R. 1913. (*Followed*) .. 692

——— v. Nagan Chetty, 30 M. 221; 17 M. L. J. 372; 6 Cr. L. J. 235. (*Followed*) .. 760

——— v. Panchu Das, 58 Ind. Cas. 929; 47 C. 671 at pp. 692, 696; 24 C. W. N. 501; 31 C. L. J. 402; 21 Cr. L. J. 849. (*Relied on*) .. 67

——— v. Surnamoyee Biswas, 21 Ind. Cas. 900; 41 C. 621; 4 Cr. L. J 660. (*Followed*) .. 145

Empress of India v. Ganraj, 2 A. 444; 4 Ind. Jur. 581; 1 Ind. Dec. (N. S.) 851. (*Explained*) .. 705

——— v. Mulu, 2 A. 646; 5 Ind. Jur. 263; 1 Ind. Dec. (N. S.) 991. (*Explained*) .. 705

Enuga Sundarama Reddi v. Bezwada Pattibhiramireddi, 42 Ind. Cas. 421; (1917) M. W. N. 495; 6 L. W. 272. (*Relied on*) .. 449

Esheechunder Singh v. Samachurn Bhatto, 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3. (*Followed*) .. 557

F

Fakirchand Motichand v. Motichand Hurruckchand, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294. (*Relied on*) .. 497

Fateh Chand v. Rup Chand, 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182; 43 I. A. 183 (P. C.). (*Distinguished*) .. 902

Fateh Din v. Qutab Din, 67 Ind. Cas. 543; 3 L. 71 (1922) A. I. R. (L.) 108. (*Relied on*) .. 824

F—concld.

Page.

Fazal v. Hashmati, 31 Ind, Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916. (*Followed*) .. 1020

Fazal Rab v. Manzur Ahmed, 45 Ind. Cas. 773; 40 A. 425; 16 A. L. J. 433. (*Relied on*) .. 43

Ferens v. O' Brien, (1883) 11 Q. B. D. 21; 52 L. J. M. C. 70. 31 W. R. 643; 15 Cox. C. C. 332; 47 J. P. 472. (*Followed*) .. 159

Fillingham v. Captain C. I. Dunn, 20 Ind. Cas. 194; 8 P. R. 1914; 266 P. L. R. 1913; 235 P. W. R. 1913. (*Followed*) .. 64

Firm Ishar Das-Dharm Chand of Amritsar v. Firm Buta Mal-Durga Das of Amritsar, 67 Ind. Cas 870; (1922) A. I. R. (L.) 54; 4 L. L. J. 425. (*Relied on*) .. 101

G

G. I. P. Railway Co. v. Amraoti Municipality, 16 Ind Cas. 449; 8 N. L. R. 107. (*Relied on*) .. 737

Gaj Kumar Chander v. Syed Salamat Ali, 52 Ind. Cas. 756; 42 A. 8; 17 A. L. J. 1057; 1 U. P. L. R. (A) 142. (*Followed*) .. 280

Gajadhar Singh v. Kishen Jiwan Lal, 42 Ind Cas. 93; 39 A. 641; 15 A. L. J. 734. (*Followed*) .. 2

Gajja Nand v. Emperor, 64 Ind. Cas. 500; 2 L. 288; 8 P. L. R. 1922; 23 Cr. L. J. 20. (*Relied on*) .. 24

Ganapati v. Chathu, 12 M 223; 4 Ind. Dec. (N. S.) 505. (*Followed*) .. 115

Ganesh Rab Naik v. Vithal Vaman Mahalya, 19 Ind. Cas. 475; 37 B. 387; 15 Bom L. R. 244. (*Relied on*) .. 430

Ganesh Dutt Thakoor v. Jowach Thakoorain, 1 C. 262; 14 M. L. J. 8; 31 I. A. 10; 8 C. W. N. 146; 8 Sar. P. C. J. 57; 6 Bom. L. R. 1 (P. C.). (*Followed*) .. 227

Ganga Ram v. Mihin Lal, 28 A. 416; 3 A. L. J. 187; A. W. N. (1906) 72. (*Relied on*) .. 351

Ganga Singh v. Ram Sarup, 33 Ind. Cas. 110; 38 A. 223; 14 A. L. J. 252. (*Followed*) .. 330

Gangabai v. Basvant, 5 Ind. Cas. 866; 34 B. 175; 12 Bom. L. R. 143. (*Distinguished*) .. 579

Gangadharrao Venkatesh v. Shidramapa Balapa Desai, 18 B. 586; 9 Ind. Dec. (N. S.) 899. (*Relied upon*) .. 1004

Ghansham Das v. Hardei, 32 Ind. Cas. 380; 2 O. L. J. 562. (*Distinguished*) .. 449

Ghansham Singh v. Bhola Singh, 74 Ind. Cas. 411; 21 A. L. J. 465; (1923) A. I. R. (A.) 490; 45 A. 506; (*Distinguished*) .. 784

Ghansham Singh v. Teg Bahadur Singh, 13 Ind. Cas. 191; 9 A. L. J. 496. (*Distinguished*) .. 244

Ghazi v. Sukru, 19 A. 515; A. W. N. (1897) 139; 9 Ind. Dec. (N. S.) 33. (*Relied on*) .. 24

Ghazidin v. Fakir Bakhsh, 7 A. 73; A. W. N. (1884) 226; 4 Ind. Dec. (N. S.) 301. (*Relied on*) .. 418

G—contd.

Page.

Ghelabhai Punsi v. East Indian Peninsular Railway Company, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525. (*Dissented from*) .. 26

Ghelabhai Punsi v. East Indian Railway Company, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525. (*Not followed*) .. 260

Ghasa Singh v. Gajraj Singh, 33 Ind. Cas. 37; 18 O. C. 289; 3 O. L. J. 45. (*Followed*) .. 626

Ghorey v. Shib Lal, 58 Ind. Cas. 410; 18 A. L. J. 781; 2 U. P. L. R. (A.) 266. (*Relied upon*) .. 813

Ghulam v. Jowala Singh, 48 Ind. Cas. 363; 103 P. R. 1918; 130 P. W. R. 1918; 130 P. L. R. 1918. (*Dissented from*) .. 818

Ghulam Fatima v. Rahman, 50 Ind. Cas. 270; 127 P. R. 1919. (*Followed*) .. 562

Ghunsham Das v. Uma Prshad, 50 Ind. Cas. 264, 15 N. L. R. 68; 17 A. L. J. 40; 36 M. L. J. 48; 21 Bom. L. R. 42; 23 C. W. N. 81; (1919) M. W. N. 513; 10 L. W. 511; 1 U. P. L. R. (P. C.) 80 (P. C.) (*Discussed and dissented from*) .. 749

Gill v. Varada Raghavayya, 55 Ind. Cas. 517; 43 M. 396; 38 M. L. J. 92; 11 L. W. 174. (1919) M. W. N. 124; 27 M. L. T. 146 (*Followed*) .. 93

Girdhar e Lall v. Kantoo Lall I. A. 31; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 330 (P. C.). (*Relied on*) .. 785

Girish Chandra Chando v. Sirish Chandra Das, 9 C. W. N. 255. (*Distinguished*) .. 55

Godimella Rangamma v. Panchangam Narasimhacharyulu, 35 Ind. Cas. 110; 31 M. L. J. 20; (1916) 2 M. W. N. 258. (*Followed*) .. 336

Gokaldas Gopaldas v. Puranmal Prmsukhdas, 10 C. 1035 at p. 1046; 11 I. A. 126; 8 Ind. Jur. 396; 1 Sar. P. C. J. 513; 5 Ind. Dec. (N. S.) 692 (P. C.). (*Relied on*) .. 472

Gopal Chandra Neogy v. Bigoo Mistry, 8 C. W. N. 70. (*Relied upon*) .. 993

Gopal Chundra v Gunamoni Dasi, 20 C. 570; 10 Ind. Dec. (N. S.) 251. (*Considered*) .. 46

Gopala Kunbi v. Ramkrishnapuri, 50 Ind. Cas. 93; 15 N. L. R. 95. (*Followed*) .. 826

Gopalaratnamayyar v. Bapala Narasimma Nayudu, 4 M. 409; 1 Ind. Dec. (N. S.) 1118. (*Distinguished*) .. 443

Gopimmal v. Srinivasa Iyengar, 27 Ind. Cas. 921; 28 M. L. J. 96 (*Followed*) .. 592

Goverdhandas Vishindas v. Ramchand Manjimal, 47 Ind Cas. 785; 12 S. L. R. 41. (*Followed*) .. 1041

Govindaswami Thevan v. Doraiswami Pillai, 6 Ind. Cas. 78; 34 M. 119; 20 M. L. J. 380; 8 M. L. T. 13; (1909) M. W. N. 394. (*Relied on*) .. 1016

Great Indian Peninsular Railway Company v. Jitan Ram-Nirmal Ram, 67 Ind. Cas. 664; 3 P. L. T. 222; (1924) A. I. R. (Pat.) 17. (*Followed*) .. 26

G—concld.

Page.

Great Indian Peninsular Railway Company v. Jitan Ram-Nirmal Ram, 7. Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 69; (1923) A. I. R. (Pat.) 285; 2 Pat. 42. (*Follow d*) .. 26

Groves v. Administrator-General of Bengal, 22 M. 119; 8 M. L. J. 248; 8 Ind Dec. (N. S.) 84. (*Not followed*) .. 46

Gujar v. Auliya, 23 Ind. Cas. 835; 78 P. R. 1914; 184 P. L. R. 1914; 119 P. W. R. 1914. (*Dissented from*) .. 246

Gulab v. Ram Singh, 102 P. R. 1890. (*Followed*) .. 271

Gulab Chand v Sher Singh, 35 Ind. Cas. 68; 149 P. W. R. 1916; 8 P. L. R. 1917. (*Followed*) .. 107

Gur Narayan v Sheo Lal Singh, 40 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 435; 23 C. W. N. 521; 1 U P. L. R (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C. . (*Relied on*) .. 1048

Gurbakhana v. Bujha, 6 Ind. Cas. 821; 42 P. R. 1911; 63 P. W R. 1911; 99 P. L. R. 1911. (*Followed*) .. 317

H

Habibullah v Kalyan Das, 25 Ind. Cas. 169; 12 A. L. J. 1080. (*Distinguished*) .. 655

Hadu v. Lala, 21 Ind. Cas. 151; 41 P. R. 1 15; 15 P. L. R. 1914; 16 P. W. R 1914. (*Relied upon*) .. 820

Hanuman Din v. Ram Bisal, 14 Ind. Cas. 26 . (*Relied on*) .. 666

Hanuman Kamat v Hanuman Murdur, 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 61; 9 Ind. Dec. (N. S.) 527 (P. C.) (*Followed*) 469

Har Dershan v. Ram Chandar, 63 Ind. Cas. 750; 19 A. L. J. 807. 3 U. P. L. R. (A.) 139; 44 A. 37; (1922) A. I. R. (A.) 174. (*Followed*) .. 931

Hardi Narain Sahu v. Ryder, Perkash Misser, 10 C. 626; 11 I. A. 26; 8 Ind. Jur. 211; 4 Sar. P. C. J. 510; 5 Ind. Dec. (N. S.) 420 (P. C.). (*Considered*) .. 406

Hari Chand v. Magli Mal, 40 Ind. Cas. 67 ; 78 P. R. 1917; 95 P. W. R. 1917; 112 P. L. R. 1917. (*Distinguished*) .. 461

Hari Dass Sanyal v. Srituala, 15 C. 108; 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 989 (F. B.) (*Relied upon*) .. 978

Hari Lal Pran Lal v. Bai Rewa, 21 B. 376; (1 Ind Dec. (N. S.) 253. (*R lied on*) .. 902

Harmukh Rai-Munna Lal v. Radha Mohan, 54 Ind. Cas. 931; 158 P. R. 1919; 109 P. W R. 1919. (*Relied on*) .. 497

Hassanbhai v. Umaji, 28 B. 153; 5 Bom. L. R. 892. (*Not followed*) .. 899

Hayward v. Mutual Reserve Association, (1891) 2 Q B 236; 65 L. T. 492; 9 W. R. 824. (*Distinguished*) .. 221

Hazari Khan v. Lasar Chand a Lal Chowdry, 40 Ind. Cas. 7 ; 22 C. W. N. 475; 18 Cr. L J. 718. (*Followed*) .. 75

Helan Dasi v. Durga Das Mundal, 4 C. L. J. 323. (*Relied on*) .. 474

H—concld.

Page.

Hemanta Kumari Debi v. Midnapore Zemindari Co., Limited, 53 Ind. Cas. 534; 46 I. A. 240; 37 M. L. J. 515; 1 A. L. J. 1117; 24 C. W. N. 17; (1920) M. W. N. 66, 27 M. L. T. 42; 11 L. W. 301; 31 C. L. J. 295; 22 Bom. L. R. 488; 47 C. 485 (P. C.) (*Followed*) .. 461

Hiralal v. Shankar, 62 Ind. Cas. 637; 23 Bom. L. R. 506; 45 B. 11,0. (*Followed*) .. 118

Hobson v. Garringe, (1877) 1 Ch. 182; 66 L. J. Ch. 11; 75 L. T. 610, 45 W. R. 356. (*Considered*) .. 838

Holland v. Hodgson, (1872) 7 C. P. 328 at p. 334; 41 L. J. C. P. 140 26 L. T. 490; 20 W. R. 990. (*Considered*) .. 838

Hooper v. Smart (Daily v. Piper), (1874) 18 Eq. 683; 43 L. J. Ch. 701; 31 L. T. 86; 22 W. R. 943. (*Relied on*) .. 421

Hunooma pursaud Panday v. Babooee Munraj Koonwaree, 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 9; 1 Sar. P. C. J. 552; 19 E. R. 147. (*Distinguished*) .. 375

Hunoomanpersaud Panday v. Babooee Munraj Koonwaree, 6 M. I. A. 393 at p. 421; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.). (*Followed*) 53, 561

Hunoomanpersaud Panday v. Babooee Munraj Koonwaree, 6 M. I. A. 393 at p. 20; 18 W. R 81n; Sevestre 25 n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.). (*Referred to and relied upon*).. 770

I

Imam-ud-din v. Sadarat Rai, 5 Ind. Cas. 89; 32 A. 101; 7 A. L. J. 228. (*Followed*) .. 321

Imperial Oil Soap and General Mills Co., Limited, Delhi v. Misbah-ud-din, 61 Ind. Cas. 325; 2 L. 83. (*Distinguished*) .. 910

J

Jagabhai Lalubhai v. Vijbhukhandas, 11 B. 31; 6 Ind. Dec. (N. S.) 24. (*Relied on*) .. 497

Jagadish Bhattacharjee v. Rama Sundari Dasya, 51 Ind. Cas. 972; 23 C. W. N. 608; 29 C. L. J. 411. (*Followed*) .. 46

Jagannath Saha v. Chairman of Berhampur Municipality, 4 Ind. Cas. 55; 9 C. L. J. 406. (*Followed*) .. 506

Jagat Tarini Dasi v. Rakhal Chandra Tewary, 3 Ind. Cas. 324; 10 C. L. J. 396; 14 C. W. N. 752. (*Distinguished*) .. 863

Jagrani v. Bisheshar Dube, 35 Ind. Cas. 701; 38 A. 306; 14 A. L. J. 449 (F. B.). (*Relied on*) .. 593

Jagrani Kuer v. Durga Parshad, 22 Ind. Cas. 103; 30 A. 93; 16 O. C. 380; 12 A. L. J. 125; 26 M. L. J 153; 15 M. L. T. 125; (1914) M. W. N. 17; 19 C. L. J. 165; 18 C. W. N. 521; 16 Bom. L. R. 141; 1 O. L. J. 571 41 I. A. 76 (P. C.) (*Relied on*) .. 881

J—contd.

Page.

Jai Chand v. Girwar Singh, 52 Ind. Cas. 366; 41 A. 666; 17 A. L. J. 614. (*Distinguished*) .. 672

Jainab Bibi Saheba v. Hyderally Saheb, 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. (*Followed*) .. 445

Jaikam v. Gopikisan, 47 Ind. Cas. 32; 14 N. L. R. 125. (*Relied on*) .. 601

Jamna Das v. Ram Autar Pande, 13 Ind. Cas. 304, 34 A. 63; 16 C. W. N. 97; 11 M. L. T. 6, 9 A. L. J. 37; (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.). (*Distinguished*) .. 1016

Janardhan Panurang v. Gopal Pandurang, 5 B. H. C. R. (A. C. J.) 145. (*Relied on*) .. 474

Jangal Chaudhary v. Laljit Pasban, 60 Ind. Cas. 124; 6 P. L. J. 1; 1 P. L. T. 735; (1920) Pat. 3; 3 U. P. L. R. (Pat.) 1. (*Discussed*) .. 343

Jansi Das v. E. I. Ry. Company, 6 A. 634 A. W. N. (1884) 210 4 Ind. Dec. (N. S.) 247. (*Distinguished*) .. 915

Jaugal Singh v. Ghulam Mahomed, 67 Ind. Cas. 700, 4 U. P. L. R. (L.) 100; 3 L. 376, 32 P. W. R. 1922; (1922) A. I. R. (L.) 461. (*Relied on*) .. 743

Jayan i Venkayya v. Damisetti Sathiraju, 64 Ind. Cas. 470; 44 M. 714; 41 M. L. J. 117; 14 L. W 180. (*Followed*) .. 2

Jenkins v. Robertson, 1 H L. Sc. 117. (*Followed*) .. 336

Jiu Lal Gir v. Jogmohan Gir, 26 C. 576; 13 Ind Dec. (N. S.) 970. (*Followed*) .. 983

Jogal Kishore v. Chammo, 85 P. R. 1905; 151 P L. R. 1905 105 P. W. R. 1905 (F. B.). (*Distinguished*) .. 479

Jogendra Chandra Roy v. Sham Das, 1 Ind. Cas. 108; 9 C. L. J. 271; 36 C. 543. (*Distinguished*) .. 863

Jogendra Nath Roy Bahadur v. Price, 24 C. 584; 12 Ind. Dec. (N. S.) 1058. (*Followed*) .. 173

Johnson v. Croydon Corporation, (1886) 16 Q. B D. 708; 55 L. J. M. C. 116; 54 L. T. 295; 50 J. P. 487. (*Considered*) .. 390

Jones v. Evans, (1848) 17 L. J. Ch. 469; 12 Jur. 664; 80 R. R. 192. (*Relied on*) 421

Jotendromohun Tagore v. Ganendromohun Tagore, 1. A Sup. Vol 47; 18 W. R. 359; 9 B. L. R. 377; 2 Suth P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.). (*Followed*) .. 45

Joykishen v. Ataoor Rahoman, 6 C. 22; 5 Ind. Jur. 522; 6 C. L. R. 575; 3 Shome L. R. 197; 3 Ind. Dec. (N. S) 15 (P. C.). (*Relied on*) .. 520

Jugeshar Misra v. Nath Koeri (Sundermohan Panigrahi Ghana Rout), 65 Ind. Cas. 335; 3 P. L. T. 205; (1922) Pat. 49; 4 U. P. L. R. (Pat.) 9; (1922) A. I. R. (Pat.) 19 & 114; 1 Pat. 317 (F. B.). (*Followed*) .. 284

Jumna Prasad v. Karan Singh, 46 Ind. Cas. 338; 41 A. 28; 16 A. L. J. 859. (*Followed*) .. 280

J—concld.

	Page.
Jawa a Dei v. Pirbhu, 14 A. 35; A. W. N. (1891) 192; 7 Ind Dec. (N. S.) 394. (*Followed*) ..	457
Jawala Prasad v. Salig Ram, 13 A. 575; A. W. N. (1891) 158; 7 Ind. Dec. (N. S.) 363. (*Followed*) ..	1053
Jyotindra Nath Sarkar v. Lodna Colliery Co., Limited, 62 Ind. Cas. 649; 6 P. L. J. 350; 2 P. L. T. 361; (1921) Pat. 177 (F. B.). (*Distinguished*) ..	265

K

Kabal Shah v. Muhammad Baqa, 73 Ind Cas. 120. (*Followed*) ..	246
Kap ldeo S ngh v. Ramrikha Singh, 8 Ind. Cas. 484; 33 A. 237; 7 A. L. J. 1191. (*Dissented from*) ..	993
Karam Ilahi v. Babua Mal, 21 P. R. 1900. (*Followed*) ..	610
Karoolal Sajawal v. Shyam Lal, 32 C. 935; 9 C. W. N. 864; 1 C. L. J. 216; 2 Cr. L. J. 215. (*Followed*) ..	531
Kartick Chandra Ghosh v. Ashutosh Dhara, 12 Ind. Cas. 103; 39 C. 298; 14 C. L. J. 425; 16 C. W. N. 26. (*Followed*) ..	1053
Kassim Sa b v. Luis, 17 M. 82; 6 Ind. Dec. (N. S.) 56. (*Distinguished*) ..	219
Kayarohana Pathan v. Subbaraya Thewan, 19 Ind. Cas. 690; 38 M. 250; 13 M. L. T. 460; (1913) M. W. N. 642; 25 M L J. 251. (*Relied on*) ..	474
Kearley v. Thomson, (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P 804. (*Relied on*) ..	27
Kedarnath Dutt v. Harra Chand Dutt, 8 C. 420; 4 Ind; Dec. (N. S.) 268. (*Distinguished*) ..	489
Kesar Kunwar v. Kashi Ram, 30 Ind. Cas. 777; 37 A. 634; 13 A L. J. 889. (*Distinguished*) ..	931
Keshava Sanabhaga v. Lakshminarayana, 6 M. 192; 7 Ind. Jur. 186; 2 Ind. Dec. (N. S.) 413. (*Followed*) ..	115
Keshavrav Krishna v. Bhavanji, 8 B. H. C. R. (A. C. J.) 142. (*Distinguished*) ..	7
Kesho Das v. Morat Pandey, 23 Ind. Cas. 320; 12 A L J. 367. (*Distinguished*) ..	280
Kesho Prasad Singh v. Sheopargash Ojha, 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P. L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A.) 301. (*Relied on*) ..	593
Kessowji Issur v. Great Indian Peninsula Railway Company, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.). (*Relied on*) ..	331
Khair-ul-nisa v. Bahadur Ali, 27 P. R. 1906; 11 P. L. R. 1906. (*Distinguished*) ..	461
Khazan Singh v. Suhel Singh, 54 Ind. Cas. 923; 156 P. R. 1919. (*Followed*) ..	680
Khiarajmal v. Daim, 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.). (*Distinguished*) ..	46

K—concld.

	Page.
Kirpal Singh v. Sant Singh, 13 Ind. Cas. 305; 71 P. R. 1911; 30 P. L. R. 1912; 205 P. W. R. 1911. (*Followed*) ..	774
Kishan Dial v. Ali Bakhsh, 87 P. R. 1890. (*Relied on*) ..	610
Kollipara Seetapaty v. Kankipaty Subbayya, 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718; 6 M. L. T. 121. (*Distinguished*) ..	769
Korumbakkatparkum Vengalasheri Moideen Kutti v. Thuniyilandiyal Mariamumma, 70 Ind. Cas. 113; 14 L. W. 502; 41 M. L. J. 457. (*Distinguished*) ..	334
Kota Balabhadra Patro v. Khetia Doss, 37 Ind. Cas. 168; 31 M. L. J. 275; 4 L. W. 99; (1917) M. W. N. 149. (*Considered*) ..	406
Krishna Kesor De v. Nagendrabala Chaudhrani, 60 Ind. Cas. 694; 25 C. W. N. 942; 35 C. L. J. 33. (*Relied on*) ..	782
Krishnaji v. Manwar Ali, 6 Ind. Cas. 821; 6 N. L. R. 72. (*Distinguished*) ..	999
Krishnan Chetti v. Muthu Palandi, 22 M. 172, 8 Ind. Dec. (N. S.) 122. (*Distinguished*) ..	198
Krishnan Chetty v. Vellaichami Thevan, 12 Ind. Cas. 568; 37 M. 38; 10 M. L. T. 385; (1911) 2 M. W. N. 461; 21 M. L. J. 1077. (*Followed*) ..	1002
Kuar Sen v. Mamman, 17 A. 87; A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 381. (*Relied on*) ..	38
Kulada Kinkar Roy v. Danesh Mir, 33 C. 33; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.). (*Followed*) ..	75
Kumara Venkata Perumal v. Thatha Ramaswamy Chetty, 9 Ind. Cas. 875; 35 M. 75; (1911) 1 M. W. N. 290; 9 M. L. T. 487; 21 M. L. J. 709. (*Followed*) ..	336
Kuppu Reddi Nookayya v. Mandaluka Bucemanna, 73 Ind. Cas. 733; (1923) M. W. N. 176; 17 L. W. 712; (1923) A. I. R. (M.) 454; 44 M. L. J. 91. (*Followed*) ..	465

L

Lachchi Ram v. Emperor, 65 Ind. Cas. 852; 20 A. L. J. 218; 23 Cr. L. J. 196; (1922) A. I. R. (A.) 61. (*Distinguished*) ..	358
Lachhman Das v. Jowahir Singh, 70 Ind. Cas. 250; 4 P. L. R. 1922. (*Relied on*) ..	562
Lachman Ram v. Dhiru Dusadh, 48 Ind. Cas. 342; 19 Cr. L. J. 1002. (*Followed*) ..	531
Lahore Electric Supply Company v. Durga Das, 45 Ind. Cas 171; 85 P R. 1918; 79 P. W. R. 1918; 77 P. L. R 1918. (*Followed*) ..	456
Lakhmi Narain v. Tara Singh, 6 P. R. 1901; P. L. R. 1901 p. 513. (*Followed*) ..	1043
Lakhu Mal v. Bishen Das, 66 Ind. Cas. 408; 3 L. 74; (1922) A. I. R. (L.) 291. (*Followed*) ..	239
Lakshman Mayaram v. Jamnabai, 6 B. 225; 6 Ind. Jur. 309; 3 Ind. Dec. (N. S.) 608. (*Relied on*) ..	774

L—concld.

Page.

Lakshmanan v. Muttja, 11 M. 1; 4 Ind. Dec. (N. S.) 1. (*Followed*) .. 572

Lalji, *In the matter of the petition of*, 19 A. 302; A. W. N (1897) 52, 9 Ind. Dec. (N. S.) 198. (*Considered*) .. 695

Lalji Misir v. Jaggu Tiwari, 7 Ind. Cas. 938; 33 A. 104; 7 A. L. J. 1022. (*Distinguished*) .. 401

Lalji Sahoy v. Odoya Sunderi Mitra, 14 C. 757; ; Ind. Dec. (N. S.) 502. (*Not Followed*) 830

Lancaster Banking Corporation, *Ex parte*, Westby, *In re*, (1878) 10 Ch. D. 776; 48 L. J. Bk. 89; 39 L. T. 673; 27 W. R. 292. (*Relied on*) .. 572

Ledgard v. Bull, 9 A. 197; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.). (*Distinguished*) .. 805

Lekh Ram v. Ramji Das, 57 Ind. Cas. 215; 3 L. L. J. 370; 1 L. 234; 141 P. L. R. 1920. (*Relied on*) .. 667

Leslie, Limited v. Sheill, (1914) 3 K. B. 607; 83 L. J. K. B. 1143; 111 L. T. 1; 58 S. J. 453; 30 T. L. R. 460. (*Followed*) .. 269

Liverpool Borough Bank v. Turner, (1860) 2 De G. F. & J. 502, 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. (N. S.) 491; 9 W. R. 202; 129 R. R. 172; 45 E. R. 715. (*Followed*) .. 129

Lokasikhamani Mudaliar v. Thiagaroya Chettiar, 38 Ind. Cas. 415; (1917) M. W. N. 420; 5 L. W. 596. (*Referred to and (Distinguished*) .. 189

Lopez v. Mudun Mohun Thakoor, 14 W. R. 11; 5 B. L. R. 521; 13 M. I. A. 467; 20 E. R. 625; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 504 (P. C.). (*Distinguished*) .. 935

Lord Southampton's Estate, *In re*, Allen v. Lord Southampton Lanfather's Claim, (1881) 16 Ch. D 178 at p. 187; 50 L. J. Ch. 218; 43 L. T. 687; 29 W. R. 231. (*Relied on*) .. 579

Lott v. Outhwaito, (1893) 16 T. L. R. 76 at p. 77. (*Followed*) .. 193

M

Ma Pan Nyun v. Ma Hla Sein, 30 Ind. Cas. 665; 8 L. B. R. 190; 8 Bur. L. T. 149. (*Relied on*) .. 163

Macgregor v. Dover & Deal Railway Company, (1852) 18 Q. B. 618 at p. 631; 7 Railw. Cas. 227; 22 L. J. Q. B. 69; 17 Jur. 21; 19 L. T. (O. S.) 316; 88 R. R. 715; 118 E. R. 233. (*Followed*) .. 506

Macnaghten v. Mahabir Pershad Singh, 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.). (*Followed*) .. 546

Madhavan v. Keshavan, 11 M. 191; 4 Ind. Dec. (N. S.) 133. (*Followed*) .. 336

Madho Prasad v. Mahtab Chand, 8 Ind. Cas. 410. (*Relied on*) .. 870

M—contd.

Page.

Mahabir Pershad v. Moheswar Nath Sahai, 17 C. 584; 17 I. A. 11; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. S.) 929 (P. C.). (*Relied upon*) .. 82

Mahadeo Sahai v. Secretary of State for India, 65 Ind. Cas. 255; 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1. (*Dissented from*) .. 993

Maharaja of Bobbili v. Venkataramanjulu, 25 Ind. Cas. 585; 39 M. 265; 16 M. L. T. 181; 27 M. L. J. 409. (*Considered*) .. 406

Mahmud v. Jumma, 54 Ind. Cas. 646; 28 P. R. 1919; 16 P. L. R. 1920. (*Followed*) .. 610

Mahomed Fazalur Rahman Chowdhri v. Mahomed Fayzur Rahman Chowdhri, 10 Ind. Cas. 354; 15 C. W. N. 677. (*Distinguished*) .. 334

Mahomed Musa v. Aghore Kumar, 28 Ind. Cas. 930; 42 I. A. 1; 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. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.). (*Followed*) .. 118

Mahomed Riasat Ali v. Hasin Banu, 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique & Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737 (P. C.). (*Distinguished*) .. 953

Mahomed Syedol Ariffin v. Yeoh Ooi Gark, 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678; 43 I. A. 256 (P. C). (*Followed*) .. 269

Malijya Pillai v. Tirumalaperumal Pillai, 12 Ind. Cas. 170; 36 M. 62; 21 M. L. J. 1022; 10 M. L. T. 277; (1912) M. W. N. 161. (*Relied on*) .. 549

Malkarjun v. Narhari, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 27 I. A. 216; 7 Sar. P. C. J. 739; 2 Bom. L. R 927 (P. C.). (*Followed*) .. 46

Manakji v. Surajmal, 10 Ind. Cas. 705; 7 N. L. R. 32. (*Followed*) .. 589

Mangar Sahu v. Bhattu Singh, 57 Ind. Cas. 473; 1 P. L. T. 416; 5 P. L. J. 672. (*Relied on*) .. 485

Manindra Nath v. Mohanunda Roy, 13 Ind. Cas. 161; 15 C. L. J. 360. (*Followed*) .. 850

Manohar v. Emperor, 47 Ind. Cas. 91; 16 A. L. J. 614; 19 Cr. L. J. 895. (*Dissented from*) .. 289

Manohar Lal v. Sadiqa Begam, 37 Ind. Cas. 292; 101 P. R. 1916; 202 P. W. R. 1916. (*Followed*) .. 1020

Manohar Lall v. Nanbi, 66 Ind. Cas. 399; 2 L. 366; (1922) A. I. R. (L.) 320. (*Followed*) .. 913

Mariamnissa Bibi v. Joynab Bibee, 33 C. 1101; 4 C. L. J. 149; 10 C. W. N. 934. (*Dissented from*) .. 570

Mati Lal Mitha Lal v. Advocate General of Bombay, 11 Ind. Cas. 547; 35 B. 279; 13 Bom. L. R. 471. (*Relied on*) .. 902

Maung Ba Maung v. Maung Pyu, 40 Ind. Cas. 854. (*Relied on*) .. 166

M—contd.

Page.

Maung Pan U v Ma Kyi Nyo, 8 Ind. Cas. 1200; 3 Bur. L. T. 107. (*Relied on*) .. 166

Maung Tun Tha v Ma Thit, 38 Ind. Cas 209; 44 C 379; 19 Bom L R. 294; 15 A. L. J 96; 32 M L J 71; 21 M L T. 97; 21 C. W. N. 527; 26 C L J. 169; 9 L. B. R 56; 10 Bur. L. T. 138; 44 I. A. 42 (P. C) (*Relied on*) .. 934

Maya Devi v. Ram Chand, 31 Ind. Cas. 186; 20 P R 1916; 177 P. W. R 1915. (*Relied on*) .. 24

Mazahir Ali v. Emperor, 71 Ind. Cas 662; 27 C W. N. 99; 30 C. L. J. 417; 24 Cr. L J. 198; (1923) A. I. R. (C.) 196; 50 C. 223. (*Followed*) .. 715

Mazhar Rai v Ramgat Singh, 18 A. 290; A. W. N (1896) 50; 8 Ind. Dec. (N. S.) 899 (*Followed*) .. 955

Mc Murdo, *In re*, Penfield v. Mc Murdo, (1902) 2 Ch. 684 at pp 699, 706; 71 L J. Ch. 691; 86 L. T 814; 50 W. R. 644 (*Followed*) .. 572

Mc Murdo, *In re*, Penfield v. Mc Murdo, (1902) 2 Ch 684 at pp. 699, 706; 71 L. J. Ch. 691; 86 L. T 814; 50 W. R. 644 (*Relied on*) .. 572

Mehr Khan v. Ghulam Rasul, 64 Ind Cas. 194; 2 L. 282; 3 L. L J 553; (1922) A. I. R. (L) 300 (*Distinguished*) .. 845

Mela Ram v. Rikhikesh, 69 Ind Cas 111; 33 P. W R. 1922; (1923) A. I. R. (L) 69 (*Relied on*) .. 101

Muthaiam Ramrakhiomal v. Rewachand Ramrakhiomal, 44 Ind Cas. 266; 45 C. 866; 22 C. W. N. 377; 4 P L. W. 197; 34 M. L. J. 327; 7 L. W. 361; 23 M. L. T. 218; 16 A L. J. 281; 27 C. L. J 345; 20 Bom. L. R. 507; (1918) M. W. N. 587; 12 S. L. R. 116; 45 I. A. 41 (P. C). (*Relied on*) .. 774

Midnapore Zemindary Company, Limited v. Nilya Kazi Desi, 24 Ind. Cas. 243. (*Followed*) .. 570

Mihan Singh v. Bhagwan Kaur, 37 Ind. Cas. 390; 111 P. R. 1916; 234 P. W. R. 1916. (*Followed*) .. 818

Minu Sirdar v. Rhodoynathroy, 5 C. L. R. 135. (*Relied on*) .. 57

Mir Husain Bux v Kando, 32 Ind. Cas. 689; 9 S. L. R. 174. (*Relied on*) .. 549

Mirza Bakhsh v. Gouda Ram, 13 Ind. Cas. 250; 89 P W R. 1912. (*Followed*) .. 680

Misri Lal v. Mozhar Hossain, 13 C. 262; 6 Ind. Dec (N. S.) 974. (*Followed*) .. 816

Mithan Lal v Mizaji Lall, 17 Ind. Cas 914; 10 A L. J. 529. (*Followed*) .. 553

Mofiz Shaikh v. Rasik Lal Ghosh, 6 Ind. Cas. 796; 37 C. 815; 14 C. W. N. 932; 12 C. L. J. 246. (*Followed*) .. 838

Mohammad Niaz Khan v Mohammad Idris Khan, 44 Ind. Cas 227; 16 A. L. J. 233; 40 A. 322. (*Distinguished*) .. 404

Mohini Mohan Misser v. Gour Chandra Ray, 56 Ind. Cas. 765; (1921) Pat. 105; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (Pat.) 123. (*Followed*) .. 115

M—concld.

Page.

Mohsenuddin v. Phagaban Chandra, 61 Ind. Cas 443; 25 C. W. N 29; 3 C L. J 286; 48 C. 605 (P. C.). (*Distinguished*) .. 209

Mohendra Chandra v Bhagaban Chandra Sutradhar, 61 Ind. Cas. 445; 48 C 605; 25 C. W. N. 29; 32 C L J 280 (*Not followed*) 794

Moideensa Rowthen v Mahammad Kasim Rowthen, 28 Ind. Cas. 895. (*Distinguished*) .. 334

Monohar Pal v. Ananta Moyee Dasya, 20 Ind. Cas. 198; 17 C. W. N 802. (*Distinguished*) .. 841

Monti v. James, (1901) 1 K B. 205; 70 L. J K P 225, 83 L. T 610; 49 W R. 147; 17 T L. R 88 (*Considered*) .. 838

Morel v Westmoreland, (1904) A. C. 11; 5 L. J K. B 93; 89 L. T 702; 52 W. R. 353; 20 T L. R. 38. (*Followed*) .. 161

Mortlock v. Buller, (1804) 10 Ves Jun 292 at p. 315; 32 E R. 857; 7 R R 417. (*Relied on*) .. 421

Motan Mal v. Muhammad Bakhsh, 66 Ind. Cas. 771; 3 Lah 200; (1922) A. I. R. (L) 254; 4 U. P. L. R. (L) 55, 42 P. L. R. 1922 (F. B) (*Followed*) 375, 667

Motilal Hiralal v. Emperor, 64 Ind. Cas. 40; 23 Bom. L. R. 885; 46 B. 61; 22 Cr L J 72; (1922) A. I. R (B) 138. (*Dissented from*) .. 365

Moulvee Mahomed Shumsool Hooda v. Shewbuksram, 22 W. R 409 2 I. A 7 14 B. L R. 226, 3 Sar P. C. J. 405 P. C.) (*Followed*) .. 244

Muhamma. Husain v. Ajudhia Prasad, 10 A. 467, A W N. (1888) 179, 6 Ind Dec (N S) 313. (*Distinguished*) .. 993

Muhammad Ismail Khan v. Madhu Lal, 17 Ind Cas 656, 11 A. L. J. 649 (*Distinguished*) .. 655

Muhammad Shaffi v. Karamat Ali, 76 P R 1896. (*Followed*) .. 849

Muhammad Sulaiman v. Muhammad Yar Khan, 11 A 267, A W. N. (1889) 55 13 Ind Jur 427, 6 Ind. Dec. (N. S) 598 (F. B). (*Followed*) .. 2

Muhammad Yasin v Ilahi Bakhsh, 16 Ind. Cas 455. 34 A. 545, 10 A. L. J 73. (*Distinguished*) .. 655

Muchand Kuber v. Bhuchia, 22 B 812; 18 Ind Dec. (N. S) 1125. (*Relied on*) .. 24

Municipality of Sholapur v. Abdul Wahab, 61 Ind. Cas. 428 45 B. 797; 23 Bom. L R. 244 (*Distinguished*) .. 777

Munirama Reddi, *In re*, 1 Ind. Cas. 546; 5 M L. T. 290; 9 Cr. L. J. 305. (*Followed*) .. 985

Murtaza Husain Khan v. Mohammad Yasin Ali Khan, 36 Ind. Cas. 299, 38 A. 52. 20 M. L. T. 362; 14 A. L J 1083 18 Bom. L. R 884 31 M. L. J. 804; (1916) 2 M. W. N. 55, 25 C. L. J. 19 O C. 290, 1 P. L. W. 122; 21 C. W N. 410; 4 O. L. J 8, 4 L W. 538; 43 I. A. 269 (P C.). (*Followed*) .. 626

Musharaf Ali v Inkhar Husain, 10 A 634; A. W. N. (1888) 257; 6 Ind. Dec. (N. S.) 427. (*Distinguished*) .. 869

N

Page.

Nabi Bakhsh v. Mahammad Ali, 67 Ind. Cas. 305; 3 L. L. J. 380 (*Relied on*) .. 928

Nagashar Bakhsh Singh v. Ganesha, 50 Ind. Cas. 306; 23 O. C. 170. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 542; 43 A. 368; 13 L. W. 622; 47 I. A. 57 (P. C.). (*Distinguished*) .. 227

Nanda Lal v. Jagat Kishore Acharjya, 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.). (*Followed*) .. 674

Nanda Lal v. Jugat Kishore Acharjya, 36 Ind. Cas. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.). (*Referred to and Relied upon*) .. 770

Nanjaya Mudali v. Sharangapani, 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576. (*Considered*) .. 406

Nanthi Jan v. Bhikari, 30 A. 321; 5 A. L. J. 611; A. W. N. 1908, 125. (*Relied on*) .. 1043

Nanomi Bhuasin v. Madhun Mohun, 13 C. 21; 13 I. A. 1; 9 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.). (*Followed*) .. 53

Narain Singh v. Raj Kumar Singh, 66 Ind. Cas. 62, (1922) A. I. R. (A.) 217; 44 A. 428; 20 A. L. J. 251. (*Distinguished*) .. 593

Narain as v. Jasmal, 65 Ind. Cas. 37; 15 S. L. R. 135. (*Followed*) .. 1041

Narayana Aiya v. Ram Aiyar, 20 Ind. Cas. 625; 38 M. 396 (1913) M. W. N. 53; 14 M. L. T. 9, 25 M. L. J. 219. (*Followed*) .. 872

Narayana Kathan v. Kuppanasundaram Pillai, 19 M. 29; 6 Ind. Dec. (N. S.) 858. (*Distinguished*) .. 46

Narain ra Lal Kapur v. Hirdik sh Mukherjee, 46 Ind. Cas. 765. (*Followed*) .. 1002

Narasa Ayyar v. Annasami Ayyar, 25 M. 426. (*Distinguished*) .. 219

Nath Mal Das v. Tajammul Hussain, 7 A. 36; A. W. N. (1884) 218; 4 Ind. Dec. (N. S.) 264. (*Followed*) .. 1053

National Telephone v. Postmaster General, (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 601; 29 T. L. R. 637. (*Relied on*) .. 189

Nawab Amjumat Ali Khan v. Jowahir Singh, 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth. P. C. J. 316; 2 Sar. P. C. J. 573; 20 E. R. 602. (*Relied upon*) .. 821

New Zealand Shipping Company v. Société Des Acheliers Et Chantiers De France, (1919) A. C. 1; 87 L. J. K. B. 74; 118 L. T. 731; 24 Asp. M. C. 291; 62 S. J. 519; 34 T. L. R. 400. (*Relied upon*) .. 233

N—concld.

Page.

Nizam-ud-din Shah v. Bohra Brothers, 43 Ind. Cas. 570; 40 A. 203; 16 A. L. J. 85. (*Followed*) .. 2

Nobel Brothers Petroleum Production Co. v. P. Stewart and Co., (1890) 6 T. L. R. 37. (*Distinguished*) .. 673

Nagendra Chunder Ghose v. Mahomed Esuff, 10 B. L. R. 66; 18 W. R. 13; 3 Sar. P. C. J. 151 (P. C.). (*Distinguished*) .. 955

O

Official Assignee of Madras v. Ramchandra Aiyar, 68 Ind. Cas. 895; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; (1923) A. I. R. (M.) 55; 46 M. 54. (*Followed*) .. 471

Owen v. Morgan, (1880) 35 Ch. D. 492; 56 L. J. Ch. 383; 56 L. T. 503; 35 W. R. 705. (*Relied on*) .. 433

P

Pandiri Bangaramma v. Kamakumaraju, 5 Ind. Cas. 388; 34 M. 159; 8 M. L. T. 285. (*Distinguished*) .. 579

Parasram Singh v. Pandohi, 67 Ind. Cas. 533; 20 A. L. J. 401, (1922) A. I. R. (A.) 135; 44 A. 422; 4 U. P. L. R. (A.) 145 (*Followed*) .. 942

Parbhu Narain Singh v. Harbans Lal, 35 Ind. Cas. 271; 14 A. L. J. 281 at p. 291, 292. (*Followed*) .. 280

Parsee Kuthanmal, *In re*, 26 M. 116; 2 Weir 109 (*Dissented from*) .. 703

Parthasam Baithankar v. Rumal Zanjar, 20 B. 110; 10 Ind. Dec. (N. S.) 689. (*Relied on*) .. 740

Parsanam Narain v. Tarey Singh, 26 A. 178; A. W. N. (1903) 217 (*Distinguished*) .. 555

Patridge v. Ware, (1910) 2 Ch. D. 34; 79 L. J. Ch. 715; 103 L. T. 420. (*Followed*) .. 579

Pary Lal Das v. Pary Lal Dawn, 22 Ind. Cas. 407, 19 C. W. N. 903, 16 C. L. J. 149. (*Followed*) .. 749

Pedda Yarakaya v. Kanumuri Venkata Krishnamraju, 4 Ind. Cas. 64; 6 L. W. 281; 22 M. L. T. 234; (1917) M. W. N. 721. (*Followed*) .. 814

Peruchi Cherai v. Sangili Vira, 10 M. 241; 14 I. A. 84; 11 Ind. Jur. 272; 5 Sar. P. C. J. 38; 3 Ind. Dec. (N. S.) 91 (P. C.). (*Relied upon*) .. 823

Pirbhu Kuar v. Hashmat Ullah Khan, 29 Ind. Cas. 553, 37 A. 460, 13 A. L. J. 679. (*Followed*) .. 387

Pirthu Dial v. Ram Chand, 5 P. R. 1904; 42 P. L. R. 1904. (*Followed*) .. 1034

Pir hi Nath v. Basheshar Nath, 69 Ind. Cas. 403. (*Followed*) .. 695

Poonambilath Parapravan Kunhamed Hajee v. Poonambilath Parapravan Kutinha Hajee, 3 M. 169; 1 Ind. Dec. (N. S.) 675. (*Relied on*) .. 476

S—contd.

Page.

Soturatnam Aiyar v. Venkata he'a Gounden, 56 Ind. C s. 217; 43 M. 567 at p 577; (1920) M. W. N. 6 27 M. L. T. 20; 11 L. W. 300; 38 M. L J 476; 22 B m. L. R. 578, 28 A. L. J. 207 25 C W. N. 485; 47 I. A 76 (P C) (*Relied on*) .. 782

Shahab Din v. Miran Bakh h, 25 Ind C s. 519 79 P. R. 1914; 208 P. L R. 1914; 169 P. W. R. 1914 (*Follow d*) .. 90

Shahe'zadee Shahun hah Begum v. Fergusson, 7 C. 490; 3 Ind. Dec. (N. S.) 871. (*Dis ented from*) .. 173

Shahz di Begam v. Muhammad Ibrahim, 59 Ind Cas 787; 43 A. 200; 19 A. L. J. 14. (*Dis inguish d*) .. 619

Shaligram Sa ash o Pande v. Narai , 45 In . Ca . 66 (*Rel d on*) .. 502

Sham P.rshad v Ram Chand, 20 Ind Cas. 203, 60 P. R. 1913; 273 P L R 1913; 217 P. W R. 1913, 25 P. W R 1914. (*Follow d*) .. 477

Shamb u v. Kanhaya, 75 Ind Cas 45 44 A. 619; 20 A. L. J 599, (1922) A. I. R. (A 332 (*Follow d*) .. 898

Shankar hai v. Somabhai, 25 B 477; 3 Bom. L R. 129. (*Distinguish d*) .. 769

Sharp v. Jack on, (1899) A. C 419; 68 L. J. Q B. 806; 80 L. T 845, 15 T L. R. 418, 6 Manso. 264 (*Rel d on* .. 861

Sheo P asa v. Hira Lal, 12 A. 440, A W. N. (1890) 103; 6 Ind. Dec. (N. S) 1026. (*Followed*) .. 46

Sheodhy n v Bholanath, 21 A. 311; A. W. N. (1899) 8., 9 Ind. Dec (N S.) 907. (*F llow d*) .. 103

S onandan Parsha Sukul v Ba ha Ra t, 4 In . Cas 54; 9 C. L. J. 281. (*Follow ed*) .. 427

Shib u Mul v. Pai a Singh, 86 P. R 1877. (*Follow d*) .. 519

Sh o Kumari D i v Go ind Shaw T ti, 2 C 48; 1 Ind. D c. (N S.) 550. (*Dis tinguish d*) .. 63

Shiva Chand r Singh v. Ram Chander Sirgh, 30 In . Cas 559; 37 A. 5 5; 3 A. L J 851. (*Fo l w d*) .. 553

Shwe E n v. Em r r, 3 L. B. R. 122; 3 Cr. L. J. 355. (*F l wed*) .. 295

Sia Ram v R m Chan a, 44 In . Cas 863, 20 P R. 1918; 51 P W. R. 1918, 114 P. L R 1918. (*Followed*) .. 512

Svagami Ach i v Subrahma ia Ayyar, 27 M. 250 14 M. L. J. 37. (*D l ted*) .. 901

Smith v. Bromley, 2 Doug 696 (*Re d on* 9 E. R 441. (*Re d on*) .. 27

Smith v Cud, (1806) 6 M & S 6 18 R R. 84; 105 E. R. 1203 (*Re d on*) .. 27

Smith Limi ed v. G eat We tern R ilway, (1922) 1 A. C. 178, 91 L J K B 428; 2 Com. Cas. 247; 38 T. L R 359. (*Followe l*) .. 260

Smi ra Ku r v Damri La 62 Ind Cas. 61; 2 P. L. T. 336. (*D ssente from*) .. 430

Sobha Sin h v. Kis or Chand, 65 P. R 1907; 203 P L R. 1908; 146 P. W R. 1907. (*Distinguished*) .. 87

S—contd.

Page.

Somandan Karkot E'at il Ravarappan Nambiar v. Malikardi Aketh Mayan, 23 In . Cas. 251; 26 M L. J. 267. (*Dis t guished*) .. 46

Somandan Karkat E nth l Ravararpan Nam iar v. Ma k ndi Aketh Mayan, 23 In Cas. 251; 26 M L. J 267. (*Not followed*) .. 46

Somasun ar m Chetty v. Va ivelu Pil ai, 30 M. 531; 4 M. L. T. 344. (*Distinguished*) .. 613

South American and Mexican Company, *In re*, Bank of England, *Ex parte*, (1895) 1 Ch 37; 64 L. J Ch. 189; 12 R. 1, 71 L. T. 594 43 W. R. 131 (*Follow ed*) .. 336

Sr m ty Codoi Mon e Dei e v Bishonath Dutt, 7 W R 11. (*Follwed*) .. 955

Sre m ty Soorje mo y Do e v. Dinobundho Mu ik 6 M I A 526 at p 555. 1 I. Ju . (N S.) 377; 1 W R P C. 14; 1 Moo I R. 223, 1 Suth P C. J 291; 1 Sar. P C J 53 1 E R. 198 (*Follwed*) .. 435

Sr ram Naraia h v. Bo. mireddi Venkata ramiah, 7 Ind Cas. 6; 35 M L J. 50; 8 L. W 517 (1918) M. W. N. 718; 24 M L T. 45; 42 M. 59. (*Rel d upon*) .. 816

Sri Gajapa i Raulikapatta Mahade i Garu v. Sri G japa i R dhamani Mahadevi Garu, 7 M 96; 2 Ind. Dec. (N. S.) 652. (*Foll wed*) .. 874

Srinivas Prosad Singh v. Kesho Prosad Sin h 12 In . Cas. 145; 14 C. L. J. 489. (*Rel d on*) .. 615

Sri at Sin h D gar v. Prodyot Kumar Ta ore, 50 I d Cas. 252 44 C. 524; 32 M L J 133. 15 A L. J 247; (1917) M. W N 103 21 C W. N 142; 25 C L. J 229; 21 M L. R. 222 9 Bom. L R. 200; 34 A I (P. C). (*Follow d*) .. 316, 597

Srooman M dab sh i Gopala Varlu v. Emmani Subamma, 55 Ind Ca . 984. 43 M 487 38 M L. J 493 (1920) M W N. 435; 27 M L T 219. (*Followed*) .. 336

Sri ev Gobi ki Cooke s v Corp ra ion of I lin o (1904) 2 K B 615; 73 L. J. K. B 1 5; 91 L. T. 437. 52 W R 262; 68 J P 183; 2 L G R 341 20 T. L. R. 219 (*Co sidered*) .. 390

Su bai r v. Mouiam Subramania Iyer, 10 In . Ca 54; 36 M. 8, 10 M. L. T 51; (1911) 2 M. W N. 6; 21 M. L. J. 800. (*R i ion*) .. 111

Subbar ya Reddiar v Raja opala Reddiar, 20 Ind C s. 570; 38 M 887, 15 M. L. T 240, 1914) M. W. N. 376. (*Relied o*) .. 562

Subbaray n v. Narayan, 75 In . Cas. 393; 45 M. 785; 6 L. W. 68; (1922) M. W. N 424; 43 M L J 108, 31 M L. T. 240; (1922) A. I. R. (M.) 268 (F. B.). (*Distinguis d*) .. 572

Sub a Goundan v. Krishnamoha i, 68 Ind. Cas. 809; 45 M. 449; 30 M. L. T. 217; 42 M I. J. 372; 15 L. W. 537; (1922) M W N. 269; (1922) A. I. R. (M.) 112. (*Considered*) .. 406

S—concld.

Page.

Subbe Goundan v. Krishnamachari, 68 Ind. Cas. 869; 45 M. 4 9; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W N. 269; (1922) A. I. R. (M) 112. (*Followed*) .. 406

Subrahmania Ayyar v. King-Emperor, 25 M. 61 a' p. 98; 11 M. L. J 233; 3 Bom. L. R 540 20 I. A. 257; 5 C. W. N 865; 2 Weir 271; 8 Sar. P. C. J. 150 (P. C.). (*Followed*) .. 980

Subramania Pillai v. Kumaravelu Ambalam, 33 Ind. Cas 66; 30 M. 541. (*Relied on*) .. 789

Sudhama Upadhya v. Queen-Empress, 23 C. 308, 12 Ind. Dec. (N. S.) 249. (*Considered*) .. 695

Sugra a v Ram Lal Misra, 59 Ind. Cas. 503; 23 O. C 352. (*Relied on*) .. 928

Sugra Mal Hir haran Das v Sham Lal-Gokal Chand, 46 Ind. Cas. 777; 146 P. W. R. 19 8. (*Followed*) .. 1020

Sukhdeo Rai, *In the matter of the application of*, 2 A. L. J. 489. (*Relied on*) .. 457

Sukheswar Phukan v. Emperor, 11 Ind Cas. 593; 38 C. 789 12 Cr. L. J. 409; 15 C. W N. 1001; 15 C. L J. 186. (*Overruled*) .. 129

Sultanat Jahan Begam v. Sundar Lal, 58 Ind. Cas. 90; 42 A. 409; 18 A. L J. 431. (*Relied on*) .. 101

Sundar Das v. Puran Singh, 67 Ind. Cas. 856; 11 P. W. R. 1922, (1922) A. I. R. (L) 56 (*Relied on*) .. 827

Sundari Dassee v. Madhoo Chunder Sircar, 14 C. 502; 7 Ind. Dec. (N. S.) 302. (*Followed*) .. 613

Sunder Das, *In re* 11 C 42; 5 Ind Dec. (N. S.) 785. (*Discussed and dissented from*) .. 749

Suraj Bun i Koer v. Sheo P rsad Singh, 5 C. 148; 6 I. A 88, 4 C L R. 226; 4 Sar. P. C J. 1; 3 Suth P. C. J. 581; 2 Shome L. R 242, 2 Ind. Dec. (N. S.) 705 (P. C). (*Followed*) .. 316

Surajba i Singh v Mohammad Nasir 48 Ind. Cas. 220; 16 A. L. J. 879. (*Relied upon*) .. 792

Surajmani v. Rab Nath Ojha 30 A. 84; 5 A L J. 67; 12 C W N 23; 18 M L J 7; 10 Bom L. R 53; 7 C. L. J. 1 6; 3 M. L. T 141; 35 I. A. 17 (P. C). (*Distinguished*) .. 902

Sur sh Chunder Maitra v. Kris'o Rangini Dasi, 21 C. 240; 10 Ind. Dec. N. S.) 798. (*Discussed and followed*) .. 769

Suraj ram Marwari v. Barhamdeo Prasad, 2 C L. J. 10: (*Relied upon*) .. 821

Syed Ali Sakar v. Manikjan Bibi, 43 Ind. Cas. 728. (*Distinguished*) .. 449

T

Tadman v. Henwan, (1893) 2 Q B. 168; 5 R. 479; 57 J P. 664 (*Relied on*) .. 495

Taj Muhamma i v. Kashi Mal, 19 Ind. Cas. 804; 237 P. L. R. 1913; 135 P. W. R. 1913. (*Relied on*) .. 656

T—concld.

Page.

Tarap Ali v. Kali ada Bandopadhaya, 34 Ind. Cas. 97; 23 C. L. J. 655. (*Followed*) .. 22

Taylor, *Extate*, Goldsmid. *In re*, (1887) 18 Q B. D 295; 56 L. J. Q. B 195; 35 W. R. 348. (*Relied on*) .. 441

Tilakdhari Lal v Kh dan Lal, 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1918) M. W. N 591; 2 U. P. L. R. (H. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 32 C. L J. 479; 13 L W. 161; 2 P. L. T. 101; 47 I. A 230 (P. C.). (*Relied on*) .. 579

Trilochan Panda v. Dinabandhu Panda, 44 Ind. Cas 377; 3 P. L J 88 at p. 90. (*Relied on*) .. 60

Tulja am Rew v. Alagappa Chettiar 8 Ind. as 40; 55 M. ; (1909) M. W. N. 697; 8 M. L. T. 453; 2 M. L. J. 7. (*Relied on.*) .. 901

U

Udit Upadhia v. Imam Bandi. 24 A. 402; A. W. N (1902) 90 (*Followed*) .. 664

Umar Bakhsh v. Abdul Karim, 70 P. R. 1898. (*Followed*) .. 610

Umardaraz Ali Khan v Wilayat Ali Khan, 10 A 169; A. W. N. (1887) 4; 9 Ind. Dec. (N. S) 111. (*Distinguished*) .. 913

V

Vadilal v. Fulchand, 30 B. 56; 7 Bom. L. R. 604. (*Relied on*) .. 520

Vaithe wara Iyer v. Srinivasa Raghava Iyengar, 50 Ind. Cas. 309; 42 M. 318; 36 M. L. J. 90; 9 L. W. 302; 25 M L. T. 35; (1919) M. W. N 299 (P. B.). (*Followed*) .. 378

Varada Pillai v Jeyaratnammal, 53 Ind. Cas 901; (1919) M W. N. 724; 10 L. W. 699; 24 C W. N 34; 38 M. L. J. 313; 18 A. L J. 274; 43 M 244; 2 P L R. (P. C.) 64; 2 Bom. L R. 444; 46 I. A 85 (P C.) (*Relied on*) .. 166

Vaithilingath Tavazhi v. Ramaswami Pattar, 27 Ind. Cas 886; 2 L. W. 155 (*Relied on*) .. 562

Vellavappa Rowthen v. Bawa Rowthen, 29 Ind. Cas 747 (*Relied on*) .. 562

Venkata Chandrasekhara Raz v Alakaramjamba Maharani, 22 M. 18; 8 Ind. Dec. (N S) 131 (*Relied on*) .. 457

Venkatacharyulu v Rangachar ulu, 14 M. 310; 1 M L J 85; 5 Ind. Dec. (N S) 221 (*Relied on*) .. 24

Venkatarama Ayyar v Janab Hamid Sultan Maracayar Sahib Bahadur, 30 Ind Cas. 93; 44 M L. J. 161; (1923) M. W. N. 78; 32 M L. T. 114; 17 L. W 656; (1923) A. I. R. (M) 360. (*Relied on*) .. 189

Page.

Wadhawa v. Hassi, 2 Ind. Cas. 778; 73 P. R. 1915; 111 P. L. R. 1915; 64 P. W. R. 1915. (*Followed*) .. 818

Wajahat Husain v. Ratan Lal, 12 Ind Cas. 18; 8 A. L. J. 1094. (*Distinguished*) .. 96

Wajid Khan v. Dargahi Khan, 9 O. C. 161. (*Relied on*) .. 579

Walayat Husain v Ram Lal, 25 Ind. Cas. 643; 12 A. L. J. 1113. (*Followed*) .. 1053

Wali Ahmad Khan v. Ajudhia Kandu, 13 A. 537; A. W. N. (1891) 196; 7 Ind Dec. (N. S.) 340. (*Relied on*) .. 837

Walian v. Banke Behari Pershad Singh, 30 C. 1021; 30 I. A. 182; 7 C. W. N 771; 5 Bom L. R. 822; 8 Sar P. C J. 512 (P. C.). (*Followed*) .. 44

Walker v. Rostron, (1842) 9 M. & W. 411; 11 L J. Ex. 173, 60 R. R. 770; 152 E. R. 174. (*Relied on*) .. 161

W—conc'd.

Page.

Wasinda Ram v. Sita Ram, 59 Ind. Cas. 393; 1 L. 389; 51 P. W. R. 1920. (*Distinguished*) .. 269

Y

Yakub Khan v. Raghpat Rai, 17 Ind. Cas. 235; 165 P. W. R. 1912; 192 P. L. R. 1912. (*Followed*) .. 87

Z

Zaharia v. Debia, 7 Ind. Cas. 156, 33 A. 51; 7 A. L. J. 861. (*Followed*) .. 570

Zemindar of Bhadrachalam & Polavancha v. Venkatadri Appa Rao, 70 Ind. Cas 689; 43 M. L J 486; (1922) M. W. N. 532; 16 L. W. 309; (1922) A. I. R (M.) 457; 46 M 190. (*Relied on*) .. 934

INDIAN CASES

1923.

VOLUME 75.

PATNA HIGH COURT.

CIVIL REVISION No. 162 OF 1923.

July 2, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

Babu DEBI LAL—PLAINTIFF—PETITIONER

versus

Babu JAI PRAKASH NARAIN SINGH AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3—Order directing plaintiff to furnish defendant with documentary evidence in certain language—Jurisdiction—Failure to comply with order—Dismissal of suit, whether justified.

There is no statutory provision which empowers a Court to compel a plaintiff to supply the defendant with a copy of his documentary evidence in any specific language. An order, therefore, directing a plaintiff to furnish the defendant with copies of entries in his account-books in the Hindi language is without jurisdiction, and the dismissal of the suit under r 3 of O XVII of the Civil Procedure Code for non-compliance with such an order is not justified.

Revision from an order of the Subordinate Judge, First Court, Gaya, dated the 28th March 1923.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Petitioner.

Messrs. *Kailaspati, S. Dyal, Brij Kishore Prasad* and *Raghunandan Prasad*, for the Opposite Party.

JUDGMENT.

Mullick, J.—The suit was instituted on the 23rd August 1922. The plaintiff filed his account-books which were in the Mahajani character and applied for the r return on condition that a true copy was kept upon the record. The Court ordered that the books should be returned after inspect on by the defendants and adjourned the case till the 9th January 1923. On the 9th January the Court directed that the plaintiff should make over a Hindi copy of the entries to the defendants and he adjourned the case for hearing till the 27th January. Instead of supplying Hindi copies it appears that the plaintiff supplied copies, in Devanagri both to the Court and to the defendants. On the 27th January the defendants applied for an adjournment and for issue of warrant of arrest on Rai Sahib Surajmal, who is the brother of the plaintiff. The Court thereupon recorded the following order:—"Plaintiff to make over a Hindi copy of the entries of *rokar* and *khata* to the defendants' Pleader. The plaintiff's Vakil, Babu Deep Narain Lal, undertakes to make Rai Sahib Surajmal appear in person on the date fixed. Both parties to come ready on the dated fixed. Plaintiff's witnesses to come over on the said date." It seems that when this order was presented for counter-s gnature to the Pleader of the plaintiff, he recorded the following note: "I have undertaken to only inform him."

Nothing further appears to have been done by the learned Subordinate Judge in the matter and on the 28th March, when the case came up for hearing, the plaintiff put in a petition for the issue of a commision for the examination of Rai Saheb Surajmal on the ground that he was ill. The Court thereupon recorded the following order: "The plaintiff has not yet complied with the Court's order of 9th January 1923 and 27th January 1923. The suit is, therefore, dismissed. Defendants will get costs on *ex parte* scale." It

is not clear under what provision of law this order was passed. To begin with, there is no statutory provision compelling the plaintiff to furnish the defendants with a copy of his documents either in Devanagri or Hindi or in any other language. The Court's direction upon the plaintiff to furnish a copy of the account-books in the Hindi character was wholly without jurisdiction. In point of fact, the plaintiff did make an attempt to comply with the Court's order by furnishing the defendant with a copy in the Devanagri character which is the alternative Court language for the Gaya District, and in any event the learned Judge's order dismissing the suit on this ground was, in my opinion, wrong.

Then, with regard to the non-compliance in the matter of the production of Rai Saheb Surajmal, the note recorded by Babu D. N. Lal seems to indicate that he never agreed on behalf of his clients to produce Rai Saheb Surajmal in person. Indeed, it is difficult to see how he could be made to produce a witness in person if that witness either by reason of illness or for any other cause was unable to appear in Court; much less was it possible for the Subordinate Judge to dismiss the suit because the plaintiff had not been able to bring the defendant's witness to Court on the 28th March.

It is contended that the learned Subordinate Judge acted under O. XVII, r. 3, Civil Procedure Code, and that as the plaintiff had failed to carry out an order which prevented him from continuing the trial, he was justified in dismissing the suit under r. 3 of O. XVII. Now, in both the above matters the learned Subordinate Judge acted without authority; but apart from the fact that there was no statutory provision the orders were in themselves so unreasonable that it was impossible to expect the plaintiff to carry them out. His proper course was either to issue a warrant for the attendance of Rai Saheb Surajmal or to issue a commission for his examination as requested by the plaintiff and in any event he should have called upon the plaintiff to proceed with his case; and if he was unwilling to grant any further adjournment he should have made a decree upon the evidence adduced before him.

In my opinion the order of the 28th March was not a decree for there was no adjudication. I agree also that it was wholly without jurisdiction.

The result is, that the order of the Subordinate Judge will be set aside with costs hearing fee Rs. 32.

The Subordinate Judge is directed to proceed with the trial according to law.

Bucknill, J.—I agree.

Order set aside.

W. C. A.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 49 OF 1921.

April 26, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

UMA CHARAN CHAKRABARTI AND OTHERS—DEFENDANTS—APPELLANTS

versus

NIBARAN CHANDRA CHAKRABARTI —PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 181—Preliminary decree affirmed in appeal—Application for final decree—Starting point of limitation—Time fixed for payment of money, commencement of—Effect of disposal of appeal on decree.

When a preliminary decree in a mortgage suit is affirmed on appeal, an application made within three years of the date of the affirmance in order that a final decree might be passed is within the period prescribed by Art. 181 of the Limitation Act. [p. 3, col. 2.]

Gajadhar Singh v. *Kishen Jiwan Lal*, 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734, *Nizamm ud-din Shah* v *Bohra Bhim Sen*, 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85 and *Jayanti Venkayya* v. *Damisetti Sathiraju*, 64 Ind. Cas. 470; 44 M. 714; 41 M. L. J. 117; 14 L. W. 180, followed.

Time for the doing of any thing under a decree runs from the date of the ultimate decree which terminates the litigation and becomes, as soon as it is passed, the only operative decree between the parties. [p. 5, col. 2.]

Sashikanta Acharyya v. *Sarat Chandra*, 70 Ind. Cas. 634 C. L. J. 415 at p. 427, referred to.

UMA CHARAN CHAKRABARTI v. NIBARAN CHANDRA CHAKRABARTI.

When time is fixed by the lower Court for payment of money, and the decree of that Court is confirmed on appeal, the time for payment runs from the date of the decree of the Appellate Court though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree. [p. 5, col. 2.]

If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the Appellate Court it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously. [p. 4, col. 1.]

Arunachella v. *Veludayan*, 5 M. H. C. R. 215 and *Mahammad Sulaiman* v. *Muhammad Yar Khan*, 11 A. 267; A. W. N. (1889) 55; 13 **Ind. Jur.** 427; 6 Ind. Dec. (N. S.) 598 (F. B.), **followed.**

Batuk Nath v. *Munni Dei*, 23 Ind. Cas. 644; 41 I. A. 104; 19 C. L. J. 574; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 590; 16 Bom. L. R. 360; 27 M. L. J. 1; 1 L. W. 729; (1914) M. W. N. 437 (P. C.), *Abdul Majid* v. *Jawahir Lal*, 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.), **distinguished.**

Appeal against the decision of the Subordinate Judge, 24-Parganas, dated the 1st December 1920.

Babus *Mahendra Nath Ray, Hira Lal Chuckerbutty, Promotha Nath Bandopadhya* and *Sib Chunder Palit*, for the Appellants.

Babus *Ram Chunder Mazumdar, Charu Chunder Biswas, Bimla Charan Deb* and *Rama Prosad Mookerjee*, for the Respondent.

JUDGMENT.—This is an appeal against the final decree in a mortgage suit for sale. The decree has been assailed on the ground that it was made on the basis of an application under O. XXXIV, r. 5, sub-rule (*ii*), of the Code of Civil Procedure which was presented after the lapse of the prescribed time. To test the validity of this argument, it is necessary to refer to the salient facts in this case. The preliminary decree was made on the 16th July 1914 under section 96 of the Code of Civil Procedure, an appeal lay against this decree. Indeed, under section 97 if an appeal was not preferred, the defendants would not be competent to challenge its correctness in an appeal against the final decree. An appeal was consequently lodged in this Court. The appeal was heard on the merits and the Court came to the conclusion that the decision of the Trial Court could not be successfully assailed. The result was that the decision of the Trial Court was affirmed and the appeal was dismissed with costs on the 30th May 1917. On the 24th March 1920, the present application was made under O. XXXIV, r. 5, sub-rule (*ii*), in order that a final decree might be passed. The defendants urged that the application was barred by limitation under Art. 181 of the Schedule of the Indian Limitation Act, inasmuch as it had been presented more than three years after the 16th July 1914, when the preliminary decree had been made by the Primary Court. The Subordinate Judge overruled this contention on the author ty of the decision in *Gajadhar Singh* v. *Kishen Jiwan Lal* (1). It has not been disputed before us that the contention of the appellants is opposed to the decisions in *Gajadhar Singh* v. *Kishen Jiwan Lal* (1), *Nizam-ud-din Shah* v. *Bohra Bhim Sen* (2) and *Jayanti Venkayya* v. *Damisetti Sathiraju* (3). These cases are authorities for the proposition that, when a preliminary decree in mortgage suit has been affirmed on appeal, an application made within three years of the date of the affirmance with a view to make a final decree is within the period prescribed under Art. 181 of the Schedule of the Indian Limitation Act. We have been asked to hold, however, that these cases were erroneously decided and that they are contrary to the principle recognised by the Judicial Committee in *Hukum Chand Boid* v. *Pirthichand Lal* (4). In our opinion, this contention is not well founded.

We shall assume, for the purposes of the present case, that an application to make final a decree in a mortgage suit is governed by Art. 181 which provides that applications for which no period of limitation is provided elsewhere in the Schedule or by section 48 of the Code of Civil Procedure,

(1) 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734.
(2) 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85.
(3) 64 Ind. Cas. 470; 44 M. 714; 41 M. L. J. 117; 14 L. W. 180.
(4) 50 Ind. Cas. 444; 46 C. 670; 30 C. L. J. 71; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 26 M. L. T. 137; 10 L. W. 416; 46 I. A. 52 (P. C.).

1908, must be presented within three years from the date when the right to apply accrues. On behalf of the appellants, it has been contended that as by the preliminary decree the mortgagors were permitted to redeem within six months from the date of the decree, that is, on or before the 16th January 1915, the decree-holders were bound to apply to make the decree final within three years from the 16th January 1915, that is, on or before the 16th January 1918. It may be conceded that this contention is, *prima facie*, well founded. But that does not justify the conclusion that the appellants are entitled to succeed in their content on. We cannot overlook the events which have happened between the 16th January 1915 and 16th January 1918. The appeal preferred by the defendants in this Court had been dismissed on the 30th May 1917, and it is incumbent on the Court to consider the legal effect of the decision of this Court on the rights of the parties.

We may usefully recall here the lucid exposition given by Mr. Justice Dwarkanath Mitter in *Ram Charan* v. *Lakhi Kant* (5) of the true effect of the disposal of an appeal upon the decree of the Primary Court. If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the Appellate Court it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously. This is in accord with the view expounded by Scotland, C. J., in *Arunachella* v. *Veludayan* (6), and was subsequently adopted by the majority of the Full Bench in *Muhammad Sulaiman* v. *Muhammad Yar Khan* (7), where the observations of the Judicial Committee in *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (8) were explained.

This principle has been repeatedly approved and illustrations of its application will be found in *Luchmun Persad Singh* v. *Kishun Persad Singh* (9), which was decided by a Full Bench of this Court and followed the decision of the Judicial Committee in *Pitts* v. *La Fontaine* (10) in *Muhammad Sulaiman* v. *Muhammad Yar Khan* (7) and *Muhammad Sulaiman Khan* v. *Fatima* (11), which were decided by two Full Benches of the Allahabad High Court; and in *Rameswar* v. *Bhaba Sundari Debi* (12), *Aghora Kumar Ganguli* v. *Mahomed Musa* (13), *Brija Lal Singh* v. *Mahodeo Prasad* (14), *Gajraj Mati* v. *Shami Nath* (15), *Kailash Chandra Basu* v. *Girija Sundari Debi* (16) and *Chandra Kanta* v. *Lakshman Chandra* (17); which review many of the earlier decisions on the subject and show that the doctrine is supported by the judgment of the Judicial Committee in *Brij Narain* v. *Tejbal Bikram* (18).

The decisions of the Judicial Committee in *Batuk Nath* v. *Munni Dei* (19) and *Abdul Majid* v. *Jawahir Lal* (20) are clearly distinguishable, as based on a recognition of the principle that dismissal of an appeal for default is not an affirmance of the decree; to the same class belong the decisions in *Patloji* v. *Ganu* (21), *Bhola Nath* v.

(5) 7 B. L. R. 704 at p. 714; 16 W. R 1 (F.B.).
(6) 5 M. H. C. R. 215.
(7) 11 A. 267; A. W. N. (1889) 55; 13 Ind. Jur. 427; 6 Ind. Dec. (N. S.) 598 (F. B.).
(8) 14 M. I. A. 465; 17 W. R. 292; 10 B. L. R. 101; 2 Suth. P. C. J. 564; 3 Sar. P. C. J. 62; 20 E. R. 860.
(9) 8 C. 218; 4 Shome L. R. 261; 10 C. L. R. 425; 4 Ind. Dec. (N. S.) 140 (F. B.)
(10) (1881) 6 App. Cas. 482; 50 L. J. P. C. 8; 43 L. T. 519.
(11) 11 A. 314; A. W. N. (1889) 107; 6 Ind. Dec. (N. S.) 628 (F. B.).
(12) 5 Ind. Cas. 304; 11 C. L. J. 81.
(13) 5 Ind. Cas. 723; 11 C. L. J. 155.
(14) 12 Ind. Cas. 669; 15 C. L. J. 432; 17 C. W. N. 133.
(15) 36 Ind. Cas. 307; 39 A. 13; 14 A. L. J. 853.
(16) 14 Ind. Cas. 299; 39 C. 925; 16 C. W. N. 658.
(17) 36 Ind. Cas. 460; 24 C. L. J. 517; 21 C. W. N. 430.
(18) 6 Ind. Cas. 669; 37 I. A. 70; 11 C. L. J. 560; 32 A. 295; 14 C. W. N. 667; 7 A. L. J. 507; 12 Bom. L. R. 444; 8 M. L. T. 571; 20 M. L. J. 587; (1910) M. W. N. 392 (P. C.).
(19) 23 Ind. Cas. 644; 41 I. A. 104; 19 C. L. J. 574; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729 (1914) M. W. N. 437 (P. C.).
(20) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 171 (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).
(21) 15 B. 370; 8 Ind. Dec. (N. S.) 252.

Kanti Chundra (22), *Kailash Chandra Basu* v. *Girija Sundari Debi* (16) and *Syam Mandal* v. *Sati Nath* (23). These decisions do not m litate against or weaken the effect of the two decisions of the Judicial Committee in *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (8) and *Brij Narain* v. *Tejbal Bikram* (18). The decision of the Judicial Committee in *Hukum Chand Boid* v. *Pirthichand Lal* (4) is also clearly distinguishable. In this case, a claim was put forward for compensation on the ground of failure of consideration by cancellation of the sale. It was ruled that the right to claim compensation had accrued on the date of the cancellation of the sale, by the Primary Court and that the person entitled to the compensation could not claim extension of time on the ground that an appeal had been preferred from the proceedings for reversal of the sale for there was no suspension of the right as in *Hemendra Mohan Khashnabis* v. *Noresh Chandra Battacharjee* (24), which followed *Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (25), *Prannath Roy Chowdhury* v. *Rookea Begum* (26) and *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (27).

In the case before us, the facts are entirely d fferent. The plaintiffs seek to make final a preliminary decree in a mortgage suit. The question is, which is the preliminary decree that can be made absolute at the date of the application? In the first place, it is manifest that the only decres which is operative and can be affirmed on the date of the application is the decree of the High Court made on the 30th May 1917, and, consequently, time ran not from the 16th July 1914, but from the 30th May 1917. The common principle which governs all the cases is, that the time runs from the date of the ultimate decree which term nates the litigation and becomes, as soon as it is passed, the only operative decree between the parties, as was pointed out in *Sashikanta Acharyya* v. *Sarat Chandra* (28). If a contrary view were adopted, it would be impossible to reconcile the cases on the subject. Our attention has finally been drawn to the case of *Basanta Kumar* v. *Radha Rani Dasi* (29), which appears to be an authority for the proposition that, when time is allowed by the decree of the Court of first instance for the performance of an act, the time is not extended by the dismissal of the appeal preferred against that decree. This view does not touch the question in controversy before us. But we may point out that there is much divergence of judicial opinion on the subject, as pointed out in the case of *Sashikanta Acharyya* v. *Sarat Chandra* (28). The balance of judicial opinion is in favour of the view that, when time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the Appellate Court though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree. We need not, for the purpose of the present case, discuss whether the decis ons which take the contrary view may be defended on principle.

We hold accord ngly, that the view taken in *Gajadhar Singh* v. *Kishen Jiwan Lal* (1), *Nizam-ud-din Shah* v. *Bohra Bhim Sen* (2), and *Jayanti Venkayya* v. *Damisetti Sathiraju* (3) is well-founded and should be adopted.

The result is, that the decree made by the Court below is affirmed and this appeal dismissed with costs.

The order for stay of sale will stand discharged.

K. S. D. & W. C. A. *Appeal dismissed.*

(22) 25 C. 311; 1 C. W. N. 671; 13 Ind. Dec. (N. S.) 208.

(23) 38 Ind. Cas. 493; 44 C. 954; 24 C. L. J. 523; 21 C. W. N. 776.

(24) 62 Ind. Cas. 418; 33 C L. J. 260; 25 C. W. N. 376.

(25) 12 M. I. A. 244; 11 W. R. P. C. 5; 2 B. L. R. P. C. 10; 2 Suth. P. C. J. 173; 2 Sar. P. C J. 424; 20 E. R. 331; 1 Ind Dec. (N. S.) 489.

(26) 7 M. I. A. 323; 4 W. R. P. C. 37; 1 Suth P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331.

(27) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 11; 20 M. L. T. 10 (P. C.).

(28) 70 Ind. Cas. 6; 34 C. L. J. 415 at p. 427.

(29) 70 Ind. Cas. 735; 26 C. W. N. 440; 36 C. L. J. 159; (1922) A. I. R. (C.) 329.

MAUNG PO HAN v. MA SO YI.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 83 OF 1923.

March 8, 1928.

Present :—Mr. Justice Carr.

MAUNG PO HAN—PLAINTIFF—APPELLANT

versus

MA SO YI—DEFENDENT—RESPONDENT.

Pleadings— Appellate stage of suit— Amendment of plaint.

Plaintiff, a Burmese Buddhist, sued his wife for possession of all the joint property on the ground that she had committed adultery by taking another husband in spite of his protest. The defendant in her written statement alleged that there had been a divorce by mutual agreement. The plaintiff succeeded in the first Court. In appeal, the defendant urged for the first time that the plaintiff had no cause of action since he did not allege a divorce, nor did he pray for one. The plaintiff then made an oral application for amendment o plaint which was refused. On second appeal:

***Held*, that having regard to the fact that the omission from the plaint of a prayer for divorce was in all probability due to the fact that the plaintiff and his legal adviser considered that the marriage was already dissolved, which view, though erroneous, was under the circumstances at least excusable, and also having regard to the fact that the objection to the form of the suit was taken for the first time in appeal, the case was pre-eminently one in which an amendment of the plaint should have been allowed in order that justice might be done.**

***Quære*.—Whether a suit lies by a Burmese Buddhist for possession of all the joint property on an allegation of the commission of adultery by his wife, without a prayer for divorce ?**

Mr. *Maung Thein*, for the Appellant.

Mr. *Maung Lat*, for the Respondent.

JUDGMENT.—The parties in this suit were, or are, husband and wife. The plaintiff, the husband, sued the wife for possession of all the joint property, on the ground that she had committed adultery. He said in his plaint that the defendant had taken a lesser husband, that though he protested in the presence of elders she took no notice of him.

The defendant in her written statement alleged that there had been a divorce by mutual agreement, and that at that time the plaintiff told her she could take another husband. Consequently, she married again and did so publicly.

These are all the allegations in the plaint that are at present material.

The Sub-Divisional Court found for the plaintiff and gave him a decree as prayed. The defendant appealed to the Divisional Court and her first ground of appeal was that there was no cause of action, since the plaintiff did not allege that he had effected a divorce, nor did he pray for one. This ground of objection does not appear to have been raised in the Court of first instance.

The learned Divisional Judge upheld this objection and on it allowed the appeal and dismissed the plaintiff's suit. He based his decision on the case of *Maung Po* v. *Ma Lon Ma Gale* (1) in which their Lordships of the Privy Council remarked that the cause of action for a partition of property was the divorce.

I am by no means sure that this dictum of their Lordships is a binding and conclusive one on the question now before us. The question before them was whether a prior suit for divorce would bar a subsequent suit for partition under the provisions of the Civil Procedure Code. They held that it would not, and in the course of their discussion made the remark quoted. The question before us is a very different one, whether, in the somewhat unusual circumstances of this case, the mere fact of the adultery of the wife would not be a sufficient cause of action in the suit. When their Lordships made this remark they did not necessarily mean that there could be no other cause of action than a divorce. And the Dhammathats very clearly give the husband of an adulterous wife the right to require her to leave the house with only the cloths on her back. In ordinary circumstances, of course, the question whether adultery had been committed or not should be decided by a tribunal. But in this case it is admitted that the wife publicly took another husband. Thus the question whether there was adultery or not depends on whether the original marriage had previously been dissolved or not. The defendant alleged that it had. The plaintiff alleged that it had not, but it seems to me clear that he regarded this conduct of his wife as automatically dissolving it. Thus, essentially, both parties considered that the marriage-tie was no longer in existence at the time of the filing of the suit.

(1) 11 Ind Cas 497; 4 Bur. L. T. 153; 6 L. B. R. 18; 15 C. W. N. 766; 8 A. L. J. 739; 13 Bom L. R. 464; 14 C. L. J 15; (1911) 2 M. W. N. 397; 38 C. 629; 10 M. L. T. 479; 38 I. A. 140 (P. C.).

But I do not think it necessary finally to decide the question whether the suit will lie without a prayer for divorce. There was no written application for leave to amend the pleading on the record of the Divisional Court, but it would seem that there must have been an oral application, for in his judgment the Divisional Judge says that he does not consider this a case in which leave to amend should be given. The reason for this is: "It appears to me that the plaintiff-respondent chose his form of suit deliberately, for the purpose of giving his wife as much annoyance as possible without, at the same time, giving her the satisfaction of being released from the marriage tie."

I do not at all agree with this view. In my opinion, no inference of this kind adverse to the plaintiff can justly be drawn. In all probability the omission from the plaint of a prayer for divorce was due to the fact that plaintiff and his legal adviser, considered that marriage tie was already dissolved. And in the peculiar circumstances of the case, this view, if erroneous, was at least excusable.

We have, moreover, the fact that the objection was raised for the first time in first appeal.

In my opinion the case was pre-eminently one in which an amendment of the plaint should have been allowed in order that justice might be done. And I think that the amendment should be allowed now.

The Divisional Judge having decided the appeal on this point only the case must be remanded.

I set aside the judgment and decree of the Divisional Court, and remand the appeal to the District Court of Prome (the successor in jurisdiction of the Divisional Court) with a direction that the plaintiff-appellant be allowed to amend his plaint by the addition of a prayer for a divorce, and that the District Court do then proceed to hear and determine the appeal on its merits.

The appellant will be given a certificate for the refund of the Court-fee paid on this appeal. The other costs of this appeal will be costs in the first appeal and will follow its result.

N. H. *Suit remanded.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

April 23, 1923.

Present:—Viscount Finlay, Lord Dunedin, Lord Atkinson, Sir John Edge, KT., and Mr. Ameer Ali.

Seth KANHAYA LAL, SINCE DECEASED, (NOW REPRESENTED BY *Seth* HANUMAN PARSHAD AND ANOTHER)—APPELLANTS

versus

THE NATIONAL BANK OF INDIA, LIMITED, DELHI—RESPONDENT.

Contract Act (IX of 1872), s. 72—Payment made under protest to avoid attachment, whether made under coercion— Transfer of Property Act (IV of 1882), s. 69—Mortgage in Punjab—Power of sale without intervention of Court, validity of —Company—Mortgage—Sale by mortgagee— Purchase by debenture-holder, validity of—Registration Act (XVI of 1908), ss. 33, 34, 35, 87— Presentation for registration—Power-of-attorney— Presumption—Execution—Omnia praesumuntur, rite et solenniter acta, *applicability of.*

A payment made by the owner of a property under protest in order to avoid an unlawful attachment of the property is made under coercion and is recoverable under section 72 of the Contract Act. [p. 10, col. 1.]

The provisions contained in the Transfer of Property Act are not applicable to the Punjab, and there is no positive enactment in force in that Province which prohibits the insertion of a clause in a mortgage-deed conferring a power of sale on the mortgagee without the intervention of the Court. [p. 10, col 2.]

Therefore, there is nothing to prevent a limited Company in the Punjab issuing debentures and securing them by a mortgage in favour of trustees with the power of sale. [p. 10, col 2.]

Bhuwani Churn Mitr v. *Jykishen Mitr*, (1847) S. D. A. 354; 8 Ind. Dec. (O. S.) 326, *Keshavrav Krishna* v. *Bhavanji*, 8 B. H. C. R. (A. C. J.) 142, distinguished.

A person in a fiduciary position cannot sell to himself property which he holds in his fiduciary character, the principle being that the interest of the seller to get the highest price and that of the buyer to offer the lowest price should not be centred in the same person. [p. 10, col. 2; p. 11, col. 1.]

York Buildings Company v. *Mc Kenzie*, (1795) 3 Paterson 378, referred to.

This principle, however, is inapplicable to the case of a sale of the property of a limited Company effected by the trustees for the debenture-holders of the Company, under a power of sale conferred upon them, where the property is purchased by one of the debenture-holders, inasmuch as the sale being on behalf of the Company it is the duty and interest of the trustees to secure as high a price as possible and there is no conflict of interests. [p. 11, col. 1.]

Where an endorsement on a registered deed states that the person presenting the deed for registration held a special power-of-attorney autho-

rising him to present it, it must be presumed, under the terms of section 33 of the Registration Act, that the power-of-attorney was a proper power. [p. 11, col. 1.]

By section 34 of the Registration Act the duty of enquiring as to execution is put upon the Registering Officer and section 35 of the Act provides that if he is satisfied as to various particulars he shall register the document, therefore, the fact of registration gives rise to the presumption of *omnia præsumuntur rite et solemniter acta*, and the fact of execution of the document by parties by whom it purports to have been executed must be presumed. [p. 11, col. 1.]

Appeal from the Lahore High Court.

Messrs. *De Gruyther, K. C.*, and *Parikh*, for the Appellant.

Messrs. *Tomlin, K. C.*, *Dunne, K. C.*, and *Raikes*, for the Respondents.

JUDGMENT.—The present action is to recover a sum of Rs. 83,005 with interest, being a sum paid, as alleged, under coercion and as such is recoverable under section 72 of the Contract Act. In order to make the matter intelligible it is necessary to give the history of the various transactions which has given rise to the claim.

A limited Company, called the Delhi Mills Cotton Company, was established before 1891 and carried on business. In January 1891, it issued debentures to the extent of two lacs of rupees in favour of a Mr. Anderson and others. The debentures were secured by a mortgage of immoveable property of the Company. Later in the same year, the Company arranged for a cash credit with the respondents—The National Bank of India—to the extent of two lacs. By a supplementary agreement of the 6th March 1900, this was increased to three lacs. In security of the sums to be advanced under the cash credit, the Company gave the Bank a lien on all manufactured goods and on all raw materials hereafter belonging to the Company. The Company came to owe the bank large sums and on the 30th June 1900, the respondents put in force their lien and sold off the manufactured goods and stock of raw material of the Company. After realisation of the effects sold, the Company still owed Rs. 78,000 odd. The Company being in need of money to continue business applied to the appellant, and on the 21st August 1900 entered into an agreement with him. In terms of this agreement the appellant advanced to the Company three separate sums of Rs. 2,25,000 each, the first sums to be applied in paying off the debentures issued in favour of Mr Anderson and others; the other sums were to be used for the payment of debts and the provision of working capital. By the agreement, the Company further agreed to give a mortgage on its whole immoveable property and also to give a lien for its stock and raw material in the same manner as it had given lien to the respondents. By another term of the agreement the appellant was made Managing Agent of the Company and given full and exclusive power as to the management of its business with certain provisions as to his remuneration. The appellant advanced the money, entered upon the management, and continued the business. He paid up the earlier debentures and a new mortgage was granted in favour of certain persons—Lachman Das and Rukma Nand—who were to act as trustees for the debentures which were now held by the appellant. The provisions of this mortgage were the same as the provisions in the original mortgage to Mr. Anderson and others, and allowed the mortgagees, if any attachment was put in force against the Company's immoveable property, to enter into possession and effect a sale. On the 20th December 1900, the respondents raised an action against the Company for the sum of Rs. 79,000 odd still due to them. This action was unsuccessful before the first Judge, but on appeal judgment was given as craved, and on the 21st April 1902 it was declared that the Bank had a lien on raw material and manufactured goods. On the 16th May 1902 an application was made for attachment of all the property—both moveable and immoveable—of the Company. On the same day an order for an attachment was made, but the order only referred to attachment of the moveable property. Certain of the goods of the Company were, on the 18th May, attached in virtue of this order. An objector was taken on the 19th May, and the attachment was set aside on the same day. A Mr. Clarence Kirkpatrick, who had obtained a power-of-attorney from Lachman Das and Rukma Nand, entered into possession of the immoveable property in virtue of the mortgage. Notwithstanding the order of the 19th May, the respondents brought up the matters again and asked

that the moveables attached should be sold On the 31st May, the District Judge refused to give any such order in respect of his previous order of the 19th May. Appeal was taken against this, and on the 20th June the Chief Court set aside the orders of the 19th and the 31st May, and an interlocutory order was pronounced against the Company dealing with the articles attached and a warning issued against the trustees (who had entered into possession of the premises) from interfering with the articles attached. On the 25th June, Mr. Clarence Kirkpatrick, after all due advertisement, exposed the Mills for sale and they were, on that date, bought by the appellant for Rs. 5,02,000. After deducting the expenses and paying the sum due to the appellant as debenture-holder and as mortgagee there remained a sum of Rs. 10,000 odd which was sent by cheque to the Company. This cheque was attached by the respondents and paid to them.

The proceedings as to attachment came up for final disposal on the 4th August, when the District Judge was directed to proceed on the basis of the attachment of the 18th May. Inasmuch, however, as the attachment was admittedly only of moveable property, the respondents on the 15th August put in a further application for attachment of the premises. Following up this the Mills themselves were attached on the 20th August. On the 27th August the appellant, who, in virtue of the sale, had become the owner of the Mills, put in a petition for removal of the attachment on the ground that it was his own property which was being attached for a debt of the Company. To remove the attachment he paid the debt under protest. The next day he raised the present suit to recover the money so paid under coercion in terms of section 72 of the Contract Act. There was originally added a claim for damages. The suit has had a most unfortunate history and been protracted for a very long period, different claims having been already twice before the Board. What happened may be best stated in the words of Lord Moulton in the judgment of the Board* upon the second appeal :—

"In his plaint the plaintiff states that he was the sole proprietor of such Mills and of their contents. On thus being ousted from his property he took the course of paying under protest the sum claimed. Having thus freed his property from the attachment, he at once brought the present action claiming a return of the money so paid and the damages for the alleged illegal acts of the defendants.

"In reply to the above plaint, the respondent Bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest of which it is only necessary to cite the first, which was that 'the suit as framed will not lie.' It is admitted that the plea is in substance identical with the more usual form of plea, *viz.*, that the plaint discloses no cause of action.

"The District Judge, no doubt, with the laudable intention of shortening the proceedings and thereby lessening the costs, heard an argument on these preliminary pleas before requiring anything further to be done by the defendants, and on the 18th November 1902, he gave judgment to the effect that, so far as the recovery of the money was concerned, the plaint disclosed no cause of action. He, therefore, dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. The plaintiff having in vain applied for the drawing up of an order embodying this decision, decided not to proceed with that part of the case which related to damages and consequently did not appear on the further hearing, whereupon the District Judge dismissed the whole case for default under section 102 of the Civil Procedure Act. The plaintiff appealed to the Chief Court against this decision and that Court dismissed the appeal on the ground that no appeal lay against an order dismissing a suit under section 102. From this decision the plaintiff appealed to His Majesty in Council, and their Lordships held that the order of the 18th November 1902 was a final decision on the case as to the recovery of the money paid and that, therefore, it was not competent to the Judge to dismiss that part of the case under the powers of section 102. They, therefore, remitted

*See 18 Ind. Cas. 949 (P. C.).—[*Ed.*]

rising him to present it, it must be presumed, under the terms of section 33 of the Registration Act, that the power-of-attorney was a proper power. [p. 11, col. 1.]

By section 34 of the Registration Act the duty of enquiring as to execution is put upon the Registering Officer and section 35 of the Act provides that if he is satisfied as to various particulars he shall register the document, therefore, the fact of registration gives rise to the presumption of *omnia præsumuntur rite et solemniter acta*, and the fact of execution of the document by parties by whom it purports to have been executed must be presumed. [p. 11, col. 1.]

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Messrs. *Tomlin, K. C.*, *Dunne, K. C.*, and *Raikes*, for the Respondents.

JUDGMENT.—The present action is to recover a sum of Rs. 83,005 with interest, being a sum paid, as alleged, under coercion and as such is recoverable under section 72 of the Contract Act. In order to make the matter intelligible it is necessary to give the history of the various transactions which has given rise to the claim.

A limited Company, called the Delhi Mills Cotton Company, was established before 1891 and carried on business. In January 1891, it issued debentures to the extent of two lacs of rupees in favour of a Mr. Anderson and others. The debentures were secured by a mortgage of immoveable property of the Company. Later in the same year, the Company arranged for a cash credit with the respondents—The National Bank of India—to the extent of two lacs. By a supplementary agreement of the 6th March 1900, this was increased to three lacs. In security of the sums to be advanced under the cash credit, the Company gave the Bank a lien on all manufactured goods and on all raw materials hereafter belonging to the Company. The Company came to owe the bank large sums and on the 30th June 1900, the respondents put in force their lien and sold off the manufactured goods and stock of raw material of the Company. After realisation of the effects sold, the Company still owed Rs. 78,000 odd. The Company being in need of money to continue business applied to the appellant, and on the 21st August 1900 entered into an agreement with him. In terms of this agreement the appellant advanced to the Company three separate sums of Rs. 2,25,000 each, the first sums to be applied in paying off the debentures issued in favour of Mr Anderson and others; the other sums were to be used for the payment of debts and the provision of working capital. By the agreement, the Company further agreed to give a mortgage on its whole immoveable property and also to give a lien for its stock and raw material in the same manner as it had given lien to the respondents. By another term of the agreement the appellant was made Managing Agent of the Company and given full and exclusive power as to the management of its business with certain provisions as to his remuneration. The appellant advanced the money, entered upon the management, and continued the business. He paid up the earlier debentures and a new mortgage was granted in favour of certain persons—Lachman Das and Rukma Nand—who were to act as trustees for the debentures which were now held by the appellant. The provisions of this mortgage were the same as the provisions in the original mortgage to Mr. Anderson and others, and allowed the mortgagees, if any attachment was put in force against the Company's immoveable property, to enter into possession and effect a sale. On the 20th December 1900, the respondents raised an action against the Company for the sum of Rs. 79,000 odd still due to them. This action was unsuccessful before the first Judge, but on appeal judgment was given as craved, and on the 21st April 1902 it was declared that the Bank had a lien on raw material and manufactured goods. On the 16th May 1902 an application was made for attachment of all the property—both moveable and immoveable—of the Company. On the same day an order for an attachment was made, but the order only referred to attachment of the moveable property. Certain of the goods of the Company were, on the 18th May, attached in virtue of this order. An objector was taken on the 19th May, and the attachment was set aside on the same day. A Mr. Clarence Kirkpatrick, who had obtained a power-of-attorney from Lachman Das and Rukma Nand, entered into possession of the immoveable property in virtue of the mortgage. Notwithstanding the order of the 19th May, the respondents brought up the matters again and asked

that the moveables attached should be sold On the 31st May, the District Judge refused to give any such order in respect of his previous order of the 19th May. Appeal was taken against this, and on the 20th June the Chief Court set aside the orders of the 19th and the 31st May, and an interlocutory order was pronounced against the Company dealing with the articles attached and a warning issued against the trustees (who had entered into possession of the premises) from interfering with the articles attached. On the 25th June, Mr. Clarence Kirkpatrick, after all due advertisement, exposed the Mills for sale and they were, on that date, bought by the appellant for Rs. 5,02,000. After deducting the expenses and paying the sum due to the appellant as debenture-holder and as mortgagee there remained a sum of Rs. 10,000 odd which was sent by cheque to the Company. This cheque was attached by the respondents and paid to them.

The proceedings as to attachment came up for final disposal on the 4th August, when the District Judge was directed to proceed on the basis of the attachment of the 18th May. Inasmuch, however, as the attachment was admittedly only of moveable property, the respondents on the 15th August put in a further application for attachment of the premises. Following up this the Mills themselves were attached on the 20th August. On the 27th August the appellant, who, in virtue of the sale, had become the owner of the Mills, put in a petition for removal of the attachment on the ground that it was his own property which was being attached for a debt of the Company. To remove the attachment he paid the debt under protest. The next day he raised the present suit to recover the money so paid under coercion in terms of section 72 of the Contract Act. There was originally added a claim for damages. The suit has had a most unfortunate history and been protracted for a very long period, different claims having been already twice before the Board. What happened may be best stated in the words of Lord Moulton in the judgment of the Board* upon the second appeal :—

"In his plaint the plaintiff states that he was the sole proprietor of such Mills and of their contents. On thus being ousted from his property he took the course of paying under protest the sum claimed. Having thus freed his property from the attachment, he at once brought the present action claiming a return of the money so paid and the damages for the alleged illegal acts of the defendants.

"In reply to the above plaint, the respondent Bank filed certain preliminary pleas relating to the claim for the return of the money paid under protest of which it is only necessary to cite the first, which was that 'the suit as framed will not lie.' It is admitted that the plea is in substance identical with the more usual form of plea, *viz.*, that the plaint discloses no cause of action.

"The District Judge, no doubt, with the laudable intention of shortening the proceedings and thereby lessening the costs, heard an argument on these preliminary pleas before requiring anything further to be done by the defendants, and on the 18th November 1902, he gave judgment to the effect that, so far as the recovery of the money was concerned, the plaint disclosed no cause of action. He, therefore, dismissed with costs the claim for the recovery of the money and directed that the action should proceed on the question of damages for illegal attachment. The plaintiff having in vain applied for the drawing up of an order embodying this decision, decided not to proceed with that part of the case which related to damages and consequently did not appear on the further hearing, whereupon the District Judge dismissed the whole case for default under section 102 of the Civil Procedure Act. The plaintiff appealed to the Chief Court against this decision and that Court dismissed the appeal on the ground that no appeal lay against an order dismissing a suit under section 102. From this decision the plaintiff appealed to His Majesty in Council, and their Lordships held that the order of the 18th November 1902 was a final decision on the case as to the recovery of the money paid and that, therefore, it was not competent to the Judge to dismiss that part of the case under the powers of section 102. They, therefore, remitted

*See 18 Ind. Cas. 949 (P. C.).—[*Ed.*]

the case to the Chief Court in order that the appeal to that Court, so far as it related to the recovery of the money paid, might be heard and decided on its merits."

Their Lordships go on to find that the payment under the circumstances described was a payment under coercion and remitted the case that the defences, other than that rested on the words of the Statute, might be disposed of.

The Subordinate Judge gave judgment in favour of the appellant, but on appeal that judgment was reversed and the suit dismissed, and it is from that judgment that the present appeal lies. The judgment of the Appeal Court proceeded on one ground alone—namely, that on consideration of the whole circumstances it was not equitable that the money should be paid back. That view was supported before their Lordships by a very lengthy and careful argument examining all the English decisions, from *Moses* v. *Macferlan* (1) downwards, as to what defences were available to the action for money had and received. In their Lordships' opinion all these authorities are beside the question. The right here sought to be enforced is a statutory right expressed in terms of section 72 of the Contract Act and this Board has already held that the circumstances gave rise to that statutory right. To append a consideration (as the Court of Appeal has done) of the relation of parties *inter se*—apart from the actual circumstances which enforced the payment, is simply to allow counter-claim under another name, and a counter-claim in the Punjab is not admissible.

While this disposes of the ground on which the Appellate Court reversed the judgment of the Subordinate Judge it does not dispose of all the grounds of defence. The respondents assert that the Mills did not belong to the appellant, and if that were so then necessarily the appellant could not complain of the attachment. As regards the sale itself there is no ground of challenge. Mr. Kirkpatrick was duly authorised by the deed under which he acted, due notice was given of the sale, and no fault is found with the procedure at the sale itself. The respondents attack the sale on other grounds. First, they say that it is not possible in India to put a clause into a mortgage-deed allowing of sale except through the medium of the Court, and, second, they say as the appellant was the debenture-holder in whose interests the sale was brought on, he was incapable of purchasing. As to the first point, there is no positive enactment prohibiting such a stipulation being annexed to a mortgage, for section 69 of the Transfer of Property Act does not apply, the Act not having been extended, at least at the time of these transactions, to the Punjab. Their Lordships' attention was, however, directed to the cases of *Bhuwanee Churn Mitr* v. *Jykishen Mitr* (2) and *Keshavrav Krishna* v. *Bhavanji* (3). Their Lordships do not question these authorities, but they consider that they have no application to the case of a limited Company issuing debentures and securing the debenture by a mortgage in favour of trustees with the power of sale. The whole reasoning which led to the judgment cited was the necessity of protecting persons who from their circumstances needed protection, entering into transactions of loan, and the class of mortgages there dealt with did not include mortgages in the English form. To say that a limited Company—a creature of Statute—requires protection or that the trustees for the debenture-holders are the persons who might take advantage of the scanty knowledge of the mortgaging Company—the kind of argument which led to the decision in those cases and which was applicable in terms to transactions between the persons aforesaid—is really to consider the situation in a light almost absurd.

As regards the second point, there are numberless authorities to the effect that when any one is in a fiduciary position he cannot sell to himself. Thus an ordinary trustee cannot buy trust property nor can an official appointed to conduct a sale for creditors be himself the purchaser. See *York Buildings Company* v. *McKenzie* (4). But no such position arose here. M. Kirkpattrick, who was the seller, sold

(1) (1760) 2 Burr. 1005; 1 W. Bl. 219; 97 E. R. 676.

(2) (1847) S. D. A. 354 8 Ind. Dec. (o. s.), 326.

(3) 8 B. H. C. R. (A. C. J.) 142.

(4) (1795) 3 Paterson, 378.

not on behalf of the debenture-holder alone but on behalf of the Company. It was his duty and interest to secure as high a price as possible so that the balance—after meeting secured debts—should go to the Company. Such a balance was in fact received. The fact, therefore, that the buyer was himself a holder of the debentures became irrelevant. There was no merging of the two positions which is what is prohibited—namely, that the interest of the seller to get the highest price, and of the buyer to get the lowest price, is centred in the same person. This point accordingly fails. The only remaining point was this—the respondents urged that the conveyance in favour of the appellant was bad because the registration was not in order in respect that the registration does not bear that a proper power-of-attorney was possessed by the person asking for the registration and in respect that it does not afford proper evidence of the execution by Lachman Das—one of the signatories to the deed of transfer.

These points were admittedly not taken before the Courts below and their Lordships would be slow to admit their validity in such circumstances. But, further, they think they are unsustainable on their merits. The deed was presented by Mr. Kirkpatrick and the endorsement of the deed as registered bears that he held a special power-of-attorney authorising him to appear. It must, therefore, be presumed that the power-of-attorney was a proper power under the terms of section 33 of the Registration Act.

Then, as regards the execution of Lachman Das—a witness was examined who deposed to the fact. Now, by section 34, the duty of enquiring as to execution is put upon the Registering Officer, and by section 35 it is provided that if he is satisfied as to various particulars he shall register the documents, Here, again, the presumption from registration of *omnia presumuntur rite et solemniter acta* would apply; but the matter is finally set at rest by section 87, which provides that "nothing done in good faith pursuant to the Act by any Registering Officer shall be deemed invalid merely by reason of any defect in his appointment or procedure."

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside with costs and the decree of the Subordinate Court restored.

The respondents will pay the costs of the appeal.

Z. K. *Appeal allowed.*

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

Solicitors for the Respondent:—Messrs. *Sanderson & Orr Dignams.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 689 OF 1921.

March 20, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Panton.

SANTALA BEWA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BUDASWARI DASI—PLAINTIFF—RESPONDENT.

Hindu Law—Rajbansis—*Widow, re-marriage of—Forfeiture of estate—Custom—Hindu Widow's Re-marriage Act (XV of 1856), s 2.*

Rajbansis are governed by the ordinary Hindu Law. [p. 13, col. 2.]

Fanindra Deb Raikat v. *Rajeswar Das*, 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.), referred to.

Ram Das v. *Chandra Dassia*, 20 C. 409; 10 Ind. Dec. (N. S.) 277, followed.

A Rajbansi widow on re-marriage forfeits her former husband's estate, even though there is a custom of re-marriage in her caste. [p. 14, col. 1.]

Case-law reviewed.

Appeal against a decree of the Deputy Commissioner, Darjeeling, dated the 5th December 1920, reversing that of the Munsif, Siliguri, dated the 4th August 1920.

Babu *Tarakeswar Pal Choudhury* for the Appellant.

Babu *Mrityunjoy Chattopadhaya*, for the Respondent.

SANTALA BEWA *v.* BUDASWARI DASI.

JUDGMENT.—The defendants are the appellants before us and the facts of the suit, out of which this appeal has arisen, are, shortly stated, as follows :—

The plaintiff is the daughter of one Lalua Singh who held a six-pies share in a certain *jote*. The defendant No. 1, Santala Bewa, is Lalua's second wife. On Lalua's death she inherited the share of Lalua in the said *jote*. Thereafter, the defendant No. 1 married again, according to the custom of the Rajbansis and subsequently she sold the said six-pies share in the *jote* to defendant No. 2 who again sold the same to defendant No. 3. The plaintiff has brought the present suit for recovery of possession of the said six-pies share on the ground that the defendant No. 1 by her re-marriage had forfeited her right to the said share and that the defendant Nos. 2 and 3 by their purchase had acquired no right and title to the same. The defendant No. 1 in her defence stated that there was a special custom among the Rajbansis that a widow did not forfeit her right to her husband's property by her re-marriage.

The Munsif held that the Rajbansis were not Hindus and that the parties were governed not by Hindu Law but by custom, and that among the Rajbansis a widow could keep a Dangua, and by keeping one she was not divested of her former husband's property. He accordingly held that the defendant No. 1 did not forfeit her right to her first husband's property by her re-marriage, and accordingly dismissed the suit.

The plaintiff appealed to the Deputy Commissioner of Darjeeling and the latter held that the special custom referred to by the Munsif had not been satisfactorily established. It was also held by the learned Deputy Commissioner that the Rajbansis were governed by the ordinary Hindu Law and that, therefore, the defendant No. 1 forfeited the estate inherited from her first husband by her re-marriage and consequently the defendants Nos. 2 and 3 acquired no title to the property in suit by purchase from the defendant No. 1.

On behalf of the appellants it has been contended before us that the lower Appellate Court was wrong in holding that the Rajbansis were governed by the ordinary Hindu Law, and, in the second place, that there was a difference between a widow among the Rajbansis re-marrying and keeping a Dangua according to the custom which prevails among the Rajbansis, and that the fact of the defendant No. 1 having kept a Dangua did not entail any forfeiture of the interest taken by her in her first husband's estate.

As regards the first contention that the Rajbansis are not governed by the ordinary Hindu Law, reliance has been placed upon the decision of the Privy Council in the case of *Fanindra Deb Raikat* v. *Rajeswar Das* (1). The question of acknowledgement and recognition of Non-Hindus as Hindus arose in the following manner in that case. The dispute related to the succession of a *Zemindari* called the Baikantpur Raj and the question their Lordships had to determine was as to the validity of the adoption of the defendant in that case as a son to the deceased *Zemindar*. It was found that the family of Cooch Behar to which the parties belonged, originally belonged to the Cooch Behar Aboriginal tribe, which had abandoned their old customs, called themselves Rajbansi Kshatriyas, adopted Hinduism as their religion and claimed a divine ancestry for their Chief, who traced his pedigree to the god Shiva. Upon this the High Court presumed that the parties were Hindus and cast upon the plaintiff, who was rival claimant, the burden of proving the invalidity of the defendant's adoption.

On a review of their family history, their Lordships held that it showed, "that although they affected to be Hindus, they had retained and were governed by family customs, which as regards some matters were at variance with the Hindu Law." They, therefore, held that the family was subject only to Customary Law and that as no custom in favour of adoption had been proved, the defendant lost his estate, though he held a deed of adoption from the deceased *Zemindar* such deed, according to the opinion of their Lordships, failing to convey the property to a *persona designata*. In that case, the ratio of the decision was

(1) 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.).

that the process of coversion into Hinduism was incomplete when the case arose. In the case of *Ram Das* v. *Chandra Dassia* (2), where the parties were Rajbansis, the Court held that the process of conversion into Hinduism was complete and that the ordinary Hindu Law applied to the parties.

The distinction between the two cases referred to above was this, that while in the one case the origin and history of the family was known, in the other case it was not, and there being nothing to show that the conversion into Hinduism in the latter case was incomplete, the Court assumed the ostensible state to be the real state and held the parties to be Hindus bound by the *lex loci*, adding, "it must be taken that they have adopted in its entirety one form or other of Hindu Law, and it being uncertain which form they adopted, it is not unreasonable to infer that they adopted the form which prevailed in the locality."

In his "Tribes and Castes of Bengal", Vol. I, at page 491, Sir Herbert Risley observes as follows:—"The transformation of the Kochh into the Rajbansi, the name by which they are now known in Rangpur, Jalpaiguri and Kuch or Kochh Behar, is a signular illustration of the influence exercised by fiction in the making of caste. As described by Buchanan at the beginning of the century and by Hudson some fifty years ago, the Koch tribe was unquestionably non-Aryan and non-Hindu. Now the great majority of the Kochh inhabitants of Northern Bengal invariably describe themselves as Rajbansis or Bhanga Kashatriyas a designation which enables them to pose as an outlying branch of the Kashatriyas who fled to these remote districts in order to escape from the wrath of Parsu Ram. They claim descent from Raja Dasarath, father of Rama, they keep Brahmans, imitate the Brahminical ritual in their marriage ceremony and have begun to adopt the Brahminical system of *gotras*. In rspect of this last point they are now in a curious state of transition, as they have all hit upon the same *gotra* (Kasyapa) and thus habitually transgress the primary rule of the Brahminical system which absolutely prohibits marriage within the *gotra*. But for this defect in their connubial arrangements a defect which will probably be corrected in a generation or two as they and their *Purohits* rise in intelligence there would be nothing in their customs to distinguish them from the Aryan Hindus although there has been no mixture of blood and they remain thoroughly Kochh under the name of Rajbansi. Although there is no historical foundation for the claim of the Rajbansis to be a provincial variety of Kshatriyas, it is a singular fact that the title Rajbansi serves much the same purpose for the lower strata of the Hindu population of Northern Bengal as the title Rajput does for the landholding classes of dubious origin all over India. The one term like the other, serves as the sonorous designation of a large and heterogenous group bound together by the common desire of social distinction."

There are three kinds of marriage prevalent amongst the Rajbansis, *viz.*, (1) Gandharva, (2) Brahma and (3) Widow Marriage. Widow marriage amongst the Rajbansis takes place without any ceremonies whatever. The peculiar circumstances under which widows are received by men as wives amongst Rajbansis have given rise to different names by which such women are known, such as Dangua wife, Dhoka wife, Pashua wife. *Dang* means a stick or a blow dealt with a stick; when a widow lives by herself and a man goes to the house with a *dang* or stick in his hand and strikes a blow with it on the roof of the house, and so enters in and takes possession of the woman such woman is called a Dangua wife (See Hunter's Statistical account of Bengal, Volume X, page 377.

In this case the lower Appellate Court has observed that it is a matter of common knowledge that the Rajbansis have assumed the sacred thread and have termed themselves Chatries and that, in these circumstances, it is not understood why it should be held that they are not governed by the ordinary Hindu Law, although there may be a custom prevailing amongst them which renders re-marriage of widows permissible.

In our opinion the parties to this particular case are governed by the ordinary

(2) 20 C. 409; 10 Ind. Dec. (N. S.) 277.

Hindu Law and in that view of the matter the question arises whether having regard to the provisions of Act XV of 1856, a Rajbansi widow after re-marriage forfeits her former husband's estate, even though there is a custom of re-marriage in her caste. Now, the second section of Act XV of 1856 contemplates the case of any widow, which may include even a widow of a class or caste in which such marriages are allowed or permitted by caste custom, and the scope of this section has been the subject of controversy in many cases [See *Murugayi* v. *Viramakali* (3), *Vithu* v. *Govinda* (4), *Panchappa* v. *Sanganbasawa* (5) *Matungini Gupta* v. *Ram Rutton Roy* (6).]

The consensus of opinion so far as this Court and the Madras and Bombay High Courts are concerned is that the second section of Act XV 1856 applies not only to widows who could not re-marry before the passing of the Act, but also to those who were not so precluded from re-marrying, either by law or custom [See *Nitya Mudhav* v. *Srinath Chandra* (7).] *Rasul Jehan Begum* v. *Ram Surun Singh* (8) it was held that a Hindu widow on re-marriage forfeits the estate inherited from her former husband, although, according to the custom prevailing in her caste, re-marriage is permissible. Much support is lent to this view by the fact that almost all castes in which a re-marriage is allowed by custom, such marriages are followed by forfeiture of the first husband's estate. In the case of *Gouri Churn Patni* v. *Sita Patni* (9) it was held that a Hindu widow after re-mariage forfeits her deceased husband's estate, even though there is a custom of re-marriage in her caste. We are not unmindful of the fact that a different view has been taken by the Allahabad High Court, (see *Khuddo* v. *Durga Prasad* (10) and *Mula* v. *Partab* (11) but we think we are bound by the decisions of this Court to which reference has already been made.

The result, therefore, is that this appeal fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 1 M. 226; 1 Ind. Jur. 234; 1 Ind. Dec. (N. S.) 149.
(4) 22 B. 321; 11 Ind. Dec. (N. S.) 796.
(5) 24 B. 89; 1 Bom. L. R. 543; 12 Ind. Dec. (N. S.) 596.
(6) 19 C. 289; 9 Ind. Dec. (N. S.) 638 (F. B.)
(7) 8 C. L. J. 542.
(8) 22 C. 589; 11 Ind. Dec. (N. S.) 392.
(9) 5 Ind. Cas. 710; 14 C. W. N. 346.
(10) 29 A. 122; A. W. N. (1906) 299; 3 A. L. J. 729.

(11) 6 Ind. Cas. 116; 32 A. 489; 7 A. L. J. 417

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL NO. 1005 OF 1921.

June 14, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Sulaiman.

RADHA DULAIYA—DEFENDANT—APPELLANT

versus

RASHIK LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (I of 1908), Sch. I, Arts. 118, 144—Adoption, invalid—Suit for possession against adoption—Limitation.

Under a family arrangement among the members of a joint Hindu family, the widow of a deceased member was given, in lieu of maintenance, a certain share in a village which share was to revert to the family on her death unless in the meantime she adopted a son to her deceased husband. The widow got the share mutated in her own name as well as in that of another person whom she declared she had adopted. About eleven years after the death of the widow, the reversioners sued the alleged adoptee for possession. It was found that there had been no adoption in fact:

Held, that the suit not being merely for a declaration that the defendant's adoption was invalid was not barred under Art. 118 of Schedule I to the Limitation Act, and that as it was brought within 12 years of the death of the widow, the plaintiffs were entitled to succeed. [p. 16, col. 2.]

Chunni Lal v. *Sita Ram*, 11 Ind. Cas. 476; 34 A. 8; 8 A. L. J. 1101, *Basdeo* v. *Gopal*, 8 A. 644 A. W. N. (1886) 232; 5 Ind. Dec. (N. S.) 382, referred to.

Second appeal from a decree of the District Judge, Jhansi.

Mr. *Sital Prasad Ghosh*, for the Appellant.

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

JUDGMENT.—This is a defendant's appeal arising out of a suit for recovery

of certain property including a 5-annas 4-pies *zemindari* share in village Patora Kalan, and a 6 pies share in Lalitpur. The plaintiffs' case, as set forth in the plaint, was that the property in dispute was given to one *Musammat* Sarawan Dulaiya under an award dated 12th July 1891, that she was to have possession of it for her life, and, under the said award, the property was to revert to the plaintiffs' family, and that she died on the 3rd of May 1908, on which date the plaintiffs became entitled to recover possession of this property.

The claim was contested mainly by the present defendant-appellant, *Musammat* Radha Dulaiya, who pleaded that in fact there was no valid and binding award in existence, and, further, that her deceased husband, Damodar Das, had been adopted by *Musammat* Sarawan Dulaiya and had been in possession of the property as such; and, lastly, that the claim was barred by time. Both the Courts below have decreed the suit. The defendant-appellant has come up in second appeal to this Court, and, on her behalf, the findings of the learned District Judge are challenged.

The points for determination before us are really two. One is as to the validity of the transaction of 1891, and the second is the question of limitation.

It appears that one Janki Prasad had four sons by his first wife and five sons by the second. About the year 1891 two of the sons by the first wife had died leaving two widows, *Musammat* Ojhari and *Musammat* Sarawan Dulaiya. There were three sons by the second wife alive at this time. As the learned District Judge has remarked, it was with the object of securing peace for the family that there was a reference made to certain arbitrators by Janki Prasad and his three sons by the second wife, on the one hand, and Ram Prasad and Har Das, the sons by the other wife, acting for themselves and as guardians of the two minor widows of their deceased brothers on the other. The arbitrators made an award on the 12th July 1891, under which half the property went to one branch and the other half was divided between Ram Prasad and Har Das and the two widows. The widows were to retain possession of the quarter share given to each for their lives in lieu of maintenance and, on their death, the properties were to revert to Ram Prasad and Har Das and their sons. There was, however, a provision in the award that the widows had power to adopt in writing a son from among the descendants of Janki Prasad, Ram Prasad and Har Das, and that, in case any such adoption was made, the adopted son would become the owner of the property given to the widows. At the time when this award was made, *Musammat* Sarawan Dulaiya was a minor and she does not appear to have attained majority till sometime about the year 1900.

It is conceded before us that, inasmuch as *Musammat* Sarawan Dulaiya was a minor at the time and had not been properly represented, the award as an award is not binding on her, but both the Courts below have come to the conclusion that this transaction was really in the nature of a family settlement and, as such, was binding on all the members of the family even though some of them were minors at the time. About the year 1902 *Musammat* Sarawan Dulaiya and the other widow applied to the Revenue Court for mutation of names in respect of the share in village Patora. The passage in the judgment of the first Court shows that the names of Sarawan Dulaiya as well as Damodar Das were recorded jointly and Damodar Das was described as a minor under the *sarparasti* or management of Sarawan Dulaiya. In the village Lalitpur, the defendants did not obtain possession till after the year 1910, and that was under a Will left by Janki Prasad.

In our opinion there can be no doubt that *Musammat* Sarawan Dulaiya obtained possession of the share in village Patora in pursuance of the arrangement of 1891. In the first place, there is a finding to that effect by the learned District Judge which, in our opinion, cannot now be disturbed. Furthermore, her own conduct in applying to the Revenue Court in the years 1902 and 1904 shows, that she was endeavouring to obtain possession of the share given to her by the award. We are of opinion that, so long as she was alive, her possession, therefore, in the circumstances cannot be

deemed to have been adverse to the other members of the family. The finding of the learned District Judge is clearly to the effect that she obtained possession in pursuance of the arrangement arrived at between the various members of the family in the year 1891. It is true that her name was not actually recorded till long after 1891 but that may be explained by the circumstance that she had not attained majority till about the year 1900.

On the question of limitation the learned Advocate for the appellant first of all contended that the claim was barred by the three years rule as contained in Art. 113 of the Limitation Act and he relied on the case of *Talewar Singh* v. *Bahori Singh* (1). In our opinion, Art. 113 has no application whatsoever to the case. This is not a claim for the specific performance of any contract and that Article is inapplicable.

Next, it was contended that the claim in substance is for a declaration that the adoption set up by the defendant was invalid, and that, therefore, it is barred by Art. 118 of the Limitation Act. On the question of adoption the learned District Judge has come to a finding of fact that, in reality, no adoption had taken place and all that had happened was that *Musammat* Sarawan Dulaiya had declared in the deed of 1902 that the defendant's husband Damodar Das was her adopted son. It is, however, contended that, whether the adoption did in fact take place or not, the claim is barred by Art. 118 and reliance is placed on a case of this Court reported as *Chunni Lal* v. *Sita Ram* (2). In the first place, in the plaint the plaintiffs did not seek any relief as to a declaration that the alleged adoption is invalid. The present suit was instituted after the death of *Musammat* Sarawan Dulaiya when the plaintiffs, according to the case set forth in the plaint, were entitled to recover possession of the property. The suit is not merely a suit for a declaration that the defendant's adoption is invalid. This view is supported by a case of this Court in *Vasdeo* v. *Gopal* (3). The case relied upon by the learned Advocate for the defendant, namely, *Chunni Lal* v. *Sita Ram* (2), however, is not conclusive. In the first place, it is directly opposed to the rule of law laid down in the earlier case quoted, and, in the next, the learned Judges themselves did not decide the point finally for, at page 12* they remark: "As the trend of authorities in this Court is the other way and as it is unnecessary to discuss that point in the present appeal, we refrain from entering into that question."

The view taken in *Chunni Lal* v. *Sita Ram* (2) has been followed by other Courts also. In our opinion the present claim, therefore, not being a claim merely for a declaration that the defendant's adoption is invalid, is not barred by Art. 118 of the Limitation Act.

As to the question of the claim being barred by 12 years' adverse possession, we are of opinion that that contention also is without force. The present suit was instituted on the 23rd of April 1920, and *Musammat* Sarawan Dulaiya died on the 3rd of May 1908, that is to say, just within 12 years of the institution of the suit. If the possession of *Musammat* Sarawan Dulaiya during her lifetime was with the consent and acquiescence of the other members of the family and in pursuance of the award of 1891, it is clear that her possession can in no sense have been adverse to the other members of the family. The right to recover possession arose on the death of the widow, and from that date the claim is well within time.

On behalf of the defendant, reliance has been placed on the ruling of their Lordships of the Privy Council in *Sham Koer* v. *Dah Koer* (4), but in that case it is to be noted that their Lordships were distinctly of opinion that it had not been proved that the widow had obtained possession of the property in suit under any family arrangement at all. The evidence being nil and the widow not being entitled to actual possession of the property their Lordships held that her possession must be deemed to have been adverse. In the

(1) 26 A. 497; A. W. N. (1894) 72.
(2) 11 Ind. Cas. 476; 34 A. 8; 8 A. L. J. 1101.
(3) 8 A. 644; A. W. N. (1886) 232; 5 Ind. Dec. (N. S.) 382.
(4) 29 C. 664; 29 I. A. 132; 6 C. W. N. 657; 4 Bom. L. R. 547; 8 Sar. P. C. J. 280 (P. C.).

* Page of 34 A.—[*Ed.*]

present case we have already remarked that the finding of the learned District Judge is that the widow did obtain possession of this property under the award, which embodies the arrangement arrived at by the various members of the family. The Privy Council case, therefore, is distinguishable. The plaintiffs' case thus is not barred by time. We think, therefore, that the view taken on both these points by the lower Appellate Court is correct. The appeal fails and is hereby dismissed with costs.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

FULL BENCH.

REFERRED CASE NO. 14 OF 1922.

April 6, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, Justice Sir Francis Oldfield, KT., and Mr. Justice Ramesam.

PAKKIM SOLOMON—PLAINTIFF

versus

CHELLIAH PILLAI—DEFENDANT.

Divorce Act (IV of 1869), s. 2—Excommunication by sect or Church, effect of—Excommunicated person whether ceases to be Christian—Profession of Christianity—Native Converts' Marriage Dissolution Act (XXI of 1866), s. 16—Conversion of married Hindu to Christianity—Dissolution of marriage—Procedure.

Where a person who professes the Christian religion is excommunicated by the sect or Church to which he belongs he does not thereby cease to profess Christianity within the meaning of section 2 of the Divorce Act. The question of profession of Christianity is a question of his own action and not of the action of his Church. [p. 17, col 2]

Under the Native Converts' Marriage Dissolution Act the conversion to Christianity of one of two spouses of a Hindu marriage does not dissolve the marriage. Under that Act, to obtain dissolution of marriage the convert must first of all apply for restitution of conjugal rights and then, after the lapse of a year, for dissolution of the marriage if conjugal rights are refused. Otherwise, the conversion to Christianity of one of two spouses has no effect on the existing marriage. [p. 18, col. 1]

Per *Oldfield, J.*—The policy of the Divorce Act appears to require the application of the words of section 2 of the Act to what may be a substantial class of persons in this country, *viz.*, those who have abandoned a particular sect, but who still remain unattached to any religion other than Christianity [p 18, col 2.]

Per *Ramesam, J.*—The religion of a person is what that person professes and it does not require recognition by the other persons belonging to that religion. A Hindu who professes to be a Hindu, though he may be excommunicated by all the existing Hindu castes, is still a Hindu, though probably he is subject to great social inconvenience. In this respect there is nothing peculiar to Christianity. If a person says that he is a Christian though he does not belong to any of the existing Christian Churches, he is still a Christian. Probably his creed is different from the existing creeds and he is subject to social inconvenience in respect of the performance of marriage and burials, but he would still be a Christian. [p. 18, col. 2.]

Case referred by the District Judge, Madura, in his letter, dated the 9th September 1922, No. 5130 for confirmation by the High Court under section 17 of the Indian Divorce Act (IV of 1869) of the decree *nisi* passed in Original Suit No. 5 of 1921 on the file of the District Court of Madura.

Mr. *T. M. Ramaswamy Aiyar*, for the Plaintiff.

JUDGMENT.

Schwabe, C. J.—This is a suit for nullity of a marriage under the following circumstances. The respondent, when a Hindu, was married to a Hindu. The respondent changed his religion being converted to Christianity. No steps were taken by him to dissolve his marriage, but he then went through a form of marriage with the petitioner, also a Christian. The petitioner now brings this suit on the ground of bigamy of her husband, he having a wife alive at the time went through the form of marriage with her.

The first defence raised is that the petitioner has no rights under the Indian Divorce Act because it is alleged that she does not profess the Christian religion. This is based on a resolution of the particular sect to which she belongs, in effect excommunicating her. In my judgment, although she may be excommunicated by the sect or the Church to which she belongs, she does not thereby cease to profess Christianity. The question of profession of Christianity is a question of her own action and not of the action of her Church. It is to be observed that the petitioner was the daughter of a Christian and, no doubt, was

baptised as a Christian. I cannot see how it can be said that she ceases to profess the Christian religion because her Church, disapproving of her conduct, has excommunicated her.

The second defence raised is that at the time of this marriage there was no existing marriage of the respondent, it being alleged that by reason of his conversion his then existing marriage became dissolved. That is not the law. It is quite clear from the Native Converts' Marriage Dissolution Act XXI of 1866 that the conversion to Christianity of one of two married Hindus does not dissolve the marriage. That act provides for means to obtain dissolution of the marriage by application to the Court, first of all, for restitution of conjugal rights and then, after the lapse of a year, for dissolution of the marriage if conjugal rights are refused. Otherwise, the conversion to Christianity of one of two spouses has no effect on the existing marriage.

It follows that the decree that it is a nullity is correct and must be confirmed with costs.

Oldfield, J.—I have felt some doubt with regard to the first question raised by this petition, whether the petitioner can be said to have been professing the Christian religion at the time she presented it, within the meaning of section 2 of the Indian Divorce Act. My hesitation arises from the facts, evidenced by the resolution of excommunication referred to by my Lord, that she had repudiated the authority of the governing body of the Christian denomination, to which she belonged, and that she was by the resolution deprived of the spiritual privileges of the Christian faith in the only form, in which, so far as appears, she has ever possessed them. The reply suggested is that, notwithstanding her withdrawal or expulsion from a particular denomination, she can still be heard to say that she professes an unsectarian Christianity. These words of the Act have always been difficult of interpretation; and it is with some hesitation that I accept the suggestion made on her behalf. It is some justification for doing so that there is nothing before us as to her admission or re-admission to Hinduism, which presumably was originally her faith or that of her parents, and nothing to show whether such re-admission or admission is possible and there is, further, the fact that the policy of the law appears to require the application of the words of section 2 to what may be a substantial class of persons in this country, those who have abandoned a particular sect but who still remain unattached to any religion other than Christianity.

In these circumstances, I do not feel justified in dissenting from the judgment just delivered.

Ramesam, J.—I agree with the judgment of the learned Chief Justice. In my opinion the religion of a person is what the person professes and does not require recognition by the other persons belonging to that religion. A Hindu, who professes to be a Hindu, though he may be excommunicated by all the existing Hindu castes is still a Hindu though probably he is subject to great social inconvenience. In this respect I do not think that there is anything peculiar to Christianity. If a person says that he is a Christian, though he does not belong to the existing Christian Churches he is still a Christian. Probably his creed is different from the existing creeds and he is subject to social inconvenience in respect of the performance of marriage and burials. Still he would be a Christian.

V. N. V. *Decree confirmed.*
Z. K. & W. C. A.

PATNA HIGH COURT.

CIVIL REVISION PETITION NO. 158 OF 1923.
June 27, 1923.
Present:—MR. Justice Foster.
ARJUN DAS-GULAB RAI FIRM—PETITIONER
versus
E. I. RAILWAY CO.—OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 72, 80—Consignee, right of—Strike of Railway employees, whether enough to exonerate Company from liability.

A consignee has a right of suit against the Railway to which the goods are delivered by the consignor thereof as well as against the particular Railway

RAJUN DAS-GULAB RAI v. E. I. RAILWAY CO.

Administration on whose Railway the loss occurs. [p. 19, col. 2.]

Mere proof that a strike took place on the Railway of the defendant Company is by no means a justifiable basis for the inference that the defendant is not liable. [p. 19, col. 2]

Petition from an order of the Subordinate Judge, Dhanbad, dated the 12th March 1923.

Mr. *Banwari Lal*, for the Petitioners.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Opposite Party.

JUDGMENT.—The plaintiff was consignee of 135 bags of mustard seed despatched from the Chaparmookh Station on the Assam Bengal Railway to the plaintiff at Dhanbad, East Indian Railway. The consignment would in the ordinary course pass over the Assam Bengal Railway, the Eastern Bengal Railway and, finally, the East Indian Railway. The plaintiff succeeded in recovering from the East Indian Railway only 120 bags of mustard delivered at Dhanbad Station and he sues for compensation for non-delivery of the remaining bags. The Subordinate Judge who tried the case in the Small Cause Court found that the Risk Note, Forms A and B, was not proved to have been signed by any agent of the consignors or by the consignors themselves and, therefore, the responsibility of the Railway was as indicated in the first sub-section of section 72 of the Indian Railways Act. In other words, this decision meant that it was for the Railway to prove that they had exercised in respect of the goods bailed such care as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Had the decision been otherwise the onus would have rested upon the plaintiff to show that the loss fell under one of the exceptions mentioned in the Risk Note. The learned Subordinate Judge's judgment proceeds as follows:—"On the evidence of the defendant's side I am satisfied that the loss was not due to any want of proper care on the part of the East Indian Railway Company in carrying the goods or for wilful negligence. It is proved that there was a labour strike throughout the line for two months from the end of February and the Company had no control over the strikers and so the defendant's case, that the loss was due to circumstances beyond their control seems to be correct."

The fault I find with this judgment is that an unjustifiable inference is drawn from the established fact that there was a strike. If the Railway assigns the strike as the cause of the loss and if it is found, as has been found in this case, that there was a strike it still remains to be shown that the loss occurred on the Railway which was affected by the strike, that the loss occurred during the period of the strike and that the loss was in some specific way the result of the strike. In connection with the last point it is to be remembered that a strike in itself need not inevitably result in loss of goods. If this is true, then it is for the Railway to show what other circumstances, possibly circumstances connected with or arising out of the strike, brought about the loss. It is also necessary in this connection to remember why it is that under section 80 of the Indian Railways Act the consignee has a right of suit against the Assam Bengal Railway, to which Railway the goods were delivered by the consignor thereof, as well as a right of suit against the particular Railway Administration on whose Railway the loss occurred. The reason is that the Assam Bengal Railway was in the matter of this consignment agent of the East Indian Railway which was finally to deliver the property to the consignee. The principal would ordinarily be liable for the negligence of his agent and the person who suffers the loss would also have the option of suing the agent himself who had been negligent. That is the reason for the provisions of section 80 of the Indian Railways Act. So, the mere proof that a strike took place on the Railway of the principal defendant is by no means a justifiable basis for the inference that that Railway was not responsible. In my opinion the judgment is defective, because the issues of fact have not been kept in view and a wrong inference had been drawn from one fact alone which in itself would be an inadequate defence. Up to this point I have assumed that the Railway had the burden of showing that there was no wilful negligence.

I now come to consider whether the learned Subordinate Judge has rightly decided

that the case falls under the first sub-section of section 72 of the Act. The Risk Notes purport to be signed by one Gangadhar on behalf of the firm Lachmi Chand-Golab Chand who were the consignors. But the members of the Chaparmookh Station Staff deposed that the signature was made by one Nowrang, a partner of that firm, and there is no evidence to show what connection Gangadhar had with the consignor firm. From this the learned Subordinate Judge deduces the conclusion that there is no proof that the consignors or their agents signed the Risk Note forms and thereupon he assigned the onus in the case to the defendant. It is urged by the learned Vakil on behalf of the respondents that this decision is unsatisfactory from a legal point of view inasmuch as it does not take notice of the fact that the consignee plaintiff has availed himself of the benefits of the Risk Note. He has taken delivery of 120 bags after paying a reduced freight through his Agent the consignor. It is urged that this act of the plaintiff may be construed as binding him either on the ground that he has ratified the act of whoever signed the Risk Note, or on the ground that he is estopped by having induced the Railway to accept lower rates and to give up the goods (120 bags) to himself on production of the Risk Note.

On all these grounds I consider the judgment is defective and not in accordance with the law. The question whether the acts of the plaintiff are such as to preclude the plaintiff from pleading that his rights are not limited by the Risk Note depends on detailed facts which are to be got from the evidence. The Court will have to decide these questions and draw the proper inference. If the decision is that the case falls under the first sub-section of section 72 of the Indian Railways Act then the matter of wilful negligence will have to be considered in greater detail and with more regard to the legal elements of negligence than have been displayed in the judgment of the learned Subordinate Judge. I consider that the trial has not been in accordance with law, so I set aside the judgment and the decree and direct a re-trial *intoto*. Costs will abide the result.

K. S. D. *Retrial ordered.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 112 OF 1921.

April 10, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

Chowdhury MOHAMMAD AMIN—PLAINTIFF—APPELLANT

versus

BIJOY CHAND MAHATAB—DEFENDANT—RESPONDENT.

Bengal Patni Taluks Regulation (VIII of 1819), s. 14—Sale of patni taluk *set aside—Purchaser, remedy of—Suit to recover purchase-money, whether maintainable.*

The object of the Legislature in enacting section 14 of the Bengal Patni Taluks Regulation was to avoid multiplicity of litigation and to afford protection to an innocent purchaser, the sale in whose favour might be cancelled without default on his part. [p. 21, col. 1.]

Where a sale of a *patni taluk* is set aside, the purchaser must have recourse to the remedy provided by section 14 of the Bengal Patni Taluks Regulation to the extent that it is available, and he cannot maintain a separate suit to obtain the relief which, if he had so desired, might have been granted to him against the *zemindar* in the suit for reversal of the sale. [p. 22, col. 1.]

Case-law considered.

Appeal against the decree of the Subordinate Judge, Burdwan, dated March 5, 1921.

Babu *Mahendra Nath Roy*, Maulvis *Nuruddin Ahmed* and *A. S. M. Akram*, for the Appellant.

Babu *Dwarka Nath Chakravarti*, Dr. *Dwarka Nath Mitter* and Babu *Sarat Kumar Mitra*, for the Respondent.

JUDGMENT.

Mookerjee, J.—This is an appeal by the plaintiff in a suit for recovery of money instituted by the auction-purchaser at a sale under the Patni Regulation, 1819, which was subsequently set aside. The facts material for the determination of the questions raised before us are really not in controversy, and may be briefly recited. Patni Taluk Gopalnagar was sold under Regulation VIII of 1819 on the 15th May 1909, and was purchased by the plaintiff for Rs. 1,000. The father of the plaintiff and others were the *patnidars* under the defendant, the Maharaja of Burdwan. At the instance of one of the defaulters, who instituted a regular suit on the 14th April 1910, under section 14 of the Patni Regulation the sale was set aside by the Sub-

ordinate Judge on the 22nd November 1911. The purchaser and the *zemindar* preferred separate appeals to this Court. These appeals were dismissed on the 19th July 1916. The purchaser thereupon instituted the present suit on the 18th July 1919 to recover from the *zemindar* the following sums of money:

(i) Rupees 550 in respect of purchase-money together with interest thereon.

(ii) Rent and cess paid by the plaintiff to the defendant during the time that plaintiff was in possession as purchaser.

(iii) Costs which the plaintiff had to pay in the High Court in the previous litigation.

(iv) The amount given as security by the plaintiff together with damages.

The defendant expressed his readiness to return the securities mentioned in the fourth item, but denied his liability to pay the amounts covered by the first three items. The Subordinate Judge has dismissed the suit; he has held the claim in respect of the first three items untenable under section 14 of the Patni Regulation, while he has come to the conclusion that, there was no cause of action for the fourth item.

Section 14 of the Patni Regulation authorises the institution of a suit against the *zemindar* for the reversal of a sale and then provides as follows: "The purchaser shall be made a party in such suits and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss at the charge of the *zemindar* or person at whose suit the sale may have been made." There is, in our opinion, no room for controversy that the first three items of the claim put forward in the present action might have been urged in the previous litigation.

The object of the Legislature plainly was to avoid multiplicity of litigation and to afford protection to an innocent purchaser, the sale in whose favour might be cancelled without default on his part. Thus, in *Bykunt Nath Singh* v. *Maharajah Dheraj Mahtab Chund* (1), it was ruled that on reversal of a *patni* sale the purchaser was entitled to a refund of his purchase-money and to recover his costs from the *zemindar*. In *Mobaruck Ali* v. *Ameer Ali* (2), the purchaser was declared entitled to a refund of the purchase-money with interest; and to the same effect is the decision in *Bejoy Chand Mahatab* v. *Amrita Lal* (3). In *Tara Chand* v. *Nafar Ali* (4) it was held that on cancellation of the sale the purchaser can require the Court to compel the *zemindar* to indemnify him on account of all payments of rent which he may have made. But the point remains, whether the remedy furnished by section 14 is exclusive. Sir Francis Maclean, C. J., was inclined to answer the question in the negative in *Radha Madhub* v. *Sastl Ram* (5). The facts of that litigation, however, did not attract the operation of section 14 and Banerjee, J., was more cautious in his statement when he observed that section 14 did not ordain that the remedy prescribed thereby was to be the sole remedy to which the auction-purchaser was entitled notwithstanding that by virtue of any other provision of law he might be entitled to a remedy against any other person than the *zemindar*. In the case then before the Court, the purchaser was held entitled to maintain an action against the defaulters to reimburse himself in respect of sums paid by him as rent to the *zemindar* during the time that the sale was in force; these sums had clearly been paid by him as a person interested in the payment of money, which the defaulters were bound by law to pay. The question of the true scope of section 14, whether, and if so, how far, the remedy provided thereby in the purchaser's favour excludes all other remedies, was raised before the Judicial Committee in *Hukum Chand Bajd* v. *Pirthichand Lal Chowdhury* (6), but was left undecided. Sir Lawrence Jenkins, it is noticeable, expressed a strong inclination in favour of the view that section 14 should be held to make the remedy provided therein exclusive, unless such an interpretation was opposed to a long and uninterrupted

(1) 17 W. R. 447; 9 B. L. R. 87.

(2) 21 W. R. 252.
(3) 27 C. 308; 14 Ind. Dec. (N. S.) 203.
(4) 1 C. L. R. 236.
(5) 26 C. 826; 13 Ind. Dec. (N. S.) 1129.
(6) 50 Ind. Cas. 444; 46 C. 670; 23 C. W. N. 721; 17 A. L. J. 514; 36 M. L. J. 557; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.).

course of construction to the contrary. It transpires, however, that the tendency of judicial decisions has been in favour of the view that section 14 furnishes an exclusive remedy: See *Tara Chand* v. *Nafar Ali* (4), *Suresh Chandra* v. *Akkori Singh* (7), *Bejoy Chand Mahatab* v. *Tinkari Banerjee* (8) and *Bijoy Chand Mahatap* v. *Asutosh Chakrabarty* (9). We are not unmindful that the actual decision in *Nagendra Nath* v. *Chandra Sekhar* (10), militates against his view, but the question as to the effect of section 14 was neither raised nor considered there. We are of opinion that the purchaser must have recourse to the remedy provided by section 14 to the extent that it is available and that he cannot maintain a separate suit to obtain the relief which, if he had so desired, might have been granted to him against the *zemindar* in the suit for reversal of the sale.

In the present suit, the Subordinate Judge has pointed out that the purchaser did ask for relief in the suit instituted by the defaulters under section 14, but his prayer was not granted, as he was found to have made the purchase for the benefit of his father who was himself one of the defaulting *patnidars*. It further appears that in the appeal presented to this Court the plaintiff complained against the judgment of the Subordinate Judge refusing to award compensation to him, but this Court confirmed the decree of the Subordinate Judge. The view may consequently be well maintained that the claim for compensation urged by the plaintiff as defendant in the previous suit was overruled. From this standpoint, the claim is clearly barred and cannot be re-agitated in this litigation. We hold accordingly that the Subordinate Judge has correctly found that the claim in respect of the first three items cannot be sustained.

As regards the fourth item the respondent has expressed his willingness to return the security deposit, namely, the four promissory-notes of the face value of Rs. 100 each and Rs. 26 in cash.

The result is that the decree made by the Subordinate Judge is affirmed, subject to the modification that the decree will direct the defendant to return to the plaintiff the security deposit mentioned above. As the appeal has substantially failed, the appellant must pay the respondent the costs in this Court.

Rankin, J.—I concur.

Z. K.

Appeal dismisssed.

(7) 20 C. 746; 10 Ind. Dec. (N. S.) 503.
(8) 58 Ind. Cas. 741; 24 C. W. N. 617.
(9) 62 Ind. Cas. 731; 48 C. 454; 25 C. W. N. 42.
(10) 5 C. L. J. 59.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1037 OF 1921.

July 2, 1923.

Present:—Mr. Justice Foster.

MR. M. H. MEYRICK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DIPA PANDEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 29—Interpretation—Tenant taking settlement from proprietors, position of—Suit by thekadar *for arrears of rent—Rate of rent payable—Enhanced rent paid for 3 years—Enhancement, whether validated.*

The rule of section 29 of the Bengal Tenancy Act is intended to be a strict one, which the Courts should not allow to be defeated or evaded. [p. 24, col. 1.]

Plaintiff, the *thekadar* of a *patta* in a certain estate, sued to recover arrears of rent on the basis of a lease. It appeared that defendant No. 1 took different leases from defendant No. 2 the proprietor of the estate and finally executed a new lease in respect of the whole of the area comprised in the previous *kabuliyats*. On the expiry of this *kabuliyat*, defendant No. 1 took a fresh settlement of the same land from the proprietor at a rental in kind the value of which was estimated at Rs. 61. A suit was brought in respect of this lease:

Held, that defendant No. 1 had acquired occupancy rights by this settlement and that by virtue of section 29 of the Bengal Tenancy Act, his rent must be taken to be the original cash rent; [p. 24, col. 1.]

(2) that the plaintiff's suit was an attempt to defeat the provisions of section 29 of the Bengal Tenancy Act and he was not entitled to get any rent other than the original cash rent. [p. 24, col 1.]

Tarap Ali v. *Kalipada Bandopadhya*, 34 Ind. Cas. 971; 23 C. L. J. 635, followed.

MEYRICK *v.* DIPA PANDEY.

(3) that even if the enhanced rent had been realised for 3 years, the illegal enhancement could not be validated. [p. 24, col. 1.]

Bipin Behari v. *Krishnadhan Ghose*, 32 C. 395; 9 C. W. N. 265; 1 C. L. J. 10, referred to.

Appeal from the decision of the Subordinate Judge, Muzafferpur, dated the 3rd February 1921, affirming that of the Munsif Sitamarhi, dated the 15th June 1920.

Messrs. *L. N. Singh, Ram Prasad* and *Rai B. B. Saran*, for the Appellants.

Mr. *Mohammed Hassan Jan*, for the Respondents.

JUDGMENT.—The plaintiff is a *thekadar* under the Sheohar estate in respect of a *patti* of 3-annas 9-pies in *Mauza* Bhatalia. The second party defendants are the proprietors of the Sheohar estate. The defendants first party took leases from the Sheohar proprietors as follows: 16 *kathas* from 1308 to 1310 *Fasli* at an annual rental of Rs. 4-2-0 including cess, and 2 *bighas* 7 *kathas* from 1309 to 1315 *Fasli* at a rental of Rs. 12-2-0 including cess. These leases were taken in 1901 and 1902. Thereafter, the defendant No. 1 took another *patta* from the Sheohar proprietors in respect of 3 *bighas* 3 *kathas* of land, that is the whole of the area comprised in the previous *kabuliyats* at a rent which is called *manhunda* and which is a fixed amount of grain payable annually. This last *patta* having expired in 1322 *Fasli* a fresh settlement of the same land was taken by the defendant No. 1 from the Sheohar proprietors at a rent of 21 maunds 10½ seers of rice of which, according to the *kabuliyat*, the "*takhminan kimat*" is Rs. 61. This last lease is for the period 1323 to 133 *Fasli* and is the basis of the present suit for arrears of rent for the years 1324 to 1327 *Fasli*. The lower Courts have held that the lands were of *raiyati* stock and were settled by the proprietors with the defendant No. 1 who is a settled *raiyat* of Bhatalia village, that defendant No 1 acquired occupancy rights by this settlement, and that by virtue of section 29 of the Bengal Tenancy Act his rent must be taken to be the original cash-rent, namely, Rs. 12-2-0 plus Rs. 4-2-0 including cesses. Against this decision the plaintiff is appealing.

No argument has been addressed to me nor has evidence been put before me to suggest that there has been any surrender or any other form of determination of the original cash rent tenancy. In paragraph 7 of the written statement it would appear to be asserted that although the first settlement of 16 *kathas* came to an end in 1310 *Fasli* yet the defendant No. 1 has in fact ever since the original settlement been in possession of the whole area of 16 *kathas* and 2 *bighas* 7 *kathas*, 3 *bighas* 3 *kathas* in all. The first argument that has been put before me on behalf of the appellants is one which appears to me to be directly contrary to the terms of section 22 (2) of the Bengal Tenancy Act. It is urged that, as the Sheohar proprietors are only co-sharers in the village and as they purchased this area of 3 *bighas* 3 *kathas* in auction-sale, they should be considered to be *raiyats* in respect of this area, and, therefore, the defendant No. 1 cannot be himself an occupancy *ratyat*. I need not discuss this argument in view of the plain terms of section 22 of the Tenancy Act, but I may remark that there is not the slightest indication on the record that it has ever been the present appellant's case in any previous stage of this suit that he is other than a *thekadar* of a separate *takhta* or *patti* held from the Sheohar proprietors including within its ambit the land settled with the defendant No. 1. In fact the *kabuliyats* which have been filed as well as the pleadings indicate that this is the position.

It is urged that the remark in the *kabuliyat* as to the "*Takhminan kimat*" is mere surplusage its meaning being that at the time of the *kabuliyat* 21 maunds 10½ seers had a value of approximately Rs. 61. So it would be urged this was not a cash rent settlement, it was a fresh *bhaoli* settlement and the creation of a new holding and it would be urged that where the holding is changed and there is a break in continuity the new rent cannot be considered to be an enhancement. Moreover, as we know, *bhaoli* rents are uncertain and may change in value from year to year. In Fallon's Dictionary the word "*Takhminan*" which is evidently derivd from the word "*Takhmina*" (meaning an estimate) is defined as signifying "by appraisement," "at a rough estimate" and there is a secondary meaning "more or less". It appears clear to me

that the word in its context means that the value of 21 maunds 10½ seers shall be estimated at Rs. 61 for the purpose of the settlement. So, in my opinion, the ruling quoted by the learned Subordinate Judge *Tarap Ali* v. *Kalipada Bandopadhya* (1) is in point. It is clear that the rule of section 29 of the Bengal Tenancy Act was intended to be a strict one which the Courts should not allow to be defeated or evaded. A reference to section 147A of the Bengal Tenancy Act will show that the Courts are directed to examine even the compromises that are filed in Court between landlord and tenant to see whether the effect of such compromises would be to enhance the rent in a manner or to an extent not allowed by section 29. In my opinion the plaintiff's suit, as it stands, is an attempt to defeat the provisions of section 29 and the lower Courts have acted rightly in refusing any rent other than the original cash rent.

The last point urged is one which need not be discussed at length. The first proviso of section 29 has been quoted as validating even an illegal enhancement if the enhanced rent has been realised for three years. This is an obviously mistaken view of the section which it is unnecessary to dilate upon. It is not necessary to quote any authority, but I may refer to a Full Bench case *Bipin Behari* v. *Krishnadhan Ghose* (2).

This appeal is dismissed with costs to the tenant defendants.

Appeal dismissed.

K. S. D.

(1) 34 Ind. Cas. 97; 23 C. L. J. 635.
(2) 32 C. 395; 9 C. W. N. 265; 1 C. L. J. 12.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 965 OF 1922.
March 22, 1923.
Present:—Mr. Justice Moti Sagar.

JAGAN NATH AND OTHERS—DEFENDANTS—APPELLANTS
versus
BASANT RAM—PLAINTIFF—RESPONDENT.

Hindu Law—Guardianship—Marriage performed without consent of guardian, validity of—Civil Procedure Code (Act V of 1908), O. XXI, r. 32—Restitution of conjugal rights—Direction in decree that wife shall not be sent to Jail—Discretion, when to be exercised.

Under the Hindu Law, in the absence of the father and paternal male relations, the right of selecting a husband for a female infant devolves upon the mother and she is fully competent to give her daughter in marriage. [p. 25, col. 1]

The rules of Hindu Law as to the duty of giving in marriage are directory and not mandatory and in the absence of force or fraud a Hindu marriage, otherwise legally contracted and performed with necessary ceremonies, is not invalidated by the absence of the consent of the guardian entitled to give such consent. [p. 25, cols. 1 & 2.]

Maya Devi v. *Ram Chand*, 31 Ind. Cas. 186; 20 P. R. 1916; 177 P. W. R. 1915, *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316; 1 M. L. J. 85; 5 Ind. Dec. (N. S.) 221, *Ghazi* v. *Sukru* 19 A. 515; A. W. N. (1897) 139; 9 Ind. Dec. (N. S.) 333, *Mulchand Kuber* v. *Bhudhia*, 22 B. 812; 11 Ind. Dec. (N. S.) 1125 and *Gajja Nand* v. *Emperor*, 64 Ind. Cas. 500; 2 L. 288; 8 P. L. R. 1922; 23 Cr. L. J. 20, relied on

Dyal v. *Narain Das*, 64 P. R. 1884, distinguished.

The tendency of modern legislation is against sending women to Jail in civil matters, but when it is found that a woman against whom a decree for restitution of conjugal rights has been passed has contracted a second marriage and is living with her second husband, the discretion vested in the Court under O. XXI, r. 32 of the Civil Procedure Code should not be exercised in her favour. [p. 25, col. 2; p. 26, col. 1.]

Second appeal from a decree of the District Judge, Amritsar, dated the 6th March 1922, reversing that of the Munsif, First Class, Amritsar, dated the 10th of February 1921.

Mr. *Nihal Chand Mehra*, for the Appellants.

Mr. *Kanwar Narain* and Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—This was a suit for the restitution of conjugal rights brought by the respondent, Basant Ram, against his wife, *Musammat* Rukman, defendant No. 1. Three other persons were also impleaded as defendants to the suit. One was Jagan Nath, defendant No. 2, with whom *Musammat* Rukman, the wife of the

JAGAN NATH v. BASANT RAM.

plaintiff, is alleged to have contracted a second marriage. Defendants Nos. 3 and 4 were the father and mother of the plaintiff's wife. It was alleged that defendants Nos. 2 to 4 were preventing defendant No. 1 from going to her husband, and it was prayed that an injunction should be granted to the plaintiff restraining defendants from doing so. It was pleaded that there was no marriage between *Musammat* Rukman and the plaintiff that she had been lawfully married to Jagan Nath, defendant No. 2, with whom she had been living as a wife for seven years and that the plaintiff was not entitled to maintain the suit. The Trial Court found the factum of the marriage with the plaintiff established but held that it was invalid inasmuch as the father had not given his consent. The suit was accordingly dismissed. On appeal the learned District Judge found that no fraud on the part of the plaintiff had been proved, and that the marriage was not invalid for any other reason. He further held that the girl had been given in marriage by her mother and that the mere fact that the father had not given his consent did not render the marriage invalid. As a result of this finding, the plaintiff's suit was decreed but the Court ordered that the defendants shall not be arrested or detained in prison in execution of the decree.

Against this decision the defendants have preferred a second appeal to this Court, while the plaintiff has filed cross-objections with regard to the direction given by the lower Appellate Court that the decree shall not be executed by the arrest or detention of the judgment-debtor. It is clear that, in the absence of the father and paternal male relations, the right of selecting a husband for a female infant devolves upon the mother and the mother is, according to the rules of Hindu Law, fully competent to give her daughter in marriage. It has been laid down in *Maya Devi* v. *Ram Chand* (1) that the rules as to the duty of giving in marriage are directory and not mandatory and that in the absence of force or fraud, a Hindu marriage otherwise legally contracted and performed with the necessary ceremonies, is not invalidated by the absence of consent of the guardian entitled to give such consent. The same principle has been laid down in *Venkatacharyulu* v. *Rangacharyulu* (2), *Ghazi* v. *Sukru* (3), *Mulchand Kuber* v. *Bhudhia* (4) and *Gajja Nand* v. *Emperor* (5). Mr. Nihal Chand Mehra, however, relies very strongly on *Dyal* v. *Narain Das* (6) but it is manifest that that judgment does not lay down any rule of general applicability, and deals with its own peculiar circumstances. In that case the marriage was set aside because it was celebrated by the mother in direct opposition to her husband's authority and because the marriage was found to be unnecessary and unsuitable. There is no such finding in the present case. On the contrary, the finding of the learned District Judge is that no fraud has been established and that the marriage was not invalid for any other reason. I have, therefore, no hesitation in holding that a Court would not be justified in setting aside a Hindu marriage performed with all the necessary ceremonies simply because the consent of the guradian entitled to give such consent had not been obtained. I see no reason for disturbing the decree for restitution of conjugal rights granted by the Court below and dismiss the appeal of the defendants with costs.

As to the cross-objections filed by the plaintiff it appears that the only grounds upon which the learned District Judge has disallowed execution of the decree by the arrest of the judgment-debtor are that the marriage had been brought about by the mother of the girl who was under the influence of one Tota Ram, with whom she is alleged to have contracted an illegal intimacy and that the girl himself was a minor at the time the marriage took place. I do not think there are sufficient reasons for not allowing execution as proved in the ordinary manner. I am not unmindful of the fact that the tendency of the modern legislation is against sending women to Jail in civil

(1) 31 Ind. Cas. 186; 20 P. R. 1916; 177 P. W. R. 1915.

(2) 14 M. 316; 1 M. L. J. 85; 5 Ind. Dec. (N. S.) 221.

(3) 19 A. 515; A. W. N. (1897) 139; 9 Ind. Dec. (N. S.) 333.

(4) 22 B. 812; 11 Ind. Dec. (N. S.) 1125.

(5) 64 Ind. Cas. 500; 2 L. 288; 8 P. L. R. 1922 23 Cr. L. J. 20.

(6) 64 P. R. 1884.

matters but the facts of this case seem to me to be peculiar. Here the girl is alleged to have contracted a second marriage with another person, and she has been admittedly living with him as a wife for some time.

If the plaintiff is not allowed to reap the fruits of his decree, the result would be that the girl would probably be leading an unchaste life which would be highly undesirable. I would, therefore, allow the cross-objections and amend the decree of the lower Appellate Court by ordering that the direction that the decree shall not be executed by imprisonment shall be removed. No order as to costs.

Z. K. *Appeal dismissed; Cross-objection allowed.*

PATNA HIGH COURT.

CIVIL REVISION PETITION NO. 332 OF 1922.
April 17, 1923.
Present:—Mr. Justice Kulwant Sahay.
THE EAST INDIAN RAILWAY COMPANY, LIMITED—DEFENDANTS—APPLICANTS
versus
NETRAM GANESH LAL,—PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890), ss. 72, 76—Risk Note, Form B—"Loss," meaning of—Goods consigned for carriage—Suit for damages—Liability of Railway Company—Burden of proof.

The loss referred to in section 72 and other sections of Chapter VII of the Railways Act is the loss suffered by the consignor or the true owner, where such loss occurs by reason of misdelivery or non-delivery.

The word "loss" in the Risk Note, Form B, is not confined to the case of involuntary or unwilling parting with the things with reference to which the word is used.

Great Indian Peninsular Railway Company v. *Jitan Ram-Nirmal Ram* 72 Ind. Cas 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442, followed.

Where goods are consigned to a Railway Company for carriage under the Risk Note, Form B, the ordinary liability of the Railway Company under section 76 of the Railways Act is limited by the special agreement entered into by and between the parties under the Risk Note.

Great Indian Peninsular Railway Company v. *Jitan Ram-Nirmal*, 67 Ind. Cas. 664; 3 P. L. T. 222; (1922) A. I. R. (Pat.) 17, followed.

In order to succeed in an action for damages for loss of goods consigned to a Railway Company for carriage under the Risk Note, Form B, it is incumbent upon the plaintiff to prove wilful neglect on the part of the Railway Company or theft by or wilful neglect of its servants, agents or carriers.

Ghelabhai Punsi v. *East Indian Peninsular Railway Company*, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525, dissented from.

Petition against the decision of the Small Cause Court Judge, Dhanbad, dated the 14th August 1922.

Messrs. *Naresh Chandra Sinha* and *Sivanarayan Bose*, for the Appellants.

Mr. *Janak Kishore*, for the Respondents.

JUDGMENT.—This is an application for revision under section 25 of the Provincial Small Cause Courts Act filed by the defendants, the East Indian Railway Company, against the decision of the Small Cause Court Judge of Dhanbad, dated the 14th August 1922. The suit was brought by the plaintiffs for compensation for non-delivery of three bags of flour out of a consignment of 221 bags. The defendant Company raised the defence, *inter alia*, that the goods were despatched at owner's risk under Risk Note, Form B, and they were not liable for compensation as the three bags were lost during transit and the loss was not due to wilful neglect on the part of the Railway Administration or to theft by, or to the wilful neglect of, its servants. The learned Subordinate Judge has held that the Risk Note, Form B, was executed by the consignor, but he threw the onus upon the defendant Company to prove that the three packages in question were put into the wagon and sent but were lost. He held that there was no such evidence and that unless loss is proved the plaintiffs could not be called upon to prove that the loss was due to wilful neglect of the defendant. In support of the view taken by him the learned Judge relied upon the case of *Ghelabhai Punsi* v. *East Indian Railway Company* (1). He accordingly decreed the suit with costs.

It has been argued by the learned Vakil for the petitioners that the learned Judge was wrong in throwing the onus upon the defendant Company to prove the loss in

(1) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L.R., 525.

the first instance. He argues that the onus was entirely on the plaintiffs to prove wilful neglect on the part of the defendant Company. He further argues that, in any event, it was admitted by the plaintiffs in the plaint that the three packages in question were lost and, therefore, the defendant Company was not called upon to adduce evidence to prove the loss.

As regards the first point, the question is now settled by the decision of this Court in the case of *Great Indian Peninsular Railway Company* v. *Jitan Ram-Nirmal Ram* (2), that the loss referred to in section 72 and other sections of Chapter VII of the Indian Railways Act is the loss suffered by the consignor or the true owner, where such loss occurred by reason of misdelivery or non-delivery. The word 'loss' in the Risk Note is not confined to the case of involuntary or unwilling parting with the things with reference to which the word is used. If that is so, then non-delivery of the three packages in question in the present case amounts to loss within the meaning of the term used in the Risk Note executed by the consignor and, therefore, it was not necessary for the Railway Company, in the first instance, to prove the loss by adducing evidence on the point. Moreover, the loss of the packages was, I find, clearly admitted by the plaintiffs. The onus was, therefore, upon the plaintiffs to prove wilful neglect on the part of the Railway Administration or theft by, or to the wilful neglect of its servants, agents or carriers as provided for in the Risk Note, Form B.

It has been argued by the learned Vakil of the opposite party that, under section 76 of the Indian Railways Act, it was not necessary for the plaintiffs to prove how the loss was caused, but, as was held in the case of *Great Indian Peninsular Railway Company* v. *Jitan Ram-Nirmal Ram* (3), the ordinary liability under section 76 of the Indian Railways Act was limited by the special agreement entered into by and between the parties under the Risk Note, Form B. Such an agreement has been saved by clause (2) of section 72 of the Indian Railways Act and the parties were bound thereby. I am, therefore, of opinion that the learned Judge was wrong in throwing the onus upon the defendant Company to prove the loss in the first instance. In order to succeed in the action, it is incumbent upon the plaintiffs to prove wilful neglect on the part of the defendants or theft by, or wilful neglect of its servants, transport agents or carriers as provided by the Risk Note. The decree of the Court below must, therefore, be set aside and the case remanded to it for decision after throwing the onus of proof on the plaintiffs as stated above. It would be open to the plaintiffs to adduce evidence of wilful neglect if they choose to do so. Cost will abide the result. Hearing fee one gold *mohur*.

Z. K. *Order accordingly.*

(2) 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 169; (1923) A. I. R. (Pat) 285; 2 Pat. 442.

(3) 67 Ind. Cas. 664; 3 P. L. T. 222; (1922) A. I. R. (Pat.) 17.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1675 OF 1921.

March 2, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Panton.

RAM KUMAR DAS—PLAINTIFF—APPELLANT

versus

NANDA KUMAR SHAHA—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 16, 23—Undue influence—Public policy—Transfer made to stifle non-compoundable case, whether can be avoided—"In pari delicto melior est conditio possidentis," applicability of.

Where contracts or transactions are prohibited by law for the sake of protecting one set of men from another set of men; the one from their situation or condition being liable to be oppressed or imposed upon by the other; the parties cannot be said to be *in pari delicto* and the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. [p. 30, col. 1.]

Browning v. *Morris*, (1778) 2 Cowp. 790; 98 E. R. 1364, *Kearley* v. *Thomson*, (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804, relied on.

Therefore, where one person has, in such circumstances, paid money to another or has exe-

cuted deeds in favour of another in pursuance of an illegal agreement, *e. g.*, with the object of stifling a prosecution for a non compoundable offence, though both parties are *in delicto* yet they are not *in pari delicto* and the person who has paid the money or executed the deeds may recover it back in an action for money had and received or may apply for the setting aside of the deeds. [p. 30, col. 1.]

Atkinson v. *Denby*, (1861) 6 H. & N. 778; 123 R. R. 824; 30 L. J. Ex. 361; 7 Jur (N. S.) 1205; 4 L. T. (N. S.) 252; 9 W. R. 539; 158 E. R. 321, *Smith* v. *Cuff*, (1817) 6 M. & S. 160; 18 R. R. 340; 105 E. R. 1203 and *Smith* v. *Bromley*, (1760) 2 Douglas 696 *n.*; 99 E. R. 441, relied on.

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated May 12, 1921, reversing that of the Munsif, South Raujan, dated November 5, 1919.

Babu *Jogesh Chandra Roy* (with him Babu *Narendra Kumar Das*), for the Appellant.

Dr. *Sarat Chandra Basak* (with him Babus *Chandrashekhar Sen* and *Charuchandra Sen*), for the Respondents.

JUDGMENT.—The plaintiff is the appellant before us and the facts which have given rise to the suit out of which this appeal has arisen are, shortly stated, as follows: The defendants Nos. 1 and 2, who are the landlords, sued the plaintiff for an order for registration of an alleged agreement in respect of a tank. They were unsuccessful. They then sued the old tenant, defendant No. 7, one Rajani Raha, for the rent of the holding and obtained an *ex parte* decree. The latter applied for the setting aside of the said *ex parte* decree. During the pendency of that application, the defendant No. 7 applied for an adjournment of the hearing of the said application on the ground of his illness and in support thereof used an affidavit which had been sworn to by the plaintiff who had purchased the holding, which had originally belonged to defendant No. 7, and who had been recognized as tenant by the landlords, *i.e.*, the defendants Nos. 1 and 2. The affidavit referred to above was filed on the 10th February 1917 and it was alleged that the affidavit was false to the knowledge of the plaintiff. On the 14th March 1917, the defendants Nos. 1 and 2 applied to the Court for sanction under section 195 of the Code of Criminal Procedure to prosecute the plaintiff for offences under sections 193 and 199, Indian Penal Code, alleging that he had made a false affidavit. The application for sanction was set down for hearing on the 2nd February 1918, after various adjournments had been obtained by the parties. On that date the defendants Nos. 1 and 2 filed a list of their witnesses who were in attendance, but, subsequently, on the same day, they and the plaintiff filed a joint petition for time, alleging that they had come to terms and that the plaintiff would execute certain deeds on the following Tuesday "settling a tank and *bhita* with defendants Nos. 1 and 2's man Jagat Saha and releasing some paddy lands to the defendant No. 7 Rajani Raha." The case was accordingly adjourned to the 6th February 1918, and on that date a petition was filed by both parties, stating that the matter had been settled and praying that the application might be dismissed. The application was accordingly dismissed. On the same day, the plaintiff executed and presented for registration three deeds, Exhibit C, a *patta* settling the tank with defendants Nos. 1 and 2, Exhibit D, a dead of release, relinquishing the *bhita* in favour of defendant No. 3 and Exhibit E, a conveyance conveying the *nal* lands to the defendant No. 7, Rajani Raha. The plaintiff, in the present suit, alleges that the defendants Nos. 1 and 2 gained over the defendant No. 7, and as the result of a conspiracy between these persons and defendant No. 3 and Naba Saha, who was the predecessor-in-interest of the defendants Nos. 4 to 6, the case for sanction to prosecute the plaintiff was started. The plaintiff was apprehensive that sanction might be granted for prosecuting him, and as the defendants continued to threaten him with prosecution he was compelled to accept their proposals that he should execute certain deeds in consideration of their abandoning the application for sanction to prosecute. He urges that he executed the document referred to above without any consideration and as a result of undue influence, coercion, and threats of criminal prosecution excercised and used by the defendants Nos. 1 and 2, and he prays for a declaration that the said deeds are void

and inoperative and for an injunction restraining the defendants from excercising any rights over the properties comprised in the said deeds. There is also a prayer for recovery of possession of the said properties, should it be found that possession thereof is with the defendants. The allegations made by the plaintiff as regards charges of conspiracy, undue influence, coercion and threats of criminal prosecution are denied by the defendants, and it is urged on their behalf that the plaintiff voluntarily executed the deeds in question.

The Trial Court found that the possibility of a trial for perjury unsettled the plaintiff's mind and that on the 2nd February 1918, he had no other alternative but to accept the proposals of the defendants Nos. 1 and 2 in order that he might extricate himself from the position in which he found himself. It was further found that the defendants Nos. 1 and 2 were in a position to dominate the will of the plaintiff and that the facts connected with the execution of the deeds in question could fit in only with the theory that the defendants Nos. 1 and 2 did take advantage of their position to excercise undue influence upon the plaintiff to induce him to execute the deeds in question in respect of properties which the plaintiff had all along jealously guarded and it was also found that no consideration whatsoever had passed in respect of the deeds. After reviewing the entire evidence in the case, the Trial Court held that the deeds were executed by the plaintiff under undue influence practised upon him by the defendants Nos. 1 to 3 and 7 and for the purpose of avoiding a possible prosecution for perjury. In this view of the matter the plaintiff's suit was decreed.

The defendants preferred an appeal and it was held by the lower Appellate Court that it could not be said that there was a criminal conspiracy for the purpose of putting the plaintiff to trouble. It was further held that the plaintiff understood that there was every chance of sanction being accorded for his prosecution and in order to avoid the prosecution, which might result in a conviction, the plaintiff agreed to a compromise with the defendants on such terms as they were willing to offer. In other words, it was found that the compromise was for the purpose of stifling a criminal prosecution for a charge which was not compoundable, and that the object of the compromise was consequently illegal. But the lower Appellate Court held that the plaintiff could not apply to set aside the said document inasmuch as he was a person *in pari delicto* with the defendants, and, further, that on the evidence no case of undue influence had been made out. The lower Appellate Court, therefore, set aside the judgment and decree of the Court of the first instance.

Against this judgment and decree the plaintiff has appealed to this Court and it has been argued on his behalf that, on the findings arrived at by the two Courts, the conclusion that there was no undue influence exerted on the plaintiff is not sustainable, and, secondly, that the circumstances show that the conduct of the defendants was oppressive and that there is nothing in the law to prevent the plaintiff from getting the relief he seeks. On behalf of the respondents it has been argued that, assuming that the transaction in question was illegal, yet the plaintiff is disentitled to any relief, because the illegal purpose, whatever it was, had been carried out by the execution and the registration of the deeds in question and the parties were *in pari delicto* and maxim *melior est conditio possidentis* applies; in other words, it is argued that if the plaintiff could not make out his case for relief otherwise than through the medium and by the aid of the illegal transaction, to which he was himself a party, then it must be held that the plaintiff and the defendants were *in pari delicto* and, therefore, the plaintiff who seeks relief is disentitled to the same. The appellant relies upon the cases of *Willliams* v. *Bayley* (1), *Flower* v. *Sadler* (2); *Jones* v. *Merionethshire Building Society* (3); *Nujebar Rahman* v. *Muktashed Husain* (4) and *Muthuverappa Chetti* v. *Rama-*

(1) (1866) 1 H. L. 200 at p. 220; 12 Jur. (N. S.) 875; 35 L. J. Ch. 717; 14 L. T. 802.
(2) (1883) 10 Q. B. D. 572.
(3) (1892) 1 Ch. 173; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R. 273; 17 Cox C. C. 389.
(4) 15 Ind. Cas. 259; 40 C. 113; 16 C. W. N. 854.

swami Chetti (5) while the respondents rely upon the cases of *Taylor* v. *Chester*(6); *Scott* v. *Brown* (7) and *Holman* v. *Johnson* (8) where Lord Mansfield stated that the principle of public policy being *ex dolo male non oritur actio*, "no Court will lend its aid to a man who founds his cause of action upon an immoral and illegal act." The contention advanced by the respondents is only the application of the general rule that money paid on illegal contract cannot be recovered in the absence of fraud, duress or undue influence or oppression where the payment was obtained by the innocent misrepresentation of the other party [see *Harse* v. *Pearl Life Assurance Company* (9)]. The generality of the rule referred to above is, however, subject to some qualification *e. g.*, where contracts or transactions are prohibited by law, for the sake of protecting one set of men from another set of men; the one from their situation and condition being liable to be oppressed or imposed upon by the other; there the parties are not *in pari delicto*; and it has, therefore, been held that the person injured, after the transaction is finished and completed, may bring his action and defeat the contract [Per Lord Mansfield *Browning* v. *Morris* (10), *Kearley* v. *Thomson* (11)]. It would, therefore, follow that if one person has, in such circumstances, paid money to another or has executed deeds in favour of another in pursuance of an illegal agreement, though both parties are *in delicto*, yet they are not *in pari delicto* and the person who has paid the money or has executed the deeds may recover it back in an action for money paid and received or may apply for the setting aside of the deeds respectively. For instance, where a debtor has under pressure secretly paid a sum of money to his creditor to induce him to agree to a composition, the money so paid may be recovered back by the debtor [See *Atkinson* v. *Denby* (12) see also *Smith* v. *Cuff* (13), where Lord Ellenborough says: "It can never be predicated as *par delictum* when one holds the rod and the other bows to it." See also *Smith* v. *Bromley* (14). The case, therefore, resolves itself in to this, whether, on the facts disclosed in the evidence on record, it can be inferred that pressure or undue influence was exerted on the plaintiff, and for that purpose we have carefully considered the judgments of the two Courts below and such portions of the record as have been brought to our notice. In our opinion the facts found by the Trial Court, namely, that the application for sanction to prosecute was kept hanging over the head of the plaintiff from the 14th March 1917 to the 2nd February 1918; that on the last mentioned date the Pleaders for the defendants Nos. 1 and 2 insisted upon a joint petition for further time being put in, alleging that the parties had come to terms; that on the next adjourned date the plaintiff not only executed the three deeds in question but completed the registration thereof between 1 and 2 P. M.; that about 4 P. M. on the same date the application for sanction was allowed to be dismissed; that the defendant No. 7, whose illness was sworn to by the plaintiff in the affidavit referred to above, had been gained over by the defendants Nos. 1 and 2 (*e. g.*, his name was included in the list of witnesses filed by the defendants Nos. 1 and 2 on the 2nd February 1918); that under the deeds in question, defendants Nos. 1 and 2 got the tank, to obtain which they had pro pounded a forged lease in 1910 (Exhibit 9); that the defendant No. 3 and Naba Saha got the homestead which they sought in vain to get under a decree; and defendant No. 7 got the land which his family had lost many years ago and in respect of which the defendants Nos. 1 and 2 got the *ex*

(5) 34 Ind. Cas. 401; 40 M. 285; 31 M. L. J. 264.
(6) (1869) 4 Q. B. 309; 10 B. & S. 237; 38 L. J. Q. B. 225; 21 L. T. 359.
(7) (1892) 2 Q. B. 724; 61 L. J. Q. B. 738; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213.
(8) (1775) 1 Cowp. 341; 98 E. R. 1120.
(9) (1904) 1 K. B. 558; 73 L. J. K. B. 373; 90 L. T. 245; 52 W. R. 457; 20 T. L. R. 264.
(10) (1778) 2 Cowp. 790; 98 E. R. 1364.
(11) (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.
(12) (1861) 6 H. & N. 778; 123 R. R. 824; 30 L. J. Ex. 361; 7 Jur. (N. S.) 1205; 4 L. T. (N. S.) 252; 9 W. R. 539; 158 E. R. 321.
(13) (1817) 6 M. & S. 160; 18 R. R. 340; 105 E. R. 1203.
(14) (1760) 2 Douglas 696 *n.*; 99 E. R. 441.

parte decree, which the plaintiff was seeking to set aside lead to the irresistable conclusion that the deeds in question were not voluntary and the transaction was brought about because the defendants held the rod and the plaintiff bowed to the same. The facts have been very exhaustively set out in the judgment of the First Court, and, as far as we can see, the findings arrived at by the First Court cannot be and have not been legitimately displaced. In this view of the matter, the judgment and decree of the lower Appellate Court must be set aside and those of the Court of first instance restored.

The result, therefore, is that this appeal is allowed with costs in this Court and in the lower Appellate Court.

Appeal allowed.

Z. K.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 40 OF 1922.

February 2, 1923.

Present:—Mr. Justice Lentaigne.

MA MI AND OTHERS—DEFENDANTS —APPELLANTS

versus

HADJI MAHOMED *Bin* HAJI PULLAI MOHAMMED—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts 142, 144—Adverse possession—Trespasser, transferee from, whether entitled to tack on period of possession to that of predecessor.

Where a trespasser sells his claim to possession to a purchaser, the latter is entitled to tack the previous possession of his predecessor to his own possession for purposes of limitation and each subsequent purchaser of the claim or right to possession has a similar right to tack the previous periods of his predecessors-in-title. [p. 35, col. 1.]

Appeal against the judgment and decree of the Divisional Court, Myaungmya, passed in its Civil Appeal No. 106 of 1921.

Mr. *Villa*, for the Appellants.

Mr. *Barnabas*, for the Respondent.

JUDGMENT.—This is a second appeal filed on behalf of appellants-defendants against the concurrent decisions of the Sub-Divisional Court of Kyaiklat and the Divisional Court of Myaungmya granting the plaintiff-respondent a decree for possession of Holding No. 4 of 1918-19 of the Kakayan Kwin measuring 111·31 acres or thereabouts.

It is admitted that in 1902 one Ma Pwa Shin was the owner of the land in suit and that, in order to find funds to contest a suit relating to twenty-one holdings, she entered into an agreement for the sale of the twenty-one holdings to one Ma On Myaing for Rs. 12,000. That greement, dated the 12th June 1902, is filed at page 157 of the record of Civil Regular No. 2 of 1903 of the District Court of Pyapon.

In that suit, C. R. No. 2 of 1903, Ma On Myaing sued Ma Pwa Shin for specific performance of the said agreement and she joined S. Dhar, a Pleader, and his wife, Amelia Dhar, as second and third defendants, alleging that a conveyance of the same lands to the Dhars, dated 7th May 1903, and now filed at page 50 of C. R. No. 21 of 1906, was not binding on her and was made with full knowledge of and in breach of her agreement and also claiming that such conveyance to the Dhars should be delivered up and be cancelled. She obtained a decree in that suit for specific performance and a declaration that the conveyance to the Dhars was of no effect as against her. At page 187 of the same record there is also a receipt signed by S. Dhar, dated the 18th December 1906, acknowledging that Messrs. Burjorji and Dantra (the Advocates for the plaintiff, Ma On Myaing) had paid S. Dhar whatever was due to him as price of the lands. Ma On Myaing succeeded in obtaining possession of twenty holdings out of the twenty-one under that decree which she must have complied with. The result of that decree was that the title of the Dhars has become extinguished as against Ma On Myaing and such fact was *res judicata* as between the plaintiffs therein, Ma Pwa Shin, the first defendant, and the Dhars and all representatives of any of such parties.

It is stated that, so far, everybody referred to above had regarded the land

MA MI v. HADJI MAHOMED.

in suit as in "Kalayat Kwin" and not in "Kakayan Kwin," which is the correct description of the land in suit. The words "Kalayat Kwin" are the words in the conveyance to the Divars. I do not think that anything in this appeal turns on this mistake.

Previously to the settlement of the above suit, U Bi Po and his wife had obtained some decree, presumably a money-decree against Ma Pwa Shin, and in execution of such decree they caused the land in suit under its proper description of "Kakayan Kwin" to be attached and sold on the 28th March 1905, and the auction-purchaser at such Court-sale was one Maung On Gaing, whose representatives are the first five defendants-appellants in this second appeal. Maung On Gaing and his representatives have claimed that Maung On Gaing got possession after the Court-sale in 1905. Such taking of possession was regarded as an accepted fact in the judgment of the Chief Court in 1915 suit (discussed below) and it appears also to be an accepted fact in this case, and the Advocate for the respondent has in effect admitted it. Maung On Gaing and his representatives have also claimed that Maung On Gaing had continous possession from 1905 onwards until they sold the land to the Chetties defendants. This latter fact was also evidently an accepted fact in the Chief Court Appeal in the 1905 suit, and likewise does not appear to have been contested in this suit but it was attempted in the lower Court to take away the legal effect of such adverse possession by an ingenious argument as to independent trespassers, which did not really contest the above fact but only the claim to tack the subsequent possession of the Chetties for the purpose of limitation.

Respondent's Advocate referred to a statement made by Maung On Gaing in paragraph 3 of Exhibit 5 at page 96 of the 1915 Record that the Bailiff along with Ma E Byu had evicted Maung On Gaing's tenants and made over possession on the 17th August 1907 to Ma On Myaing as directed in Civil Execution No. 11 of 1907. The order, dated 5th September 1907, in the last three lines of page 99 of the same 1915 Record shows that Maung On Gaing or his tenant was nevertheless reinstated and allowed to continue in possession of the land during the enquiry into his objection. Presumably, the action of the Bailiff must have been cancelled by an order in that enquiry and, if so, the alleged ouster would not have constituted a break in possession, and, presumably also, the illegal ouster referred to in these papers must have ceased with the order at page 99, because, otherwise, the opponents of Maung On Gaing would most certainly have made a lot of capital out of it in both of these suits, instead of leaving it to the discovery of the Advocate for the respondent in this second appeal. In any case, the ouster would appear to have ended more than twelve years prior to the institution of the present suit. In the judgment of the Chief Court in 1915 there is a reference to Maung On Gaing's thirteen years possession and in 1920 it was probably fifteen years. When questioned by me as to the alleged ouster the Advocate for respondent informed me that he was unable to give any particulars as to how long the said ouster continued or as to when Maung On Gaing or his tenants re-entered into possession. The above reference to the order of September 1907 was subsequently discovered by me. I am, therefore, bound to hold that there was more than twelve years' possession on the part of defendants-appellants and their predecessor, Maung On Gaing, prior to the filing of this suit in 1920.

I am also of opinion that the plaint in this 1920 suit is defective in this respect and that it does not contain the necessary particulars as to possession or those required under O. VII, r. 6, of the Civil Procedure Code. It was the duty of the plaintiff to give the necessary details to show when his cause of of action arose and to show that the suit was not barred by limitation both in the plaint and when questioned, and also to prove them. Once it is admitted that Maung On Gaing was in possession in 1905, and that he has been in possession in recent years, there is a presumption in his favour, and, as I have said above, the fact of over twelve years' possession prior to suit does not appear to have been disputed except by the

untenable legal arguments as to the change from one trespasser to another.

Prior to the auction sale, the Dhars had failed in an application for a removal of the attachment, and, subsequently, they filed Civil Regular Suit No. 21 of 1906, a suit under section 283 of the former Civil Procedure Code against Maung On Gaing, the auction-purchaser, and the judgment-creditor, decree-holders, but they omitted to join the judgment-debtor, Ma Pwa Shin, as a party. In their plaint they alleged that they had possession but instead of filing it on a Rs. 10 stamp, they filed it as a suit for consequential relief on a stamp of Rs. 85; and they claimed not merely a declaration of their alleged title at the date of the attachment but also the consequential relief that the auction-sale be set aside. When judgment was passed in favour of the Dhars on the 5th February 1909, the Court overlooked tha fact that the Dhars had claimed more than a mere declaration and gave them only a declaration of their title at the date of attachment. In other words, the prayer that the sale be set aside was overlooked. Uner section 11, Explanation V, of the Civil Procedure Code of 1908, which had come into force on the 1st January 1909, the relief that the auction-sale be set aside which had been sought for in the plaint should, under this judgment and decree, be deemed to have been refused. All that was decreed was a mere declaration that the Dhars had a right to the land at the date of the attachment in 1904.

The decree in Suit No. 2 of 1903 was passed on 7th March 1904 and was altered on appeal but the Dhars' title, if any, would not under that decree have been extinguished until the Rs. 12,000 had been tendered as the price for specific performance and I take it that the actual extinguishment of the Dhars' title would not have occurred until they paid the price of the land on the 18th December 1906. After that date the Dhars had no further interest in the land and it is difficult to see how the decree passed on the 5th February 1909 in Civil Regular No. 21 of 1906 could be of any use to anybody unless and until it was made effective by getting possession under some subsequent decree. I notice that the question of joining Ma On Myaing as a party, plaintiff had been considered in that suit Civil Regular No. 21, for I find that she was made a plaintiff and struck out by consent whilst at another time the Dhars had tried to get their names struck out. The probability is that the Dhars continued in that suit merely to oblige Ma On Myaing and in the hope that they might be trustees for her. The decree they obtained obviously did not create any title in anybody or do anything more than remove a technical bar to further proceedings and declare that at a certain date in 1904 the Dhars had a right to the land as against the judgment-debtor, Ma Pwa Shin.

We now come to the suit Civil Regular No. 20 of 1915 of the District Court of Pyapon. According to the plaint in that suit Mulla Dawood Sons & Co. had become vested firstly with the rights of Ma E Byu, attorney of Ma On Myaing, to the lands in suit under a mortgage-deed, dated 13th January 1909, and, secondly, by other deeds, through Tar Muhammad, of the right to the equity of redemption subject to that mortgage. In that suit Mulla Dawood Sons & Co., sued Maung On Gaing, his wife and the two Chetties for possession of the suit land and it is stated in the plaint that Maung On Gaing had transferred the land to the Chetties defendants in that suit. The plaint in suit actually alleged a transfer by the Dhars to Ma E Byu in 1908 of their rights in the land in suit but the transfer apparently only covered the other twenty holdings. Though Ma On Myaing had obtained a decree for specific performance against Ma Pwa Shin, she had been content with a partial performance from the Dhars and had no complete formal title to the land in suit and consequertly the transferees of her rights were under the same defect. That suit was dismissed.

Then the present plaintiff in the present suit, Civil Regular No. 49 of 1920, again sued the defendants-appellants for possession of this same land. It is alleged that, as the present plaintiff has not merely a proper sequence of deeds from previous owners since Ma On Myaing but also *inter*

alla a proper conveyance from the Dhars, he is in a better position. The conveyance from the Dhars is dated 13th December 1916 and does purport to convey a piece of land in Kakayan Kwin, presumably the land in suit.

Mr. Villa contended that as the Dhars' title had been extinguished in 1906, there was nothing which they could convey by this later conveyance. On a closer consideration of the question, I am doubtful as to the accuracy of this contention. The decree in the 1903 suit only set aside the title of the Dhars against Ma On Myaing. This does not necessarily mean that the title of the Dhars as against other persons was set aside, and it does appear to me that there may have been some residuum of title left in the Dhars which could be transferred to Ma On Myaing or her successors-in-title.

Mr. Villa also contends that the present suit is barred under the law as to *res judicata* by reason of the decrees in the 1915 suit. The plaintiff-respondent, however, contends that the additional conveyance from Dhar makes the present suit one in which the parties are not litigating under the same title, and that, therefore, section 11 of the Civil Procedure Code cannot apply. I am of opinion that in one very important respect the plaintiffs in both suits were litigating under the same title. The title of the plaintiffs to the land as against the Dhars under the decree in the 1903 suit and which constituted the most essential part of their claim to recover possession of the land was common to both suits as it was based on the decree in the 1903 suit, and the beneficial interest of the persons really entitled to be beneficiaries was vested in the plaintiff in both suits. It is quite true that such title was held in the 1915 suit to be insufficient to enable the plaintiffs-respondents to recover the land, but I am of opinion that such a contention would not be sufficient to prevent a finding that the fundamental beneficial title was common to the two suits. If the Dhars had filed a suit to recover possession of the land in 1915, they would have been met by the objection that the decree in the 1903 suit had completely divested them of all *subsequent* title so far as concerned Ma On Myaing and her successors-in-interest. It was not intended in that decree that the Dhars should convey to Ma On Myaing but that Ma Pwa Shin should convey, and consequently the decree when it became absolute on payment effectually divested the Dhars of title, and if Ma On Myaing had obtained the proper conveyance from Ma Pwa Shin, it would not have been necessary to get any conveyance from the Dhars who had been paid off in full.

The object in getting the conveyance from the Dhars was two-fold, *firstly*, to cloak the fact that no proper conveyance had been obtained from Ma Pwa Shin in accordance with the decree in the 1903 suit and, if possible, to get over that defect I will assume for the argument that it was effectual for that purpose of transferring title from a trustee to a beneficiary. *Secondly*, the object would be to get whatever benefit could be obtained from the declaratory decree in the 1906 suit and to remove all questions under the closing words of section 283 of the old Code of 1882.

On this consideration of the case, the question of *res judicata* would really depend on the answer to the question whether the holding of the beneficial interest as persons so entitled to the ownership of the property in the suit of 1915 would render the questions decided in that suit and the right to claim relief against defendants-appellants *res judicata* so as to bar the present suit in which an additional or clearer title is made by the additional transfer of some outstanding trustee interest which had been held in trust for such beneficiaries? If it is necessary to decide this point, it will be only fair to permit the parties to argue this legal question, as the arguments before me were really intended to cover only the question of limitation.

As I consider that the question of limitation is the one clear and final answer to plaintiff's suit, I will decide the case on that point. In my opinion it would be absurd to describe the possession of Maung On Gaing and his successors-in-title as the possession of a trespasser. That possession originated in a Court-sale in which Maung On Gaing paid a considerable sum believing

that he was getting a good title and I have held that such possession was continuous and lasted from 1905 up to the institution of the suit in 1920. Maung On Gaing was entitled to remain in possession from 1905 onwards until the Court-sale should be set aisde and until he should be properly dispossessed, in which event he would have been entitled to recover the purchase price he had paid for the land. Assuming that somebody else either the beneficiaries, Ma On Myaing and her successors (in a title traced from her decree), or the possible trustees, the Dhars had a better title, that would not make Maung On Gaing a trespasser, and if it did, it would not matter for purposes of limitation. A trespasser is also entitled to rely on a title acquired by twelve years' adverse possession.

The cases quoted in the lower Courts to the effect that one trespasser cannot tack the period occupied by the possessor of another trespasser does not touch the real question in this case. The trespassers in such cases would be *independent* trespassers and not the so called trespassers claiming to have purchased the one from the other. In other words, each of the independent trespassers referred to in such cases would have entered in defiance of the rights of all previous trespassers. As the law assumes that possession follows title, the law would have assumed that the interval between the occupation of one such trespasser and that of the other was a period in which the real owner was in possession.

On the other hand, where a trespasser sells his claim to possession to a purchaser, that purchaser is entitled to tack the previous possession to his own possession for purposes of limitation and each subsequent purchaser of the claim or right to possess on would have the similar right to tack the previous periods of his predecessors-in-title. That aspect of the case is fully discussed in Rustomji on the Law of Limitation, Third Edition, 1922, at page 634, and the question as to the different position of the *independent* trespassers is discussed in the following ten or twenty pages. In the present case there is, admittedly, a transfer from Maung On Gaing to the Chetties.

I pointed out these pages of Rustomji and the above distinction to the Advocates and they did not argue that it was incorrect, but confined the argument to the question whether the appellants were trespassers and whether the possession was proved. As I hold that defendants-appellants had twelve years' adverse possession of the land in suit both for the purposes of Arts. 142 and 144 of the Indian Limitation Act, I set aside the judgments and decrees of both the lower Courts and I direct that the plaintiffs-respondents' suit be dismissed and that defendants-appellants do recover costs in all three Courts.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 370 OF 1920.
March 16, 1923.
Present:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Gokul Prasad.
BIJAI SHANKER SELHER AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAM CHRITRA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Alluvion—Accession—Bengal Alluvion and Diluvion Regulation (XI of 1825)—Right asserted on several occasions negatived—Presumption.

There is no law under which alluvial land can be regarded as an accession to a village unless it is a case of gradual accretion within the meaning of Bengal Regulation XI of 1825. [p. 37, col. 2.]

Plaintiffs asserted their rights to certain alluvial lands in 1853, 1884, 1894, 1899, 1901 and 1903 and the right was negatived on each occasion. They brought a suit to establish their title to the lands in 1904 but withdrew it. In 1919 they brought the present suit for declaration of their title to the lands. It was found that they had never been in possession of the lands in dispute:

Held, (1) that the plaintiffs had not established any right to the land in dispute; [p. 38, col. 1.]

(2) that even if they had acquired any rights to the lands by accession, they had acquiesced in the deprivation of their rights and were no longer entitled to the property. [p. 38, col. 1.]

Secretary of State for India v. *Krishnamoni Gupta*, 29 C. 518; 4 Bom. L. R. 537; 6 C. W. N.

617; 29 I. A. 104; 8 Sar p. C. J. 269 (P. C.) and *Basanta Kumar Roy* v. *Secretary of State*, 40 Ind. Cas. 337; 44 C. 858; 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; 44 I. A. 104 (P. C.), distinguished.

Partab Bahadur Singh v. *Gajadhar Bakhsh Singh*, 24 A. 521; 29 I. A. 148; 7 C. W. N. 971; 4 Bom. L. R. 845; 8 Sar P. C. J. 310 (P. C.) and *Khuda Bakhsh* v. *Alim-un-nissa*, 27 A. 313; 1 A. L. J. 715; A. W. N. (1904) 273, referred to.

First appeal from the decree of the Subordinate Judge, Ghazipur, dated the 13th of September 1920.

Messrs. *B. E. O'Conor*, *S. N. Sen* and *A. Sanyal*, for the Appellants.

Dr. *S. M. Sulaiman*, Messrs. *Iqbal Ahmad*, *P. L. Banerji*, *K. N. Laghate* and *S. N. Gupta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a declaration of the plaintiff's right to some alluvial land, 1005 *bighas* in area. This land has emerged out of the river Ganges which lies to the north of Dhanapur, the village of which the defendants are the owners. To the west of that parent village is a village which has apparently been formed since 1836 and is called Arazi Dayara Dhanapur. The plaintiffs alleged in their plaint that they were the owners of the village Arazi Dayara Dhanapur; that the land in suit had accreted to that village, and, therefore, formed an accession to the village; that they had themselves become proprietors of the disputed land, and that the defendants, the owners of the village Dhanapur *khas*, had no right to the aforesaid land. They based their claim in the plaint upon the custom known as the custom of *dhardhura*. That custom means that the deep stream is the boundary between two villages lying on opposite banks of the stream. Dr. Sen has in his argument conceded that the present claim cannot be regarded as a claim based upon the custom of *dhardhura*. As we have already stated, the plaintiffs alleged that they were the owners of the village now known as Arazi Dayara Dhanapur. It has been found by the Court below that the plaintiffs are not the owners of that village, but that they are mortgagees from the owners of the village, namely, the predecessors-in-title of the defendants, and that they are in possession of the village as such mortgagees. This position has been accepted by Dr. Sen on behalf of the appellants, and he urges that the land in dispute is an accession to the village mortgaged to them, and that their security has thus increased by the addition to it of the alluvial land now in dispute.

It has been established by the evidence adduced in this case that in the year 1836 some land emerged from the river Ganges and this land was settled with the owners of the parent village Dhanapur, and was declared to be the village of Arazi Dayara. In front of this village lies the land now in controversy. In 1853 some 55 *bighas* of land emerged from the Ganges and it was settled with the defendants' predecessors, namely, the owners of Dhanapur on a revenue of Rs. 80. After that year the land was submerged and the revenue was reduced to Re. 1, which was paid by the proprietors of Dhanapur. In 1884 the land re-appeared and the quantity of culturable land in that year was about 47 *bighas*. This was again settled with the defendants on a revenue of Rs. 68. The predecessors of the plaintiffs claimed that the settlement of this land should be made by Government with them, but their claim was disallowed by the Revenue Authorities and the land was settled, as we have said above, with the defendants' predecessors. Since the year 1884 settlements have been made with the predecessors-in-title of the defendants and the defendants, down to the year 1920. In 1894 the plaintiffs' predecessors again asked the Revenue Authorities to settle the land with them, but their prayer was rejected, and they were referred to the Civil Court to establish their title. Both in that year and in 1884 their right to the land now in dispute was challenged by the proprietors of Dhanapur. In 1899 the predecessors of the plaintiffs made an application to the Revenue Court asking that the boundaries should be fixed between the village of Arazi Dayara and the parent village of Dhanapur on the one side, and between Arazi Dayara and the land which had newly emerged and which they described as Dayara *jadid*. We may mention that at the time when the Revenue Authorities settled the land which had re-merged with the defendants' predecessors

they described the land as Gangbarar Dhanapur, and it is between this Gangbarar Dhanapur and the village of Arazi Dayara, that the predecessors of the plaintiffs asked the Revenue Court to fix boundary pillars. In 1901 there was some litigation in the Revenue Court relating to the payment of rent of land appertaining to the land now in dispute. The predecessors of the plaintiffs claimed to have realized the rent. The Revenue Authorities held against them and also held that they had no right to this land which had been settled with the ancestor of the defendants. Again, in 1903, disputes arose in the Criminal Court under section 145, Criminal Procedure Code, as to the possession of this land, and the Criminal Court held in favour of the defendants, maintaining their possession. In 1904 the plaintiffs instituted a suit similar to the present suit asking for a declaration of their title to the land in dispute. That suit was resisted by the defendants but the plaintiffs withdrew the suit. It was not until the year 1919 that they instituted the present suit in which they claim only a declaratory decree. Ever since the year 1884, when their title to the land in question was disputed, they never came to the Civil Court (except in 1904) to establish their right, and it is very reasonably contended on behalf of the respondents that, in these circumstances, the Court ought to be very reluctant to grant a decree for a declaration of right only. There is no evidence on the record to prove at what period the mortgage in favour of the plaintiffs' predecessors was made, but we find from the evidence that, up to the year 1853, they had no connection with the village of Arazi Dayara. It is only for the first time in the *wajib-ul-arz* for the year 1882 that mention was made of the name of Jagmohan Singh as mortgagee of the village. We have to see whether the mortgage in favour of the plaintiffs' predecessors could be attached to the land now in dispute. Originally, the land described as Gangbarar Dhanapur was settled with the defendants. At that time the defendants were owners both of the parent village Dhanapur and of the village Arazi Dayara Dhanapur. Manifestly, the land which had appeared in 1853 had become submerged in that year and re-appeared in 1884. The area of the culturable portion of the land on both occasions was practically the same. Therefore, it may reasonably be presumed that the settlement which was made with the defendants' predecessors in 1884 was a settlement of the same land which had in 1853 been settled with them. At no time during this period had it been recorded as an accretion to the village of Arazi Dayara. In the absence of the mortgage-deed which it was the duty of the plaintiffs to produce and prove, it cannot be said whether the land which had appeared in 1853 in front of the village of Arazi Dayara was mortgaged to the plaintiffs' predecessors or could be deemed to be land appertaining to that village. Between 1853 and 1884 the land was under water. In 1884, for the first time, it re-appeared and subsequently it re-appeared in larger quantities year after year. The learned Subordinate Judge has held that the land accreted to the village of Arazi Dayara and, therefore, under the law and the prevailing custom and upon principles of equity, the mortgagees must be deemed to have acquired a right to the additional land thrown up by the river. We are not aware of any law under which the land could be regarded as an accession to the village of Arazi Dayara Dhanapur, unless it was a gradual accretion to the land within the meaning of Regulation XI of 1825. It was nowhere alleged in the plaint that the land was a gradual accretion, and it has not been shown that the accretion was in reality gradual. As to usage, the only usage alleged was the custom of *dhar dhura* which, admittedly and obviously, has no application to the present case. We fail to see upon what principle of equity the plaintiffs can be deemed to have acquired the right to this land. As already stated, they asserted their right upon two or three occasions and on each occasion their right was denied and they took no further steps to have that right established. We are not satisfied that the plaintiffs have been able to prove that they ever acquired a right to the disputed land as an accession to the village of which they are the mortgagees. On the contrary, by their application in 1899 they seem

to have accepted the position that their village was distinct from Gangbarar Dhanapur, that is, the disputed land which they call in their application Dayara *jadia* or the new alluvial land. From these circumstances Mr. Peary Lal Banerji, on behalf of the defendants, has contended that the plaintiffs' suit should fail on two grounds. First, that they have not established their right to the land in question, and, secondly, that even if they had acquired such right, they abondoned the right so far back as 1899. His contention in both respects seems to us to be valid. We have not been satisfied that the plaintiff's acquired this land at any time, and it has not been shown that they ever got possession. The evidence is to the contrary and actual possession has always remained with the defendants except during the short periods that the land was under water in the rainy season. As the plaintiffs never acquired the ownership of the land and were never in possession, the rulings of their Lordships of the Privy Council in the case of *Secretary of State for India* v. *Krishnamoni Gupta* (1) and the case of *Basanta Kumar Roy* v. *Secretary of State* (2) do not seem to have any application to the present case and cannot help the plaintiffs. The conduct of the plaintiffs clearly shows that they acquiesced in the deprivation of any rights which they might have acquired as accessions to their security. This case to some extent resembles the case of *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (3) and the case of *Khuda Bakhsh* v. *Alimun-nissa* (4). We do not agree with the learned Subordinate Judge in his conclusion that the land was an accession to the village of which the plaintiffs are mortgagees. But we do agree with him that the plaintiffs have lost any right which they may have had by reason of their not having brought any suit for a declaration of their right within 6 years prior to the institution of the present suit. In these circumstances, the appeal must fail. We dismiss it with costs including fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 29 C. 318; 4 Bom. L. R. 537; 6 C. W. N. 817; 29 I. A. 104; 8 Sar P. C. J. 260 (P. C.).
(2) 40 Ind. Cas. 337; 44 C. 858; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 399; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P.C.)
(3) 24 A. 521; 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar P. C. J. 310 (P. C.).
(4) 27 A. 313; 1 A. L. J. 715; A. W. N. (1904) 273.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO 289 OF 1921.
April 23, 1923.
Present :—Justice Sir William Ayling, KT., and Mr. Justice Odgers.
THE TALUK BOARD, DINDIGUL, THROUGH ITS PRESIDENT—DEFENDANT NO. 1—APPELLANT
versus
VENKATARAMA AIYAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Poramboke *land—User by villagers for communa purposes—Right of Government to grant land for building purposes—Acquisition of right by villagers—Customary right, acquisition of.*

A piece of *Natham Poramboke* land in a village which had been used by the villagers from time immemorial as a threshing floor in time of harvest, for stocking manure and green leaves, for drying paddy and other communal purposes connected with agricultural operations, was granted by Government to a Taluk Board for building purposes :

Held, that the enjoyment of the land by the villagers was of too fugitive and permissive a character to afford support to the acquisition of any right based on prescription or custom, and that consequently the grant by Government for building purposes was legal. [p. 39, col. 2.]

Per *Ayling, J.*—According to the Common Law of the country, the control of the *gramanatham* vests in the Revenue Authorities and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes. [p. 39, col. 2.]

Collector of Godavari District v. *Jannavula Pedda Rengayya*, 4 M. L. T. 440, followed.

Per *Odgers, J.*—The user alleged in the case was much too indefinite in extent and application to constitute evidence of any custom. [p. 41, col. 1.]

Palaniandi Tevan v. *Puthirangonda Nadan*, 20 M. 389; 7 Ind. Dec. (N. S.) 277, referred to.

A Court should not hold in favour of the existence of a local custom unless it is satisfied of its reasonableness and of its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not

by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that, originally, by agreement or otherwise, the usage had become the customary law of the place in respect of the persons or things which it concerned. [p. 41, col. 1.]

Kuar Sen v. *Mamman*, 17 A. 87; A. W. N. (1895) 101; 8 Ind Dec. (N. S.) 381, relied on.

Second appeal against the decree, dated 4th October 1920, of the Court of the Additional Subordinate Judge, Madura, in Appeal Suit No. 49 of 1920, preferred against the decree, dated 15th July 1919, of the Court of the District Munsif of Thirumangalam in Original Suit No. 417 of 1918.

Messrs. *T. Narasimha Aiyangar* and *Nalasiwam Pillai*, for the Appellant.

Mr. *K. Bashyam Aiyangar*, for the Respondent.

JUDGMENT.

Ayling, J.—This appeal relates to a plot of land, 14 cents in extent, forming part of S. No. 261/2 P-4 in Solaikurichi village, Madura Taluk, which measures 19·28 acres and is registered as *Nattam* (building site) *poramboke*. Most of the S. No. has already been built over, but 2.92 acres are still vacant and of this Government has granted the suit plot to the Dindigul Taluk Board (1st defendant) to build a Girls' School upon. The plaintiffs are villagers, who claim that they have a right to use the whole of the vacant land (including the suit site) for various agricultural purposes and plead that the grant to the Taluk Board is consequently illegal.

The sole question is as to the legality of the grant and on this the two lower Courts have come to opposite conclusions, the Subordinate Judge in first appeal deciding in favour of plaintiffs.

It is not disputed that *nattam poramboke* may properly be granted for the purpose specified: but plaintiffs claim a right vested in the villagers, whom they represent, incompatible with such a grant.

They say in paragraph 5 of the plaint, "from time immemorial this *kalam poramboke* has been in the undisturbed enjoyment of the *raiyats* of the said villages and they have been using it as of right for communal purposes as detailed hereunder. That the said site from time out of mind has been used and is now being used as a threshing floor for about 500 acres in times of harvest (*kodai* and *kalam*) for storing manure and green leaves, for stocking hay-stacks immediately after the harvest, for drying paddy before they are taken to the granaries of the *raiyats*, for allowing their cattle, buffaloes, etc., amounting to 1,000 and more, to stray and remain there, before they are taken for grazing and for other incidental innumerable purposes connected with agricultural operations."

The lower Appellate Court finds as a fact that the villagers have been using the land for purposes mentioned in the plaint and proceeds: "The question is whether such enjoyment has given them the right asserted by them in the plaint or whether it was only as a matter of grace that the villagers were permitted such acts of enjoyment." He decides in favour of plaintiffs.

It seems to me that whether the right claimed by the plaintiffs is based on custom or prescription, the enjoyment alleged is of too fugitive and patently permissive a kind to afford any support to it. There is probably no village in the Presidency in which the unoccupied village site is not used for the purposes indicated. Such user does no harm to any one, and is unobjectionable until the land is wanted for its legitimate purpose. I do not propose to labour this point, as it is sufficient to quote from the judgment of a Bench of this Court (Benson and Bhashyam Aiyangar, JJ.,) dealing with an absolutely similar case, *Collector of Godavari District* v. *Jannavula Pedda Rengayya* (1)" "According to the Common Law of the country the control of *gramanatham* vests in the Revenue Authorities and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes."

It is suggested as a ground of distinction that the use of the land as a threshing floor, which is not specifically referred to by the learned Judges in that case though probably included, is a ground of distinction. It seems to me to differ in no way from the other uses set out in the plaint Any

(1) 4 M. L. T. 449.

flat hard piece of ground can be utilized as a threshing floor and such user is of just the same character as the others.

Apart from the evidence of user, the only other evidence in plaintiffs' favour to which we are referred is Exhibit A, copy of an order of the Madura Tehsildar in 1902. It appears from this that about that time another portion of the same unoccupied *natham poramboke* had been set apart for building Police Lines and that on the *ralyats* petitioning that this would be "an obstruction to the public use" it was ordered "that another locality should be selected and that the place originally chosen should be kept as threshing floor, *poramboke*, etc., for the public use."

I am not prepared to attach much weight to this as evidence of recognition by Government of the rights claimed by plaintiffs, and still less as evidence of a fresh grant for communal purposes other than building site. Exhibit A is merely the order of the Tehsildar communicating to the *ralyats* the fact that the Board of Revenue had acceded to their request and given up the scheme of building Police Lines on that spot. Neither the petition of the *ralyats* nor the orders or reports of the Deputy Collector and Collector, or the proceedings of the Board (all specifically referred to in Exhibit A) are in *evidence* and I find it impossible to say from Exhibit A that Government either recognised plaintiffs' rights, or made a fresh grant of the land. We do not know the extent of the land required for the Police Lines, or, except by conjecture, the nature of the petitioners' objections, or the extent to which the existence of an equally suitable alternative site may have influenced the Board's decision. I cannot agree with the lower Appellate Court that Exhibit A evidences any acknowledgment of plaintiffs' rights, or was more than a concession to their pleas (or those of their predecessors) on the ground of comparative convenience as estimated at the time.

I would set aside the decree of the lower Appellate Court and restore that of the District Munsif dismissing the suit with costs throughout.

Odgers, J.—My learned brother has set out the facts and it is unnecessary for me to repeat them. The question is, "have the plaintiffs acquired any and what right in the suit land?" The question falls under two heads: (1) have they acquired such rights, if at all, by long enjoyment: or (2) by grant? The land is admittedly building site *poramboke* and any rights acquired by long enjoyment must have been acquired against Government. The lower Appellate Court has apparently found a customary right in favour of plaintiffs, founded on long enjoyment from 28 to 70 years as spoken to by the witnesses.

The nature of the enjoyment is very varied —the user most prominently put forward is *kalam* (threshing floor); but other alleged user includes, "storing manure and green leaves, stocking hay-stacks, drying paddy, allowing cattle, buffaloes, etc., to stray and remain there before they are taken for grazing and for other incidental innumerable purposes connected with agricultural operations." (See plaint paragraph 5). In the first place, it seems clear that no easement in the ordinary sense of the term, as defined by section 4 of the Easements Act, has been acquired. The right is not set up in respect of a dominant tenement to which the easement is appurtenant over a servient tenement subject to it. *Ashraf Ali* v. *Jagannath* (2). It is true that section 18 of the Easements Act recognizes that easements may be acquired by virtue of a local custom and the Illustration (*a*) to the section appears to illustrate a customary right rather than an easement though it may be justified by the fact that every cultivator, as the owner or possessor of cultivated land has the right to graze his cattle on the common waste. In my opinion the right claimed here must be established, if at all, as a custom recognised in section 2 (*b*), Easements Act. The distinction between a customary right and customary easement is seen in *Palaniandi Tevan* v. *Puthirangonda Nadan* (3). No fixed period is laid down by law as necessary to establish the former. In the Madras case quoted above, the law as laid down in

(2) 6 A. 497; A. W. N. (1884) 186; 4 Ind. Dec. (N. S.) 147.
(3) 20 M. 389; 7 Ind. Dec. (N. S.) 277.

Kuar Sen v. *Mamman* (4) was approved. The learned Judges there held (paragraph (2) p. 92) " In our opinion a Court should not decide that a local custom, such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned." Apart from reasonableness, I do not think it can be said in the present case, that the alleged custom is certain as to extent of application. The waste land in question was obviously used for any and all purposes or for several purposes at one or different times. Each user was fugitive or intermitent so much so that, as shown by the plaint itself, it is extremely difficult if not impossible to say what the customary user sought to be established was. Indiscriminate miscellaneous user of village waste land cannot, in my opinion, establish the fact that such user had become " a customary law of the place in respect of the persons and things which it concerned." The user here is much too indefinite to do anything of the kind ; I do not think the attempt to establish the primary user of the land as *kalam* can be supported.

In *Collector of Godavari District* v. *Jannavula Pedda Rengayya* (1) a precisely similar case arose as to the village building site. The learned Judges held that no customary right was established. They said: "until it (the land) is appropriated in this way to the use of some definite person it is usual for the villagers to make use of it in any way that suits them best. They throw rubbish on it, graze their cattle on it, use it as a latrine and the like and they are rarely interfered with. But it is always understood that this use is permissive on the part of Government and that Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes."

(4) 17 A. 871 A. W. N. (1895) 101 6 Ind. Dec. (N. S.) 381.

There is, therfore, no sufficient evidence from which I can say that a custom has been established.

There is no direct evidence of any grant; but the lower Appellate Court relies on Exhibit A as an acknowledgment of the rights of the plaintiffs in the suit land. The villagers protested some years ago when it was proposed to erect Police Lines on the site in question. The Collector's order, proceedings of the Board of Revenue and Deputy Collector's disposal, though referred to in Exhibit A, are not before us and Exhibit A is an endorsement signed by the Tehsildar on the petitions of the villagers. The endorsement says, 'the place shall be kept as threshing floor, *poramboke*, etc., for the public use.' It may be that no undertaking is intended or implied in this that the place shall be so kept for ever; in any case I think it impossible to hold that Government by this endorsement of the Tehsildar either intended or must be held in law to recognise the alleged customary rights of the villagers in the waste. If this were so, it would be reasonable to suppose that this would much more clearly appear from the proceedings of the Collector or the Board which the appellants have not laid before us. Under the circumstances; I am not prepared to say that Exhibit A is an acknowledgment of these rights of the villagers. Differing from the lower Appellate Court, I, therefore, hold that the appellants must succeed and that no customary right has been established by the respondents.

V. N. V.
W. C. A. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 61 OF 1921.

April 12, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

RAMKAMAL BANIK SAHA—
PLAINTIFF—APPELLANT
versus
SYAM SUNDER BANIK SAHA—
DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. II, Art. 120—

RAMKAMAL BANIK SAHA v. SYAM SUNDAR BANIK SAHA.

Suit for construction of Will—Limitation, starting point—Declaratory suit, when maintainable—Further relief—Specific Relief Act (I of 1877), s. 42, proviso, effect of.

A suit for the construction of a Will is governed by Art. 120 of the Schedule to the Limitation Act, but the right to sue does not accrue from the death of the testator or the date of the Probate of the Will so long as the estate is in the hands of the executor, and the administration had not been completed. The right to obtain construction of the Will is a continuing right. [p. 44, col. 1.]

Chukkun Lal Roy v. *Lolit Mohan Roy*, 20 C. 906; 10 Ind. Dec. (N. S.) 609, followed.

A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for [p. 45, col. 1.]

The proviso to section 42 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. [p. 45, col. 2.]

Joynarain Sen v. *Suchitra Debi*, 65 Ind. Cas. 81; 26 C. W. N. 206; 33 C. L. J. 592; (1922) A. I. R. (C.) 8, referred to.

Appeal against the decision of the Subordinate Judge, Dacca, dated the 6th December 1920.

Babus *Rupendra Kumar Mitter*, *Navadwip Chandra Saha* and *Rama Prosad Mukherji*, for the Appellant.

Dr. *Sarat Chandra Basak*, Babus *Kanai Lal Saha* and *Promothanath Bhandopadhya*, for the Respondent.

JUDGMENT.—This appeal is directed against a decree of dismissal made in a suit for construction of a Will. One Krishna Prosad Saha Banik, the father of the plaintiffs and the first defendant made a testamentary disposition of his properties on the 30th April 1897. Probate was taken by the executors on the 13th September 1897. The present suit was instituted on the 15th August 1919 for construction of the Will and for a declaration that the testator has died intestate with regard to all his properties except what he had specifically bequeathed to his widow, and that the plaintiffs had thereupon become entitled to two-thirds share of the estate left by their father by right of inheritance. The suit was defended on a variety of grounds which need not be enumerated for our present purpose. It is sufficient to state that the suit has been dismissed as barred by limitation. The Subordinate Judge has held that right to sue for declaration that the father of the plaintiffs had died intestate and that they had thereupon taken shares as heirs to the properties left by him, must be deemed to have arisen from the time when the first defendant, the surviving executor, put in an application for Probate of the Will or at the latest when the Will was proved.

The point in controversy in the present appeal is whether this view of the law is well-founded. The plaintiff has not disputed that the period of limitation applicable is that provided in Art. 120 of the Second Schedule to the Indian Limitation Act which provides that a suit for which no period of limitation is provided elsewhere in the Schedule must be instituted within six years from the date when the right to sue accrues. The defendant also has invoked the aid of the Article; but the parties are not agreed as to the interpretation of the provision in the third column, namely, what is the point of time when the right to sue accrues in cases of this description where the plaintiff seeks to have construction of a Will. The quetion appears to have been considered by this Court in the case of *Chukkun Lal Roy* v. *Lolit Mohan Roy* (1). In that case a suit was instituted for the construction of a Will alleged to have been executed by Saroda Prosad Roy on the 17th September 1865. A codicil was added on 18th March 1868 just before the death of the testator. As the Will has been executed before the Hindu Wills Act came into operation, no application for Probate was made. The suit for construction was commenced on the 13th February 1889. The plaintiff prayed as follows: namely, first, that the Will and codicil of the late Saroda Prosad Roy be construed and the rights and interests of Lalit Mohun and of all other parties, if any, respectively, under the Will be declared; secondly, that, subject to such dispositions as may be determined by the Court to have been validly made by the Will, the rights and interests of the plaintiffs as heirs to the estate of Saroda Prosad Roy, deceased, under the Mitak-

(1) 20 C. 906; 10 Ind. Dec. (N. S.) 609.

shara Law of inheritance may be declared; and, thirdly, that all necessary declarations and directions may be made and such reliefs may be granted as under the circumstances of the case, may be fit. The suit was defended on the ground, amongst others, that the claim was barred by limitation. Thereupon the third issue was raised in the following terms: Is the suit barred by limitation? The District Judge discussed the question in the following terms: "regarding the suit as one for a declaration, the question of limitation is not so easy to decide, for I find no provision in the Act expressly referring to suits of this kind generally though there are provisions respecting some particular kinds of such suits. Article 120 of the Second Schedule is the only one which seems to apply. This provides a limitation of six years from the date when the right to sue accrues, for all suits for which no period of limitation is provided elsewhere in this Schedule. The question then is, when the right to sue accrued." For the solution of this question, the District Judge relied upon the judgment of Sir Richard Garth, C.J., in the case of *Kristomoni Dasi* v. *Nripendra Krishna* R. A. Nos. 29 and 30 of 1884 unreported. Where the Chief Justice had made the following observation: "In my opinion, under section 42, Specific Relief Act, a person who is entitled to any right to property may, as a rule, institute a suit against any other person for a declaratory decree on any occasion when by word or deed, such other person may deny his right within the meaning of that section. There is, therefore, in the present case a recurrent cause of action on every refusal or neglect to pay over the surplus profits of the estate. Not only section 23 but also section 10 of the Limitation Act applies to the case and the suit is, in my opinion, not barred as regards any part of the relief sought." The District Judge then proceeded to construe the Will, and his decree embodied a declaration as to the effect of the provisions contained in the testament. An appeal was next referred to this Court. Mr. Woodroffe who appeared on behalf of the respondent contended that the view taken by the District Judge upon the question of limitation was not correct. He formulated his argument in the following terms. "As to limitation, I say six years from the death of the testator is allowed. Article 141 does not interfere with this, as I have the estate against the heiress. My estate was adverse to her when I kept her out. I have held for myself from the death of Saroda; and if the Will does not give me an interest, I have been in possession for more than 20 years before suit." In reply, Mr. Charles Paul argued that as to limitation the suit was one for construction of a Will, and the cause of action did not arise when the widow was alive; the plaintiffs asked for a declaration and for an account. Mr. Justice Ghose, who delivered the judgment of the Court, overruled the contention that the suit was barred by limitation and observed as follows: "The suit is not for possession but for construction of the Will and codicil, and for a declaration of the plaintiff's rights, as heirs to Saroda Prosad. Except in the few cases especially provided for in the Limitation Act (*e.g.*, a suit to obtain a declaration that an adoption is invalid, or that an alienation by a widow is not binding on a reversioner) a suit for a declaratory relief of this nature cannot be held to be barred so long as the right to the property in respect of which the declaration is sought is a subsisting right. So long as the widow was alive, the plaintiff's right as reversionary heirs was a subsisting right. The right to bring a suit to construe the Will and codicil and for a declaration of the plaintiff's right, is a continuing right and may be claimed within the statutory period (whether it be 12 years or 6 years under Art. 120) from the time when the plaintiffs become entitled to possession or other consequential relief. This suit having been instituted within six years is amply within time." The Court then proceeded to construe the provisions of the Will and adopted a construction contrary to that which had found favour with the District Judge. The matter was next taken on appeal to the Judicial Committee; *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (2). The question of limitation does not appear to have been

(2) 24 C. 834; 24 I. A. 76; 1 C. W. N. 387; 7 Sar P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.).

argued, although it was the interest of the respondent to support the judgment of the High Court on that gound. The judgment delivered by Lord Davey deals with the question of construction and the view adopted by the Judicial Committee was that the construction adopted by the High Court could not be supported. The Judicial Committee accordingly proceeded to restore the decree of the District Court with a slight variation. It is inconceivable that the Judicial Committee should have considered the case on the merits, if the suit was obviously barred by limitation. We are consequently of opinion that the decision of this Court in *Chukkun Lal Roy* v. *Lolit Mohan Roy* (1) is an authority for the proposition that a suit for construction of a Will is governed by Art. 120 of the Schedule to the Limitation Act, but that the right to sue does not accrue from the death of the testator or the date of the Probate of the Will. The case clearly shows that, so long at least as the estate is in the hands of the executor and the administration has not been completed, the right to obtain construction of the Will is a continuing right.

This view appears to have been recognised impliedly in numerous cases of construction of Will to be found in the reports. Reference may be made to the case of the Will of Haridas Dutt which was executed on the date of the death of the testator, the 30th October 1875. The Probate was taken out on the 20th December 1875. The suit for construction was instituted on the 19th December 1904. There was no suggestion that the suit for construction was barred by limitation. The case was heard in the first instance by Woodroffe, J., then by a Special Bench and ultimately by the Judicial Committee. The judgments will be founded reported as *Radha Prasad Mullick* v. *Ranee Mani Dassee* (3) *Radha Prasad Mullick* v. *Ranee Mani Dassee* (4). Although the suit had been instituted after the lapse of nearly 30 years from the death of the testator, some of the questions of construction had to be reserved and were reserved, following the precedent of the Judicial Committee in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (2) the result was that there was another litigation for construction of the Will, for the determination of one of the questions which had been left open. [See the cases of *Radha Prasad Mullick* v. *Ranimoni Dasi* (5) and *Srimutty Ranimoni Dassi* v. *Radhaprasad Mullick* (6). It is worthy of notice that even in this last judgment another possible question of construction has been left open and may give rise to a further litigation. Reference may also be made to the case of *Purna Chandra Bysack* v. *Gopal Lal Sett* (7) which arose out of a suit instituted in 1904 for the construction of a Will executed on the 29th May 1841. It was not suggested before this Court or the Judicial Committee, *Gopal Lal Sett* v. *Purna Chandra Bysack* (8) that the suit was barred by limitation. Reference may again be made to the cases of *Jehangir Dadabhoy* v. *Katkhusru Kavasha* (9) and *Kaikhushru Bezonji Nanabhoy Capadia* v. *Shirinbai Bezonji Capadia* (10) where the suits for construction of Will would, have been obviously barred by limitation if the view adopted by the Subordinate Judge in this case and urged by the respondent had been the law.

The view we take is in no way inconsistent with the decision of this Court in *Mohatharat Saha* v. *Abdul Hamid Khan* (11) where reference is made to the decision in *Chukkun Lal Roy* v. *Lolit Mohan Roy* (1); on the other hand, it is in agreement with the view

(3) 33 C. 947; 3 C. L. J. 502; 10 C. W. N 695.
(4) 35 C. 896; 8 C. L. J. 48; 12 C. W. N. 729; 35 I. A. 118; 4 M. L. T. 23; 18 M. L. J. 287; 5 A. L. J. 460; 10 Bom. L. R. 604 (P. C.).

(5) 8 Ind. Cas. 1061; 38 C. 188; 13 C. L. J. 183; 15 C. W. N. 113.
(6) 23 Ind. Cas. 713; 41 C. 1007; 20 C. L. J. 348; 26 M. L. J. 653; 18 C. W. N. 873; (1914) M. W. N. 624; 16 M. L. T. 217; 1 L. W. 731; 16 Bom. L. R. 787; 20 C. L. J. 348; 41 I. A. 176 (P. C).
(7) 8 C. L. J. 369.
(8) 67 Ind. Cas. 561; 49 I. A. 100; 36 C. L. J. 57; 20 A. L. J 625; 43 M. L. J 116; 49 C. 459; 24 Bom. L. R. 937; (1922) A. I. R. (P. C.) 253; 16 L. W. 963; 27 C. W. N. 174 (P. C.).
(9) 27 Ind. Cas. 53; 42 I. A. 71; 39 B. 296; 28 M. L. J. 167; 2 L. W. 208; 13 A. L. J. 217; 19 C. W. N. 426; 21 C. L. J. 210; 17 Bom. L. R. 197; 17 M. L. T. 203; (1915) M. W. N. 633 (P. C.).
(10) 51 Ind. Cas. 481; 45 I. A. 257; 43 B. 88; 21 Bom. L. R. 130; 23 C. W. N. 419; 9 L. W. 483 (P. C.).
(11) 1 C. L. J. 73.

adopted by Chatterjee and Richardson, JJ., in *Tarak Nath Roy* v. *Syama Charan* (12). We are consequently of opinion that the suit should not have been dismissed as barred by limitation on the ground that the suit had been instituted after the lapse of more than six years from the death of the testator or the application for grant of Probate or the issue of Probate. The plaintiff contends that the administration of the estate has not yet been completed. The first defendant, the surviving executor, also urged in his written statement that the administration of the estate has not yet come to an end. In such circumstances, it is plain that the questions of construction may arise and may require decision, if for no other purpose, at least for the purpose of guiding the executor in the discharge of his duties.

It is now necessary to consider two further points. In the first place, an objection was taken in the Court below that the necessary parties are not before the Court. No opportunity was allowed to the plaintiffs to bring such parties before the Court. The plaintiffs have offered to add as defendants all persons who are likely to be interested in or affected by the determination of the question of construction of the Will. This will accordingly be done as soon as the record reaches the Court below.

In the second place, it was suggested that the suit could not be maintained as a suit for declaration without consequential relief in view of the provisions of section 42 of the Specific Relief Act. We are of opinion that there is no force in this contention. The true effect of section 42 was explained by this Court in *Joy Narain Sen* v. *Suchitra Deby* (13). The expression used by the Legislature is not "other relief" but "further relief." A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to section 42 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. In the present case, it is impossible for us to say that the plaintiffs at the present time, required any relief other than the construction of the Will. If the plaintiffs are not successful in maintaining their view of the legal effect of the provisions of the Will, no further question arises. If they are successful, it would be for them to determine what relief, if any, they should seek on the basis of the construction which may ultimately be adopted by the Court. If they are successful in this litigation and thereafter institute a suit for further relief, such questions as may arise will be decided, including the question of limitation, in relation to any possible claim for administration, accounts or possession. It is to be distinctly understood that if the plaintiffs succeed in maintaining their view of the legal effect of the Will, there will be no declaration in the decree to the effect that they had a subsisting title at the date of the commencement of this litigation. The sole question for decision is, what is the legal effect of the provisions made by the testator in his Will. Such construction cannot prejudice the determination of other controversies which may arise between the parties in future.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for construction of the Will.

The appellants are entitled to their costs of this Court. The costs in the Court below will abide the result of the trial of the suit.

K. S. D. & W. C. A. *Appeal allowed.*

(12) 36 Ind. Cas. 292.
(13) 65 Ind. Cas. 81; 26 C. W. N. 206; 33 C. L. J. 521; (1922) A. I. R. (C) 8.

DORAISAMI *v.* CHIDAMBARAM PILLAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 924 OF 1921.

March 7, 1923.

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

DORAISAMI, MINOR AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHIDAMBARAM PILLAI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 5 AND 7 AND LEGAL REPRESENTATIVE OF DEFENDANT NO. 8—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 92, O. XXII, r. 4—Execution of decree—Death of judgment-debtor—Legal representative not brought on record—Sale, whether nullity—Notice, absence of—Irregularity—Hindu Law—Widow—Alienation—Inadequacy of price—Sale to pay off usufructuary mortgage.

In execution of a decree, certain properties were attached and ordered to be sold. But before the sale actually took place, the judgment-debtor died. The sale went on and was completed without any one being added to the record as the legal representative of the deceased judgment-debtor. No application under rr. 89, 90 or 91 of O. XXI of the Civil Procedure Code was made and the sale was confirmed under r. 92 and a sale certificate issued to the auction-purchaser. The legal representative of the deceased judgment-debtor did not challenge the validity of the sale. In a suit by the reversioner of the deceased to declare the sale a nullity on the ground that at the time of sale the estate was not represented by any one:

Held, that the sale could not be regarded as a nullity as the failure to add the legal representative of the deceased judgment-debtor was only an irregularity, which, if substantial injury had been caused thereby, would only entitle the party affected to institute proceedings to set aside the sale within the period prescribed by law. [p. 48, col. 1.]

Per *Spencer, J.*—If an order is passed by an Executing Court against a party without notice being given to him of the application which gave rise to the proceedings, the party behind whose back such proceedings are taken will not be bound by the order. [p. 47, col. 2.]

Where process is issued without the notice which O. XXI, r. 22 of the Civil Procedure Code prescribes in cases where the judgment-debtor is dead or the decree is more than one year old, the want of notice might constitute a material irregularity entitling a person whose interests are affected to apply under O. XXI, r. 90 or to bring a suit to have the sale set aside. But where the decree-holder has done all that the law requires him to do and the judgment-debtor or one of several judgment-debtors happens to die during the course of the execution of the sale-warrant, the sale cannot be invalidated by the accident of the judgment-debtor's death before the sale is completed. [p. 47, col. 2.]

The law only prescribes the issue of notice to judgment-debtors or their legal representatives at the commencement of execution proceedings, and the latter cannot claim as a matter of right to have fresh notice if their representation of the deceased's estate commences during the progress of the carrying out of the processes of the Court nor are they justified in treating such processes as invalid for want of jurisdiction on the part of the Court and its officers. [p. 48, col. 1.]

Order XXII, r. 4 of the Civil Procedure Code is inapplicable to the execution proceedings.

Sheo Prasad v. *Hira Lal*, 12 A. 440; A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026, *Bepin Behari Bera* v *Shashi Bhushan Datta*, 22 Ind. Cas. 95, 18 C. W. N. 766; 18 C. L. J. 628, *Malkarjun* v *Narhari*, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 27 I. A. 216; 7 Sar P. C. J. 739; 2 Bom. L. R. 927 (P. C.) and *Jagadish Bhattacharjee* v. *Rama Sundari Dasya*, 51 Ind. Cas. 972; 23 C. W. N. 608; 29 C. L. J. 411, followed.

Bzswantapa v. *Ranu*, 9 B. 86; 5 Ind. Dec. (N. S.) 58, *Biyyakka* v *Fakira*, 12 M. 211; 4 Ind. Dec. (N. S.) 497, *Narayana Kothan* v *Kalianasundaram Pillai*, 19 M. 219; 6 Ind. Dec. (N. S.) 858, *Khiarajmal* v. *Daim*, 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1, 9 C. W. N. 201; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.), *Somandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan*, 23 Ind. Cas. 251; 26 M. L. J. 267, distinguished.

Ramasami Ayyangar v. *Bagirathi Ammal*, 6 M. 180; 2 Ind. Dec. (N. S.) 404, *Groves* v. *Administrator-General of Bengal*, 22 M. 119; 8 M. L. J. 288; 8 Ind. Dec. (N. S.) 84, *Somandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan*, 23 Ind. Cas. 251; 26 M. L. J. 267, *Raghunathaswami Iyengar* v. *Gopauj Rao*, 68 Ind. Cas. 667; 41 M. L. J. 547; (1921) M. W. N. 732; 15 L. W. 123; (1922) A. I. R. (M.) 307, not followed.

Aba v. *Dhondu Bai*, 19 B. 276; 10 Ind. Dec. (N. S.) 187, *Gopal Chunder* v. *Gunamoni Dasi*, 20 C. 570; 10 Ind. Dec. (N. S.) 251, *Premmoye Choudhrani* v. *Presonath Dhur*, 23 C. 636; 12 Ind. Dec. (N. S.) 423, considered.

A sale by a Hindu widow of certain items of property which are not encumbered in order to pay off a usufructuary mortgage of certain other items included in the sale cannot be justified on the ground of necessity [p. 50, col. 2.]

A sale should not be revised long after it has taken place on a mere estimate as to what price the property sold ought to have fetched. [p. 50, col. 2.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Trichnopoly, in Appeal Suit No. 351 of 1920, preferred against a decree of the Court of the District Munsif of Karur in Original Suit No. 497 of 1916.

Messrs. *S. Srinivasa Ayyangar* and *L. S. Veeraraghava Aiyar*, for the Appellaants.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

DORAISAMI *v.* CHIDAMBARAM PILLAI.

JUDGMENT.

Spencer, J.—This suit was brought by one of the reversioners to the estate of Muruga Pillai for a declaration on behalf of himself and defendants Nos. 6 and 7 that the private sale of items Nos. 1 to 8 in the plaint schedule and the Court-sale of items Nos. 9 to 11 during the lifetime of Muruga Pillai's widow (first defendant) are not binding beyond the lifetime of the widow, who died during the pendency of the appeal in the lower Appellate Court. The District Munsif dismissed the suit *in toto*.

In appeal the Additional Subordinate Judge held that the Court-sale of items Nos. 9 to 11 was void and gave the plaintiffs a decree accordingly. He held that the private sale of items Nos. 1 to 8 by the widow under Exhibit B was binding on the reversioners to the extent of Rs. 1,000 only and made that amount a charge on these items excepting item No. 5 and half of item No. 8.

The learned Subordinate Judge's reason for holding the Court-sale to be void was that it took place on January 17th, 1916, after Muruga Pillai had died on December 16th, 1915, and that no representatives of the deceased owner were brought on the record. He was of opinion that the Court had no jurisdiction to sell the properties of a deceased person without any representatives being brought on the record, and in support of this view he cited *Ramasami Ayyangar* v. *Bagirathi Ammal* (1), *Krishnayya* v. *Unnissa Begam* (2), *Groves* v. *Administrator-General of Bengal* (3), and *Somandan Karkat Edathil Rayaruppan Nambiar* v. *Mutikandi Aketh Mayan* (4). Besides these cases, there is a recent decision of a Bench of this Court in *Raghunathaswami Iyengar* v. *Gopauj Rao* (5) in which Ramesam, J., in holding that a sale in execution carried out against a dead person (or "no person" as he says) was void and should be regarded as a nullity and had not got to be set aside, observed that it was "opposed to all notions of justice to allow legal proceedings to be taken against an estate without there being some one on the record to represent the estate." I presume that the learned Judge when he used these words had in his mind the principle of *audi alteram partem* which in *Narayana Kotthan* v. *Kalianasundaram Pillai* (6) was spoken of as a principle which could not justifiably be disregarded except where it was necessary to do so in order to protect *bona fide* purchasers at Court-sales. If any order is passed by an Executing Court against a party without notice being given to him of the application which gave rise to the proceedings, I entirely agree that the party behind whose back such proceedings are taken, will not be bound by the order. Further, if process is issued without the notice which O. XXI, r. 22 prescribes in cases where the judgment-debtor is dead or the decree is more than one year old, I consider that the want of notice might constitute a material irregularity entitling a person whose interests have been affected to apply either under O. XXI, r. 90 or by suit to have any sale of property that has been held upon the decree-holder's application set aside. But if the decree-holder has done all that the law requires him to do and if the judgment-debtor or one of several judgment-debtors, where there are more than one, happens to die during the course of the execution of the sale-warrant, or, it may be, while the auctioneer is actually holding the auction, with due respect, I fail to see how the sale is invalidated by the accident of the owner's death before the sale is completed. It has been suggested that, as soon as a judgment-debtor dies, his interest in his property passes to his legal representatives and that the law nowhere permits the sale of a dead man's assets. On the other hand, sections 50 and 53 of the Civil Procedure Code, speak of "the property of the deceased" and section 50 provides for decrees being executed against such property in the hands of the legal representatives. Al-

(1) 6 M. 180; 2 Ind. Dec. (N. S.) 404.
(2) 15 M. 399; 5 Ind. Dec. (N. S.) 630.
(3) 28 M. 189; 8 M. L. J. 288; 8 Ind. Dec. (N. S.) 84.
(4) 23 Ind. Cas. 251; 26 M. L. J. 267.
(5) 68 Ind. Cas. 667; 41 M. L. J. 547; (1921) M. W. N. 732; 15 L. W. 1231 (1922) A. I. R. (M.) 307.

(6) 19 M. 219; 6 Ind. Dec. (N. S.) 858.

though it may not be accurate to speak of a dead man as owning property, it is well understood that in law there are estates of deceased persons. The definition of "legal representatives" in section 2, clause (11), Civil Procedure Code, speaks of such estates. So long as r. 22, clause (2), permits an Executing Court to dispense with notice for reasons to be recorded, it is difficult to see how the issue of process without notice and without recording reasons would affect the jurisdiction of the Court or would be more than an irregularity. The operation of O. XXII, r. 4, which provides for legal representatives of defendants who die during the pendency of a suit being brought on the record, has been excluded from execution proceedings. So a decree once passed does not become barred or incapable of being executed by reason of the death of a judgment-debtor, nor do execution proceedings abate owing to the failure of the decree-holder to bring the legal representatives of the judgment-debtor on the record. O. XXI, r. 22 is the only provision, which deals with legal representatives of parties to decrees and that only applies to the commencement of execution proceedings. The legal representatives of judgment-debtors who die during the course of the processes of Court being executed are able to watch public sales without being personally served with notice. When the law only prescribes the issue of the notice to them at the commencement of execution proceedings, they cannot claim as a matter of right to have fresh notice if their representation of the deceased's estate commences during the progress of the carrying out of the processes of the Court, nor are they justified in treating such processes as invalid for want of jurisdiction on the part of the Court and its officers. In my opinion the view taken in *Raghunathaswami Iyengar* v. *Gopauj Rao* (5) that a sale in execution carried out against a dead person is *per se* void is based on a fallacy and I think we are bound to follow the judgment of the Privy Council in *Malkarjun* v. *Narhari* (7) in preference to the decision of a Bench of our own Court. Their Lordships distinctly say that a judicial sale is not a nullity if it is held without notice being given to the proper legal representative of a deceased person. They observe that to treat such an error (that of serving with notice a person who did not legally represent the estate) as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. They add that strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do. They point out that when a Court tries a suit without a debtor or his estate being subject to its decree it actually never possesses the jurisdiction which it purports to exercise, but it is a different matter when the Court by its decree has established the debtor's liability and is in the process of working it out against his estate.

My learned brother Ramesam, J., distinguished this case on the facts from those in *Raghunathaswami Iyengar* v. *Gopauj Rao* (5). He observed that in *Malkarjun* v. *Narhari* (7) an application was made to bring the legal representatives of the deceased judgment-debtor on the record, the Court received the application and did issue notice to the party named as the heir. Only it issued notice to the wrong heir. But in the case before him he said that the procedure laid down by the Code was not followed. He does not state what procedure he means, but from what precedes, he can only mean that general obligation of bringing some one on the record at every stage to represent the estate of the judgment-debtor. I have tried to show already by a reference to O. XXII, rr. 4 and 12, Civil Procedure Code, that there is no statutory obligation of such a kind cast upon decree-holders during the processual stages of execution of their decrees. The above are my reasons for considering that the Subordinate Judge was wrong in reversing the decree of the District Munsif and that we should now restore the Trial Court's decree so far as these items are concerned. But some of the reported decisions relied on by the Subordinate Judge and some quoted in the arguments in this Court remain to be noticed.

The judgment in *Ramasami Ayyangar* v. *Bagirathi Ammal* (1) is a very short

(7) 28 B. 3371 5 C. W. N. 101 10 M. L. J. 368; 27 I. A. 216; 7 Sar. P. C. J. 730; 2 Bom. L. R. 907 (P. C.).

one. The learned Judges do not say that the sale was a nullity, but they set it aside on the ground that the further process of sale could not legally issue without some representative of the deceased judgment-debtor being on the record. In revision they reversed the order of a Subordinate Court which confirmed a sale under section 312 of the old Code (O. XXI, r. 92 of the present Code). It is not clear from the report whether the order for sale was passed behind the back of the legal representatives. If that was the case, they naturally objected under section 311 to its legality.

Biyyakka v. *Fakira* (8) is an authority for the proposition that if a judgment-deotor dies between an order for possession being made under section 318, Civil Procedure Code (now O. XXI, r. 95) and being executed, there is no necessity to bring his legal representatives on record between that date and the date of executing the order. This supports the view that I have taken, the difference being only in the nature of the decree to be executed.

In *Krishnayya* v. *Unnissa Begam* (2) the omission to bring legal representatives on the record is treated not as making the sale void, but as being a material irregularity, which the learned Judges say must necessarily cause substantial injury to the legal representatives (why this is necessary is not made clear).

In *Narayana Kothan* v. *Kulianasundaram Pillai* (6) the confirmation of a sale without notice to a judgment-debtor who had been declared insane, after the decree and before the sale, is treated as an irregularity but not as making the sale void. In *Groves* v. *Administrator-General of Bengal* (3) Boddam, J., repeats the fallacy about the sale of a deadman's property passing no rights to the purchaser but in the result, the sale was not treated as a nullity, but it was set aside in revision of an order passed in execution. *Somandan Karkat Edathil Rayappan Nambiar* v. *Malikandi Aketh Mayan* (4) follows *Ramasam Ayyangar* v. *Ragarathi Ammal* (1) and *Groves* v. *Administrator-General of Bengal* (3) and attempts to distinguish *Malkarjun* v. *Narhari* (7) as being a case of a *bona fide* purchaser. It is not clear whether there was an order for sale made in this case, without notice to the legal representatives of the deceased mortgagor. If an order of Court was made with such notice to the party concerned, the decision may be right.

Sheo Prasad v. *Hira Lal* (9) the judgment of a Full Bench of five Judges (one dissenting) dissents from *Ramasami Ayyangar* v. *Bagirathi Ammal* (1) and refutes the theory that the death of a judgment-debtor would cause an attachment to abate or make it necessary for a judgment-creditor to take steps to keep the attachment alive. The observations of Edge, C. J., at page 446 are very pertinent to the present case. He says: "I do not find in the Code of Civil Procedure any provision requiring notice to be given personally to a judgment-debtor, or his legal representative, of a sale of property under attachment.... To hold otherwise would be to impose upon the purchaser at an execution sale under a decree, the necessity of ascertaining before he paid the purchase-money whether the judgment-debtor was alive at the actual moment when the sale took place, or the risk of losing the purchase-money which he paid and the property in respect of the purchase of which that money was paid, and would in any event render it difficult for such a purchaser to maintain his title under his sale certificate if subsequently challenged by the legal representative of the deceased judgment-debtor, the exact date of whose death it might be impossible for the purchaser to ascertain or prove."

In *Aba* v. *Dhondu Bai* (10) one of the learned Judges (Jardine, J.) followed *Sheo Prasad* v. *Hira Lal* (9) and the other (Ranade, J.) prefers the Madras view. This was prior to the Privy Council decision in *Malkarjun* v. *Narhari* (7) which settled the question.

Gopal Chunder v. *Gunamoni Dasi* (11) treats the issue of a notice to the legal re-

(8) 12 M. 211; 4 Ind. Dec (N. S.) 497.

(9) 12 A. 440; A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026.
(10) 19 B. 276; 10 Ind. Dec. (N. S.) 187.
(11) 20 C. 370; 10 Ind. Dec. (N. S.) 251.

presentative of a deceased judgment-debtor as a condition precedent to the issue of a warrant of execution. This is the view about jurisdiction in execution matters which the Privy Council condemn as being calculated to introduce great confusion into the administration of the law.

Premmoyi Choudhurani v. *Preonath Dhur* (12) follows *Sheo Prasad* v. *Hira Lal* (9). The learned Judges observe that the omission to place on the record the heir of a judgment-debtor who died during the course of execution did not vitiate the sale but was at most an irregularity.

In *Khiarajmal* v. *Daim* (13) there was a sale of the estate of a deceased man, which estate was not represented in the suit itself. This made the sale of property without jurisdiction and null and void. This is not an authority on the legal consequences of failure to get representation of a deceased judgment-debtor's estate in execution, but it belongs to the first class of cases described in *Malkarjun* v. *Narhari* (7) where a defendant does not come under the jurisdiction of the Court that tries the suit and passes the decree.

Bepin Behari Bera v. *Shastri Bhushan Dutta* (14) is another case that follows *Sheo Prasad* v. *Hira Lal* (9) and *Malkarjun* v. *Narhari* (7). A sale held when the Court was aware of the death of one of the judgment-debtors was treated not as a nullity but as voidable at the instance of the persons affected. It again was followed in *Jagadish Bhattacharjee* v. *Rama Sundari Dasya* (15) where the judgment-debtor died after attachment but before the sale and the sale held without his legal representative being brought on the record was held to be not necessarily invalid but open to attack on the ground of irregularity.

In *Ruhini Nandan Ghose* v. *Rajendra Nath Ghose* (16) the principal defendant died before the preliminary decree was made absolute in a mortgage suit and his legal representative was not brought on the record. The High Court observed that the Executing Court had no jurisdiction to sell the property and the decree or sale would be a nullity as against persons who were not properly represented, and might be disregarded. The want of jurisdiction here was in the Court that tried the suit, not in the Executing Court and, therefore, it was a redical defect like it was in *Khiarajmal* v. *Daim* (13).

These decisions show that, apart from the Privy Council decision in *Malkarjun* v. *Narhari* (7), the balance of authority is in favour of the view taken in *Sheo Prasad* v. *Hira Lal* (9) and against that in *Ramasami Ayyangar* v. *Bagirathi Ammal* (1), *Somandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan* (4) and *Raghunathaswami Iyengar* v. *Gopauj Rao* (5).

As regards items Nos. 1 to 8, excluding item No. 5 which was found by the District Munsif to belong to the second defendant, the Subordinate Judge found that the sale of these items was not for a proper price and that out of the sale price of Rs. 1,740 only Rs. 1,000 was received for purposes binding on the estate. I do not think that the sales should be revised long after they have taken place on a mere estimate as to what price the propety sold ought to have fetched. The mortgages on items Nos. 2, 3, 6 and 7 were usufructuary and there was no necessity to sell items Nos. 1, 4, 5 and 8 which were not encumbered in order to discharge usufructuary mortgages.

When the mortgagee gets the usufruct of the land in lieu of interest the debt does not by lapse of time become an increased burden on the land, but if such mortgaged property is sold outright the reversioners are deprived of the chance of redeeming it. The sale of these items was evidently neither a prudent nor a *bona fide* transaction. The second appeal is dismissed as regards this part of the claim. Each side will pay and receive proportionate costs throughout. The memorandum of objections is not pressed and is dismissed with costs.

Krishnan, J.—This second appeal arises

(12) 23 C. 636; 21 Ind. Dec. (N. S.) 423.
(13) 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I A. 23; 8 Sar. P. C. J. 734 (P. C.).
(14) 22 Ind Cas. 95; 18 C. W. N. 766; 18 C. L. J. 628.
(15) 51 Ind. Cas. 972; 23 C. W. N. 608; 29 C. L. J. 411.
(16) 61 Ind Cas. 291.

from a suit brought by a reversioner to have it declared that certain alienations of properties of one Muruga Pillai, the last male owner after his death, are not binding on the reversioner. One of the sales so challenged is a Court-sale of items Nos. 9 to 11, in execution of a decree obtained against Muruga Pillai. These items had been attached in execution of that decree, and ordered to be sold by the Court and the proclamation for sale had been also issued during the lifetime of Muruga Pillai. Muruga Pillai seems to have died sometime thereafter and just before the auction-sale actually took place; and no one had been added to the record as his legal representative. His widow, the first defendant, was the proper party to be so added. The second defendant who, though a reversioner himself, was not a party to that decree purchased the properties in Court-auction and he claims to be a *bona fide* purchaser for value and that claim has not been displaced by any finding of the lower Appellate Court. No applications under rr. 89, 90 or 91 of O. XXI, Civil Procedure Code, having been made the sale was in due course confirmed under r. 92 and a sale certificate issued to the second defendant. The legal representative, the widow, has never challenged the validity of the sale but the reversioner, the plaintiff, contends that the sale was a nullity and was void because at the time it took place the estate was not represented by any one on the record. The Subordinate Judge has upheld his contention and declared the sale void fo owing *Ramasami Ayyangar* v. *Bagirathi Ammal* (1), *Krishnayya* v. *Unnissa Begam* (2), *Groves* v. *Administrator-General of Bengal* (3) and *Somandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan* (4). It may be mentioned that there is further a recent ruling of a Bench of this Court in *Raghunathaswami Iyengar* v. *Gopauj Rao* (5) in support of his view where it was held that "a sale in execution carried out against a dead person or no person is void and should be regarded as a nullity and has not to be set aside."

This extreme view introduces a most serious uncertainty into Court-sales and will tend to further dissuade bidders from coming forward in Court-auctions, a result to be avoided, if po sible. As pointed out by my learned brother, it does not seem to be in accord with the principles laid down by the Privy Council in *Malkarjun* v. *Narhari* (7) and we must, of course, follow the former in preference to the decisions of our own Court. In *Raghunathaswami Iyengar* v. *Gopauj Rao* (5) Ramesam, J., has tried to distinguish this case by confining its effect to its own facts; the principles laid down in that case do not, however, seem to me to be affected by the particular facts here. Their Lordships say that, "If the Court took proceedings wholly without jurisdiction the plaintiffs (the legal representatives) would remain unaffected by them... but a decree had been made, and partially, though to a minute extent, executed against Nagappa (the original debtor); and his estate was liable to make good the balance. To enforce this liability was within the jurisdiction of the Court." Then they go on to distinguish the case of *Baswantapa* v. *Ranu* (17) on the ground that the decree there was itself a nullity. They say that in that case "neither the debtor nor his estate was ever made subject to the decree... the liability was never established, and the process of execution had nothing to rest upon," and they point out that, "it is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against the estate." The case of *Khiarajmal* v. *Daim* (13) relied on by Ramesam, J., in *Raghunathaswami Iyengar* v. *Gopauj Rao* (5), above cited, is a similar case where the decree was itself void. Their Lordships proceed to say in *Malkarjun's case* (7) that, "it was necessary for the plaintiffs to set aside the sale and that the omission to serve notice on the proper legal representative was a serious irregularity." Now, under O. XXI, r. 22, Civil Procedure Code, a proviso has been added enabling the Court in certain circumstances to dispense with such notice so that even the non-service of notice may not always be an irregularity. It is clear from *Malkarjun's case* (7) that when the Court has jurisdiction its sale cannot be treated as a nullity but can only be set a side if at all for irrgularity. I am inclined to agree with the

(17) 9 B. 86; 5 Ind. Dec. (N. S.) 51.

view of Mahmud, J., in the Full Bench case in *Sheo Prasad* v. *Hira Lal* (9) that failure to add the legal representative of a deceased judgment-debtor is only an irregularity and that to set aside a sale on the ground of irregularity, it must be shown that it has led to substantial loss or injury otherwise the sale must be supported, more especially when the purchaser is a *bona fide* purchaser for value. I am unable to adopt the view in *Krishnayya* v. *Unissa Begam* (2) that the failure to add the legal representative to the record is a material irregularity which necessarily leads to substantial injury. Such injury must be proved whether the sale is sought to be set aside by an application under O. XXI, r. 90 or by suit.

That the failure to add the legal representative of a deceased judgment-debtor to the record after attachment is only an irregularity is the view accepted by the other High Courts and the weight of authority, as my learned brother, who has dealt with the authorities cited at length, points out, is in favour of that view. I should have, however, in view of the Madras cases cited referred the point to a Full Bench but the ruling of the Privy Council in *Mulkarjun* v. *Nirhari* (7) renders it unnecessary to do so.

Now, in the case before us though the suit has been brought within one year as provided in Art. 12 it has not been established that any substantial injury has been caused by the failure to add the widow to the execution record. As already stated, she does not dispute, and she has never disputed, the validity of the sale nor has she asserted that not being added to the record she has been injured by losing any opportunity that she otherwise would have had for getting the sale set aside. For the above reasons, I agree with my learned brother that the decree of the Subordinate Judge must be reversed and that of the District Munsif restored with regard to items Nos. 9 to 11.

The next question is as regards items Nos. 1, 2, 3, 4, 6, 7 and half of item No. 8. These items were sold by the widow to the second defendant for Rs. 1,000, Rs. 875 were due under a usufructuary mortgage by Muruga Pillai himself on items Nos. 2, 3, 6, and 7 and Rs. 125 were required for first defendant's maintenance. The Subordinate Judge finds that the consideration of Rs. 1,000 is binding on the estate. But he holds that the sale was fraudulent as it was for an inadequate price, the properties being worth at least Rs. 1,740 at the time of the sale and as it was made by the widow very shortly after her husband's death and in favour of her brother's brother-in-law, the second defendant. There was no real necessity to sell all the seven items to pay off a usufructuary mortgage on only four of them. I think, therefore, that the Subordinate Judge was right in setting aside the sale as fraudulent and giving the second defendant a charge for Rs. 1,000 on the properties. It was not argued that the sale should be upheld as the whole of the consideration for it under the sale-deed had been found to be for purposes binding on the estate but it was only contended that the purchaser should be allowed to pay Rs. 740 more, the deficiency in the price of the reversioners and the sale should thereupon be affirmed. I do not think that that can be done as the sale is shown to be a fraudulent one; this is not the case of a sale, being a proper sale, where a small portion of the consideration is shown to have been not binding on the reversioners.

I agree in dismissing the second appeal as regards these items and to the order of costs proposed by my learned brother and also to the dismissal of the memorandum of objections with costs.

Appeal dismissed;
Decree varied

V. N. V.
Z. K.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1014 OF 1921

July 18, 1923.

Present:—Mr. Justice Kulwant Sahay and Mr. Justice Foster.

DEBENDRA KUMAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

THE FYZABAD BANK, LTD.—PLAINTIFF—RESPONDENT.

Hindu Law—Father's debts—Son's pious duty to pay, when arises.

The pious obligation of a Hindu son to pay his father's debt exists during the lifetime of the father and does not arise only in the event of the death of the father.

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 421; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.) and *Nanomi Babuasin* v. *Modhun Mohun*, 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.), followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.) and *Chet Ram* v. *Ram Singh*, 67 Ind. Cas. 569; 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; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 27 C. W. N. 150; 49 I. A 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.), discussed.

Appeal from a decision of the Subordinate Judge, Arrah, dated the 11th March 1921, modifying that of the Additional Munsif, Arrah, dated the 31st January 1920.

Messrs. *N. C. Sinha* and *N. G. Ghose*, for the Appellants.

Mr. *Shiveshwar Dayal* for Mr. *Sambhu Saran*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal on behalf of defendants Nos. 3 and 4 who are the minor sons of defendant No. 1 against the decree of the Subordinate Judge of Arrah, modifying the decree of the Additional Munsif. The suit was brought by the respondent for recovery of a sum of money found due on an adjustment of account from the defendant No. 1. The learned Munsif made a decree as against the defendant No. 1 alone and dismissed the suit as against the other defendants. The plaintiff preferred an appeal before the Subordinate Judge and the learned Subordinate Judge has modified the decree to this extent that he has passed a decree in favour of the plaintiff not only as against the defendant No. 1, but also as against his minor sons (defendants Nos. 3 and 4).

The only point raised in this appeal is, that the minor sons of the defendant No. 1 are not liable in the lifetime of their father. It has been found by both the Courts below that the minor defendants were joint with the defendant No. 1, and formed members of a joint family. It has also been found that the sums advanced to the defendant No. 1 by the plaintiff were not required for legal and justifying necessities of the joint family and that there was no proper enquiry by the plaintiff before making the advances. The learned Munsif further found that the defendant No. 1 was a man of immoral habits, but there is no finding that the debt in question was incurred for immoral purposes.

Now, the facts found being that the debts were not incurred for legal and justifying necessities of the joint family or for the benefit of the defendants Nos. 3 and 4, and it also not being found that the debts were incurred for immoral purposes, the learned Subordinate Judge has held that the minor sons of the defendant No. 1 were bound to satisfy their father's debt on the theory of the pious obligation of the sons to pay their father's debt. He has accordingly made a decree as against the defendants Nos. 3 and 4 and has limited their liability to the extent of the co-parcenary property of the joint family.

It has been argued by the learned Vakil for the appellants that the learned Subordinate Judge was wrong in making the sons liable during their father's lifetime on the theory of the pious obligation of the sons. He contends that the question is settled by the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) and the later case of *Chet Ram*

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

v. *Ram Singh* (2). On the other hand, it has been contended by the learned Vakil for the respondent that these decisions of the Privy Council do not settle the law on the subject, that their Lordships' observations on the question of the pious obligation of the son to pay his father's debt in the lifetime of his father were *obiter dicta* and their Lordships did not mean to lay down definite propositions of law contrary to what has been the settled law in this country for nearly half a century. In my opinion, the contention of the learned Vakil for the respondent is correct.

In the case of *Girdharee Lall* v. *Kantoo Lall* (3) their Lordships of the Privy Council laid down the proposition that ancestral property in the hands of a son is liable to be seized and sold for payment of his father's debt under the pious obligation of the son to pay his father's debt, unless the debt is illegal or has been contracted for an immoral purpose. This was in the year 1874 and their Lordships rely on the observations of Lord Justice Knight-Bruce in the case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (4), where the rule is thus stated by the learned Lord Justice: "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estates, would still be an act of pious duty in the son. By the Hindu Law the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt" This principle was re-affirmed by their Lordships of the Privy Council in the case of *Nanomi Babuasin* v. *Modhun Mohun* (5). Now, these decisions have always been followed by all the Courts in India and no distinction has ever been made that the pious obligation of the son to pay his father's debt arises only in the event of the death of the father. In the case of *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (6), which was decided in 1916, the Lord Chancellor delivering the judgment of their Lordships of the Judicial Committee observes as follows: "The grounds for that action were these: The property in question was joint property governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone" These observations were made in connection with the claim of the son in a joint Mitakshara family to recover possession of his interest in the joint family property sold in execution of a decree on a simple money-debt incurred by the father and had evidently proceeded on the pious obligation of the son to pay the father's debt.

The question is, whether the law so established has been upset by their Lordships in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) and the case of *Chet Ram* v. *Ram Singh* (2)

In my opinion, their Lordships never intended to do so. In *Sahu Ram Chandra's case* (1) their Lordships proceeded to settle the conflict of decisions on the question of the validity of the alienation of the ancestral joint property for an antecedent

(2) 67 Ind. Cas. 569; 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; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.).

(3) 22 W. R. 56; 1 I. A. 321; 14 B. L. R. (P. C.) 187; 3 Sar. P. C. J. 380 (P. C.).

(4) 6 M. I. A. 393 at p. 421; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 291 1 Sar. P. C. 552; 19 E. R. 147 (P. C.).

(5) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.).

(6) 39 Ind. Cas. 252; 44 C. 524; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 I. A. 1 (P. C.).

debt of the father, and the long series of decisions on the question of the pious obligation of the son to pay the father's debt was never considered by their Lordships Unless there is a more definite pronouncement of their Lordships on this point, I am not prepared to say that their Lordships intended to overrule this long series of decisions on this point The case of *Sahu Ram Chandra* v. *Bhup Singh* (1) has been considered by the Indian Courts in a number of cases, and I need only refer to the observations of their Lordships of the Madras High Court in the case of *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (7), where their Lordships deal exhaustively with this subject. I may also refer to the discussion of *Sahu Ram Chandra's case* (1) in the case of *Hanmant Kashinath Joshi* v. *Ganesh Annaji Pujari* (8). In the case of *Chet Ram* v. *Ram Singh* (2) the question for consideration of their Lordships was practically the same as that in *Sahu Ram Chandra's case* (1), namely, the question of antecedent debt, and the observations made by their Lordships in this case as regards the pious obligations of the sons or grandsons to pay the debts of their father or grandfather stand on the same footing as their Lordships' observations in that respect in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1).

I am, therefore, of opinion, that the question has been correctly decided by the learned Subordinate Judge and this appeal must be dismissed with costs

Foster, J.—I agree.

W. C. A. *Appeal dismissed*

(7) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(8) 51 Ind. Cas. 612; 43 B. 612; 21 Bom. L. R. 435.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 44 AND 415 OF 1921.

March 14, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

BARADA PRASAD BANERJEE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHUPENDRA NATH MUKHERJEE—PLAINTIFF—RESPONDENTS.

Landlord and tenant—Tenant at fixed rent—Permanent tenancy—Excavations by tenant—Suit for damages by landlord—Injunction.

There is nothing in the law which prevents tenants having permanent heritable rights at a fixed rent from using the land of the tenancy in any manner they think fit so long as there is no risk to the right of the landlord to recove the rent payable and, unless there are any reservations, the landlord has no right in the case of such tenures other than the right to receive the stipulated rent.

A tenant holding permanently at a fixed rent made excavations on the lands of the tenancy for the purpose of making bricks. The landlord brought a suit for damages and injunction:

Held, that, in the absence of evidence that the excavations were such as would be detrimental to the right of the landlord to recover the rent payable, the landlord's claim with respect to damages or injunction was not sustainable.

Anund Coomar Mookerjee v. *Bissonath Banerjee*, 17 W. R. 416 and *Girish Chandra Chando* v. *Sirish Chandra Das*, 9 C. W. N. 255, distinguished.

Appeals against the decrees of the Subordinate Judge, Hoogly, dated September 18, 1920, modifying the decree of the Munsif, Serampore, dated December 22, 1919.

Babu *Narendra Kumar Bose* for Dr. *Dwarka Nath Mitter* (with him Babu *Hari Charan Banerjee*), for the Appellants.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Haradhan Chatterjee*), for the Respondent.

JUDGMENT.

Ghose, J.—These two appeals arise out of two suits brought by the plaintiff against the defendants. The principal prayer of the plaintiff is this:—'That it may be declared that, save and except *garkaemi* ordinary *ticca jote* right to terminate at will under the plaintiff in respect of the land and *jama* described in the Schedule, the defendants have no right and power to make hollows and excavations and to manufacture bricks in the said land and *jama* and

thus to change the features of the *jote* and to alter the character of the tenancy." It is unnecessary to state any of the othe prayers of which there is a large number, except that the plaintiff claims damages for certain excavations made by the defendants on the lands comprised in the tenancies. The Court of first instance dismissed the suits entirely. On appeal by the plaintiff, the Subordinate Judge had made a partial decree in his favour. With regard to Appeal No. 5, arising out of one of the suits, his order runs thus: "The plaintiff's suit is decreed in terms of prayers *ka* and *kha* of the plaint and that he do recover from the defendants Nos. 1 to 3 Rs. 6-4-0 as damage and that the other prayers be dismissed. So far as *ka* prayer is concerned, the first part of the prayer that the defendants are *garkaemi itoca* tenents-at-will be dismissed, but it will be declared that they have no right to make excavations and to alter the nature of the tenancy." In Appeal No. 6 the only relief allowed is this: "The plaintiff will get a declaration that the defendants have no right to make excavations for brick-making and that they are permanently restrained from doing so in future so as to extend the excavation;" and the other prayers were rejected. The findings of the learned Subordinate Judge as to the nature of the tenancies are as follows: "The land in Appeal No. 6 is not agricultural. It comprises *bastu* and *bagan*. The evidence, so far as it can be traced, leads us to a very old date and the rent never changed and there were inheritances and transfers recognised." From this, he comes to the conclusion that it is a tenancy at a fixed-rate, although he makes use of the words "holding at a fixed-rate." The result is that it is a permanent tenancy not governed by the Bengal Tenancy Act. With regard to the other tenancy which was the subject of the Appeal No. 5 before him, he holds that the defendants are permanent tenure-holders. This tenure consists of about 133 *bighas* of land and the act complained of is that some excavations have been made for the purpose of making bricks on two plots to the extent of about 24 feet *into* 21 feet. The Subordinate Judge says, "having regard to the circumstances, I allow only nominal damage, that is, one fourth of the amount claimed just to vindicate the right of the plaintiff." As to the other land, the Subordinate Judge has found that there was no material alteration of the land and the excavation was acquiesced in. The question, therefore, is whether the defendants are entitled to make the excavation complained of, and whether the plaintiff is entitled to any damages. Obviously, the provisions of section 23 of the Bengal Tenancy Act to which reference was made in the course of the argument do not apply. There is nothing in the law which prevents tenants having permanent heritable rights at fixed rent from using the land in any manner they think fit so long as there is no risk to the right of the landlord to recover the rent payable, and, I think, it is now settled that, unless there are any reservations, the landlord has no right in the case of such tenures other than the right to receive the stipulated rent. There is no actual damage found in these cases for which the landlord is entitled to any relief. There does not appear to be any justification for the ground on which the Subordinate Judge has allowed nominal damages. Reliance has been placed on behalf of the respondents on the case of *Anund Coomar Mookerjee* v. *Bissonath Banerjee* (1) as supporting the contention that even if a *mukarari* makes an excavation on the land, he is liable to damages. But it will be seen that, in that case, the excavations were considerable and it was remarked that 'If the landlord wanted to bring a suit for enhancement against the defendant on the ground that the value of the produce or that the productive powers of the land had increased, he would find it extremely difficult to make out any case at all in consequence of the soil having been excavated and taken away by the defendant for the purpose of making bricks." That case has, therefore, no application to the circumstances before us. Then, as to the question of injunction, there is no finding that anything has been done so as to affect

(1) 17 W. R. 416.

the right of the landlord to obtain his rent. In my judgment the case of *Girish Chandra Chando* v. *Sirish Chandra Das* (2) relied on by the Subordinate Judge and also by the learned Vakil for the respondents, is not of any assistance to the plaintiff. In that case, it was held that, if the excavations by the tenants were such as would cause the total destruction of the property, he might be restrained from making them. Here the plaintiff did not charge the defendants with any such act of waste as could be detrimental to his interest. The ground on which an injunction was asked for is that the defendants are *garkaemi* ordinary *ticca jote* tenants whose rights are terminable at will and that they have no right to use the land in the way alleged. That has been found against the plaintiff. In my opinion, the plaintiff has not made out any case for an injunction. The plaintiff is not, therefore, entitled to any of the reliefs granted by the Subordinate Judge and his suits must fail. The appeals are accordingly decreed and the suits dismissed with costs in all Courts.

Walmsley, J.—I argee.

Z. K. *Appeals allowed.*

(2) 9 C. W. N. 255.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1229 OF 1920.
March 8, 1923.

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

LADHA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat HUKUM DEVI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Document thirty years old—Period, how to be reckoned.

The period of thirty years mentioned in section 90 of the Evidence Act must be reckoned, not from the date on which the document is put into Court, but from the date on which after it has been tendered in evidence, its genuineness becomes the subject of proof. [p. 58, col. 1.]

Minu Sirkar v. *Rhedoynathroy*, 8 C. L. R. 185, relied on.

Second appeal from a decree of the District Judge, Lahore, dated the 24th February 1920, affirming that of the Munsif, First Class, Lahore, dated the 12th August 1918.

Mr. *Gobind Ram*, for the Appellants.

Lala *Ganga Ram*, for the Respondents.

JUDGMENT.—The first five defendants, who live at Atari Saroba, sued Indo and her husband, Diwan Chand, for possession of a house in that village. The case ended in a compromise by which half of the house was given to Indo. Indo's sister has now sued for a declaration that half of the house belongs to her, alleging that the house was owned by her father Kahna, and that since his death it has been the property of her sister and herself. The defendants denied that the plaintiff was in possession and pleaded that Kahna was not the owner of the house but lived in it with their permission. The Courts below have given judgment for the plaintiff, finding that she is in possession and that Kahna's ownership is proved by two documents, Exhibits P. 3 and P. 4, which show that defendants or their ancestors sold the house to him.

No evidence was given as to the execution of those documents, but the Courts below have held that their genuineness may be presumed under section 90 of the Evidence Act as they are more than 30 years old and were produced from proper custody. No objection is taken to the admissibility of P. 4, which was executed in 1874 but it is contended in second appeal that P. 3, which is dated the 3rd August 1888, is not admissible without proof as it was produced on the 19th December 1917 less than 30 years after its execution.

The learned District Judge has held that the period of 30 years mentioned in section 90 of the Evidence Act is to be reckoned back from the time when the document is in controversy, and this view is supported by *Minu Sirkar* v. *Rhedoynathroy* (1) where it was held that the period is to be reckoned, not from the date on which the document is put into Court, but from the date on which after the document has been tendered in evi-

(1) 8 C. L. R. 185.

dence, its genuineness becomes the subject of proof up to the 12th August 1918, when the first Court gave its judgment, the genuineness of P. 3 does not appear to have been called in question, and it was only when the case came up to the Appellate Court that the defendants took the objection that P. 3 had not been proved. The learned District Judge is of opinion that the period of 30 years should be reckoned from the date of his predecessor's order remanding the case, and we think that, at all events, it cannot be reckoned from a date earlier than the 12th August 1918 when the Trial Court gave its decision. From whichever of these dates the period be counted, the document is more than thirty years old, and we hold, therefore, that proof of its execution is not required.

It is argued that the house to which P. 3 relates is not shown to be the one in dispute, but this point was not taken the grounds of appeal either in this Court or in the lower Appellate Court.

The finding, therefore, that the house belonged to Kahna, being supported by evidence, cannot be contested, and the finding as to the plaintiff's possession is also not open to contest. The contention that the plaintiff has a third sister and cannot sue for more than her own share has no force, as, in the first place, it does not appear to be known whether that sister is alive or dead, and, in the second place, the suit is not for possession, but only for a declaration of the title of the plaintiff, with whose rights the defendants are seeking to interfere.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL NO. 26 OF 1923.

August 10, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

BARO BAHADUR MAN SINGH—APPLICANT

versus

Maharani NAWLAKHBATI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109

(c), 110—"*Decision,*" *meaning of—High Court reversing findings but affirming decision of Trial Court, effect of—Combined effect of several factors—High Court, whether will certify appeal.*

The term "decision" in the last clause of section 110, Civil Procedure Code, means the decree or order passed, and not the reasons given for passing such decree or order. [p. 60, col. 2.]

Where the decree of a Trial Court is affirmed on appeal by the High Court, it is not necessary that the judgment of affirmance should be based on precisely the same reasons as those given by the Trial Court. The mere circumstance, therefore, that there are no concurrent findings of fact would not remove the case from the last clause of section 110 of the Civil Procedure Code, and so relieve the person applying for leave to His Majesty in Council from showing that some substantial question of law was involved in the appeal. [p. 60, col. 2.]

Where an Appellate Court permits an issue which had been given up to be re-opened, and allows in the appellate stage further evidence to be taken, that in itself is not a sufficiently substantial question of law to entitle an applicant to appeal to His Majesty in Council, especially where the applicant was in no way prejudiced by the procedure adopted by the Appellate Court. [p. 60, col. 2.]

Clause (*c*) of section 109 of the Civil Procedure Code imposes no limitation to the cases in which a High Court may certify a case as a fit one for appeal to His Majesty in Council, but the power given by that clause ought to be used very sparingly. [p. 61, col. 1.]

Where, in a case (*a*) the property involved is of very large value, (*b*) the decision of the High Court is based upon findings of fact which reversed the findings of the Trial Court, (*c*) the evidence upon which the High Court acted was not all before the Trial Court, and (*d*) a question of procedure of somewhat unusual character is involved, and it is possible that a higher Tribunal might take a different view in respect thereto:

Held, that the combined effect of these matters was such that the High Court ought to exercise its power under section 109 and certify the case as a fit one for appeal to His Majesty in Council. [p. 61, col. 2.]

Application for leave to appeal to Privy Council from a decree of the Division Bench of the Patna High Court, dated the 6th April 1923.

Messrs. *S. Ahmad* and *S. C. Mazumdar*, for the Appellant.

Mr. *P. Dayal*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an application on behalf of the plaintiff in the suit for leave to appeal to His Majesty in Council from a decree of a Division Bench of this Court, dated the 6th April this year. The value of the property which is the subject-matter of the suit and of this appeal is stated to be 45 lakhs of rupees.

The decree appealed from affirmed the decision of the Trial Court but on different grounds from those upon which the Trial Court's decision was based. The applicant contends that the appeal complies with the provisions of section 110 of the Civil Procedure Code, but if this contention should fail he contends further that the case is a fit one for a certificate under the provisions of section 109, clause (c), of the Code.

The suit was instituted by the plaintiff on the 17th January 1921 for a declaration of his title to, and to obtain possession of, the estate of the late Maharaja Sir Harballabh Narain Singh who died in the year 1907 leaving two widows Maharani Tarabati and Maharani Nawlakhbati but no male issue. On the death of the Maharaja his property descended to his widows who took a Hindu widows' estate. The senior Maharani Tarabati had a married daughter, Padambati, who had two sons Rao Bahadur Gobind Singh and Rao Bahadur Rudra Partap Singh. The plaintiff is the son of Gobind Singh. Shortly after the death of the late Maharaja Harballabh Narain Singh, the estate was taken over by the Court of Wards under the provisions of the Court of Wards Act (Bengal Act IX of 1879) and the Maharanis became Wards of Court. The two Maharanis are said to have conceived the idea of relinquishing the estate in favour of one of the two grandsons of the senior Maharani but it was pointed out to them on behalf of the Court of Wards that they could not relinquish in favour of one only of the next male reversioners. In the result, on the 18th December 1918, they did execute a deed of relinquishment in favour of both the grandsons Gobind Singh and Rudra Pratap Singh in equal shares. Subsequently, when Gobind Singh applied for substitution of his name in the Land Registration Department together with that of his brother, his claim was opposed on behalf of the Court of Wards and his prayer for registration was rejected. In October 1919 Gobind Singh died leaving as his heir the plaintiff in this suit. If the deed of relinquishment relied upon is a valid and binding instrument the interest of the plaintiff's father in the estate became vested at the date of the deed in December 1918 and on his death his son, the plaintiff, would succeed to his share in the inheritance jointly with his uncle Rudra Pratap Singh. The defendant first party in the suit is the surviving Maharani Nawlakhbati, the junior widow of the late Maharaja, who was sued through the Manager of the estate under the Court of Wards. As the plaintiff's uncle, Rudra Pratap Singh, refused to join in the suit, he was impleaded as the defendant second party.

Several pleas were raised in defence to the suit on behalf of the Manager of the Court of Wards who then represented the Maharani Nawlakhbati. It is only necessary, however, for present purposes, to refer to two of the issues which were framed at the trial. Issue No. 3 was, "Whether the deed of surrender dated the 18th December 1918 was executed by the Maharanis, widows of Maharaja Sir Harballabh Narain Singh Bahadur, under misrepresentation, without getting any independent advice and without knowing or understanding its contents. Is it legally valid or operative?" Issue No. 5 was, "Is the deed of surreder valid, having regard to the provisions of section 60 of the Court of Wards Act?"

It was apparently the case of the Maharani that she had no independent advice and had no knowledge or understanding of the contents of the document when she executed it. Her evidence was taken before a Commissioner appointed for that purpose and after she had made certain statements with regard to this issue the learned Vakil engaged by the Court of Wards to represent her interest stated to the Commissioner appointed to record the evidence that, under instructions from the Court of Wards, he would not press issue No. 3. Consequently, she was not cross-examined on this issue. After the evidence was closed and after the learned Vakil for the plaintiff had addressed the Court in argument, but before judgment was delivered, the estate ceased to be under the management of the Court of Wards and was restored to the surviving

Maharani. Immediately thereafter, having appointed another Vakil to represent her interests in the suit, she applied through him to be allowed to raise the issue which had been abandoned by the learned Vakil who had previously represented her under the instructions of the Court of Wards, and to be allowed to give further evidence upon the matters raised in that issue. The learned Additional Subordinate Judge refused the application to adduce further evidence and to re open the issue, but in his judgment he considered at great length the questions of fact raised in that issue and decided them in favour of the plaintiff. With regard to issue No. 5 he decided that the surrender by the Maharanis in favour of their grandsons was invalid by reason of the provisions of section 60 of the Court of Wards Act. He accordingly dismissed the suit upon that ground.

The plaintiff appealed to the High Court and contended suecessfully that the deed of relinquishment was not invalid by reason of the provisions of section 60 of the Court of Wards Act. He objected to the findings of fact by the Trial Court upon the third issue being re-opened in appeal as this point had been abandoned during the trial. The learned Judges before whom the appeal came considered, however, that they had power in the circumstances to consider this issue but, before determining it, they thought that the appellant should have an opportunity, if he so desired, to cross-examine the Maharani upon the evidence she had already given and to call any further evidence he might wish to adduce upon this point. In the result, the Maharani was cross-examined and further evidence was called by the appellant before the Appellate Court. That Court by its judgment found that the Maharani had had no independent advice and had signed the deed of relinquishment without knowing or understanding its contents. The result was that, although the Appellate Court reversed the findings of the Trial Court both upon the question of law and upon the question of fact, the decree of the Trial Court was affirmed and the appeal dismissed.

In applying for leave to appeal to His Majesty in Council from that decision the learned Government Advocate on behalf of the plaintiff has contended that the decree from which he seeks leave to appeal does not affirm the decision of the Court below within the meaning of section 110 of the Civil Procedure Code and that it is not necessary, therefore, for him to show that the appeal involves some substantial question of law. It is true that there are no concurrent findings of fact in the present case but that does not, in my opinion remove it from the operation of the last clause of section 110. The decision of the Court below was a decision dismissing the suit and the decree which it is now sought to appeal against undoubtedly affirmed that decision. It is unnecessary, in my opinion, that the judgment of affirmance should be based upon precisely the same reasons as those given by the Court below. The decision mentioned in that part of the section must, I think, mean the decree or order passed and not the reasons given for passing such decree or order.

It was next contended that the Appellate Court committed an error of procedure in permitting an issue which had been given up to be re-opened and in allowing, in the appellate stage, further evidence to be taken and that this was in itself a sufficiently substantial question of law to entitle the applicant to appeal to His Majesty in Council. I am unable to accept the view that a substantial question of law arises in this respect. Having regard to the peculiar circumstances of this case, I think it would have been perfectly legitimate for the learned Subordinate Judge of the Trial Court to have granted the defendant's request to be allowed to raise the issue which she asked to raise at a late stage of the case provided that the other side were given an opportunity of adducing evidence upon the issue raised and if the Court of Appeal considered that in the interests of justice this issue ought not to be shut out I think they had power to deal with it having regard to the provisions of sections 151 and 153 of

the Civil Procedure Code. I cannot see that the appellant was prejudiced as he was given the opportunity, which he availed himself of, of cross-examining the Maharani and of calling further evidence upon the issue.

It was next contended that a question of law does arise in this appeal, namely, the construction of section 60 of the Court of Wards Act. The construction of that section, however, is not involved in the present appeal as it was construed by the Appellate Court in favour of the appellant and there is no appeal from that part of the decision. Moreover, if the appeal must fail unless a finding of fact is first reversed it does not appear to me that an appeal in such circumstances necessarily involves any question of law at all.

It remains to consider whether this is a case which we ought to certify as a fit one for appeal under clause (*c*) of section 109. No limitation is imposed by that clause to the cases in which the Court may certify, but at the same time it is a power which ought to be used very sparingly. The question generally arises in cases where the value of the subject-matter in appeal is below the statutory amount of Rs. 10,000. In such cases it is unusual to grant a certificate unless the case is one of great general importance or involves the interests of a large section of the community. But it is perhaps not possible, and I do not think it desirable to attempt, to lay down any general rule which will govern all cases There are, however, in my opinion, special features in the present case which ought, I think, to justify us in certifying that this is a fit case for appeal under section 109 clause (*c*) of the Code. In the first place, the value involved in the present case is very large. Secondly, the decision of the High Court was based upon findings of fact which reversed the findings of the Trial Court. Further, the evidence upon which the High Court acted was not all before the Trial Court. Again, although, in my opinion, the question of law contended for is not one of substance it is a question touching procedure of a somewhat unusual character and it is quite possible that a higher Tribunal might take a different view. Although no one of these features alone might be sufficient to justify us in acting under section 109, I think that in the peculiar circumstances of this case the combined effect of these matters is such that we ought to exercise our power under section 109 and certify that the case is a fit one for appeal to His Majesty in Council under the provisions of clause (*c*) of that section. The applicant is entitled to his costs of this application. Hearing fee five gold *mohurs*.

Mullick, J.—I agree.

W. C. A. *Application granted.*

BOMBAY HIGH COURT.

INSOLVENCY PETITION NO. 334 OF 1922.

July 4, 1922.

Present:—Mr. Justice Marten.

In re MANECKCHAND VIRCHAND PATNI.

Presidency Towns Insolvency Act (III of 1909), s. 18, applicability of—Commissioner in Insolvency, whether can stay insolvency proceedings in District Court—District Court, whether subject to superintendence of Commissioner—District Judge powers of

Section 18 of the Presidency Towns Insolvency Act applies where the Insolvency Court has power to stay an ordinary civil suit which may be pending at the date of the insolvency against an insolvent. It does not relate to some other insolvency pending in some other Court of another Province or in any of the District Courts of the Presidency. [p 62, col. 1]

A District Court is not subject to the superintendence of the Commissioner in Insolvency but to that of the High Court on its appellate side. [p. 62 col 2]

A District Judge has powers of staying insolvency proceedings in his Court similar to those which a Single Judge of the High Court has under section 22 of the Presidency Towns Insolvency Act in respect of insolvency proceedings pending in the High Court. [p. 63, col. 1.

In re Aravayal Sabhapathy, 21 B. 297; 11 Ind. Dec. (N. S.) 201. *In the matter of William Watson*, 31 C. 761: 8 C. W. N. 553, referred to.

Mr. *Bramhandkar*, for the Insolvent.

Mr. *Bhandarkar*, for the Opposing Creditor.

JUDGMENT.—This is an application by one Maneckchand Virchand, an insolvent,

first, that the further proceedings in the Insolvency Petition No. 1 of 1922 in the District Court of Nasik be stayed by sending a notice to that Court as provided by section 18 of the Presidency Towns Insolvency Act, III of 1909; secondly, that the Insolvency Petition No. 1 of 1922 pending in the District Court, Nasik, be ordered to be transferred to this Court; thirdly, that the present High Court insolvency petition and the Nasik insolvency petition be then consolidated, and, lastly, for such other order as the Court may think fit to make.

The other order that I think fit to make is, that this application be dismissed as being entirely misconceived. It is apparently based on section 18 of the Presidency Towns Insolvency Act which runs:—

"(1) The Court may, at any time after the making of an order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court."

That section, of course, applies to the familiar case where the Insolvency Court has power to stay some ordinary civil suit which may be pending at the date of the insolvency against the insolvent. In my opinion it does not relate to some other insolvency pending in some other Court of another Province or in any of the District Courts of our own Presidency. Certainly, that other insolvency is not a "suit" pending against the insolvent. Nor in my opinion is it an "other proceeding" pending against the insolvent. Such other proceeding should, I think, be *ejusdem generis* or analogous to a suit. But, however that may be, I am of opinion that the District Court is not subject to the superintendence of the Commissioner in Insolvency, and that, consequently, on that ground alone section 18 is not complied with.

I may also observe that section 22 of the Presidency Towns Insolvency Act expressly provides for the case where other insolvency proceedings are pending in any other British Court. Then, if the Court thinks that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon. Examples of how that jurisdication is exercised will be found in the cases of *In re Aranvayal Sabhapathy* (1) and *In the matter* of *William Watson* (2). In the other words, each Court can stay its own proceedings, but cannot interfere with another Court, unless it has sperintendence over it.

Then, when one turns to the Provincial Insolvency Act, V of 1920, which is the latest Act regulating insolvency matters in our Province, it is quite clear that appeals under that Act lie from the District Court to the High Court. In my opinion the High Court there means the High Court on its appellate side, and does not mean the Commissioner in Insolvency. So it is the High Court on its appellate side, which has superintendence over the District Court.

As far as the ordinary procedure and powers of the Judges on the Original Side are concerned, the Full Bench case of *Narayan Vithal* v. *Jankibai* (3) decides that it is not competent for a Single Judge of the High Court, exercising the ordinary original civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the Mofussil, unless authorised so to do by rule. Mr. Justice Macleod in that case was of opinion that there was jurisdiction *in personam* to restrain the parties from proceeding with such a suit, and the Appellate Court in *Mulchand Raichand* v. *Gill & Co.* (4) was of the same opinion. But, however that may be, that point does not arise in the present case. I am not here exercising any jurisdiction *in personam* whatever.

I thus refer to the Original Side Jurisdiction, because this morning Counsel for the applicant urged that, under section 5 of the Provincial Insolvency Act, 1920, I had the same powers as if I was sitting on the Original Side. But the Full Bench case shows that, even then, I should have no power to stay the Nasik proceedings

(1) 21 B. 297; 11 Ind. Dec. (N. S.) 201.
(2) 31 C. 761; 8 C. W. N 553.
(3) 30 Ind. Cas. 560; 17 Bom. L. R. 655; 39 B. 604 (F. B.).
(4) 53 Ind. Cas. 518; 21 Bom. L. R. 963; 44 B. 283.

and much less to transfer them to the High Court. At the time of that argument, nobody appeared to oppose, but for various reasons I stood the matter over till after the midday adjournment. Then Mr. Bhandarkar appeared for the opposing creditor, and has argued that I have no jurisdiction to hear the present application at all. I cannot decide the point of jurisdiction without hearing the parties, but having done so, my conclusion is that I have no jurisdiction to grant the present application.

I should mention one other matter. The parties appeared to be greatly moved over certain proceedings that have taken place in a Nasik civil suit where certain property has been realized, and certain sums I understand have been set aside by the Subordinate Judge pending the Nasik insolvency proceedings. It is further said that the *interim* Receivers appointed in the Nasik insolvency proceedings by the Nasik District Judge are entitled to these sums so set aside and that they ought not to be lost to the general body of creditors. As to that the present High Court petition states as follows:—

"The petitioners further learns that the District Judge of Nasik after he received the letter of the Official Assignee has recently passed an order in the said Insolvency Petition No. 1 of 1922 that the said *interim* Receivers do vacate their office and hand over possession of all properties of the petitioners to the Official Assignee excepting the sum of Rs. 15,005 lying with the Second Class Subordinate Judge of Yeola. And that the petitioner further learns that the District Judge of Nasik is going to dismiss and dispose of the said Insolvency Petition No. 1 of 1922 pending in his Court against the insolvents on 24th June 1922. That the petitioner, therefore, submits that immediate action is urgently required to be taken by this Hon'ble Court."

How far that paragraph is accurate I do not know. But the learned District Judge of Nasik has similar powers of staying insolvency proceedings in his own Court, to those which I have under section 22 of the Presidency Towns Insolvency Act. And it would appear to be a question here following, I take it, the decisions in *In re Aranvayal Sabhapathy* (1) and *In the matter of William Watson* (2) as to which Court this particular insolvency can be more conveniently prosecuted in. The assets certainly seem to be very large—nearly three lacs—but I have no materials at the present moment before me pointing to a conclusion either the one way or the other. Nor is there even any application before me by Mr. Bhandarkar's client, asking that I should exercise my powers under section 22. But if the learned Nasik District Judge, after considering all the facts, is of opinion that this matter may be more conveniently disposed of in the High Court, then I dare say he will exercise his powers of staying proceedings. In saying this, I am in no way attempting to fetter his discretion, and for two very good reasons. First, that it would be very improper for me to do so, and, secondly, I have not got the facts before me on which I could exercise my own discretion. But I do say that, as at present advised, I think it will be very inconvenient to have two sets of insolvency proceedings going on together.

As regards the sum of Rs. 15,005 and the position of the *interim* Receivers, personally I do not see any difficulty. The Official Assignee will, I take it, intervene and get whatever he can subject to such orders as may be passed in the Nasik Court. If there are prior persons there in the way of *interim* Receivers, then presumably their claims will have to be satisfied first. This is not the first time this sort of point has arisen, as will be seen on looking at the authorities. I think a little common sense will remove this difficulty which the legal gentlemen concerned in the case appear at the present moment to feel.

My order will be that the present application be dismissed. There will be no order as to the costs of Mr. Bhandarkar's client.

R. N. *Application dismissed.*

DES RAJ SAWHUNY v. FRAY'S MOTOR WORKS.

LAHORE HIGH COURT.

CIVIL REVISION NO. 458 OF 1922.

January 6, 1923.

Present:—Mr Justice Moti Sagar.

DES RAJ SAWHUNY—DEFENDANT —PETITIONER

versus

FRAY'S MOTOR WORKS—PLAINTIFFS —RESPONDENTS.

Interest Act (XXXII of 1839)—Interest, whether allowable without notice of demand or agreement.

In the absence of an express agreement to pay interest, or a written demand or notice that interest would be charged under the provisions of the Interest Act, a claim as to interest cannot be entertained.

Edulji & Co v. *McDonald*, 55 P R 1901, *Fillingham* v *Captain C. I. Dunn*, 20 Ind. Cas. 194, 8 P. R. 1914; 266 P. L. R. 1913; 235 P. W. R. 1913, followed.

Civil revision from a decree of the Judge, Cantonment, Small Causes Court, Rawalpindi, dated the 22nd April 1922.

Mr. *Mukand Lal Puri*, for the Petitioner.

Mr. *B. D. Qureshi*, for the Respondents.

JUDGMENT.—The main question for determination in this case is whether the claim as to interest has been rightly decreed. The suit was one for the recovery of Rs. 106-5-0 due on a tradesman's bill with Rs. 13-11-0 interest at 6 percent per annum.

The lower Court gave a decree for the full amount claimed with costs and against this decision the defendant applies for revision to this Court. It is urged on his behalf that his vouchers have not been produced and that there is no evidence on the record on which the claim could have been decreed. It is further contended that the claim as to interest is wholly illegal, and that costs should not have been allowed in any case.

In my opinion there is no force in the first contention. The plaintiff gave a statement on oath in the Court below that Rs. 106-5-0 were due and also produced a copy of his accounts the correctness of which was not in any way challenged. If the defendant doubted the correctness of the the plaintiff's claim it was open to him to have summoned the plaintiff with the vouchers as a witness in the case, and to have satisfied himself whether the amount claimed was or was not really due. The lower Court believed the statement of the plaintiff, and there being no other evidence to the contrary it was fully competent to the lower Court to decree the claim on the strength of that statement alone.

On the question of interest Mr. Puri relies on *Edulji & Co.* v. *McDonald* (1) and *Fillingham* v. *Captain C. I. Dunn* (2) in which it has been held that in the absence of an express agreement to pay interest or a written demand or notice that interest would be charged under the provisions of Act XXXII of 1839, the claim as to interest cannot be entertained. The present case is fully covered by these authorities, and no express agreement to pay interest having been alleged and there being no evidence that a demand was made in accordance with the provisions of Act XXXII of 1839, I must hold that interest should not have been decreed.

As to costs, I do not see any reason why they should not be allowed on the principal sum decreed. Costs generally abide the result, and no valid reason has been assigned as to why an exception should be made in this case. I allow the revision, and modify the order of the lower Court by reducing the decretal amount from Rs. 120 to 106 5 0 only with proportionate costs on this sum. The rest of the claim for Rs. 13-11-0 is dismissed also with costs.

No order as to costs in this Court.

W. C. A. *Revision allowed.*

(1) 55 P. R. 1901.

(2) 20 Ind. Cas. 194; 8 P. R. 1914; 266 P. L. R. 1913; 235 P. W. R. 1913.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 114 OF 1923.
April 6, 1923.
Present:—Justice Sir John Bucknill, KT.
BANSIDHAR MARWARI—PETITIONER
versus
INDAR NARAIN SINGH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 144, 145—Dispute with regard to land—Both parties called upon to show cause—One party subsequently called upon to show cause why it should not be bound over—Proceedings set aside by District Magistrate—Fresh proceedings under s. 145 ordered—Illegality—Irregularity in form without prejudice to party—Interference—Revision, whether desirable.

In many cases where m orders there has been irregularity of form but where it appears that no harm would be done to the parties, although by a wrong metho l a right result may have been reached, it is undesirable that the High Court should exercise its discretionary jurisdiction in revision. [p. 66, col. 2]

Upon a Police report a Magistrate recorded an order under section 144, Criminal Procedure Code, and issued notice to the parties to show cause. On the date fixed for hearing proceedings were drawn against one party under section 107 of the Code and a date was fixed for showing cause why they should not be bound over. This party applied to the District Magistrate to set aside this order. Without issuing any notice to the other party the District Magistrate set aside the preliminary order under section 107 and directed that proceedings be taken under section 145 of the Code. Proceedings were taken up accordingly and the party applied to the High Court in revision:

Held, that the District Magistrate had no power to set aside the order under section 107 nor had he any jurisdiction to direct the Sub-Divisional Magistrate to initiate proceedings under section 145. [p. 66, col. 2]

Revision from an order of the District Magistrate, Bhagalpur, dated the 23rd February 1923.

Messrs. *G. C. Majumdar* and *S. G. Majumdar*, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application in criminal revisional jurisdiction. The matter is a very simple one. The Sub-Divisional Officer of Bhagalpur on the 25th January 1923, as the result of the perusal of a Police report and under the belief that there was an imminent danger of a breach of the peace, made an order restraining both parties from going upon certain lands about which there was a dispute between them; this he did under the provisions of section 144 of the Criminal Procedure Code. He ordered that notices should be issued on the parties accordingly and that they should show cause before him on the 7th February last. On the 7th February the matter came before him. His order-sheet reads: "Cause shown by both parties. Draw proceedings under sect on 107, Criminal Procedure Code, against second party Fix 26th February 1923 for showing cause by the second party why they should not be ordered to execute a bond of Rs. 200 each to keep the peace for the period of one year with a surety of like amount." Now, I think that it is common ground here that the Sub-Divisional Officer seems to have made a mistake. He does not clearly round off or finish the proceedings under section 144 of the Criminal Procedure Code which were actually before him. Presumably, he intended to conclude the proceedings under section 144, and, after having closed them down, to initiate proceedings under section 107; but at any rate he passed no order under the provisions of section 144. I think that I should mention that in coming to the conclusion to which he did, the Sub-Divisional Officer had the advantage of seeing the written statements which had been filed in response to his notice of the 25th January by both parties. Now, on the 23rd February it would appear that the second party, (that is, the respondent here) applied, it is said *ex parte*, to the District Magistrate of Bhagalpur to set aside the Sub-Divisional Officer's order. The District Magistrate on that date and, it is alleged, without any notice having been given to the first party, made an order which is the principal subject-matter of the application now before this Court. In this order, after reciting that he had read the records and the Police report and after commenting upon the fact that the Sub-Divisional Officer did not appear to have made any order absolute under the provisions of section 144 and assuming that it had been intended that those proceedings under section

144 had been in some fashion or other dropped, the District Magistrate writes: "The petitioner has questioned the propriety of a proceeding under section 107, Criminal Procedure Code. The dispute, he says, is a dispute concerning land and this is admitted by the Police report on which the Magistrate relies." He then expresses the view that, on the materials which were available before him, it could hardly be said that the claim which was put forward by the second party could be regarded off-hand as not *bona fide* and, then, makes the following order: "This is, therefore, a case in which section 145 should be applied. Therefore, under section 435 of the Criminal Procedure Code I set aside the preliminary order under section 107, Criminal Procedure Code, and direct that proceedings be taken up under section 145, Criminal Procedure Code." Now it is admitted here that each part of this order is bad. In the first place, had the District Magistrate desired to deal in any way with the order which had been made by the Sub-Divisional Officer under the provisions of section 107 of the Criminal Procedure Code, he might possibly have referred the matter to this Court but *he* certainly had no power to set aside the order which had been made by the Sub-Divisional Officer. In the second place, it is also similarly admitted that the District Magistrate had no jurisdiction to direct the Sub-Divisional Officer to take proceedings under section 145 of the Criminal Procedure Code. Now, when the District Magistrate's order was sent down to the Sub-Divisional Officer, he, obeying the directions which had been given to him by the District Magistrate, made the following order on the 26th February:— "Perused District Magistrate's order. Draw proceedings under section 145, Criminal Procedure Code and fix the 16th March 1923. In the meantime the land is attached under section 145, clause (4), Criminal Procedure Code. Send copy of this order to Police for attachment." This series of errors was brought to the attention of this Court on the 5th March and a rule was obtained from Mullick and Adami, JJ., all further proceedings being stayed pending the hearing of the application. The matter has now come before me.

What has actually taken place is not defended or excused by the learned Assistant Government Advocate who appears for the opposite party. Indeed, the District Magistrate himself, in his reply to the communication from this Court asking him whether he had any cause to show why his order should not be set aside, does not, so far as I understand his explanation, seem now to contemplate that he can justify his having made an order of this character. What, however, is urged, very sensibly, by the learned Assistant Government Advocate is that in many cases where in orders there has been irregularity of form but where it would seem on such investigation as is possible in this Court, that no harm would be done to the parties and that although by a wrong method a right result may perhaps have been reached; it is undesirable that this Court should exercise its discretionary jurisdiction in revision. Whilst I am in full accord with that proposition I must say that in this case I think it can hardly be said that it is one in which it is not more important to draw attention to the series of errors which has taken place than to take up the attitude that formalities have not been observed which should be condoned. It was, I think, quite obvious that the Sub-Divisional Officer ought to have concluded his investigation under the provisions of section 144 and at any rate to have made some order which would indicate what had happened to those proceedings which seem to have been left by him in the air. It is also equally clear that the District Magistrate had neither power to question the proceedings which had been initiated by the Sub-Divisional Officer under the provisions of section 107, nor to order the Sub-Divisional Officer to initiate proceedings under section 145. Lastly, as a corllary, it was doubtless irregular for the Sub-Divisional Officer to have drawn up proceedings under the provisions of section 145 simply on the ground that he was told so to do by the District Magistrate. I fear that, if such a series of errors were passed over without comment

and the orders which have been wrongly made were allowed to stand simply because it may possibly be that no harm will eventuate to either of the parties as a result of such orders, those who have to administer the criminal law in subordinate capacities might perhaps feel that any close adherence to the formalities prescribed by the Criminal Procedure Code is unnecessary. In this case, therefore, I feel that a sense of the irregularity of what has taken place should be marked by setting aside these orders. I direct, therefore, that the order of the District Magistrate of the 23rd February last and the order of the Sub-Divisional Officer of the 26th January last be set aside. The result will be that the Sub-Divisional Officer will be left with the proceedings which were commenced by him on the 7th February under the provisions of section 107 of the Code of Criminal Procedure. In order to place his order-sheet upon a proper footing, he ought, strictly speaking, to pass some order indicating what has happened to the proceedings under section 144 which he initiated so long ago as the 25th January. I wish, however, specifically to mention that it does not necessarily follow that other proceedings in addition to or in lieu of those taking place under section 107 may not also be desirable or even necessary. With that, however, I have here nothing whatever to do. Whether such steps are desirable or necessary must depend upon circumstances as they arise.

K. S. D. & W. C. A. *Order accordingly.*

BOMBAY HIGH COURT.

FIFTH CRIMINAL SESSIONS CASE NO. 4 OF 1921.

December 21, 1921.

Present—Mr. Justice Fawcett.

EMPEROR—PROSECUTOR

versus

Haji SHER MAHOMED AND OTHERS—ACCUSED.

Evidence Act (I of 1872), s. 14—Accused charged with belonging to gang of dacoits—Evidence of offences other than dacoity, admissibility of.

When several persons are charged with belonging to a gang of persons habitually committing dacoity under section 400 of the Penal Code, evidence of the commission by them of offences other than dacoity, being evidence of bad character, is inadmissible under section 14 of the Evidence Act. [p. 67, col. 2.]

Public Prosecutor v. *Bongiri Pottigadu*, 2 Ind. Cas. 307; 32 M. 179; 5 M. L. T. 100; 9 Cr. L. J. 567, *Emperor* v. *Debendra Pershad*, 2 Ind. Cas. 601; 36 C. 573 at p. 584; 13 C. W. N. 973; 9 C. L. J. 610; 10 Cr. L. J. 91, *Emperor* v. *Panchu Das*, 58 Ind. Cas. 929; 47 C. 671 at pp. 692, 696; 24 C. W. N. 501; 31 C. L. J. 402; 21 Cr. L. J. 849, relied on.

Empress v. *Naba Kumar Patnaik*, 1 C. W. N. 146 at p. 150; *Bonai* v. *Empreor*, 9 Ind. Cas. 555; 38 C. 408; 15 C. W. N. 461; 12 Cr. L. J. 97, *Emperor* v. *Tukaram Malhari*, 15 Ind. Cas. 811; 14 Bom. L. R. 373 at p. 375; 13 Cr. L. J. 539; 1 Bom. Cr. C. 136, referred to.

Mr. *S. G. Velinkar* with him Mr. *Haji*, instructed by the Public Prosecutor, for the Crown.

Mr. *R. S. Pandit*, for Accused Nos. 4, 22, 23, 24.

JUDGMENT.—There are twenty-four accused persons before the Court charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity under section 400, Indian Penal Code. It is sought to prove against one or more of these accused that they have been previously convicted for the offence of theft, or have been ordered to give security for good behaviour on the ground of being habitual thieves, etc, under Chapter VIII of the Criminal Procedure Code. The question is whether evidence of such previous convictions or orders is admissible against them under section 14 of the Indian Evidence Act. There is no doubt (1) that, in the case of a person accused under section 400, Indian Penal Code, a previous conviction of dacoity is admissible under section 14, as held in *Empress* v. *Naba Kumar Patnaik* (1), and (2) that a previous conviction of theft or an order to give security on the ground of being an habitual thief, is admissible against him in a case where he is charged under section 401, Indian Penal Code, *i. e.*, belonging to a gang of persons associated

(1) 1 C. W. N. 146 at p. 150.

for the purpose of habitually committing theft or robbery, as held in *Bonai* v. *Emperor* (2) and *Emperor* v. *Tukaram Malhari* (3). In these two cases such evidence clearly falls under section 14 of the Indian Evidence Act, as showing a disposition on the part of the accused towards the particular conduct alleged against him in the charge, namely, a habit of committing (1) dacoity and (2) theft. But if in order to establish a habit of committing dacoity you rely on evidence that the accused had previously committed thefts, you no doubt produce evidence which may show a disposition towards conduct *of a similar description* to that in question, but not *of the exact description* in issue. Dacoity is equivalent to (*a*) theft + (*b*) more offenders than four (*c*) violence and elements (*b*) and (*c*) are wanting. A person may be a habitual surreptitious night thief, but this goes very little way towards showing that he has a disposition towards dacoity. It is little, if anything, more than evidence of bad character which is excluded by section 54 of the Indian Evidence Act. This lays down the general rule that, ordinarily, the fact that the accused person has a bad character is irrelevant, and it is only if the evidence now sought to be put in falls under section 14 that it escapes this general rule. Explanation 1 to section 14 lays down that a fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question, and illustrations (*o*) and (*p*) to the section illustrate what is meant thereby. If in illustration (*p*) the word "did" is substituted for the word "said" I think it clearly shows that the evidence in question is irrelevent. It will then run as follows:—

"A is tried for a crime:

The fact that he did something indicating an intention to commit that particular crime, is relevant.

The fact that he did something indicating a general disposition to commit crimes of that class, is irrelevant."

(It may be noted that there is a mistake in repeating this illustration in Ameer Ali's Evidence Act, which has persisted even to the last Edition, namely, the word "relevant" is wrongly given in the last clause instead of the word "irrelevant)."

In a case like the present the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, and simple theft or bad livelihood, in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not, I think, evidence indicating an intention to commit the particular crime of which the accused is charged. It at most merely indicates a disposition to commit crime of a similar class, though I think, it is very doubtful whether dacoity must not be put in a higher class than theft, so that the evidence would not even fall within the description mentioned in the last clause of illustration (*p*). Therefore, I think that at section 14 does not permit of this evidence being admitted. The authorities also support this view. In *Public Prosecutor* v. *Bonigiri Pottigadu* (4) it was held that in a case under section 400, Indian Penal Code, the evidence of the commission of other offences than dacoity is only evidence of bad character and is inadmissible under section 54 of the Indian Evidence Act. The remarks in *Emperor* v. *Debendra Pershad* (5) and in *Emperor* v. *Panchu Das* (6) support the view I have taken. In the last named case even the dissenting Judge, Chaudhuri, J., at page 709* says:

"No doubt, evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to them."

(2) 9 Ind. Cas. 555; 38 C. 408; 15 C. W. N. 461; 12 Cr. L. J. 97.

(3) 15 Ind. Cas. 811; 14 Bom. L. R. 373 at p. 378; 13 Cr. L. J. 539; 1 Bom. Cr. C. 136.

(4) 2 Ind. Cas. 307; 32 M. 179; 5 M. L. T. 100; 9 Cr. L. J. 367.

(5) 2 Ind. Cas. 601; 36 C. 573 at p. 584; 13 C. W. N. 973; 9 C. L. J. 610; 10 Cr. L. J. 91.

(6) 58 Ind. Cas. 929; 47 C. 671 at pp. 692, 696; 24 C. W. N. 501; 31 C. L. J. 402; 21 Cr. L. J. 849.

*Page of 47 C.—(*Ed.*)

I hold, therefore, that the proposed evidence is inadmissible except in the case where the accused himself has given evidence that he has a good character, in which case it is admissible under section 54.

Order accordingly.

W. C. A.

PATNA HIGH COURT.

CRIMINAL REVISION No. 177 OF 1923.

April 30, 1923.

Present:—Justice Sir John Buckhill, KT.

NAND KISHORE MISSAR—PETITIONER

versus

KALIKA MISSIR AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146, —Property—Joint possession of parties—Order of attachment, whether legal.

Where in a dispute concerning property which the Magistrate finds is joint property and in the joint possession of the parties, he has no jurisdiction to make an order under section 145, or section 146 of the Criminal Procedure Code.

Revision from an order of the Sub-Divisional Officer, Buxar, dated the 19th March 1923.

Mr. *G. C. Pal*, for the Petitioner.

Mr. *P. Dayal*, for the Opposite Party.

JUDGMENT.—This was an application in criminal revisional jurisdiction. It was made on behalf of certain persons who were parties to proceedings instituted by the Sub Divisional Officer of Buxar. It is a little difficult to understand exactly what the Sub-Divisional Officer has done. It would appear, however, that in the first instance, he started proceedings under section 107 of the Code of Criminal Procedure against both the parties on the 26th January. On the 20th February he appears to have ordered the institution of proceedings under section 145 and on the 16th March to have proceeded to hear evidence apparently in both proceedings. On the 19th March he gave a judgment which appears to be, so far as I can gather, a judgment both in the proceedings started under section 107 and those started under section 145. He orders that the proceedings under section 107 should be dropped and that the land should be attached under the provisions of section 146.

Now, it is pointed out by the learned Vakil who appears for the applicant that it would seem that the Magistrate had no jurisdiction to make this order, because it would seem clear from what the Magistrate himself writes that the property is in the joint possession of the parties. Here, again, it is a little difficult to gather exactly what the Magistrate means, but, at any rate, he starts his judgment of the 19th ultimo by saying: "This is a joint family dispute. Deodat Missir, Jaigobind Missir, Kalika Missir and Jagdat Missir are brothers, their properties are joint.... The present dispute is over 8 *bighas* of land." Then later, towards the end of his judgment, he writes: "This is clearly a dispute over which the Criminal Court has no jurisdiction. As regard possession it is impossible to come to any conclusion. The whole family used to possess and cultivate this land jointly." Now, if he had merely said that he had been unable to come to any conclusion as to who was in possession of the property, no doubt he would have had jurisdiction to make the order under section 146 as he did. But as he finds apparently that the property is joint and presumably in the joint possession of the parties, under such circumstances it is quite clear on ample authority that he cannot make an order under section 145 or under section 146.

Under those circumstances the order of the Sub-Divisional Officer of Buxar, dated the 19th March 1923, attaching the land in dispute under the provisions of section 146 of the Code of Criminal Procedure must be set aside.

W. C. A.

Order set aside.

EMPEROR v. SHER MAHOMED.

BOMBAY HIGH COURT.

FIFTH CRIMINAL SESSIONS CASE NO. 4 OF 1921.

December 21, 1921.

Present:—Mr. Justice Fawcett.

EMPEROR—PROSECUTOR

versus

Haji SHER MAHOMED AND OTHERS—ACCUSED.

Evidence Act (I of 1872), s. 25—Statement by one accused to Police criminating co-accused —Admissibility.

A statement by one accused to the Police that certain property which he produced had been given to him by two other accused who were charged with him as being members of a gang of dacoits, is inadmissible as being an admission of a criminating circumstance under section 25 of the Evidence Act.

JUDGMENT.—During Police inquiries into the present case the accused No. 16, Mahomed Ubhayya, was questioned by an Inspector of Police, Mr. Satham, regarding a bundle of ammunition which he produced. He is said thereupon to have made a statement that it had been given to him by Mahomed Jaffer and Mahomed Karim and it is sought to put in evidence this statement to the Police Inspector. The question is whether it is not excluded as being a confession made to a Police Officer under section 25 of the Evidence Act. Mahomed Jaffer is accused No. 11 and Mahomed Karim was accused No. 10, but has since been made an approver. Mahomed Karim has given evidence that this particular ammunition belonged to the gang of dacoits, of which he and accused Nos. 11 and 16, with others, were members.

Mr. Velinkar, for the Public Prosecutor, argues that this statement does not amount to an admission of an incriminating circumstance so as to constitute a confession within the meaning of section 25, and he relies upon the case of *Emperor* v. *Mahomed Ibrahim* (1), where a statement made by an accused to a Police Officer that a box, which he was found carrying away at night, belonged to him, was held to be admissible, inasmuch as it did not amount directly or indirectly to an admission of a criminating circumstance. There is of course no doubt that a statement of a self-exculpatory kind, which, if true, is in favour of the accused, is admissible, in spite of the fact that, if it is shown to be false, it raises an inference of guilt; and a distinction must be made between such statements and statements which, although intended to be made in self-exculpation and not as a confession, nevertheless contain an admission of an incriminating circumstance, on which the prosecution relies. Instances of the latter class of statements are to be found in *Imperatrix* v. *Pandharinath* (2) and *Queen-Empress* v. *Javecharam* (3). The leading cases on the subject are collected in the judgment of Carnduff, J., in *Barindra Kumar Ghose* v. *Emperor* (4) and I agree with his conclusion that it is for the Court to decide, according to the particular circumstances of each case, whether a statement of an accused amounts to a confession or not. In this particular case the statement of accused No. 16 that Mahomed Jaffer and Mahomed Karim had given him the ammunition is clearly of an incriminating kind, inasmuch as both Mahomed Jaffer and Mahomed Karim are alleged by the prosecution to have been members of the same gang of dacoits as the one to which the accused No. 16 is charged with having belonged. The mere fact that the accused in making his statement may have intended it to be self-exculpatory is insufficient. The real test is, what is its effect: and, having regard to the circumstances I have mentioned, there can, I think, be no doubt that it is a statement which can properly and would presumably be relied upon by the prosecution as a true statement and an admission that he was associated with members of the alleged gang of dacoits.

The case is in some respects similar to that of *Queen-Empress* v. *Javecharam* (3) where a statement of one accused that he had received certain property, which was alleged to have been stolen, from his co-accused was held to be inadmissible

(1) 5 Bom. L. R. 312.

(2) 6 B. 34; 3 Ind. Dec. (N. S.) 479.
(3) 19 B. 363; 10 Ind. Dec. (N. S.) 245.
(4) 7 Ind. Cas. 359; 37 C. 467 at pp. 520, 523; 14 C. W. N. 1114; 11 Cr. L. J. 453.

as being an admissible of a criminating circumstance, on which the prosecution evidently relied.

Following this and similar rulings, I hold that the statement in question is inadmissible under section 25 of the Evidence Act.

W. C. A. *Order accordingly.*

RANGOON HIGH COURT.

CRIMINAL REVISION PETITION NO. 651 OF 1922.

January 4, 1923.

Present:—Mr. Justice May Oung.

AH LIN AND ANOTHER—PETITIONERS

versus

EMPEROR—RESPONDENT.

Burma Gambling Act (I of 1899), s. 12—Offences contemplated by section—Duty of Court—Essentials to justify conviction—Informer, statement of.

Section 12 of the Burma Gambling Act contemplates at least four distinct offences in relation to a common gaming house, and it should be explained to an accused person the exact charge he is called upon to meet. [p. 72, cols. 1 & 2]

In order to justify a conviction under the above section, there must be evidence of actual knowledge on the part of the accused. [p. 72, col. 2.]

There is no justification in law for making use of the statement of an informer to the deterriment of a person accused under the Burma Gambling Act. [p. 72, col. 2.]

Mr. *De Glanville*, for the Petitioner.

ORDER.—This is a petition for revision of the judgment of the Head-Quarters Magistrate of Akyab finding the petitioners Ah Lin and Ah Kaing, guilty under section 12, Burma Gambling Act. Their appeal to the Court of Sessions Judge, Arakan, was dismissed.

The facts are simple:—A shop belonging to the petitioner Ah Kaing was raided and from 30 to 40 persons were found have been engaged in gambling in an inner room. In the stampede that followed, seven persons (not now before me) were arrested and various gaming instruments and some money were seized; these persons have since been convicted under section 11 of the Act.

The house was entered under the provisions of section 6 and the following presumptions, therefore, arose under section namely:—

1. That the house was used as a common guming house; and

2 that the persons found therein were there present for the purpose of gaming.

Neither Ah Lin nor Ah Kaing was present at the time of the raid. Ah Kaing is a wealthy P. W. D. contractor and one of the elders of his community. He does not live in the shop nor does he do business therein. The shop is managed by one Ah See, who was, however, not in Akyab on the day of the raid. The first petitioner, Ah Lin, is Ah See's assistant and was arrested because, as stated by the arresting officer, he admitted that he was in charge of the shop.

The learned Magistrate, when calling upon Ah Lin and Ah Kaing to show cause against conviction, explained to them that they were "charged under section 12 of the Burma Gambling Act for *owning and occupying and having the use* of the shop in question as a common gaming house on the 30th June 1922," section 12 runs:

"Whoever, (*a*) being the owner or occupier, or having the use of any house, etc., *opens, keeps or uses* the same as a common gaming-house; or

(*b*) being the owner or occupier of any house, etc., *knowingly permits* the same to be opened, used or kept as a common gaming house; or

(*c*) *has the care or management* of, or in any manner *assists in conducting the business* of any common gaming-house; or

(*d*) Advances or furnishes money for the purpose of gaming with persons frequenting any common gaming-house shall be liable.....

When examining Ah Lin, the learned Magistrate asked him, "Did you occupy the house in question for the purpose of gambling? and also instruments of gaming by way charge for the use of them or the house (*sic*)?" the reply was—"No Sir; I am the salesman of the shop owned by Ah Kaing."

Ah Kaing's examination ran:—

Q—The shop in question is yours?

A—Yes Sir.

Q—Did you occupy it for gaming with commission?

A—No Sir."

In the result, Ah Lin and Ah Kaing were declared guilty under section 12 of the Gabmbling Act.

This is most unsatisfactory. The section contemplates at least four distinct offences in relation to a common gaming house, and it is only fair to an accused person to explain to him the exact charge he is called upon to meet.

The learned Additional Sessions Judge's findings were—

As to Ah Lin :—

" Ah Lin is Ah Kaing's salesman. There is nothing to show that he was present at the time of entry but he was in charge of the shop at the time, according to Ah See's evidence (D. W. No. 9) and probably escaped with others, I do not see how any other conclusion can be arrived at than that he had the care and management of the shop, and that he assisted in conducting the business of the common gaming house held there. "

As to Ah Kaing :—

" Ah Kaing admits that the shop is his. I presume the Court has convicted him under section 12 (*b*) of the Act. I consider it *fair inference* that Ah Kaing knew that the house was being used as a common gaming house. There is some divergence of opinion, as to how far this shop is from his house but I do not consider that the keeping of this common gaming house *for a month* could go on without his knowledge."

Ah See did *not* say that Ah Lin was in charge of the shop at the time. He said, that Ah Lin was his assistant, and, later, that Ah Lin was kept in charge of the shop during his absence. It is possible that *Lein* is a mere slip of the pen for *Lin* but I cannot assume this to be so against a person charged with committing a crime. Be that as it may, there is no evidence that Ah Lin lived on the premises or that he was present at any time on the day of the raid. There were other shopmen employed there. The only tangible thing against him is that he admitted to the Deputy Superintendent of Police at the Police Station that he was in charge of the shop. However, even if this were relevant it must be noted that this alleged admission was not put to Ah Lin, and at no time was he called upon to plead to a specific charge under section 12 (*c*). I do not consider it proper, therefore, to confirm his conviction.

As to Ah Kaing, the case against Lim is still weaker. Not only was he not informed of the specific charge against him but the conviction is entirely based on a presumption which did not arise under section 7. In order to justify a conviction in such a case there must be actual evidence of knowledge on the part of the accused. This knowledge has been presumed from the alleged fact that the place had been kept as a common gaming house for a month. There is no admissible evidence as to this on the record. The only place in which the allegation appears is on page 5 which gives the informer's statement as recorded by the District Magistrate prior to issuing a warrant. There is no justification in law for making use of such statement to the detriment of an accused person.

The conviction and sentences are set aside. The fines will be refunded.

I deem it necessary to remind the Courts below that very strict attention to matters of detail is essential.

W. C. A. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 257 OF 1923.

June 8, 1923.

Present :—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

ABDUL HAMID—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898). s. 502, scope of—Absence of accused—Trial when can proceed—Jurisdiction—Defect, whether cured by consent of accused—Point not raised at trial—Revision—High Court, whether can interfere.

Section 205 of the Criminal Procedure Code applies only to cases in which the Magistrate has issued a summons in the first instance. It does not apply to a case where the accused has been arrested without or after the issue of a warrant. [p 73, col 2.]

When a Magistrate has no jurisdiction to hear a case in the absence of the accused, jurisdiction cannot be conferred by any consent on the part of the accused. [p 73, col. 2.]

The fact that the accused does not take objection to the trial on the ground that the Court has no jurisdiction to proceed with it would not debar him from raising the same point in a petition for revision before the High Court. The defect is not cured by section 537 of the Code. [p. 74, col. 1.]

ABDUL HAMID *v.* EMPEROR.

Revision from a decision of the Sessions Judge, Purnea, dated the 3rd April 1923, affirming that of the Sub-Divisional Magistrate, Araria, dated the 31st January 1923.

Messrs. *Yunas* and *Reyasat Husain*, for the Petitioners.

JUDGMENT.

Mullick, J.—It is most unfortunate that there must be a re-trial in this case.

Of the four accused persons tried by the Sub-Divisional Magistrate, Araria, Bati Lal appeared on the 8th July 1921, Abdul Razak and Sultan on the 23rd August 1921 and Abdul Hamid on the 2nd September 1921. The next material date was the 17th March 1922, on that date all the accused, with the exception of Abdul Hamid were present and the Court recorded the following order: "Accused Hamid absent. Said to be ill. Applies for appearance by Mukhtar. Permitted. Three prosecution witnesses examined at length. To-morrow for further hearing."

It appears that a Mukhtar, named Babu Sheo Nandan Lal, was permitted to represent Abdul Hamid, and some witnesses for the prosecution were then examined-in-chief on various dates in his presence between the 17th March and the 19th May when the Court recorded the following order :—

"Accused Hamid absent. Said to be ill. Permitted to appear through Babu Bajrang Sahay, Mukhtar."

The reason for appointing another Mukhtar to represent Abdul Hamid, is not stated in the order, but a possible reason has been suggested by the learned Counsel for the petitioner to which reference will be presently made. Between the 19th May and 27th July more prosecution witnesses were examined-in-chief. On this last mentioned date Abdul Hamid attended and on the 29th July a charge under section 420, Indian Penal Code, was framed against him and his three co-accused. On the 15th August Babu Charu Chandra Majumdar appeared for him and the cross-examination of the witnesses for the prosecution began on that date in his presence and the case continued till the 31st January 1923, when it ended in the conviction of all the accused.

Now, the point made before us is, that the trial is bad because the Deputy Magistrate had no power to allow Abdul Hamid to be represented by a Mukhtar and to hear the examination-in-chief of the prosecution witnesses in his absence. I think this contention must prevail. Section 205, Criminal Procedure Code, applies only to cases in which the Magistrate has issued a summons in the first instance. It does not apply to a case such as the present where the accused has been arrested without or after the issue of a warrant. It would also appear that Abdul Hamid never asked to be represented by a Mukhtar or Pleader, but I doubt whether the defect in jurisdiction would have been cured even if there had been an express request on his part; for if the Magistrate had no jurisdiction to hear the case in the absence of the accused jurisdiction could not be conferred by any consent. The Magistrate seems to have been under the erroneous impression that Abdul Hamid had made a petition and the fact seems to be that the accused Abdul Razak signed and filed a petition the body of which purports to be a petition by Abdul Hamid requesting for permission to appear by proxy. It does not appear that Abdul Razak had any authority to make any application on behalf of Abdul Hamid and the petition is unintelligible unless it be taken as a request by Abdul Razak to allow Abdul Hamid to be represented by proxy in order that the case against Abdul Razak might not be further delayed. The order passed upon this by the Magistrate was that Abdul Hamid was to be represented by Mukhtar, Babu Sheo Nandan Lal; but this gentleman was not Abdul Hamid's Mukhtar at all and how he came to be appointed is not known. In Abdul Razak's petition it was prayed that either Maulvi Fariduddin or Babu Bajrang Sahay might be appointed to represent Abdul Hamid and it seems that on the 19th May, finding that Babu Sheo Nandan had no authority to appear for Abdul Hamid, the Magistrate recorded an order permitting Bajrang Sahay to represent him.

Therefore, in this case the Deputy Magistrate's order was bad for two grounds;

firstly, because it was not a case in which a summons had been issued and, secondly, because the accused had not asked for permission to appear by his Pleader or Mukhtar.

The fact that the accused did not take the objection in the Trial Court does not appear to me to be material. If the defect could be cured by section 537, Criminal Procedure Code, his acquiescence would have been an important factor, but as, in my opinion, there was a complete absence of jurisdiction to hold the trial in his absence the question of the application of section 537 does not arise.

The result is, that the conviction and sentence passed upon Abdul Hamid will be set aside and the case will be remanded to the Sub-Divisional Magistrate of Araria for a *de novo* trial.

The petitioner will surrender before the District Magistrate when called upon to do so.

Bucknill, J.—I agree.

K. S. D. *Case remanded.*

RANGOON HIGH COURT.

CIVIL REVISION No. 9 OF 1922.
February 12, 1923.
Present:—Mr. Justice Heald.
ABDUL AZIZ—APPELLANT
versus
MAUNG TIN AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195—Applicability of section—"Any proceeding"—"Judicial proceeding."

The provisions of section 195 of the Criminal Procedure Code apply to "any proceeding" and are not necessarily restricted to a "judicial proceeding." [p. 75, col. 1.]

Revision against an order of the District Court, Pegu, in Civil Appeal No. 141 of 1921.

Messrs. *Keith* and *Davies*, for the Appellants.

Messrs. *B. Covesjee* and *De Glanville*, for the Respondents.

JUDGMENT.—Respondents filed a suit against certain defendants to enforce registration of a deed of sale of certain lands to them.

Petitioner was allowed to be impleaded because he objected to the registration on the ground that the transaction recorded in the deed was fraudulent and he produced a registered conveyance of the same lands to him by the same defendants.

The Trial Court held that respondents failed to prove execution of the deed of sale and dismissed their suit.

Respondents appealed and the District Court held that their suit was not maintainable because no action under sections 71 and 76 of the Registration Act had been taken.

Petitioner then applied for sanction to prosecute the first respondent for forgery of the document which he had claimed to register, and the Trial Court sanctioned the prosecution.

The first respondent appealed to the District Court which set aside the sanction on the ground that the proceedings in respect of which it was grantd were without jurisdiction and were, therefore, a nullity, so that the evidence recorded therein could not be used as a basis for a sanction to prosecute.

Petitioner now asks me to set aside the District Court's order on the ground that the learned Judge was wrong in law in holding that the original Court had no jusrisdiction to grant sanction.

The relevant words in section 195 of the Code of Criminal Procedure are as follows.

"No Court shall take cognizance of any offence described in section 463 or punishable under section 471....of the Indian Penal Code when such offence has been committed by a party to any proceedings in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such Court, or of some other Court to which such Court is subordinate."

It will be noticed that the words used in the section are "any proceeding" not "any judicial proceeding." The distinction is important in view of the definition of "judicial proceeding" given in section 4 (*m*) of the Code of Criminal Procedure.

There can be no doubt that there was in this case a "proceeding" or a "Court;" that the respondents were parties to that proceeding, and that the document in respect of which sanction was asked was produced by the respondents in that

proceeding. It does not matter whether the proceeding was a judicial proceeding or not. It was sufficient for the purpose of sanction that there was a proceeding in the Court and that the document was produced in that proceeding by a party thereto. If there had been no proceeding no sanction would have been necessary.

It seems to me perfectly clear that the original Court had power to grant sanction, but the question then arises whether or not that sanction was rightly granted. It has been authoritively held that sanction must be based on legal evidence. This consideration has been held to vitiate a sanction based on Police reports, on an affidavit sworn before a Magistrate who had no power to administer the oath, and on an investigation held under section 202 of the Code of Criminal Procedure, but I have been unable to find and have not been referred to any case in which a sanction has been revoked, on the ground that it was based on evidence taken in proceedings which were subsequently held to be bad, because certain steps which were held to be necessary preliminaries to the institution of the suit had not been taken. In this case the Court had on the pleadings, full jurisdiction to try the suit. It had power to record evidence on oath, and, in my opinion, the evidence so recorded did not become any the less legal evidence because it subsequently appeared that the plaintiff in the suit had omitted to take certain steps which the Appellate Court considered necessary before the suit could be instituted. I am of opinion, therefore, that the evidence on which the sanction was based, was evidence on which such a sanction could legally be based.

I have considered that evidence, and I am further of opinion that it is sufficient to warrant the sanction to prosecute the first respondent. The document which he produced purported to have been executed on the 29th of March 1921.

The oral evidence which is on the record casts grave doubts on its authenticity, and those doubts are confirmed by the fact that, there was no reference to the document in a petition to the Sub-Registrar which the first respondent is said to have filed on the 11th of April 1921, and in which he objected to the registration of the deed in favour of the present petitioner. If the deed on which he now relies had been in existence at that time, he could hardly have failed to refer to it or produce it, and I fail to see how he could explain the discrepency between its contents and those of his application.

Under these circumstances, I hold that the sanction was rightly given and I set aside the order of the District Court revoking it.

W. C. A. *Application dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 167 OF 1921.

May 4, 1921.

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

SHAHABAJ MANDAL—PETITIONER

versus

BHAJAHARI NATH—OPPOISTE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Possession of auction-purchaser on date of initiatory order and two months before—Subsequent dispossession—Proper order.

In execution of a decree obtained against the predecessor-in-interest of the first party to the proceedings under section 145 of the Criminal Procedure Code, a tank and a house were purchased at an auction-sale by the second party. The auction-purchasers obtained possession of the tank in November 1918 through the Civil Court five days before the death of the judgment-debtor. It was found, however, that, notwithstanding the delivery of possession, the first party continued to be in possession up to the day when proceedings were instituted. It was found further that the auction-purchaser took possession of the residential house in May 1920 but that on the date when the proceedings were instituted and for more than two months preceding that date the members of the first party were in possession:

Held, (1) that so far as the tank was concerned, the Magistrate ought to have declared the first party and not the second to have been in possession;

(2) that so far as the house was concerned, there must have been a dispossession of the auction-purchasers giving rise in their favour to a fresh cause of action and the Magistrate should have declared the first party to be in possession.

Hazari Khan v. *Nafar Chandra Pal Chowdry*, 40 Ind. Cas. 718; 22 C. W. N. 479; 18 Cr. L. J. 718, *Kulada Kinkar Roy* v. *Danesh Mir*, 33 C. 331; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.), followed.

SHAHARAJ MANDAL v. BHAJAHARI NATH.

Criminal revision against an order of the Deputy Magistrate, Jangipur, dated February 18, 1921.

Babu *Birbhusan Dutt*, for the Petitioners.

Babu *Santosh Kumar Bose*, for the Opposite Party.

JUDGMENT.—This Rule arises out of certain proceedings instituted under the provisions of section 145, Criminal Procedure Code. These proceedings refer to a tank known as Mirsagar and to a dwelling house which, we are informed, is now more or less dilapidated. It appears that in execution of a decree obtained against the predecessor of the petitioners before us, who were the first party to the proceedings under section 145, these properties and other properties were sold, and were purchased by the members of the second party who are the opposite parties in this Rule. It has then been found by the Trial Magistrate that on the 17th November 1918 the auction-purchasers obtained possession of the tank through the Civil Court. That possession was taken in the lifetime of the judgment-debtor, who is said to have died some five days after the delivery of possession.

It has next been found that the auction-purchaser took possession of the residential house on the 16th May 1920. In the execution proceedings terminating in the delivery of possession of the house the petitioners Nos. 1 and 2, the son and widow of the original judgment-debtor, were impleaded as parties. The section 145 proceedings were instituted on the 22nd January 1921. The Magistrate's finding on the evidence is that, notwithstanding the delivery of possession taken on the occasions which we have set out, the members of the first party have continued all along to be in possession and, therefore, were in actual possession on the day on which the section 145 proceedings were instituted.

Relying, however, on the decision of this Court in *Atul Hazra* v. *Uma Charan Changdar* (1), the learned Trying Magistrate has made his final order in favour of the second party, and the question before us is whether that order, on the facts and circumstances of the present case, can be supported. As we have already pointed out, the heirs and representatives of the original judgment-debtor have been in possession from the date of his death sometime soon after the 17th November 1918. Their possession from that date onwards to the 22nd January 1921, in our opinion, should have been regarded as adverse to the auction-purchaser. In that view it follows that, in so far as the tank is concerned, the order made in favour of the second party cannot be supported.

Then, with regard to the house the case of the auction-purchasers was not that they merely took formal possession, but that they took actual possession. The house, it is said, was found vacant, and the officer of the Court who delivered possession actually inducted the representatives of the auction-purchaser into the house. The finding of the Magistrate is that, on the date when the proceedings under section 145 were instituted and for more than two months preceding that date, the members of the first party have been and are in possession It follows, therefore, that between the delivery of possession on the 16th May 1920 and the institution of the proceedings on the 22nd January 1921 there must have been dispossession of the auction-purchasers giving rise in their favour to what may be called a fresh cause of action. In that view of the matter, it is clear that the Magistrate's order as regards the house is also not to be supported. In support of the view that we take we may refer to the cases of *Hazari Khan* v *Nafar Chandra Pal Chowdry* (2) and *Kulada Kinkar Roy* v *Danesh Mir* (3).

In the result, this Rule is made absolute, and the Magistrate's order made in favour of the second party with regard to both the house and tank is set aside.

K. S. D. *Rule made absolute.*

(1) 33 Ind. Cas. 824; 20 C. W. N. 796; 17 Cr. L. J. 182; 23 C. L. J. 555.

(2) 40 Ind. Cas. 718; 22 C. W. N. 479; 18 Cr. L. J. 718.

(3) 33 C. 331; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.).

LABH SINGH *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 651 OF 1922,
October 31, 1922.

Present :—Mr. Justice Moti Sagar.

LABH SINGH—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 376, 458, conviction under—Separate sentences, legality of.

The conviction of an accused person under sections 458 and 376 of the Penal Code, and the awarding of a separate sentence for each offence is not illegal, as the two offences are not portions of the same transaction, the offence under section 458 being complete as soon as a man breaks into a house at night after making the necessary preparations as specified in the section, irrespective of his committing any other offence. [p. 78, col. 2.]

Criminal appeal from an order of the Sub-Divisional Magistrate, Kasur, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 10th May 1922.

Mr. *Ghulam Rasul*, for the Appellant.

Sheikh *Nias Ali*, for the Respondent.

JUDGMENT.—The facts of this case which have given rise to this appeal are fully stated in the judgment of the learned Magistrate, and may briefly be summarised as follows:—

On the night of 20th December last one *Musammat* Ishar Kaur was sleeping in her house with her two children, her husband having gone on a visit to her parents. At about midnight the appellant Labh Singh who was accompanied by another man Jawand Singh knocked at the door. On *Musammat* Ishar Kaur enquiring as to who was there, she was asked to open the door which was chained from inside. *Musammat* Ishar Kaur delayed in doing so, hoping that the intruders would go away, but they forced the door off its hinges and entered the house. The appellant, it is alleged, was armed with a *chhavi* while his companion was carrying a thick *dang*. They threatened to kill the woman if she dared to shout. The story for the prosecution is that Jawand Singh stood as guard over her with the *chhavi*, while Labh Singh threw her on the ground and raped her. Jawand Singh is then said to have exchanged places with Labh Singh and to have also raped her. Both the culprits then went away. As soon as they had left *Musammat* Ishar Kaur raised a hue and cry which brought several people on the spot to whom she related the whole story. *Musammat* Ishar Kaur's husband returned home four days after and on being apprized of the facts reported the matter to Sardar Rajindar Singh, Honorary Magistrate, who was residing in the same village. Sardar Rajindar Singh is then said to have enquired into the matter, and on being assured of its truth to have given a *rukka* addressed to the Circle Inspector. The Circle Inspector is said to have recorded the report, and to have directed the husband to *Thana* Khalia.

The appellant was charged on these facts under section 458 with having committed the offence of house-breaking by night after having made preparations for causing hurt and also with the offence of rape under section 376. He has been found guilty, and sentenced to seven years' rigorous imprisonment including three months' solitary confinment under section 458 and to five years' rigorous imprisonment under section 376. Both sentences are to run consecutively. Labh Singh has preferred an appeal to this Court against his convictions and sentences through Mr. Ghulam Rasul, and it has been argued on his behalf that the evidence on the record is insufficient to prove participation of the accused in this crime, and that, in any case, separate convictions and separate sentences under sections 458 and 376 are illegal. The evidence in support of the prosecution story set out above consists entirely of the statements of *Musammat* Ishar Kaur and her daughter, *Musammat* Goran, aged about seven years who was sleeping in the same house and was an eye-witness of the crime. The latter has identified the accused, and has deposed to her having seen her mother being raped. No explanation has been offered by the accused as to why she should concoct a false case against him, and there is no reason why her statement, which has obviously been given in a most natural and straightforward manner, should not be believed.

As to *Musammat* Ishar Kaur's testimony it is urged that it should be rejected

as improbable and untrue because it has not been corroborated by any other independent evidence. I have read her statement, and am of opinion that there is nothing improbable in it. She had no motive for setting up a false charge against Labh Singh and it is hardly possible that any self-respecting woman would come forward in a Court of Justice to make such a humiliating statement against her honour unless it was absolutely true. As to corroboration, the evidence of her daughter, *Musammat* Goran, is, in my opinion, quite sufficient and I do not think one could expect a better corroboration in such a case. After a carefull review of the entire circumstances, I have no reason to doubt the veracity of either of the two witnesses and am of opinion that their evidence correctly represents the incidents as they happened. The plea put forward by the accused that *Musammat* Islar Kaur was carrying on a liaison with one Babu Khatri whom he once beat, and that he has instigated a false case against him, has not been accepted by the learned Magistrate who tried the case, and after examining the evidence produced in support of this plea, I have no doubt that his conclusion is correct.

The next question argued before me is the question relating to the legality of separate convictions and separate sentences under sections 458 and 376, Indian Penal Code. It is contended that house-breaking by night was a necessary concomitant of the offence of rape which, on the facts alleged, was the main, and in fact the only, object the accused had in view. It is consequently urged that the two offences, were portions of the same transaction, and that, when the accused had been convicted and sentenced for the main offence under section 376, a separate conviction and a separate sentence under section 458 was wholly improper. I do not think that there is any force in this contention, nor do I think that the authority relied on in support of this proposition, *viz.*, *Queen-Empress* v. *Malu* (1), is in any way applicable to this case. There the offences committed were those of house-breaking by night *in order to commit theft* under section 457 and theft under section 379, Indian Penal Code. It was held on the facts of that case that though a conviction under each of the two sections would be quite legal, yet, having regard to the provision of section 71 of the Code only one sentence for either of the offences in question should be awarded. The present case is one under section 458, in which the gist of the offence lies in the offender's committing house-breaking by night *after his having made preparations of a particular description*. Under this section the offence is complete as soon as a man breaks into a house at night *after making the necessary preparations* as specified in the section irrespective of his committing any other offence. Not so under section 457, where the substantive offence *is the commiting of house-breaking in order to commit theft*. It is obvious that if theft is also committed in such a case it is a part and parcel of the same transaction and not an offence for which a separate sentence is needed. I have, therefore, no hesitation in holding that the authority cited is wholly inapplicable and that the separate convictions and separate sentences passed in this case are quite in accordance with law.

As to punishment, I see no reason to interfere with the sentences passed. The crime committed was of a most atrocious character and the accused must have known of the helpless and unprotected condition of the woman when he broke into her house.

The case is one which requires exemplary punishment, and, taking everything into consideration, I do not think that the aggregate sentence of 12 years' rigorous imprisonment for the two offences is in any way improper. The result is that I uphold the convictions and the sentences and reject the appeal.

W. C. A. *Appeal dismissed.*

(1) 23 B. 706; 1 Bom. L. R. 514; 12 Ind. Dec. (N. s.) 472 (F. B.).

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1043 OF 1922.
October 30, 1922.
Present:—Mr. Justice Moti Sagar.
KUDRAT NATH—CONVICT—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 405—Station Master failing to credit over-charge on sale of tickets sold—Offence.

An Assistant Station Master of the North-Western Railway, one of whose duties was to issue tickets to passengers and charge fares as fixed by the Railway, was convicted of an offence under section 405 of the Penal Code, in that he had made an over-charge of the aggregate amount over some of the tickets issued by him, and had not credited the excess realized to the Railway:

Held, that, although the over-charges had actually been made and their payment deliberately withheld from the Railway, accused could not be convicted under section 405 of the Penal Code as he was not a trustee within the meaning of that section.

Criminal revision against an order of the Sessions Judge, Lyallpur, dated the 12th June 1922, modifying that of Magistrate, Lyallpur, dated the 4th May 1922.

Mr. *Ram Chana Manchanda*, for the Petitioner.

Sheikh *Niaz Ali*, for the Respondent.

JUDGMENT.—The applicant Kudrat Nath has been convicted in his capacity of a public servant on two counts, of committing criminal breach of trust as defined in section 405 of the Indian Penal Code, and has been sentenced under section 409 of that Code to three months' simple imprisonment on each count, the sentences to run concurrently.

Kudrat Nath was an Assistant Station Master at Jhok Datta Railway Station in the Lyallpur District, and one of his duties was to issue tickets to passengers and to charge fares as fixed by the Railway. He was provided with a register in which he was required to enter all monies realized by the sale of tickets and then periodically to submit copies of those entries to the higher authorities with a view to their being audited and checked with the tickets when collected. It appears that in the months of August and September 1921, the petitioner ran short of printed tickets and had to issue blank card tickets to the passengers with the amount of fares chargeable endorsed thereon in his own hand. The story for the prosecution is that the petitioner made an overcharge of the aggregate amount of Rs. 5-0-6 in the month of August and of Rs. 1-5-6 in the month of September over some of the tickets issued during these months, and did not credit the excess so realized to the Railway. The alleged embezzlement was detected when the tickets were collected, and checked with the returns submitted by the petitioner. The accused admitted that the fares entered in the returns (which according to the rates fixed by the Railway were correct) did not tally with those entered on the tickets, but pleaded that the discrepancies were the result of oversight due to pressure of work and his not keeping good health. The learned Sessions Judge did not accept this explanation and after a careful consideration of all the circumstances was of opinion that the prosecution had succeeded in establishing that the overcharges had actually been made and their payment deliberately withheld from the Railway. In my opinion this finding is fully justified by the evidence on the record and as a Court of Revision I am not prepared to go behind it.

The only question which requires consideration is, whether the petitioner was a trustee within the meaning of section 405, Indian Penal Code, in respect of the money so realized. I am clearly of opinion that he was not. A trustee is a person in whom is invested the legal or formal interest in property, the equitable or beneficial interest vesting in and belonging to some other person. In the present case it is beyond doubt that the legal and the beneficial interest both vested in and belonged to one and the same person, *viz.* the petitioner, the Railway having no beneficial interest in the money dishonestly recovered and in fact in direct contravention of their own instruction.

It is clear, therefore, that whatever other offence the accused may have committed, it is not the offence of criminal breach of trust as defined in section 405 of which he has been convicted by the Courts below.

I allow the revision and setting aside the conviction acquit the accused.

W. C. A. *Revision allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 128-B OF 1922.
April 25, 1923.

Present:—Mr. Kotval, A. J. C.

NILKANTH AND ANOTHER—PARTY No. 1—APPLICANTS
versus
SURYABHAN AND OTHERS—PARTY No. 2
NATHMAL—PARTY No. 3—
NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 146, 439—Order of attachment, when can be passed—Magistrate, duty of—Magistrate refusing to make inquiry—Revision—High Court, power of.

An order under section 146 of the Criminal Procedure Code attaching the subject-matter in dispute can only be passed after the Magistrate has taken evidence under section 145, and has satisfied himself that none of the parties was in possession, or that he is unable to satisfy himself as to which of them was in possession.

Where a Magistrate refuses to make an inquiry under section 145(4), his proceeding cannot be held to be one under that section so as to bar the jurisdiction of the High Court to revise his order.

Criminal revision of an order of the Sub-Divisional Magistrate, First Class, Chandur Taluk, dated the 13th June 1923, in Miscellaneous Criminal Case No. 4 of 1922.

Mr. *R. R. Jaiwant*, for the Applicants.
Mr. *A. V. Khare*, for the Non-Applicants.

JUDGMENT.—The proceeding of the Magistrate cannot be held to be one under section 145, Criminal Procedure Code. The proceedings were commenced by a preliminary order on the 26th April 1922. On the 5th and 6th May 1922 written statements were taken. On the 25th May a new claimant was added to party No. 2 and the site in dispute was attached. The parties undertook to produce a map at the next hearing which was fixed for the 15th June 1922 and the witnesses present were bound over to appear on that day when the case was brought to a termination in the manner appearing in the following order :—

"The parties are present but have not produced a map. I cannot waste my time by giving further opportunity for the production of the map One further applicant comes forward for inclusion in party No. 2. The parties are all examined shortly by the Court and an order written after consultation of the main parties."

The Magistrate states in his order that he has not taken evidence of all the parties as it would be an interminable business and no useful result would be gained thereby. He thinks that an order under section 145 would not serve the interests of justice as whosoever was declared to be in possession would be in a position to appropriate the subject-matter in dispute, which was a heap of earth. He also thinks that after taking evidence he would not be in a position to adjudicate who was in possession at the time of the preliminary order. He, therefore, passes an order under section 146. Apparently, the Magistrate seems to think that an order under that section can be passed without any enquiry at all. But the section states that the Magistrate may attach the subject of dispute only if he decides that none of the parties was then in possession or that he is unable to satisfy himself as to which of them was in possession. Until he has taken evidence under section 145 he cannot decide or satisfy himself as above. There must, therefore, be a proceeding under section 145 before an order under section 146 can be passed. The Magistrate has here refused to make an enquiry under section 145 (4). For this reason his proceeding cannot be held to be in substance one under section 145 so as to bar this Court's jurisdiction to revise his order. The Magistrate is not justified in assuming that he will not be in a position to adjudicate who was in possession at the time of the preliminary order and ignoring the provisions of section 145 on that ground.

I set aside the Magistrate's order attaching the subject in dispute. The case will, if desired, be proceeded with in accordance with law. This order governs also Criminal Revision No. 157-B of 1922.

W. C. A. *Order set aside.*

SEODOYAL KHEMKA *v.* JOHARMULL MANMULL.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 4 OF 1922.

February 3, 1923.

Present:—Mr. Justice Page.

SEODOYAL KHEMKA AND OTHERS—PLAINTIFFS

versus

JOHARMULL MANMULL AND OTHERS—DEFENDANTS.

Limitation Act (IX of 1908), s. 22, Sch. I, Art. 177—Amendment of plaint, when permissible—Addition or substitution of parties—Court, powers of—Partnership—Stranger joining member, status of—Firm, whether can become member—"Firm," meaning of—Official version of an Act, value of—Evidence Act (I of 1872), s. 78, scope of.

A Court has jurisdiction to add or substitute parties *suo motu* untrammelled by the provisions of the Limitation Act, but it is not entitled, when making amendments, to effect the substitution or addition of parties to disregard the provisions of that Act. [p. 83, col. 1.]

A firm as such is neither a person nor an entity and, therefore, cannot be a member of a partnership. The term "firm" is merely a collective name for the individuals who are members of the partnership. [p. 84, col. 2.]

Ex parte Blain, In re Sawers, (1879) 12 Ch. D. 522 at p. 533; 41 L. T. 46; 28 W. R. 334 and *Sadler* v. *Whiteman*, (1910) 1 K. B 868 at p. 889; 102 L. T. 472; 26 T. L. R. 372; 54 Sol. J. 375, referred to.

In considering the terms of an Act of the Legislature the version of the Act contained in the Acts printed and published by order of the Government, and not the version set out in the *Gazette* is the accurate and true version of the Act which the Legislature enacted. [p. 86, cols. 1 & 2.]

26 C. W. N. cc, dissented from.

Under Art 177 of the Limitation Act, 1908, as amended by Act XXVI of 1920, ninety days from the period within which an application to bring legal representatives on the record should be made is ninety days from the death of the party. [p. 86, col. 1.]

A stranger who is jointly interested with a member of a partnership does not thereby become a partner in the partnership itself. [p. 87, col. 1.]

Ex parte Barrow, (1815) 2 Rose 252 and *Cox* v. *Hickman*, (1860) 8 H. L. Cas. 268; 9 C. B. (N. S.) 47; 30 L. J. C. P. 125; 7 Jur. (N. S.) 105; 3 L. T. 185; 8 W. R. 754; 11 E. R. 431; 125 R. R. 148; 142 E. R. 19, referred to.

In a suit by certain members of a partnership for a declaration that the partnership is dissolved, and for accounts, enquiries or incidental reliefs, one of the defendants was sued as a firm. Subsequently, the plaint was allowed to be amended and the full names and description of the partners of the alleged firm were put in:

Held, that the amendment did not amount to an addition of new parties, but was an amendment merely for the purpose of more clearly describing the parties who were already before the Court, and did not, therefore, fall within section 22 of the Limitation Act. [p. 85, col. 1.]

Mohunt Padmalav Ramanuja Das v. *Lukmi Rani*, 12 C. W. N. 8, *Nistarini Dassya* v. *Saral Chandra Majumdar*, 29 Ind. Cas. 680; 20 C. W. N. 49; 22 C. L. J. 279, *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur*, 14 C. 400; 7 Ind. Dec. (N. S.) 265 and *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*, 32 C. 582; 9 C. W. N. 421, on Appeal 5 Ind. Cas. 404; 37 C. 229; 7 A. L. J. 125; 7 M. L. T. 163; 14 C. W. N. 261; 20 M. L. J. 171; 11 C. L. J. 220; 12 Bom. L. R. 257; 37 I. A. 27 (P. C.), referred to.

Section 78 of the Evidence Act is a permissive and not an exclusive section. [p. 86, col. 1.]

Mr. *A. N. Chaudhuri* (with him Mr. *K. P. Khaitan*), for the Plaintiffs.

Mr. *S. R. Das*, Advocate-General (with him Mr. *W. W. K. Page*), for Defendants Nos. 1 to 3.

Mr. *A. K. Roy*, for Defendants Nos. 4 and 5.

JUDGMENT—The decision of the issues in this case involves the determination of some interesting question relating to practice. The action was brought by the plaintiffs as three members of the firm of Nathuram-Ramkissen against the defendants who are, they allege, the other members of that firm. The action is brought for a declaration that the firm is dissolved, for accounts, enquiries and incidental relief.

The facts are as follows:—The firm of Nathuram-Ramkissen has been in existence for some seventy years, and from time to time has been composed of different members. On the 28th June 1918, the terms and conditions under which the partnership was from that date to be regulated and carried on, were set out in a memorandum of agreement, called the Partnership Agreement. On the 18th March 1918, by a document of that date, the partnership was dissolved, but it was agreed by all parties at the trial that that notice of dissolution was not acted upon at the time, and that the partnership was continued until the 14th July 1919, when it was dissolved, except in so far as it related to one of the businesses carried on by the partnership, the Banianship agreement with Greaves, Cotton and Co., which under the special provisions of that Banianship agreement, was continued until August 1919. The partnership having come to an end, on the 10th February 1920 the plaintiffs, discovering that some of the defendants had been using the firm name of Nathuram-Ramkissen in respect

of businesses other than those carried on by the partnership, contending that there had been a wrongful user by those defendants of the partnership name. As a sequel to that allegation, some of the defendants asserted that the partnership had not come to an end; that all that had happened was that on the 14th July 1919, certain members of the partnership had retired from it (members other than those who admitted using the firm name for their private purposes), and that the partners who remained were entitled to use the firm name after the retirement of those other partners. That involved an important issue of fact between the members of the partnership, and one which the defendants have persisted in raising right up to the hearing of the suit. In paragraph 4 of the written statement of the defendants Joharmull Khemka, Manmull Khemka, Gurgadhur and Dungarmull, it is alleged that the plaintiffs, by mutual consent of the partners, retired from the partnership, and that thereupon the assets of the partnership became the property of the remaining partners, except the shares of the retiring partners which were to be repaid to them. Now, the partnership property is of great value, and a large portion of the partnership property was, after the dissolution, at first by consent, and since the 5th May 1915, under an arbitration agreement signed by all the partners, divided and distributed among the several members of the partnership in proportion to their shares under the Partnership Agreement. The time for completing the distribution of the estate, however, under the arbitration agreement, although extended from time to time, has long since expired, and the plaintiffs allege that, owing to the obstructive tactics of the defendants Nos. 1 to 3, the arbitration proceedings have become ineffective and of little value, and they seek to have the partnership assets allocated to the several partners, in so far as they are not already distributed, under an order of the Court.

On the 3rd January 1922, this suit was commenced, and on the 6th September 1922, Joharmull Khemka (one of the partners) died. Up till the time when this suit was heard the real issue between the plaintiffs and defendants Nos. 1 to 3—there is no issue between the plaintiffs and the other defendants—was, whether there had been a dissolution, or whether there had been merely a retirement of certain of the members from the partnership. After Counsel for the plaintiff had opened the case at the hearing, however, the Advocate-General admitted that there had been a dissolution of the partnership, and he gave up the point that there had been a retirement of some of the partners by consent of the other partners. It was impossible, in face of the facts which the plaintiffs were in a position to prove, to persist in the allegation that there was not a dissolution, but merely a retiring of certain of the partners. The Advocate-General, however, after he had given up this main contention, did not abandon his defence altogether, but he took two points either of which, he contended, if decided in his favour, must result in the suit being dismissed. The points were these: In the first place, he contended that the suit was wrongly constituted on the ground that the defendant No. 1 set out in the plaint Joharmull-Manmull, was sued as a firm, and that he was in a position to prove that Joharmull Manmull was not the firm and that neither at the present time nor at any material time was there such a firm as Joharmull-Manmull. He further contended that, assuming that he satisfied the Court that there was no such firm as Joharmull-Manmull, the suit was wrongly constituted, because on the authority of two cases, *Ramdoyal* v. *Junmenjoy Coondoo* (1) and *Ambika Charan Guha* v. *Tarini Charan Chanda* (2), it was necessary for the plaintiffs in a suit for partnership accounts to join as parties all the members of the partnership, and if Joharmull-Manmull, the firm, was not in existence, the suit was wrongly constituted because two members of the partnership Joharmull Khemka and Manmull Khemka were not parties to the suit, and, therefore, by reason of the provisions of section 22 and Art. 106 of Schedule I of the Limitation Act (IX of 1908), the suit must be dismissed. Now, by section 22

(1) 14 C. 701; 7 Ind. Dec. (N. S.) 524.
(2) 19 Ind. Cas. 983; 18 C. W. N. 464.

of the Limitation Act of 1908, it is provided that: "Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party," and by Art. 106, Schedule I of the Limitation Act, the limitation for the time within which a suit for an account or for a share of a dissolved partnership must be brought is three years from the date of the dissolution. The Advocate-General, therefore, contended that, whether the dissolution took place on the 9th April or on the 14th July, in either case an application for leave to add Joharmull Khemka and Manmull Khemka as defendants, or to substitute the names of those two persons for Joharmull Manmull, could not now be entertained by the Court, because any application for such an amendment would, he contended, be an application to put a new party upon the record, more than three years after the date of the dissolution of partnership. Now, there is authority for the proposition that the Court has jurisdiction to add or substitute parties *suo motu*, untrammelled by the provisions of the Limitation Act, under O. I, r. 9 or O. I, r. 10, sub-rule (2), but it is, in my opinion, rightly and finally settled that the Court, acting on its own intiative, is no more entitled when making amendments to effect the substitution or addition of parties under these two Orders, to disregard the provisions of the Limitation Act, than it would be entitled so to do if the amendment was made upon an application by one of the parties, [*vide* the case of *Ram Kinkar Biswas* v *Akhil Chandra Chaudhuri* (3), *Imam Ali* v. *Baij Nath Sahu* (4), *Imam-ud-din* v *Liladhar* (5), *Guruvayya* v. *Dattatraya* (6) and the case of *Ambika Charan Guha* v. *Tarini Charan Chanda* (2), which I have already referred to.]

His second contention was that, on the assumption that the suit was rightly constituted and that all necessary parties were before the Court, as Joharmull Khemka died on the 6th September 1922 and an application had not been made to cause his legal representative to be made a party within 90 days of his death (which is the time limited for such an application under Art. 177 of the First Schedule to the Limitation Act, 1908), the suit had abated by reason of the provisions of O. XXII, r. 4, and that, unless the Court granted an application to set aside the abatement under O. XXII, r. 9, the suit in that event also must be dismissed against all the defendants. He further contended that the time within which an application to set aside the abatement must be made was 60 days from the date of the abatement under Art. 171 of the First Schedule to the Limitation Act.

Now, I allowed the defendants Nos. 1 to 3 to amend their written statement in such a way as to enable them to allege that Joharmull Manmull was not a firm, and evidence by both parties was adduced upon the issue as to whether or not Joharmull Manmull was a firm. By section 239 of the Contract Act a partnership is defined as the "relation which subsists between persons who have agreed to combine their labour or skill in some business and to share the profits thereof." Now the facts, as I find them after having heard the evidence, are that Joharmull Khemka and Manmull Khemka were two brothers who with their families were living together, and were joint in food and worship; that these two brothers deposited monies from time to time with the firm of Nathuram-Ramkissen for the joint use of themselves and their families, and that sums were drawn to meet the needs of the two families by Joharmull Khemka or Manmull Khemka or their relations as occasion arose. On referring to the Partnership Agreement, it is to be observed that, in setting out the shares of the different members of the partnership, the phrase occurs; "Joharmull Manmull's share 5-annas 6-pies," and there is no doubt that not only in this Partnership Agreement is found the phrase "Joharmull, Manmull" but in the submission to arbitra-

(3) 35 C. 519; 11 C. W. N. 350; 5 C. L. J. 242; 2 M. L. T. 137 (P. B.).
(4) 33 C. 613; 3 C. L. J. 575; 10 C. W. N. 551.
(5) 14 A. 524; A. W. N. (1892) 104; 7 Ind. Dec. (N. S.) 705.
(6) 28 B. 11; 5 Bom. L. R. 618.

tion, an important docume t, the phrase also o curs, "Jo harmull Manmull," and Counsel for the plaintiffs contends t at such a phrase necessarily indicates a partnership. The use of such an expression is some evidence, no doubt, of a partnership, but when the facts are known, in my opinion, the contention that these two gentlemen, Joharmnll Khemka and Manmull Khemka, were carrying on a partnership business in the firm name of Joharmull Manmull, is not made out. They were living with their families together in a joint establishment, and Manmull, who was called, said: "We were joint, Joharmull was *burra* brother; we sometimes under those circumstances used the words "Joharmull Manmull" to indicate ourselves because we were always together, but we were never a partnership in the sense in which that term is used in section 239 of the Contract Act, and we never carried on any business under that firm name. The witnesses were asked, and I invited Counsel for the plaintiffs to suggest, what the business was which the firm of Joharmull Manmull was carrying on. The only answer given was a suggestion by Counsel for the plaintiffs that the business which was carried on by that firm was one of endeavouring to get as large a share as possible out of the profits of Nathuram-Ramkissen. Well, I do not think that that contention is worth wasting much time upon.

I have come to the conclusion that the name of "Joharmull Manmull," although it is some indication of a partnership, is not in any way conclusive of the question, and when I consider how Joharmull Khemka and Manmull Khemka in fact acted in relation to the partnership documents, I think it is perfectly clear that they were individual members of the partnership of Nathuram-Ramkissen, and that they were not members of the partnership merely as being members of a firm of "Joharmull Manmull," because in the Partnership Agreement as well as in the submission to arbitration, notwithstanding that the words "Joharmull Manmull" appear in both these documents, the signatures in both are those of Joharmull Khemka and Manmull Khemka individually, and there were other documents to the same effect which were produced. Now, under these circumstances, I find as a fact that there was no s ch firm as Joharmull-Manmull. That being so, I have to consider the contentions which are put forward on behalf of the defendants Nos. 1 to 3 by the learned Advocate-General. I take the first contention. It is a contention which has no merit in it whatever; it is a contention which was only thought of by the lawyers after the death of Joharmull Khemka in September 1922. It is admitted by these defendants that there was a partnership; it is admitted that Joharmull Khemka and Manmull Khemka were members of the partnership; it is admitted that there was a dissolution, and it is admitted that there is property belonging to the partnership which has to be accounted for and distributed among the members of the partnership. Orders and rules framed for procedure in suits and actions were created for the purpose of being the handmaid, and not the mistress of the law, and if the contention of the Advocate-General were to succeed, an otherwise rightly constituted suit would be defeated on grounds of the barest technicality. In my opinion, however, there is no substance in this contention. A firm as such cannot be a member of a partnership. A partnership under section 239 is a relationship which subsists between persons; but a firm is not a person, it is not an entity, it is merely a collective name for the individuals who are members of the partnership. It is neither a legal entity, nor is it a person. [See *per* Lord Justice James in *Ex parte Blain, In re Sawers* (7), and *per* Lord Justice Farwell in *Sadler* v. *Whiteman* (8)]. In Scotland the position is different, because in Scotland a firm is a legal person [*vide* Partnership Act, 1890, 53 & 54 Vict. c. 39, section 4, sub-section (2) and the Note set out in Appendix 1 of the late Lord Lindley's book on Partnership, 6th Edition, 775]. A firm name, in truth, is merely a description of the individuals who compose the firm. It is that, and

(7) (1879) 12 Ch. D. 522 at p. 533; 41 L. T. 46; 28 W. R. 334.
(8) (1910) 1 K. B. 868 at p. 889; 102 L. T. 472; 26 T. L. R. 372; 54 Sol. J. 375.

it is nothing more. If that be so, not only would it have been impossible for the firm of Joharmull-Manmull, even if it had existed, to be a member of the partnership of Nathuram-Ramkissen, but the words "Joharmull Manmull" as they appear in the plaint, are merely a description of the individuals Joharmull Khemka and Manmull Khemka who are in fact admittedly members of the firm of Nathuram-Ramkissen. Neither Joharmull nor Manmull were in any doubt as to the individuals who were indicated by the term "Joharmull-Manmull." Manmull in his evidence says that it was a description which they sometimes used to describe themselves, although he said "we were separate individuals." Moreover, no point was taken in the pleadings that these persons were wrongly described, and to make the matter even more clear when a writ of summons was served, although it was endorsed "by Joharmull Khemka for Joharmull-Manmull," Manmull admits that it was a perfectly good service upon him and, acting upon that, these two gentlemen filed a written statement, and the written statement which they filed commences "written statement of Joharmull Khemka and Manmull Khemka sued as Joharmull-Manmull." Now, in my opinion, in the pleadings as they stand, the defendants Joharmull Khemka and Manmull Khemka are sufficiently described, and, in my opinion, those two gentlemen are before the Court, and are parties to the suit. If an application were made to amend the plaint so as to substitute for Joharmull-Manmull the words "Joharmull Khemka and Manmull Khemka," such an amendment would not be an amendment by which a new party was added, but it would be an amendment merely for the purpose of more clearly describing parties who are already before the Court. Such an application would not, in my opinion, be within section 22 of the Limitation Act [See on this point *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (9), *Nistarini Dasya* v. *Sarat Chandra Mojumdar* (10), *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur* (11) and *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee* (12).]

I, therefore, come to the conclusion that there is no substance in the first contention put forward on behalf of these defendants.

I come to the second contention. These defendants urge that, on the assumption that the proper parties are before the Court, after the death of Joharmull Khemka it became necessary that an application should be made within 90 days under Art. 177 of the First Schedule of the Limitation Act, 1908, to add his legal representative as a party on the record, and that on the failure to make such an application the suit had abated by reason of the provisions of O. XXII, r. 4. On behalf of the plaintiff it was contended, in reply to that contention, that the time within which such an application has to be made, is not 90 days, but six months, and in support of their contention they referred to a copy of the Limitation Act of 1908, set out in the *Gazette of India*. On reference to that copy, it will be observed that in Art. 177 of Schedule I, in the second column, appear the words "six months", and on behalf of the plaintiffs it was contended that the *Gazette* is the best evidence of the provisions of the Act, and as, in the *Gazette* the words are "six months," that the plaintiffs have six months from the date, *i.e.*, six months from the 6th September 1922, in which to make the application, which period has not yet expired. The Advocate-General, however, referred to a copy of the Act printed by Government Authority which he contends is the proper place in which to look for the provisions of the Acts of the Legislature. On looking at that copy of the Act, I find under section 177, not the words six months, but the word "ditto."

(9) 12 C. W. N. 8.

(10) 29 Ind. Cas. 680; 20 C. W. N. 49; 22 C. L. J. 279.

(11) 14 C. 400; 7 Ind. Dec. (N. S.) 265.

(12) 32 C. 582; 9 C. W. N. 421 on Appeal 5 Ind. Cas. 404; 37 C. 229; 7 A. L. J. 125; 7 M. L. T. 163; 14 C. W. N. 261; 20 M. L. J. 171; 11 C. L. J. 220; 12 Bom. L. R. 257; 37 I. A. 27 (P. C.).

Now, in section 78 (2) of the Evidence Act it is provided that the following published documents may be proved as follows:—"The proceedings of the Legislature by the journals of those bodies respectively, or by published Acts or abstracts or by copies purporting to be printed by order of Government." In my opinion, I am not bound to have recourse exclusively to the mode of proof in respect of published documents set out in section 78. I think that is a permissive and not an exclusive section; therefore, I find myself at liberty from any available source to make up my mind as best I can as to what the words in the Act were. Having regard to the intrinsic evidence in the Acts themselves, it appears to me to be quite clear that the version contained in the published Acts, and not that contained in the *Gazette*, is the right one, for this among other reasons that the Act of 1908 was amended by Act XXVI of 1920, and by that Act, *inter alia*, in Art. 176 "six months" was altered to "90 days." In Art. 178 "ditto" was altered to "six months." Now, if the Act had been in the terms set out in the *Gazette*, there would have been no necessity in the amending Act to have made the alteration in Art. 178 at all, because if it were the fact that the Act of 1908 Art. 177 in the second column, had the words "six months" then "ditto" in Art. 178 would have served the same purpose as the alteration of "six months" which the Legislature thought fit to provide by Act XXVI of 1920. I, therefore, come to the conclusion that the Act of 1908 had, in Art. 177 second column the word "ditto," and not the words "six months" and the effect of that will be that, as by Act XXVI of 1920, Art. 176 is altered from "six months" to "90 days," Art. 177 becomes 90 days as well. That being so, I come to the conclusion that 90 days from the death is the time within which this application to add legal representatives had to be made. I am aware that in the High Court of the Punjab it has been held that the version in the *Gazette* is to prevail [*vide* 26 C. W. N. 61] but I am unable to agree with that decision, because I think that it is abundantly clear from the intrinsic evidence to be found in the Acts themselves, that the version set out in the published reports, and not the version set out in the *Gazette* is the accurate and true version of the Act which the Legislature enacted.

Under those circumstances it is admitted on behalf of the plaintiff that the suit has abated and an application must be made by the plaintiff under O. XXII, r 9, for the abatement to be set aside and I should have to be satisfied, before I granted such an amendment, that there is sufficient cause shown for the abatement to be set aside.

Now, by O. I, r. 13, all objections on the ground of non-joinder or misjoinder are to be taken at the earliest possible opportunity, and no objection in respect of wrongful joinder or misjoinder or non joinder of parties in this suit was taken until the hearing of the action. I am not prepared to hold, nor do I think it necessary for me to hold, that the effect of a delay so long as that which has occurred in this case precludes the defendant from making an application under O. I, r. 13, but the failure to apply for so long a period might reasonably lead the plaintiffs to assume that no objection was going to be made on the ground of non-joinder or misjoinder of parties. Moreover, no such objection was taken in the pleadings and could not now be taken without an amendment in that behalf being applied for and granted. In my opinion, there was a *bona fide* mistake made by the plaintiffs with respect to this matter, and there was sufficient cause within O XXII, r. 9, for the plaintiff to have failed to make the application before the time ran out within which the application must needs have been made.

Now, there is one other matter which I wish to deal with, and it is this: It

is said with respect to another party that the action is wrongly constituted. It is said that one Sukdeo was a partner and that he also ought to have been joined as a party to the suit. On reference to the Partnership Agreement I notice that Sukdeo Gungadhar and Sukdeo Dungarmull receive a 2 annas 6-pies share, and the evidence was to the effect that Sukdeo was the father of Gungadhar and Dungarmull, and that as between them the annas 2, pies 6 was split up into shares of anna 1, 3 pies, anna 1 and pies 3, respectively. Gungadhar received the largest, and Sukdeo, the father, the smallest share. In my opinion, however, there is no evidence upon which I can find that Sukdeo was a partner in the firm of Nathuram-Ramkissen. The evidence which was led on this point is to be found in the cross-examination of the plaintiff Jamnadas Khemka, and, although he does state in one or two places that Sukdeo was a partner, having regard to the whole of the evidence which he gave, I am satisfied that what he intended to convey was, as I find the fact is, that although Sukdeo was not a partner of Nathuram-Ramkissen, he was jointly interested with his two sons in their shares; that the two sons who signed (Sukdeo did not sign) the agreement were partners, and that as between them and their father there was a certain arrangement made as to the distribution of the family share. But that, of course, would not amount necessarily to Sukdeo being a partner in the firm of Nathuram-Ramkissen. It may be that there are cases in which a stranger may be jointly interested with a member of a partnership, so far as the shares in the partnership of that member are concerned; such mutual interests may amount to a partnership but it is not a partnership in the main firm, but what is called a sub-partnership, the effect of which would be that the stranger who is a partner of the sub-partnership would not be a partner of the main partnership. [*See* the observations of Lord Eldon on *Ex parte Barrow* (13) and *Cox* v. *Hickman* (14).] I have come to the conclusion that Sukdeo was not a partner in any sense in the firm of Nathuram-Ramkissen, although there is some evidence that as between the father and the two sons, the father was jointly interested in their shares. That is sufficient to dispose of this case. The contentions put forward on behalf of defendants Nos. 1 and 3 in my opinion, fail and there is no defence to this action.

K. S. D. & W. C. A. *Order accordingly.*

(13) (1815) 2 Rose 252.

(14) (1860) 8 H. L. Cas. 268; 9 C. B. (N. S.) 47; 30 L. J. C. P. 125; 7 Jur. (N. S.) 105; 3 L. T. 185; 8 W. R. 754; 11. E. R. 4311; 125 R. R. 148; 142 E. R. 19.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 224 OF 1920.

February 13, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

PARTAP SINGH—DEFENDANT—APPELLANT

versus

HAKIM SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation— Necessity — Money borrowed to satisfy pre-emption decree.

Money borrowed by a sonless proprietor on the security of ancestral land to enable him to reap the benefit of a decree for pre-emption is an act of good management, and the loan must be held to have been raised for valid necessity. [p. 88, col. 2.]

Yakub Khan v. *Raghpat Rai*, 17 Ind. Cas. 235; 165 P. W. R. 1912; 192 P. L. R. 1912, followed.

Sobha Singh v. *Kishore Chand*, 65 P. R. 1907; 203 P. L. R. 1908; 146 P. W. R. 1907, distinguished.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 15th August 1919, varying that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 28th March 1919.

Mr. *M. L. Puri*, for the Appellant.

Lala *Kahan Chand*, for Pandit *Bindra Ban*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit by Hakim Singh and Wazir Singh, plaintiffs, for a declaration that five

deeds of mortgage of ancestral land executed by their deceased brother Jowala Singh should not affect their reversionary rights after the death of defendants Nos. 3 and 4, the widows of the mortgagor. In the present appeal we are only concerned with one of these mortgages, namely, No. 2, dated the 10th of May 1909, by which 58 *kanals* of land was mortgaged to Partap Singh, appellant, for Rs. 2,628. The Trial Court held that the whole of this sum, with the exception of item No. 2 for Rs. 224, had been raised for necessity, and decreed accordingly. The learned District Judge, on appeal by Hakim Singh, disallowed items amounting to Rs. 1,936 in addition to the Rs. 224 disallowed by the First Court.

In appeal Partap Singh asks us to restore the decree of the first Court. The items which go to make up the consideration of Rs. 2,628 are given in detail on page 6 of the paper-book. Item No. 1 is Rs. 1,150 due on a prior mortgage-deed also in favour of Partap Singh, dated the 7th June 1905. This sum of Rs. 1,150 was made up of four items (*a*), (*b*), (*c*) and (*d*) which are given on pages 6 and 7 of the paper-book. Item (*a*) has been disallowed by the District Judge, and that is the first item which we have to consider. That sum had been borrowed by Jowala Singh to pay into Court in a pre-emption suit which was pending at the time when he borrowed it. The suit was instituted on the 17th April 1905. The vendee of the land sought to be pre-empted was a stranger to the village, and the object of the suit appears to have been to keep the land from getting into the hands of a stranger and doubtless also to increase the family estate. The first Court, relying upon the case of *Yakub Khan* v. *Raghpat Rai* (1), held that this sum was raised for a necessary purpose. The learned District Judge, on the other hand, quoted *Sobha Singh* v. *Kishore Chand* (2), in which it was held that advances made to agricultural proprietors on the security of ancestral land to provide them with funds to fight out speculative suits for pre-emption can under no circumstances be regarded as incurred for legal necessity. It is contended on behalf of the appellant that the facts of the present case are dissimilar from those of the case reported as *Sobha Singh* v. *Kishore Chand* (2) inasmuch as the pre-emption suit brought by Jawala Singh in 1905 was not a speculative one. A reference to the record of that suit shows that on the 19th May 1905 the vendee filed his written pleas in which he admitted the plaintiffs' right of pre-emption. The only contest was in regard to the price. The money was borrowed for payment into Court on the 10th June 1905 and at the time when it was borrowed it could not be said that the suit was a speculative one, inasmuch as the plaintiff's right of pre-emption had been fully admitted. Jawala Singh actually acquired proprietary rights in 26½ *kanals* by that suit and thereby increased the family estate. No doubt he mortgaged his ancestral land, but this mortgage could be redeemed at any time. It appears to us, therefore, that his act in borrowing the money to obtain this land by pre-emption was an act of good management and that it must be held that Rs. 800 was raised for valid necessity.

Item No. 3 is one of Rs. 444 due on account of rent for four years from *Kharif*, *Sambat* 1962, to *Rabi* 1966 at Rs. 111 per year. This year was due on the land mortgaged by Jawala Singh to Partap Singh on the 7th June 1905 which land Jawala Singh retained as a tenant under the mortgagee at the rent of Rs. 111 per year. Exhibit D6, the entry in the *jamabandi* of 1905-6, shows that Jawala Singh had to pay Rs. 111 as *chakota* to Partap Singh, mortgagee, and the entry in the mortgage-deed in dispute shows that Jawala Singh admitted that four years' rent was due on the 10th May 1909. This was a just debt due from him and must be held to constitute legal necessity.

The fourth and fifth items of Rs. 315 and Rs. 57 respectively were disallowed by the learned District Judge for the same reasons that he disallowed the Rs. 800 referred to above. Exhibits D9 and D30 show that Jawala Singh had on the 18th December 1905 obtained two decrees for pre-emption conditional on payment of

(1) 17 Ind. Cas. 235; 165 P. W. R. 1912; 192 P. L. R. 1912.
(2) 65 P. R. 1907; 203 P. L. R. 1908; 146 P. W. R. 1907.

two sums amounting to Rs. 315 by *Jeth, Sambat* 1964, to Mahn Singh. The money was payable upto the end of *Jeth* 1964 corresponding with the 13th June 1907. It is proved that this money was actually paid on that date to Mahn Singh's son Arjan Singh as Mahn Singh himself was absent. No doubt the payment was not considered payment within the period fixed in the decree, but the mortgagee did not know anything about that. It was sufficient for him that he knew that the money was due, and, in our opinion, these items must also be allowed for the same reasons which we have given in allowing the item of Rs. 800. Item No. 6 is Rs. 112 due as interest on items Nos. 4 and 5 and must be allowed as they have been allowed.

Item No. 7 is one of Rs. 300 for payment to Chhajju and Dalip Singh due on a mortgage executed by Jowala Singh in their favour on the 24th March 1909. In regard to this, the learned District Judge says:—"Rs. 300 were paid as deposit on a mortagage-deed which was never acted upon and the sum was taken back in consequence. Respondents' Counsel admits that he cannot explain what the necessity was for this item and I disallow it accordingly." The matter is quite clear from a reference to the mortgage-deed (Exhibit D-31) and to the evidence on the record referred to in the judgment of the Trial Court on page 8 of the paper-book. Jowala Singh mortgaged his land to Chhajju and Dalip Singh for Rs. 2,000 on the 24th March 1909. The consideration consisted of debts due to certain third persons plus Rs. 300 in cash paid to Jowala Singh. Partap Singh, appellant, paid this Rs. 300 to Chhajju according to the receipt (Exhibit D9) of the 20th May 1909, thereby cancelling the mortgage-deed in favour of Chhajju and Dalip Singh. This Rs. 300 was a just antecedent debt due to third persons and its payment was a valid necessity.

The last item is one of Rs. 26 costs of registration out of which the learned District Judge has disallowed Rs. 19. As in accordance with our findings only Rs. 224 is to be disallowed out of the total consideration for the mortgage, we think the full amount of this Rs. 26 should be allowed.

We, therefore, accept the appeal and modifying the order of the lower Appellate Court, we restore the decree of the first Court with costs throughout.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1139, 1136 AND 1033 OF 1920.

February 13, 1923.

Present :—Mr. Justice C. C. Ghose and Mr. Justice Panton.

PRABHAT CHANDRA CHATTERJI—DEFENDANT—APPELLANT

versus

BIJOY CHAND MAHATAP—PLAINTIFF—RESPONDENT.

Landlord and tenant—Suit for arrears of rent—Kabuliyat admitted by tenant—Decree.

Plaintiff sued to recover arrears of rent in respect of certain lands alleged to have been settled with the defendant, who had executed a *kabuliyat* in favour of the plaintiff and had obtained possession of the lands:

Held, that inasmuch as the execution of the document regulating the rights of the parties was established, the plaintiff was entitled to recover the arrears claimed. [p. 90, col. 2.]

Appeals against a decree of the District Judge, Hooghly, dated the 29th January 1920, modifying that of the Officiating Subordinate Judge of that District, dated the 18th December 1918.

Dr. *Jadunath Kanjilal* (with him Babu *Binodelal Mukerji*), for the Appellants.

Babu *Dwarkanath Chakrabarti*, Dr. *Dwarkanath Mitter* and Babu *Saratkumar Mitra*, for the Respondent.

JUDGMENT.—These three appeals arise out of three suits for recovery of arrears of rent. Suits Nos. 5 and 6 of 1916, out of which Appeals Nos. 19 and 20 of the lower Appellate Court arose, related to the arrears of rent in respect of certain *chaukidari chakran* lands in a number of *Mouzas* alleged by the plaintiff to have been duly settled with the

defendant Prabhat Chandra Chatterji and Suit No. 1 of 1918 out of which Appeal No. 97 of the lower Appellate Court arose, related to the arrears of rent of certain *chaukidari chakran* lands in the said *Mouzas* with the exception of *Mouza* Harishpur. The periods covered by the three suits were different. It has been found by both the Courts below that the defendant, Prabhat Chandra Chatterji, executed the *kabuliyat* referred to in the plaints in the said three suits in favour of the plaintiff and that the said defendant had obtained possession of all the *chaukidari chakran* lands in the *patni mehal* concerned with the exception of the lands in *Mouza* Harishpur. The contention in Suit No. 1 of 1918 of the defendant, Prabhat Chandra Chatterji, amongst others was that one *Sreemati* Nagendrabala Chaudhurani who had brought a suit for declaration of title against the plaintiff having been made a party defendant in these suits, they were bad for misjoinder of parties. The contention of the defendant *Sreemati* Nagendrabala Chaudhurani was that no relationship of landlord and tenant subsisted between the plaintiff and herself and that accordingly these suits in questionshould be dismissed with costs. The appeal, Second Appeal No. 1033 1920, before us was a joint appeal on behalf of the said two defendants, but Dr. Jadunath Kanjilal who argued them, in reply to a question by the Court, made it clear that he elected to argue this appeal only on behalf of the defendant, Prabhat Chandra Chatterji, and that he did not desire to appear on behalf of the defendant *Sreemati* Nagendrabala Chaudhurani. Dr. Kanjilal's contention was that the lease in favour of the defendant, Prabhat Chandra Chatterji, was void, inasmuch as it had been found in another suit that Prabhat Chandra Chatterji was merely the *benamidar* of the defendant *Sreemati* Nagendrabala Chaudhurani and that, therefore, the plaintiff was incompetent to maintain the present suit. He argued that by accepting a deed of conveyance in fee and going into possession, a grantee is not estopped to deny the title or seisin of his grantor unless he claims under the deed. The argument advanced by the appellant Prabhat Chandra Chatterji which really was an argument on behalf of Nagendrabala Chaudhurani, may have to be considered in a properly constituted suit by the parties; we think, however, so far as these suits for arrears of rent are concerned, we must proceed on the basis that, inasmuch as the execution of the document regulating the rights of the parties which have been produced by the plaintiff is not denied by the defendant, Prabhat Chandra Chatterji, these suits for arrears of rent should succeed, there being no real answer to them, and we agree with the reasons given by the lower Appellate Court in its judgment. In this view of the matter, these appeals fail and must be dismissed with costs.

K. S. D. & W. C. A. *Appeals dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1316 OF 1921.

December 11, 1922.

Present:—Mr. Justice Broadway.

THE MUNICIPAL COMMITTEE, BHERA—DEFENDANT—APPELLANT

versus

SHIV RAM—PLAINTIFF, AND GOKAL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 20—Appeal—Power of Court to add parties—Discretion—Neglect of Counsel.

The Law of Limitation does not apply to action taken by an Appellate Court under r. 20 of O. XLI of the Civil Procedure Code, but the power to take such action is discretionary and should not be exercised where the appellant has been guilty of extreme neglect. [p. 91, col. 2.]

Shahab Din v. *Miran Bakhsh*, 25 Ind. Cas. 549; 79 P. R. 1914; 268 P. L. R. 1914; 169 P. W. R. 1914, followed.

It is an act of gross neglect to implead as an appellant a person who is a necessary party to an appeal without any authorisation from him. [p. 91, col. 1.]

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 12th March 1921, varying that of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 1st June 1920.

Mr. *Abdul Rashid* for Mr. *Abdul Aziz*, for the Appellant.

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

JUDGMENT.—Shiv Ram, Gokal Chand, Mehr Chand, Diwan Chand and Ram Lal, minor, are the owners of certain house property in Bhera. Shiv Ram is manager in charge of the property and to him the Municipal Committee of Bhera issued certain notices with regard to this joint property. These notices were not complied with and the Committee decided on certain demolitions. Thereupon Shiv Ram instituted a suit against the Committee making the other four co-sharers co-defendants. In this suit he asked for an injunction against the Municipal Committee restraining it from making the intended demolitions.

The First Court granted him (Shiv Ram) a decree *qua* part of the erections. He appealed to the District Judge *qua* the remainder making the other co-sharers respondents along with the Committee. The learned District Judge accepted the appeal in part and extended the injunction to certain other portions of the structures.

Against this decree an appeal was filed by Mr. Abdul Aziz, Barrister-at-law. This appeal purported to be on behalf of the Committee as well as the other co-sharers, Shiv Ram alone being the respondent. When the case came up for hearing on the 12th May 1922, it was pointed out to me that Mr. Abdul Aziz was appearing on behalf of the Municipal Committee of Bhera alone and at Mr. Abdul Aziz's request I directed that the other four persons should be made respondents. This was accordingly done, and on the case coming up again for hearing Mr. Badri Das for the respondents contended that as the appeal had not been filed against the other four respondents within time it should be dismissed. It was urged that the other four co-sharers were necessary parties to this suit and that Mr. Abdul Aziz had been grossly negligent in making them appellants instead of respondents without any authorization on their part. Mr. Rashid did not deny that the mistake was a bad one but urged that under O. XLI, r. 20, Civil Procedure Code, I have the power to make these persons respondents and that by my doing so the question of limitation would be avoided. In *Shahab Din* v. *Miran Bakhsh* (1) it was held that the Law of Limitation did not apply to action taken by a Court under this rule and Order but that the power to take this action was discretionary and should not be exercised in a case of extreme neglect.

It seems to me that the present case is one of grave neglect. It is apparent on the face of the documents that the co-sharers, other than Shiv Ram, were necessary parties. The Committee could in no circumstances appeal on their behalf and it has not been contended before me that they desired to do so. The injunction enures for the benefit of the property, and the co-sharers have now acquired a valuable right which I do not think I should take away from them in the circumstances of the present case.

I accordingly decline to act under O. XLI, r. 20, and dismiss this appeal with costs.

Z. K. & W. C. A.

Appeal dismissed.

(1) 25 Ind. Cas. 549; 79 P. R. 1914; 268 P. L. R. 1914; 169 P. W. R. 1914.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 119 OF 1923 WITH CIVIL REVISION No. 193 OF 1923.

August 13, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

RAMESHWARDHARI SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SADHO SARAN SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908),

of a joint family so as to make section 7, clause (4), of the Court-Fees Act apply, but alleges that he is in joint possession, the Article applicable is Art. 17, clause (6). The present case is one of a Muhammadan co-sharer who sues her other co-sharers for partition and possession of her share of her deceased father's properties, and she alleges that she is in possession of some of the items as indicative of her joint possession in law with the other co-sharers of the deceased's estate. There is no case here of her being excluded from any part of that estate by her co-sharers or to put in another way her being ousted from possession of any part of it. In such a case as this the suit is one for partition and possession of one's share by one having joint possession of the estate taken as a whole. It is clear from *Gill* v. *Varada Raghavayya* (1) and the cases cited there, one of which in *Ahamuddin Tamijuddin* v. *Amiruddin* (2), is the case of Muhammadans, that the suit falls under Art, 17, clause (6), and not under section 7, clause (5)

The order of the lower Court is set aside and it is directed to restore the case to its file and to dispose of it according to law. Costs here will abide and follow the result.

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

(2) 44 Ind. Cas. 216.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2339 OF 1918.

January 9, 1923.

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

KISHAN DAS—PLAINTIFF—APPELLANT

versus

LACHHMAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

***Hindu Law*—Sadhus—*Inheritance, rules of*—*Property acquired by* Sadhu, *whether* wakf.**

A person on being initiated into a fraternity of *Sadhus* severs his connection with all his natural relations and kinsmen and becomes not only a disciple but also the spiritual son of his *guru*. Thus all other disciples of his *guru* become his religious brothers and the *guru's guru* is his grandfather and the disciples of the latter are his uncles and inheritance is governed by the religious relationship thus established. [p. 95, col. 2.]

Secular property, even if acquired by a *Sadhu*, does not change its character unless dedicated for a special purpose, religious or charitable. [p. 96, col. 1.]

First appeal from a decree of the Subordinate Judge, First Class, Delhi, dated the 4th May 1918.

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

Lala *Sardha Ram*, for the Respondents.

JUDGMENT.—This first appeal arises out of a suit in which the properties in dispute were:

(1) a house,
(2) four shops, and
(3) three *ahatas* or sites,

situate in Delhi, which along with other properties of the same kind had been acquired by one Harsukh Das, a *Sadhu* or *faqir* of the order known as *Dadupanthi*. On his death, which took place in 1892, all the properties were seized by one Kanhaya who was the son of his mistress. A claimant to the estate of Harsukh Das appeared in the person of Bal Ram (defendant No. 3) who too is a *Sadhu* of the said *Dadupanthi* order, and succeeded in his suit for possession of it as the spiritual heir of Harsukh Das. Kanhaya appealed to the Chief Court but his appeal was dismissed by its judgment dated the 14th May 1904. All the properties thus acquired by litigation were sold by Bal Ram to Lachhman Singh for Rs. 11,000 under the deed, dated the 22nd February 1909. Out of these properties Lachhman Singh sold to Fazal Ilahi, defendant, for Rs. 10,250 the house, etc., which are the subject-matter of the present litigation and mortgaged the rest to Chhanga Mal for Rs. 20,000. The deed of sale and the mortgage-deed were executed on the 26th September 1913 and 17th November 1914 respectively. Two suits were almost simultaneously instituted to contest these alienations, one by Kishen Lal, appellant, and the other by Thandi Ram and both were dismissed. The appeal preferred to this Court by Thandi Ram abated because the representatives of Lachhman Singh, who died during the pendency of the

suit, were not brought on the record within the prescribed period. Lachhman Singh was a respondent in the present case also and Counsel for the appellant Kishen Lal admits that the claim for mesne profits, etc., against Lachhman Singh has abated.

Kishen Lal plaintiff-appellant's case was that Harsukh Das founded a temple of *Dadupanthi Sadhus* in the house in dispute and endowed it with the other properties which he had acquired, that all these properties were thus *waqf* and inalienable, that, therefore, the sale thereof was void and inoperative and that he was entitled to possession thereof because he was the *Mahant* of the parent temple of the order situated at Dubal Dhan, District Rohtak, and as such had the right and power of control over the temple at Delhi which was an off-shoot of the former. The defence was that Harsukh Das founded no temple nor dedicated any property for its use and that in any case the plaintiff had no *locus standi* to claim possession of the properties. Tho two vital questions put in issue by the Court below and decided against the plaintiff were:

(1) whether Harsukh Das founded a temple and endowed it with the other properties; and

(2) whether the plaintiff was competent to maintain the suit.

It is common ground that Harsukh Das, though a member of the said fraternity of *Dadupanthi Sadhus*, was neither a mendicant nor an ascetic retired from the world, and that he earned his livelihood by the practice of medicine, kept a mistress, gambled and was on all hands a dissolute man of no character. It is further admitted by Counsel for the appellant that there is no direct evidence to show that Harsukh Das consecrated the house as a temple and endowed it with property; but his contentions are:

(1) that in the former case the Chief Court not only found Bal Ram to be the heir of Harsukh Das as his nearest spiritual reversioner or *chachera gurbhai* but also that the "property was claimable as devoted to religious and not to secular purposes;"

(2) that as the property descended from *guru* to *chela* it must be treated as religious property;

(3) that the evidence that the *pothi* or sacred book of *Dadupanthis* was kept in a niche in the house and that Harsukh Das used to deliver sermons from it to the people was sufficient to show that the house had been converted into a temple, and

(4) that the plaintiff as the *Mahant* of the superior *gaddi* had the right to recover the temple from the hands of strangers.

All these contentions are, in our opinion, quite untenable and none is supported by any evidence worth the name. It is a matter of common knowledge that a person on being initiated into a fraternity of *Sadhus* severs his connection with all his natural relations and kinsmen and becomes not only a disciple but also spiritual son of his *guru*. Thus, all other disciples of his *guru* become his religious brothers and the *guru's guru* is his grandfather and the disciples of the latter are his uncles. Inheritance is governed by the religious relationship thus established and, therefore, all that the Chief Court decided in the former case was that Bal Ram was the heir of Harsukh Das according his spiritual or religious relationship with him. The question whether the property of Harsukh Das was devoted to religious purposes was not before the Chief Court at all whose judgment opens with the following:

"The question before us in appeal may be put thus: "Is there any flaw in the evidence offered to prove Bal Ram's spiritual relationship and heirship to the deceased *Bawa* Harsukh Das, and is there any reason to doubt that Harsukh Das' property self-acquired or other, had to devolve in this manner." And the learned Judges answered this question in the affirmative finding that Bal Ram was the *chachera gurbhai* and heir of Harsukh Das and that the property was subject to the devolution usual amongst *faqirs*. There is no mention in their judgment as to the property being *waqf* or having a temple in it. No authority was cited for the proposition

that "the property of a *Sadhu* must be presumed to be devoted to religious purposes for the reason that it descended from *guru* to *chela*." A secular property, even if acquired by a *Sadhu*, does not change its character unless dedicated for a special purpose, religious, charitable, etc. The story that a copy of the sacred book of the *panth* or cult was kept in a niche in the house, even if true, does not lead to the conclusion that the house thereby became a temple and there was nothing to show that the building was consecrated to serve as a temple. Lastly, even if it be conceded that the house was a temple, there was no evidence to establish the plaintiff's authority over it and his right thereunder to take possession of it. Therefore, the appeal fails and we dismiss it with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1534 OF 1921.

August 13, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

SANT LAL SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NANKU LAL SINGH AND ANOTHER —DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagors jointly and severally liable—Mortgagee realising money from one of the mortgagors—Contribution, liability for.

Plaintiff No. 1 and defendant No. 1 mortgaged their respective properties to one *A* for Rs. 400, agreeing as between themselves to take the mortgage-money half and half, but their liability to the mortgage was joint and several. *A*, having brought a suit to enforce his mortgage got a decree and in execution thereof brought the plaintiffs' property to sale. Plaintiffs then brought the present suit claiming contribution from the defendants to the extent of that portion of the mortgage-money which was appropriated by them:

***Held*, that the mortgagee was entitled to proceed against the plaintiffs' properties for the entire debt due to him and as the plaintiffs were compelled to discharge an obligation which vested not only on them but also on the defendants, the defendants were liable to pay contribution to the plaintiffs.**

Wajahat Husain v. *Ratan Lal*, 12 Ind. Cas. 182; 8 A. L. J. 1092, distinguished.

Appeal from a decision of the District Judge, Monghyr, dated the 4th August 1921, reversing that of the Munsif, Second Court, Begusarai, dated the 25th January 1921.

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

Mr. *C. S. Banerjee*, for Mr. *L. M. Ganguli*, for the Respondents.

JUDGMENT.

Das, J.—I think that this appeal must succeed. There is no dispute that the plaintiff No. 1 and the defendant No. 1 mortgaged their respective properties to one Ali Hossain to secure a loan of Rs. 400 granted by him to them. It is quite true that, as between the plaintiff No. 1 and defendant No. 1, there was an arrangement by which plaintiff No. 1 took Rs. 200 and the defendant No. 1 took Rs. 200, but their liability to Ali Hossain was joint and several and it was open to Ali Hossain to proceed against any of the properties mortgaged to him.

That being the position, Ali Hossain brought a mortgage-suit to enforce his mortgage against the plaintiff and defendant No. 1. He got his decree in due course and caused the properties belonging to the plaintiff to be sold in execution of the decree. It appears that there was a prior mortgage affecting the property belonging to the defendant and that the property belonging to the defendant had already been sold in the suit brought by the prior mortgagee to which Ali Hossain was a party. The plaintiffs now claim that, as their properties have answered for the claim of Ali Hossain, they are entitled to claim contribution from the defendants to the extent of that portion of the mortgage-money which was appropriated by the defendants. I can see no answer to the claim put forward on behalf of the plaintiffs.

The view of the learned Judge in the Court below appears to be this, that, as the puisne mortgagee cited in the action

against the defendant, it was the duty of Ali Hossain to redeem the mortgage, and, as he failed to do so, it must be taken that the consented to the integrity of the mortgage being broken up. That being so, it was open to the plaintiff to claim partial redemption on payment of the proportionate share of the debt due by him. The plaintiffs, not being bound by law to satisfy the entire decree obtained by Ali Hossain, cannot claim any contribution from the defendants.

As far as I know, there is no authority in support of this view. All the properties mortgaged to Ali Hossain remained liable for the entire debt due to Ali Hossain, and there is nothing in section 82 of the Transfer of Property Act which compelled the mortgagee to proceed against the properties belonging to the plaintiffs for the share of the debt proportionate to the value of those properties. He was entitled to proceed against those properties for the entire debt due to him, unless indeed he had, by his own act, destroyed the integrity of the mortgage, and I know of no authority which lays down that the failure to redeem a prior mortgage that may exist in respect of any of the properties, operates as a splitting up of the mortgage security. Though he was entitled to redeem the prior mortgage, he was not bound to do so, and it was for him to decide whether, having regard to the value of the other properties included in his mortgage, he should take the risk. The result is that he lost portion of his security, not because he released it, but because there was an assertion of a title paramount against him.

The case of *Wajahat Husain* v. *Ratan Lal* (1), to which the learned Vakil for the respondents referred, is an entirely different case. That was a case where *A* and *B* hypothecating their respective properties to *C* by a single mortgage-deed, *left in the hands of* C *part of the consideration for the redemption of a prior mortgage held over a portion of* B's *property by* D. It was found that *C* did not redeem *D* although it was his clear duty to do so. It was held, in these circumstances, that the integrity of the mortgage in favour of *C* was broken up and that it was open to *A* to redeem his portion of the mortgaged property upon payment of a proportionate amount of the mortgage-money. But in the case before us, the mortgagors did not leave any fund in the hands of Ali Hossain and it was, as I have said before, no part of the duty of Ali Hossain to redeem the prior mortgagee. That being so, it was open to Ali Hossain to proceed against the properties which belonged exclusively to the plaintiffs. He did proceed against those properties with the result that the plaintiffs have been compelled to discharge an obligation which rested, not only on their property but also on the properties of the defendant and on the defendant personally. I know of no principle which allows the defendants to escape from the liability, just because they had the foresight to give in mortgage a property which they had already mortgaged to a third person.

The learned Judge was much pressed by the terms of section 82 of the Transfer of Property Act, but in truth section 82 has nothing whatever to do with the case. That section deals with the burden that may be lawfully placed on each of the several properties mortgaged to secure one debt, it does not touch the question of personal liability that always arises when one person is compelled to pay the debt of another. The learned Judge thought that there was no personal decree against the defendants; that is true enough; but it is entirely irrelevant to consider that matter. The personal liability was always there, and would in due course have given rise to a decree, but for the fact that the property belonging to the plaintiff was sufficient to pay off Ali Hossain. The question is free from all complications and in my opinion was correctly decided by the learned Munsif.

I would allow the appeal, set aside the judgment of the Court below and restore the judgment and decree passed by the Court of first instance. The plaintiffs are entitled to their costs throughout.

Macpherson, J.—I agree.

K. S. D. *Appeal allowed.*

(1) 12 Ind. Cas. 182; 8 A. L. J. 1092.

MUNDO SINGH v. KRISHNA DAYAL GIR.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1760 OF 1921.

August 13, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

MUNDO SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Mahanth KRISHNA DAYAL GIR—PLAINTIFF, AND CHULAI SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 75—Instalment bond, suit on—Default in payment of instalments—Terminus a quo.

Plaintiff sued to recover money due on a bond. It was an instalment bond providing that the first instalment should be paid on the 18th June 1913, the second on the 19th June 1914 and the subsequent instalments on the 19th June of every year. The plaintiff alleged and the Court found that the first two instalments were paid but that the third was not paid. Plaintiff, therefore, contended that his cause of action arose on the 19th June 1915:

Held, that section 20 of the Limitation Act did not apply to the case and it was open to the Court to find that the instalments were paid even though the fact of payment did not appear in the hand-writing of the defendant;

(2) that the suit was governed by Art. 75 of the Limitation Act and the period of limitation began to run from the date when the default was made, *i.e.*, the 19th June 1915.

Appeal from a decision of the District Judge, Gaya, dated the 19th September 1921, reversing that of the Munsif, Third Court, Gaya, dated the 14th April 1921.

Mr. *Nawal Kishore Prosad II*, for the Appellant.

Messrs. *S. N. Palit* and *Kailaspati*, for the Respondent.

JUDGMENT.

Das, J.—Two points have been urged before us; first, that the suit is barred by limitation, and, secondly, that the finding as to legal necessity is not sufficient. The learned Vakil was under the impression that the bond sued upon was not registered in accordance with law; but it appears that the bond is a registered one, and it must follow that the plaintiff had six years from the date of the cause of action. It was, however, strongly contended by the learned Vakil that the plaintiff's cause of action actually arose on the 18th June 1913 and not on the 19th June 1915 as the plaintiff alleges. In order to determine this point, it must be remembered that the bond sued upon is an instalment-bond in common form which provided that the first instalment should be paid on the 18th June 1913 the second on the 19th June 1914 and the subsequent instalments on the 19th June of every succeeding year. The plaintiff's case is that the first two instalments were paid by the defendants, and the learned Judge in the Court below has found that they were in fact paid. The plaintiff contends that the third instalment was not paid, and that his cause of action arose on the 19th June 1915. It is conceded that the suit is well within time if the cause of action did arise on the 19th June 1915. The case of the defendants, on the other hand, is that they never paid any of the instalments in respect of the bond sued upon, and that the cause of action arose on the 18th June 1913, in which case the suit must be held to be time-barred. As I have said before, the learned Judge in the Court below has found that the first two instalments were in fact paid by the defendants to the plaintiff. The finding of the learned Judge on this point is a finding of fact and is binding on us in second appeal.

The point of law argued by the learned Vakil is this: that it was not open to the learned Judge to find that any of the instalments was in fact paid by the defendants, unless the fact of the payment appeared in the hand-writing of the person actually paying, and the learned Vakil relied on section 20 of the Limitation Act. The answer to the argument is that section 20 has nothing whatever to do with the case. Section 20 applies where the cause of action has already arisen, and the plaintiff is seeking to have a fresh period of limitation computed from the time when a payment was made by the debtor. Section 20 lays down that he is not entitled to a fresh period unless, where the plaintiff relies on the part-payment of the principal of a debt, the fact of

the payment appears in the handwriting of the person making the same. But, if the plaintiff's case be true, the cause of action did not arise till a year after the payment of the second instalment by the defendants. The provision as to limitation applicable to this case is to be found in Art. 75 of the Limitation Act which gives the plaintiff three years time (in the case of a registered bond, the period would be six years) to bring a suit to enforce a bond of this nature from the date when the default is made. The learned Judge has found as a fact that the default was made on the 19th June 1915. I have no hesitation whatever in deciding against the appellants on the first point urged before us by the learned Vakil.

The other point is equally without merit. It has been found by the Courts below that the instalment-bond was executed in order to secure to the plaintiff the payment of rent that had already accrued due to the plaintiff. In my opinion, the benefit to the family is apparent on the face of the transaction. They were liable for a large sum of money, and the plaintiff agreed to accept payment by easy instalments spread over twelve years.

The appeal must be dismissed with costs.

Macpherson, J.—I agree.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2574 OF 1919.

January 31, 1923.

Present :—Mr. Justice LeRossignol and Mr. Justice Harrison.

MUHAMMAD HAFIZULLAH KHAN—DEFENDANT—APPELLANT

versus

BULAQI MAL AND ANOTHER—PLAINTIFFS AND MARUF—DEFENDANT—RESPONDENTS.

Minor—Transfer not for benefit of, nature of—Subsequent transferee, whether can question transfer.

A transfer which is not for the benefit of a minor, is voidable at the instance of the minor and cannot be questioned by a subsequent transferee.

Second appeal from a decree of the District Judge, Lahore, dated the 25th August 1919.

Mr. *Gopal Chand*, for the Appellant.

Mr. *Tirath Ram*, for the Respondents.

JUDGMENT.—The facts in this case are quite simple, but a somewhat difficult point of law is involved. Mrs. Maruf, a Christian widow, acting as guardian of her son Muhammad Aslam Maruf, first executed a lease on the 22nd of June 1915 in favour of Bulaqi Mal and Ram Lal for a period of fifteen years in consideration of a sum of Rs. 1,000. Subsequently, on the 6th of October 1916, she sold the same land to *Sardar* Muhammad Hafiz Ullah Khan describing it as free of all encumbrances. Both the instruments were registered. Plaintiff now sues for possession of the land leased to him and is met by a plea on behalf of defendant that the transaction was not for the benefit of the minor and, therefore, the lease is not valid. The finding of the learned District Judge is that this plea could only be taken by the minor who has not been impleaded in the case, that the contract is only voidable and not void and that, therefore, the transferee from the minor cannot question plaintiffs' title. We have been referred to various authorities and more especially to *Mohanlal* v. *Kisan* (1), a decision of the Judical Commissioner of Nagpur, which is to the effect that a transferee from a minor after he has attained majority can challenge the alienation made by that minor during his minority. As against this we have *Muthukumara Chetty* v. *Anthony Udayar* (2) where it is explained that a right to avoid is a personal privilege and though a minor may sue through a next friend to set aside a transfer even during his minority, he and he alone can exercise this personal privilege. With this view

(1) 62 Ind. Cas. 313; 17 N. L. R. 53.
(2) 24 Ind. Cas. 120; 38 M. 867 at p. 877; 15 M. L. T. 361; 29 M. L. J. 617.

we agree and we find that a transferee is not entitled to question a previous transaction or to assume the privileges which are personal to the minor and to no body else whether the transfer was effected after or before the minor attained majority.

We, therefore, find that the plaintiff is entitled to the decree he seeks and we dismiss the appeal with costs.

W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL NO. 3 OF 1923.

MAY 25, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

BU ALI KHAN—DEFENDANT—APPELLANT

versus

SUJAN KUAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110 —Application for leave to appeal to His Majesty in Council—Suit by Hindu widow—Plaintiff adopting son pendente lite—Son not brought on record—Substantial question of law.

In a suit by a Hindu widow in possession of her husband's estate the defendants contended that the suit was not maintainable because a previous suit commenced by the predecessors-in-interest of the plaintiff had abated under O. XXII, r. 9 of the Civil Procedure Code. It was also urged that as the plaintiff had, during the pendency of the suit, adopted a son it was incumbent upon her to bring upon the record as plaintiff the name of the minor boy she had adopted. Both these contentions were overruled and the suit was eventually decreed by the High Court. The defendant then applied for leave to appeal to His Majesty in Council:

Held, that neither of the questions raised was a substantial question of law within the meaning of section 110, Civil Procedure Code, and leave could not, therefore, be granted. [p. 100, col. 2.]

Application for leave to appeal to His Majesty in Council.

Mr. *Haidar Mehdi*, for the Appellant.

Messrs. *Piary Lal Banerji* and *Uma Shankar Bajpai*, for the Respondent.

JUDGMENT.—The question before us is whether we can or ought to certify that the appeal proposed to be preferred by the unsuccessful defendants-appellants, against a decision of this Court, dated the 3rd of August 1922, satisfies the conditions laid down by section 110 of the Code of Civil Procedure, so as to make it a proper case for an appeal to His Majesty in Council. As regards the value of the subject-matter in dispute, it is admitted that the requisite conditions are fulfilled. It is, however, also admitted that, inasmuch as this Court affirmed the decision of the Court below, this appeal must involve some substantial question of law before we can certify it as a suitable appeal to be preferred to His Majesty in Council. We had to deal, in substance, with two points, and the petition laid before us to-day shows that these are the points which it is desired to raise before His Majesty in Council. Neither of these points has anything whatever to do with the merits of the case. They were both of them objections of a highly technical character, not affecting the right of the plaintiff in the action to recover the money claimed, but only the procedure adopted in the course of the action for its recovery. One contention was that the suit was not maintainable, because a previous action commenced by the predecessor-in-interest of the plaintiff had abated under O. XXII, r. 9, of the Code of Civil Procedure. We disposed of this technical objection by an argument, also technical in its nature, the effect of which was that it was quite impossible to hold that the previous suit referred to in the pleadings had "abated" within the meaning of the rule in question. We are, in no way, prepared to certify that the question thus decided by us was a substantial question of law within the meaning of section 110 of the Code of Civil Procedure.

The other point requires to be stated in some further detail. The suit was instituted by Rani Sujan Kunwar as a Hindu widow in possession of the estate of her late husband. During the pendency of the action she adopted a son. At some stage or other in the course of the trial the question was raised whether after this adoption it was not incumbent upon the lady to bring upon the record as

plaintiff in the suit the name of the minor boy whom she had adopted, and then to continue the action as his next friend or natural guardian. This contention was repelled by the Trial Court. We pointed out, when it was raised before us in appeal, that it would have been open to the Trial Court to accept the contention and to meet it by a formal order bringing the minor in question on to the record. At the same time, having regard to certain facts which were proved at the trial as to the circumstances under which the adoption was effected, we found that the Court below had not been wrong in the procedure actually adopted by it, that is to say, in permitting the widow lady to continue the action in her own name. There was at the time of the adoption an agreement between the lady herself and the father of the boy who was given and taken in adoption, the effect of which was to vest the management, at any rate of the estate, in the hands of the lady until the boy should attain majority. It is now contended before us that a substantial question of law is here involved, because of the general principle of Hindu Law by which a widow making an adoption to her deceased husband, at once divests herself of the estate in favour of the son so adopted. Our attention has been drawn to certain cases in which the question has been considered whether an agreement entered into at the time of the adoption, the object of which is to postpone its effect until the death of the widow, would be valid or enforceable, as against the adopted son. In the case before us the validity of the agreement is not being contested, and, so far as we know, has never been contested, by the adopted son. It is the plaintiff in the action, that is to say the widow, who is seeking to protect the rights of the minor by continuing this action for his benefit. She instituted it at a time when she herself represented the estate of her late husband. She has been permitted to continue it on the strength of the authority exercisable by her under the agreement entered into at the time of the adoption. We are not prepared to certify that any substantial question of law of general importance is involved in our decision on this point.

The application is dismissed with costs.

K. S. D. *Application dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 15 OF 1923.

March 28, 1923.

Present:—Mr. Justice Abdul Raoof.

BAGH SINGH—DEFENDANT—PETITIONER

versus

BHAGWAN DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 10, 115—Order refusing to stay suit—Revision, whether lies.

Inasmuch as an order refusing to stay a suit under section 10 of the Civil Procedure Code, does not amount to a decision of a case within the meaning of section 115 of the Civil Procedure Code, an application to revise such order cannot be entertained.

Mela Ram v. *Rikhkesh*, 69 Ind. Cas. 111; 33 P. W. R. 1922; (1923) A. I. R. (L.) 69, *Firm Ishar Das-Dharm Chand of Amritsar* v. *Firm Buta Mal-Durga Das of Amritsar*, 67 Ind. Cas. 870; (1922) A. I. R. (L.) 54; 4 L. L. J. 425, *Sultanat Jahan Begam* v. *Sundar Lal*, 58 Ind. Cas. 90; 42 A. 409; 18 A. L. J. 431 and *Buddhoo Lal* v. *Mewa Ram*, 63 Ind. Cas. 151; 43 A. 564; 19 A. L. J. 558 (F. B.), relied on.

Petition for revision of the order of the Subordinate Judge, First Class, Delhi, dated 19th December 1922.

Mr. *Tek Chand*, for the Petitioner.

Kanwar *Dalip Singh*, for the Respondent.

JUDGMENT.—This is an application for revision made against an order refusing to stay a suit under section 10 of the Code of Civil Procedure. A preliminary objection is taken to the hearing of this petition by Mr. Dalip Singh on the ground that no revision lies against the order as no case has been decided. In support of his contention he has relied upon the following rulings:—

(*i*) *Mela Ram* v. *Rikhi Kesh* (1), (*ii*) *Firm Ishar Das Dharm Chand of Amritsar* v. *Firm Buta Mal-Durga Das of Amritsar* (2), (*iii*) *Sultanat*

(1) 69 Ind. Cas. 111; 33 P. W. R. 1922; (1923) A. I. R. (L.) 69.

(2) 67 Ind. Cas. 870; (1922) A. I. R. (L.) 54; 4 L. L. J. 425.

Jahan Begam v. *Sundar Lal* (3) and *(iv) Buddhoo Lal* v. *Mewa Ram* (4).

In my opinion, all these cases support the contention of Mr. Dalip Singh. It is true that there are certain decisions the other way also to which my attention has been called by Mr. Tek Chand, the Counsel for the applicant, but I find that the preponderance of the authorities is in favour of Mr. Dalip Singh's contention.

I, therefore, accept the preliminary objection, and reject this application for revision with costs.

Application rejected.

W. C. A.

(3) 58 Ind. Cas. 901 42 A. 409; 18 A. L. J. 431.
(4) 63 Ind. Cas. 151 43 A. 564; 19 A. L. J. 558 (F. B.).

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 297 OF 1922.

March 3, 1923.

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

THAKOREDAS TRIBHAVANDAS AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

LALUBHAI TRIBHOVANDAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Appellate Court, finding of, that no compromise or arbitration—Revision—High Court, jurisdiction of, to interfere.

Where an Appellate Court finds that there was no lawful agreement to refer the disputes between the parties to a suit to arbitration, or a compromise of the suit, and directs a trial of the suit, there is not such a decision of the case to warrant interference by the High Court under section 115 of the Civil Procedure Code.

Civil Extraordinary Application from the decision of the District Judge, Surat, in Miscellaneous Appeal No. 12 of 1921, reversing an order passed by the Second Class Subordinate Judge at Surat, in Civil Suit No. 706 of 1920.

Mr. *G. N. Thakore* (with him Mr. *M. K. Thakore*), for the Petitioners.

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

JUDGMENT.—In this case, there being an agreement to refer to arbitration the disputes between the parties without the intervention of the Court, the arbitrators made an award, and thereupon the defendants applied for a decree in terms of the award. That would be an application under O. XXIII, r. 3, the defendants seeking to prove to the satisfaction of the Court that the suit had been adjusted by a lawful agreement or compromise. The plaintiffs impugned the award on the ground that the arbitrators were guilty of misconduct. The Trial Court passed a decree in terms of the award. An appeal was filed to the District Judge who held that the award was vitiated and could not be given effect to in accordance with law on various grounds and accordingly the Judge directed that the decree on the award should be set aside and the suit remanded for trial.

An application has now been made under section 115 of the Code to revise the order of the District Judge. The first ground relied upon was that the Judge acted without jurisdiction in going into the misconduct of the arbitrators under O. XXIII, r. 3. It cannot be that the Judge had no jurisdiction to entertain the question, as he is bound to decide whether there was a lawful agreement or compromise, and an agreement referred coupled with an award in which it has been proved that the arbitrators are guilty of misconduct, will not be a lawful agreement or compromise. It is impossible to conceive that it was intended, when an application was made to the Court under O. XXIII, r. 3, that all that the Court had to do was to satisfy itself that there had been an agreement to refer and an award, and that it was bound to pass a decree in terms of the award, without considering any objection raised by one party or the other that there had been misconduct on the part of the arbitrators, such as is in any other case would vitiate an award.

But there is another ground on which we refuse to entertain the application and that is that the case has not been decided. All that the Court has found is that there had been no lawful agreement or compromise of the suit, and, therefore, it directed a trial of the suit. The Rule will, therefore, be discharged with costs.

W. C. A. *Rule discharged.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 178 OF 1922.

April 3, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

JAGGAN NATH—JUDGMENT-DEBTOR—APPELLANT

versus

DAUD AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104, O. XXI, rr. 66, 90, 92, O. XLIII, r. 1 (j)—Execution of decree—Application to set aside sale—Appeal, second, whether lies—Failure to issue notice before drawing up proclamation, effect of.

A second appeal is not competent from the order of a District Judge passed on appeal against an order setting aside an execution sale under O. XXI, r. 92 of the Civil Procedure Code.

The failure of an Executing Court to issue notice to the judgment-debtor under O. XXI, r. 66 of the Civil Procedure Code, before drawing up the proclamation of sale amounts to an irregularity in publishing the sale within the meaning of O. XXI, r. 90 of the Code, and an application to set aside the execution sale on that ground is covered by the rule.

Bipin Bihari Bejali v. *Kanti Chandra Mandal*, 18 Ind. Cas. 715 and *Sheodhyan* v. *Bholanath*, 21 A. 311; A. W. N. (1899) 84; 9 Ind. Dec. (N. S.) 907, followed.

Letters Patent Appeal from an order of Mr. Justice Abdul Raoof, dated the 3rd July 1922, reported as 71 Ind. Cas. 788 (passed in Miscellaneous Second Appeal No. 317 of 1922), affirming that of the District Judge, Rawalpindi, dated the 18th October 1921.

Mr. *Nanak Chand*, for the Appellant.

Mr *Ghulam Rasul*, for the Respondents.

JUDGMENT.—The facts relevant to the question of law involved in this appeal are simple and do not admit of any dispute. On the 14th November 1911 the judgment-debtor made an application to have a sale of immoveable property in execution of a decree set aside on the ground of material irregularity and fraud in publishing or conducting the sale. This application was allowed by the Court of first instance but dismissed on appeal by the District Judge. Thereupon, the judgment-debtor preferred a second appeal to the High Court, and the question for decision is whether a second appeal lay from the order of the District Judge passed on appeal against an order setting aside the sale in execution of a decree. Now, sub-section (2) of section 104 of the Civil Procedure Code lays down in express terms that no appeal shall lie from any order passed in appeal under that section. Sub-section (1) of that section enumerates the various orders which are appealable, and clause (*j*) provides that an appeal shall lie from an order made under the rules from which an appeal is expressly allowed by those rules. It is manifest that an order made under O. XXI, r. 92, is appealable under O. XLIII, and the question is then reduced to this, whether the order made by the Subordinate Judge was one under r. 92 of O. XXI.

That rule refers to an order confirming or setting aside a sale in execution of a decree, and the order passed in the present case was an order setting aside the sale. There can, therefore, be no doubt that the order of the Subordinate Judge was appealable under O. XLIII, r. 1, clause (*j*), and that the law does not allow a second appeal from an order made on appeal from that order.

A reference to O. XXI, r. 90, shows that an application to set aside a sale can now be made, not only on the ground of material irregularity, but also on the ground of fraud, in publishing or conducting the sale; and in this matter the new Code makes a departure from the law contained in the Code of 1882. The rulings under the old Code which laid down that an application made on the ground of fraud could come only under section 244 (corresponding to section 47 of the present Code) must be regarded as absolute. The effect of adding the words "or fraud" to the present rule is to take the applications setting up fraud in publishing or conducting the sale out of the purview of section 47 and to bring them within the operation of r. 90.

Mr. Nanak Chand for the judgment-debtor, however, contends that one of the grounds on which his client attacked the sale was the failure of the Court to issue notice under O. XXI, r. 66, before drawing up the proclamation of the sale,

and that this defect cannot be regarded as an irregularity in publishing or conducting the sale. This contention is, in our opinion, untenable. We think that an irregular preparation of the proclamation of sale is an irregularity in publishing the sale within the meaning of O. XXI, r, 90. This view has been taken by the Calcutta High Court in *Bipin Bihari Bejait* v. *Kanti Chandra Mandal* (1). Indeed, the Allahabad High Court has held that the absence of an attachment prior to the sale of immoveable propery in execution of a decree amounts to no more than a material irregularity in publishing the sale *Sheodhyan* v. *Bholanath* (2). We must, therefore, hold that the application of the judgment-debtor fell under O. XXI, r. 90, and that no second appeal lay from the order of the District Judge.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 18 Ind. Cas. 715.
(2) 21 A. 311; A. W. N. (1899) 84; 9 Ind. Dec. (N. S.) 907.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1533 OF 1921.
May 3, 1923.
Present :—MR. Justice Lindsay and Mr. Justice Sulaiman.
PADAM SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
UMRAO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Mortgagee in possession, position of—Wajib-ul-arz—*Suit for pre-emption, when maintainable.*

Even after making a mortgage of his share, a co-sharer has a proprietary interest left in him so as to entitle him to bring a suit for pre-emption.

The main fact that a person has taken a possessory mortgage of a share in a village does not make him a proprietor of the village so as to resist a claim for pre-emption.

Second appeal from a decree of the District Judge, Aligarh, dated the 30th of August 1921.

Mr. *B. K. Mukerji*, for the Appellants.
Mr. *E. A. Howard*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for pre-emption. The Court of first instance had decreed the plaintiffs' suit, but on appeal after some further evidence had been taken the learned District Judge dismissed it. His findings are that the plaintiff and the vendor are co-sharers in the same *mahal* in which the property in dispute is situtaed and that a custom of pre-emption exists in the village. There is a further finding that the defendant vendee is recorded as a mortgagee in possession of some share in the same *mahal*. On this latter finding the learned District Judge was of opinion that the defendant himself was a co-sharer and that, therefore, the plaintiff had no preference over him. The entry as to the custom of pre-emption in the *wajib-ul-arz* is as follows :—

Every owner of a *patti* will have the right of transferring his share in the property first in favour of *bahi haqiqi ek jaddi* (own brothers descended from a common ancestor) and in case of their refusal to other co-sharers in the village.

It seems to us that, even after having made a mortgage of his share, a co-sharer would have a proprietary interest left in him so as to entitle him to bring a suit for pre-emption. In the same way, the mere fact that a person has taken a possessory mortgage of a share in the village would not give him proprietary interest in it. If the true interpretation of the *wajib-ul-arz* were that a mortgagee in possession was to be deemed a *sharik deh* then the result would be that the right of pre-emption would be defeated by making a mortgage on one day followed by a sale to the mortgagee the next day. It is true that for certain fiscal purposes a mortgagee in possession is treated under the Land Revenue Act as a co-sharer but we are of opinion that he cannot betreated as a proprietor of the village. Under the Muhammadan Law there can be no doubt that it is only a person having an absolute interest in the property who has the right of pre-emption. The entry in the *wajib-ul-arz* does not show that a mortgagee is to be deemed a co-sharer for the purpose of pre-emption. In this view of the matter

we think that the defendant mortgagee could not resist the claim for pre-emption on the ground that he was himself a person entitled to an equal right with the plaintiff. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs including in this Court fees on the higher scale.

K. S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2083 OF 1920.

May 19, 1922.

Present:—Justice Sir Asutosh Mukerjee, Kt., and Mr. Justice Cotzner.

KEDAR NATH SADHUKHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MADHU SUDAN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Long possession and uniform payment of rent whether creates permanent tenancy—Ejectment—Tender or delivery of notice to headman of family, whether sufficient service—Transfer of Property Act (IV of 1882), s. 106.

Long possession and uniform payment of rent are not by themselves sufficient to justify the finding that the tenancy was permanent from its inception. [p. 105, col. 2.]

When there is a tender or delivery of the notice of ejectment to the head member of the family, there is sufficient service notwithstanding that there is no proof of prior tender or delivery to each of the joint tenants personally. [p. 107, col. 2.]

Appeal against a decree of the Subordinate Judge, Howrah, dated the 21st June 1920, reversing that of the Munsif, Howrah, dated the 22nd January 1919.

Babus *Dwarka Nath Chakarbutty, Gunada Charan Sen* and *Prasanta Bhusan Sen*, for the Appellants.

Babus *Ram Chandra Mazumdar* and *Nagendra Nath Ghose*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for ejectment. The case for the plaintiffs was, that the defendants held as tenants and that they are tenancy which was of a terminable character had been duly terminated by the service of notice to quit. The Court of first instance held that the tenancy was permanent and dismissed the suit. Upon appeal the Subordinate Judge has held that the tenancy was terminable and had been duly terminated before the institution of this suit. On the present appeal, the conclusion of the Subordinate Judge upon each of the two points in controversy has been assailed on behalf of the appellant.

As regards the nature of the tenancy, the Subordinate Judge has found that the tenants have been in occupation for more than 40 years, and that during this period the rent has been paid at a uniform rate. The Subordinate judge, however, has held that long possession and uniform payment of rent are not by themselves sufficient to justify the finding that the tenancy was permanent from its inception. We are of opinion that the view taken by the Subordinate Judge is well-founded.

Our attention has been drawn to the decision in *Shoroshi Charan Ghose* v. *Bhagloo Sah* (1) as also to the judgment of the Judicial Committee in *Surendra Nath Roy* v. *Dwarka Nath Chakravarty* (2); neither of these cases is of real assistance to the appellant. We have not in the present case the very material elements which existed in the decisions to which our attention has been invited, namely, that the land had been let out for purposes of residence, that it had been so occupied, that there had been instances of transfer and succession, and finally, that structures had been erected on the land. In these circumstances it is impossible for us to hold that the view taken by the Subordinate Judge as to the terminable character of the tenancy is erroneous in law.

As regards the second point, the Subordinate Judge has found that the notice to quit was duly served. The correctness of his conclusion upon this point must be tested by a reference to the provision of section 106, Transfer of Property Act which governs this case. The second paragraph of that section provides that every notice under this section

(1) 57 Ind. Cas. 877; 32 C. L. J. 85.
(2) 50 Ind. Cas. 856; 24 C. W. N. 11; (1919) M. W. N. 811 (P. C.).

must be in writing, signed by or on behalf of the persons giving it, and tendered or delivered either personally to the party who is intended to be bound by it or to one of his family or servants at his residence or (if such tender or delivery is not practicable), affixed to a conspicuous part of the property. In the case before us, the land was in the occupation of two sets of respondents—the Sadhukhans and the Bags. The Subordinate Judge has held on the evidence that the notices were duly served, because they were delivered to Kedar Nath Sadhukhan and Nagendra Nath Bag who were the respective heads of the two joint families. The appellants have contended, however, that even if these findings are accepted as correct, the fact of such delivery only raises the rebuttable presumption that the notices had reached the other joint tenants. In support of this proposition, reliance has been placed upon a passage from the judgment by the Judicial Committee in the case of *Harihar Banerji* v. *Ramsashi Roy* (3), where Lord Atkinson states that in case of joint tenants, each intended to be bound, and that it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants. Reference is then made to the cases of *Doe d. Macartney* v. *Crick* (4); *Doe d. Bradford* v. *Watkins* (5) and *Solton* v. *Kelly* (6). An examination of the judgment in these cases shows that service on one of several joint tenants is *prima facie* sufficient for all, and that it has similarly been held that service on a corporation may be effected by a service on one of its officers. *Doe d. Carlisle* v. *Woodman* (7). The case before us, however, is, as we have stated, governed by the provisions of section 106 of the Transfer of Property Act, which lays down a precise and definite rule for the service of the notice to quit required by that section. Such notice must be tendered or delivered either personally to the party intended to be bound by it or to one of his family or servants at his residence or (if such tender or delivery is not practicable) affixed to conspicuous part of the property. The appellant felt pressed by this provision and had to abandon the contention that tender or delivery to a member of the family is not sufficiet, unless an attempt has been made to tender or deliver the notice personally to the party intended to be bound thereby. It is remarkable, however, that a very different set of rules has been prescribed by the Legislature for the service of summons in suits and other judicial proceedings as is clear from an examination of the provisions of O. V of the Civil Procedure Code of 1908. Under that order substituted service is permissible, only when an attempt to effect personal service has failed. Here, however, the plain language of section 106 indicates that service may be effected in one or other of the modes prescribed. The appellant has thus been driven to contend that the term 'or' means—'or if, such personal tender or delivery is impossible'. There are two manifest objections to this interpretation. In the first place, the word 'or' is an alternative word, as was observed by Parke, B., in *Elliot* v. *Turner* (8). It is, however, not always disjunctive and is sometimes interpretative or expository of the preceding word. *Hills* v. *London Gas Light Company* (9). But no instances have been brought to our notice where the term 'or' is used neither as alternative nor as synonymous. In the second place, in section 106 the Legislature uses the expression "if such tender or delivery, is not practicable", in one contingency, namely, when service is effected by fixing the notice to a conspicuous part of the property. If the Legislature had intended that the mode previously mentioned should not be alternative but that recourse should be permissible to one of the modes only when the other had proved infructuous, the Legislature could

(3) 48 Ind. Cas. 277; 46 C. 458 at p. 480; 29 C. L. J. 117; 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J. 707; 9 L. W. 148; 25 M. L. T. 159; 21 Bom. L. R. 522; (1919) M. W. N. 471; 1 U. P. L. R. (P. C.) 56; 45 I. A. 222 (P. C.).

(4) (1805) 5 Esp 196; 8 R. R. 848.

(5) (1806) 7 East 551; 8 R. R. 670; 103 E. R. 233; 3 Smith 517.

(6) 6 Ir. C. L. R. 367.

(7) (1807) 8 East 228; 9 R. R. 422; 103 E. R. 329.

(8) (1845) 2 C. B. 446; 15 L. J. C. P. 49; 135 E. R. 1019; 69 R. R. 501.

(9) (1860) 5 H. & N. 312; 29 L. J. Ex. 409; 157 E. R. 1202; 120 R. R. 605.

easily have framed the section in suitable terms. We are consequently of opinion that in the case before us, where there was a tender or delivery of the notice to the head member of the family, the service was sufficient, notwithstanding that there is no proof of prior tender or delivery to each of the joint tenants personally. We hold accordingly that the Subordinate Judge has correctly found that the notice was duly served.

The conclusion follows that the tenancy was terminable and has been legally terminated. The decree of the Court below is affirmed and this apeal dismissed with costs.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION NO. 435 OF 1922.

January 5, 1923.

Present:—Mr. Justice Zafar Ali.

THE FIRM RAHMAD ULLAH-FAKHAR-UD-DIN—PLAINTIFFS—PETITIONERS

versus

THE FIRM RAHIM BAKHSH-QUMAR-UD-DIN—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 44—Civil Procedure Code (Act V of 1908), O. XVI, r. 19—Revision—Interlocutory order—Order in contravention of law—Interference by High Court.

Interlocutory orders cannot, or at any rate should not, be interfered with by the High Court in revision, even though such orders are made in contravention of an express provision of the law, such as an order which contravenes the provisions of r. 19 of O. XVI of the Civil Procedure Code.

Gulab Chand v. *Sher Singh*, 35 Ind. Cas. 608; 149 P. W. R. 1916; 8 P. L. R. 1917, followed.

Civil revision against an order of the Junior Sub-Judge, Delhi, dated the 10th April 1922.

Mr. *M. Obedulla*, for the Petitioner.

Mr. *Gopal Chand*, for the Respnodents.

JUDGMENT.—This is a petition in revision against an interlocutory order, to which Counsel for the respondent raises the preliminary objection that no revision lies, and cites *Gulab Chand* v. *Sher Singh* (1), *Buddhoo Lal* v. *Mewa Ram* (2) and *Mahtab Rai* v. *Kaman Lal* (3). Counsel for the petitioner cites *Gauri Shankar* v. *Ganga Ram* (4).

It may be stated that section 44 of the Punjab Courts Act is word for word the same as section 115 of the Code of Civil Procedure and that a Full Bench of the Allahabad High Court held in *Buddhoo Lal* v. *Mewa Ram* (2) that no revision lay when no case had been decided by the Court below within the meaning of section 115, Civil Procedure Code.

In *Gulab Chand* v. *Sher Singh* (1) it was held by a Judge of the Punjab Chief Court that interlocutory orders cannot, or at any rate should not, be, interfered with in revision. Several rulings, specially *Mahtab Rai* v. *Kaman Lal* (3) were referred to in that case.

The facts of *Gauri Shankar* v. *Ganga Ram* (4) were quite peculiar and it can afford no assistance in this case.

The order of which revision is sought in this case was that the Court below in supersession of its previous order issuing a commission to examine a witness who resided in Amritsar at a distance of more than two hundred miles from Delhi where the Court was, issued a summons to him to attend the Court at Delhi. This order is in contravention of O XVI, r. 19, Civil Procedure Code, but this Court cannot interfere.

Dismissed. No order as to costs.

W. C. A. *Petition dismissed.*

(1) 35 Ind. Cas. 608; 149 P. W. R. 1916; 8 P. L. R. 1917.
(2) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 (F. B.).
(3) 51 P. R. 1899.
(4) 52 Ind. Cas. 859; 77 P. R. 1919.

KUNDAN LAL *v.* JAGAT RAM.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1668 OF 1922.

May 31, 1923.

Present:—Mr. Justice Daniels.

KUNDAN LAL, AND ANOTHER—OPPOSITE-PARTIES—APPELLANTS

versus

Babu JAGAT RAM—OBJECTOR—RESPONDENT.

Mortgage—Prior and subsequent mortgages—Prior mortgagee failing to set up mortgage in suit on puisne mortgage, whether can enforce it against mortgagor—Res judicata, *what operates as.*

The rule that a prior mortgagee who abstains from setting up his prior mortgage in a suit by a puisne mortgagee cannot afterwards set up that mortgage against the puisne mortgagee or against the auction-purchaser under a decree obtained on the puisne mortgage, has no application to a case where the prior mortgagee seeks to enforce his mortgage against the mortgagor or his representative. [p. 108, col. 1.]

Appellant, who held a mortgage on certain property obtained a decree for sale on foot of his mortgage. Subsequently, he obtained a simple money-decree against the mortgagor and brought the mortgaged property to sale in execution subject to his mortgage-decree, which was duly notified. The property was purchased by the respondent. Meanwhile, a puisne mortgagee had brought a suit for sale on his mortgage to which appellant was made a party. In that suit appellant failed to set up his prior mortgage on the basis of which he held a decree for sale. He now sought to execute that decree against the respondent:

Held, that there was nothing to prevent the appellant from executing his decree against the respondent who was in the same position as the mortgagor and who was not only aware of the mortgage decree on the date on which he purchased the property, but had purchased the property subject to the mortgage-decree which appellant was now seeking to execute.

It is the issue decided and not the reason for the decision which constitutes *res judicata*. [p. 109, col. 1.]

Execution second appeal from a decree of the District Judge, Saharanpur, dated the 13th July 1922.

Mr. *Balmakunda*, for the Appellants.

Mr. *S. A. Haidar*, for the Respondent.

JUDGMENT.—This is an appeal in execution proceedings. The appellant, Kundun Lal, held a mortgage of the year 1905 upon the same property. He brought a suit on this mortgage and obtained a decree for sale in 1917. He now seeks to put that decree in execution and the Court below, overruling the Trial Court, has held that he is precluded from doing so. The appellant, Kundun Lal, subsequently obtained a simple money decree against Ram Chandra, the owner of the property. In execut on of this decree he got the property proclaimed for sale subject to his mortgage decree of 1917 which was duly notified. The property was brought to sale and was purchased by the respondent, Babu Jagat Ram, on the 20th of January 1920. Between the date of the plaintiff's decree and the date of the purchase of Jagat Ram a puisne mortgagee, named Lachhman Singh, had brought a suit for sale of the property on the basis of his mortgage which was of December 1913. To that suit Kundan Lal was made a party in respect of a prior mortgage of January 1913 which he held on the property. He failed to set up his mortgage of 1905 possibly thinking it unnecessary to do so as that mortgage had already merged in a decree for sale. The learned District Judge holds that Kundan Lal's failure to set up his mortgage decree in the suit brought by Lachhman Singh precludes him from enforcing that mortgage against the respondent Jagat Ram. The ruling on which he relies, and there are other rulings to the same effect, lays down that if a prior mortgagee abstains from setting up his prior mortgage in a suit by the puisne mortgagee he cannot afterwards set up that mortgage against the puisne mortgagee or against the auction-purchaser under a decree obtained on the puisne mortgage. There is no authority for applying the same rule to the case of a mortgagor. In this case the puisne mortgagee has apparently not attempted to execute his decree and certainly no sale has taken place under it. Kundan Lal, on the contrary, not only holds a decree for sale on the mortgage but Jagat Ram when he bought the property was fully aware of the existence of the prior charge and bought the property subject to it. There is no ground either of principle or authority on which the decree-holder can be debarred from executing his decree under the circumstances. The position of the puisne mortgagee and of the mortgagor with reference to a prior mortgagee is not analogous. To the puisne mortgagee the existence of a prior mortgage is of vital importance. He may

lose his security altogether if the prior mortgage is enforced. In any case he is entitled only to what is left after the prior mortgage is satisfied. If, therefore, the prior mortgagee is impleaded in a suit by the puisne mortgagee without his priority being recognised he is bound to set up his prior charge as a ground of defence under Explanation 4, section 11, Civil Procedure Code to the suit. Otherwise, the mortgagee will obtain a decree entitling him to bring the entire property to sale and not merely the equity of redemption. But to the mortgagor the question of priority as between encumbrances all of which he is bound to pay is largely immaterial. His position is thus radically different from that of the puisne mortgagee who is only liable to satisfy charges having priority to his own.

It appears also, although the learned District Judge has not taken notice of the fact, that the question was really *res judicata* against the respondent. Jagat Ram's objection in which he maintained that the decree-holder had now no right to take out execution of the decree was filed on the 5th of January 1921. The decree-holder filed an answer to it, and the matter was decided by the learned Munsif on the 7th of May 1921 by an order declaring that the objection had no force and dismissed it. An appeal was filed against that decision to the District Judge but was withdrawn on the 25th of August 1921, when the District Judge passed an order:—"The appeal having been withdrawn is dismissed." The Munsif's order, therefore, became final. No doubt it has been found by the District Judge that the ground on which the Munsif dismissed the objection was erroneous, the ground being, that the property now sought to be sold was different from that contained in Lachhman Singh's decree. It is, however, the issue decided and not the reason for the decision which constitutes *res judicata*, and the question at issue was whether the decree-holder was by reason of not pleading his mortgage in the former suit precluded from executing his decree. After the Munsif's decision Jagat Ram put in an application that there was some confusion between the *khewa* numbers of the old and new Settlements and asked that the *khewat* numbers of the recent Settlement might be exempted from sale. It is on the basis of this application that the orders now in appeal have been passed. For the reasons already given, the appeal is allowed, the decree of the Court below set aside, and the decree of the Trial Court dismissing the objection is restored with costs in all Courts.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2907 OF 1918.

March 12, 1923.

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

Musammat BAL KAUR—PLAINTIFF—APPELLANT

versus

Musammat DEVKI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Custom—Succession—Daughters v. widow and daughters of predeceased son—Joshi Brahmins of Hoshiarpur—Presumption.

High caste Hindus living in towns and working as traders are presumably governed by the Hindu Law, and in the absence of sufficient evidence it cannot be said that that law is superseded on any particular point by custom. [p. 110, col. 2.]

There is no special custom among the Joshi Brahmins of Hoshiarpur which entitles the widow and daughters of a predeceased son to succeed in preference to daughters. [p. 110, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Hoshiarpur, dated the 16th July 1918.

Lala *Faqir Chand*, for the Appellants.

Mr. *Manohar Lal* and Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—The main question for decision before us in this first appeal from the judgment and decree of the Senior Subordinate Judge, Hoshiarpur, is whether there obtains a special custom among the Joshi Brahmins and other high caste Hindus of Hoshiarpur which, overriding Hindu Law, entitles the widow and daughter of a predeceased son to

succeed in preference to daughters. The facts are briefly as below :—

One Mokand Lal, a Joshi Brahmin of Hoshiarpur, was the father of one son and two daughters who were all married. The son died on the 1st May 1914 leaving a widow and a daughter. Mokand Lal survived him for some three months and died on the 23rd July 1914. He left three shops, one house, Rs. 1,600 cash, and goods valued at Rs. 1,500. As his son's widow, *Musammat* Devki, and her minor daughter, *Musammat* Ram Vantiti, lived with him in the residential house, they remained in possession thereof after his death. The daughters claimed to be his heirs according to Hindu Law and obtained a Succession Certificate for realising the money payable to him, and subsequently instituted the present suit for possession of the house and shops, and also to obtain a declaration that they were entitled to the money (Rs. 3,100) left by Mokand Lal out of which Rs. 2,900 were lying in deposit with the firm of Thakarya Mal-Gujar Mal. The defendant, *Musammat* Devki, set up in defence the special custom stated above, and further raised the alternative plea that she and her daughter had the right of residence and maintenance in the estate of Mokand Lal, and that the money required for the marriage of her daughter was also to be paid out of that estate. Their right of residence, etc., was conceded but there was disagreement as to the amount of the maintenance allowance and the sum to be paid for marriage expenses.

On the question of custom the defendants examined 15 witnesses whose evidence coupled with the judicial instances cited by the defendants was considered sufficient by the Court below to establish it. We are of opinion that this evidence is quite insufficient. Of the 15 witnesses examined by the defendants there was only one Joshi Brahmin. The remaining 14 included five Khatris, four Brahmins, two Suds, one Kalal, one Bania and one Bhabra. Then of these witnesses Nos. 1, 2, 3, 6, 8, 9, 12, 13, 14 and 15, could cite no instance in support of the alleged special custom, and the instances cited by the rest and judicial instances were not in point. The learned Senior Subordinate Judge himself expressed the following opinion about these inanstces:—

"Taken as a whole, the above instances do not serve as a proper guide in the present case. None of them except the Chief Court's appeal of 1914 (which related to a case from the Jullundur District) were between a daughter and daughter-in-law. They were between daughter-in-law and collaterals or others and do not exactly fit in the present case."

It is difficult to follow the line of argument adopted by the learned Senior Subordinate Judge to arrive at the conclusion that, in spite of no instances, the oral testimony of the defendants' 15 witnesses of different castes was sufficient to prove the existence of the alleged customs among Joshi Brahmins as well as other high caste Hindus of Hoshiarpur. All that the learned Counsel for the defendants-respondents could say in support of the finding of the lower Court was that Hindu Law was not so rigorously applied in the Punjab as in Bengal and the United Provinces, and that the oral evidence indicated the prevailing sentiments of Hindus generally in favour of the rights of the widow of the predeceased son as against daughter. But high caste Hindus living in towns and working as traders are presumably governed by Hindu Law and in the absence of sufficient evidence it cannot be said that that law is superseded on any particular point by custom.

On the question of maintenance, etc., the parties are not much at variance. Counsel for the plaintiffs-appellants agrees that the family residential house may be left wholly in the occupation of the defendants till the death of the widow and marriage of her daughter, that Rs. 1,000 be allowed for the marriage of the daughter and that the shop whose rent is Rs. 10 or 12 per mensem be allotted to them for their maintenance. The defendants' Counsel claims Rs. 1,500 for marriage expenses and Rs. 20 per mensem for maintenance. We are of opinion that the sum of Rs. 1,000 will be quite sufficient for the marriage expenses and that Rs. 16 per mensem should

be allowed for maintenance. The rent of one of the shops situate in Khara-Khu of which Sardari Lal is at present the tenant is Rs. 10 as already stated and that of another shop is Rs. 6. We consider that these two shops should be allotted to the defendants so that they may live on the rent thereof. They themselves will be responsible for keeping them in proper repair. After the marriage of her daughter the widow will be entitled to retain only the shop whose rent is Rs. 10, and the other shall then go to the plaintiffs, Rs. 1,000 will be payable to the defendants from the sum of Rs. 3,100 left by Mokand Lal. If they have not already received this amount and are not able to realise it they will be entitled to raise it on the security of the house or shops. We accept the appeal and reversing the judgment and decree of the Court below pass a decree in the terms stated above and decree the plaintiff's suit with the said reservations. Parties to bear their own costs throughout.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1606 OF 1921.
May 2, 1923.

Present:—Mr. Justice Kanhaiya Lal.

Musammat ISLAM FATIMA—DEFENDANT—APPELLANT

versus

Syed TAMIZ ALI—PLAINTIFF—RESPONDENT.

Sale—Non-payment of purchase-money, or inflation of purchase-money in sale-deed, effect of—Registration Act (XVI of 1908), s. 52—Sale-deed—Presentation by vendee—Refusal of vendor to sign endorsement, effect of—Registration, validity of.

In a sale of immoveable property the mere non-payment of the purchase-money would not prevent the passing of the ownership from the vendor to the purchaser. Similarly, where in a sale-deed the sale consideration is inflated, and there is no repudiation of the sale, nor any defect in the registration of the transaction, such inflation would not vitiate the sale, so as to deprive the vendee from acquiring a good title. [p. 112, col. 1.]

The mere refusal by the vendor to sign the registration endorsement would not affect the validity of the sale, where the deed was presented for registration by the vendee who had duly signed the presentation endorsement as required by section 52 of the Registration Act. [p. 112, col. 2.]

Sagaji v. *Namdev*, 23 B. 525; 1 Bom. L. R. 5; 12 Ind. Dec. (N. S) 349, *Baijnath Singh* v. *Paltu*, 30 A. 125; 5 A. L. J. 96; A. W. N. (1908) 38, *Subbaier* v. *Moniam Subramania Iyer*, 10 Ind. Cas 546; 36 M. 8; 10 M. L. T. 51; (1911) 2 M. W. N. 6; 21 M. L. J. 800, relied on.

Second appeal against a decree of the District Judge, Bijnor, dated the 30th June 1921.

Mr. *A. M. Aziz*, for the Appellant.

Mr. *Ibn-i-Ahmad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for the possession of certain property said to have been sold by defendant No. 1, through defendant No. 2, who is her husband, to the plaintiff. The sale was effected on the 31st December 1918. The sale-deed was presented for registration on the 2nd January 1919. On that date the Registering Officer went to the house of defendant No. 1 and asked her whether she had executed a sale-deed. She admitted having done so, but when the terms of the sale-deed were read over to her, she said she had agreed to these terms except in so far as the amount of consideration payable to her was overstated in the sale-deed. The consideration specified in the sale-deed was Rs. 1,250 but the lady stated that she had agreed to sell the property in question for Rs. 1,100. The plaintiff asserted that the sale had been settled for Rs. 1,250 and that he had already paid Rs. 150 by executing a promissory-note in favour of defendant No. 2. It appears that the property sold was a share in a certain village in which the parties were also co-sharers The Courts below found that, for fear of pre-emption, the plaintiff wanted that the sale consideration should be stated at Rs. 1,250 in the sale-deed, while the vendor,

insisted that the correct amount of the consideration payable to her should be entered. The result of the dispute between the vendor and vendee at the time of the registration of the sale-deed was, that the vendee refused to pay the sale consideration but the registration of the sale-deed was, all the same, effected, and the vendor refused to affix her thumb impression below the registration endorsement and to deliver possession over the property in question.

The only question for consideration in this appeal is, whether, in those circumstances, a good title had passed to the plaintiff. The Courts below found that, in spite of the question of the consideration money payable to the vendor, the plaintiff had acquired a good title to the property conveyed by the sale. On behalf of the defendant-appellant, it was urged that the plaintiff had repudiated the sale in the form in which it was agreed upon and that her only remedy was now to sue for the specific performance of the contract of sale. But, as the Court below observed, though the sale consideration was settled at Rs. 1,100 only and the sale consideration in the sale-deed was inflated, there was no defect in the registration of the transaction and the plaintiff had acquired a good title. There was in fact no repudiation of the sale; the plaintiff agreed to every term mentioned by the vendor, he merely wanted an extra sum of Rs. 150 entered in the sale-deed as a part of the consideration for his protection against any possible claim for pre-emption. Its inclusion did not vitiate the sale. As held in *Sagaji* v. *Namdev* (1) and *Baijnath Singh* v. *Paltu* (2) in a sale of immoveable property mere non-payment of the purchase-money would not prevent the passing of the ownership from the vendor and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property.

In *Subbaier* v. *Moniam Subramania Iyer* (3) where a sale was effected for an ostensible consideration of Rs. 300 but the real consideration for the deed was a promise by the husband of the vendee that he would maintain the vendor for the rest of his life, it was held that the mere fact that the price was not paid in the manner stated in the sale-deed would not prevent the passing of the land by sale from the vendor to the vendee after the sale-deed had been executed and registered. The refusal of the lady to affix her thumb impression below the endorsement after the plaintiff had agreed to pay the purchase-money, did not also affect the validity of the registration because the document was presented for registration by the vendee whose signature below the presentation endorsement was duly obtained as required by section 52 of the Indian Registration Act of 1908. In spite of the small difference between the parties as to the amount of sale consideration which was to be entered in the sale-deed, the sale was for all intents and purposes complete and effectual.

The appeal, therefore, fails and is dismissed with costs including fees in this Court on the higher scale

W. C. A. *Appeal dismissed.*

(1) 23 B. 525; 1 Bom. L. R. 5; 12 Ind. Dec. (N. S.) 349.
(2) 30 A. 125; 5 A. L. J. 96; A. W. N. (1908) 39.
(3) 10 Ind. Cas. 546; 36 M. 81; 10 M. L. T. 52; (1911) 2 M. W. N. 6; 21 M. L. J. 800.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 184 OF 1921.
April 19, 1923.
Present:—Mr. Justice Krishnan and Mr. Justice Ramesam.

PENDEKKALLU THIMMAYYA—DEFENDANT—APPELLANT
versus
PENDEKKALLU SIDDAPPA—PLAINTIFF—RESPONDENT.

Pleadings—Title, accrual of, during pendency of suit—Procedure—Co-owners—Suit by one co-owner to eject trespasser, maintainability of.

Where on the date of suit a plaintiff has no title to the property in suit but before the case is disposed of by the First Court, he becomes entitled to the property and an amendment of the plaint can then be allowed setting forth the claim as arising on such accrual of title, the Court acts rightly in disposing of the suit on the footing of the plaintiff's title acquired during the pendency of the suit. One co-owner may sue to eject a trespasser without the other co-owners being

made parties to the suit, provided the title of the latter is not denied.

Ahmad Sahib Shutari v. *Magnesite Syndicate Limited*, 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598, followed.

Ponnaya Tirumalai Vandaya Thevar v. *Kandasami Vandaya Thevar*, 17 Ind. Cas. 136, referred to.

Second appeal against the decree, dated the 27th July 1920, of the Court of the Subordinate Judge, Bellary, in A. S. No. 57 of 1920, preferred against a decree, dated the 11th February 1918, of the Court of the District Munsif of Gooty, in O. S. No 194 of 1917.

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

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

JUDGMENT.—The first point taken is that, on the date of suit, the plaintiff had no title to the property, as two of the daughters of the original owner, Timmayya, were alive and they were entitled to the property in spite of the relinquishment of their rights in favour of Nagamma. It is contended that their relinquishment did not involve the loss of their right to take by survivorship to Nagamma. This would really depend upon the nature and extent of the relinquishment. If they expressly relinquished their right to take the estate after the death of Nagamma, they could not, in our opinion take it subsequently on the ground of survivorship, but it will pass to the heirs of Timmayya as if all the daughters were dead, that is, in this case, to the daughters' sons, the plaintiff and Hanumanthu.

Here, however, there is no deed of relinquishment and it is not possible on the facts to say positively whether the relinquishment involved the loss of right to enjoy the property on Nagamma's death.

We would, therefore, assume that, at the date of suit, the plaintiff's title is not established. In this connection reliance was placed by the appellant on the case in *Muthiyalu Chengappa* v. *Burada Gunta* (1). With all respect to the learned Judges, we feel considerable doubt as to its correctness. We need not, however, deal further with that case on the view we are taking of the effect of relinquishment.

Although we assume that the plaintiff had no title on the date of suit, it is found that, very soon after the suit was filed and before the case was disposed of by the First Court, the two daughters died and then, at all events, plaintiff and Hanumanthu became entitled as co-owners of the suit property. It is conceded that an amendment of the plaint could have been allowed setting forth the claim as arising on the death of the daughters. That being so, we think the Subordinate Judge was right in disposing of the suit on that footing. If necessary, we would allow an amendment ourselves, but as no useful purpose would be served we think it unnecessary to insist on a formal amendment.

It is next argued that, taking defendant to be a trespasser, on the findings of the lower Court, one co-owner cannot eject even a trespasser without the other co-owner being a party to the suit. This argument is directly opposed to the ruling in *Ahmad Sahib Shutari* v. *Magnesite Syndicate Ltd.* (2). The case cited by the appellant in *Ponnaya Tirumalai Vandaya Thevar* v. *Kandasami Vandaya Thevar* (3) is not opposed to this view, provided one co-owner does not deny the other co-owner's right. Plaintiff does not deny before us that Hanumanthu is also jointly entitled with him and the decree in plaintiff's favour will be for the benefit of both himself and Hanumanthu.

The plea of *res judicata* is clearly untenable.

All the points taken by the appellant failing, second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 60 Ind. Cas. 135; 43 M. 855; 39 M. L. J. 567; 12 L. W. 656; 25 M. L. T. 272; (1921) M. W. N. 29.

(2) 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598.

(3) 17 Ind. Cas. 136.

LALSA RAI v. UDIT RAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 146 OF 1922.

May 7, 1923.

Present :—Mr. Justice Gokul Prasad.

LALSA RAI AND OTHERS—PLAINTIFFS —APPELLANTS

versus

UDIT RAI AND ANOTHER—DEFENDANTS AND RAM SUMER RAI—PLAINTIFF —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (11) —"Legal representative," definition of, scope of —Decree against intermeddler, whether binding on real heir.

The definition of "legal representative" in section 2 (11) of the Civil Procedure Code is only for the purposes of procedure in instituting and defending suits and cannot affect the rules of substantive law. [p 115, col. 1.]

It is true that when a person intermeddles with the property of a deceased person he must be regarded as a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but there is no principle of law which makes him the representative of the deceased so far as success on to the property of the deceased is concerned. [p. 115, col. 1.]

The mere fact that an intermeddler is joined as a party to a suit for recovery of possession cannot make a decree in that suit in any way binding on the real heir who is not a party to that suit, and who later on gets a decree against the intermeddler declaring his superior right. [p. 115, col. 1.]

Second appeal from a decree of the Subordinate Judge, Azamgarh, dated the 17th December 1921.

Mr. *Harnandan Prasad*, for the Appellants.

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

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit brought under the following circumstances. It appears that one Ugrah Rai was the owner of certain property. He mortgaged it to the defendant first set. The defendant first set brought a suit for sale on his mortgage and impleaded as defendant *Musammat* Bhagwanta, the widow of a pre-deceased son of Ugrah Rai who was found to be in possession of the property. The matter was compromised between the two sets of defendants and the mortgagee decree-holder has now put up his decree in execution and asked for sale of the property. The plaintiffs alleged (1) that this decree was not binding on them as they being the next reversioners to the estate of Ugrah Rai were the owners of the property and were not made a party to the decree, and (2) that under the compromise decree the mortgagee applied for sale of more property than was mortgaged to him. They, therefore, sued for a declaration, that they were the reversioners and as such owners of the property left by Ugra Rai and that the defendant No. 1, the mortgagee, has no right to execute the decree he obtained against the defendant second set, against the property of Ugrah Rai. The defence of the mortgagee was (1) that the plaintiffs were not the reversioners to the estate of Ugrah Rai; (2) that he was the mortgagee under a mortgage by Ugrah Rai and wanted his money, and (3) that Ugrah Rai having died more than twelve years ago the defendant No. 2 who had been in adverse proprietary possession had acquired a full title to the property and was competent to enter into the compromise.

The First Court came to the conclusion that the plaintiffs were the heirs of Ugrah Rai and that *Musammat* Bhagwanta had not preferred her title by adverse possession because she had not been in possession for twelve years before the plaintiff got a decree declaring their title against her. It has found that the decree obtained by the mortgagee on a compromise with *Musammat* Bhagwanta was not a fraudulent and collusive decree. It further found that the mortgagee should have obtained a decree against the plaintiffs who were the rightful owners of the property, and, therefore, the plaintiffs were not bound by the decree and the property in suit was not liable to sale in execution thereof. On these findings it decreed the plaintiff's suit. The defendant mortgagee went up in appeal and the learned Judge of the lower Appellate Court has decreed the appeal and dismissed the plaintiff's suit. He has come to the conclusion in accordance with the Court of first instance that the plaintiffs have proved that they are the next heirs of Ugrah Rai and that *Musammat* Bhagwanta was not the heir of Ugrah Rai. He has also found that *Musammat* Bhagwanta was in possession for 8 years only when the plaintiffs sued her and obtained a decree for Ugrah Rai's property against her. He also agreed with the Munsif in finding that the decree obtained by the mortgagee against *Musammat* Bhagwanta for sale of the property was not a

fraudulent and collusive decree, but he says that *Musammat* Bhagwanta was the legal representative of Ugrah Rai and intermeddled with his estate (see section 2, clause (11) of the Code of Civil Procedure) and, therefore, by some process of reasoning he comes to the conclusion that the decree being against the legal representative of Ugrah Rai was binding on the plaintiffs. It is quite true that when a person intermeddles with the property of the deceased he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but I do not see any principle of law which makes him the representative of the deceased so far as the succession to the property of the deceased is concerned. The definition of 'legal representative,' in the Code of Civil Procedure is only for the purposes of procedure in instituting and defending suits. Any definition for the purposes of adjective law cannot alter the rule of substantive law and it is not easy to understand how the mere fact that an intermeddler is joined as a party to the suit for recovery of possession can make a decree in that suit in any way binding on the real heir who is not a party to that suit and who later on gets a decree against the intermeddler declaring his superior right. I see no reason in law or justice under which the present plaintiffs can be held to be bound by the compromise decree entered into between the mortgagee and *Musammat* Bhagwanta Kunwar. That decree could in no sense be binding on the plaintiffs who have already got a decree declaring their superior title as against *Musammat* Bhagwanta. On the findings arrived at by the lower Appellate Court the plaintiffs' claim should have been decreed and the judgment of the Court of first instance should not have been interfered with. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Munsif with costs in all Courts including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. *722* OF 1922.

April 10, 1923.

Present:—Mr. Justice Venkatasubba Rao.

VENKATACHELLAM PILLAI—DEFENDANT No. 1—PETITIONER

versus

P. V. SRINIVASA AIYAR—PLAINTIFF—RESPONDENT.

Court-Fees Act (VII of 1870), s. 7, v (c), Sch. II, Art. 17 (1)—Madras Civil Courts Act (III of 1873), s. 12—Suit to set aside award—Value for purposes of Court-fees and jurisdiction.

A suit to set aside an award is, for the purpose of Court-fees, governed by Art. 17, clause (4) of Schedule II to the Court-Fees Act, and the Court-fee payable on a plaint in such a suit is a fixed fee of Rs. 15. [p. 116, col. 2.]

For the purposes of jurisdiction, the value of the subject-matter of a suit to set aside an award is the actual value of the interest affected by the award, and involved in the suit. The plaintiff in such a suit is not at liberty to arbitrarily place his own valuation on the relief he seeks. Thus, where an award directs the payment by a person of a particular sum of money, and he institutes a suit to have the award set aside, the value of the suit for purposes of jurisdiction is the amount which he is directed by the award to pay. [p. 116, col. 2; p. 117, col. 1.]

Keshava Sanabhaga v. *Lakshminarayana*, 6 M. 192; 7 Ind. Jur. 186; 2 Ind. Dec. (N. S.) 413, *Ganapati* v. *Chathu*, 12 M. 223; 4 Ind. Dec. (N. S.) 505, *Rachappa Subrao* v. *Shidappa Venkatrao*, 50 Ind. Cas. 280; 43 B. 507; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.), *Mohini Mohan Misser* v. *Gour Chandra Rai*, 56 Ind. Cas. 762; (1921) Pat. 105; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (Pat) 123, followed.

Sheo Deni Ram v. *Tulshi Ram*, 15 A. 378; A. W. N. (1893) 137; 7 Ind. Dec. (N. S.) 960, *Bai Rewa* v. *Keshavram*, (1895) P. J. 228, *Bai Machhbai* v. *Bai Hirbai*, 10 Ind. Cas. 816; 35 B. 264; 13 Bom. L. R. 251, *Prolhad Chandra Das* v. *Dwarka Nath Ghosh*, 6 Ind. Cas. 636; 37 C. 860; 14 C. W. N. 929, referred to.

Petition, under section 115 of Act V of 1908 and under section 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Valangiman, dated the 4th September 1922 in Original Suit No. 233 of 1922.

Messrs. *A. Krishnaswami Iyer* and *K. Narasimha Iyengar*, for the Petitioner.

Mr. *T. R. Venkatrama Sastrier*, for the Respondent.

JUDGMENT.—The question to be determined in this civil revision petition is whether the District Munsif's Court had jurisdiction to decide the suit. The first defendant pleaded that the Court had no jurisdiction. The District Munsif overruled the plea.

The suit was instituted for the setting aside of an award passed by defendants Nos. 2 to 6 to whom the plaintiff and the first defendant referred certain matters in dispute between them. By the award, the plaintiff was directed to pay to the first defendant the sum of Rs. 11,070 with interest thereupon. The contention of the first defendant is that the value of the subject-matter of the suit is the amount mentioned in the award and that the District Munsif had consequently no jurisdiction to try the suit.

For the purpose of the Court-fee payable, it is conceded by the plaintiff that the suit is governed by the Court-Fees Act, Schedule II, Art. 17, clause (4). Under that provision a fixed fee of Rs. 15 is payable on a plaint in a suit to set aside an award. As was pointed out in *Phul Kumari* v. *Ghanshayam Misra* (1) the award to be set aside 'may be of value of Rs. 10 or of value of Rs. 1,00,000; and yet no distinction is made. In short, the Statute, for good reasons or bad, has dealt with certain actions irrespective of value." But it is equally clear that it is only for the purposes of Court-fees, there is to be no reference to value. It is to an altogether different enactment that we must turn to find out if the suit falls within the jurisdiction of the District Munsif's Court. Section 12 of the Madras Civil Courts Act, III of 1873, provides that the jurisdiction of a District Munsif extends to all original suits and proceedings of a civil nature of which the amount or value of the subject-matter does not exceed Rs. 2,500. The short question to be decided is, does the subject-matter of the suit exceed in value Rs. 2,500? In my opinion, the question does not admit of any doubt, and the answer is clearly that the value of the subject-matter is the amount awarded by the arbitrators to the first defendant. The plaintiff seeks to set aside an award which directs payment by him of a sum over Rs. 11,000. He is affected by the award to that extent, and, similarly, if the award subsists, the first defendant will be entitled to that sum. If the award is set aside that sum represents the measure of the first defendant's interest affected. The expression "the amount or the value of the subject-matter" in section 12 must receive its ordinary significance and I fail to see how in a suit to set aside an award the value of the subject-matter can be fixed with reference to any other consideration.

The learned Vakil for the plaintiff has not argued that the suit falls within section 7, clause (4) (*c*) of the Court-Fees Act which relates to suits to obtain declaratory decrees where consequential relief is asked for. No doubt, if the suit, for the purpose of Court-fees, is governed by that section, the plaintiff may value the relief at his pleasure and the Court-fee payable is *ad valorem* computed with reference to that valuation. Section 8 of the Suits Valuation Act will, in that case, apply, and the value as determinable for the computation of Court-fees and the value for the purposes of jurisdiction will, in that event, be the same. As already observed, Schedule II, Article 17, clause (4) being in terms applicable to the suit in question, there is no necessity to resort to section 7, clause 4 (*c*). This being the case, there is no occasion to impute to the relief claimed an imaginary or a notional value, as distinct from the real value. The plaintiff valued the relief at Rs. 2,500 to enable the suit to be filed in the District Munsif's Court. It is not disputed that this sum has no relation to the amount actually involved in the suit. The argument on behalf of the plaintiff, therefore, amounts to this, that in a suit to set

(1) 35 C. 202; 7 C. L. J. 361; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A.

arbitrarily his own valuation on the relief and that it must be accepted as conclusive for purposes of jurisdiction. I do not think there is any warrant for this position in any of the three Acts mentioned above —the Court-Fees Act, the Suits Valuation Act and the Madras Civil Courts Act.

The view contended for on behalf of the plaintiff leads to the anomaly, namely, that a suit to set aside an award affecting rights to property valued at Rs. 1,00,000 may be filed in a Court of the lowest grade, and, unless there is very strong authority in favour of that proposition, I should not be prepared to accept it. On the contrary, the cases by which I am bound tend strongly to support the view which I am disposed to think is correct. In *Keshava Sanabhaga* v. *Lakshminarayana* (2) it was held that in a suit by a reversioner for a declaration that in fact there was no adoption or, in the alternative, if the adoption was made it was invalid, the value of the suit for purposes of jurisdiction was the value of the estate in question; or, in the words of the learned Judges, 'the value of the interest that would be lost to the alleged adopted minor if the adoption be declared invalid." This case was dissented from in *Sheo Deni Ram* v. *Tulshi Ram* (3) and the Bombay High Court in *Bai Rewa* v. *Keshavram* (4) followed the Allahabad case last cited and in *Bai Machhbai* v. *Bai Hirbai* (5) followed again its earlier decision. In *Prolhad Chandra Das* v. *Dwarka Nath Ghosh* (6) the learned Judges observed that in a suit to set aside an adoption the practice was that the plaintiff could be permitted to value the relief and the valuation given by him was taken to determine the forum. I may observe in passing, that the Allahabad, Bombay and Calcutta High Courts have treated the question as one relating to the practice prevalent in those Provinces and that there is no discussion of the principle in any of the cases referred to above. These, then, are the authorities bearing on the valuation for purposes of jurisdiction of a suit to set aside an adoption.

Turning to suits for mere declaratory decrees, it has been held in *Ganapati* v. *Chathu* (7), that the value of a suit of that description must be taken for purposes of jurisdiction to be 'what it would be, if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared." This case was followed and the law was stated in the same terms by the Patna High Court in *Mohini Mohan Misser* v. *Gour Chandra Rai* (8), the ground for the decision being stated thus:—

'It is difficult to see how the value of the declaration can be other than the value of the property in respect of which the declaration was asked for."

I have referred to the authorities dealing with suits to set aside an adoption and suits to obtain mere declaratory decrees because, for purposes of Court-fees, Schedule II, section 17 of the Court-Fees Act treats them as standing precisely on the same footing as suits to set aside an award. If, in the two classes of suits mentioned first, the actual value of the subject-matter determines the forum, it seems to me indeed difficult to apply a different rule to suits of the third description, namely, suits to set aside an award.

Considerable light is thrown on this question by the observations of the Judicial Committee in *Rachappa Subrao* v. *Shidappa Venkatrao* (9). The suit was instituted in the Court of the First Class Subordinate Judge to establish the plaintiff's claim to the property of a deceased person on the ground that the plaintiff was his adopted son. The suit could be heard by the Judge in the exercise of his special original jurisdiction if the amount or the value of the subject-matter exceeded Rs. 5,000. As already seen, by Schedule

(2) 6 M. 192; 7 Ind. Jur. 186; 2 Ind. Dec. (N. S.) 413.
(3) 15 A. 378; A. W. N. (1893) 137; 7 Ind. Dec. (N. S.) 960.
(4) (1895) P. J. 228.
(5) 10 Ind. Cas. 816; 35 B. 264; 13 Bom. L. R. 251.
(6) 6 Ind. Cas. 636; 37 C. 860; 14 C. W. N. 29.
(7) 12 M. 223; 4 Ind. Dec. (N. S.) 505.
(8) 56 Ind. Cas. 762; (1921) Pat. 105; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (Pat.) 123.
(9) 50 Ind. Cas. 280; 43 B. 507; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 331; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.).

II to the Court-Fees Act, a fixed fee is prescribed for a plaint in a suit to obtain a declaratory decree where no consequential relief is asked for. The fixed fee was Rs. 10 and the prayer for declaration was valued in the suit at Rs. 130 in accordance with a practice not uncommon in Bombay of valuing a prayer for a declaratory decree at Rs. 130 as being the amount on which the fee nearest to Rs. 10 would be leviable. The value of the property, however, exceeded Rs. 60,000. Their Lordships say that it is contrary to the scheme of the Act that there should be any valuation of a prayer for declaration and that when a fixed fee under Schedule II of the Court-Fees Act is payable, regard should be had to the real value of the property for the purposes of jurisdiction. Their Lordships, however, very clearly and emphatically point out that there is no warrant in law in such cases for what is described as notional value of the property. Of course, the case before the Judicial Committee was one falling within section 17 (3), whereas the present case falls within section 17 (4). But, as I stated above, the principle to be applied is identical and the observations quoted from the judgment of the Privy Council have a very direct and material bearing on the question before me.

I have no hesitation in holding that the District Munsif is wrong and I reverse his decision and allow the civil revision petition with costs throughout.

In the view I have taken, the learned Vakils on both sides agree that the order I am to make is to direct the District Munsif to return the plaint for presentation to the proper Court.

I order accordingly.

V. N. V. *Petition allowed.*
W. C. A.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 768 OF 1921.
November 20, 1922.
Present:—Mr. Justice Marten and
Mr. Justice Fawcett.

SANDU VALJI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BHIKCHAND SURAJMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage by way of conditional sale—Agreement to transfer—Equity of redemption—Part performance—Suit for redemption—Agreement whether admissible in evidence—Registration Act (XVI of 1908), s. 17.

Plaintiffs conveyed two Survey Nos. 76 and 394 to the defendants for Rs 1,200 by a deed of sale. At the same time another deed was passed between the parties whereby the plaintiffs undertook to pay to the defendants Rs. 125 per annum for a period of ten years and on such re-payment the defendants undertook to re-sell the property to the plaintiffs. Subsequently, the parties arrived at an arrangement which was embodied in an unregistered document and by which the plaintiffs gave Survey No. 76 to the defendants as sold for the mortgage-amount and retained the other Survey No. free from the mortgage-debt. Defendants took possession of Survey No. 76 accordingly. Later on plaintiffs sued to have an account taken of the mortgage:

Held, that, inasmuch as the agreement arrived at between the parties with regard to the apportionment of the two Survey Nos. had been acted upon for some eleven years prior to the suit it was, according to the equitable principle of part performance, binding and the plaintiffs were not entitled to succeed. [p. 122, col. 1.]

Per *Marten, J.*—To establish the principle of part performance it must be shown that the respective parties have so changed their respective positions, that the change can only be referable to the contract alleged. [p. 120, col. 2.]

Per *Marten, J.*, (*Fawcett, J. Contra.*)—A document which embodies an agreement between the parties and does not itself purport to be a sale-deed, but merely creates a right to get formal sale-deeds if necessary does not as such require registration. [p. 120, col. 1.]

Mahomed Musa v. *Aghore Kumar*, 28 Ind. Cas. 930; 42 I. A. 1; 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. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.), *Hiralal* v. *Shankar*, 62 Ind. Cas. 637; 23 Bom. L. R. 506; 45 B. 1170, *Salamat-uz-zamani Begam* v. *Masha Allah Khan*, 43 Ind. Cas. 645; 40 A. 187; 16 A. L. J. 98, followed.

Second appeal from the decision of the Assistant Judge, Khandesh, in Appeal No. 120 of 1920, confirming the decree passed by the Subordinate Judge at Bhussawal, in Civil Suit No. 145 of 1919.

Mr. *S. R. Gokhale* for Mr. *D. R. Patwardhan*, for the Appellants.

Mr. *K. H. Kelkar*, for the Respondents.

JUDGMENT.

Marten, J.—The point in this appeal is, whether the plaintiffs-appellants are entitled to treat Survey No. 76 as still subject to the mortgage of January 24, 1906. The respondents contend that, as the result of a contract arrived at in 1908, it was agreed that they should acquire the equity of redemption in Survey No. 76 but should re-convey the other property originally comprised in the mortgage, *viz.*, Survey No. 394.

The controversy has mainly turned on the document of March 23, 1908, Exhibit 34, which is alleged to evidence this agreement. The appellants contend that it is inadmisible in evidence for want of registration, and, alternatively, that, on the true construction of it, it only amounted to putting the defendants in possession of one of the plots, whereas up to that date they had not obtained possession of either plot.

As to its admissibility in evidence, one main question is, whether the document amounts to a transfer of the equity of redemption, or whether, on its true construction, it only amounts to a contract to transfer the equity. The Full Bench decision in *Bapu* v. *Kashinath* (1) establishes that in this Court a contract for sale which is capable of specific performance may be set up in answer to a claim for possession by a vendor. And *Venkatesh* v. *Mallappa* (2) shows that where a purchaser has obtained possession, it is immaterial that more than three years have elapsed since the date for completion of the original contract. Further, the Indian Registration Act itself draws a clear distinction between what I will call conveyances which require registration, and mere agreements which do not. Broadly speaking, this may be described as the difference between sub-section (1)(*b*) and sub-section (2) (*v*) of section 17 of the Indian Registration Act. Accordingly, it was decided by Sir Charles Sargent and Mr. Justice Telang, in *Shridhar Ballal Kelkar* v. *Chintaman Sadashiv Mehendale* (3), that an agreement to sell an equity of redemption need not be registered.

To understand the document of 1908, one must appreciate what was the then position under the two documents of January 24, 1906, Exhibits 28 and 32. The first of these documents purported to be a sale-deed by the plaintiff to the defendants for Rs. 1,200. The other document purported to be an agreement by which the plaintiff was to pay the defendant Rs. 125 per annum for ten years, and on such re-payment the defendant was to execute a deed of re-sale, and in default of payment the annual instalments were to carry interest, and if the plaintiff failed to pay off the money he should not have any right left in the property. In my opinion the lower Courts have rightly arrived at the conclusion that these two documents taken together constitute a mortgage and not a sale.

Turning next to the document of March 1908 (Exhibit 34). I am of opinion that, on its true construction, the parties intended that the mortgagee was to take Survey No. 76 free from redemption, and that the mortgagor was to take Survey No. 394 free from the mortgage-debt. In effect, therefore, in my opinion, the agreement was that the mortgagor was to sell Survey No. 76 to the defendant for the amount of the mortgage-debt.

It will be seen, therefore, that a reconveyance, or a deed of re-sale, was necessary as regards Survey No. 394. Accordingly, Exhibit 34 provided as follows:—"You (the mortgagee) have agreed to effect the re-sale of that at my convenience by a regular registered deed." But as regards Survey No. 76 the parties seem to have thought that it would be sufficient to leave the original deed of sale, Exhibit 28, standing, and merely to cancel the contemporaneous document, Exhibit 32. Accordingly, Exhibit 34 provides that "Survey No. 76 from out of the properties involved in that mortgage by way of sale has been given this day to you in lieu of the debt of your shop and has been given into your possession this day.....and the posesssion of Survey No. 76 has accordingly, been given to you this day. And the Survey No. has accordingly been transferred to your ownership itself...the

(1) 39 Ind. Cas. 103; 19 Bom. L. R. 100; 41 B. 438 (F. B.).
(2) 66 Ind. Cas. 868; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 91 46 B. 722.
(3) 18 B. 396; 9 Ind. Dec. (N. S.) 772.

field of Survey No. 76 is given to you for cultivation and has been given into your possession.....the said Survey No. shall be treated as sold on the basis of that *kararnama* and an endorsement has been made in the said *kararnama* and is cancelled and has been given into your possession."

Now, it is common ground that no endorsement has been made on the *kararnama*, Exhibit 32, nor has it been cancelled formally. On the whole, I am of opinion that this document, Exhibit 34, did not amount to an actual transfer of the equity of redemption, but only amounted to an agreement to transfer, or, alternatively, an agreement to cancel Exhibit 32, and that, consequently, Exhibit 34 is admissible in evidence as an agreement and can be relied on by the defendants accordingly. The case of *Vani* v. *Bani* (4) is, I think, clearly distinguishable, as there the Court construed the particular document before it as creating a charge in the nature of a mortgage. It was not, therefore, a document which merely created a right to demand another document. Accordingly, on this point, I disagree with the lower Appellate Court, and I agree with the conclusion which I understand the learned Trial Judge to have arrived at, at page 10, lines 20—32 of his judgment, *viz.*, that the document itself did not purport to be the sale-deed, but created a right to get formal sale-deeds if necessary.

But there is an alternative way of putting the defendant's case. In *Mahomed Musa* v. *Aghore Kumar* (5) it has been held by the Privy Council that in effect the English doctrine of part preformance as explained in *Maddisom* v. *Alderson* (6) applies in India as being a principle of natural justice, *viz.*, to prevent the success of fraud in land transactions. No doubt in *Mahomed Musa* v. *Aghore Kumar* (5) the documents in question were before the date when the Transfer of Property Act came into operation. But their Lordships were fully aware of that fact (see page 6), and yet in no way qualified the principles which are there laid down. Further, in Bombay that decision has been followed in *Hiralal* v. *Shankar* (7) by Sir Norman Macleod and Mr. Justice Shah in a case arising in 1916 long after the Act came into operation in this Presidency.

No doubt, to establish the application of that principle, it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. A mere payment of purchase-money, for instance, is insufficient (See Halsbury, Vol. XXV, pages 294-295). In the present case I think the defendants satisfy that test. Since 1908 they have been in exclusive possession of Survey No. 76: they have paid the assessment: no accounts have ever been demanded by the plaintiffs, nor have the plaintiffs made any payments. On the other hand, the plaintiffs have been in exclusive possession of Survey No. 394 and no demand for payment has been made on them. This is exactly in accordance with the views I have expressed as to the intention of the parties under Exhibit 34. But it seems to me a complete variation of the original agreement, Exhibit 32 of 1906, under which the plaintiffs were to pay Rs. 125 every year for ten years, and under which, as we know, the mortgagors remained in possession till 1908 of both plots of land. Further, the suit was not brought till 1919 and this length of time strengthens the inference that otherwise I would be prepared to draw.

The plaintiffs relied on *Kurri Veerareddi* v. *Kurri Bapireddi* (8) and *Ramanathan Chetty* v. *Ranganathan Chetty* (9) but the decision in *Salamat-uk-zamani Begam* v. *Masha Allah Khan* (10) is to the contrary effect, and, under the circumstances, I would prefer to adopt what appears to me to be the true

(4) 20 B. 553; 10 Ind. Dec. (N. S.) 934.
(5) 28 Ind. Cas. 930; 42 I. A. 1; 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. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.)
(6) (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 10 L. T. 393; 31 W. R. 820; 47 J. P. 821.
(7) 62 Ind. Cas. 637; 23 Bom. L. R. 506; 45 B. 1170.
(8) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.).
(9) 43 Ind. Cas. 138; 40 M. 1134; 6 L. W. 300; 22 M. L. T. 173; 33 M. L. J. 252; (1917) M. W. N. 757.
(10) 43 Ind. Cas. 645; 40 A. 187; 16 A. L. J. 08.

effect of *Mahomed Musa* v. *Aghore Kumar* (5) followed as it is in this Court by *Hiralal* v. *Shankar* (7). Accordingly, if necessary, I think that the defendants are also entitled to succeed upon this alternative ground.

In my opinion, therefore, the result arrived at by the lower Courts was correct and this appeal must be dismissed with costs.

Fawcett, J.—The document, Exhibit 34, recites that Survey No. 76 has not only been given into the possession of the defendant mortgagee, but also that its ownership has been transferred to him. It also says that Survey No. 76 is to be treated as sold, and the *kararnama*; Exhibit 32, is cancelled to that extent. In view of these provisions I do not think the document can be treated as falling under clause (*v*) of sub-section (2) of section 17 of the Indian Registration Act, 1908. Even if the document is taken to contemplate a further document cancelling Exhibit, 32 to the extent mentioned, this makes no difference : See *Vani* v. *Bani* (4).

The test is whether the document does not itself by its express terms create a certain interest in immoveable property, but expressly contemplates the creation of that interest by a subsequent instrument : *cf.* Birdwood, J.'s remarks in *Chunilal Panalal* v. *Bomanji Mancherji* (11) a decision approved in *Shridhar Balal Kelkar* v. *Chintaman Sadashiv Mehendale* (3). Otherwise proper effect is not given to the words " not itself creating, declaring, assigning, limiting or extinguishing any right," etc., and " merely creating a right to obtain," etc., in section 17 (2) (*v*). Here it seems to me the parties clearly intended Exhibit 34 to be the main document evidencing the sale of the equity of redemption, and the endorsement on Exhibit 32 as a subsidiary affair. In my opinion it goes beyond " merely creating a right to obtain another document," to effect the sale, and itself purports to create or declare a transfer of ownership. I regret, therefore, I do not agree with my learned brother's view that the document can be treated as a mere agreement for sale.

Accordingly, I think the lower Appellate Court was right in holding that the document required registration, and is, therefore, inadmissible in evidence for the purpose of affecting the Survey No. in question under section 49 of the Indian Registration Act. It can, no doubt, be looked at for a collateral purpose ; but that must be one other than that of creating or extinguishing a right to the land : see *Bai Gulabbai* v. *Shri Datgarji* (12). I think this excludes looking at it even for the purpose of evidence as to the nature of defendant's possession, which he obtained under the arrangement of 1908 : *cf. Muthukaruppan* v. *Muthu Samban* (13).

But the mere fact that the lower Court wrongly looked at the document does not necessitate a reversal of its decision : section 167, Indian Evidence Act. There was other clear evidence of a new arrangement in 1908, which has been considered by both the lower Courts who hold that it establishes the arrangement asserted by defendant as against that asserted by plaintiffs. The evidence seems sufficient to justify their conclusion, and no sufficient ground has been shown for our taking a different view of the facts in second appeal.

But it is contended that in law this arrangement is invalid, because it involves a sale of plaintiffs' equity of redemption which (as it is worth more than Rs. 100) can only be effected by a registered instrument under section 54 of the Transfer of Property Act and section 17 of the Indian Registratin Act.

The answer to this is suggested in the lower Court's judgment which refers to the two cases of *Mahomed Musa* v. *Aghore Kumar* (5) and *Nilkanth* v. *Hanmant* (14). In the former case an equity of redemption was held to be extinguished, because, even if a regular conveyance was necesssary, or if some other formal defect had occurred, the acts of the parties had been such as to supply all the defects, on the equitable doctrine of performance or part performance of an agreement. In this case, on the findings of the lower Court,

(11) 7 B. 310 at p. 315; 4 Ind. Dec. (N. S.) 209.

(12) 9 Bom. L. R. 393 at p. 399.

(13) 25 Ind. Cas. 772; 38 M. 1158; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497.

(14) 58 Ind. Cas. 415; 22 Bom. L. R. 992; 44 B. 881.

the agreement to make defendant complete owner of Survey No. 76 and to cancel the mortgage of 1906, had been acted on by the parties for some eleven years prior to the suit; and if the equitable principle in question can be properly applied to this case it gives a clear answer to plaintiffs' contention.

No doubt, the Madras High Court has held that this principle has no operation in the case of a sale governed by section 54 of the Transfer of Property Act: see *Kurri Veerareddi* v. *Kurri Bapireddi* (8) and *Ramanathan Chetty* v. *Ranganathan Chetty* (9). The latter decision was not, however, unanimous, Wallis, C. J., and Abdur Rahim, J., dissenting. It has also been dissented from by the Allahabad High Court [*Salamat-uz-zamani Begam* v. *Masha Allah Khan* (10)] where the equitable principle of part performance was applied to the case of a transfer falling under section 54, Transfer of Property Act. In this Court the Madras view was taken in *Lalchand* v. *Lakshman* (15) but this has been virtually overruled by the Full Bench case of *Bapu* v. *Kashinath* (1), where section 54 of the Transfer of Property Act is considered, and it is held that, in spite of its provisions, a defendant in possession under an agreement of sale but without a registered conveyance can resist an action in ejectment by the plaintiff, who agreed to sell him the land and put him in possession. In the arguments the Privy Council case of *Mahomed Musa* v. *Aghore Kumar* (5) was referred to.

I think it is clear that this ruling, which is binding on us, governs the present case, and, personally, I have the less hesitation in following it, in that the judgment in that case is based on Indian statutory provisions, which (it is held) qualify section 54 of the Transfer of Property Act. If that is so, the equitable principle in question is one recognised by the Legislature: and the view taken by their Lordships in *Mahomed Musa* v. *Aghore Kumar* (5) and *Lakshmi Venkayyamma Rao* v. *Venkatanarasimha Appa Rao* (16) that the law in India is not inconsistent with this equitable principle, is shown to be justified. The case of *Maung Shwe Goh* v. *Maung Inn* (17) does not affect this, for that only concerned the English rule that a contract for sale of real property makes the purchaser the owner in equity of the estate, which is clearly opposed to the express provisions of section 54 regarding a contract for sale.

I was at first inclined to think that *Bapu* v. *Kashinath* (1) would not apply to this case, as it was not a suit for possession but merely for an account. On further consideration, I think the same principle applies, for in both cases a liability to account for profits arises, and defendant is entitled to show that he is not so liable: *cf.* the passage from Story's Equity Jurisprudence cited in *Bapu* v. *Kashinath* (1). And both, *Mithiram Bhat* v. *Sowanatha Naickar* (18) and *Mahomed Musa* v. *Aghore Kumar* (5), where the principle in question was held applicable, were suits for redemption of a mortgage and not for possession.

I also think that the fact that defendants' right to a decree for specific performance may now be barred, is immaterial. In *Mithiram Bhat* v. *Sowanatha Naickar* (18) the defendants' claim was similarly barred as pointed out in *Ramanathan Chetty* v. *Ranganathan Chetty* (9). And a similar view has also been taken in *Venkatesh* v. *Mallappa* (2).

The provisions of section 92, proviso (4), Indian Evidence Act, were also relied on; but it is not a mere case of setting up an oral agreement in modification of a registered instrument, and in *Mahomed Musa* v. *Aghore Kumar* (5) a similar contention was unsuccessful (see at pages 811 and 812*).

I agree, therefore, that the appeal should be dismissed with costs.

K. S. D. & W. C. A. *Appeal dismissed.*

(16) 34 Ind. Cas. 921; 39 M. 509 at p. 525; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 24 C. L. J. 279; 43 I. A. 138 (P. C.).

(17) 38 Ind. Cas. 938; 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; 21 C. W. N. 500; L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15; 44 C. 542 (P. C.).

(18) 24 M. 397.

(15) 28 B. 466; 6 Bom. L. R. 510.

*Pages of 42 C.—[*Ed.*]

BIBI HAFIZUNNISSA v. IMAMUDDIN KHAN.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 113 OF 1920.

July 16, 1923.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Ross.

Musammat BIBI HAFIZUNNISSA *alias* SHAHZADI—DEFENDANT—APPELLANT

versus

Maulvi IMAMUDDIN KHAN—PLAINTIFF—RESPONDENT.

*Mortgage—Part payment of consideration—*Ekrarnama *about payment of balance—Mortgagor accepting payment after due date—Acquiescence.*

In equity all that is required, *prima facie* even when the period of payment is expressed, is that the promisor should show that he was ready to perform his part within a reasonable time. [p. 127, col. 1.]

Plaintiff sued on a mortgage executed in his favour by the defendant on the 12th December 1910 for Rs. 7,000. At the time of the mortgage Rs. 3,000 only were paid to the mortgagor and an *ekrarnama* of even date with the mortgage was executed with regard to the payment of the balance by a certain specified date. The payment was not made by that date but the mortgagor accepted a payment subsequent to that date:

Held, that by this belated payment there was no new or substituted contract, but merely a waiver of the stipulation as to the time of payment; [p. 127, col. 2.]

(2) that the mortgagor having accepted a payment after due date had acquiesced in the arrangement and could not now contend that the mortgage was only for the amount originally advanced. [p. 127, col. 2.]

Upperton v. *Nicholson*, (1871) 6 Ch. 436 at p. 443; 40 L. J. Ch. 401; 25 L. T. 41; 19 W. R. 733, *Leather-Cloth Co.* v. *Hieronimus*, (1875) 10 Q. B. 140; 44 L. J. Q. B. 54; 32 L. T. 307; 23 W. R. 593, referred to.

Appeal from a decision of the Additional Subordinate Judge of Darbhanga, dated the 15th January 1921.

Messrs. *S. M. Mullick, S. N. Ray* and *Satyadeo Sahai*, for the Appellant.

Messrs. *S. C. Miller* and *Rai T. N. Sahai*, for the Respondent.

JUDGMENT.

Ross, J.—This is an appeal by the defendant against the decree of the Additional Subordinate Judge of Darbhanga in a suit brought by the plaintiff on a mortgage executed in his favour by the defendant on the 12th December 1910. The suit was decreed in part. There is also a cross-appeal by the plaintiff in respect of a portion of the claim that was disallowed but this cross appeal was not pressed.

The plaintiff alleges that the defendant took a loan of Rs. 7,000 under a registered mortgage-bond dated the 12th December 1910, the debt became payable on the 10th December 1911, compound interest at the rate of Re. 1-8-0 per mensem with six-monthly rests was stipulated for. At the time of the execution of the mortgage Rs. 3,000 only was paid to the defendant and an *ekrarnama* of even date with the mortgage was executed with regard to the payment of the balance. The balance of the Rs. 7,000 was paid from time to time with the exception of Rs. 114 which the defendant refused to accept.

In the written statement the defendant admits that the plaintiff got a deed for Rs. 7,000 executed in his favour by her. She denies, however, that any consideration passed. She alleges that she was under the influence of the plaintiff and had no opportunity to take advice and that she acted according to his directions; that she had an appeal pending before the Judicial Committee, and that the plaintiff expressed his readiness to conduct the appeal and defray the expenses and asked that the defendant should execute a bond for Rs. 7,000 for his satisfaction and said that he would also execute an *ekrarnama* by way of contract for her satisfaction and would take the money mentioned in the bond from her after the appeal was decreed by the Privy Council. She further alleges that she had no knowledge of the contents of the bond or the *ekrarnama* and that the plaintiff did not pay Rs. 3,000 for the expenses of the Privy Council appeal. There was a further defence that the effect of the *ekrarnama* is, in the events that have happened, to make the mortgage a mortgage for Rs. 3,000 only.

The learned Subordinate Judge accepted the proof of the passing of consideration except in respect of Rs. 975 and holding that, notwithstanding the terms of the *ekrarnama*, the mortgage was good for Rs. 7,000 he made a decree accordingly.

Six issues were framed, of which Issues Nos. 3, 4 and 6 were as follows:—

"Issue No. 3. Was the mortgage bond in suit executed by the defendant with

full knowledge of its terms? Were the same fully explained to and understood by her? Had the defendant any independent advice before the alleged execution of the said mortgage bond?"

"Issue No. 4. Was the bond in suit executed under the circumstances mentioned in paragraph 7 of the written statement?"

"Issue No. 6. To what other relief is the plaintiff entitled?"

On the 5th of January 1920 after the case was opened the learned Subordinate Judge recorded the following order:—

Case opened. Parties' Pleaders stated their case. "Issues Nos. 3, 4, and 6 cancelled as useless. To-morrow for evidence."

It was contended on behalf of the appellant that these issues ought not to have been deleted. But the question was evidently debated before the learned Subordinate Judge and no petition of objection was filed and there is nothing on this point in the grounds of appeal. The point is not one of substance because the matter of these issues has been fully dealt with in the judgment.

The mortgage-bond is Exhibit 1. It recites that the executant is in need of Rs. 7,000 to defray the expenses of the Privy Council case in which she was the appellant against Syed Saadat Ali Khan, respondent, and that she had negotiated for the loan of Rs. 7,000 through Sheikh Faiyaz-ud-din, her son-in-law, with Munshi Imamuddin Khan and that in consideration of Rs. 7,000, receipt of which was acknowledged, she mortgaged the properties set forth in the schedule to the deed. The stipulation about interest followed, together with an agreement to pay interest by *tankhas* drawn on the Indigo Factories Hursinghpore and Motipore in favour of the mortgagee. The bond was signed for *Musammat* Hafizunnissa, mortgagor, by the pen of Faiyazuddin, her son-in-law. There is also a signature by the mortgagor herself and her seal is affixed. The deed is attested by five witnesses of whom Gobind Chandra Roy, Vakil, is dead. Three of the witnesses have been examined but one Hakim Mohammad Abdus Shakur was not questioned about the bond as he was supposed to have been won over by the defendant. Babu Lal Behari Dutt, Pleader, one of the attesting witnesses, proves his attestation and the execution of the deed by the defendant. He also says that it was read out and explained to the executant by the writer. Similar evidence is given by Dhana Prosad another of the attesting witnesses, and further evidence of execution is given by the plaintiff himself in whose presence the defendant signed and sealed the document.

It was argued on this evidence that the execution is suspicious because not only does Faiyzauddin sign for *Musammat* Hafizunnissa but *Musammat* Hafizunnissa also signs her own name. There are several signatures of the defendant on the record of this case, some of which are admitted. I have compared these signatures with the signature on the bond and hold that the signature is genuine. Moreover, the execution of the bond is admitted in the written statement.

The first question of substance is, whether consideration passed. Exhibit 2 is a *tankha* executed by the defendant in favour of the plaintiff authorising the manager of Hursinghpore Indigo Concern to pay to the plaintiff a sum of Rs. 930 in part satisfaction of the interest on the debt secured by the registered mortgage-bond, dated the 12th December 1910, amounting to Rs. 7,000. Exhibit 2A is a similar *tankha* in respect of Rs. 270 directed to the proprietor of Motipore Concern. In this document also the mortgage-bond is recited. Both these documents are signed by *Musammat* Hafizunnissa and also by her son-in-law on her behalf and they are admitted in the written statement. Exhibit 3 is a cheque for Rs. 3,000 issued by the plaintiff in favour of Bibi Hafizunnissa or order. The receipt is endorsed by Faiyazuddin. This cheque is dated the 13th December 1910. The amount of the cheque is entered in the ledger of the Benares Bank under that date. Evidence regarding the payment of this cheque has been given by Abdul Hamid Mokhtear who says that Faiyazuddin signed the cheque in his presence and that the endorsement on the back of the cheque is in the witness' handwriting signed by him. This endorsement is an identification of Faiyazuddin. The witness states that Faiyazuddin received

payment of this cheque from the Benares Bank for Hafizunnissa and that he learned of this payment from the *Musammat* herself. Moluvi Mohammad Shafi, a Vakil, deposes that the Manager of the Benares Bank wanted identification of the payee of this cheque from a respectable person and suggested the witness. The witness endorsed the cheque; he made the endorsement at the request of Faiyazuddin. Dhana Prosad deposes that the plaintiff made over the cheque of Rs. 3,000 to the defendant. The passing of this part of the consideration is, in my opinion, fully proved.

The next item is a sum of Rs. 2,500. Exhibit 4 is a draft for this amount by the Benares Bank on the Allahabad Bank in favour of Imamuddin Khan or order. It is endorsed for payment to Basil C. Wilson or order and signed on the back by Basil C. Wilson. Exhibit 13 is a voucher for Rs. 2,506-5-0 signed by Imam-ud-din. The transaction is entered in the ledger of the Bank under date the 30th January 1911 (Exhibit 12). The plaintiff deposes to having taken this draft and to having endorsed it in favour of Mr. Wilson at the request of the defendant and to making it over to the defendant. Muhammad Elias deposes that he knows Faiyazuddin, the son-in-law of Hafizunnissa, that he accompanied him to the Office of Mr. Basil C. Wilson, Attorney, to whom the draft for Rs. 2,500 was made over in the witness's presence. Satish Chandra Sen who was employed in the office of Mr. Wilson at this time also deposes that he knows Faiyazuddin that he had heard of Hafizunnissa in connection with the Privy Council appeal which was in the hands of Mr. Wilson and that Faiyazuddin used to instruct Mr. Wilson in the matter of that appeal. He proves Mr. Wilson's signature on the back of the draft. Formal evidence of the payment of the draft was also given by Mr. J. D. Wilson, an Assistant Agent of the Allahabad Bank. I hold that the passing of this part of the consideration is also fully proved. The only other two items which the learned Subordinate Judge has allowed are a sum of Rs. 125 paid by cheque on the 26th January 1911 (Exhibit 3A) and a sum of Rs. 400 for which a receipt was given by the defendant herself, (Exhibit 5). This receipt recites that whereas Rs. 1,375 out of the bond-money was due from Munshi Imamuddin Khan Saheb out of which she has received Rs. 400 from him to pay the salary of Munshi Mohammad Khalil Saheb *karperdaz* payable by her, she, therefore, gave this receipt in writing. The receipt is dated the 30th January 1911. The sum of Rs. 1,375 is the difference between Rs. 7,000 and the above mentioned three sums of Rs. 3,000, Rs. 2,500 and Rs. 125. This receipt, therefore, further establishes the fact of these payments. The plaintiff deposes to the fact of this payment and to the defendant having signed and sealed the receipt. There was no cross-examination on this part of his evidence. In argument it was suggested that the receipt is not reliable because it purports to be a receipt for Rs. 400 on the 30th January 1911, whereas this Rs. 400 was in fact paid on five dates between the 2nd of March 1911 and the 2nd of February 1914 as endorsed on the back. These endorsements are all by Muhammad Khalil for the payment of whose salary the receipt was given. I see no reason to doubt the genuineness of this receipt on this account. The effect of the receipt was that Imamuddin undertook the responsibility for the salary of Muhammad Khalil to the extent of Rs. 400 and the endorsements show that this responsibility was duly discharged. The other items of which proof was tendered by the plaintiff were disallowed by the Subordinate Judge as being payments made contrary to the terms of the *ekrarnama* which will be referred to later.

Three witnesses were examined on behalf of the defence as well as the defendant herself. The evidence of these witnesses was not referred to by the learned Vakil for the appellant and a perusal of it shows that it is without value. The defendant in her evidence denied all the material allegations in the plaintiff's case, stating among other things that the document was not read out to her, that she had no seal and could not sign, and that she did not know Lal Belari Babu. She admits knowing Gobind Babu, but he is dead. She denies having received any cheque or any money and she professes ignorance

of the *ekrarnama*. Her cross-examination shows that she has had a varied life and that she had executed another bond although in giving evidence in a suit brought on that bond she denied execution. Her evidence in that case also negatives her present statement that she had no seal and could not sign her name. She admits that she had no ill-feeling with Faiyazuddin and did not mistrust him. She says that he called a man named Muslim to read out the mortgage-bond to her but he did not read it and told her orally about it that it was a *bima* deed. She further says that the Registrar did not question her but his peon did in his hearing and that she told the peon that she had executed a *bima* deed. Now the bond itself shows that execution was admitted at the Registry by the defendant, Bibi Hafizunnissa. The evidence of the defendant must be rejected as false and unreliable. I find, therefore, that the execution of the mortgage-bond and the passing of consideration to the extent allowed by the learned Subordinate Judge are definitely proved.

Two arguments remain to be considered. It is contended, in the first place, that the defendant had no independent advice; that the plaintiff was in a position of active confidence towards her, and that he must prove the *bona fides* of the transaction. Reference was made to decisions in *Satis Chandra Ghosh* v. *Kalidasi Dasi* (1) and *Saratkumari Dasi* v. *Amullyadhan Kundu* (2) and to section 111 of the Evidence Act. Now, it is proved and admitted that the defendant was on bad terms with her husband at the time, that she was in need of money and that she had an appeal before the Judicial Committee. There is no reason to suppose that the transaction was imprudent or reckless and there is really no question of good faith in this case. Babu Lal Behari Dutt says that the deed was explained to the defendant and so does Dhana Prasad. In her cross-examination, although she says that it was a *bima* deed, she says that she consulted her daughter and brother and husband and son-in-law and that they advised her to execute the deed. The deed itself shows that the loan was negotiated by Faiyazuddin and the defendant admits that she did not mistrust him. The *tankhas* refer to the mortgage and the admission of execution was made before the Sub-Registrar. There can, therefore, be no doubt that the defendant knew perfectly well what she was doing. Maulvi Wajid Hussain who worked as her Pleader states that in a previous litigation in which a compromise was filed by him on her behalf she used to come on every date in a *palki gharry* to Court. She has given evidence on a previous occasion (Exhibit 15) and at the present trial she deposed in Court. She is evidently a woman of the world, experienced in affairs. There is no ground for suggesting that she did not fully understand the nature of the transaction; nor for doubting its good faith.

In the second place, it is argued that the effect of the *ekrarnama*, in the events that happened, is to make the mortgage a mortgage for Rs. 3,000 only. The terms of this *ekrarnama* (Exhibit A) are these. It recites the mortgage-bond for Rs. 7,000 and the fact that the executant Imamuddin Khan had not got the whole amount ready and had paid Rs. 3,000 and promised to pay the remaining amount of Rs. 4,000 on the 15th January 1911 and contracted that if he failed to pay this amount by that date the mortgage-deed should be considered to have been executed for the sum of Rs. 3,000 only and that interest would run thereon. The argument is that as the balance of Rs. 4,000 was not paid by the 15th January 1911, the mortgage becomes a mortgage for Rs. 3,000 only, and that if it is to be taken to be a mortgage for Rs. 7,000 this can only be by a substituted contract which is neither in writing nor registered and of which, therefore, no evidence can be given. The plaintiff stated that he was ready to pay Rs. 4,000 to the defendant on the 15th January but she asked him to wait and said that she would take the money when she required it. This statement is not in the plaint and it is uncorroborated and in my opinion cannot safely be acted upon. Apart from this

(1) 68 Ind. Cas. 577; 26 C. W. N. 177; (1922) A. I. R. (C.) 203; 34 C. L. J. 529.
(2) 71 Ind. Cas. 632; 27 C. W. N. 629; 17 L. W. 481; (1923) A. I. R. (P. C.) 131; 32 M. L. T. 137; 25 Bom. L. R. 548; 37 C. L. J. 501; (1923) M. W. N. 909 (P. C.).

statement, however, the case stands thus. There was a mortgage for Rs. 7,000. By reason of the *ekrarnama* the defendant was entitled to refuse further payments on account of the mortgage loan after the 15th January 1911 but she did not exercise this right. On the contrary, the receipt (Exhibit 5) dated the 30th January 1911 expressly states over her own signatures that Rs. 1,375 out of the bond-money was still due and that she then received Rs. 400. This is a clear admission that the payments over and above Rs. 3,000 were attributed by her to the mortgage loan. As was observed by James, L. J., in *Upperton* v. *Nickolson* (3), "it constantly happens that an objection is waived by the conduct of the parties." In equity all that is required, *prima facie* even when the period of payment is expressed, is that the promisor should show that he was ready to perform his part within a reasonable time. The date of payment was expressed to be the 15th January 1911. The last payment for which credit has been given to the plaintiff is dated the 30th January 1911. Not only is this within a reasonable time in the circumstances of this case but the defendant by her very act in granting the receipt has shown that she accepted it as such.

The principle is stated in Halsbury's Laws of England, Vol. VII, page 424, as follows:—

"In the case of a contract which is required by law to be in writing, although its terms cannot be varied by a fresh agreement that is not made in writing, there is nothing to prevent the parties from agreeing verbally to waive the stipulations of the contract as to the mode or time of performance; and, if the contract is performed in accordance with such verbal agreement, the obligations which have been waived are discharged."

The *Leather-Cloth Co.* v. *Hieronimus* (4) was a case in which the written contract provided that the goods should be forwarded by a particular route. There was a subsequent understanding that they should go by a different route and as they were damaged in transit the defendant repudiated the contract. With regard to the argument that there had been a substituted contract, Blackburn, J., observed as follows.

"The answer is: the plaintiffs do not rely on a substituted contract, but on the original contract; and they say, 'You, the defendant, on being told of the substituted delivery, did not object, but, by your conduct, assented to it' I cannot see why the assent to such a substituted mode of performing one of the terms of a contract need be in writing and may not be by parol, though the original contract must have been in writing. They are quite different things, the proof of a substituted contract and the proof of a ratification or approval, after performance, of the substituted mode of performance."

In my opinion there was here no new or substituted contract but merely a waiver of the stipulation as to the time of payment. Reading the two documents, the original mortgage and the *ekrarnama*, together, in the light of the conduct of the parties, I hold that the mortgage was for Rs. 7,000.

In my opinion, therefore, the decision of the learned Subordinate Judge is correct. But it requires modification in one respect. By the terms of the *ekrarnama* the mortgagee agreed that on payment of the full amount of the loan he would take "Rs. 100 as the consolidated amount of interest on the entire amount of the loan every month." There is no stipulation for compound interest and in this respect the original bond has been modified. The total payment fell short of Rs. 7,000 by Rs. 975 as found by the learned Subordinate Judge; therefore, the interest of Rs. 1,200 per annum will be reduced proportionately and simple interest at this reduced rate will be decreed on Rs. 6,025 from the 1st February 1911, when the payment was completed until the expiry of the period of grace which is fixed at six months from this date. Credit must also be given to the defendant for the payments by *tankha* amounting to Rs. 1,070. On paying the amount so found due to the plaintiff within the period limited by this

(3) (1871) 6 Ch. 436 at p. 443; 40 L. J. Ch. 401; 25 L. T. 41; 19 W. R. 733.
(4) (1875) 10 Q. B. 140; 44 L. J. Q. B. 54; 32 L. T. 307; 23 W. R. 593.

decree the defendant will be entitled to recover the property and the sale will be set aside. If the amount be not paid, the sale will stand and the defendant will receive the surplus of the sale-proceeds over the amount herein decreed.

It may be noted that if the contention of the appellant had prevailed and the bond had been held to have been a bond for Rs. 3,000, the interest on which, under the terms of the bond and *ekrarnama*, is compound interest at 18 per cent. with half-yearly rests, the amount of the decree would have been much larger than it has now been found to be.

The result is, that the appeal is decreed so far as the rate of interest is concerned and the decree of the Subordinate Judge is modified as directed above. The appeal is decreed with proportionate costs to both parties throughout.

The cross-objection is dismissed.

Jwala Prasad, J.—I agree.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 198 OF 1921.

April 12, 1922.

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

GANU GOPAL SONAR—APPLICANT—APPELLANT

versus

DATTATRAYA LAXMAN POTDAR—DEFENDANT—RESPONDENT.

Minor—Certificated guardian of person, application by, for sanction of marriage—Proper procedure—Benefit of minor.

When once a guardian of the person of a minor is appointed under the Guardians and Wards Act, any application for the marriage of the minor must be considered from the point of view of benefit to the minor. A relation who is entitled to be heard on the application may be heard, but his opposition to the application must be considered at its true value and cannot be considered as an absolute bar to the Court giving sanction to the marriage.

First appeal from the decision of the District Judge, Satara, in Miscellaneous Application No. 7 of 1916.

Mr. *A. G. Desai*, for the Appellant.

Mr. *K. V. Joshi*, for the Respondent.

JUDGMENT.—This is an application by the certificated guardian of the minor for the sanction of the Court to the marriage of the minor. The opposition is raised by the step-brother of the minor, and the learned Judge seems to have given effect to that opposition by refusing sanction without dealing with the guardian's proposal on the merits. I do not think that that is the right view to take, as once the guardian is appointed under the Guardians and Wards Act, any application for the marriage of the minor by the guardian must be considered from the point of view of benefit to the minor, and any relation that might be entitled to be heard on the application will be heard; but such opposition must be considered at its true value and cannot be considered as an absolute bar to the Court giving sanction to the marriage.

The case must, therefore, go back to the District Court, and the District Court must consider whether, in the absence of any proposal of the step-brother, the bridegroom proposed by the guardian is a suitable person. If the step-brother makes counter-proposals, then the Court will consider them. But whether the Court is considering the proposals of the guardian or whether it is considering the proposals of the step-brother it must always have before it in the first place the welfare of the minor.

So the appeal must be allowed, and the case sent back to the District Court.

R. N. *Appeal allowed.*

CALCUTTA HIGH COURT.
FULL BENCH.

FULL BENCH REFERENCE NO. 1 OF 1923
in the matter of GOVERNMENT CRIMINAL APPEAL NO. 2 OF 1923.

June 11, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir N. R. Chatterjea, KT., Justice Sir Thomas Richardson, KT., Mr. Justice Buckland and Mr. Justice Panton.

GOVERNMENT OF ASSAM—APPELLANT
versus
SAHEBULLA AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 90—"After recording its reasons," meaning of—Warrant, issue of, without recording reasons, effect of—Magistrates, duty of—Construction of Statutes—Court, duty of.

The words "after recording its reasons in writing" in section 90 of the Criminal Procedure Code are not *imperative* but *directory*. [p. 134, col. 2.]

A warrant which, on the face of it, is a good and valid warrant, is signed by the Magistrate, sealed with the seal of the Court, addressed to a Police Officer, and which states the reason upon which the Magistrate relied, is not invalid merely by reason of the fact that the Magistrate has omitted to record in writing, otherwise than in the warrant, the reason which actuated him to issue the warrant. [p 136, cols. 1 & 2.]

Sukheswar Phukan v. *Emperor*, 11 Ind. Cas. 593; 38 C. 789; 12 Cr. L. J. 409; 15 C. W. N. 1001; 13 C. L. J. 186, overruled.

Before issuing a warrant the Magistrate should record his reasons specifically in writing and should not be satisfied with signing a warrant in the form given in the schedule to the Criminal Procedure Code. [p 136, col. 2.]

No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed. [p. 135, col. 1; p. 139, col. 2.]

Liverpool Borough Bank v. *Turner*, (1860) 2 De G. F. & J. 502; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. (N. S.) 494; 9 W. R. 292; 129 R. R. 172; 45 E. R. 715, followed.

N. R. Chatterjea, J.—(dissenting)—Section 90 requires not merely the statement in the form of the warrant that the Court has good and sufficient reasons but these reasons should be stated. The mere signing of the warrant which states that the Court has reason to believe is not sufficient compliance with the law. [p. 137, col. 1.]

Criminal Reference against an order of the Senior Extra Assistant Commissioner, Dhubri, dated the 12th August 1922.

ORDER OF REFERENCE TO A FULL BENCH.

Buckland, J.—This is an appeal by the Government of Assam against a judgment of the Senior Extra Assistant Commissioner at Dhubri acquitting 12 persons charged under section 147, Indian Penal Code, as members of an unlawful assembly, the common object of which was to resist the execution of a warrant of arrest.

For the present purpose a bare outline of the facts suffices, for there has been no decision upon the merits and this appeal turns wholly upon a question of law and if it succeeds a remand is inevitable.

Certain constables were deputed to execute a warrant of arrest against a recalcitrant witness of the name of Sonaba Bibi in connection with a criminal case in the Court of the Extra Assistant Commissioner. The execution of the warrant was resisted and the learned Judge has held that the warrant was illegally issued, with the consequence that the resistance did not amount to an offence. The warrant was issued under section 90 of the Criminal Procedure Code, but it appears that the Court by which it was issued did not record in writing its reasons for issuing it. What has now to be considered is whether a warrant issued in such circumstances is or is not a valid warrant.

The learned Advocate-General has submitted to us that the defence to which the learned Judge who tried the case gave effect amounts to that which, stated in the words of the Indian Penal Code, is the exercise of the right of private defence. Though the learned Judge did not in so many words so define it, I think that this is correct. Upon that the learned Advocate-General has contended that under section 99, Indian Penal Code, the right of private defence has no application to the case as the acts resisted were done by a public servant acting in good faith under colour of his office though the acts may not be strictly justifiable by law. He has further relied upon *Bisu Haldar* v. *Emperor* (1), in which a search warrant had been issued under section 96, Criminal Procedure Code, whereas it should have been issued under section 100 of the same Code. Its

(1) 11 C. W. N. 358; 5 C. L. J. 1907; 6 Cr. L. J. 38.

execution was resisted and the accused persons were convicted under section 147, Indian Peanal Code, and one of them under sectoion 353, Indian Penal Code. The warrant was held to have been wholly illegal and on that ground the accused persons were held to have committed no offence, as section 99, Indian Penal Code, did not apply. A distinction was there drawn between cases where there is a complete absence of jurisdiction and an excess of jurisdiction. We have been asked to make the same distinction in this case.

The foregoing argument, in my opinoin, is fallacious. The question of the constable acting in excess of any jurisdiction which the warrant purported to confer upon him does not arise in the case as it comes before us now. The judgment of the learned Judge is founded upon the initial invalidity of the warrant as I shall shortly show. Whether or not the constable acted in excess of his jurisdiction if the warrant was a valid warrant is a question of fact to be determined upon the evidence. This is the question which arises upon the application of section 99, Indian Penal Code, which does not involve the question before us, *viz.*, the validity of the warrant itself. If the warrant was illegal from the beginning, there is no question of excess of jurisdiction for there could have been no excess where there was no jurisdiction at all. Further, with reference to section 99, Indian Penal Code, if the warrant was illegal it could not be used to support any acts of the constable and the question whether or not any act of his was such as was not strictly justifiable could not arise.

The learned Judge in support of his decision that resistance to an invalid process cannot amount to an offence has referred to *Sukheswar Phukan* v. *Emperor* (2). In that case a warrant was issued under section 90, Criminal Procedure Code, for the arrest of a witness. The Magistrate did not, however, record his reasons in writing for adopting that course. The warrant was executed by the arrest of the witness but she was released by the petitioner to this Court, who had been tried and convicted of an offence under section 225B, Indian Penal Code. The Rule was granted upon the grounds that the actior of the Court issuing the warrant or arrest was illegal and vitiated the subsequent proceedings including the conviction of the petitioner for resisting an invalid process. The Rule was made absolute and in the judgment it is stated that the procedure was illegal as, on the face of it, no reasons were recorded by the Court issuing the warrant. Their Lordships referred to and commented upon the circumstances that in lieu of a summons a warrant was ordered in the first instance, but that is justified by the Code of Criminal Procedure and I do not gather from the judgment that, however much they may have concemned that course, they based their judgment upon that ground.

I find myself unable to distinguish this case from the appeal now before us. But, with great respect to the learned Judge who decided it, I find myself also unable to agree with them. The position is that stated by Mr. Mayne in his well-known work on the Criminal Law of India (4th Edition, **page** 205) where he classifies the ways in which acts purporting to be done under the authority of the law may be illegal. This case falls within the class first stated, where the warrant under which the officer acts is on the face of it legal even though defective in form and is issued by an authority competent to issue such a warrant but was improperly or irregularly issued. Here there is no suggestion that the warrant was defective on the face of it, and the judgment of the learned Judge has proceeded entirely upon the basis of its having been illegally issued. In such cases the learned author states resistance is always unlawful, which proposition he supports by reference to English authorities. But as the procedure in this country is governed by the Code of Criminal Procedure it is to that Code alone that one must refer for matters for which it provides.

I do not propose to refer to decisions in cases where the Code states that something shall be done and the question is, whether or not that which was done amounted to a compliance with the law, for they do not assist in coming to a decision where a particular act does not even purport

(2) 11 Ind. Cas. 590; 38 C. 989; 12 Cr. L. J. 098; 15 C. W. N. 1001; 15 C. L. J. 186.

to have been done. In *In re Karuthan Ambalam* (3) it was decided that the failure to record reasons in writing vitiated a warrant under section 90 and that the omission to do so was not cured by section 537, Criminal Procedure Code, as the recording of reasons was a necessary preliminary to the exercise of the jurisdiction. The judgment of the learned Judge does not, however, give reasons for this statement of the law and it appears, moreover, very questionable whether the warrant with which his judgment dealt was issued under section 90, Criminal Procedure Code, though for the purposes of the case he assumed that to have been so.

Now, the section is not mandatory in its terms. The issue of the warrant is to follow the recording of reasons. That is indicated by the use of the preposition 'after.' But the section, if analysed further, does not in so many words prescribe the recording of reasons. Rather, it assumes the recording of reasons and by the word "after" states the order of events. I do not go so far as to suggest that it is merely permissive but, in my opinion, it is far from mandatory, and the rules applicable to the construction of mandatory sections of the Code have no application to it. Even if the section may be said to require or prescribe that the Court shall record its reasons in writing I do not consider that it is more than directory in that respect.

I have considered the application of section 537, Criminal Procedure Code, but have come to the conclusion that it can have no application to a case such as this. It applies to the reversal or alteration of findings, sentences and orders on the ground of errors, omissions or irregularities. But though we are concerned with an error, omission or irregularity, there is no question of the reversal or alteration of a subsequent finding or sentence, and the circumstances are not such that the section could apply. The question involved here primarily arises between the witness and the person desiring his or her attendance and if it is permissible to refer to the principles of section 537 it is difficult to see how the witness could be prejudiced in any way by the Court not having recorded its reasons in writing for the issue of the warrant. Section 90, however, also applies where a warrant is issued for the arrest of a person accused of an offence who fails to obey a summons, and if in such a case the reasons of the Court had not been recorded in writing I should hesitate to say that section 537 had no application though the ultimate test would be whether any failure of justice had been occasioned thereby. It would be anomalous absolutely to hold that as regards a witness the warrant is illegal if no reasons in writing have been recorded before it is issued, whereas in the case of a person accused of an offence a warrant issued in similar circumstances may be of full legal force and effect. Section 538 of the same Code, though it has no application to the present case, is interesting as an analogy, and that section lays it down in the clearest terms that, in circumstances not far removed from those with which we are concerned, a person making a distress shall not be deemed a treapasser.

For the reasons I have given in my judgment the warrant was not illegal because the reasons for issuing it were not recorded. This is as far as it is necessary to go as the learned Judge has considered himself concluded by the judgment in *Sukheswar Phukan* v. *Emperor* (2), and consequently has refrained from discussing the evidence against the 12 persons charged by him under section 147, Indian Penal Code. I, therefore, express no opinion as to the facts nor as to the legality or otherwise of the way in which the warrant was executed, which may involve the application of section 99, Indian Penal Code.

In consequence of the view of the law which I have expressed, the order which I would make in this appeal is that the order of the learned Judge acquitting the accused under section 258, Criminal Procedure Code, should be set aside and the case remanded to him to dispose of subject to our judgments on this point. As he has already recorded all the evidence on both sides no further evidence need be taken.

But as we are differing from the judgment of a Division Bench of this Court on a point

(3) 33 Ind. Cas. 308; 38 M. 1088; 17 Cr. L. J. 132.

of law, under Chapter VII of the Appellate Side Rules, the point must be referred to a Full Bench of the Court. The question to be referred is:— If a Court under section 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?

Cuming, J.—This is an appeal by the Government of Assam against an order of acquittal. One Chapai Sheik brought a criminal complaint against certain persons among them one Karicha of enticing away his wife Sanka under section 498, Indian Penal Code. Process was issued and also a warrant against Sanka who was a witness. This warrant was issued under the provision of section 90, Criminal Procedure Code, and according to the provision of the section the Court before issuing the warrant should have recorded its reason for issuing a warrant and not a summons. No such reasons were recorded. When the constable went to execute the warrant he was resisted by the girl's father and number of other persons and a riot ensued.

These persons were duly prosecuted. The learned Magistrate acquitted the accused relying on the authority of the case of *Sukheswar Phukan* v. *Emperor* (2). He held that as no reason had been recorded for issuing a warrant instead of a summons as required by section 90, Criminal Procedure Code, the arrest was illegal and hence the accused were entitled to resist the execution of the warrant. The learned Advocate-General who appears for the Government of Assam has contended that the case of *Sukheswar Phukan* v. *Emperor* (2) relied on by the learned Magistrate is distinguishable and that the present case falls within the purview of secton 99, Indian Penal Code. Section 99, Indian Penal Code, provides that there is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt if done or attempted to be done by a public servant acting in good faith under colour of his office though that act may not be strictly justifiable by law.

The Magistrate who issued the warrant had full jurisdiction to do so and his proceedings were only so far irregular in that he omitted to record his reasons for issuing the warrant instead of a summons. His omission to record these reasons is, in my opinion, an irregularity, but the omission did not render the warrant illegal so as to give the accused persons that right of private defence against the constable executing it. This view of the law is in direct conflict with the view taken in case of *Sukheswar Phukan* v. *Emperor* (2), relied on by the learned Magistrate, and, in my opinion, the cases are not distinguishable. The facts of that case are the accused persons were prosecuted on a charge of unlawfully rescuing from custody a person who had been arrested on a warrant similar to the warrant now under discussion and the learned Judges held that such a warrant was illegal because of the omission to record the reason for issuing a warrant and not a summons and this case also turns entirely on exactly the same point, *viz.*, whether the warrant was or was not a legal one. I do not think that this is a case in which it can be held that there was an excess of jurisdiction as distinct from a complete absence of jurisdiction. There was in this case either complete jurisdiction or no jurisdiction.

The Magistrate in issuing the warrant did nothing in excess of his jurisdiction for he had jurisdiction to issue the warrant. The omission to record his reasons cannot be said to be doing something in excess of his jurisdiction. Neither in executing it can the constable be said to have done anything in excess of his jurisdiction. The warrant was either a good one or a bad one and this would depend on whether the omission to record the reasons for issuing it was an irregularity, or an illegality. In my opinion it is an irregularity only. The provision for recording the reasons for issuing the warrant is directory and not mandatory. The warrant was, therefore, a good and valid warrant. As this finding is in direct conflict with the authority relied on by the learned Magistrate the question should be referred to a Full Bench.

The Advocate-General and Babu *Surendara Nath Guha*, for the Appellant.

GOVERNMENT OF ASSAM *v.* SAHEBULLA.

Babus *Manmatha Nath Mukherjee, Sris, Chandra Biswas* and *Radhikaranjan Guha*, for the Respondents.

JUDGMENTS OF THE FULL BENCH.

Sanderson, C. J.—This is a Reference by two learned Judges of this Court sitting as a Criminal Appeal Bench, and the question referred is—"If a Court under section 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?"

In my opinion it is necessary, and, at all events, advisable to state the facts which gave rise to this Reference. One Saifaiuddin took criminal proceedings against certain persons under section 498 of the Indian Penal Code, alleging that such persons had enticed away Sanaka Bibi, who was alleged to be the complainant's wife. A warrant was issued by the Extra Assistant Commissioner, who was a First Class Magistrate, for the arrest of Sanaka Bibi in order that she might be brought before the Court as a witness in these proceedings. The warrant was in the following form:

"To—The Police Officer in charge of *thana* Salmora.

Whereas complaint has been made before me that Kancha Sheik of Dimatola has committed the offence under section 498, Indian Penal Code, and it appears likely that Sanaka Bibi of Dimatola can give evidence concerning the said complaint and whereas I have good and sufficient reason to believe that she will not attend as a witness on the hearing of the said complaint unless compelled to do so:

This is to authorise and require you to arrest the said Sanaka Bibi and on the 15th May to bring her before this Court. You will be competent to enlarge the witness on bail of Rs. 50 to make her appear in Court on the date fixed, to be examined touching the offence complained of.

Given under my hand and the seal of the Court this the 27th day of April 1922.

Sd, D. Sarma,
Magistrate, First Class."

When the Police Officers went to execute the warrant at the house of Sahebulla, who was the father of the woman Sanaka, it was alleged that an attack was made upon the Police Officers by Sahebulla and others. Consequently, proceedings were instituted under section 149, Indian Penal Code, against 29 persons; and the common object of the unlawful assembly alleged was to resist the execution of legal process, *viz.*, the warrant.

The learned Commissioner who tried the case discharged accused Nos. 13 to 29 under section 253 of the Code of Criminal Procedure.

After the evidence in the case had been finished the learned Pleader for the defence, in concluding his argument, took the point that the Magistrate who issued the warrant did not record his reasons in writing before he issued the warrant and relied upon the decision in *Sukheswar Phukan* v. *Emperor* (2). The learned Pleader argued that the process was illegal and that consequently the offence charged against the accused had not been committed. The Magistrate was of opinion that he must hold, in view of the High Court decision to which I have already referred, that the process was invalid and that the accused had not committed the offence of being members of an unlawful assembly the common object of which was resistance to legal process.

Thereupon, the Government of Assam appealed to this Court.

The appeal was dismissed as regards 11 of the respondents, but it was admitted against one, namely, Sahebulla. The course was taken, as we were informed by the learned Advocate-General, for the purpose of raising the point which is now in issue.

My learned brothers, who were then sitting as the Criminal Appeal Bench, disagreed with the decision in the case of *Sukheswar Phukan* v. *Emperor* (2), and consequently they referred the matter to the Full Bench.

Those are the facts which I think it is necessary for the purpose of my judgment to state.

Section 90 of the Criminal Procedure Code provides as follows:—

"A Court may, in any case in which it is empowered by this Code to issue a

summons for the appearance of any person, other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest.—

(*a*) If, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(*b*) If at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure."

The form of the warrant is given in Schedule V, form 7, and the warrant in this case, to which I have already referred, followed the form given in the Schedule.

The form in the Schedule, in my opinion, was obviously framed in such a way as to cover all the contingencies contemplated in section 90; and it might be argued that the Magistrate by signing the warrant thereby recorded his reasons in writing; for, it must be obvious that the Magistrate had signed the warrant before it was issued. The warrant is good and valid on the face of it, and, in my opinion, it is sufficient to inform the person against whom it was issued of the reason for its issue; and, assuming as I do, that in this case the Magistrate was in fact justified in issuing the warrant on the materials before him, I am not prepared to hold that a warrant in such a form would be invalid merely by reason of the fact that the Magistrate did not record in writing on the order-sheet of the case the reason for its issue which might be the same as that which he had stated in the warrant itself, and for which he made himself responsible.

The learned Advocate-General has referred to section 555 of the Code of Criminal Procedure and argued that the provisions thereof were sufficient to absolve the learned Magistrate from doing anything more than signing the warrant in the form prescribed. I am not prepared to accept that argument. In my judgment section 555 deals with the form of the warrant itself and nothing more, and the words of section 555, in my opinion, are not intended to supersede the provisions of section 90.

The main ground, however, upon which the learned Advocate-General relied was, that the material words, namely, "after recording its reasons in writing" are not *imperative* but merely *directory* and that by reason of the omission of the Magistrate to record his reasons otherwise than in the warrant, the warrant was not invalid.

I have already said that, for the purpose of this Reference, I assume that the learned Commissioner had materials before him which would justify the issue of a warrant instead of a summons and that he applied his judicial discretion in the matter.

On the question whether the material words are *imperative* or *directory* I do not think much assistance, if any, can be obtained from considering the many decisions given on this matter.

The principle which ought to be applied in considering whether the provisions of a Statute or an Act are *imperative* or *directory* cannot be better stated, in my judgment, than in the passage which is to be found in the judgment of Lord Penzance in the case of *Howard* v. *Bodington* (4)—the passage to which I refer is to be found at page 211: There, Lord Penzance said this:

"Mr. Jeune was good enough to refer me to Sir Bonson Maxwell's book 'On the Interpretation of Statutes,' and to quote a number of cases from it (Maxwell on the Interpretation of Statutes, Chapter XII, section 3, pp. 330-345). Since the matter was argued I have been very carefully through these cases, but upon reading them all the conclusion at which I am constrained to arrive is that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of the *Liverpool Borough Bank* v. *Turner* (5). Lord Campbell was then sitting as

(4) (1877) 2 P. D. 203.
(5) (1860) 2 De G. F. & J. 502; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. (N. S.) 494; 9 W. R. 292; 129 R. R. 1721 45 E. R. 715.

Lord Chancellor in an appeal from the Vice-Chancellor, and in giving judgment, his Lordship said :—'No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed.'

"I believe, as far as any rule is concerned, you cannot safely go further than that; in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

I adopt that as the principle which ought to be applied in this case; and I do not believe that by searching through the numerous cases which have been decided upon different Statutes and upon different words, we will get any assistance upon such a question as the present.

The learned Vakil, who argued the appeal on behalf of the respondent and to whom we are much indebted, inasmuch as he took upon himself to argue the case at the request of the Court, submitted that the object of the material words in section 90 was two-fold: first, to ensure that the Magistrate should exercise his judicial discretion and satisfy himself upon the materials before him that it was right and proper to issue a warrant instead of a summons; and, secondly, to give the person against whom the warrant was issued an opportunity of knowing on what grounds the warrant had been issued, and if necessray testing the legality of the warrant.

I am prepared to assume that both of those objects might have been in the minds of those who were responsible for the drafting of this Act. I think, it is quite possible that they intended to draw attention to the fact that a warrant ought not to be issued, where a summons would suffice, and that care should be exercised by the Court to satisfy itself, upon the materials before it, that it was really necessary to issue a warrant which, of course, might result in the arrest of the person against whom it was directed. Further, it might have been intended that there should be a record in writing, otherwise than in the warrant itself, of the reasons, which induced the Court to issue the warrant, in order that the person affected by it might have no doubt as to the grounds on which the warrant had been issued, in case he or she desired to test the validity of it.

But these arguments, to my mind, are not conclusive upon the point; for, it seems to me that if the Magistrate in this case had written upon the order-sheet the reason which was included in the warrant itself, namely, that he had good and sufficient reason to believe that the person, against whom the warrant was issued, would not attend as a witness on the hearing of the complaint unless compelled to do so, it would have been difficult to hold that he had not complied with the section; and, I fail to understand how, if this had been done, the person, against whom the warrant was issued would have been in a better position, if she wished to test the validity of the issue of the warrant, than she would be by reading the warrant itself.

Further, in my judgment, in considering the general scope of the section one must have regard to the consequences which might follow upon our holding in favour of the learned Vakil's argument.

Our attention was drawn to a passage in Maxwell on the Interpretation of Statutes which is taken from the case of *Margate Pier Company* v. *Hannam* (6). The judgment in the case was delivered by Abbot, C. J., who was considering what was the effect of a warrant issued by a Justice of the Peace, who had not taken the oath at a general sessions in accordance with the Statute. The learned Chief Justice pointed out what serious consequences might result if it were held that a warrant issued by a Justice of the Peace, who had not complied with the Statute by taking the oath, was invalid. The learned Chief Justice said :—

(6) (1819) 3 B. & Ald. 266; 22 R. R. 378; 106 E. R. 661.

"It is obvious that if the act of the Justice issuing a warrant be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority: a constable who arrests, and a gaoler who receives a felon will each be a trespasser; resistance to them will be lawful; everything done by either of them will be unlawful; and a constable or persons aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these Statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction."

The principle which is stated in that judgment, to my mind, may be applied to this case. This wsa a warrant, good and valid on the face of it, signed by the Magistrate, sealed with the seal of the Court, addressed to a Police Officer with reference to a person, whose attendance as a witness was desired. The warrant itself stated that the Magistrate had good reason to believe that the person in question would not attend as a witness unless compelled to do so.

If we were to hold that such a warrant was invalid merely by reason of the fact that the Magistrate had omitted to record the reason for the issue of the warrant otherwise than in the warrant itself, it might lead to very serious consequences, such as those indicated by Abbot, C. J., and such a construction of the section ought not to be placed upon it, if it will admit of any other reasonable interpretation.

I have said enough to show that, in my judgment, the words in section 90, now under consideration are not *imperative* but *directory* and consequently I am not prepared to hold that in a case in which the Magistrate had materials before him sufficient to justify the issue of a warrant and to which the Magistrate did apply his judicial discretion and in which the warrant was good and valid on the face of it and stated the reason upon which the Magistrate relied, the warrant was invalid merely by reason of the fact that the Magistrate omitted to record in writing, otherwise than in the warrant, the reasons which actuated him in issuing the warrant.

In my judgment, therefore, with the above mentioned reservations and upon the above mentioned assumptions, the question contained in the Reference should be answered in the affirmative.

Before parting with this case, we think it desirable to state distinctly that Magistrates should record their reasons specifically in writing before issuing a warrant and should not be satisfied with signing their names to warrants in the form given in the schedule. If in the future they will follow the clear provisions of the section they will save the High Court a great deal of time and trouble.

The result is that we direct the acquittal to be set aside and remand the case to the learned Judges, who referred the case to the Full Bench, for disposal.

N. R. Chatterjea, J.—The question referred tothe Full Bench is as follows:—If a Court under sectoin 90, Criminal Procedure Code issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect?

Section 90 of the Criminal Procedure Code lays down that a Court may, in any case in which it is empowered by the Court to issue a summons for the appearance of any person other than a juror or assessor, issue after recording its reasons in writing, a warrant for his arrest - (*a*) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or (*b*) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

The normal course is to issue summons in the first instance. The Court can, however, issue a warrant in either of the cases mentioned in clauses (*a*) and (*b*) of the section. But in either case the Court can do so after stating its reasons in writing. The question is whether a warrant issued

without complying with the said provision is a valid and legal warrant. Form 7 of Schedule V prescribes the form for a warrant under section 90 and it states (to quote the material portion): "Whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so." It is contended by the learned Advocate-General that the signing of this warrant is sufficient compliance with the provision of the Statute, and that it does not matter whether the same reasons which are recorded in the form of the warrant are or are not again recorded on another paper on the record. I think, however, that this contention is not correct. The form does not state the reason. It merely says that the Court has "good and sufficient reason to believe," and words to that effect appear in clause (*a*) of section 90. But that is merely a statement that the Court has reasons. It is not stating what those reasons are. Section 90 requires not merely the statement in the form of the warrant that the Court has good and sufficient reasons but those reasons should be stated. I think, therefore, that the mere signing of the warrant which states that the Court has reason to believe is not sufficient compliance with the law. If it were so, it would have been wholly unnecessary to state in the body of the section that the Court after recording its reasons in writing may issue a warrant.

Then, the question arises whether a warrant issued by a Court without recording its reasons in writing is an illegal process. The words "after recording its reasons in writing" show that it must be done before issuing the warrant. The Legislature had some object in view in making the provision. The objects it seems to me, are, first, to insure deliberation on the part of the Magistrate before issuing the warrant, and, secondly, that the person to whom the warrant is issued may know the reasons why it is issued so that such person may come before a higher Court and show that it has been wrongly issued. Somewhat similar words are used in section 25 of the Indian Arms Act. That section provides for the search and seizure of arms by the Magistrate: and the third paragraph of that section lays down as follows: "Such Magistrate having first recorded the grounds of his belief may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has resason to believe such arms...are or is to be found." The words "having first recorded the grounds of his belief" have been judicially construed in the case of *Clarke* v. *Brojendra Kishore Roy Chowdhury* (7). In that case Maclean, C. J., observed as follows, at page 447*:—"These words must have been inserted in the section with an object and the object probably was to protect the public against searches being inconsiderately directed and to ensure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is mandatory and what is merely directory in the language of any particular Statute. The present case appears to fall within that class of cases in which, when a Statute creates a special right, but certain formalities have to be complied with antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the defendant in the case now before us, did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action." Harington, J., observed (at page 451*) as follows; "It is admitted that the defendant did not record the grounds of his belief in this case, but it is urged that the provision that he should do so is merely directory, and that his entry on the premises is justified as he had good grounds for his belief that arms were stored in the Cutchery notwithstanding his failure to record these grounds. I do not agree with this, and I think that where a Statute authorises the doing of an act, which is *prima facie* a wrong to an individual, the doer must comply strictly with the condition imposed by the Statute, if he desires to rely on the Statute as a justification for his act. He cannot claim as against the individual who is injured by his act, the protection

(7) 2 Ind. Cas. 436; 36 C. 433; 9 C. L. J. 298; 3 C. W. N. 458; 5 M. L. T. 367
*Page of 36 C.—[*Ed.*].

of the Statute, unless he strictly complies with the conditions, on which the Statute affords that protection." The decision of the majority of the Court of Appeal was reversed by the Judicial Committe. See *Clarke* v. *Brojendra Kishore Roy* (8). But so far as the particular question was concerned their Lordships observed at page 176:* "Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute." It is contended that the question before the Privy Council was whether Mr. Clarke, not having complied with the provisions of the Statute, could claim protection under the Arms Act, and that it is a totally different thing from saying that the search was illegal. It is urged that, although the Magistrate issuing the process may, by not complying with the provisions of a Statute, make himself liable for damages, it does not follow that the process is illegal. But I have referred to this case to show that the recording of the grounds of belief was held to be an essential preliminary to the search being made. The Judicial Committee distinctly stated that it was a *preliminary condition* for the section to be taken under the Act. It appears, therefore, that although the Magistrate may have perfectly good grounds of belief for making a search, it would not be legal unless he first records the grounds of his belief, because if it were legal notwithstanding the omission to record the grounds of his belief, there is no reason why he could not defend his action under the Statute. Two of the learned Judges of this Court, as stated above, were of opinion that the provision that the Magistrate "after having first recorded the grounds of his belief" is mandatory and not directroy, and if the Judicial Committee were of opinion that it was merely directory, their Lordships would not have held that the Magistrate not having complied with the preliminary condition could not defend his action under the Arms Act. In this connection I may refer to the case of *Shankar Baksh* v. *Bulwant Singh* (9), where in laying down that although reasons should be recorded by the Judge under section 626 of the Code of Civil Procedure when granting an application for review, their absence is not a ground for special leave to appeal, Lord Hobhouse observed: "It is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it." In *Clarke's case* (8) on the other hand, the Judicial Committee were of opinion that the recording of reasons is a preliminary condition. These two cases illustrate the ground of distinction between the two classes of cases.

It is said that it would make no difference to the person for whose arrest the warrant is issued, whether the reasons were or were not stated in the record. But would it have made any difference to person whose house was searched [*Clarke's case* (8)], whether the grounds of belief of the Magistrate were or were not first recorded before the search was made. Then again, how would the absence of a seal on a warrant (otherwise good) affect the person to be arrested? But it was held in *Mahajan Sheikh* v. *Emperor* (10) that under section 75 the affixing of the seal of the Court is essential to the validity of a warrant, that an arrest under a warrant duly signed, but not sealed is, therefore, illegal, and that a conviction under section 225B of the Penal Code is bad in law.

The learned Advocate-General has referred to certain passages from Maxwell on the Interpretation of Statutes, 6th Edition. At page 664 it is stated, "The usual provision in the Commission of the Peace that no Justice named in it shall be capable of acting or authorised to act unless he shall have taken the oaths required by law, would lead to intolerable inconvenience and injustice if it were imperative, and struck with invalidity every act of an unqualified justice. If his acts were held void, it was pointed out by the King's Bench all persons who acted in the

(8) 16 Ind. Cas. 501; 39 I. A. 163; 39 C. 953; 16 C. L. J. 231; (1912) M. W. N. 760; 12 M. L. T. 171; 10 A. L. J. 193; 16 C. W. N. 865; 23 M. L. J. 321; 14 Bom. L. R. 717; 13 Cr. L. J. 693 (P. C.).

*Page of 39 I. A.—[*Ed.*].

(9) 27 I. A. 79; 27 C. 333; 4 C. W. N. 203; 2 Bom. L. R. 596; 7 Sar. P. C. J. 686; 14 Ind. Dec. (N. S.) 220 (P. C.).

(10) 28 Ind. Cas. 672; 42 C. 708; 19 C. W. N. 224; 16 Cr. L. J. 336.

execution of a warrant issued by him, would act without authority; a constable who arrested, and a gaoler who received the arrested person, under it, would be trespassers. Resistance to them would be lawful; everything done by them would be unlawful; and a constable, and the persons aiding him might become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity of which they were wholly ignorant." But the omission to take oath by a Justice does not stand on the same footing as an omission to comply with the provisions of a Statute enacted on grounds of public policy—as some sort of guarantee that the Court should carefully consider the circumstance which is involved in writing out the reasons for issuing a process affecting the liberty of a person.

Another passage is cited from page 650, which runs as follows: 'When a public duty is imposed, and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative."

The question of inconvenience and injustice will be considered later, but I may here refer to a passage from the book (page 657): "The same imperative effect seems, in general, presumed to be intended even where the observance of the formalities is not a condition exacted from the party seeking the benefit given by the Statute, but a duty imposed on a Court or public officer in the exercise of the power conferred on him; when no general inconvenience or injustice calls for a different construction. The 5 Eliz C 23 requiring that the writ *De Contumacy Caprendo* shall be brought into the Queen's Bench and there opened in the presence of the Judges, the omission of this apparently idle ceremony was deemed fatal to the validity of an arrest made in pursuance of the writ, though it had been enrolled in the Crown Office. An enactment which provided that every warrant issued by a Court should be under its seal, was equally imperative, and not only was a commitment under an unsealed warrant invalid, but the person who had obtained it without taking care that the Court performed its duty of sealing it was liable in damage to the person arrested under it. This was hard on the former, but it was essential for the latter that the warrant should be duly authenticated."

As pointed out by Lord Campbell, L. C. in the case of the *Liverpool Borough Bank* v. *Turner* (5). "No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed."

It is contended that if a warrant which is, on the face of it, valid, is to be treated as unlawful because of the omission to record reasons for issuing it, it may result in serious consequences to the person executing the warrant who may have no means of knowledge of such omission. But the question of inconvenience or consequences should be considered not only with reference to the person executing the process, but also with reference to the person who is to be affected by the process and for whose benefit the provision is made. A warrant may be issued for the arrest of a respectable *purda nashin* lady, and if the provision for recording reasons is made on grounds of public policy with the object of insuring deliberation on the part of the Magistrate so that he may apply his mind to, and take into consideration all the circumstances of, the case, the observance of the condition precedent laid down by the Statute before issuing the process should not be held to be directory merely because inconvenience may otherwise result to the person executing it. If the process is unlawful, can it be held to be lawful merely because the person executing it may have no means of knowing the defect in the process where it affects the liberty of the person affected by the process? The consequence of taking such a view would be to deprive the person

for whose benefit the salutary provision is made by the Legislature. In cases affecting the liberty of the subject there is weighty authority for holding, that even in matters of form, every form and every step in the process be followed with extreme precision. See *Dale's case* (11).

The learned Advocate-General referred to two Full Bench decisions under section 145 of the Criminal Procedure Code, *viz.*—*Sukh Lal Shekh* v. *Tara Chand* (12), and *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (13). The first dealt with the question whether the omission to publish a notice under section 145 (3) of the Code of Criminal Procedure at some conspicuous place at or near the subject of dispute is an illegality which deprives the Magistrate of his jurisdiction. It was held that the omission did not affect the jurisdiction of the Magistrate, that the provision was merely directory and not a condition precedent. In the second case it was held that an initiatory order under section 145 was not defective because it was not self-contained and did not state in express terms the grounds upon which the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed when such grounds appeared in the Police report on which the order was founded and to which it made reference in express terms. These cases, therefore, do not help the appellant.

Reference was also made to some passages from Mayne's Criminal Law where the learned author deals with the question of resistance to processes of the Court with reference to English authorities. But, as pointed out by Buckland, J., in the referring order, the procedure in this country is governed by the Code of Criminal Procedure, and it is to that Code alone that one must refer for matters for which it provides. It is to be noted that in this reference we are not concerned with the legality or otherwise of the manner in which the warrant was executed which may involve the application of section 99 of the Indian Penal Code.

The only reported decision of this Court under section 90 of the Criminal Procedure is that of *Sukheswar Phukan* v. *Emperor* (2), in which the Court held the omission to record the reasons in writing rendered the warrant illegal. A similar view was taken in *In re Karuthan Ambalam* (3), where it was held that the recording of reasons is a *necessary preliminary* to the exercise of the jurisdiction. In the Allahabad Court *Mahar Singh* v. *Emperor* (14), Gokul Prasad, J., did not follow *Sukheswar Phukan's case* (2) on the ground that section 537, Criminal Procedure Code, had not been referred to in that case. But, as pointed out by Buckland, J., in the referring order, section 537 has no application to a case like the present. *Sukheswar Phukan's case* (2) has been followed in the Punjab Chief Court [see *Bela Singh* v. *Emperor* (15)].

For all these reasons, I regret I am unable to agree with the view taken by the learned Chief Justice, and I would answer the question referred in the negative.

Richardson, J.—The question referred is—" If a Court under section 90, Criminal Procedure Code, issues a warrant for the arrest of any person as therein specified but does not first record its reasons in writing, has the warrant so issued any legal force and effect ?

I will not again read section 90. It is sufficient to observe that the two clauses (*a*) and (*b*) are in the alternative. Provision is made for the issue of a warrant against a witness in two contingencies, (I) under clause (*a*), in the first instance, no summons having been issued, if the Court sees reason to believe that a summons will not be obeyed, and (II) under clause (*b*), as a remedial measure, if the witness has already failed to appear in answer to a summons duly served. The Code says that in either of these contingencies the Court may, after recording its reasons in writing, issue a warrant.

A form of warrant for use under section 90, will be founnd in Schedule V of the Code

(11) (1881) 6 Q. B. D. 376 at p. 463; 50 L. J. Q. B. 234; 43 L. T. 769.

(12) 33 C. 68; 2 C. L. J. 241; 9 C. W. N. 1046; 2 Cr. L. J. 618.

(13) 33 C. 352; 2 C. L. J. 259; 9 C.W. N. 1065; 2 Cr. L. J. 687 (F. B.).

(14) 59 Ind. Cas. 415; 18 A. L. J. 1149; 22 Cr. L. J. 111.

(15) 44 Ind. Cas. 971; 7 P. W. R. 1918 Cr.; 50 P. L. R. 1918; 19 Cr. L. J. 443.

(Form No. VII). This form with letters substituted for most of the blanks is as follows :—

" Whereas complaint has been made before me that *A. B.* of Z has committed the offence of *N* and it appears likely that *C. D* can give evidence concerning the said complaint : and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so ;

" This is to authorise and require you to arrest the said *C*, *D* and on (a day to be stated) to bring him before this Court, to be examined touching the offence complained of.

" Given under my hand and the seal of the Court, this (date to be stated),

Signature. "

It will be observed that the form is so framed as to be applicable in either of the contingencies above-mentioned.

As to the signature, under section 75 of the Code every warrant of arrest issued by a Court under the Code must be in writing signed by the Presiding Officer and bear the seal of the Court A warrant so signed and sealed remains in force until it is cancelled by the Court which issued it, or until it is executed.

Further, section 80 of the Code provides that " the Police Officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant. "

As to the forms in Schedule V, it is laid down generally in section 555 of the Code, that subject to certain powers conferred on the High Courts " the forms set forth in the Fifth Schedule, with such variations as the circumstances of each case require, may be used for the respective purposes herein mentioned, and if used shall be sufficient."

Lastly, as to the word " writing " which occurs in sections 75 and 90 under section 3 (58) of the General Clauses Act X of 1897), ' Unless there is anything repugnant in the subject or context expressions referring to ' writing ' shall be construed as including references to printing, lithography, photography and other modes of representing or re-producing words in a visible form."

Regard being had to the meaning so given of the term " writing " it has been contended that when in a particular case the Presiding Officer of a Court, for instance a Magistrate, signs a warrant in the statutory form stating that he has good and sufficient reason to believe that the witness *C D* will not attend unless compelled to do so, the Magistrate has sufficiently complied with requirements of section 90 as to recording his reasons in writing before the issue of the warrant. The warrant of course is not issued until after the Magistrate has signed it

The case, however, has been argued before us on the footing which I adopt, that the mere signature by the Magistrate of a stereotyped form is not a sufficient compliance with section 90. Mr. Mukherjee who has been good enough to appear at our request as *amicus curiæ* to present the case for the respondent, urged that the reasons contemplated by the Legislature should or must show that the Magistrate has applied his mind to the facts of the particular case and should or must show whether the Magistrate is acting under clause (*a*) or under clause (*b*) of the section. That argument is material not only on the question whether the warrant is itself a sufficient compliance with the section but on the further question with which I am about to deal. I will only say now that I do not think the Legislature could have intended that the Magistrate should record his reasons at any length. It may be a matter of urgency the warrant should be issued with all possible despatch. The witness may be intending to leave the jurisdiction. His train or his ship may be about to start, and time waits for no man, while he is setting out reasons at length.

On the footing indicated, that some record of the Magistrate's reasons is required apart from the warrant, the main controversy is whether the words " after recording his reasons in writing," are mandatory or directory. The terms are familiar and useful but in *R. v. Justices of the County of London* (16), Lord Bowen

(16) (1893) 2 Q. B. 476; 63 L. J. Q. B. 148; 69 L. T. 680; 42 W. R. 1.

is reported to have said: "Now it seems to me that the truth lies rather between the two, and that there is no such exact division of sections in Acts of Parliament into those that are directory and those that are imperative as is ordinarily assumed to be a categorical decision which exhausts every possible class of section. You must look at each Act of Parliament and at each section to see exactly what it means. No other rule of construction of Acts of Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all."

In other words, it may not always be possible to bring a statutory enactment of the kind now in question wholly under the category "mandatory" or wholly under the category "directory." In the present case I hesitate to say that the material words of section 90 are "mandatory" and obligatory at one pole or "directory" and permissive at the opposite pole.

If the law requires a record of the Magistrate's reasons and the attention of the Magistrate is drawn to the law, it is not for him to decide whether he will record his reasons or not. He is bound to make the record. He has no choice in the matter. Nor can neglect on the Magistrate's part of such a duty be regarded as immaterial or a matter of no substance, to be lightly passed over. The superior Courts have no dispensing power.

Accordingly, it might be no answer to an application by a witness under arrest or in custody for a direction of the nature of a *habeas corpus*, that the provision requiring the Magistrate to record his reasons was merely directory. So, too, putting aside the Judicial Officers Protection Act (XVIII of 1850) such a plea might be of no avail to a Magistrate against whom a suit was brought for damages for unlawful arrest or false imprisonment.

On the other hand, if inadvertently or wilfully, the Magistrate omits to record his reasons, I am not prepared to say that the warrant in the hands of a Police Officer, though, on the face of it, a perfectly valid warrant, is wholly void, issued without jurisdiction, nothing more than a piece of waste paper, so that the Police Officer, if he attempts to execute it, may be resisted by force, possibly injured the more severely the more he tries to do what he thinks it his duty, and may in addition be amenable for trespass or assault and battery. If such were the law, the Police Officer, if anyone could be found to be a Police Officer, would no doubt have to make the best of it. But the consequences at least justify a doubt whether such is the law. And if the policy of the law be in question, we have not yet reached an age when the services of Police Officers are no longer requisite, and it is not in the public interest that men of self respect, common prudence, and common sense should be deterred from undertaking Police duties.

If the execution of the warrant might be lawfully resisted, not only if it turned out that the Magistrate had not recorded his reasons but also as Mr. Mukherjee suggested if it turned out that he had not recorded his reasons sufficiently, the consequences would be still more serious. Mr. Mukherjee was driven to make the suggestion to meet the point that the statement of the reasons in the warrant was a sufficient compliance with section 90. And if the record of the reasons is essential to the jurisdiction it is hardly possible to stop short of saying that jurisdiction also depends on the reasons being sufficiently recorded. Under such a construction of the law, resistance would be countenanced to an extent subversive of the power conferred on Magistrates to compel the attendance of recalcitrant witnesses. Recalcitrant witnesses would be encouraged to risk continuing in their recalcitrance and the position of Police Officers wolud be still more intolerable.

What I have said, as it appears to me, furnishes an answer to the argument founded on the observation of their Lordships in one of the concluding paragraphs of their judgment in the case of *Clarke* v. *Brojendra Kishore Roy* (8). There the respondent had brought a suit claiming damages for trespass on the allegation that Mr. Clarke, then District Magistrate of Mymensingh, had illegally searched his Cutchery. Under section 25 of the Indian Arms Act, 1878 a Maristrate "having first recorded the grounds of his belief" may cause a search

to be made of premises in which he believes that arms are stored for some unlawful purpose. Mr. Clarke had caused the plaintiff's butchery to be searched for arms by the Police in his presence and under his personal direction. Nothing incriminating had been found. At page 176* of the report their Lordships said "that they were disposed to agree with the majority of the Court of Appeal (in India) that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute." In saying that, their Lordships were dealing with a suit against the Magistrate and not with such a case as the present.

In order to determine whether section 90 is mandatory or directory for the purpose now material, the section must be read with the other provisions of the Code relating to warrants, including the form in Schedule V and the provision in section 555. To read section 90 does not, in my opinion, lead to the result for which Mr. Mukherjee in his very able and concise address contended.

The Code of Criminal Procedure confers powers on Courts (including Magistrates) for the purposes of the general administration of criminal justice. In connection with the exercise by Magistrates of their general jurisdiction, the Code, *inter alia*, confers powers on Magistrates to issue warrants of arrest and one of the classes of warrants are warrants for the arrest of witnesses which may be issued under section 90. As a safeguard, introduced, no doubt, for the protection of witnesses, the law requires that the Magistrate should record his reasons before exercising this particular power. The object may be to ensure due deliberation on the part of the Magistrate or the object may be to give the witness after his arrest the opportunity of acquainting himself with the Magistrate's reasons and possibly of removing the Magistrate's belief that he would not have attended in obedience to a summons. Possibly the Legislature had both these objects in view. But whatever the object of Legislature may be, and however important it may be that a Magistrate who desires to inspire confidence in his administration of justice should comply with the requirements of the Code and follow strictly the procedure therein indicated, in my opinion the omission of the Magistrate to record his reasons will not invalidate the warrant in the hands of the Police Officer.

I can find nothing in the Code inconsistent with the reasonable view or principle that when a Magistrate, having general jurisdiction over the subject-matter of the case pending before him, issues a warrant in a statutory form, as to which the Code itself provides that, if used, it shall be sufficient, the warrant is a valid warrant and neither the Police Officer to whom the warrant is delivered for execution nor the witness whose arrest is ordered, nor his friends are at liberty to treat it as invalid. At that stage it must be assumed that the Magistrate has done his duty.

The conclusion, therefore, at which I arrive is that where, as in this case, a warrant is issued in the statutory form the omission of the Magistrate to record his reasons (apart from the statement in the warrant) does not go to the Magistrate's jurisdiction to the extent of making the warrant null and void in the hands of the Police Officer or deprive him of the authority to execute it. I differ, therefore, with respect, from the learned Judges who decided the case of *Sukheswar Phukan* v. *Emperor* (2). Those learned Judges had not the benefit of any argument for the Crown or of the close examination to which the provisions of the Code have been subjected on the present occasion.

On the authority of Mayne (Criminal Law of India, 2nd Edition, pp. 439 and 440), I apprehend that the view I take is consistent with English Law on this topic. "It is sufficient," says the learned author, "if the process itself be legal in the frame of it, and issue in the ordinary course of justice from a Court of person having jurisdiction in the case." He continues, "No error or irregularity in the previous proceeding will affect it or excuse the party killing the officer in the execution of it from the guilt of murder." If, therefore, in the present case, the Police Officer had been killed in attempting to arrest the witness, it seems that under the English Law his assailants would have been guilty of murder and the attempt to arrest would not have been regarded as provocation

*Page of 30 I. A.—[Ed.]

reducing the crime to man-slaughter. Further on, the learned author adds, "So, although the cause be not expressed with sufficient particularity, the officer is justified if enough appear to show that the Magistrate had jurisdiction over the subject-matter. This must, however, be understood of a warrant containing all the essential requisites of one . . ."

The warrant before us fulfils the conditions thus laid down. It was issued in proper form, with all the requisites and marks of a valid warrant by a Magistrate having general jurisdiction over the subject-matter or the case which was pending before him.

An examination of the Code has led me to the view that resistance to such a warrant is unlawful and, in my opinion, that view is in accord with the interests of justice at large and of accused persons as well as complainants in criminal cases.

It may be said that if a Magistrate stops to record his reasons, he may not issue the warrant at all. But if a remedy be required for such neglect of duty on the part of Magistrates, it must be sought in other directions, for instance, in the provision of a penalty or in some amendment of the Judicial Officers Protection Act. The law, as I understand it, furnishes no excuse for resistance to the warrant.

The present case must, of course, be distinguished from cases where the warrant, on the face of it, is defective in form or where the Police Officer does not follow the procedure laid down for him. If the warrant is not signed and sealed in the prescribed manner or if the Police Officer does not notify the substance of it to the person to be arrested, obviously different considerations may arise.

In the course of the argument, mention was made of two cases in which their Lordships of the Privy Council held that words requiring reasons to be stated by the Court in connection with a step taken in the progress of a cause were not mandatory. In one of those cases their Lordships dealt with a provision in the Civil Procedure Code of 1859, corresponding with O. XLI, r. 33 (2) of the present Code: *Ganga Gobind Mundul* v. *Collector of 24-Pergunnahs* (17). The other case related to a provision in the Code of 1882, which has now been omitted: *Shankar Baksh* v. *Bulwant Singh* (9). In those cases, however, no question of the liberty of the subject was involved and there is a general agreement that the question whether a particular enactment is mandatory or directory depends little, if at all, on the form of the words but rather on the whole scope of the Statute to be construed: *Howard* v. *Bodington* (4). Craies' Statutory Law, 2nd Edition, p. 251. On the other hand, it seems to me that, generally speaking, a requirement that reasons should be recorded will rather be directory in its nature than mandatory. If the jurisdiction depends on reasons being recorded, it would seem, as already stated, that it must also depend on reasons being sufficiently recorded and probably it would not be the intention of the Legislature to make a requirement as to which so much doubt might arise, a condition precedent to the exercise of the jurisdiction.

Some reference was made to the observation of Brett, L. J., in *Dale's case* (11). With great deference, the actual decision in that case seems to me to have carried the law to an extreme point, but, so far as I may, I will adopt for the present purpose every word which the learned Lord Justice uses in the passage referred to and will only add that he was not dealing with resistance to a warrant in proper form issued by a Court having jurisdiction over the subject-matter and delivered to a Police Officer to execute.

Before concluding, I desire to say that I agree with the learned Judges who made this Reference that the question at issue is not in any view of it governed by section 99 of the Penal Code. If the warrant was an invalid warrant issued without jurisdiction, the act of the Police Officer in attempting to make the arrest cannot properly be described as "an act not strictly justifiable by law." It was a wholly unauthorised act. On the other hand, if in the hands of the Police Officer the

(17) 11 M. I. A. 345 at p. 368; 7 W. R. P. C. 21; 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 864; 20 E. R. 131.

warrant was a valid warrant, there is no occasion for recourse to section 99.

Similarly, as regards the second clause of section 141 of the Penal Code, if the view I take is right, the warrant was a " legal process " within the meaning of that clause.

With these observations, I concur in the answer to the question referred, proposed by the learned Chief Justice.

Buckland, J.—I agree that the question referred should be answered in the affirmative for the reasons given in the judgments of my learned brethern in support of that conclusion, in addition to those which I have already expressed.

Panton, J.—I agree with my Lord the Chief Justice.

K. S. D. *Acquittal set aside. Case remanded.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 74 OF 1922.

December 15, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Chotzner.

EMPEROR—PROSECUTOR

versus

NRITYA GOPAL ROY AND OTHERS —ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Judge disagreeing with Jury—Reference —High Court, when may interfere.

The High Court will interfere on a reference under section 307 of the Criminal Procedure Code only when it is satisfied that the verdict of the Jury is so manifestly wrong that it ought to be set aside. [p. 147, col. 2.]

Queen v. *Sham Bagdi*, 13 B. L. R. App. 191 20 W. R. Cr. 73, *Emperor* v. *Surnamoyee Biswas*, 21 Ind. Cas. 900; 41 C. 621; 4 Cr. L. J. 660, followed.

Criminal Reference by the Sessions Judge, Hooghly.

Babu *Manmatha Nath Mukherjee*, (with him Babus *Narendra Krishna Bose* and *Amullyadhan Mukherjee*), for the Accused.

Babu *Sures Chandra Taluqdar*, for the Complainant.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is a Reference under the provisions of section 307 of the Criminal Procedure Code by the learned Sessions Judge of Hooghly with reference to the case of ten accused persons, now before us, who, along with eight others, were tried before a Jury. With regard to the latter, the verdict of the Jury has been accepted by the learned Sessions Judge. The accused persons were tried on charges under sections 147, 304, read with sections 149, 325, read with section 34, and section 148 of the Indian Penal Code. The learned Sessions Judge, disagreed with the verdict of the Jury with reference to the ten accused persons before us and has, under the provisions of section 307, referred the case of the ten accused persons to this Court for its orders.

The facts have been very fully and exhaustively set out in the learned Sessions Judge's charge to the Jury, and also in the Letter of Reference to this Court, and, therefore, it will not be necessary for us to repeat the same in detail. Briefly stated, it appears that there is a person of the name of Nritya Gopal Roy in village Sachanari in the District of Hooghly, and within the jurisdiction of the Arambagh Police Station. He is apparently a person of considerable wealth and influence in the village but he is given to dissolute habits, and it is stated that, some time before the date of the occurrence, he brought a prostitute of the name of Kallidasi to the village and housed her near the houses of respectable villagers. These latter remonstrated with Nritya Gopal and, for sometime past, there has been considerable tension of feeling between Nritya Gopal and his adherents on the one side and the people who were opposed to him in the village. Proceedings under section 107 of the Code of Criminal Procedure was started by both parties against their respective adversaries and there has been, as stated above, considerable friction between the two parties owing to this and other reasons. It is alleged that on the 1st *Baisak* last, corrsponding to 14th April 1922, Nritya Gopal, accompanied by his some of his adherents, came to the house of one of his opponents named Surendra Sarkar. There a person of the name of Safulla Thakur, who was a Brahmin by caste, was sitting at that time in the *baitakkhana* of his master and Bhikkabhai Surendra Sarkar. Nritya Gopal with two of the accused, Rakhal and Nogen came and began to taunt Safulla. Safulla

EMPEROR v. NRITYA GOPAL ROY.

remonstrated with the party but to no effect and thereupon, it is alleged, Nritya Gopal gave orders to his men to attack Safulla. It is alleged that under the orders of Nritya Gopal, accused No. 7, Narode Adak gave Safulla a *lathi* blow. Safulla was severely wounded and was carried to a sugarcane field where he was further struck several times by means of *lathis* at the instance of Nritya Gopal and some of his adherents. Meanwhile, two of the servants of Surendra Sarkar, named Nibaran Bagdi and Sarada Bagdi, who were sitting in the *baitakkhana* of Surendra when Safulla was attacked, came to the rescue of Safulla. Their intrusion was resented by Nritya Gopal's men and the accused Rakhal, it is alleged, speared Nibaran in the abdomen and the accused Nogen Adak speared Sarada. At or about this time the assault on Safulla had proceeded so far that he lost his consciousness, and thereafter, it is alleged, Safulla was carried to Nritya Gopal's house. Safulla's clothes had been smeared with blood and it was thought necessary that his clothes should be changed. This was accordingly done in Nritya Gopal's house. He was thereafter taken to the house of the accused Rakhal where he was kept for some considerable time. Afterwards, he was carried to the house of certain persons who have been described in this reference as "Tellies" and at this last place one of the "Tellies," a person of the name of Subodh Dey, was severely assaulted by the rioters. Safulla thereafter was carried to the *sadar* door of Surendra Sarkar and was left there. The two persons who had been struck by means of spears Nibaran and Sarada, died shortly after. As regards Safulla, he recovered after lapse of a considerable time from the effects of the wounds which had been inflicted on him. News of this assault was taken to the Police Station which is at a distance of 12 miles from the scene of the occurrence, by one of the Tellies, namely, a person called Kamikha Dey. He apparently was not, at the time when he started for the Police Station, fully acquainted with all that had happened. His information has been commented upon as not being exhaustive and sufficiently full of the incidents spoken to later on, by the prosecution witnesses. Investigation was commenced by the Police Officers on the following day. Nibaran and Sarada died shortly thereafter. During the course of the Police investigation it was found that the accused persons, and other persons belonging to their camp, had all left the village and the Police Officers had considerable difficulty in tracing them out and in collecting information as regards the occurrence. The evidence as against the accused persons has been divided by the learned Sessions Judge in his charge to the Jury, and also in his Letter of Reference to this Court, under four heads—the first head being the assault on Safulla at the house of Surendra Sarkar, the second part of the case being concerned with the incidents which had happened when Safulla was carried to the sugarcane field and thence to the house of Nritya Gopal and thence to the house of Rakhal. The third part of the case related to the incidents which took place at the house of the Tellies, and the fourth part of the case related to the incidents which took place when Safulla was carried to the *sadar* door of his master.

With reference to the first part of the case there are two witnesses who speak to it, namely, Safulla and the witness Brojonath. With reference to the second part of the case, not less than seven witnesses speak to the same but with reference to the first two of the seven witnesses who speak to the second part of the case the learned Judge has very fairly put before the Jury and also in the Letter of Reference, circumstances indicating, in his opinion, that these two witnesses, namely Chandy Charan De and Babu Ram De, were not witnesses on whose testimony implicit reliance could be placed. He has, however, discussed fully the evidence of the five remaining witnesses.

With reference to the third part of the case, there are two witnesses, namely, Subodh Charan Dey, being the person who was beaten at the house of the Tellies, and Chandy Charan De, one of the witnesses whose testimony has not been accepted by the learned Judge.

As regards the fourth part of the case, there is the evidence of Safulla who had regained his conciousness by the time when he was taken from the house of

Rakhal to the *saldar* door of Surendra Sarkar, in addition to the evidence of the witness No. 23 Jogendra Dutty and the witness Radhi Bagdi, who is described as one of the mistresses of Nritya. The learned Sessions Judge has in his charge to the Jury, as well as in his Letter of Reference to this Court, pointed out certain circumstances which in his opinion went to show that the defence theory which was to be gathered from the cross-examination is one which cannot be believed. There is, in our opinion, considerable force in what the learned Judge has said with reference to the unreliability of the case set up by the defence in the Court below. We have examined such portions of the evidence as were relied upon by the accused in the Court below as proving their innocence in this case with some degree of care and we have also listened with attention to what has been urged by Mr. Mukherjee in support of the theory that the case of the prosecution is one which cannot be relied upon. Now in this case nearly all the witnesses of the prosecution were partisan witnesses. This is a fact which has no doubt been referred to in the learned Sessions Judge's charge to the Jury, and also in his Letter of Reference to this Court. For sometime past, criminal proceedings were pending between the parties, some of which were started by one faction and some by the other faction. Mr. Mukherjee has dwelt upon this fact for the purpose of showing that the Jury were entitled to take into consideration the nature of the case for the prosecution and the character of the witnesses. In other words the Jury were entitled to consider whether there was sufficient motive on the part of the witnesses for prosecution to so depose as to bring home to the accused their guilt in this case. Mr. Mukherjee has also called our attention to the fact that, not only did the Jury bring in a unanimous verdict of not guilty with reference to the eighteen persons, but that with reference to eight of such persons the verdict of the Jury has been accepted by the learned Sessions Judge indicating thereby that, at any rate, the evidence with reference to the eight accused persons as regards whom the verdict of the Jury has been accepted by the learned Sessions Judge was, in the opinion of the learned Judge, not of such a nature that it could be relied upon. Mr. Mukherjee has further argued that if the learned Judge was of opinion that with reference to the eight accused the prosecution evidence could not be safely acted upon, there is considerable room for the contention that with reference to the remaining ten accused persons the same standard of judgment should be applied to the evidence as regards them. In other words, it is urged that it is not enough to show that this Court, if it had tried the case as a Court of original jurisdiction, would upon the evidence on the record come to a conclusion other than the conclusion at which the Jury have come but that it must be shown by this Court before it sets aside the verdict of the Jury on a reference under section 307 of the Code of Criminal Procedure that the verdict of the Jury with reference to the ten persons whose case has been referred to this Court is so manifestly wrong that it must be set aside by this Court. We have come to the conclusion on consideration of the whole case that the defence theory is one which cannot be accepted, but our duties under section 307 do not end by merely finding that the defence story is one which cannot be accepted. We have to find out for ourselves whether on the evidence such as appears on the record it was possible for the Jury to take the view which they have taken in this case with reference to the ten accused persons whose case has been referred to us. Putting it briefly, it amounts to this, namely, whether the Jury were entitled to discount the evidence which had been given by the prosecution witnesses because of the fact that the witnesses who have come and deposed on the side of the prosecution are witnesses who are admittedly adherents of a party opposed to that of the accused. In the second place, the fact that nearly all the witnesses had been at sometime or other, concerned in criminal cases either started by them or started against them is a circumstance so important that the Jury can hardly be blamed if they took that into their consideration and came to the conclusion that the evidence on the side of the prosecution was one which

they could not accept. In the third place, if the evidence with reference to the eight accused could not be relied upon, could it be said with certainty and safety that the evidence, with reference to the ten accused, given by the same persons who spoke to the culpability of the eight accused with reference to whom the learned Sessions Judge has accepted the verdict of the Jury, is of such a character after making all allownaces as regards the partisan character of the witnesses and the motive of the witnesses, as to induce us to hold affirmatively that the verdict of the Jury in this case with reference to the ten accused whose cases are now before us, is manifestly wrong? On a very careful and anxious consideration of the case, we have come to the conclusion that we could not say that that evidence is of such a character that the verdict of the Jury is manifestly wrong. There can be no doubt whatsoever that an occurrence such as has been described above did take place. But these are not circumstances which would entitle us to hold on consideration of the evidence on the record that the prosecution evidence must necessarily be believed. We have come to the conclusion that we cannot accept this Reference and that the accused persons must be discharged.

Our attention has been drawn by Mr. Mukherjee to a series of cases decided under the provisions of section 307 of the Code of Criminal Procedure, laying down principles which ought to guide this Court when it is called upon to exercise its powers under section 307. The case which has always been referred to in this connection is the well known case of *Queen* v. *Sham Bagdi* (1), if we respectfully may, we endorse and emphasise what has been laid down in that case and also the principles laid down in the case of *Emperor* v. *Surnamoyee Biswas* (2).

The bail bonds of the accused are discharged.

K. S. D. & W. C. A.

Accused discharged.

(1) 13 B. L. R. App. 19; 20 W. R. Cr. 73.
(2) 21 Ind. Cas. 900; 41 C. 621; 14 Cr. L. J. 660.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 1 OF 1923.

March 19, 1923.

Present:—Mr. Justice Rafique.

PEARY LAL AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Order directing prosecution based on inadmissible evidence, legality of—Discretion of Court, exercise of.

An order under section 476 of the Criminal Procedure Code directing the prosecution of a person for forgery should not be made on the basis of a piece of evidence which is inadmissible and which cannot be legally regarded as evidence at all, especially when there is positive legal evidence against it. [p. 149, col. 2.]

The power conferrd by section 476 of the Criminal Procedure Code on Courts should be exercised with great caution and care and with due regard to the evidence on which the order is sought to be based. [p. 150, col. 1.]

Civil revision against an order of the District Judge, Meerut, dated the 21st of December 1922.

Mr. *C. Ross Alston*, for the Appellants.

Messrs. *G. P. Boys* and *L. M. Banerjee*, for the Respondent.

JUDGMENT.—This is an application in revision from an order passed by the learned District Judge of Meerut, under section 476 of the Code of Criminal Procedure, directing the prosecution of the three applicants on the charge of perjury. It appears that one Rohtagi Mal died on the 15th April 1922 possessed of considerable moveable and immoveable property. On the 19th April 1922 an application under Act XIX of 1841 was made by the opposite party to the Court of the District Judge for the making of an inventory of the effects of the deceased and the appointment of a Curator. It was stated in the application that the three applicants before this Court were servants of the deceased and were unlawfully in possession of the effects of the deceased and there was danger of the waste and the disappearance of the said effect. On the application under Act XIX of 1841 the learned District Judge passed an order appointing the Nazir of his Court to go to the house of the deceased and make an inventory. During the making of the inventory a box containing documents purporting to belong to the

deceased was produced before the N zir and a paper purporting to be the last Will and testament of Rohtagi Mal was discovered dated the 5th March 1921. During the pendency of the application under Act XIX of 1841 Peary Lal, Bashi Lal and Kanhaiya Lal who are the applicants before this Court went to the Revenue Court and asked for mutation of names in their favour. The opposite party resisted the application for mutation but the Revenue Court allowed the mutation of names to be effected in favour of Peary Lal and two others. The application under Act XIX of 1841 was made before Mr. Collister. Before the disposal of that application Mr. Collister was transferred and Mr. Neave succeeded him. Before passing final orders on the application Mr. Neave made an order on the 21st December 1922 directing the prosecution of Peary Lal, Bashi Lal and Kanhaiya Lal on the charge of forgery under section 471, Indian Penal Code. The next day *i.e.*, 22nd November 1922, the application of the opposite party for making an inventory of the goods of the deceased and the appointment of a Curator was rejected by the learned District Judge. The applicants before this Court whose prosecution has been directed challenge the order against them on the ground that it is illegal or at least tainted with material irregularity. For the opposite party the contention is that there is no illegality or material irregularity in the order of the learned District Judge dated the 21st December 1922, and, therefore, the present application is not maintainable.

I have examined the record and carefully studied the order of the learned District Judge which forms the subject of the present application for revision. I am of opinion that the order is illegal for the reasons to be mentioned presently. The application is, therefore, entertainable under section 115 of the Code of Civil Procedure. The order of 21st November 1922 is based upon the evidence of Sagar Mal and on the report of one Mr. Brewster who is said to be an expert attached to the Government of India for the examination of handwritings. The learned District Judge says in his order that Sagar Mal has deposed that he never attested the Will of Rohtagi Mal. On a reference to the statement of Sagar Mal I find that in his cross-examination he distinctly stated that he had attested the Will of Rohtagi Mal. The only basis of the order under revision is, therefore, the report of Mr. Brewster. It is contended on behalf of the applicants that the report of Mr. Brewster who never came into the witness-box and whose report is not supported even by an affidavit is inadmissible in evidence and should not have formed the basis of the order of the learned District Judge directing the prosecution of the applicants on such a serious charge as that of forgery. On the other hand, the contention of the learned Counsel for the opposite party is that, in a proceeding under section 476 of the Code of Criminal Procedure, a Judge or a Magistrate is not bound to base his sanction for the prosecution for an offence under the Indian Penal Code brought to his notice on evidence admissible according to law. The jurisdiction of the Judge or the Magistrate is unfettered and he can take into consideration the evidence which, strictly speaking, would not be admissible under the law. A reference in connection with this argument is made to paragraph 596 of the Commentary of the Code of Criminal Procedure, edited by a learned Counsel of this Court, namely, Mr. G. P. Boys. I have read the paragraph with great interest and I find that the opinion is advanced there that a Presiding Officer of a Court under section 476 of the Code of Criminal Procedure is entitled to base his sanction on evidence which is not strictly admissible according to law. It may be that if sanction is granted on the basis of some evidence which is admissible under the law and other evidence which, strictly speaking, may not be admissible under the law the contention for the opposite party may perhaps be valid. But where a sanction is given on a piece of evidence that can in no circumstances be called legal evidence and especially when, as in the present case, there is positive legal evidence against it, I mean that of Sagar Mal, I am strongly of opinion that such a sanction should never have been granted and should not be upheld by this Court. The direction to prosecute a person on a charge of forgery is a very serious matter to the person concerned. It is true that if he is innocent he will get off but he has

a right to say that before he is sent to take his trial on such a serious charge as that of forgery the Presiding Officer who grants the sanction should have something before him which according to law can be described as evidence. In the present case not only is the report of Mr. Brewster to the District Judge inadmissible but there is positive legal evidence that contradicts it. Moreover, I find that the learned Judge was not himself sure whether the Will produced before him was genuine or not. All that he says in his order is that the Will in question is probably a forgery and it appears likely that an offence has been committed under section 471, Indian Penal Code, by the three applicants. If the contention for the opposite party is correct that the law of this country gives a very wide discretion and power to Presiding Officers to grant sanction under section 476, Criminal Procedure Code, there is much more the reason that that power should be exercised with great caution and care and with due regard to the evidence upon which the sanction is based. I pronounce no opinion as to the character of the Will in question. It may be genuine or it may not be genuine but I am of opinion that the sanction granted against the three applicants for their prosecution under section 471, Indian Penal Code, cannot be sustained for a moment. I, therefore, allow the application and cancel the order directing the prosecution of the three applicants on the charge of forgery under section 471, Indian Penal Code. The bail-bond taken from the applicants will be discharged.

Z. K. *Application allowed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 259 OF 1923.
April 24, 1923.
Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.
DWIGENDRA NARAIN BAGCHI—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 205—Permission to accused to appear by Pleader revoked—Power of Magistrate—Discretion, how to be exercised.

The power conferred on a Magistrate under section 205 of the Criminal Procedure Code of exempting a person from personal appearance is discretionary, and where a Magistrate, in exercise of this discretion, permits a person to appear by a Pleader, the concession so extended ought not to be revoked. [p. 151, col. 2.]

Criminal revision against an order of the Sub-Divisional Magistrate, Meherpur, dated the 28th February 1923.

Babus *Dasarathi Sanyal, Amarendra Nath Bose, Hiralal Chukerbutti, Lalit Mohun Sanyal* and *Jotl Nath Ghose*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.—This is a Rule calling upon the District Magistrate of Nadia to show cause why the proceedings instituted against the petitioner under the provisions of the Income Tax Act, 1922, should not be quashed on the ground that the said proceedings had not been instituted under proper sanction, as the District Magistrate and Collector is not the Assistant Commissioner of Income Tax in respect of assessment of incomes exceeding Rs. 20,000 and, secondly, why the order of the Trying Magistrate dated the 28th February 1923 revoking the concession of appearing by a Pleader under section 205 of the Code of Criminal Procedure should not be set aside.

As regards the first ground, Mr. Dasarathi Sanyal, who appears on behalf of the petitioners, states that he does not wish to press the same. The Rule will, therefore stand discharged so far as the first ground is concerned.

As regards the second ground, the

facts are as follows :—The petitioner before us was served with a notice on the 12th December 1922, by the Sub-Divisional Officer of Meherpur, in his capacity as an Income Tax Officer, requiring the petitioner to submit a return of his income within seven days. The petitioner, it appears, thereupon raised a question as to whether his separate income should or should not be included in the total income of the undivided joint Hindu family of which he was a member. Certain correspondence ensued between the petitioner and the said Sub-Divisional Officer in his capacity as an Income Tax Officer and, eventually, on the 11th February 1923, the Sub-Divisional Officer applied to the District Magistrate in the latter's capacity as an Assistant Commissioner of Income Tax for sanction to prosecute the petitioner under section 51 (*c*) of the Income Tax Act, for having failed without reasonable cause or excuse to furnish in due time a return which had been called for from him under section 22 of the Act.

The District Magistrate of Nadia granted sanction for prosecution of the petitioner on the 15th February 1923. On the 16th February 1923, the Sub-Divisional Officer in his capacity as an Income Tax Officer purported to make a report to himself as the Sub-Divisional Magistrate, with a request for issue of a process against the petitioner and on the same date the Sub-Divisional Officer took cognizance of the case and summoned the petitioner to appear before him on the 26th February 1923; on the 27th February 1923 the petitioner appeared before the Sub-Divisional Officer through a Pleader and prayed for exemption from personal attendance and for permission to appear through a Pleader. This prayer was granted by the Sub-Divisional Officer and on the case being put up before him on the 28th February 1923, the Sub-Divisional Officer took the statement of the Pleader, wherein it was stated that the petitioner was not legally bound to submit a return and that the learned Sub-Divisional Officer had no jurisdiction to try the petitioner. Thereupon the Sub-Divisional Officer recorded the following order in the order-sheet :—"He (the petitioner) further objects to trial by me. I have no objection to give the accused option to have the case tried elsewhere, but I am afraid his attitude shows that he is bent on delaying the ends of justice anyhow. I cannot quash the proceedings at this stage on the objection taken by the accused without entering into the merits of the case. Before, however, writing up to the District Magistrate for transfer of the case from my file, I must enforce the attendance of the accused, so I revoke the concession granted under section 205 (2) of the Code of Criminal Procedure and order the issue of warrant against him with bail of Rs. 200; fixed 6th March 1923."

This order of the Sub-Divisional Officer is challenged by the petitioner on the ground that the discretion vested in the Sub-Divisional Officer under section 205 of the Code of Criminal Procedure was exercised wrongly and unfairly, having regard to the facts appearing on the record. We have gone through the record and while we are reluctant to say anything which may have the effect of limiting the discretion given to Magistrates under section 205 of the Code of Criminal Procedure, we think, in the circumstances of this particular case, the Sub-Divisional Officer would have been well advised if he had not revoked the concession which he had previously extended to the petitioner of allowing him to appear by a Pleader. We think it was wholly unnecessary to order the issue of a warrant against the petitioner and in that view of the matter we must set aside the order of the Sub-Divisional Officer, requiring the personal attendance of the accused before him.

We gather from the record that the case against the petitioner will come on for trial before a Magistrate other than the Sub-Divisional Officer. We desire to observe that the order that we have just made will not be understood to limit in any way the discretion vested, under section 205 of the Code of Criminal Procedure in the Magistrate before whom the case will eventually come on for trial.

The Rule, therefore, is made absolute in the manner indicated above on the second ground.

E. S. D. & W. C. A. *Rule made absolute.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 157 OF 1923.
September 12, 1923.
Present:—Mr. Pipon, J. C.
MOTI RAM—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Confession—Retracted confession, value of—Particulars necessary to be established—Shy witness, statement of, whether can be transferred to Sessions record—Evidence Act (I of 1872), s. 154.

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent carroborative evidence. [p. 153, col. 2.]

A Court must not regard the confession of an accused person in the same light as an admission made by parties in civil litigation. [p. 154, col. 1.]

What has to be seen in the case of a confession is (1) whether the same was made voluntarily, *i.e.*, whether the disqualifying conditions given in section 24 of the Evidence Act were absent, and (2) whether, if so, the confession is true as tested by the circumstances in which it was made, its internal evidence of truth and its consistency with other evidence. It cannot be laid down that independent evidence in the sense of evidence corroborating the details of the crime itself is obligatory. [p. 154, col. 1.]

A statement of a witness made before the Committing Magistrate cannot be transferred to the Sessions Record simply on the ground that the witness was "shy and speechless." [p. 155, col. 1.]

Section 154 of the Evidence Act gives a very wide discretion to the Courts and the proper course in such a case is to give permission to the prosecution to ask the witness a leading question and then to read out the evidence before the Comitting Magistrate and so obtain an admission or a denial of its truth. [p. 155, col. 2.]

Appeal from an order of conviction recorded by the Sessions Judge, Derajat, dated the 29th of August 1923.

Mr. *Saaduddin Khan*, K. B., for the Appellant.

Mehta *Mangal Sain*, for the Crown.

JUDGMENT.—The appellant Moti Ram, aged about 25, of D. I. Khan City, has been convicted of the murder of his wife, *Musammat* Gelibai, aged about 22, and has been sentenced to death subject to the confirmation of this Court.

The deceased woman was killed, at some time which cannot be exactly ascertained, on the 1st of December 1921. At the time the marriage festivities of the son of the accused's brother Bansi Ram were in progress in the house of the latter. The bride was a resident of the distant village of Chaudhwan in the Kulachi Tahsil, and the marriage procession was to proceed there in the evening. The accused Moti Ram and his wife had three small children, a daughter, *Musammat* Totibai, aged about 6, and two sons, one of about 3 years old and one of 4 or 5 months. Some relatives of the deceased woman heard the infant crying in Moti Ram's house and found the outer door locked on the outside. They could get no answer and had the door broken open. In the house they discovered the dead body of *Musammat* Gelibai lying in a pool of blood. The body was covered with the most appalling wounds. There appear to have been no less than 28 injuries, all of a horrible description.

There were 8 wounds on the front of the body; one penetrated the liver, another the stomach, and another the lung. There were 6 wounds on the back, one of which had penetrated into the abdomen. There were 9 wounds on the right arm and 5 on the left. The face was cut all over. There was a wound on the neck which cut the larynx and appeared to have been caused by no less than seven slashes. The virgina had a lacerated wound which extended to the buttock and penetrated the rectum. This appears to have been caused after death. A rope had also been tied tightly round the neck partly inside the wound. The medical witness thought that this was probably tied after death.

A report was made at the Police Station at 7 P. M. the same evening by Hukam Chand, brother of the accused Moti Ram. In this report, which has now been proved in evidence, Hukam Chand gave no motive for the murder and denied any personal knowledge of the circumstances. He simply stated that he heard from people that it was Moti Ram who had killed his wife. The Police investigated the case, but Moti Ram was not to be found. A record of evidence was made under section 512, Criminal Procedure Code Nothing was heard of Moti Ram for nearly a year and a half. At 9 A. M. on the 29th of May 1923 he walked into the D. I. Khan Police Station and gave

himself up. At 10 P. M. the same evening he made a full confession before a First Class Magistrate which has been proved in evidence by the latter. In Court, however, he retracted this confession and said that it had been extorted from him by pressure from the Police, and that he was intoxicated at the time when it was made. The story told by the accused in this confession was as follows. Moti Ram on the day in question was preparing to join the marriage procession of his nephew which was destined for Chaudhwan. He changed his clothes and began to pump up his bicycle. He had a lot of piece goods in his house and told his wife, *Musammat* Gelibai, that she must remain in the house at night with the children. His wife protested and said that she was afraid to be left alone and wanted to go to her parents' house. The accused replied that, as she had the children with her and as there were other residents in the street, there was nothing to fear. The accused, owing to the marriage festivities, was drunk at the time and was enraged by the constant refusal of his wife to accede to his wishes. He took a knife out of his pocket and stabbed her in the stomach. He stabbed her a second time in the stomach, and she fell down. He then lost all control of himself and cannot say how many wounds he inflicted. After the woman was dead he locked the outer door of the house and went away. He hired a vehicle and drove to Darya Khan Railway Station and proceeded to Sukkur. He then described his various wanderings up to the time of his re-appearance. Eventually he said that he learnt that two of his children had died and also that debts had accumulated against him. He concluded "now my property may be sold up and my creditors paid off, and I may be hanged." He mentioned also that he had left the broken knife in his house. This, as a matter of fact, was not discovered there.

In retracting this confession the accused said that he had returned because he was hardly pressed by his creditors, but that he knew that he was charged. For this reason he went direct to the Police Station, as he knew that if he went to his friends, he would get them into trouble. He protested that, if he had been guilty of the murder, he never would have given himself up and, as described above, he declared that he had been forced by the Police to make the confession, and that he was drunk when it was made.

The case for the accused has been ably argued on this appeal. His Counsel contends that there is no other evidence against the accused upon the record except the retracted confession; that this confession lacks the essential condition of being corroborated by independent evidence; that it contains improbabilities; and that it was made under pressure.

The law regarding the attitude which Courts should adopt towards a retracted confession is not really in doubt. Some early rulings of the Madras High Court laid down a somewhat inelastic rule that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. That Court, however, has since followed other High Courts in holding that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. As remarked by the learned Commentators, Woodroffe and Amir Ali upon the Law of Evidence in British India, "The weight to be given to such a confession must depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted, including the reasons given by the prisoner for his retraction. The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned, upon such belief. The use to be made of such a confession is a matter of prudence rather than of law." It is quite clear indeed that there is no statutory bar to the conviction of an accused person upon a retracted confession, but the reason for caution in this respect is

obvious. The principle has to be emphasized that a Court must not regard the confession of an accused person in the same light as an admission made by parties in civil litigation. In the latter, an admission made by a party to the suit absolves the Court from further necessity of testing its truth. A criminal trial, on the other hand, is not a contest of pleadings between opposing parties, and a Criminal Court cannot escape from the obligation to ascertain the actual facts. The necessity of treating a confession with caution is due to the known fact that innocent persons will occasionally accuse themselves of a crime either under pressure, or purely for the sake of notoriety. The latter feature is probably not common in India, but has been proved to exist in England. Now, a retracted confession may be validly impugned on the ground that the very fact of its retraction shows (1) that it was not made voluntarily, (2) that it is not true. But the exclusion of an involuntary or extorted confession does not only rest upon an inference of its untruth. It may be inadmissible even if true. The exclusion of such a confession may conflict with the Court's duty of ascertaining the truth, but this is simply because considerations of general public policy are more important than the obligation to ascertain the facts of a particular case. The Legislature has disallowed the extortion of confessions in any circumstances even from guilty persons. What has to be seen, therefore, is (1) whether the confession was made voluntarily, *i. e.*, whether the disqualifying conditions given in section 24 of the Evidence Act are absent, and (2) whether, if so, the confession is true, as tested by the circumstances in which it was made, its internal evidence of truth, and its consistency with other evidence. It cannot be laid down that independent evidence, in the sense of evidence corroborating the details of the crime itself, is obligatory. In other words, we have the simple and self evident proposition that the Court must satisfy itself of the truth of the confession and not merely accept it because it has been actually made.

The first question to be decided, therefore, is whether the confession was made voluntarily. A presumption of its voluntariness arises under section 80 of the Evidence Act from the Official Record made by the Magistrate. The Magistrate had entered the following note at the conclusion of his proceedings:—"The accused was separated from the Police. He was unfettered and fear of the Police was removed from his mind. He was made to understand all the good and bad features of his confession in every respect, and subsequently the confession was recorded." As against this, the learned Counsel for the appellant points out that the accused was in Police custody for about 13 hours before the confession was recorded, that there was no reason for this delay except the theory of pressure, and that an inference must be drawn from the fact that the confession was recorded in the Magistrate's own house at 10 o'clock at night. It would appear that a large crowd of persons had collected on hearing of the accused's surrender, and that the Police did not wish to allow communication with him. I do not think that this can be called an unjustifiable proceeding. That the accused was drunk at the time is highly unlikely, especially after he had been in Police custody for so many hours, and there is nothing in the confession itself which warrants such an assumption. The Magistrate who recorded the confession is an experienced First Class Magistrate who has given very definite evidence in Court on the subject. He states that he warned the accused that the statement would be used in evidence against him, and that the accused said he was making the statement willingly, and should be punished as he had committed the crime. He also verified the fact that the handcuffs of the accused were removed and the Police sent away when the confession was made. It is quite clear that the Magistrate took every possible precaution to satisfy himself that the confession was perfectly voluntary. It is, again, argued that a man would not give himself up to the certainty of conviction, and the

learned Counsel objects to the Sessions Judge having used the word "surrender" and thereby prejudging the issue as to whether the accused, on arrival at the Police Station, intended to confess. It is also pointed out that the accused had other motives for returning home, namely, the fact that his property was being sold up by his creditors. As against these arguments, I must agree with the Public Prosecutor's contention that there are innumerable precedents for a guilty man surrendering himself even with the certainty of conviction. Both the two young sons of the accused died during his absence, and the accused could hardly escape from the horror of realizing that he had lost all that made life worth living. I can see nothing in the least improbable in his having found life insupportable when tortured by remorse and by family and financial troubles. In fact this is exactly the attitude to be inferred from the concluding words of his confession described above. I must hold on this point that the confession was made voluntarily and without pressure, and that its subsequent retraction does not weaken it in this respect.

The argument for the appellant continues that there is not the least valid evidence on the record to support the confession and that it stands alone. I have already dealt with the proper method of dealing with a confession in this respect. The learned Counsel contends that such evidence as has weighed with the Sessions Judge, as corroborating evidence, is inadmissible in evidence. For instance, the accused's daughter, *Musammat* Totibai aged, about 7 was described by the learned Sessions Judge as "shy and speechless" and in consequence he has simply transferred to the Sessions Record the statement which she has made before the Committing Magistrate. It is argued that section 33 of the Evidence Act only covers cases where a witness is dead, cannot be found, has become incapable of giving evidence, or cannot be summoned without undue expense, delay and inconvenience. It does not, he contends, cover the case of a witness who is too shy to speak. No doubt this objection is at least partly justified. The proper course would no doubt have been to give permission to the prosecution under section 154 of the Evidence Act to ask the witness a leading question and then to have read out the evidence of the witness given before the Committing Magistrate and to have obtained an admission or a denial of its truth. A very wide discretion is given to Courts by section 154, and this discretion arises primarily from the possibility of a witness being hostile to the party producing him. As the record at present stands, however, the evidence of *Musammat* Totibai must be ruled out. The learned Counsel then objects to the treatment in the Sessions Court of the evidence of two other witnesses, *Musammat* Hondibai and *Musammat* Tikaibai. They were examined by the Police in the original investigation, but their statements were not recorded by a Magistrate under section 512, Criminal Procedure Code. It is argued that statements made by them to the Police have not been merely used to test their veracity, but have been substituted for statements made in Court. I hardly think that it can be said that their statements have been substituted, but the objection is to this extent reasonable that we have really no right to read anything into their present statements which those statements do not contain, and that the most that can be said in respect of any discrepancies which have come to light, is that these two women possibly wished to screen the accused rather than to give evidence which might tell against him. I do not myself think that their evidence is, in any case, of any great importance. The learned Counsel lays great stress upon the fact that the Sessions Judge has remarked in his judgment that "it was incumbent that evidence should be placed before the Court showing that *Musammat* Gelibai was seen at or about a certain hour; that subsequent to that she was never seen alive, and that no one but the accused had access to her." It is contended that the Sessions Judge has overlooked the fact that it was exactly this evidence which is absent in the

present trial. The view taken in this argument, however, of the remark made by the Sessions Judge is not correct. The learned Judge was not referring to the present trial, but was giving the history of the proceedings taken before the accused's arrest. As I read the judgment, what he intended to lay stress upon was that, in the absence of the accused and of any confession, the Police inquiry was directed primarily to establish the facts mentioned above, and that it was for this reason that certain witnesses were examined at the time. It may be conceded that, if it were not for the accused's own confession, the evidence against him would be meagre but I am entirely unable to accept the contention that there is no corroborative evidence upon the record. A most important point to be established is that the accused was present in the City when the murder was committed, and that he disappeared immediately afterwards. If he was present at the time, the inference to be drawn from his disappearance and absence for a year and a half is particularly strong. We have the evidence of *Musammat* Ramalbai clrealy showing that the accused was present in the city when the marriage festivities were taking place. She says now that she saw him leaving with the marriage procession, and it is argued for the accused that this must imply that he did not leave immediately after the crime. It clearly confirms the fact, however, that he was present in the city. We have, again, the evidence of *Musammat* Ganeshibai, sister of the deceased, to the effect that the accused had said he would take his wife to a "Jhandi" meeting. This is evidence that he was present at the time. We then have the report made to the Police by his brother Hukam Chand. That report is no direct evidence that the accused committed the crime, but it is inconsistent with the theory that he was not present in the City at the time. There is then in corroboration of the confession the fact that although a year and a half has elapsed since the crime, it has never yet been suggested that any other person was responsible for it. It is almost impossible to conceive that, if the statements made by the accused in his confession are entirely untrue, some other explanation of the murder would not have come to light. We then have one piece of evidence which entirely corroborates a detail of the accused's confession. He said that after committing the murder, he locked the outside door of his house. We know from evidence on the present record that the door was actually locked and had to be broken open. There is, therefore, every reason to accept the confession as corroborated both by independent evidence and by the whole circumstances including the manner in which it was made. As regards the question of the accused's "surrender" it is, to my mind, perfectly clear that the accused walked into the Police Station with the intention of making a confession, and I am unable to see how there has been any unwarranted assumption in this respect.

A further argument put forward for the accused is, that the motive for the crime could not possibly be that which is given in the confession. The motive alleged was a trivial one, and does not explain why the woman's body, when found, was completely naked. The inference drawn by the learned Sessions Judge that the accused really compelled his wife to strip and killed her in an access of drunken fury, because she refused, is challenged as unwarranted and as in direct conflict with the fact that she was actually stripped when killed. It is contended that the confession can only be taken as a whole, and that, if one part of it is ruled out as untrue, the whole must be discredited. I have never been able to accept the extreme view which is sometimes put forward that a Court is not justified in holding that a confession as a whole may be true, although a particular detail is false, and this is specially the case when the detail in question refers only to the motive. It is of course perfectly true that a Court cannot pick out portions of different statements made by an accused person and piece them together so as to make a new statement. A case of this kind was recently condemned by the present Court. But there appears to me no ques-

tion of this having been done in the present case. There is not any good reason to hold that the motive given by the accused himself was not a true one. The most that can be said is that in his own interests and not in that of the prosecution it may be legitimate to doubt whether he had not received some provocation more severe than he asserted for himself. It is suggested by his Counsel that, if the accused must be held to have committed the crime, the explanation really lies in a sexual intrigue. It is argued that the discovery of the body completely naked is evidence of this, and that it is extremely probable that the accused found his wife *in flagrante delicto* with some other person. It is suggested that the Police investigation will show that an intrigue between her and one Tulsidas was spoken of. I have examined the Police diaries in this respect, and I can only find that apparently some suggestion had been made to the Police that the deceased and Tulsi Das had an intrigue, but that it was not admitted by the relatives. It is, however, clear from that inquiry that the deceased and the accused had been for some time on extremely bad terms. He seems to have objected to her visiting any one outside his own house. Her visits to Tulsidas' house were also said to have been forbidden. Tulsidas is a relative. So far from the contention being borne out that the accused found his wife *in flagrante delicto*, there seems to me every thing to show that the accused was a man of very unusual temperament and had peculiar ideas as to his wife's conduct. I can find nothing incompatible with his own explanation that he objected strongly to her refusal to remain in his own house while he was absent, and that, being drunk at the time, he started by stabbing her and then lost all control of himself and committed the horrible mutilations which are apparent from the medical evidence. I am unable to see that any exception has been proved which would reduce the crime from one of murder to culpable homicide. The *onus* of proving an exception lies upon the accused. It is, no doubt, true, as argued by his Counsel, that there are many precedents in this Court, and there are possibly many in Courts of higher authority, that any thing which would seriously disclose the existence of an exception must be taken into account in the accused's favour even if he has not pleaded it himself. This is specially essential where accused persons are badly advised in drawing up their defence and where there is a traditional tendency to deny even circumstances which might tell in their favour. At the same time, there is no justification for a Court merely assuming the remote possibility of an exception when it has not been pleaded by the accused and when it is not supported by evidence upon the record. It appears to me impossible in this case that the accused could have found his wife *in flagrante delicto*. There is nothing to show how the paramour could have escaped. It is, again, extremely improbable that an incident of this kind would not have come to light in a year and a half, and that it would not have been pleaded by the accused himself, when he gave himself up to justice or at least put forward by his relatives in extenuation. My own view is that it is impossible to escape from the conclusion that the horrible nature of the injuries is not unconnected with a debased form of desire. Such a perversion of sexual instinct is well known to Medical Science. I cannot, however, accept this theory as one which is proved, and it is sufficient to say that it is at least conclusively proved, to my mind, that the accused murdered his wife in a brutal manner on receiving from her the very slight provocation which he has himself asserted in his own confession. The Assessors unanimously found that the accused was guilty of murder, and that this confession was true. I am unable to accept the argument that their verdict was, in any way, vitiated by the introduction of inadmissible evidence.

The plea that this is not a case for the infliction of the death penalty rests upon the contention which I have dealt with above, that the crime was due at least to the discovery of the victim's infidelity, whether the provocation engendered was sudden or not. I am

unable to see, however, any extenuating circumstances, and the murder can only be described as a bestial one. On the above findings I uphold the conviction and the sentence of death passed upon Moti Ram and dismiss his appeal.

K. S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 260-B OF 1922.

April 18, 1923.

Present:—Mr. Kotval, A. J. C.

RAMRAO GURAO—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 211—Complaint—No intention to set law in motion—Complainant, whether guilty.

No offence is committed under section 211 of the Penal Code, when there is no intention to set the law in motion against anybody. [p. 159, col. 1.]

Rayan Kutti v. *Emperor*, 26 M. 640; 2 Weir 704; 1 Weir 122 & 190 and *Mathura Prasad* v. *Emperor*, 42 Ind. Cas. 761; 39 A. 715; 15 A. L. 767; 18 Cr. L. J. 1017, referred to.

One *D.* laid information before the Police that a theft had occurred at his house and that he suspected the applicant. Thereupon, the Police started their investigation, kept the applicant in custody and ill-treated him. The latter made an application praying that enquiry be conducted in the presence of the Magistrate. The Magistrate sent the application to the District Superintendent Police for report. After the report was received, notice was issued to the applicant to appear before the Magistrate when the Magistrate examined and cross-examined him at great length and directed the application to be taken on the file as a complaint under section 330 of the Penal Code. Then having held "a preliminary enquiry" he dismissed the complaint under section 203 of the Criminal Procedure Code and taking proceedings under section 476 of that Code ordered the applicant to be prosecuted under section 211 of the Penal Code:

Held, that the application in question was not a complaint within the meaning of the Criminal Procedure Code, no offence was committed and the order of prosecution was bad. [p. 159, col. 1.]

Revision of the order of the Magistrate, First Class, Ellichpur, dated 21st November 1922.

Mr. *M. B. Niyogi*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The Magistrate's order begins with the following statement:—

"On October 6, 1922 one Ganpat, son of Ramji Mali, of Tuljapur, laid a complaint before me to the effect that he was suspected of having committed the house-breaking that occurred some days previously at the house of one Digambar Gurao of Tuljapur Gadhi and that during the investigation the Head Constable, Assegaon, Chandrayya Constable, Sheocharan, Gunya Gurao and Baliram Patel of Tuljapur tortured and voluntarily caused hurt to him on the night of Wednesday, September 27, 1922, in order to extort a confession from him."

This is a statement for which, it is admitted, there is no basis on the record. The application filed on October 6, 1922 stated that one Digambar Gurao had laid information before the Police on the 22nd September 1922 that a theft had occurred at his house and that he suspected the applicant. Thereupon the Head Constable came to enquire, kept the applicant in custody "Taba" and made enquiries from his wife and children. The Head Constable and Gunya Gurao ill-treated the applicant putting red ants on his head. The applicant could not bear the ill-treatment and has, therefore, come away. He was afraid of further trouble. He, therefore, prayed that the enquiry be directed to be made in the presence of the officer and that it be ordered that the Police should not trouble him in any way.

This application does not mention Chandrayya, Constable Sheocharan or Baliram Patel at all, nor does it say that torture or hurt was caused on the 27th September 1922. The application is not made in respect of any offence said to have been committed and it does not ask for an enquiry into it. All that it wants done is that the enquiry into the alleged offence of theft should be made by the officer to whom the application was presented and not by

the Police. The application is written by a petition writer. If it was meant to be a complaint it would be addressed to a Magistrate, would mention the section under which the offence fell, would use the word 'accused' for the persons charged and would call the applicant 'complainant.' The Magistrate himself when it was filed did not treat it as a complaint of an offence. He did not examine the complainant at once but sent the application to the District Superintendent of Police for report. After the report was received the Magistrate endorsed an order on it on the 23rd October 1922 directing notice to issue to the applicant to appear before him on the 13th November 1922. On that day he examined and apparently cross-examined the applicant at great length and then directed the application to be taken on file as a complaint under section 330, Indian Penal Code. He then stated that he wanted to hold a preliminary enquiry and directed notices to issue to 16 witnesses including two stated to be "Head Constable concerned" and "one Constable also present at Gunya's house." After having examined altogether 18 witnesses, including Gunya Gurao and some Policemen, and perused the Police diary the Magistrate wrote a brief order dismissing the complaint under section 203, Criminal Procedure Code, in which he did not refer to the witnesses or discuss their evidence. He then took proceedings under section 476, Criminl Procedure Code, against Ganpat and Ramrao (P. W. 14) a person said by the Police in their report to have been one of the persons who instigated Ganpat to file the application. Ganpat was ordered to be prosecuted under section 211 and Ramrao under section 211, read with section 109 and section 193, Indian Penal Code.

I am clear that no offence under section 211 has been committed as there was no intention to set the law in motion against anybody. There was neither an institution of any criminal proceedings against the Police or Gunya Gurao nor were these persons charged with having committed an offence: vide *Rayan Kutti* v. *Emperor* (1) and *Mathura Prasad* v. *Emperor* (2).

(1) 26 M. 640; 2 Weir 704; 1 Weir 122 & 190.

As regards the charge under section 193 against Ramrao I consider no useful purpose will be served by a prosecution The statements said to have been falsely made by him are not on material points, and are made in a proceeding of which the validity appears to me to be doubtful. I am doubtful if the Magistrate was right in taking proceedings as upon a complaint or an offence upon an application which was not meant to be such. I am further doubtful if the conclusion of the Magistrate that the complaint was false based as it is upon the evidence of the very persons who were charged in the complaint—assuming there was one—can be supported. I, therefore, set aside the order for the prosecution of the applicants, Ganpat and Ramrao.

K. S. D. *Order set aside.*

(2) 42 Ind. Cas. 761; 39 A. 715; 15 A. L. J. 767; 18 Cr. L. J. 1017.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 232 OF 1923.

June 1, 1923.

Present:—Mr. Justice Daniels.

MAHADEO PRASAD AND ANOTHER —APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 378—Water when can be subject of theft—Criminal Procedure Code (Act V of 1898), s. 439—Revision—Sentence, plea of, when can be urged.

Water when conveyed in pipes and so reduced into possession can be the subject of theft. [p. 160, col. 1.]

Ferens v. *O'Brien*, (1883) 11 Q. B. D. 21; 52 L. J. M. C. 70; 31 W. R. 643; 15 Cox C. C. 332; 47 J. P. 472. *In re Chockalingam Pillay*, 13 Ind. Cas. 819; (1912) M. W. N. 119; 11 M. L. T. 162; 13 Cr. L. J. 131, followed.

Emperor v. *Sheikh Arif*, 35 C. 437; 12 C. W. N. 534; 7 Cr. L. J. 367, referred to.

Where a person takes a water connection from a Municipal water pipe into his house contrary to law and without the permission or knowledge of the Municipal Board, he is guilty of an offence under section 378 of the Penal Code. [p. 160, cols. 1 & 2.]

Where no plea on the question of the severety of the sentence is urged before the Court of Appeal it cannot be taken in revision before the High Court. [p. 160, col. 2.]

Criminal revision against an order of the Sessions Judge, Allahabad, dated the 12th of December 1922.

Mr. *Sailanath Mukerji*, for the Applicant.

Mr. *R. M. Icomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—This revision raises the question whether water in Municipal pipes can be the subject of theft. The two applicants, Mahadeo Prasad and Beni Prasad, are brothers and live in a house in Cantonments, which belongs to Mahadeo Prasad. They employed their younger brother Mangru, who was a pipe-layer overseer in Military Works Service, to put a water connection from the main water pipe into their house. This was done contrary to law without the permission of, and indeed without the knowledge of, the Cantonment Authority and the Municipal Board. The tap being in the house no one has actually seen them taking water from it, but the Courts below were quite justified in inferring that they had not gone to the trouble and expense of putting in this connection and their having it in their house for a month and a half without making use of it and taking water from it. Had they applied for permission to put in a tap in accordance with the rules they could have got permission, but they would then have had to pay water rate which they were trying to escape paying by these surreptitious proceedings. They might have been convicted under the appropriate section of the Water Works Act or of the Municipalities Act or Cantonment Code, but the Authorities considering the offence as a serious one, preferred to charge them with theft of water under section 379, Indian Penal Code, and on this charge they have been convicted and sentenced to a fine of Rs. 300 each. The convictions and the sentences have been upheld by the learned Sessions Judge in appeal.

It has been held, both in England and in India, that water when conveyed in pipes and so reduced into possession can be the subject of theft. The English case is that of *Ferens* v. *O'Brien* (1). There water was conveyed to a colliery by means of underground pipes and then supplied to the houses of the workmen by means of branch pipes to which taps were attached, the workmen being allowed to take water from taps on payment of a fixed price. The accused was seen taking water from one of the taps without having agreed to pay for it. It was held that, under the circumstances, he could be convicted of larceny at Common Law for taking this water.

In the Calcutta case of *Emperor* v. *Shelkh Arif* (2) it was held that water flowing in an open, though artificial, channel could not be the subject of theft, and *Ferens* v. *O'Brien* (1) was distinguished on the ground that in the latter case the water was confined in pipes and thereby reduced into the possession of the Water Company which supplied it.

In re Chockalingam Pillay (3) was a case in which the water had been cut off from the natural source and conveyed through pipes, and thus reduced into effective possession. It was held both with reference to the English authority and to the definition of theft contained in section 378, Indian Penal Code that it could be the subject of theft.

The present case is even stronger against the accused inasmuch as the water had not only been pumped, filtered and conveyed through pipes by the Municipal Board but was then, as I am informed at the hearing, sold by the Municipal Board to the Cantonment Authority, for supply to persons in Cantonments, at a price depending on the amount of water supplied.

After considering the authorities I am of opinion that the water in this case was in the possession of the Cantonment Authority and that the accused's act in taking it comes within the definition of theft.

I have also been asked to interfere on the ground that the sentences were excessive, but in the judgment of the Appellate Court it is expressly stated that no plea on the question of sentence was urged in that Court. The applicants are, therefore, not entitled to urge in revision that the sentences are too severe. I accordingly dismiss the applications of both accused.

K. S. D. & N. H. *Applications dismissed.*

(1) (1883) 11 Q. B. D. 21; 52 L. J. M. C. 70; 31 W. R. 643; 15 Cox C. C. 332; 47 J. P. 472.

(2) 35 C. 437; 12 C. W. N. 534; 7 Cr. L. J. 367.
(3) 13 Ind. Cas. 819; (1912) M. W. N. 119; 11 M. L. T. 162; 13 Cr. L. J. 131.

ANANTHACHARI v. RATNAM AND SARATHI.

MADRAS HIGH COURT.

CIVIL SUIT NO. 686 OF 1921.

December 13, 1922.

Present:—Mr. Justice Coutts-Trotter.

P. ANANTHACHARI—PLAINTIFF

versus

MESSRS. RATNAM & SARATHI AND ANOTHER—DEFENDANTS.

Principal and agent—Mandate to agent to pay creditor out of funds in his hands—Notice to creditor—Creditor, right of, to sue agent—Priority.

Where there are funds in the hands of an agent belonging to the principal and the principal gives a mandate to the agent to deliver them in extinguishment of an obligation of the principal to a third party and that mandate is communicated to the creditor, there arises on the part of the agent an obligation towards the creditor on which he can be sued both at law and in equity—in law as on a contract and in equity as upon an implied assignment of such funds as there may be in his hands to satisfy *pro tanto* with those funds which he had in his hands the claim of the creditor. In order to succeed on the legal claim, however, it must be shown that the fund which it is sought to attach was actually in existence in the hands of the agent at the date of the writ. [p. 163, col. 2, p. 164, col. 2.]

Walker v. *Rostron*, (1842) 9 M. & W. 411; 11 L. J. Ex. 173; 60 R. R. 770; 152 E. R. 174 and *Crowfoot* v *Gurney*, (1832) 9 Bing. 372; 2 M. & Sc. 473; 2 L. J. (N. S.) C. P. 21, 35 R. R. 557; 131 E. R. 655, relied on.

Plaintiff placed orders with the first defendant who were acting as agents of the second defendant, an English Company in London, for the purchase of certain yellow metal. The goods arrived and were in the custody of the National Bank of India whose draft for £462 the plaintiff was instructed to accept and take delivery of goods. This amount was later, by consent of parties, reduced to £400. But soon after, a different arrangement was substituted by which the plaintiff, apparently on account of the prevailing rate of exchange, sent £400 direct to the second defendant in London and the latter instructed the first defendant to pay the National Bank "out of the funds of ours in your hands" and release the goods from the Bank. But the first defendant refused to pay up the Bank till some disputes about some other matter between plaintiff and first defendant were settled. The second defendant meanwhile went into voluntary liquidation In an action by plaintiff for £400 against first and second defendants:

Held, (1) that the second defendant was liable as for moneys had and received to plaintiff's use on a consideration which had failed and plaintiff was entitled to an equitable charge for the amount of the funds of the second defendant in the hands of the first defendant; [p. 164, col. 2.]

(2) that the plaintiff's equitable charge over the funds in the hands of the first defendant must prevail over any legal claim either of the liquidators of second defendant or of the Bank and first defendant was bound to pay the amount to the plaintiff notwithstanding any pressure or prohibition from the liquidator [p. 164, col. 2.]

Barn v. *Carvalho*, (1839) 4 My. & Cr. 690; 9 L. J. (N. S.) Ch. 65; 3 Jur. 114; 48 R. R. 213; 41 E. R. 465 and *Walker* v. *Rostron*, (1842) 9 M. & W. 411. 11 L. J. Ex. 173; 60 R. R. 770, 152 E. R. 174, relied on.

A plaintiff cannot get relief both against the principal and the agent, since their liability is only alternative. [p. 163, col. 2.]

Morel v. *Westmoreland*, (1904) A. C. 11; 73 L. J. K. B. 93; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38, followed.

Civil Suit in the Ordinary Original Civil Jurisdiction of the High Court of Judicature at Madras.

Mr. *V. V. Srinivasa Aiyangar*, for the Plaintiff.

Mr. *Vere Mocket*, for the Defendants.

JUDGMENT.—This is an interesting action which is brought by a gentleman called Ananthachari, who is the proprietor of a firm trading under the name of Messrs. P. Rungachariar & Co., and the defendants are, first, a firm trading as Messrs. Ratnam & Sarathy and, secondly, an English Limited Company known as Messrs. Alfred Mumford & Co., Ltd., who are now in liquidation and are represented by their Liquidator and Official Receiver Mr. Phillips. The history of this matter, which I need only deal with very briefly, is this; that on the 5th of February 1920, Messrs. P. Rungachariar & Co., signed an indent to Messrs. Ratnam & Sarathy in the following terms: 'We authorise you to instruct Messrs. ..... to purchase and ship the goods specified below on our risk and account and subject to the conditions overleaf," and then follows the description of the goods and the price; and the terms of payment were Draft at 60 D-S documents against payment. In fact, Messrs. Ratnam & Sarathy were acting for Messrs. Alfred Mumford & Co., Ltd. They had communicated with them and on the 19th February 1920 they intimated to the plaintiffs that their principals, that is, Messrs. Alfred Mumford & Co., Ltd., had confirmed the same by wire subject to confirmation by mail, and on the 4th March there came an intimation of the confirmation by mail. On the 28th September 1920 there came a letter from Messrs. Ratnam & Sarathy to the plaintiffs in the following terms: "We are in receipt of invoice for £462-10-0 towards your order 808 which we beg to enclose herewith and request you to accept the draft when presented by the Bank.

Then, on the 30th September, the plaintiffs reiterate the allegation which they had previously made that the goods were late shipped, a dispute with the merits of which I am not now concerned; and that was followed, on the 19th November, by an intimation of the plaintiffs that they would allow the bill to be met with a reduction of £62-10-0 leaving the amount due as £400 together with the clearance charges. That proposal had been made apparently by Messrs. Ratnam & Sarathy and it was accepted by the plaintiffs in the letter of the 19th November 1920 with the proviso that, in return for this concession of waiving the contention of late shipment, another contract under another indent should be cancelled. On the 22nd November 1920 Messrs. Ratnam and Sarathy write to the plaintiffs enclosing, apparently, a letter to the National Bank of India authorising them, that is, the Bank, to take £400 net at the current rate of exchange towards the bill together with charges and thereupon they would have a right to delivery from the Bank of the copper sheets to be delivered under the contract. That was not done and I had the explanation of the plaintiff's witness which seems to make it quite clear that, instead of that proposal, a different arrangement was substituted, namely, that Messrs. Ratnam & Sarathy should themselves withdraw the draft and that, meanwhile, the plaintiffs should remit a sum of £ 400 direct to their principals Messrs. Alfred Mumford & Co., Ltd., in London That arrangement seems to have been made to gratify the desire of the plaintiffs, the postal exchange being a little more profitable to them than the Bank exchange, to avail themselves of that and to make a few hundred rupees by remitting the money direct to London. No doubt it seemed an excellant scheme at the time but had most unfortunate results and it directly led to this litigation. On the 8th December £ 400 was remitted by postal money-order by the plaintiffs to London, and on 20th December Messrs. Ratnam & Sarathy acknowledge receipt of a sum of Rs. 500 towards clearing charges and commission. Then, on the 13th January 1921, Messrs. Alfred Mumford & Co., Ltd. write from London to the plaintiffs as follows: "Your favour of the 16th December is to hand and the money-orders that you advised for the total sum of £ 400 arrived here to-day. As this money has still to be paid to the National Bank to release the documents, we are making the necessary arrangements. We agree that the 2½ tons of yellow metal (which I referred to) is cancelled." Then follows a cablegram which was received on the 15th January from Messrs. Alfred Mumford & Co., Ltd., to Messrs. Ratnam & Sarathy, and it is in these terms: "£ 400 arrived this morning. Have you sufficient to pay the National Bank of India, Ltd., about £ 350 obtain delivery to save our remittance—Mumford." And that was followed up by a letter dated the 20th January once more from Messrs. Alfred Mumford & Co., Ltd., to their agents Messrs. Ratnam & Sarathy which runs as follows: "£ 400 P. Rungachariar & Co., we got this cash and wired you to know if you had sufficient cash of ours to hand some £ 350 or so to the Bank to get the goods. This should save us paying either the Bank or you which is unnecessary while you have funds of ours as we understand at present. We make the balance with you as enclosed statement which please look into and let us know." That cablegram is acknowledged by Messrs. Ratnam & Sarathy on the 20th when they say that they will look into the matter and see how the accounts between them and their principals stand. Then, on the 27th January, the plaintiffs complain that no arrangements had in fact been made in accordance with what had been agreed to by paying the Bank, discharging its lien and putting the plaintiffs in possession of the yellow metal. Then, on the 1st February, a new attitude is taken up by Messrs. Ratnam & Sarathy. They insist that there was another consignment of goods totally distinct from those in suit as to which the plaintiffs were indebted to them. Again the contention was apparently late shipment, and in this case the plaintiffs were not willing to forego that objection nor, so far as I know from the correspondence, was any proposal made that they should. But the attitude taken by Messrs. Ratnam & Sarathy was that if the bills in respect of these further consignments were met, that would provide them with funds to dis-

charge the bills held by the Bank in respect of the suit goods and that, therefore, they would not release the goods which are the subject-matter of this contract until the later consignment of goods was paid for to put them in funds; and they communicated what they had done in that matter to their principals Messrs. Alfred Mumford & Co., Ltd., by their letter of 20th February 1921. Then follows a long letter from the plaintiff, dated the 17th February 1921, in which he argues his case and protests that the arrangement about the suit consignment of yellow metal stood alone and independent, that they were bound to retire the bills and put the plaintiffs in a position to get the metal without making or attempting to make terms as to any other goods, the subject of distinct contracts and coming by other ships. The plaintiff wrote on the 3rd March 1921 to Messrs. Alfred Mumford & Co., Ltd., as follows: "We are simply surprised at your continued silence with reference to our request to you to instruct the National Bank of India, Limited, Madras, to deliver us the 2½ tons of copper sheets shipped per SS. *Gamaria* towards the bill of which payment has been remitted to you by postal money-order months before. When remitting to you the sum of £ 400 towards the payment of the above bills we expected you to instruct the National Bank of India, Limited, Madras, by cable for effecting delivery of the above said 2½ tons of copper sheets. But it is most unfortunate that we have heard nothing from you except the acknowledging of the said £ 400 and a promise to instruct the National Bank of India, Limited, Madras, at the earliest opportunity to deliver us the 2½ tons of copper sheets. We herewith enclose a copy of the cable sent to you on 28th February 1921."

Then, on the 10th March 1921, Messrs. Alfred Mumford & Co., Ltd., write as follows: "At the time we received your cash we telegraphed Messrs. Rathnam & Sarathy to deliver the goods to you arranging payment with the National Bank of India, who held the goods. We are writing letters from this firm. As we understood it the copper had already been handed over to you. Have you paid our other draft for yellow metal?" Then, on the 17th March, there comes a further complaint from the plaintiffs, in which, I think, there is nothing new, addressed again to Messrs. Alfred Mumford & Co., Ltd., and on the 29th that complaint is reiterated once more. Shortly afterwards, apparently somewhere in March, towards the end of March, Messrs. Alfred Mumford & Co., Ltd., went into voluntary liquidation and no no one knows what any claim upon them direct is likely to be worth.

Now, in these circumstances, the plaintiffs sue the two defendants in the alternative. They cannot get relief direct against both of them because the liability of the principal and agent is alternative. *Morel* v. *Westmoreland* (1). (I am told by the learned Counsel for the defendant that the liquidation was in January, and, if it be so, I do not think that it really affects anything that I have to decide in this case). As against the first defendant Messrs. Ratnam & Sarathy, the case is put in this way. It is said that the effect of the telegram of the 15th January, and the letters of the 20th January, constitute a mandate to Messrs. Rathnam & Sarathy to pay out of the funds in their hands moneys to enure to the benefit of the plaintiffs because they were to be used to withdraw the bills at the National Bank and put the plaintiffs into possession of the goods which they had bought and which they had paid for. That was unquestionably communicated to the plaintiffs. It is really, I think almost sufficiently, conveyed by Messrs. Alfred Mumford & Co.'s letter of the 13th January 1921 to the plaintiffs and I have evidence which I believe on the part of the plaintiffs that it was also conveyed to them by Messrs. Rathnam & Sarathy and that the fact that the mandate was given was the basis of the future transactions between the parties. The cases of *Walker* v. *Rostron* (2) and *Crowfoot* v. *Gurney* (3), seem to me to establish clearly this proposition that, where there are funds in the hands of an agent belonging to his principal and when his principal gives a mandate to the agent

(1) (1904) A. C. 111; 73 L. J. K. B. 93; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38.
(2) (1842) 9 M. & W. 411; 11 L. J. Ex. 173; 60 R. R. 770; 152 E. R. 174.
(3) (1832) 9 Bing. 372; 2 M. & Sc. 473; 2 L. J. (N. S.) C. P. 21; 35 R. R. 557; 131 E. R. 655.

to deliver them in extinguishment of an obligation of the principal to a third party and when that mandate is communicated to the creditor, then there arises on the part of the agent an obligation on which apparently he can be sued both in law and equity—in law as on a contract and in equity as upon an implied assignment of such funds as there may be in his hands to satisfy *pro tanto* with those funds which he had in his hands the claim of the creditor. Now the trouble was that in this case it was not possible to prove that at the time when the suit was brought there were funds in his hands sufficient to meet this claim or any substantial part of it, certainly not sufficient funds to be able to withdraw the bills from the Bank and give the plaintiffs delivery of their goods; and I, therefore, think that any cause of action based upon a contract as against the first defendant was bound to fail because in a legal claim, in my opinion, it must be shown that the fund which it is sought to attach was actually in existence in the hands of the right person at the date of the writ. But with regard to the equitable remedy I do not feel that that difficulty exists. I am prepared to treat this plaint as in effect a request for the Court to direct an ascertainment of what funds belonging to the principal are in the hands of the agent as at the date of the ascertainment of rights, for I am not asked to do that except for a very subsidiary purpose because it is abundantly clear that the second defendant, namely, Messrs. Alfred Mumford & Co., Ltd., and their liquidator have no sort of answer to this suit whatever. They took the plaintiffs' money £ 400 and have had the benefit of it on an undertaking given by them that they would utilise that money by making such arrangements with the National Bank by making up any balance of the actual bills as would enable the National Bank to give delivery to the plaintiffs and so discharge the plaintiffs' claim. That they totally failed to do. It is not for me to enquire whether it was they that failed or their Madras representatives that failed, but the fact remains that the plaintiffs have parted with their money and have got nothing for it up to date. In these circumstances, I am prepared, at the suggestion of the parties, to hold Messrs. Alfred Mumford & Co., Ltd., directly responsible to the plaintiffs for this sum of £ 400 and it has been agreed between the parties, to save the laborious enquiry that might follow as to the rate of exchange prevailing at the material times, to accept that liability as now standing at Rs. 5,000 which I think is a very reasonable proposition and very reasonably accepted. I must, therefore, give judgment against Messrs. Alfred Mumford & Co., Ltd., for the sum of Rs. 5,000 but in accordance with the equitable doctrine which has been discussed I must further hold that there is created a charge on such funds as was found to be in the hands of Messrs. Rathnam & Sarathy belonging to Messrs. Alfred Mumford & Co., Ltd., and thus enable the plaintiffs to execute that charge on the funds in the possession of Messrs. Ratnam & Sarathy which I am told exceeds the sum of Rs. 5,000, which is the amount of my judgment against Messrs. Alfred Mumford & Co., Ltd.

Now, I am told that the first defendant's, Messrs. Ratnam & Sarathy's, difficulty in handing over the money is this. Pressure has been put upon them by the liquidator of the Company forbidding them at their peril to part with this money. That case is met, in my judgment, by what was decided in *Walker* v. *Rostron* (2), because in that case what Rostron did was to hold the person in the position of the claimant (here, the plaintiff), at bay in obedience to the pressure put upon him by the Assignee in Bankruptcy of the debtor, the principal, and the Court held that he was wrong and that he was bound to pay the person in favour of whom a charge had been created, he being in the position of the first defendant in this case, in preference to discharging the claims of the Assignee in Bankruptcy. But the matter does not stop there, because there is an even stronger case of *Burn* v. *Carvalho* (4). There the matter had gone so far that the Court of Common Law dealing with it purely as a legal claim had decided, even as for as the Exchequer Chamber,

(4) (1839) 4 My. & Cr. 690; L. J. (N. S.) Ch. 63; 3 Jur. 1141; 48 R. R. 213; 41 E. R. 255.

in favour of the Assignee in Bankruptcy. But when an appeal was filed in Equity, the Common Law Courts having expressed themselves as not dealing with the equitable claim so that it was not necessary to pass an injunction against the plaintiff against proceeding with his legal remedy, the Court of Equity held, and it was confirmed by the Lord Chancellor, that the equitable claim prevailed and that the person in the position of the plaintiff here was entitled to enforce his equitable charge to the neglect of the legal rights of those creditors in law of the principal. I am clearly of opinion that in these proceedings I am not entitled to hear the National Bank. They are not parties to this suit and they are not sought to be added. But I am further of opinion that even if they were entitled to be heard the equitable claim of the plaintiffs must inevitably prevail over any supposed legal claim either of the Bank or of the liquidator of Messrs. Alfred Mumford & Co., Ltd.

There will be judgment in the way I have outlined. There will be judgment against Messrs. Alfred Mumford & Co. Ltd., for Rs. 5,000 for moneys had and received to the plaintiffs' use on a consideration which has failed and there will be a declaration that the moneys belonging to Messrs. Alfred Mumford & Co., Ltd. in the hands of Messrs. Rathnam & Sirathy are subject to an equitable charge in favour of the plaintiffs. By agreement of parties there will be no costs.

V. N. V. *Decree for plaintiffs.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 386 OF 1922.

July 19, 1922.

Present :—Mr. Justice Harrison.

JAWAHAR SINGH, MINOR, THROUGH SANT RAM—PLAINTIFF—APPELLANT

versus

N. D. SASSOON & Co., KARACHI, THROUGH ITS MANAGER—DEFENDANT—RESPONDENT.

Jurisdiction—Plaint not disclosing cause of action.

Unless a plaint discloses a cause of action there can be no jurisdiction. [p. 166, col. 1.]

First appeal from an order of the Sub-Judge, Amritsar, dated the 7th January 1922.

Mr. *Badri Das*, for the Appellant.

Messrs. *F. Mackay* and *Data Ram Kapur*, for the Respondent.

JUDGMENT.—A decree for Rs. 1,06,770-8-0 was passed by the Additional Judicial Commissioner, Karachi, against the firm of Midhan Singh-Jawahar Singh on the 26th of March 1918. A transfer certificate was given for execution in the District of Amritsar and on the 31st of July 1918 an application to attach certain property of the firm in the hands of another firm, Midhan Singh-Gurbakhsh Singh, was made to the Subordinate Judge of Amritsar, and in accordance with that application the property named therein was attached. On the 13th of May 1921 the present suit was instituted by Jawahar Singh, a minor, in which he recites the above facts with this modification that he states that the property attached was his or, to use his own words, that proceedings have been taken against his property. He states definitely in the clearest possible language that he is not a member of the firm Midhan Singh-Jawahar Singh. He contends that both fraud and collusion have been practised, and although he is not a member of the defendants firm, he prays to have the decree declared null and void on account of this fraud and collusion, and, as a supplementary relief, asks that an injunction should be passed that the decree shall not be executed against him. If he is not a member of the firm the decree cannot be executed against him. The lower Court has dismissed the suit on the ground of want of jurisdiction. After considering the various rulings on the subject, it has held that, inasmuch as the plaintiff does not allege that any fraud was practised on him in the Amritsar District, he cannot seek his relief there, and the order concludes with the words, "I, therefore, return the plaint to be presented to the Court having jurisdiction to try it."

The plaintiff appeals urging that the Amritsar Court had jurisdiction; that

paragraphs of the plaint contained averments amounting to fraud, and that, therefore, the suit should have been heard and decided on the merits.

It appears to me that a very much simpler and more elementary question is involved in this case than that of jurisdiction, and this is whether the plaintiff has disclosed any cause of action at all. Counsel contends that it must first be decided whether a Court has jurisdiction before that Court can decide whether there is any cause of action. It appears to me that this is putting the cart before the horse. The plaint must be read before anything else is done and, if it discloses no cause of action, the suit dies still-born without reaching the point when jurisdiction can be discussed, or, rather, there can be no jurisdiction unless there be a cause of action. It is quite true, as stated in the grounds of appeal, that paragraphs of the plaint contain averments amounting to fraud, and even if it be granted, for the sake of argument, that fraud was practised, the plaintiff has still to show that he is entitled to get the decree set aside, if, as he himself states, he is not a member of the defendant firm. The plaintiff had two causes of action open to him, either to come in as a third party and object to the attachment on the ground that the property belonged to him and not to the defendant, judgment-debtor, or to admit that he was a member of the firm as the son of his father and plead fraud or any other reason for having the decree set aside. He appears to have worked out a sort of unhappy combination of both. While saying definitely that he is not a member of the defendant firm he seeks to have the decree set aside on the ground that it was obtained by fraud. This is quite impossible.

Counsel finally urges that his own grounds of appeal should be set aside and ignored, and that the second prayer in the plaint should alone be considered, namely, that the decree is not to be executed against him, the plaintiff, and that the rest of the plaint should also be treated as non-existent. It is, I think, quite impossible to treat the case in this way. The prayer contained therein and the relief sought is to have the decree declared to be legally null and void and, in the words of the plaint itself, "*bilkul be asar*" as being a fraudulent and collusive decree, and this relief is sought by a man who himself says that he is not a party to the litigation. I find that the plaint discloses no cause of action and I, therefore, dismiss the appeal with costs.

W. C. A. *Appeal dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 41 OF 1922.

May 14, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Beasley.

MA THIN MYAING—PLAINTIFF—APPELLANT

versus

MAUNG GYI AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Evidence Act (I of 1872), s. 92, proviso (1)—Registered deed of gift—Unregistered deed modifying terms of registered deed, admissibility of, in evidence—Evidence to show invalidity of deed of gift, admissibility of—Transfer of Property Act (IV of 1882), s. 123—Burma Laws Act (XIII of 1898), s. 13 (1)—Burmese Buddhist Law—Gift—Possession, transfer of, whether necessary—Gift to become operative after donor's death, validity of.

A Burmese Buddhist executed a registered deed of gift of some immoveable property in favour of three of her sons and subsequently obtained an unregistered deed from them stating that the deed of gift would not be operative till after the death of the owner:

Held, (1) that the subsequent deed was not admissible in evidence for want of registration so as to affect the land; [p. 168, col. 1.]

(2) that the fact, however, that such a document was drawn up could be proved and was relevant to explain the nature and character of the donor's possession subsequent to the execution of the deed of gift; [p. 168, col. .]

Varada Pillai v. *Jeevarathnammal*, 53 Ind. Cas. 901; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 43 M. 244; 2 U. P. L. R. (P. C.) 64; 2 Bom. L. R. 444; 46 I. A. 285 (P. C.), relied on.

(3) that evidence as to the intention of the donor to make a gift which would be operative only after her death was admissible under proviso (1) to section 92 of the Evidence Act, as the fact,

if established, would have the effect of invalidating the deed of gift under Burmese Buddhist Law. [p. 168, cols 1 & 2.]

Section 123 of the Transfer of Property Act lays down the method by which it is essential that a gift of immoveable property should be carried into effect, and abrogates the rule of Burmese Buddhist Law that transfer of possession is necessary to complete a gift. [p. 168, col. 1.]

Dharmodas Das v. *Nistarini Dasi*, 14 C. 446; 7 Ind. Dec. (N. S.) 207, *Balbhadra* v. *Bhowani*, 34 C. 853; 11 C. W. N. 956; 6 C. L. J. 233, *Bai Rambai* v. *Bai Mani*, 23 B. 234; 12 Ind. Dec. (N. S.) 155 and *Phul Chand* v. *Lakkhu*, 25 A. 358; A. W. N. (1903) 70, referred to.

Under section 13 (1) of the Burma Laws Act, where the Court has to decide any question regarding succession, inheritance, marriage, etc., the rule is that Buddhist Law is to apply in cases where the parties are Buddhists, except in so far as such law has by enactment been altered or abolished. [p. 169, col. 1.]

There may be cases where the facts and circumstances surrounding a gift necessitate the decision of a question regarding succession or inheritance and when that is the case, Burmese Buddhist Law must form the rule of decision. [p. 169, col. 1.]

A Burmese Buddhist cannot dispose of his property after his death by Will, and no Burmese Buddhist can, therefore, under the guise of making a gift, be allowed in effect to make a Will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where, therefore, his act in making a gift, owing to the circumstances in which it is made, or the conditions attached thereto, is such as to affect the succession to or inheritance of his property after his death, Buddhist Law must be resorted to, to arrive at a decision as to whether his action can be maintained or is invalid. [p. 169, col. 1.]

Maung Pan U v. *Ma Kyi Nyo*, 8 Ind. Cas. 1200; 3 Bur. L. T. 107, *Annamalay Chetty* v. *Mahomed Ismail*, 23 Ind. Cas. 903; 7 L. B. R. 123; 7 Bur. L. T. 75, *Ma Pan Nyun* v. *Ma Hla Sein*, 30 Ind. Cas. 665; 8 L. B R. 190; 8 Bur. L. T. 149 and *Maung Ba Maung* v. *Maung Pyu*, 40 Ind. Cas. 854, relied on.

It is open to a Burmese Buddhist to make a gift or an alienation of some of his property during his lifetime, but it is not open to him to make a Will, or a gift which is to operate after his death, contrary to the terms of the Buddhist Law as to inheritance. [p. 169, col. 1.]

Special second appeal against a decree of the District Court, Pegu, in Civil Regular Suit No. 21 of 1921, dated the 30th August 1921.

Sir *Robert Giles*, for the Appellant.

Mr. *Paget*, for the Respondents.

JUDGMENT.

Robinson, C. J.—The facts of this case are not in dispute. One Ma Kyin had five sons; the eldest, Ba Thein, has taken his share as *Orasa* and does not come into this case. The second son, Ba Chit, managed his mother's properties, and she gave him Rs. 1,000 in cash. The other three sons then demanded that they also should be given this amount. As she had no money and as she thought that, if she gave money to these younger sons, they might squander it, she decided to give them, in equal shares, a piece of land worth Rs. 3,000. According to her, she gave this land only subject to the condition that she was to continue in possession and enjoy the rents and profits thereof during her lifetime, and that the gift was only to take effect after her death. It is said that the petition-writer who drew up the deed of gift advised her that this could not be done in the deed itself, but only by a deed subsequently executed, which would refer to the deed of gift, and that, consequently, she executed the deed of gift which forms the basis of this case. Her signature was attested by four witnesses, included amongst whom was Ba Chit, her second son. On the way to the Registration Office, however, it was discovered that a portion of this land was entered in the Revenue Register in the joint names of Ma Kyin and Ba Chit; and, in order to prevent Ba Chit setting up any claim by reason of this fact at a later date, it was arranged that Ba Chit's name should be entered in the deed as a donor; this was done, and he executed the deed which was then duly registered. Ba Chit's execution, however, was not attested as required by section 123 of the Transfer of Property Act. Two days later, second deed was drawn up and executed, although execution by the appellant's husband is denied, but it was never registered.

It has been held that the principles of Burmese Buddhist Law apply to the case, and that, as this gift was merely an attempt to evade the principles governing inheritance under that law, and as it amounts, in fact to making a Will, the gift is invalid.

The appellant is the widow of Maung Gale, one of the three donees, who, a month after his marriage to her, became a *rahan*, and has since died, still a *rahan*. For the respondents it is argued that the addition of Ba Chit's name after the execution of the deed by Ma Kyin, was a material alteration which vitiates the deed, and that,

in addition the absence of attestation of his execution renders the whole deed invalid.

Reliance is placed on the fact that this deed amounts to an attempt to dispose of the property by Will, and it is further urged that the donees never accepted the gift, which is also for that reason invalid.

The first point to be considered, and which was the only one argued for the appellant, is whether the principles of Buddhist Law are to be applied to this case. I see no reason whatever to doubt the evidence of Ma Kyin that it was never her intention to make a gift of this land to take effect at once but that it was to take effect only after her death. Her evidence is strongly supported by the conduct of the parties. In the first place, there is no doubt that she wished this condition to be inserted in the deed, and that it was only the advice given her by the petition-writer which led to its not being so inserted. The document that was subsequently executed to carry out her wishes is not admissible in evidence for want of registration so as to affect the land. But the fact that such a document was drawn up can be proved, and that fact is relevant to explain the nature and character of the possession held by Ma Kyin subsequent to the execution of the deed of gift. The evidence would be relevant to show that Ma Kyin continued in possession and to receive the rents of this land in her own right and not as trustee for the three donees. *Varada Pillai* v. *Jeevarathnammal* (1). It is admitted that the property remained in her possession, that she enjoyed the rents and profits of it, and that she is doing so still. A mutation of names was, it is said, effected; but mutation would not grant title to the land, and it is quite in accordance with the possibility that this gift was only made subject to this condition. It seems clear that Ma Kyin never agreed and never meant by the execution of the document to make an out and out gift absolute in its nature and intended to take effect at once. This evidence would not contravene the provisions of section 92 of the Evidence Act being admissible under the first proviso. Section 123 of the Transfer of Property Act applies. That section lays down the method by which it is essential that a gift of immoveable property should be carried into effect. So far as Ma Kyin was concerned, all its provisions were complied with. In my opinion, it is not necessary to decide what was the effect of the execution of this deed subsequently by Ba Chit. But, assuming for the present that he did comply with the requirements of section 123, it would be a valid gift even though no possession was taken in pursuance of it. It is true that Burmese Buddhist Law requires possession to effectuate a gift, but, it is clear that after section 123 of the Transfer of Property Act came into force, it is not necessary that a gift should be completed by delivery of possession. Hindu Law also requires delivery of possession; but it has been held that the rule as to possession has been abrogated by section 123. *Dharmodas Das* v. *Nistarini Dasi* (2). This was followed in *Balbhadra* v. *Bhawani* (3), *Bai Rambai* v. *Bai Mani* (4) and in *Phul Chand* v. *Lakkhu* (5). So far, therefore, as the form was concerned, this gift was complete, and nothing further was required to make it effective.

It has been urged that there was no acceptance on the part of the donees, but it is to be noted, that the provisions of section 122 of the Transfer of Property Act have not been extended and that they do not apply to this case. But, even if they did, acceptance by the donees seems to be clearly proved by the fact that they went to the Registration Office to register the deed, and by the fact that steps were taken subsequently to effect the mutation of names in their favour.

The next question to be considered is: What is the effect of the condition subject to which this gift was undoubtedly made? In ordinary cases, does this condition require a reference to Burmese

(1) 53 Ind. Cas. 901; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 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.).

(2) 14 C. 446; 7 Ind. Dec. (N. S.) 297.
(3) 34 C. 853; 11 C. W. N. 956; 6 C. L. J. 233.
(4) 23 B 234; 12 Ind. Dec. (N. S.) 155.
(5) 25 A. 358; A. W N (1903) 70.

Buddhist Law and a decision in accordance with that law? In the ordinary case of a gift of immoveable property intended to take effect at once, in which the donees take possession and enjoy the rents and profits as owners by virtue of the gift there can be no question that Burmese Buddhist Law would not apply. But there is nothing in section 123 to show that any of the other provisions of Burmese Buddhist Law are in any way affected. Where the Court has to decide any question regarding succession, inheritance, marriage, etc., the rule is that Buddhist Law is to apply in cases where the parties are Buddhists except in so far as such law has by enactment been altered or abolished. (Section 13 (*l*) of the Burma Laws Act). There may be cases where the facts and circumstances surrounding a gift necessitate the decision of a question regarding succession or inheritance, and when that is the case, Burmese Buddhist Law must form the rule of decision. There is nothing in section 123 to abolish this provision of the Burma Laws Act.

A Burman Buddhist cannot dispose of his property after his death by Will, and no Burman Buddhist can, therefore, under the guise of making a gift, be allowed, in effect, to make a Will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where, therefore, his act in making a gift, owing to the circumstances under which it is made, or the conditions attached thereto, are such as to affect the succession to, or inheritance of his property after his death, Buddhist Law must be resorted to, to arrive at a decision as to whether his action can be maintained, or is invalid.

We have been referred to a series of decisions where this principle has been recognized. In *Maung Pan U* v. *Ma Kyi Nyo* (6), it was pointed out that the application of Buddhist Law depends on the circumstances of each case, and that, while there is nothing to prevent a man from making a gift to one or more of his children in the presence of others, gifts made for the purpose of evading the ordinary rules of inheritance would be governed by Buddhist Law. The same view was taken as regards Muhammadan Law in the case of *Annamalay Chetty* v. *Mahomed Ismail* (7). In *Ma Pan Nyun* v. *Ma Hla Sein* (8), it was held that questions as to the validity of *Shinbyu* gifts are questions regarding a religious usage and have, therefore, to be decided according to the Buddhist Law. In *Maung Ba Maung* v. *Maung Pyu* (9), it was held that where a gift involves questions of marriage, succession, inheritance or religious usage, the Buddhist Law will apply.

There is thus a long course of decisions taking the view that I have expressed above, and we have not been referred to any authority holding the contrary view. If, therefore, it was the intention of Ma Kyin to make a gift subject to the condition that it was only to take effect after her death, as has been established in this case, both by direct evidence and by the conduct of the parties concerned, the question arises as to whether the inheritance to her estate will not be affected and whether or not this gift is valid or invalid as contravening the provisions of Buddhist Law. The result is to alter the inheritance; in other words, in respect of this land, the inheritance will go to the three donees which otherwise ought to go to them and Ba Chit in equal shares. If the gift is to be allowed to stand the result will be to alter the rule laid down by Buddhist Law as governing inheritance. That is clearly a question regarding inheritance and Burmese Buddhist Law must form the rule of decision.

It is no argument to say that this gift was made ten years ago, and that any gift may be said to alter the amount of property to be divided after the donor's death. It is open to any Burman Buddhist to make a gift, or an alienation of some of his property during his lifetime; but it is not open to a Burman Buddhist to make a Will or a gift that would have the effect of disposing of his property after his death, contrary to the terms of Buddhist Law as to inheritance.

(6) 8 Ind. Cas. 1200; 3 Bur. L. T. 107.

(7) 23 Ind. Cas. 903; 7 L. B R. 123; 7 Bur. L. T. 75.

(8) 30 Ind. Cas. 665; 8 L. B. R. 190; 8 Bur. L. T. 149.

(9) 40 Ind. Cas. 854.

This being the case, in my opinion, the gift was invalid and cannot be enforced at the instance of the appellant. It may be, although I do not decide this question, that the whole document was invalidated by the alteration effected in it by the addition of a second donor and by the absence of attestation of its execution by him. But leaving that apart, the deed is, in my opinion, invalid as contravening the provisions of Buddhist Law.

It was sought to be argued that the appellant's husband, having become a *rahan* and having died still a *rahan*, lost all share in this gift, even if it was valid. That plea was not raised in the pleadings, and, although it was set up in the grounds of appeal to the lower Appellate Court, we could not allow it to be raised in second appeal.

In my opinion, therefore, the decision of the Court below was correct and must be confirmed, and this appeal dismissed with costs throughout.

Beasley, J.—I concur.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 30 OF 1921.
April 19, 1923.
Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Coleridge.

BERA CHANDRAMMA—
PLAINTIFF—APPELLANT
versus
CHANDRAM NAGANNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Succession—Dancing girls—Males and females, whether share equally.

Amongst the dancing girls, or Devadasis community, in Southern India there is a well-recognised custom, contrary to the ordinary Hindu Law and usage, by which females share in inheritance equally with males.

Second appeal against a decree of the Court of the Subordinate Judge, Vizagapatam, in Appeal Suit No. 225 of 1917, preferred against a decree of the Court of the District Munsif, Yellamanchelli, in Original Suit No. 514 of 1915.

Mr. *K. Sundara Rao*, for the Appellant.
Mr. *Y. Suryanarayana*, for the Respondents.

JUDGMENT.

Coleridge, J.—The suit is in ejectment. The plaintiff was a purchaser in Court auction in Original Suit No. 627 of 1911 of the suit property and he got possession; but the defendants who were tenants, refused to execute a lease and claimed occupancy rights from seven persons who, they said, were the *inamdars*. The suit lands were nautch *inam* lands, and the *inam* was enfranchised in the name of Maddila Gangayya and Maddila Bissayya by Exhibit C in 1864. Adeyya and Chellayya were two members of the families of these two original *inamdars*, and they mortgaged the property as theirs and the decree under which the sale took place was against them.

The lower Courts have found that these two were members of a dancing girl family, of which there were nine members living and the District Munsif, on remand for a finding, held that Adeyya and Chellayya were entitled only to five-ninths, that this was all they had power to mortgage; and that this was all the plaintiff could recover. The lower Appellate Court accepted the finding, that the mortgage would only bind the share of these two, but disagreed with the lower Court that there was no custom amongst the dancing girls' caste for females to share with the males; and, holding that the custom had been established that females share equally with the males, he decreed only two-ninths to the plaintiff. Both Courts held against an alleged partition and we are bound by that finding.

The only grounds of appeal here are (1) that the custom set up is not sufficiently established by the evidence, and (2) that the plaintiff's predecessors-in-title had adverse possession. As regards the latter point, it is clearly not so, for the property was held as tenants-in-common by the members of the family. Also as to this point there was no plea, no issue and no evidence. As regards the former, it is true that only one old man speaks to the custom; but, he proves two partition deeds of the caste, in which the females shared with the males. It is not as if this was some strange new

custom; it is well recognised, on which we find in Thurston's Castes and Tribes of South India dealing with Deva Dasis at page 127, Volume II, where he mentions as a recognised custom, that the sons and daughters inherit equally contrary to ordinary Hindu usage. We are, therefore, satisfied that the lower Appellate Court was justified in finding the custom proved.

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

Schwabe, C. J.—I agree and only wish to add this that, in addition to one witness aged 70, the first witness for the defendant, a young man it is true, stated 'among dancing girls' caste the males and females share equally." Although the evidence of custom is not as definite or clear as it ought to be, and I have no doubt in this case it could have been, I think there is sufficient to justify the finding of the Subordinate Judge that the custom was proved.

V. N. V. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL REGULAR SUITS NOS. 419 AND 420 OF 1920.

April 30, 1923.

Present:—Mr. Justice Young.

G. ABDOOLA AND ANOTHER—PLAINTIFFS

versus

I. A. MAHOMED AND OTHERS—DEFENDANTS.

Partnership—Accounts, settled, whether can be opened—Share of retiring partners carried over—Mistake—Fraud.

Where on the dissolution of a trading partnership owing to the retirement of some of the partners, accounts were taken and part of the retiring partners' share of the profits was carried over by the surviving partners to a new account:

Held (1) that the action of the surviving partners amounted either to a mutual mistake or to fraud and that in either case the retiring partners were entitled to a rectification of the mistake or fraud:

(2) that as the whole account was not impugned it was sufficient to give the retiring partners leave to surcharge and falsify.

Mr. *J. C. Ray*, for the Plaintiffs.

Mr. M. *Auzam*, for the Defendants.

JUDGMENT.—These are two suits heard together, being claims by two partners to re-open settled accounts under the following circumstances.

There was a partnership and accounts were taken on the 26th June 1920 obviously on the footing that the partnership was to continue, as sums to a considerable amount were carried over to the next year's account, instead of the retiring partners receiving their full share of the net profits.

The plaintiffs state that at this time they had no intention of retiring from the partnership, but retired a week or two later, *viz.*, on the 4th July, the principal partner having declared his intention to increase the shares of the partners other than himself and the plaintiffs.

The defendants deny this and say the partnership accounts were taken on the 26th June with a view to a dissolution and point to a discharge given on the 4th July in which it was recited that nothing was payable or receivable by either party. They also urge that, even on the plaintiffs' view of the case, this latter operated as a valid discharge inasmuch as it was written when the plaintiffs who jointly signed the letter in question had made up their minds to retire.

The plaintiffs have only their unsupported statements in favour of their contention that they did not intend to retire on the 26th June and this is denied by the defendants and I am not prepared to hold their story proved, especially as, in the view I take of the case, the prolongation of the partnership for these few days can make but a small difference and the case is easier to decide on the defendants' allegation, that the accounts were settled on the 26th June with a view to a dissolution. I, therefore, hold that the partnership was dissolved on the 26th June 1920. That the accounts were taken on a wrong footing is clear. It was a mere trading partnership and the surviving partners had no right to carry over part of plaintiffs' share in the profits to a new account. This was either a mutual mistake or a fraud; in either case, the fraud or mistake must be rectified and if the defendants rely on the joint letter of July 4th as a release,

then they fail to show consideration and fraud will be presumed: Daniell's Chancery Practice, 6th Edition, Volume I, page 421. I see, however, no reason to re-open the whole account which is not impugned so far as it goes. It will suffice if the plaintiffs be given leave to surcharge and falsify, Chancery Practice by Daniell, page 420, and the matter must be referred to a Commissioner for the purpose.

Z. K.

Order accordingly.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 115 OF 1921.

March 20, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.

SRINIVASA NAICKER—RESPONDENT NO. 1—APPELLANT

versus

THE OFFICIAL RECEIVER OF SOUTH CANARA—PETITIONER—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 34—Insolvency—Execution sale of insolvent's property before adjudication—Sale-proceeds—Receiver, rights of.

Where property belonging to an insolvent is sold in execution of a decree and the sale-proceeds are deposited in Court before the date of the order of adjudication, the amount deposited is excepted from the general provision contained in section 34 of the Provincial Insolvency Act of 1907, that property of the insolvent realised in the course of an execution should not be claimed by any person against the Receiver.

Appeal against an order of the District Court, South Canara, dated the 29th August 1921, in Civil Miscellaneous Appeal No. 14 of 1921, preferred against an order of the Court of the District Munsif, Mangalore, dated the 20th January 1921 in I. A. No. 35 of 1920 in I. P. No. 51 of 1919 (I. P. No. 101 of 1919 on the file of the Court of the Official Receiver, South Canara).

Messrs. *B. Sita Ram Rao* and *K. Y. Adiga*, for the Appellant.

Mr. *Lakshminarayana Rai*, for the Respondent.

JUDGMENT.—We think that this case can be disposed of on a much shorter ground than those adopted by the lower Appellate Court. The insolvent was adjudicated as such on 15th November 1919. Before that, certain property had been brought to sale under a decree. The proceeds of the sale were in Court and they are the money, which has been the subject of the present proceedings and which the lower Appellate Court awarded to the Official Receiver. In doing so it has overlooked the dates and the fact that section 34 of Act III of 1907 was applicable. The property in Court had clearly been realised in the course of the execution by sale or otherwise before the date of the order of adjudication, and it was then excepted from the general provision that such property could not be claimed by any person against the Receiver. On behalf of the Official Receiver it has been suggested that notwithstanding section 34, the lower Appellate Court was entitled to go behind the language of the decree, in execution of which the proceeds in Court or a share in them were being claimed. We have not been shown any foundation for that; and we do not think that it is consistent with the object of section 34. Taking this view, we allow the appeal, set aside the lower Appellate Court's order and restore that of the District Munsif.

As the point, on which our decision is based, was not taken in the lower Appellate Court there will be no order as to costs either in the lower Appellate Court or in this.

V. N. V. *Appeal allowed.*

Z. K.

DAKSHINA RANJAN GHOSE *v.* OMAR CHAND OSWAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1979 OF 1920.

June 26, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

DAKSHINA RANJAN GHOSE—DEFENDANT—APPELLANT

versus

OMAR CHAND OSWAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 80—Suit against public officer—Mala fides—*Notice whether necessary.*

Before instituting a suit against a public officer a plaintiff is bound to give notice under section 80 of the Civil Procedure Code even though in the discharge of his duty, the public officer acted *mala fide*. [p. 176, col. 1.]

Shahebzadee Shahunshah Begum v. *Fergusson*, 7 C. 499; 3 Ind. Dec. (N. S.) 871, dissented from.

Raghubans Sahai v. *Phool Kumari*, 32 C. 1130; 1 C. L. J. 542, distinguished.

Jogendra Nath Roy Bahadur v. *Price*, 24 C. 584; 12 Ind. Dec. (N. S.) 1058, *Samanthala Koti Reddi* v. *Porthuri Subbiah*, 40 Ind Cas. 86; 41 M. 792; 7 L. W. 586; 34 M. L. J. 494; 23 M. L. T. 357; (1918) M. W. N. 414 (F. B.), followed.

Appeal against a decree of the Subordinate Judge, Second Court, Mymensingh, dated the 21st June 1920, affirming that of the Munsif, First Additional Court, at Jamalpore, dated the 26th May 1919.

Babus *Mahendra Nath Ray* and *Ramendra Mohan Majumdar*, for the Appellant.

Babus *Brojolal Chuckerbutty* and *Birendra Kumar De*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is a second appeal by the defendant from the judgment of the learned Second Subordinate Judge of Mymensingh.

The suit was brought by one Omar Chand Oswal, who was a trader of the Dharmakura Bazar, against the Sub-Inspector of Police of the Islampore *thana*, to recover the sum of Rs. 75 which, it was alleged, the defendant had extorted from the plaintiff by placing the plaintiff under a wrongful arrest and taking him to the *thana* and detaining him there for more than an hour.

There was a further claim for Rs. 50 which was claimed as damages for the alleged wrongful arrest.

The two points which the learned Vakil who appeared for the appellant, has taken are, first, that the defendant was a public officer and in executing the arrest of the plaintiff he was purporting to act in his official capacity and that, consequently, by reason of the provisions of section 80 of the Code of Civil Procedure the plaintiff could not institute this suit until the expiration of two months next after notice in writing to the defendant; that no such notice was given and that, consequently, the suit would not lie. The other point was that the payment of the sum of Rs. 75 was the result of a bargain between the plaintiff on the one hand and the defendant on the other, and that the plaintiff was *in part delicto* with the defendant and, consequently, the plaintiff was not entitled to recover in this suit

The learned Vakil, after further consideration, admitted that he could not press the second point, having regard to the findings of fact of the learned Subordinate Judge, which were to the effect that the plaintiff purchased his release by payment to the defendant of the sum of Rs 75 under coercion, or putting it in other words, that the Rs. 75 was extorted from the plaintiff by placing him under a wrongful arrest, taking him to the *thana* and detaining him there. There is, therefore, one point only to be considered in this appeal, and that is the question whether the defendant was entitled to notice under section 80 of the Civil Procedure Code before the suit was instituted.

For the consideration of this point it is necessary to state a few facts. It appears that a person, who gave the name of Amarchand Oswal, was alleged to have embezzled a sum of Rs. 275 from the shop of one Dwarka Das Agarwalla of Sunari and then absconded. Endeavours were being made by the Police to find the absconder. Apparently, an enquiry had been made at Bikanir with no result. An enquiry was then made in Calcutta with no result. Then an enquiry slip was sent to the Superintendent of Police at Mymensingh and he sent it to the Sub-Inspector of Islampur, who is the defendant in this case, with the note "to enquire and report." Apparently, attached to this slip there was the report of the Bikanir Police

and the papers which were with the defendant described the absconder, It was the defendant's case that, having regard to the information contained in these papers and in the enquiry slip, he took action under section 54 of the Code of Criminal Procedure and arrested the plaintiff. It appears that he went to the shop of the plaintiff on the morning of the 22nd of March 1918 accompanied by some *chowkidars* and constables, that in spite of the protest of the plaintiff and some other persons, who are described by the learned Judge as respectable inhabitants of that place, the plaintiff was taken in the custody of a constable to the *thana*, that at the *thana* the defendant demanded a sum of Rs. 100 as a condition for the release of the plaintiff, that after some bargaining with the plaintiff and others who had accompanied the plaintiff to the *thana*, it was agreed that the defendant should receive Rs. 75 and one of those who had accompanied the plaintiff, went to his place of business, obtained the money which was paid to the defendant, and then the plaintiff was released on bail.

Now the learned Subordinate Judge has found that the defendant ought to have known that the plaintiff was not the absconder. He said, "The defendant had this document in his hand and a look at the man would satisfy him that the plaintiff was not the absconder." Further, he said, "The plaintiff had his firm at Dharmakura in the name of Amarchand Askaram for about 25 years and is a man of established reputation in the locality. His shop is only 15 minutes walk from the Police Station of the defendant." I need not dwell upon this at any greater detail because the finding is that the conduct of the defendant was marked with *mala fides* from the beginning to the end, and that he arrested the plaintiff having good reason to believe him to be innocent and refused to grant him bail at the shop; and, under these circumstances, the learned Subordinate Judge made a decree for the recovery of Rs 75 and a further decree for Rs. 50 as damages for the wrongful arrest.

The learned Vakil, who appeared for the appellant, has admitted that the point upon which he relies, namely, the omission of notice under section 80, does not apply to the claim of Rs. 75 because when the defendant demanded and obtained the Rs. 75 under coercion nobody could suppose that he was purporting to act in his official capacity in so demanding and obtaining the Rs. 75 and, consequently, the decree which the lower Appellate Court has made in favour of the plaintiff for the Rs. 75 must remain undisturbed.

But the learned Vakil raised the point with regard to the claim for Rs. 50 compensation or damages for the wrongful arrest.

The learned Subordinate Judge held that the defendant was not entitled to notice under section 80, because he said, "section 80 of the Civil Procedure Code is meant for the protection of Government Officers acting in good faith in lawful discharge of their duties: But it does not apply to cases of *mala fide* acts perpetrated by Government Officers taking advantage of their position and abusing the salutary provisions of law as engine of torture as has been done in the present case. The law is clear on the point. The ruling in *Peary Mohan Das* v. *Weston* (1) does not entitle the defendant to any notice in the present case, so this point also is decided against the appellant."

Speaking for myself, with great respect to the learned Subordinate Judge, I am of opinion that that decision is wrong. The words of the section are plain. In this case the material words are these: "No suit shall be instituted.....against a public officer in his official capacity until the expiration of two months next after notice in writing has been . . . .delivered to him....." On the facts of this case there is no doubt that the defendant was a public officer, and on the facts which I have already stated, in my opinion, there is equally no doubt that the act, namely, the arrest of the plaintiff, was an act purporting to be done by the defendant in his official capacity: and, consequently, in my judgment, the defendant was entitled to notice. The decision of the learned Subordinate Judge implies the importation of words into the section which cannot be found

(1) 13 Ind. Cas. 721; 16 C. W. N. 145; 13 Cr. L. J. 65.

there. He would read the section as if it were "in respect of any act purporting to be done by such public officer *bona fide* in his official capacity." In my judgment it is not legitimate to construe the section by importing into the section words which do not appear in the section. For the purpose of my judgment it really would not be necessary for me to say any thing further.

It is desirable, however, in my judgment, to refer to the case which was mentioned by the learned Subordinate Judge. That was a decision of Mr. Justice Fletcher in the case of *Peary Mohan Das* v. *Weston* (1). The passage which is relied upon by the Subordinate Judge is to be found at page 214*, which runs as follows: "The third issue is whether the defendants were entitled to notice of this suit under section 80 of the Code of Civil Procedure. In my opinion they were not. A public officer sued in respect of an act done in bad faith is not entitled to notice under section 80. The decisions in this Court of *Shahebzadee Shahunshah Begum* v. *Fergusson* (2), and *Raghubans Sahai* v. *Phool Kumari* (3), established this proposition without doubt."

With great respect to the learned Judge, I do not agree with him. The case of *Raghubans Sahai* v. *Phool Kumari* (3), in my judgment, is no authority for the proposition which the learned Judge enunciated. In the case of *Shahebzadee Shahunshah Begum* v. *Fergusson* (2), the judgment was delivered by Mr. Justice Cunningham and it contains some statements which go to support the opinion of Mr. Justice Fletcher, but in my judgment they were *obiter dicta* and were not necessary for the decision of that case.

The opinions of Mr. Justice Fletcher and that of Mr. Justice Cunningham are, in my judgment, inconsistent with the decision of this Court in the case of *Jogendra Nath Roy Bahadur* v. *Price* (4), to which Mr. Justice Macpherson and Mr. Justice Ameer Ali were parties. In that case the lower Court had not arrived at any findings of fact because the learned Subordinate Judge dismissed the suit on the ground that the defendant was entitled as a public officer to two months' notice under section 424 of the Civil Procedure Code of 1882—previous to the institution of the suit, the acts complained of having been done by the defendant in his official capacity. It is material to notice that the allegation in the plaint was that the defendant illegally and maliciously caused the plaintiff, to be arrested: and, in the judgment it is stated that, the plaintiff charges that this act was illegal and malicious. The learned Judges in giving judgment said this, "The learned Pleader for the appellant contends that as the act is said to have been done maliciously, section 424 does not apply, and that that section only applies to acts done inadvertently, and as authority he cites the case of *Shahebzadee Shahunshah Begum* v. *Fergusson* (2). There certainly are some remarks of Mr. Justice Cunningham which would lend support to this contention, but that was a case of a very different description from this, and we think the remarks made must be taken in connection with the facts of that particular case, and not as of general application." "This is a case of a wholly different character, and we are not aware of any instance, certainly no such case has been cited to us, in which it has been held that the section does not apply to the case of a public officer charged with a tortious act done by him in his official capacity. The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise"—I agree with the decision in that case, and, with great respect to Mr. Justice Fletcher, I do not agree with the decision in *Shahebzadee Shahunshah Begum* v. *Fergusson* (2). It seems to me that the decision of this Court in *Jogendra Nath Roy Bahadur* v. *Price* (4), is in accordance with the plain words of the section: and, I am glad to find that the decision has been arrived at; because, my own opinion is that, if the Courts would be satisfied to give effect to the natural meaning of the language used in the sections of the Codes, a great deal of time would be saved.

(2) 7 C. 499; 3 Ind. Dec. (N. S.) 871.
(3) 32 C. 1130; 1 C. L. J. 542.
(4) 24 C. 584; 12 Ind. Dec. (N. S.) 1058.

*Page of 16 C. W. N.—[*Ed.*]

The matter does not end there, because the learned Vakil drew our attention to a Full Bench case in the Madras High Court: *Samanthala Koti Reddi* v. *Pothuri Subbiah* (5); the head-note of which is: "A public officer is entitled to notice of suit under section 80 of the Civil Procedure Code, even, if in the discharge of his duty, he has acted *mala fide*." That decision confirms the view which I have taken of the words in section 80; and the result is, as I have already said, that I am unable to agree with the decision of the learned Subordinate Judge by which he held that it was not necessary for the plaintiff to give the notice, prescribed by section 80 before bringing a suit against the defendant, because it was proved that, although the defendant purported to act in his official capacity as a public officer, he had acted *mala fide*.

In view of the conclusion at which I have arrived as to the proper interpretation of section 80, the only question on this point is whether the arrest of the plaintiff was an act purporting to be done by the defendant as a public officer in his official capacity. On the facts of the case I have no doubt that the arrest was an act purporting to be done by the defendant as a public officer in his official capacity and, consequently, the suit so far as the claim for the Rs. 50 is concerned, could not be instituted until the expiration of two months next after notice in writing was given. Inasmuch as no notice was given, in my judgment the claim of the plaintiff for the sum of Rs. 50 as compensation or damages for wrongful arrest must fail, and the appeal in respect of that claim must be allowed and the suit in respect thereof should be dismissed.

Inasmuch as the appeal has succeeded as to a part of the plaintiff's claim and failed as regards the other part, we make no order as regards the costs of this appeal. We do not interfere with the order as to the costs of the lower Courts, which will stand.

Richardson, J.—I agree. In the present case, even though the defendant knew that he was arresting the wrong person and was in that sense acting *mala fide* he was, in my opinion, purporting to act as a public officer, that is, as a public officer, within the meaning of the section 80 of the Civil Procedure Code. That being so, the defendant was entitled to notice of this suit, so far as it is a suit for damages for wrongful arrest or false imprisonment.

Our attention has been called to no decision binding on us with which this conclusion is in conflict. Not only so. But the view that the words of section 80 should receive their natural meaning is supported by the decision of this Court in *Jogendra Nath Roy Bahadur* v. *Price* (4), which is binding upon us and which has been approved by a Full Bench of the Madras High Court in *Samanthala Koti Reddi* v. *Pathuri Subbiah* (5).

The case of *Sasanka Sekhar Banerjee* v. *Sudhangsu Mohan Ganguli* (6), to which reference was made on behalf of the respondent turns upon section 363 of the Bengal Municipal Act, 1884, the terms of which differ materially from those of section 80 of the Code.

With these observations I agree with the order which my Lord has made.

K. S. D. *Appeal allowed in part.*

(5) 46 Ind. Cas 86; 41 M. 792; 7 L. W. 586 34 M. L. J. 494; 23 M. L. T. 357; (1918) M. W. N. 424 (F. B.).

(6) 59 Ind. Cas. 572; 24 C. W. N. 891; 48 C. 45.

GARABINI KUMARIN *v.* SURJA NARAIN SINGH.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 23 OF 1922.

August 16, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

Srimati GARABINI KUMARIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SURJA NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 1, 4, 7—Application for review—Incorrect exposition of law, whether sufficient reason—Order granting review, when appealable—Suit for declaration that decree collusive—No present loss to plaintiff—Suit, whether maintainable.

The production of an authority which was not brought to the notice of the Court at the hearing and which lays down a view of the law contrary to that taken by the Court is not a sufficient ground for a review and an order granting such a review is appealable. [p. 179, col. 1.]

Chhajju Ram v. *Neki*, 72 Ind. Cas. 566; 26 C. W. N. 697; 30 M. L. T. 295; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.), followed.

A suit by the transferee of a recorded tenant of a non-occupancy holding for a declaration that a decree obtained by the landlord against the tenant for a rate of rent higher than the actual rate, was fraudulent and collusive and should be set aside, is not maintainable unless it can be shown that the transferee has suffered actual damage. [p. 178, col. 2.]

Asarfi Singh v. *Ram Khelawan Sinha*, 49 Ind. Cas. 785; 4 P. L. J. 115; (1919) Pat. 49 (F. B.), distinguished.

Letters Patent Appeal from the judgment of Mr. Justice Adami, dated the 3rd July 1922.

Mr. *S. N. Dutt*, for the Appellants.

Mr. *N. C. Ghosh*, for the Respondents.

JUDGMENT.

Miller C. J.—The question for decision in this appeal is whether an order passed by the Munsif of Raghunathpur granting a review of a judgment and a decree reversing the decision previously arrived at can stand.

The appellants, who are the plaintiffs in the suit, are the purchasers from the recorded tenants of a 12-annas share in the latters' non-transferable occupancy holding the rent of which they allege was Rs. 14. The landlords sued the tenants who had retained the other 4-annas in the holding for arrears of rent of the whole holding alleging the same to be at the rate of Rs. 31 and obtained a decree and in execution had the holding advertised for sale. The plaintiffs were not parties to that suit. Before the sale took place, the plaintiffs instituted a suit before the Munsif claiming a declaration that the decree obtained by the landlords against the recorded tenants was collusive and fraudulent and should be set aside alleging that the rent was not Rs. 31 as decreed but Rs. 14 only. Pending the hearing of the suit they obtained an injunction staying the sale. The landlords and the recorded tenants from whom the plaintiffs had purchased their 12-annas share in the holding were impleaded as defendants in that suit.

The Additional Munsif to whose file the suit was transferred for trial decided that the decree was obtained by collusion between the landlords and the tenants but that the plaintiffs had no cause of action as they had not been dispossessed and had suffered no damage and were not entitled to apply for a declaration that a decree passed in a suit to which they were not parties was fraudulent and collusive and should be set aside until they had suffered some actual damage by dispossession and as they had not been actually dispossessed of their property by sale in execution of the decree he considered that the suit was premature and not maintainable at that stage. For this proposition he relied upon the authority of *Gananath Satpathy* v. *Harihar Pandhi* (1). The facts of that case were somewhat similar. The transferees of a portion of a non-transferable occupancy holding also sued the landlords for a declaration that a rent-decree obtained by them

(1) 48 Ind. Cas. 359; (1918) Pat. 289; 5 P. L. W. 232.

against the tenants, the transferors of the plaintiffs, was fraudulent. It was not shown that the plaintiffs had suffered any damage by reason of the decree but it was said that they might be dispossessed if the decree were executed by sale of the holding. It was not suggested that the plaintiffs in that case had at the time of suit suffered any actual damage by the decree beyond the apprehension of being dispossessed and it was held that as the landlords had not up to that time dispossessed the plaintiffs and it was not known whether they would do so, the right to a declaration under section 42 of the Specific Relief Act did not arise. In the course of the judgment it was stated: "Here the landlords have not yet dispossessed the plaintiff and it is not known whether they will do so. When that time comes it will be open to the plaintiffs to adopt such remedies as the law gives them but before that time comes the plaintiffs are not entitled to a declaration that a tenant alleged by the landlords to be their tenant is not in fact their tenant and that a decree obtained by the landlords against their alleged tenant is fraudulent. Having no legal title or interest which the landlords are concerned to deny, the plaintiffs cannot invoke the operation of section 42 of the Specific Relief Act in this suit." In a later case *Asarfi Singh* v. *Ram Khelawan Sinha* (2) decided by a Full Bench consisting of three Judges of this Court in 1918 it was decided that such a suit was maintainable before the plaintiff had been dispossessed if in fact he had suffered damage by the decree, and it was held that in so far as *Gananath Satpathy* v. *Harihar Pandit* (1) purported to decide (1) that even if the transferee has made a deposit, or (2) even if the transferee has suffered actual damage by an infraction of his legal rights, irrespective of whether pecuniary damage has been sustained or not, such transferee cannot maintain an action to attack the fraudulent decree, the decision was incorrect. I agree that if the transferee has suffered actual damage or if he has been obliged to deposit the decretal amount in a fraudulent rent suit to preserve his property, which comes to much the same thing, he would be entitled to maintain an action to attack the decree as fraudulent but I do not consider that the judgment in the earlier case, in which I as a member of the Bench concurred, intended to lay down the proposition attributed to it by the Full Bench decision. However that may be, the Full Bench decision was not drawn to the attention of the learned Munsif, and he dismissed the suit upon the ground that the plaintiff had at the date of its institution suffered no damage as he had not been dispossessed and had no cause of action. The present suit was tried on the 11th June 1919. The Full Bench case was decided in December 1918 and was reported in the authorised reports on the 28th February following. There was no reason, therefore, why, with ordinary care, the decision should not have been drawn to the attention of the Court by the defendants' Pleader.

There was no appeal from the Additional Munsif's decision but the appellants applied on the 20th June in the Court of the Additional Munsif for review of judgment stating that the Court had dismissed the suit as not being maintainable on the basis of a decision which had been subsequently overruled by a Full Bench decision of the same Court. The application for review then proceeded as follows: "It will appear from the facts above stated that the present suit is maintainable. At the time of the trial of the suit the petitioners could not place the aforesaid Full Bench ruling before the Court as they were not aware of it. It is, therefore, prayed that the aforesaid Full Bench ruling may be referred to and that the suit may be decreed" after setting aside the order of dismissal." The office of Additional Munsif having been abolished the application was heard by the permanent Munsif in August 1919.

(2) 49 Ind. Cas. 785 4 P. L. J. 115; (1919) Pat. 49 (F. B.).

GARABINI KUMARIN v. SURJA NARAIN SINGH.

The learned Munsif allowed the application for review on the ground that his predecessor had committed an error of law. He considered that O. XLVII, r. 1 of the Civil Procedure Code was wide enough to include such a case. Having arrived at this conclusion, he considered the effect of the Full Bench decision in *Asarfi Singh* v. *Ram Khelawan Sinha* (2) and found that as the landlords by collusion with the tenants had obtained a decree for a rate of rent higher than the actual rate, this afforded sufficient ground in itself to give the plaintiffs a cause of action and passed a decree in their favour declaring that the decree obtained in the rent suit was fraudulent and collusive and should be set aside.

The defendants appealed to the Subordinate Judge who held, first, that no appeal lay from the decision of the Munsif, and, secondly, that the Munsif was right in holding that the suit was maintainable.

A second appeal was preferred to this Court which was heard by Adami, J., who held that an appeal lay against the order granting the application for review and, secondly, that the production of an authority which was not brought to the notice of the Judge at the hearing and which lays down a view of the law contrary to that taken by the Judge was not a sufficient ground for granting a review. He considered that the decision of the Privy Council in *Chhajju Ram* v. *Neki* (3) concluded the matter and allowed the appeal. From that decision the present appeal has been preferred to this Bench by the plaintiffs.

It was contended, in the first place, that O. XLVII, r. 7 of the Civil Procedure Code, which limits the grounds upon which an order granting an application for review may be objected to in appeal, precluded the respondents from questioning the propriety of the order in this case, and, secondly, that the decisions of the Munsif and of the Subordinate Judge on appeal accurately interpreted the law as laid down in *Asarfi Singh* v. *Ram Khelawan Sinha* (2) and applied it to the facts of this case. Under O XLVII, r. 7, apart from any question of limitation, the only grounds upon which it is permissible to object to such an order are that the application is in contravention either of the provisions of rule 2 or of the provisions of rule 4 of the Order. Rule 2 does not apply. By rule 4, proviso (*b*), it is provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. Before considering the effect of this rule, it is necessary to bear in mind that rule 1 of the Order lays down the grounds upon which a review of judgment may be applied for by a person aggrieved by the decree or order. These are (*a*) the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or (*b*) on account of some mistake or error apparent on the face of the record, or (*c*) for any other sufficient reason. It was contended that rule 4 did not apply as the ground of the application in this case was a mistake or error apparent on the face of the record and not the discovery of new and important matter or evidence. It is necessary to consider, therefore, whether where the judgment sought to be reviewed is based upon a wrong application of the law this constitutes a mistake or error apparent on the face of the record. There are undoubtedly decisions of the Courts in India which support the view that a wrong application of the law constitutes an error on the face of the judgment,

(3) 72 Ind. Cas. 566; 26 C. W. N. 697; 30 M. L. T. 295; 41 P. L. R. 1922; 3 P. L. T. 485; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.).

See *Sharup Chand Mala* v. *Pat Dassee* (4). There are also cases which lay down that the production of a binding authority which was not placed before the Trial Court amounts to the discovery of new and important matter or evidence but those decisions are by no means uniform. It is not necessary to consider them in detail as the whole question has, in my opinion, been finally settled by the decision of the Judicial Committee of the Privy Council in 1922 in the case of *Chhajju Ram* v. *Neki* (3). In that case their Lordships examined the case law on the subject in India which they found to be conflicting and they held that the first two grounds upon which a review is permissible under O. XLVII, r. 1, namely, the discovery of new and important matter or evidence which could not after due diligence have been produced at the trial or some mistake or error apparent on the face of the record did not apply to a case where the ground of review is that the judgment has proceeded upon an incorrect exposition of the law. They further held that the third ground, namely, any other sufficient reason, must be a reason sufficient on grounds analogous to those previously specified. In the present case the review was granted upon the ground that the case law relied upon by the Munsif had been modified by a subsequent decision which, in my opinion, amounts to the same thing as a wrong exposition of the law. In view of the recent decision of their Lordships of the Privy Council it is no longer open to the appellants to argue that the ground of review was an error on the face of the record. In fact, the ground upon which the application for review was based was that the petitioners were not aware of the Full Bench ruling of this Court and could not place it before the Munsif at the first trial. Even assuming that this were a legitimate ground of review which the Privy Council has decided is not so it could only be justified on the ground of the discovery of new matter or evidence and an order granting a view on such grounds is clearly appealable under O. XLVII, r. 7, coupled with rule 4 of the same Order. That rule provides that the application shall not be granted on such grounds without strict proof either that the new matter is not within the knowledge of the applicant or could not be produced by him when the decree or order was passed or made. In the present case no such proof was given. Indeed, it would be impossible to prove that a Full Bench decision of the High Court to which the Trial Court was subordinate, published in the authorised Law Reports some four months before the trial, could not have been adduced at the trial. If, in fact, the decision was not within the knowledge of the petitioner or his Pleader, ignorance of this nature ought not, in my opinion, in view of r. 1 of O. XLVII, to be allowed to be pleaded in support of an application such as the present. It follows, therefore, that the order granting the review upon the ground assigned was altogether irregular and ought never to have been made and in appeal it can be set aside.

Moreover, although it is not perhaps necessary in view of the above finding to decide the point, I am of opinion that in the present case, even on the assumption that the decree was obtained by collusion between the landlords and the tenants, the plaintiffs having at present suffered no loss, the action was not maintainable, and the facts of this case are not governed by the decision of the Full Bench in *Asarfi Singh* v. *Ram Khelawan Sinha* (2) a decision which was based upon the finding that the plaintiff in that suit had suffered loss by the wrongful and collusive act of the defendants. In my view the judgment of the learned Judge of this Court was right and should be affirmed. I would dismiss this appeal with costs.

I would add, however, that our present decision must not be taken as in any way prejudicing the plaintiffs' right to take such steps as may be open to them to challenge the validity of the decree in the rent suit, if and when their rights should be infringed, or their possession assailed. At present it is not known whether the landlord defendants will or will not attempt to deprive the plaintiffs of possession.

(4) 14 C. 627; 7 Ind. Dec. (N. S.) 416.

GARIBINI KUMARIN *v.* SURJA NARAIN SINGH.

Mullick, J.—Defendants Nos. 2 and 3 are the recorded tenants of an occupancy holding of which the defendant No. 1 is the landlord. Defendants Nos. 4, 5, 6 and 7 are said to be un-recorded tenants who have an interest in the holding jointly with defendants Nos. 2 and 3. The plaintiffs have purchased a twelve-annas share in the holding from defendants Nos. 2 and 3 and allege that the rental of the holding is Rs. 14 per annum but that the defendant No. 1, in collusion with defendants Nos. 2 and 3, obtained a decree at the rate of Rs. 31 per annum in execution of which he caused the holding to be attached and proclaimed for sale. The plaintiffs thereupon brought a suit in the Court of the permanent Munsif of Raghunathpur for a declaration that they had purchased the *jamai* right to the extent of twelve-annas in the holding and praying that the sale should be declared collusive and fraudulent and that an injunction should be issued restraining the defendant No. 1 from executing the decree. The suit was transferred to the Additional Munsif of Raghunathpur who dismissed it on the 11th June 1919 on the ground that the plaintiffs had shown no cause of action. An application for review was then filed before the Additional Munsif but upon his Court being abolished the application was heard by the permanent Munsif who, on the 22nd of August 1919, set aside the decree of the Additional Munsif. The ground for the reversal of the decree was that the Full Bench decision of this Court in *Asarfi Singh* v. *Ram Khelawan Sinha* (2) had overruled *Gananath Satpathy* v. *Harihar Pandhi* (1) upon which the Additional Munsif had acted and that the mere passing of a collusive decree was a sufficient cause of action. On appeal the Subordinate Judge of Manbhum affirmed this decree and the defendant No. 1 thereupon appealed to the High Court and on the 3rd of July 1922 Mr. Justice Adami decreed the appeal on the ground that the permanent Munsif had acted without jurisdiction and upon insufficient grounds in reviewing the judgment of the Additional Munsif. He accordingly restored the decree of the Additional Munsif and the present Letters Patent Appeal is filed by the plaintiff against the judgment of the learned Judge.

Now, the first question is whether it was open to the learned Judge of this Court to examine the sufficiency of the grounds upon which the permanent Munsif of Raghunathpur granted the review. It is contended that, when a Court grants a review his order can be objected to only for the reasons enumerated in r. 7 of O. XLVII of the Civil Procedure Code, either by an appeal against the order or by any appeal against the final decree. Here it is contended that, as the review was not granted on any of the grounds (*a*), (*b*) and (*c*) enumerated in the first clause of rule 7, but because there had been an error apparent on the face of the record or for some other sufficient reason, the order was final and could not be attacked in appeal.

It is clear that as the application for review was presented to the Additional Munsif in the first instance and was heard by the permanent Munsif after the Court of the Additional Munsif was merged in the Court of the permanent Munsif there cannot have been any breach of r. 2 of O. XLVII.

If the review was granted on the ground of discovery of new and important matter and if strict proof was not given of the fact that the matter was not within the knowledge of the applicant when the order was passed, then there was a breach of rule 4 and it was open to the Court which heard the appeal from the final decree to determine whether or not strict proof had been given. The learned Judge of this Court has held that the discovery of the decision in *Asarfi Singh's case* (1) was not new matter within the meaning of rule 1, and in this view I agree. The decision of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (3) seems to me to conclude the point.

It is next necessary to examine the contention that, if the decision in question was not new matter then the Munsif must have granted the review on the ground that there was an error apparent on the face of the record or for other sufficient reason.

Now *Chhajju Ram's case* (3) makes it clear that the sufficient reason must be a reason sufficient on ground analogous to

those previously specified in rule 1 and, therefore, the appellant is compelled to argue that an order granting a review on the ground of an error apparent on the face of the record cannot be attacked in the appeal against the final decree. If he succeeds on this point we are precluded at the outset from examining the propriety of the order.

Now in section 376 of the Civil Procedure Code of 1859 (Act VIII of 1859) it was enacted that an order refusing or granting a review shall be final. That, however, did not preclude the party affected from objecting to the review in his appeal against the decree [*Joogul Kishore Singh* v. *Oogur Na ain Singh* (5)]. Next, the Civil Procedure Code of 1882 while enacting that an objection against an order granting a review on the ground of a contravention of section 624, which now corresponds to r. 2 of O. XLVII, or of section 626, which corresponds to rule 4, could be taken either by an appeal against the order or in an appeal against the final decree, did not take away the right of the appellant to object to the order on the ground that the Court had acted without jurisdiction; nor has the present Civil Procedure Code made any alteration in the law in this respect.

If, therefore, the Munsif granted the review on the ground that there was an error apparent on the face of the record it was open to the Court which heard the appeal against the final decree to consider the correctness of his decision in this matter.

It was open, therefore, to Mr. Justice Adami to consider the propriety of the order.

In my opinion it cannot be said that the Additional Munsif committed an error apparent on the face of the record by following the decision of a Division Bench in *Gananath Satpathy's case* (1). Even if it were assumed that the Full Bench decision in *Asarfi's case* (2) directly overruled the decision of the Division Bench still that would not be a sufficient ground for review, and the proper remedy of the aggrieved party was to appeal against the decree. The decision of their Lordships of the Privy Council in *Chhajju Ram's case* (3) concludes this point. As a matter of fact, the Full Bench did not overrule the Division Bench in any way. I agree, therefore, with Mr. Justice Adami that the order granting the review was improperly made.

On the merits also the decision is correct, for, in my opinion, the plaintiffs have no cause of action.

The position of a transferee of a portion of a non-transferable occupancy holding is a peculiar one. He has a right to possession as against the whole world but the landlord is not bound to receive rent from him nor to recognize his existence in any litigation between himself and his recorded tenant. He is not a necessary party in a suit for arrears of rent or for enhancement of rent and he cannot, since the latest Full Bench decision upon this point in this Court, deposit the arrears under section 170 of the Bengal Tenancy Act so as to save the holding from sale. He may, according to the Full Bench ruling in *Dayamoyi* v. *Ananda Mohan Roy* (6), apply under O. XXI, r. 90, Civil Procedure Code, to have the sale set aside on the ground of irregularity but he cannot sue the landlord for a declaration that a decree obtained by him against the recorded tenant is void except upon showing that he has actually suffered damage by the landlord's act. I can find nothing in the Full Bench decision in *Asarfi Singh* v. *Ram Khelawan Sinha* (2) which justifies the view that a suit would lie against the landlord if his decree against the tenant had failed to cause damage to the transferee.

It is contended that, even if he cannot prove damage, the transferee's suit will lie under section 42 of the Specific Relief Act. Now, it is undoubtedly true that the transferee has a legal right in immoveable property, that is to say, a right to remain in possession. It may be also admitted that he has a right to such possession upon payment of a certain rent to the recorded tenant; but what

(5) 8 W. R. 483.

(6) 27 Ind. Cas. 61; 42 C. 1721 18 C. W. N. 971; 20 C. L. J. 52 (F. B.).

has the landlord done which can be construed as a challenge to the transferee's right. It is said that by obtaining a decree for Rs. 31 instead of Rs. 14 the landlord has proclaimed to the world that the true rental is Rs. 31 and that he has thereby cast a cloud upon the title of the transferee. The answer is that the landlord has no concern with the transferee and that the fact that he has obtained a collusive decree against the recorded tenant at Rs. 31 per annum is no declaration that the transferee is liable to pay to the recorded tenant an enhanced sum. It cannot be said that the landlord has denied the right or is interested in denying the right of a person of whose existence he is not even aware, and no case has been shown to us in which a declaration has been given to a transferee simply on the ground that the landlord has obtained a collusive decree against a recorded tenant. In my opinion the suit of the plaintiffs is premature, for the recorded tenant may satisfy the decree before sale. Reliance was placed by the respondent upon a decision of this Court in *Barhma Deo Lal* v. *Sheo Prasad Lal* (7). In that case the transferee had been allowed to deposit the decretal amount under section 170 of the Bengal Tenancy Act and, under the provisions of section 171, he had acquired a mortgage lien upon the holding and had taken possession of the same. The landlord was bound to receive rent from the transferee till his mortgage lien was discharged and he was brought into direct relationship with him. The landlord thereafter brought a collusive suit at an enhanced rental against the original tenant and it was held that the transferee was competent to bring a suit for a declaration that the decree was collusive and not binding upon him.

In that case the transferee's right to keep possession of the holding upon payment of the existing rent was directly challenged by the landlord's collusive decree and the case fell strictly within the provisions of section 42 of the Specific Relief Act. In the present case the transferee has no such mortgage lien and I cannot see that the landlord has in any way denied his right or that he is interested in denying it.

I think, therefore, that the decree of the Munsif issuing a permanent injunction upon the landlord prohibiting him from executing his rent-decree is wrong and the decree of the Additional Munsif in the first instance was right.

The result, therefore, is that the judgment of Mr. Justice Adami must be affirmed and the appeal dismissed with costs. The contesting defendant will get his costs throughout.

W. C. A. *Appeal dismissed.*

(7) 41 Ind. Cas. 237; 2 P. L. J. 561; (1917) Pat. 222; 1 P. L. W. 674.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1693 OF 1919.
March 17, 1923.
Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.
LABHU RAM—PLAINTIFF—APPELLANT
versus
ABDULLA *alias* DULLA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Construction of deed—Interest, whether charge on property—Redemption—Improvements made without consent of mortgagor—Mortgagee, whether entitled to amount spent on improvements.

A mortgage-deed after providing that the mortgage-money would carry interest at a certain rate concluded with the statement that when the mortgagor makes the payment he will pay the whole money:

Held, that the stipulation meant that the mortgagor would pay the "whole money", *i. e.*, principal and interest, at one time, and that, therefore, the interest was a charge on the property. [p. 184, col. 2.]

A mortgagee who has effected improvements on the mortgaged property is entitled to be paid, at the time of redemption, the amount spent by him on such improvements, provided the sum spent is not unreasonable, and the improvements have increased the value of the property. [p. 185, col. 1.]

Rikhi Kesh v. *Jwala Sahai*, 52 Ind. Cas. 862; 78 P. R. 1919, followed.

Rupan Singh v. *Champa Lal*, 26 Ind. Cas. 521; 37 A. 81; 13 A. L. J. 14, distinguished.

Bhagwanti v. *Mela Mal*, 33 P. L. R. 1903, *Beli Ram* v. *Chuha Ram*, 18 P. R. 1898, and *Prab Dial Shah* v. *Bhai Sawaya Singh*, 67 P. R. 1893, referred to.

LABHU RAM v. ABDULLA.

Second appeal from a decree of the District Judge, Sialkot, dated the 6th June 1919, modifying that of the Subordinate Judge, Second Class, Sialkot, dated the 19th December 1918.

Mr. *M. L. Puri*, for Bakhshi *Tek Chand*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—On the 8th August 1872 the plaintiff's father mortgaged a house to the grandfather of Milkhi Singh, defendant No. 2, for Rs. 225, and on the 14th October 1872 he executed an additional mortgage-deed for Rs. 100. Milkhi Singh sold his rights as mortgagee to the father of Abdulla, defendant No. 1. The plaintiff sues to redeem the house on payment of Rs. 325 but Abdulla claims, in addition to the principal, interest on the two mortgage-deeds and compensation for improvements.

The first mortgage-deed provided that interest on Rs. 100 out of the sum of Rs. 225 was payable at the rate of 1 per cent. per mensem, and that the property was to be redeemed when the mortgage-money with interest was paid.

The stipulation with regard to interest in the second deed is as follows:—

"Ikrar yeh hai ki jab wuh zar-i-rahn sabika ada karunga us waqt yeh rupaya bhi ada karke fakkul-rahn kara lunga. Haveli marhuna par dakhal murhin ka pehle se hua hua hai, aur chunki mirjumla 225 rupaya zar-i-rahn sabika ke eksau rupaya ka sud bahisab ek rupaya fi sadi deta hun, is sau rupaya ka bhi usi kadar sud ada kiya karunga. Aur jab ada karunga kul rupayya ada kia karunga."

The Subordinate Judge held that the interest on the first mortgage was a charge on the house, but not the interest on the second, and he allowed Rs. 700 for the cost of improvements and Rs. 100 for the cost of repairs. Both parties appealed to the District Judge, who accepted the appeal of the mortgagee to the extent of holding that the interest on the second mortgage also was a charge on the house. Both parties have filed second appeals in this Court.

It is not disputed that the interest on the first mortgage is chargeable on the house, but it is contended for the plaintiff that the interest on the second mortgage is not a charge on the house as it is provided in the first sentence of the passage quoted above that on payment of the previous mortgage-money and the additional mortgage-money the mortgagor will redeem the house. The question turns upon the meaning of the last sentence, namely, *"aur jab ada karunga kul rupaya ada kiya karunga."* Taken literally, the sentence would mean, "And when I pay I will go on paying the whole money." This makes no sense and we agree with the learned District Judge that the word *'kiya,'* is superfluous. We also think that the words *'kul rupaya'* cannot be taken as referring to the interest only. The real meaning of the sentence appears to be that the mortgagor will pay the whole money, that is to say, the mortgage-money and interest, at one time, and we agree with the learned Judge that the interest is a charge on the mortgaged property.

No objection is taken to Rs. 100 being allowed for the cost of repairs, but the plaintiff objects to the award of Rs. 700 for improvements. Besides repairing the house, which had become uninhabitable, the mortgagee has extended the building by adding the portion marked *A B E F* in the plan. It is contended that he was not justified in doing this as the mortgage-deeds do not provide for his making improvements, and reference is made to section 72 (*b*) of the Transfer of Property Act, which only allows a mortgagee to spend such money as is necessary for the preservation of the mortgaged property from destruction. Counsel for the plaintiff-appellant has cited *Rupan Singh* v. *Champa Lal* (1) in which, where a portion of the mortgaged house had fallen down and the mortgagee had re-placed it and had also added an upper storey and a stair-case without the consent of the mortgagor, it was held that he was not entitled to the cost of making those additions. We have also been referred to *Bhagwanti* v. *Mela Mal* (2), in which the mortgagee was held to be not entitled to compensation for alterations or improvements made without the written permission of the mortgagor.

(1) 26 Ind. Cas. 521; 37 A. 81; 13 A. L. J. 14.

(2) 33 P. L. R. 1903.

But, on the other hand, in *Beli Ram* v. *Chuha Ram* (3) where a *kacha* house had fallen down and had been re-built by the mortgagee in a more substantial condition, it was held that in re-building the house he was authorised to make it more substantial provided that the work was done providently and without any unnecessary expense and that he was, therefore, entitled to be recouped for the outlay, which was, under the circumstances, a reasonable one, to the extent that the mortgagor would derive benefit therefrom.

In *Prab Dial Shah* v. *Bhai Sawaya Singh* (4) it was held upon a consideration of all the circumstances that the mortgagees were entitled to the whole of the money spent by them upon permanent improvements to the mortgaged property, the value of which had increased at least to the extent of the sum expended. The learned Judges remarked that the case was one in which it would be inequitable upon general principles of justice to allow the plaintiff the benefit of the defendants' outlay, without making him recoup the defendants for at least their actual expenditure, especially as there was no danger of the plaintiff being "improved out of his estate." That decision was followed in *Rikhi Kesh* v. *Jwala Sahai* (5), in which the mortgagee was allowed the amount spent by him upon a *dalan* which he had added to the mortgaged house, the amount being not unreasonable and the addition having increased the value of the house, and the Court declined to follow *Rupan Singh* v. *Champa Lal* (1), as that decision was based solely on the provisions of the Transfer of Property Act.

In the present case also the amount spent by the mortgagee was not unreasonable and it is, in our opinion, equitable that he should be recouped for his expenditure by the mortgagor.

The defendant's appeal relates only to the amount to which he is entitled for the improvements effected. The finding, however, as to the amount spent is one of fact and cannot be contested in second appeal.

We accordingly dismiss both the appeals with costs.

Z. K. *Appeal dismissed.*

(3) 18 P. R. 1898.
(4) 67 P. R. 1893.
(5) 52 Ind. Cas. 862; 78 P. R. 1919.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 144 OF 1920.

December 7, 1921.

Present:—Mr. Justice Jawala Prasad and Mr. Justice Ross.

Babu RAJBANS SAHAY AND OTHERS—PETITIONERS—APPELLANTS

versus

ASKARAN BAID—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 90—Execution of decree—Sale—Substantial injury not established—Sale, when can be set aside at instance of judgment-debtor.

A sale in execution of a decree cannot be set aside at the instance of the judgment-debtor, unless it can be shown that he has suffered material or substantial injury, even where it is established that there were irregularities or fraud in the publication and conduct of the sale.

Appeal against an order of the Subordinate Judge, Gaya, dated the 21st June 1920.

RAJBANS SAHAY *v.* ASKARAN BAID.

Messrs. *L. N. Singh, S. N. Ray* and *Nawal Kishore Prasad II*, for the Appellants.

Messrs. *Kulwant Sahai* and *Kallaspati*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal is directed against an order of the Subordinate Judge of Gaya, dated the 21st June 1920, dismissing the application of the appellants, judgment-debtors, under O. XXI, r. 90 of the Code of Civil Procedure for setting aside the auction-sale, dated the 24th April 1920, on the ground of material irregularity and fraud in publishing and conducting the sale, and the consequent inadequacy of price, thus causing substantial injury to the judgment-debtors. In order to appreciate the objections raised by Mr. Lachmi Narain Singh appearing on behalf of the judgment-debtors, it is necessary to set out some of the salient facts.

The opposite party had two mortgages in his favour, one for Rs. 20,000 and the other for Rs. 25,000. In one of these mortgages five lots of properties were hypothecated as security for the payment of the loan, the first of which consisted of the villages of Jajapur, Jamugain, and Rampur. These villages appertain to one *mahal* called Jamugain bearing one Touzi No. 1561. The second lot of Hamidnagar, the third was Bhita, the fourth Upraul Hamza, and fifth Obera. In the second bond only three of the aforesaid properties, excepting Bhita and Hamza, were mortgaged. The mortgage suit was tried by the Additional Subordinate Judge of Gaya who delivered judgment on the 23rd of May 1918 for a consolidated sum of Rs. 1,01,283-8-3 due under both the bonds including costs. Before the decree was signed the Court of the Additional Subordinate Judge was abolished and *ipso facto* under the provisions of the law the case lapsed into the file of the permanent Court of the Subordinate Judge at Gaya which had original jurisdiction to try the said mortgage suit. On the 7th June 1919 the preliminary decree was made final by the Court of the First Subordinate Judge and thereupon the execution of the decree was levied in that Court. In the course of the execution a dispute arose between the parties as to what should be considered to be the value of the properties to be inserted in the sale proclamation under O. XXI, r. 66. The judgment-debtors suggested a very high value for each of the properties and the decree-holder, on the other hand, suggested a much smaller value. The dispute was settled between the parties and by consent an intermediate value was arrived at with respect to each of the properties aggregating in total Rs. 1,28,000. At the actual sale the properties were sold for Rs. 74,800. On behalf of the judgment-debtors it is contended that the above price fetched at the auction-sale was inadequate by the sum representing the difference between the price mentioned in the sale proclamation and that fetched at the sale, namely, Rs. 53,200. He further contends that this inadequacy of price which is a substantial loss and injury to him is due to the material irregularity and fraud in publishing and conducting the sale. No substantial evidence, however, has been given by the judgment-debtors to show what the true value of the properties is and, as observed by the Court below, the collection papers which must necessarily be with them have been withheld. The Court below found that one of the important villages Upraul Hamza was held by *mokarraridars* and practically no profit was made out of it by the judgment-debtors. The Court below was, therefore, perfectly justified in holding that the judgment-debtors failed to establish that the price fetched at the auction-sale was not a true value of the properties in question. The learned Vakil on behalf of the judgment debtors does not say that the properties in question were undervalued in the sale proclamation; he contends that the valuation of Rs. 1,28,000 entered by the lower Court in the sale proclamation should be deemed to be the true value of the properties. He has referred us to various authorities in support of his contention. Those authorities do not go beyond holding that a proper estimate of the value of the properties to be sold is a very material fact

for the purchasers to know, and, therefore, the value should be ascertained as nearly as possible by the Court in order to specify the same in the sale proclamation. The leading case on the subject is the case of *Surendra Mohan Tagore* v. *Harruk Chand* (1), but that case, as well as the subsequent authorities, have emphasised the fact that a very elaborate enquiry should be made as to the true value of the property at the stage of issuing the sale proclamation. True it is, that if a very grossly low valuation is shown in the sale proclamation the bidders might possibly be dissuaded and the property may fetch an inadequate price. In the present case the value of the property mentioned in the sale proclamation was almost double the sum fetched at the auction-sale. Therefore, no bidders could possibly have been dissuaded by the value mentioned in the sale proclamation. No authority however, has been shown to us that the value fixed by the Court for the preparation of the sale proclamation under O. XXI, r. 66 must be accepted as the true value of the property. Neither the Court nor the parties are in a position at that stage to appraise the real and proper price of the property. After all, the value mentioned in the sale proclamation is a mere estimate which, of course, should, as far as possible be a fair estimate, whereas if the sale proclamation is regular and there is no defect in the title, etc., of the property, the value fetched at the auction-sale on a competition between bidders is the real market-value of the property and must be deemed, for the purpose of O. XXI, r. 90, to be the proper value of the property. We, therefore, have no hesitation in holding that the judgment-debtors have absolutely failed in this case to establish that the value fetched at the auction-sale was in any way inadequate or that they suffered any material loss. A reference to the bid-sheet will at once show that there was no lack of bidders at the time and there was keen competition. Consequently, the price fetched was the best that the property could obtain. As there has been no material or substantial injury to the judgment-debtors they are not entitled to have the sale set aside, even if it were established that there were irregularities or fraud in the publication and conduct of the sale. We have, however, heard in very great detail the learned arguments of Mr. Lachmi Narain Singh as to whether there was any irregularity in the publication and conduct of the sale and we have no hesitation in stating at once that no material flaw has been detected anywhere.

Mr. Lachmi Narain Singh laboured very hard in order to show that the peons in the present case did not go at all to the spot to publish the sale proclamation and that the report submitted by them was, therefore, false. We have looked into the diaries of the peons as well as the report made by them and find that the peons were actually for a long time before the actual service of the sale proclamation in question out on tour for the purpose of serving processes in the neighbouring villages. It is, therefore, impossible to believe that these peons made false returns with respect not only to the processes in connection with the present sale but in connection with other cases. It has also been said that the proclamation was not served in the Collectorate as is required by the law, but the point does not appear to have been pressed in the Court below and, therefore, could not be thoroughly investigated. The judgment-debtors cannot now be permitted to take up this point abruptly in appeal before us. The learned Subordinate Judge, therefore, was right in presuming that the requirements of the law must have been complied with. It was for the judgment-debtors to show that it was not. Under O. XXI, r. 90, a *prima facie* case has to be established by the judgment-debtors before the decree-holder can be called upon to give positive evidence of the service. Therefore, we concur with the view of the Court below that the processes were properly served in the present case.

(1) 12 C. W. N. 542.

KESHAV MANJA BHAT *v.* GOVIND NAGA BHAT.

W further hold that there was no irregularity in the preparation of the sale proclamation. No doubt, the learned Vakil has urged that the entire amount of the decree of one lakh odd should not have been mentioned in the sale proclamation with respect to two of the villages, namely, Bhita and Hamza, inasmuch as they were mortgaged in only one of the bonds. But we have gone through the decree and do not find any differentiation made as to which of the properties would be liable for which quota. If there was any defect in the form of the decree the proper remedy for the judgment-debtors was to have had the decree rectified by a proper application in execution proceedings. But the validity and form of the decree cannot be questioned and the decree has to be executed now as it is.

Mr. Lachmi Narain Singh also observed that the sale proclamation with respect to lot No. 1 Jajapur was not served in all the three villages but only in one and he referred us to the evidence on this point. We do not agree with him that this was so, and in any case section 67 (3) which has been newly added to the Code goes to show that when a property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given. It has already been mentioned that these three properties, Jajapur, Jamugain and Rampur, appertain to one *mahal* and one *touzi*. Therefore, no separate service of sale proclamation was required with respect to each of the properties. But as observed above, however, the service appears to have been effected with respect to the separate villages.

The last point mentioned by Mr. Lachmi Narain Singh again goes to the root of the decree and is not capable of being entertained by this Court in execution proceedings. He says that the First Subordinate Judge who has executed the decree had no jurisdiction to do so, but the final decree was made by him on the 7th November 1919 and this was the only Court which could properly execute the decree under the law. Then it was said that the Additional Subordinate Judge, after delivering the judgment and signing it, left the Court and that the preliminary decree was signed by another Subordinate Judge. There was nothing irregular in this, for the decree must have been prepared subsequently after the Additional Subordinate Court was abolished. Therefore, under the new provisions of the Code of Civil Procedure, O. XX, r. 8, the successor of that Court was competent to sign the decree. We, therefore, overrule all the objections of Mr. Lachmi Narain Singh and dismiss the appeal with costs.

Ross, J.—I agree.

W. C. A. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 641 OF 1921.

April 10, 1922.

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

KESHAV MANJA BHAT—PLAINTIFF—APPELLANT

versus

GOVIND NAGA BHAT—DEFENDANT—RESPONDENT.

Mortgage—Personal covenant by mortgagor—Suit on mortgage—Decree, form of—Personal decree, when passed.

A decree in a mortgage suit when the mortgage contains a personal covenant should direct "that if there is any deficit the mortgagee should be at liberty to apply for a personal decree for the balance against the mortgagor." [p. 189, col. 1.]

A personal decree in a mortgage suit is passed only when it is found that the net proceeds of sale of the mortgaged property are insufficient to pay the mortgage amount.

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 146 of 1920, amending the decree passed by the Subordinate Judge at Kumta, in Civil Suit No. 206 of 1919.

Messrs. *G. P. Murdeshwar* and *D. R. Ugrankar*, for the Appellant.

Mr. *Y. N. Nadkarni*, for the Respondents.

JUDGMENT.—The plaintiff sued to recover Rs. 542-9-0, being the balance on a mortgage-bond passed by the defendants on the 22nd May 1915, together with future

interest and costs by sale of the mortgaged property or against the defendants personally. The learned Subordinate Judge passed a decree in favour of the plaintiff directing that the money should be paid with interest within six months from the date of the decree. In default of payment of the decretal amount the plaintiff was to be at liberty to recover the same by applying for sale of the mortgaged property or sufficient portion thereof subject to the provisions of section 15B, clause (2), of the Dekkhan Agriculturists' Relief Act, and to recover the deficit, if any, from the defendants personally. That is a form of the decree which it is not desirable to pass in mortgage suits, because it cannot be known until the mortgaged property had been sold whether there will be a deficit and if there is a deficit what the amount will be. A decree in a mortgage suit when the mortgage contains a personal covenant should direct "that if there is any deficit the mortgagees should be at liberty to apply for a personal decree for the balance against the mortgagor."

In appeal the learned District Judge thought that the terms of the mortgage did not include or imply a personal covenant, and, therefore, the decree was amended by the excision of the last clause. We may mention that under O. XXXIV, r. 6, of the Civil Procedure Code, it is provided that where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount. Therefore, it is contemplated that a personal decree is passed only when it is found that the net proceeds of sale of the mortgaged property are insufficient to pay the mortgage amount. We think that the decision of the learned District Judge was wrong. The words of the mortgaged-deed are as follows:—

"In case the instalments be not paid at the time fixed, but we keep the same unpaid, we will pay the amount with interest on the amount of instalments that may remain unpaid at the rate of Rs. 9-6-0 per cent. per year that may accrue up to the time of recovery, and even if two instalments be not paid at the time fixed, without putting forward the excuse of future instalments we are liable to pay in one lump sum the amount also of all the future instalments with interest at the rate mentioned above."

It is difficult to imagine how a personal covenant could be more clearly expressed. Therefore, the appeal must be allowed, but we amend the decree of the Trial Court as follows: Strike out the words "and to recover the deficit, if any, out of the personal property of the defendants and the defendants personally" and in their place put the following words: "If the net proceeds of the sale are insufficient to pay the amount due to the plaintiff, then the plaintiff to be at liberty to apply for a personal decree against the defendants for the amount of the deficit." That is obviously the right order, because until the mortgage property is sold, it is impossible to ascertain what is the amount for which a personal decree can be passed. The appellant must get his costs in this Court and in the Court below.

W. C. A. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 360 OF 1922.

March 21, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Venkatasubba Rao.

M. RUNGANATHA THATHACHARIAR —RESPONDENT NO. 1—APPELLANT

versus

KRISHNASWAMI THATHACHARIAR AND OTHERS—(PETITIONERS NOS. 1 TO 4, 2ND, 3RD, 5TH, 6TH, 7TH AND 8TH RESPONDENTS)—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 92—Scheme —Application for further relief under scheme, whether application in execution —Appeal.

When a suit is instituted under section 92 of the Civil Procedure Code to obtain a decree settling a scheme and a decree is passed embodying a scheme, the relief sought must, so far as the suit is concerned, be regarded to have been

finally given and there remains nothing to obtain by way of execution. [p 102, col. 1]

Provisions in a scheme for further remedy by applications to the Court cannot be enforced "in execution of the decree," and orders granting or refusing such applications are not "decrees" under section 2 (2) of the Civil Procedure Code and are not appealable as such under section 47 thereof.

Damodarbhat v. *Bhogilal*, 24 B. 45; 1 Bom. L. R. 509; 12 Ind. Dec. (N. S.) 567, *Prayag Doss Ji Varu Mahant* v. *Tirumala Srirangacharluvaru*, 28 M. 319; 15 M. L. J. 133, *Lokasikhamani Mudaliar* v. *Thagaroya Chettiar*, 38 Ind. Cas. 415; (1917) M. W. N. 420; 5 L. W. 590, referred to and distinguished.

Where no procedure for the exercise of the powers conferred upon it by the scheme is specified in the scheme, the functions of the Court entertaining applications under some provision in the scheme must be regarded as judicial and the applicability both of its ordinary judicial procedure and of the law relating to appeals from its ordinary decisions must be presumed.

Ramaswami Gounder v. *Muthu Velappa Gounder*, 71 Ind. Cas. 1039; 44 M. L. J. 1; 16 L. W. 848; (1923) M. W. N. 133; (1923) A. I. R. (M) 192; 46 M. 536, *Venkatarama Ayyar* v. *Janab Hamid Sultan Maracayar Sahib Bahadur*, 70 Ind. Cas. 987; 44 M. L. J. 161; (1923) M. W. N. 78; 32 M. L. T. 114; 17 L. W. 656; (1923) A. I. R. (M.) 360, *National Telephone* v. *Postmaster General*, (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637, *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. 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), relied on.

Appeal against the order of the Court of the Subordinate Judge, Chingleput dated the 15th July 1922, in Miscellaneous Petition No. 164 of 1921, in Original Suit No. 11 of 1907.

Mr. *C. Krishnamachariar*, for the Appellant.

Messrs. *N. Chandrasekara Iyer* and *Vedantam*, for the Respondents.

JUDGMENT.

Oldfield, J.—This appeal is against an order passed by the Subordinate Judge's Court, Chingleput, on a petition presented to it under clause 10 of the scheme sanctioned by the decree in Appeal Suit No. 212 of 1909 for the management of one of the Conjeevaram temples. That petition was presented on the assumption that a vacancy had occurred among the trustees under the scheme and that, as it had not been filled by either of the two agencies primarily responsible for filing it, the lower Court must, in accordance with the scheme, do so. The lower Court held after enquiry that the point disputed before it, a vacancy had occurred and directed that it should be filled in the manner provided by the rules framed by the High Court. No more need be said to show that there is no question of failure on the part of the lower Court to exercise jurisdiction or of interference with its action by way of revision. The question is then only of interference, as we are asked to interfere in the exercise of our appellate powers; and we have accordingly to decide whether an appeal against the lower Court's disposal lies, respondents contending that it does not.

That, it is conceded, depends first on whether the position of the District Court under the scheme, clause 10, is that of a *persona designata*; not of a Court, which will, in case its order is appealable under any appropriate provision of law, be subject to our appellate jurisdiction. The test to be applied has been considered fully in a recent decision, *Ramaswami Gounder* v. *Muthu Velappa Gounder* (1), which was followed in *Venkatarama Ayyar* v. *Janab Hamid Sultan Maracayar Sahib Bahadur* (2), and there is no necessity to add anything to that statement of the law, except that no distinction can be drawn between the interpretation of an Act, which was then in question and that of the scheme before us. There is, accordingly, first, the consideration that, as the precedure to be followed in the Court's exercise of the power conferred by the scheme, is not specified therein, the applicability both of its ordinary judicial procedure must be presumed and also, as follows from *National Telephone* v. *Postmaster General* (3), of the law relating to appeals from its ordinary decisions. And, next, when in accordance with the course taken by the Privy Council in *Balakrishna*

(1) 71 Ind. Cas. 1039; 44 M. L. J. 1; 16 L. W. 848; (1923) M. W. N. 133; (1923) A. I. R. (M) 192; 46 M. 536.

(2) 70 Ind. Cas. 987; 44 M. L. J. 161; (1923) M. W. N. 78; 32 M. L. T. 114; 17 L. W. 656; (1923) A. I. R. (M) 360.

(3) (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637.

Udayar v. *Vasudeva Aiyar* (4), we refer to the position occupied by the Court under clauses of the scheme, other than that now under construction, for instance, clauses 13, 48 and 61, and find that its functions thereunder are clearly judicial, we must take the same view of the function with which we are now concerned.

If, however, the Court was in this matter acting judicially, it is still, as respondents contend, necessary to see whether its order was one, against which under the ordinary law an appeal will lie; and that, it is not disputed, depends on whether its order was a decree within the meaning of section 2 (2) of the Code of Civil Procedure, or, more particularly, whether it was the determination under section 47 of a question relating to the execution of a decree. That it was so is alleged on the short ground that the order was passed to give effect to the scheme and that the scheme was prescribed in and is part of the decree. But, first, that takes no account of the requirment of the latter section that the question determined shall be one arising between the parties to the suit or their representatives. For in the present case of the parties to the lower Court's order, some at least, respondents Nos. 5 to 8, were impleaded only in their capacity as members of the Board of Supervision, which was created only under the decree in Original Suit No. 11 of 1907, and, of them 6, 7 and 8th respondents were certainly not parties in any sense and were not even connected with the community, to which the plaintiffs therein belonged or with them, even in the representative capacity, in which they sued on behalf of the Thathachar family. And, generally, it is clear that this requirment of section 47 cannot be regarded as necessarily fulfilled by every Court's order made under the scheme; for, it is obvious that this would not be so in the case of an order under clause 48 or clause 61, for the removal from office of a person, who until his appointment had had no connection with the institution and was a stranger to the suit.

There is, moreover, further and equally substantial objection to the appellant's contention that the question determined by the lower Court does not relate to the execution of a decree. For the relief asked for in Original Suit No. 11 of 1907 was simply the framing of a scheme; and, when that had been done in the decree passed, there was no further relief asked for or granted, in respect of which execution could be taken out. That having been the scope of the suit and the decree, there is no ground for the suggestion, which in fact appellant's contention involves, that the decree anomalously must be regarded as executable in perpetuity on every occasion on which a deviation from the scheme is alleged. True, the scheme provides for the Court's intervention on such occasions. But to assume that it will interve e by way of execution will be to beg the question in issue; and it is material that there is no such explicit provision for enforcement of the scheme in execution as was contemplated in a case to be referred to, *Prayag Doss Ji Varu Mahant* v. *Tirumala Srirangacharlavaru* (5), the only provision for future control over the trust being general in clause 64 for the making of rules by the District Court and in clause 65 for the modification by the High Court of the scheme itself.

It is useless, in view of the distinctive characteristics of the Indian Law of Religious Endowments and Indian Procedure relating to execution, to refer to English practice or decisions. Appellant relies first on the decision just referred to, as enunciating the general principle, that directions in a scheme can be enforced in execution by persons interested; but the preceding and succeeding context makes it clear that the Court was really only formulating a provision in the scheme it was framing. *Damodarbhat* v. *Bhogilal* (6), referred to in the decision just noticed, is no doubt in appellant's favour, to the extent that the Court was prepared to treat persons,

(4) 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.).

(5) 28 M. 319; 15 M. L. J. 133.

(6) 24 B. 45; 1 Bom. L. R. 509; 12 Ind. Dec. (N. S.) 567.

who had been parties to the decree and who failed to submit accounts in accordance with the schemes prescribed in it, as in contempt, and to compel them to do so by imprisonment or attachment of their property. But this authority was merely mentioned and distinguished in *Lokasikhamani Mudaliar* v. *Thiagaroya Chettiar* (7), and it does not seem to have ever been followed. It is, moreover, material that in it, as appears from *Damodar Bhatji* v. *Bhat Bhogilal Kasanda* (8), the taking of accounts was a relief asked for specifically in the suit and granted independently of the framing of a scheme in the Court of first instance, and as there is nothing to show that this part of the decree was altered in appeal, that fact may afford an explanation for the High Court's conclusion. Here, when the relief asked for and granted was the scheme alone, there is no reason for holding that the further remedy provided in the scheme need or can be asked for, in execution of the decree, or that the order granting or refusing it is appealable, as one passed under section 47.

On the ground that no appeal lies, the appeal must be dismissed with costs.

Venkatasubba Rao, J.—I entirely agree.

When a suit is instituted, in the words of section 92, Civil Procedure Code, to obtain a decree setting a scheme and a decree is passed embodying a scheme, the relief sought, must, so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution. In a suit for money the decree directs payment of it by the defendant to the plaintiff. To realise the money, it may be necessary to execute the decree. Similarly, in suits for specific moveables, for recovery of immoveable property, to enforce specific performance of a contract, etc., what is awarded by the decree has to be realised in execution. But where the relief asked is that a scheme may be settled by the decree and a scheme has been so settled by the decree, the plaintiffs have obtained all that they have asked and the scheme that is framed by the Court is similar in this respect to a scheme settled out of Court, or a scheme contained in a Will or an instrument, which has made the dedication.

The argument that the application in question was an application in execution, was possible because the particular clause in the scheme under which the application was made, directed an application to the *Court* and the Court is defined in the scheme as either the subordinate Court having jurisdiction over the temple, or the District Court of Chingleput. But most of the clauses in the scheme make no reference to the Court at all. And, can it be contended with any show of reason that the provisions of those clauses can be enforced in execution of the decree? For instance, clause 25 of the scheme provides that the trustees shall annually before a certain date prepare a budget for the following year. In the preparation of the budget, the trustees are directed to have regard to the custom of the Institution. If the budget is not prepared, or, in the preparation of it, the custom is disregarded, is the remedy to be by way of execution of the decree? The dereliction or non-compliance may occur fifty or hundred years after the passing of the decree. Clause 42 says that the treasurer shall not keep with him more than Rs. 2,000 in cash. If he disobeys this direction, how can it be enforced in execution? Clause 54 again provides that the opinion of the Board of Supervision shall be determined by the majority of its members. If the Board on any particular occasion gives effect to the view of the minority, I fail to see how the relief can be got in execution. Dealing with the last mentioned instances, it is obvious that neither the treasurer nor the members of the Board may happen to be parties to the suit; most likely they may not. It is impossible to conceive how an execution application lies.

The Court to which the application in question was made happens to be the Court which has jurisdiction to execute the decree passed in the suit. But this is a mere accident. The scheme might have provided that the application was to be made to another Court, a Court not having jurisdiction to execute the

(7) 38 Ind. Cas. 415; (1917) M. W. N. 420; 5 L. W. 596.
(8) 22 B. 493; 11 Ind. Dec. (N. S.) 910.

decree. As a matter of fact, clause 63 of the scheme provides for an application to the *High Court of Madras* for disposal of surplus funds and, similarly, clause 65 contemplates an application also to the High Court for the modification of the scheme. Surely if such applications are made, by no stretch of imagination can they be described as execution applications.

Now, turning to authority, the only case which may seem to support the contention of the appellant is *Damodar Bhat* v. *Bhogilal* (6). But I think it may be distinguished in the manner suggested by my learned brother. If, however, the case can be said to decide that a decree settling a scheme may be executed, I respectfully dissent from it. *Prayag Doss Ji Varu Mahant* v. *Srirangacharlavaru* (5) does no more than merely cite *Damodar Bhat* v. *Bhogilal* (6). The question did not arise and the Court was merely concerned with the actual terms of the scheme to be sanctioned. Some reliance was next placed upon *Swaminatha Mudaliar* v. *Kumaraswami Chettiar* (9) decided by Spencer, J., and myself. The question that arose was whether a decree could be executed by persons other than those on the record. In holding that it could be, we merely reproduced an observation occurring in the judgment in *Prayag Doss Ji Varu Mahant* v. *Srirangacharlavaru* (5) to the effect that persons interested (that is, other than those who are on the record) may enforce in execution the directions in a scheme. We were dealing with the question as to who could execute a decree and we held that persons not parties to the suit could also execute it. We were concerned only with the first words of the sentences we quoted and we did not intend to decide (and of course there was no occasion for it) whether or not a scheme decree is capable of execution.

I also agree that the Court exercised its powers as a Court of Law and not as a *persona designata*. but the appeal was filed and justified on the footing that the order related to execution and could be questioned in appeal under section 47, Civil Procedure Code, and we were not asked to interfere with the order in the exercise of our powers of revision or of superintendence.

With these observations, I agree that the appeal should be dismissed with costs.

V. N. V. *Appeal dismissed.*

(9) 72 Ind. Cas. 284; 44 M. L. J. 282; (1923) M. W. N. 239; 17 L. W. 422; 32 M. L. T. 212; (1923) A. I. R. (M) 472.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 582 OF 1922.

June 27, 1922.

Present:—Mr. Justice Mulla.

K. C. MEHTA—PLAINTIFF

versus

CASSUMBHAI KESHAVJI—DEFENDANT.

Principal and agent—Commission, Broker when entitled to—Mortgage—Title-deeds, inspection of—Mortgagor, right of.

In order to entitle a Broker to his commission he must prove either that the transaction has been completed, or that, if it is not, the non-completion was due to default on the part of the principal.

***Lott* v. *Outhwaite*, (1893) 10 T. L. R. 76 at p. 77, followed.**

A mortgagee in Bombay is not bound to deliver possession of the title-deeds or to produce them for the inspection of the mortgagor, until actual tender or payment of the principal, interest and costs. [p. 196, col. 1.]

***Beattie* v. *Jethu*, 5 B. H. C. R. (O. C. J.) 152 at pp. 155, 157, relied upon.**

Mr. *Lalji*, for the Appellant.

Mr. *Jayakar* (with him Mr. *Bramhandkar*), for the Respondent.

JUDGMENT.—This is a suit to recover Rs. 4,000, being brokerage alleged to be due from the defendant to the plaintiff.

The plaintiff's case is that in December 1921 he was employed by the defendant as a Broker to raise a loan of Rs. 2,00,000 on a mortgage of the defendant's property at Ripon Road. The terms of employment—as to which there is no dispute between the parties—were that the defendant should pay brokerage to the plaintiff at the rate

of two per cent. on completion of the mortgage.

The plaintiff says that he went and saw two or three persons about the loan and that eventually he saw Mr. Cama, who expressed his willingness to make a loan if the property was a substantial one. Mr. Cama, accompanied by the plaintiff, the defendant and the defendant's son, went and saw the property, and he eventually agreed to advance Rs. 2,00,000 on a first mortgage of the said property at interest at the rate of nine per cent. per annum free from income tax. Thereafter, on the 11th January 1921, the plaintiff, the defendant and his son saw Mr. Cama at his office pursuant to an appointment made with him, and from there they proceeded to the office of Messrs. Shroff and Lam, Mr. Cama's Attorneys. There the remaining terms of the loan were discussed and settled and Mr. Lam made a note (Exhibit A) of the terms agreed upon between the defendant and Mr. Cama. There is no dispute between the parties as to these terms; in fact, the notes made by Mr. Lam were put in by Counsel for the plaintiff in his opening with the consent of Counsel for the defendant.

After the terms were recorded by Mr. Lam, the defendant's son requested Mr. Lam to write a letter to one J. M. Mehta, who was the first mortgagee of the said property for ruppees one lac, to send the title-deeds to him for investigation of title. Mr. Lam, thereupon, wrote the letter Exhibit B. The defendant's son also requested Mr. Lam to prepare a formal agreement of mortgage. Mr. Lam said that there was no necessity of a formal agreement as he had made a full note of all the terms agreed upon between the parties. The defendant's son, however, told Mr. Lam that he wanted a formal agreement to show it to the first mortgagee, so that he might send the title-deeds to Mr. Lam. Mr. Lam undertook to prepare a formal agreement and he eventually drafted one. The defendant's son stated in his evidence that the plaintiff asked Mr. Lam to prepare the agreement, but I do not believe his evidence on this point.

After a few days the plaintiff went and saw the defendant's son at his shop. The defendant's son told him that the first mortgagee did not want to part with the title-deeds and that the first mortgagee having come to know of the agreement between the defendant and Mr. Cama he himself was willing to make a further advance to the defendant and to extend the time for redemption. The defendant's son also told the plaintiff that he was prevailing upon the first mortgagee to part with the title-deeds. The defendant's son also went and saw Mr. Lam and informed him to the same effect.

On or about the 19th Janaury 1922 the plaintiff again went and saw the defendant's son at his shop when the defendant son told him that the first mortgagee had agreed to make a further loan to him and that would save him costs and brokerage. Thereupon, the plaintiff demanded brokerage from the defendant's son. The latter told him that he would give him some other job to enable him to make up for the loss.

On the same day the plaintiff sent a Solicitor's notice (Exhibit C) to the defendant. To the said notice the defendant replied on the 24th January 1922 (Exhibit C), stating that there was no concluded agreement for a mortgage between the defendant and Mr. Cama, and that the plaintiff's claim was false.

Mr. Cama also sent a Solicitor's notice to the defendant on the 20th January 1922 (Exhibit D) to which the defendant sent a similar reply on the 24th January 1922 (Exhibit D).

The defendant has filed his written statement. The first defence is that there was no concluded agreement between him and Mr. Cama for the loan and that matter had rested in negotiations only. The defendant stated in his evidence that he did not agree to any of the terms taken down by Mr. Lam and that there was nothing but a talk about the terms of the loan in Mr. Lam's office. I think this is absolutely untrue. After the terms were arranged, he instructed Mr. Lam to write a letter (Exhibit B) to the first mortgagee which runs as follows:—

"We are instructed by Mr. Cassum Keshvaji, the above named mortgagor, to address you as under:—

"That he *has entered into an agreement* with our clients Messrs. J. H. Cama and

others to take a loan from them on a first legal mortgage of the above property which is at present under mortgage to you.

"We are instructed that due intimation has already been given to you by the said Mr. Cassum Keshvaji of his intention to redeem your mortgage."

At the end of the letter there is a request to the first mortgagee to send the title-deeds to the Attorneys for the investigation of title.

In this letter it is clearly stated that the defendant had agreed to take a loan from Mr. Cama. The defendant's son admits that this letter was read out and interpreted to him by Mr. Lam before it was despatched.

I hold on the evidence of the plaintiff and Mr. Cama, corroborated by the independent testimony of Mr. Lam, that there was a concluded agreement between the defendant and Mr. Cama whereby Mr. Cama agreed to lend and the defendant agreed to borrow rupees two lacs from Mr. Cama on a first mortgage of the defendant's property upon the terms contained in Exhibit A.

The second defence is that the brokerage was payable on completion of the mortgage, but as the mortgage was not completed, the defendant was not bound to pay brokerage. It is true that the mortgage was not completed as stated by the defendant. The plaintiff is not, therefore, entitled to the brokerage claimed unless he proves that the mortagage was not completed owing to default on the part of the defendant. It is well established that in order to entitle a broker to his commission, he must prove either that the transaction has been completed or that, if it is not, the non-completion was due to deafault on the part of the principal: see per Lindley, L. J., in *Loti* v. *Outhwaite* (1).

Such being the law it remains to consider whether the non-completion of the mortgage was due to default on the part of the defendant. The defendant's case on this point is thus stated in his written statement (paragraph 2):—

"The defendant says that as the former mortgagees declined to part with the title-deeds unless and until the amount of their moneys was paid to them the negotiations fell through."

In his evidence the defendant's son stated that on the 15th or 16th January 1922 he went and saw Mr. Lam and told him that the first mortgagee refused to part with the title-deeds and that Mr. Lam thereupon told him that unless he had full and free inspection of the title-deeds he would not advise Mr. Cama to advance a single pie to the defendant. This case is nowhere set out in the correspondence before suit, nor was a single question put to Mr. Lam about it in his cross-examination and when with the leave of the Court Mr. Jayakar interrogated Mr. Lam about it at the fag end of the case, Mr. Lam stated emphatically that he did not say anything of the kind to the defendant's son. On the other hand, the version given by Mr. Lam is that the defendant's son told him that the first mortgagee would not part with the title-deeds, but that he *was prevailing upon him to do so.* Mr. Lam says that the defendant's son left him under that impression, and this is corroborated by the two letters, Exhibit D. The first of them was a letter addressed by Messrs. Shroff & Lam on behalf of Mr. Cama to the defendant on 20th January 1922. The letter says:—

"Under your instructions a draft agreement for mortgage was prepared by us setting forth in detail all the terms and conditions of the said intended mortgage.

"Thereafter your son attended our office and informed us that the present mortgagee was giving trouble and stated that you would call again and inform us as to how you wished to proceed in the matter.

"We regret since then neither yourself nor your son has called at our office to give us the necessary instructions to proceed further.

"Under the above circumstances we have to write this to you asking you to see us in the matter immediately."

To the said letter the defendant replied, on the 24th January 1922, stating that the negotiations for the loan were never completed and that the defendant, therefore, did not think it necessary to attend the office of Messrs. Shroff & Lam. At the end of the letter it is stated that under the circumstances it was not necessary that the

(1) (1893) 10 T. L. R. 76 at p. 77.

defendant should see Messrs. Shroff & Lam as required in their letter. It is nowhere stated in this reply that the defendant's son did not see Mr. Lam because Mr. Lam had finally told the defendant's son that he would not advise his client to make the loan unless the title-deeds were produced to him. Had the defendant's son told Mr. Lam that the first mortgagee was firm in his refusal to produce the deeds, Mr. Lam would have investigated the defendant's title to the property by taking search of the records of the Sub-Registrar of Bombay. A mortgagee in Bombay is not bound to deliver possession of the title-deeds, or to produce them for the inspection of the mortgagor, until actual tender or payment of the principal, interest and costs. It was so held by Westropp, C. J., in *Beattie* v. *Jetha* (2). Where a mortgagee refuses to produce the title-deeds, and such cases are not uncommon, the mortgagor's title may be investigated by taking search of the records of the Sub-Registrar of Bombay. It was contended by Mr. Jayakar, on behalf of the defendant, that no such suggestion was made by Mr. Lam to the defendant or his son. The answer to that is that that stage was never reached so far as Mr. Lam was concerned, for when the defendant's son last saw Mr. Lam he left Mr. Lam under the impression that he was prevailing upon the first mortgagee to part with the title-deeds. The truth of the matter seems to be that the first mortgagee must have at first refused to part with the title-deeds, but that when he learned that the defendant had arranged for a loan elsewhere he himself offered to advance a further loan; further, the due date of payment of the first mortgage was drawing nigh, and there was a possibility, if the loan was taken from Mr. Cama, that the defendant's title might not be accepted by his Attorneys. On the other hand, if the defendant borrowed further money from the first mortgagee, there would be no fresh investigation of title, and the additional loan could be made on a further charge. A fresh mortgage for rupees two lacs would not be necessary and that would save stamp and registration charges on rupees two lacs. As it happened, the defendant's son finally arranged for a further loan with the first mortgagee on the 15th or 16th January 1922 and the only fresh document executed was a deed of further charge for Rs. 70,000.

The defendant's son, in the course of his evidence, meant to convey that the refusal of the first mortgagee to part with the title-deeds, coupled with Mr. Lam's final reply, left him no alrternative but to accept the offer of a further loan from the first mortgagee. I do not think that was so. I do not believe the defendant's son when he says that he saw Mr. Lam, that he told Mr. Lam that the first mortgagee refused to part with the title-deeds, and thereupon Mr. Lam told him that he would not advise his client to advance money unless the title-deeds were produced.

Had the first mortgagee persisted in the refusal—as to which there is no satisfactory proof, he being not called as he was not in Bombay—the defendant's son ought to have gone and seen Mr. Lam about it. He did not do so, and when he was requested by Mr. Lam's letter of the 20th January 1922 to see him, he sent a blunt reply, saying that there was no agreement for a mortgage and it was, therefore, not necessary to see Mr. Lam.

Upon these facts, I hold that the non-completion of the mortgage was due to default on the part of the defendant, and pass judgment for the plaintiff for Rs. 4,000 and costs and interest on judgment at six per cent. per annum.

R. N. & N. H. *Suit decreed.*

(2) 5 B. H. C. R. (O. C. J.) 152, at pp. 155, 157.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 865 OF 1920.

May 26, 1922.

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

SARADINDU CHAKRAVARTI—DEFENDANT NO. 4—APPELLANT

versus

GOSTA BEHARI PRAMANICK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66,

SARADINDU CHAKRAVARTI *v.* GOSTA BEHARI PRAMANICK.

O. XXI, r. 72—Mortgage-decree—Sale—Purchase by benamidar *on behalf of decree-holder, whether void—Suit by decree-holder to enforce agreement against judgment-debtor, maintainability of.*

Plaintiff obtained a mortgage-decree and brought the mortgaged property to sale. The property was purchased by a *benamidar* on behalf of plaintiff. Plaintiff then entered into an agreement with the judgment-debtor whereby the latter was to remain in possession of the property and to pay off the decretal amount by a certain date, in default of which plaintiff was to take possession of the property. The judgment-debtor made default and plaintiff brought the suit for possession:

Held, (1) that the sale in execution of the plaintiff's mortgage-decree in which the property was purchased for the plaintiff without the permission of the Court was affected with a mere irregularity and was not void but voidable; [p. 197, col. 2.]

(2) that the defendant, judgment-debtor in the previous suit, could not claim to avail himself of the remedy provided by sub-r. 3 of r. 72 of O. XXI of the Civil Procedure Code in second appeal; [p. 197, col. 2.]

(3) that the suit was not barred by section 66 of the Civil Procedure Code inasmuch as the *benamidar* had never claimed title under the sale certificate. [p. 197, col. 2.]

Per *Suhrawardy, J.*—An execution-sale in which the decree-holder purchases the property without the permission of the Court is voidable and is liable to be set aside at the instance of the judgment-debtor or his representative, but the judgment-debtor has no absolute right to ask the Court to set aside such a sale and the matter is in the discretion of the Court. [p. 198, col. 1.]

Section 66 of the Civil Procedure Code only applies to a suit in which the plaintiff attempts to enforce his secret title as against the certificated purchaser. [p. 198, col. 1.]

Appeal against the decree of the District Judge, Murshidabad, dated the 22nd December 1919, affirming that of the Subordinate Judge, Murshidabad dated the 30th September 1918.

Babu *Samatul Chandra Dutt*, for the Appellant.

Babu *Debendra Narain Bhattacharjee*, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by defendant No. 4. The plaintiff's case is that the predecessors of defendants Nos. 1—3 executed a mortgage in his favour in 1310 B. S.; he then brought a suit on the mortgage against the representatives of the mortgagors, and against the defendant No. 4 as a purchaser, in 1898 and in execution of his decree caused the property to be sold in 1909, when it was brought by Parameswar Ghose, father of defendants Nos. 5, 7, and servant of the plaintiff, as *benamidar* for the plaintiff. It is beyond doubt that there was such a mortgage, that the plaintiff obtained a decree and that the property was bought by Parameswar.

The plaintiff went on to say that the father of the defendants Nos 1—3 then entered into an agreement with the plaintiff, by which the defendants were to pay off the plaintiff's dues by the end of 1322 B. S., meanwhile remaining in possession; and in default the plaintiff was to take *khas* possession after the end of 1322 B. S. The defendants Nos. 1—3 and defendant No. 4 did, as a matter of fact, remain in possession and, according to the plaintiff, it was by virtue of this arrangement. The plaintiff further alleged that only part of the total sum was paid, so he claimed *khas* possession of the land, with mesne profits, or, in the alternative, a decree for the unpaid balance.

The First Court gave the plaintiff a decree for *khas* possession, and also for mesne profits.

The defendant No. 4 preferred an appeal which was unsuccessful, and in consequence he has preferred this second appeal.

Two points are raised on his behalf. The first is that the suit is barred by section 66 of the Civil Procedure Code. Both the lower Courts rejected this argument and I think rightly, for the reason that Parameswar and his successors have not at any stage claimed title under the sale certificate.

The second argument is based on the provisions of O. XXI, r. 72. The plaintiff as decree-holder did not obtain the Court's permission to bid at the sale, instead of seeking permission he caused his servant to buy the mortgaged property *benami*. The effect of this purchase without permission was considered by both the Courts below, and they took the view that the purchase was voidable but not void, and that defendant No. 4 could no longer avail himself of the remedy provided by clause (3) of the rule.

In the grounds of appeal to this Court; the third and fourth deal with this matter,

and we are asked now to hold that the lower Courts should have treated the written statement as an application to set aside the sale. If we were to accept that argument, we should have to remand the case, for there are at least two points which would require investigation, namely, whether the defendant could show that his application was not barred by limitation, and whether, in the circumstances, the case was one in which the Court should exercise its discretionary power of setting aside the sale under clause (3). I mention these two points merely to show the force of the respondent's answer that the defendant is setting up an entirely new case. I think that answer is correct and that on that account the appellant's contention must be overruled. The result is that the appeal must be dismissed with costs.

Suhrawardy, J.—I am of the same opinion. I think the defendant being in possession of the property in suit would be entitled to urge by way of defence that the plaintiff's purchase without permission of the Court was not enforceable as against him, even if it were voidable at the option of the defendant only. But it depends greatly on the discretion of the Court, and in exercising such discretion, according to authorities, the Court will take into account prejudice to the defendant, *e. g.*, inadequacy of price, etc. So it is not the absolute right of the defendant to ask the Court to set aside such a sale, which, I take it, is affected with a mere irregularity. In this case the defendant treated the sale as absolutely void and did not ask the Court to exercise its discretion in the matter or place materials before it for the right exercise of such discretion. Even if I were asked to exercise such discretion in this case, I would, in the absence of any material, decide it in favour of the plaintiff. I agree that at this stage of the litigation the defendant should not be allowed to make a new case.

As to section 66 Code of Civil Procedure the heirs of Parameswar do not appear in this case and deny plaintiff's *benami* purchase, that section only applies when the plaintiff attempts to enforce his secret title *as against* the certificated purchaser.

This contention, therefore, fails.

Z. K. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 89-29 OF 1922.

June 5, 1923.

Present:—Mr. Pipon, J. C.

CHANDAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 23, 25, Sch. II, para. 15—Arbitration—Award, set aside on ground of unreasonableness—Remand, proper order of—Inherent power of remand, when can be exercised.

The fact that an award does not seem to be reasonable is not a valid ground for setting it aside under the provisions of paragraph 15, Sch. II, Civil Procedure Code. [p. 199, col. 1.]

On the application of the parties, a suit was referred to three arbitrators and it was agreed that the award of the majority would be binding. One of the arbitrators disagreed with the award made by the other two and the Trial Court set it aside on the ground that it did not seem to be reasonable. The Appellate Court, holding that the question of the validity of the award had not been determined at all, remanded the case under O. XLI, r. 23 of the Civil Procedure Code. The plaintiffs appealed against this order:

Held, that the setting aside of the award by the Trial Court was not a decision on a preliminary point and the remand should have been under r. 25 of O. XLI of the Civil Procedure Code. [p. 199, col. 1.]

Krishnan Chetti v. *Muthu Palandi*, 22 M. 172; 8 Ind. Dec. (N. S.) 122, *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Limited*, 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49, distinguished.

Section 151 of the Civil Procedure Code can only be invoked in the absence of a perfectly clear provision of law applicable to the case which is before the Court. [p. 199, col. 2.]

Appeal against an order of the Additional Divisional Judge, Peshawar, dated the 10th June 1922, setting aside an order of the Sub-Judge, Nowshera, dated the 12th November 1921.

Pandit *Mool Chand*, R. S., for the Appellants.

Mir *Wallullah*, for the Respondents.

JUDGMENT.— The material facts of this case are that the suit was referred to the arbitration of three arbitrators on an application by the parties in the Trial Court. It was stated in the application that an award by a majority of the arbitrators would be binding. Two arbitrators put in a concurrent award, and the third disagreed. The Trial Court set aside the award in the following words :—"I cancel this arbitration because the award does not seem to be reasonable." It is clear at the outset that the above was not a valid ground for setting aside the award under the provisions of paragraph 15, Sch. II, Civil Procedure Code. The Divisional Court, on appeal, took the view which I have given above, and held that the question of the validity of the award had never been determined by the Trial Court at all, and it remanded the case for re-determination under O. XLI, r. 23. The remand order assumes that the Trial Court had disposed of the case upon a preliminary point. The plaintiffs have appealed against this order, and I have dealt with the grounds of appeal in my order of the 2nd of December 1922. As I have pointed out in that order, the only ground on which the order of the Divisional Court could be attacked is that there is no question of a decision upon a preliminary point and that the remand should have been under O. XLI, r. 25 and not under r. 23 of the same. It is contended by the learned Counsel for the respondents that the setting aside of the award as invalid was actually a decision upon a preliminary point. He has quoted the ruling published as *Krishnan Chetti* v. *Muthu Palandi* (1) but I am unable to see that it is at all parallel to the present case. The ruling referred to dealt with a case in which the Trial Court had passed a decree in terms of an award and the Appellate Court had overruled the award as invalid, and had sent back the case to the Trial Court for disposal upon its merits. It is perfectly obvious that the remand in that case was rightly made under r. 23. Again, I am unable to see that the Full Bench ruling of the Calcutta High Court, *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Limited* (2) is in any way relevant. It deals not with the question of the validity of an award but with the insufficient adjudication upon certain allegations made by one of the parties, and it was held that, quite apart from the provisions of rr. 23 and 25, an Appellate Court had an inherent power of remand under section 151, Civil Procedure Code. The learned Counsel for the respondents argues that the present remand may be defended in the same manner. I confess I am not able to follow this argument. Section 151 need only be invoked in the absence of a perfectly clear provision of law applicable to the case which is before the Court. In the present case it appears to me that, O. XLI, r. 25, clearly applies. The learned Counsel for the respondents would argue that the Trial Court actually adjudicated upon the question as to whether the award was valid or not, and that therefore, it can only be regarded as having come to a wrong decision upon a preliminary point. Now, I am in entire agreement with the view of the learned Additional Divisional Judge that the Trial Court never adjudicated upon the question at all. The Presiding Officer, indeed, appears to have entirely overlookd the provisions of paragraph 15, Sch. II, Civil Procedure Code, and to have been under the impression that he had complete discretion to accept or reject an award, according as to whether he considered it a just or an unjust award. It need hardly be stated that his view was radically unsound. I must, therefore, accept the contention of the appellants that the remand should have been made under r. 25. I do not propose here to go into the question of what the ultimate course of appeal will be in the event of hypothetical contingencies occurring. What is required is that the Trial Court shall properly adjudicate upon the question as to whether the award is or is not legally valid having regard to the provisions of paragraph 15 of Sch. II, Civil Procedure Code. I, therefore, accept

(1) 22 M. 173; 8 Ind. Dec. (N. S.) 122.

(2) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.

this appeal and modify the order of the Appellate Court to one which directs the Trial Court to enquire into and report its opinion upon the question as to whether the award is or is not valid. On receiving the return to the remand, the Division l Court will pass its own orders on the appeal which by reason of my order is still pending before it, and, if the award is set aside, it will consider the question as to whether there is sufficient material on the record for it to adjudicate upon the finding already come to by the Trial Court upon the merits of the case. Costs in this proceeding will be costs in the original suit.

K. S. D. *Appeal accepted.*

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 12 OF 1922.

December 14, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Pratt.

MAUNG MAUNG TIN—APPELLANT

versus

MA HLA U—RESPONDENT.

Buddhist Law—Succession—Wife living apart from husband, rights of.

When a wife has lived apart from her husband, by mutual consent, on account of incompatibility of temperament, and there is no proof of undutiful conduct towards her husband, it would not, under the Buddhist Law disqualify her from inheriting to her husband's estate or disentitle her to claiming Letters of Administration as against a grandson.

Appeal against an order of the District Judge, Bassein.

Mr. *Rahman*, for the Appellant.

Mr. *Ko Ko*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Court of Bassein awarding Ma Hla U Letters of Aministration to the estate of the deceased U Tha Gaung.

Appellant is a grandson of the deceased, being the child of a son by a former wife.

The first ground taken is that the District Judge erred in not considering that the property was in appellant's possession.

This in itself would not be a sufficient ground for giving the grandson Letters in preference to the widow. The lower Court considered the question of whether Ma Hla U was a fit and proper person to administer the estate and decided that she was.

The lower Court also considered the question of how Ma Hla U's position was affected by the fact that Ma Hla U had lived separately from her husband for eight years and came to the conclusion that, as U Tha Gaung failed to obtain a divorce and there was no subsequent act of voidation on his part terminating the marriage, proved, the mere fact of her living separately for eight years did not dissolve the marriage and did not disqualify her from inheriting her husband's estate. There can be no doubt that this finding was correct.

In the divorce proceedings U Tha Gaung entirely failed to prove misconduct or undutifulness on the part of Ma Ha U, and having done so, he appears to have reconciled himself to the inevitable and made no further attempt to effect a divorce but to have accepted the status.

The main ground on which the appeal has been argued is that the District Court was wrong in law in holding that Ma Hla U had not forfeited her right to inherit and in connection with this contention, that the District Judge overlooked section 279 of the Kinwan Mingyi's Digest.

What the Judge of the lower Court said was that he was not aware of any ruling or case in which it was laid down that a wife is not entitled to inherit her deceased husband's estate because of undutiful conduct towards him and being like an enemy.

The Judge also observed that he knew of no *Dhammathat* to this effect.

No ruling has been cited as authority for the contrary view. Section 279 of the Digest gives a list of wives who are not entitled to inherit the husba d's estate.

The two *Dhammathats* which are quoted are obscure and of late origin. Neither of them can be considered authoritative on points on which the important *Dhammathats* such as the *Manugya* are silent.

The *Shinthaba* classifies amongst the wives disentitled to inherit from their husbands, one who deserts her husband, one who leaves her husband's protection and one who does not perform the husband's funeral rites.

The *Kyannat* lays down that a wife, who does not attend her husband during his illness shall not inherit.

It is obvious that such broad propositions as these can only be received with considerable qualifications and with due regard to modern customs and modes of thought. They cannot be argued as laying down strict rules of law without regard to particular circumstances.

In the present case, although Ma Hla U left her husband's house and went to live in another opposite, it is not proved that she did so entirely of her own free will. There is no evidence that Ma Hla U was driven out of her husband's house by a third person in his presence, and the evidence was so conflicting the learned District Judge was unable to decide whether she left of her own accord or whether she was driven out.

After leaving the house she continued to reside in a house opposite belonging to her husband. There is evidence that she sent him food during his last illness and that she actually attended on him when allowed, and assisted in the funeral ceremonies.

It is impossible to call her conduct desertion. The most that can be held proved is that she lived apart from her husband by mutual consent on account of incompatibility of temperament.

In the divorce proceedings both Courts found that there had been no undutiful conduct on Ma Hla U's part, entitling her husband to a divorce.

Since those proceedings, there is no proof of undutiful conduct on her behalf, whilst the evidence adduced by her goes to show that their mutual relations became more friendly. It seems extremely probable that U Tha Gaung's relatives being jealous of his second wife did their best to prejudice him against her, and once their machinations had been successful in getting her ejected from his house, encouraged ill-feeling and strove to prevent a reconciliation.

On the evidence it is quite impossible to hold that Ma Hla U had been guilty of any misconduct of such a nature as to disqualify her from inheriting her husband's estate.

As the widow she had a better claim than the grandson to Letters of Administration.

The appeal is dismissed with costs, the decree of the Court below being confirmed.

Appeal dismissed.

W. C. A.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 2200 OF 1920.

December 19, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Chotzner.

PROMODE CHANDRA ROY CHAUDHURY—DEFENDANT—APPELLANT

versus

BINAYAK DAS ACHARJYA CHAUDHURY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 103, 106—Entry in Record of Right—Presumption—Suit for correction of entry—Burden of proof.

The plaintiffs landlords brought a suit under section 106, Bengal Tenancy Act, for correction of certain entries in the Record of Rights made under section 103 of the Act. The lower Court decreed the suit relying on Road Cess Returns and the Quinquennial Register prepared under Regulation XLVIII of 1793

PROMODE CHANDRA ROY CHAUDHURY *v.* BINAYAKDAS ACHARJYA CHAUDHURY.

Held, (1) that there was a presumption in favour of the defendants from an entry under section 103B of the Bengal Tenancy Act and the onus of proof was entirely on the plaintiffs to negative the effect of the said presumption; [p. 202, col. 2.]

(2) that having regard to the provisions of the Cess Act, the Road Cess Returns were not admissible in evidence; [p. 202, col. 2.]

(3) that even assuming that the entry in the Quinquennial Register was admissible in evidence it was not sufficent to negative the presumption under section 103B of the Bengal Tenancy Act. [p. 203, col. 1.]

Appeal against a decree of the Special Judge, Mymensingh, dated the 8th of May 1920, affirming that of the Assistant Settlement Officer, Nitrakona, dated the 3rd October 1918.

Babus *Sarat Kumar Roy Chaudhury* and *Birendra Kumar De*, for the Appellant.

Babus *Jogesh Chander Roy* and *Prokash Sunder Mazumdar*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit under section 106 of the Bengal Tenancy Act at the instance of the landlords for correction of certain entries in the Record of Rights of village Pechandary, the Survey of which has been made and and the Record of Rights in respect thereof has been prepared under the provisions of Chapter X of the Bengal Tenancy Act. The plaintiffs landlords alleged that the rent of the tenure in suit was enhancible, the tenants in their defence however, urged that having regard to the entry under section 103B of the Bengal Tenancy Act and to the fact that rent has remained unvaried for a period of over 20 years the claim of the plaintiffs landlords was not entertainable. The Assistant Settlement Officer of Mymensingh before whom this matter came in the first instance was of opinion that although the entry in the Record of Rights was in favour of the defendants, still, having regard to the Quinquennial Register of 1205 B. S. prepared under the provisions of Regulation XLVIII of 1793 and to the entries in certain Road Cess Returns filed by the plaintiffs landlords, the claim of the latter was sustainable and he accordingly decreed the suit with costs, declaring that the rent of the tenure was liable to enhancement. He further ordered that the necessary correction in the Record of Rights should be made as prayed for by the plaintiffs. There was an appeal to the Special Judge of Mymensingh at the instance of the defendants tenants. The learned Judge, after taking into consideration the documentary evidence in the case, held that there was no substance in the appeal and he accordingly dismissed the same.

The two pieces of documentary evidence relied upon by the learned Judge are (1) the Quinquennial Register referred to above which showed that at the time when the Register was prepared the rent of the tenure in question was 75 sicca rupees which was equivalent to Rs. 80 of the East Indian Company (the rent according to the defendants having been a sum of Rs. 89-11-8 for a series of years) and (11) the Road Cess Return filed by the landlords in accordance with the provisions of the Cess Act. The learned Judge, after discussing the weight to be attached to the entries in the Road Cess Return, held that there was sufficient evidence on behalf of the landlords to meet the defendants tenants' case, although he was of opinion that the Register standing by itself was far from being conclusive. It is to be observed however that the Road Cess Returns in question were tendred as exhibits in this case not on behalf of the plaintiffs landlords but on behalf of the defendarts tenants. Now, so far as the Road Cess Returns are concerned, it is quite clear, having regard to the provisions of the Cess Act, that they were not admissible in evidence at all and, therefore, so far as the defendants' case is concerned, we must leave out of consideration, the Road Cess Returns. Therefore, there remained the Quinquennial Register which was tendered as an exhibit on behalf of the plaintiffs landlords. Now, to start with, there was a presumption in favour of the defendants from an entry under section 103-B of the Bengal Tenancy Act. Therefore, the onus of proof rested entirely on the plaintiffs landlords to negative the effect of the said presumption. The question then arises as to whether the plaintiffs landlords have discharged that onus. It is unnecessary to go into the question as to whether the Quin-

quennial Register was admissible in evidence or not. Assuming, however, that the entry in the Quinquennial Register was admissible in evidence, we are of opinion that the said entry by itself was not sufficient to negative the presumption under section 103-B of the Bengal Tenancy Act. Indeed, it has been recognized by the learned Judge himself that that piece of evidence is far from being conclusive. We are satisfied, however, from the judgment of the learned Judge taken as a whole, that the onus was wrongly placed on the defendants and in that view of the matter he came to the conclusion that the plaintiffs landlords had proved their claim. We think, however, that the entry in the Quinquennial Register is not sufficient to prove the plaintiffs' case. In this view of the matter, we must allow the appeal and direct that the appeal be decreed and the suit dismissed with costs in all Courts.

S. C. M. & N. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 208 OF 1921.

April 11, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

Maharaja SASI KANTA ACHARYYA BAHADUR—PLAINTIFF—APPELLANT

versus

ABDUR RAHMAN SARKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 18—Acquisition of land in possession of tenant—No reference by landlord—Reference at instance of tenant—Separate sum awarded—Landlord, right of.

Where a landlord is satisfied with the sum awarded to him by the Collector for land acquired in the occupation of a tenant and does not ask for a reference under section 18 of the Land Acquisition Act, he cannot deprive the tenant of any additional sum which the latter is able to obtain from the Land Acquisition Judge under a reference made at his instance alone.

Appeal against a decree of the Additional District Judge, Mymensingh, dated the 11th July 1921.

Babus *Jogesh Chunder Roy* and *Nagendra Nath Bose*, for the Appellant.

Babus *Dwarka Nath Chuckerbutty* and *Surendra Nath Guha*, for the Respondents.

JUDGMENT.—This is an appeal by the landlord in an apportionment case under the Land Acquisition Act. The Collector valued the land and made an award in favour of the landlord alone on the ground that under the contract of tenancy, the landlord alone was entitled to the entire compensation. The landlord was satisfied with the amount which was thus awarded to him. The tenant, however, obtained an order of reference under section 18 of the Land Acquisition Act to the Land Acquisition Judge, who has held that, apart from what the landlord has received, the tenant is entitled to a sum of Rs. 357-8. The landlord now contends that under the terms of the contract between him and his tenant he is entitled to this additional sum. It is not necessary to consider the legal effect of the terms of the contract between the parties; for it is plain that as the landlord was satisfied with the sum which was awarded to him by the Collector and never asked for a reference under section 18, he cannot now deprive the tenant of the additional sum which the latter has been able to obtain from the Land Acquisition Judge under a reference made at his instance alone.

The result is that the decree made by the Land Acquisition Judge is affirmed but not for the reasons given by him.

As this appeal has not been contested we make no order as to costs.

W. C. A. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION INSOLVENCY PETITION NO. 282 OF 1922.

June 5, 1922.

Present:—Mr. Justice Marten.

In re MAHOMED HASHAM & CO.

Presidency Towns Insolvency Act (III of 1909), s. 9—Act of Insolvency—Departure of some of several members of firm with intent to defeat creditors.

Where it is put forward as an alleged act of bankruptcy that the partners of a firm have departed from their usual place of business or otherwise absented themselves, that must refer to the

individual partners. One man cannot as an agent for another depart from his usual place of business. [p. 206, col. 2.]

In the case of a firm with two partners the departing from the usual place of business with intent to delay and defeat the creditors must be a departure of both the partners and not merely the departure of one of them, and an adjudication order cannot be made against the firm unless both the partners depart with the same intent. [p. 207, col. 2.]

Mr. *Mulla*, for the Applicant.

Mr. *Jinnah*, for the Petitioning Creditors.

JUDGMENT.—This is an application by one Abdul Sakoor Ismail, a partner in the firm of Mahomed Hasham & Co. and M. H. Madden & Co., to set aside an adjudication order made against the firm of Mahomed Hasham & Co., on the 31st of March 1922, by Mr. Justice Kanga. The grounds on which the adjudication order was made were two, *viz.*, (1). "That in British India the said debtors have made a transfer of their property or a substantial portion thereof with intent to defeat or delay their creditors" and (2) "that with like intent the partners of the said debtors' firm have departed from their usual place of business or are otherwise absenting themselves."

The petitioning creditor Padamsey Munji obtained a decree on the 27th February 1922 for Rs. 51,000 odd, of which after giving credit for certain sales of goods, a sum of Rs. 34,650 still remains due.

As regards the first point under the adjudication order, *viz.*, the alleged statutory transfer, the ground of objection raised by the present applicant is that this transfer was not executed within three months before the presentation of the petition as required by section 12 (1) (*c*) of the Presidency Towns Insolvency Act, 1909.

The petition was presented on the 30th March 1922 and it is common ground that the mortgage relied upon is dated the 10th of October 1921. It is, however, alleged by the petitioning creditors that in effect the mortgage amounted to a statutory transfer because the mortgagee did not take possession until some date within three months before the presentation of the insolvency petition. I have not got the original of this mortgage before me but I have a copy or what purports to be a copy, and though it seems to be inaccurate in several places, I think it will suffice for the purpose of my present decision.

Before turning to the mortgage, I should explain that there are two partners in this firm of Mahomed Hasham & Co., *viz.*, Abdul Sakoor Ismail and Premchand Nandlal. It is common ground that Premchand Nandlal has absconded, and it is not disputed that he had absconded with intent *inter alia* to defeat and defraud and delay the creditors of this particular firm. But it is the other partner who denies all intention to defeat or delay the credirtors of the firm with which we are concerned. I may also say that the two firms of Mahomed Hasham & Co., and M. H. Madden & Co., appear to be the same, although M. H. Madden & Co. are not named in the adjudication order. I mention this because the applicant Abdul Sakoor in his first affidavit does not refer to Mahomed Hasham & Co. at all but refers to M. H. Madden & Co. That is explained afterwards in another affidavit to be merely an error, and that the two firms are substantially the same.

Now this mortgage of the 10th of October 1921 is interesting to this extent. The draftsman seems to have copied some of the English forms relating to limited liability companies and used them for the affairs of an ordinary partnership firm. The result is that, at any rate to an English conveyancer, some of the conveyancing is most extraordinary. We are introduced to something which is novel as far as I am concerned, *viz.*, an assignment in one place, and a charge in another place both by way of so-called floating security in connection with the assets of *A* and *B* the partners in the firm. Possibly my unfamiliarity with a floating charge over partnership assets arises from the fact that any such charge in England would probably be void under the Bills of Sale Acts. On the other hand, a floating charge contained in a debenture of a limited liability company is excepted from the operation of those Acts.

However, I find that there are certain clauses in this mortgage which purport at any rate to assign absolutely substantial portions of the alleged insolvent's

property. In clause 2 the borrowers assign unto the lender "(1) all the several debts or sums of money specified in the second column of the said schedule hereto due owing to the borrowers as aforesaid from the several persons whose names are set opposite to such respective sums in the first column of the said schedule." Then in sub-clause (3) they assign "all capital profits other moneys" (there may be some mistake in the copy here) "belonging to or to be received by the borrowers in respect of the said business." Now the debts mentioned in the schedule amount to a substantial sum, some Rs. 57,000, and they represent book debts due to the firm. This sub-clause (3) is certainly in very wide terms "All capital profits other moneys belonging to or to be received by the borrowers."

In sub-clause (2) they assign "by way of floating security all beneficial interest and good will of the borrowers in said business and the exclusive right to use or confer on others the right to use the said style or true name of Mahomed Hasham & Co. and also the full benefit of all contracts and engrossments entered into by or with the borrowers in respect of the said business. If one is to construe the words strictly I do not know how you assign by way of floating security. If, however, a charge is intended the wording should be "charge by way of floating security" and not assign. However that may be, I do not suppose that the good will of this particular firm is worth very serious consideration.

Then, in clause 3 they purport to "charge the payment of the principal sum and interest thereon by way of floating security (not hindering any sale or other dealing in the ordinary course of business of the said firm) on the borrowers' shop in the Jakeria Musjid at the approximate value of Rs. 60,000 (but not the borrowers' goods which have been already pledged by them to the Central Bank of India, Ltd.) and all papers, documents and vouchers relating to the stock in trade, goods, cattles, (I suppose that means chattels) "merchandise, as are ordered out by the borrowers and as may be received by them at said shop and, payment of the moneys due thereon including the goods now pledged with the said Central Bank of India, Ltd., as may hereafter come into their possession and all the documents of title relating thereto or which may be purchased by or assigned to them."

I suppose that means that it is to be a floating charge on the stock-in-trade at the shop exclusive of certain goods already pledged to a third party. Possibly the charge also extends to the shop itself.

Then, in clause 4 there are certain covenants by the borrowers: "(*d*) That the borrowers shall forthwith cause the lease if any of the shop and godowns transferred in the name of the lender." There are also numerous other clauses. In clause 7 the borrowers appoint the lender their attorney to do a large number of things. In clause 9 there is a power of sale. Clause 11 provides for the security becoming immediately enforceable in certain event. Clause 12 provides: "This security shall extend to all stock-in-trade, goods and chattels which the borrowers may hereafter acquire for the purpose of their business and all book debts which may accrue due in the course of the said business."

Let me assume for the sake of argument that this document amounts to this: that there are certain properties of the insolvent which were assigned absolutely by way of mortgage and certain other properties which were charged by way of floating security. How does the fact that these other properties are charged by way of floating security (whatever that means as regards the assets of private individuals) prevent there being any "transfer" of their property until the mortgagee takes possession? On the facts of this particulars case I do not think it does. If one applies the analogy of floating securities on the assets of a company, one knows that a floating security does not actually fasten specifically on any particular asset until it has what we call crystallised, but it will nevertheless take priority over certain rights of certain unsecured creditors. For instance, it is stated in Buckley on Companies, 9th Edition, p. 233:

"As between execution creditor of the Company and debenture-holder by way of floating security, the former takes subject to the equity of the latter, even if the equity arises not from an actual issue of debentures

but from a mere agreement for value to issue them; and the rights of debenture-holder prevail, at any rate until the Sheriff has sold, whether a Receiver has been appointed or not; and also notwithstanding sale if before sale a Receiver has been appointed."

There is one further matter in this particular case. There was a partnership suit brought by the applicant Abdul Sakoor against his partner Premchand alleging in effect that he had been grossly defrauded by Premchand. On the 19th December 1921 this mortgagee that I have referred to was by agreement between the parties appointed by Mr. Justice Kajiji Receiver of the partnership assets and there was a clause providing that the Receiver was to collect the partnership outstandings but he was not to pay any creditor without the leave of the Court.

Then, on the 23rd March 1922, this mortgagee Receiver resigned and Mr. Moos was appointed in his place.

It seems to me that, in the face of these orders, it is practically impossible to construe the mortgagee taking possession in January or February 1922 as being a transfer of that date by the insolvents. The only document the insolvents ever entered into was in the preceding October, and by the time they came to January or February 1922 a Receiver had been appointed by the Court and they had no right to put anybody in possession of anything. Further, the person who was appointed Receiver was the mortgagee, and he had no right as mortgagee to take possession from himself the Receiver without obtaining the leave of the Court which, at any rate, he did not do until the 23rd of March.

On these facts I utterly decline to hold that there was a transfer by these insolvents in law or in equity within the meaning of the Presidency Towns Insolvency Act at any time within three months before the presentation of the insolvency petition. Consequently, the first ground on which the adjudication order was made is, in my opinion, unfounded and to that extent the order is, in my opinion, bad.

Now we come to point No. 2. It will be remembered that it depends on whether the partners departed from their usual place of business or otherwise absented themselves. One argument that has been submitted to me on behalf of the petitioning creditors is this that it is sufficient for one partner to absent himself and that it does not matter whether the other one does. That seems to me to be an impossible view to take of the Presidency Towns Insolvency Act . I am not going to lay down any general rule as to what acts of a partner may in certain circumstances bind the firm so as to amount to an insolvency of the firm. The explanation to section 9 of the Presidency Towns Insolvency Act says:

"For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no specific authority to commit the act."

But it seems to be only common sense that where you put forward as an alleged act of bankruptcy that the partners of a firm have departed from their usual place of business or otherwise absented themselves, that must refer to the individual partners *A*, *B*, *C* and *D*. One man cannot as an agent for another depart from his usual place of business. It seems to me, in other words, to be a personal matter and there is no question of any agent acting for him. Accordingly, I decline to hold that because Premchand Nandlal departed in this manner that that amounted to a constructive departure of the other partner Abdul Sakoor.

I was not given much assistance by way of authority on this point during the course of the argument. And I can quite understand that where a case is based on its particular facts, although it is of legal interest to consider points of law, it may be unnecessary to do so where the Judge has not got to lay down any particular rule. But I wish to draw attention to two points.

In India, unlike in England, it is not an act of insolvency to fail to comply with a bankruptcy notice to pay a liquidated debt. Also, as a small matter of procedure, an adjudication order can be made against a firm in the firm's name. In England a receiving order can be made against a firm, but the adjudication order is made out in the names of individual partners. But because we have that different procedure

in India one must not think that an ordinary partnership firm is a legal entity. We only sue a firm on the Original Side in the firm's name for the purpose of convenience and because it is often difficult to know who the precise members of the partnership are. But whether we sue them in the firm's name or whether we do not, in India it is the individual partners in the firm who are in law liable and they and they only.

I may refer to *Ex parte Blain, In re Sawers* (1) where at page 529, Brett, L. J., says:

"He says it is an act of bankruptcy by the firm. He is met and challenged by being asked whether a firm as such can commit an act of bankruptcy. He assumes that it can. I beg leave to doubt it. Nay, more, I am of opinion that a firm as such cannot commit an act of bankruptcy An act of bankruptcy must be the personal act or the personal default of the person who is to be made a bankrupt."

Then in Wace on Bankruptcy, page 38, there is a reference to the cases of *Ex parte Mavor* (2) and *Mills* v. *Bennett* (3) in these terms:—

"The act of a firm of Bankers in shutting up the Bank is not necessarily an act of bankruptcy on the part of each individual partner. Thus, where one partner who resided at the place of business, and was the only partner transacting the business (the others residing at a distance), shut up the banking-house and absented himself from it and stopped payment, it was not evidence of a joint act of bankruptcy."

On the other hand, while I am referring to Wace, I wish to add a guarding word against the possibility of, say, in a firm of eight partners, seven partners absconding and leaving the eighth partner detained in Bombay on the ground of serious ill-health, and it being then said that no bankruptcy order can be made against the firm. That case I will deal with when it arises. But it seems to me to be a question of fact in each case to determine the grounds for abstention from business, and whether on all the facts an act of bankruptcy has been committed. I may refer to the authorities cited in Wace at pages 38-39.

In the present case, *viz.*, of a firm with two partners, I hold that on the true construction of our Indian Insolvency Act the departing from the usual place of business, with intent to delay and defeat the creditors, must be a departure of both the partners and not merely the departure of one of them.

I next come to this point. It is said that the applicant Abdul Sakoor in fact did depart with intent to delay and defeat his creditors. That he departed is admitted, but that he did it with any intention of defeating his creditors is denied, and the reason he put forward for his absence from business, *viz.*, that of ill-health, is supported by medical evidence of a strength which is unusual in these Courts. I have medical certificates from in all five doctors for a period between the 23rd of January and the 13th of May. They are couched in the strongest terms and they show that Abdul Sakoor was suffering from chronic dysentery with inflamed liver and a weak heart. The certificates are given not only in Bombay but also in Mysore and they are by medical gentlemen whose position and character makes it quite impossible to suggest that they are unfounded or that they are in any way exaggerated or untrue.

Further than that, we have this: that in one suit on the Original Side a commission to examine the applicant *de bene esse* was ordered. The Court's Commissioner went to take his evidence but found the applicant so weak that he did not feel justified in taking the examination and accordingly he returned without that examination being held.

As regards the medical certificates I will take as an instance the certificate of Lieut. Col. Markham Carter of the 25th of January 1922 where he says:—

"I understand his presence is required at the High Court on 26th January 1922. I certify that he is totally unfitted to attend, being physically incapable of undergoing the strain of a journey to the Court and

(1) (1879) 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334.
(2) (1815) 19 Ves. 539; 34 E. R. 616.
(3) (1814) 2 M. & S. 556; 2 Rose 269; 15 R. R. 348.

of examination therein. His menta state is apathetic and his intellect somewhat clouded by his state of low toxæima. In my opinion his convalescence will be a slow one. His chances of recovery depend on his having complete rest, and suitable treatment for his conditions. I do not think he will be fit for Court purposes for at least two months."

Then Dr. Naidu, Civil Surgeon of the Mysore Government, on the 15th of April certified that he was "now bedridden and not at all able to undertake any journey. He may require at least three months to recover his health."

Then Col. Standage on the same day certified that "he will require proper treatment and mental and physical rest and diet for some months. He is at present quite unfit to travel to Bombay, and to attend lengthy legal proceedings in Court in Bombay."

Then the last certificate dated the 13th of May states that he "is still suffering from amœbic dysentery and is too weak to travel for three months more."

Now with a man in that condition how can it possibly be said that this keeping away from his place of business was done with intent to delay and defraud his creditors? It will be remembered, in the first place, that his business was already in the hands of the Court's Receiver who had been appointed on the 19th December, and obviously if a man was not even fit to be examined at his house by the Court's Commissioner, he was not fit to attend to his business.

Then it was said that the applicant went first of all to Versova and that he went to Bangalore a day before his warrant of arrest so as to get outside the jurisdiction of this Court. The answer is that he did first go to Versova for a change of air but was told by his medical advisers that he must go to a much drier climate, and it was on that advice that he was taken to his brother's house at Bangalore. It was suggested that he could have gone to Poona or some other place in the Bombay *mofussil* having a dry climate, but I cannot see anything unreasonable in a man in such a serious condition, as I am satisfied this alleged insolvent was, going to the house of his brother in Bangalore which has presumably a better climate than Poona.

Then as regards the warrant of arrest, I cannot conceive that any Chamber Judge, if he had had brought to his attention the state of health of this unfortunate gentleman, would ever have dreamt of making a warrant for his arrest. I do not suppose for a moment that the matter was brought to the Judge's attention, and I say this partly because in Chambers during this vacation I myself was asked to grant a warrant on the Original Side for the arrest of this particular man. I raised certain queries, because it appeared that he was already insolvent, and I did not understand why I was being asked to exercise the Original Side Jurisdiction which was doubtful, as opposed to the insolvency jurisdiction which in certain cases is clear. Eventually, I was told the real reason was that the man was ill and, therefore, they wanted to get hold of him. I pointed out there and then that that should have been so stated in the application to the Court and that the true ground should not have been suppressed. I heard no more of the application. But I have very little doubt that if the matter was investigated, it would be found that the Chamber Judge who granted this warrant of arrest was not told of the condition in which this applicant was and that if he had been he would not have made this order.

The result, in my opinion, is that the applicant did not absent himself from his ordinary place of business or otherwise with a view to defeat or delay his creditors. He absented himself from his place of business because he was in a very serious state of health and totally unfit to attend to his business at all.

That being so, the grounds on which the order for adjudication was made are both of them wrong and accordingly the order must be discharged.

There have been certain other matters put forward in the affidavit as a possible ground for making the adjudication order, but I can only deal with the grounds on which the original adjudication order was made.

But there is this further point that arises, *viz.*, that subject to anything that Counsel

may say I do not see why the whole of this order should be discharged. I do not see why it should not stand as an adjudication order against the other partner Premchand Nandlal. What I suggest may be a convenient way of protecting the interests of creditors will be for the Official Assignee promptly to be made a party to the partnership suit, and that in that partnership suit or in the insolvency he can take such proceedings as he may be advised to set aside, if he can, this mortgage of 1st October 1921 and he may also take such other proceedings in the partnership suit as may be necessary. Further, if the present applicant Abdul Sakoor gets in a fit condition to give evidence, it will be quite easy under the insolvency jurisdiction to direct him to be examined in the insolvency of his partner. If, again, the petitioning creditors consider they have other grounds for making Abdul Sakoor also an insolvent, of course they will be at liberty to do so. They make a considerable number of charges of general insolvency against this firm which are more or less denied. But if there is any thing substantial in them and if they can bring their case within the Indian Insolvency Act by some future application, they will of course be at liberty to do so notwithstanding my present order for annulment of the adjudication order.

In dealing with the first point, *viz.*, as to whether there had been a fraudulent transfer, I had intended to refer to one section in the Transfer of Property Act about the meaning of the word "transfer". That is section 5 and it says:

"In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act."

I do not see that that definition applies to the Presidency Towns Insolvency Act, and I am not absolutely sure what the words "in present or in future" refer to. I should have thought that, grammatically, they referred to property. There, again, I take it that a conveyancer would say that you cannot transfer future property. Such a purported transfer can only operate as an agreement to transfer and that, when the future asset comes into existence it is seized on in equity by reason of such agreement. But all this is English equity, and how far that applies to India, particularly to the Transfer of Property Act and its special provisions, such as the concluding portion of clause 54, I do not propose to discuss and much less to decide. I only mention this to show that I have not overlooked that particular definition in the Transfer of Property Act.

One remaining matter is about costs. In the petition on which this adjudication order was founded there is not one word there said about the illness of Abdul Sakoor. The parties must have known it, and I think in such cases where parties apply for *ex parte* orders, it is incumbent on them to tell the Court all the material facts. They have not disclosed a word about this in the petition on which this order was made. I accordingly direct that the petitioning creditors pay the costs of the present application. If any difficulty arises as regards the precise form of the order, it should be mentioned to me.

K. S. D. *Order discharged.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1277 OF 1921.

July 3, 1923.

Present:—Justice Sir Jwala Prasad, KT. and Mr. Justice Ross.

RAM URAON—PLAINTIFF—APPELLANT

versus

DOMAN KALAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 46 (2), 72—Mortgage by tenant—Surrender—Landlord, whether bound by mortgage—Civil Procedure Code (Act V of 1908), O. VI, r. 4—Pleadings—Fraud—Particulars.

RAM URAON *v.* DOMAN KALAL.

The provisions contained in section 72 of the Chota Nagpur Tenancy Act are similar to those contained in section 86 of the Bengal Tenancy Act with this difference that the provision contained in clause (6) of the latter section does not find a place in the former section; and this omission leaves the power of surrender conferrred by section 72 of the Chota Nagpur Tenancy Act unhampered by the existence of any incumbrance over the property. [p. 211, col. 2.]

Therefore, in spite of a prior sale or mortgage by a *raiyat* of his holding, he is free to exercise his right of surrender of the holding in favour of the landlord, for, under clause (2) of section 46 of the Chota Nagpur Tenancy Act, no transfer by a *raiyat* of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing. [p. 211, col. 2.]

Whatever the value of a transfer by a *raiyat* of his non-transferable holding be so far as the transferee or any other person in the world is concerned, it is absolutely to be ignored and considered to be non-existent so far as the landlord is concerned. The landlord is the owner of the property, and the *raiyat*'s interest is carved out of it only for limited purposes and the right of reversion which the landlord undoubtedly has in the land cannot be affected except by express statutory provision. That reversion is recognised in the right which accrues to the landlord by an abandonment of the holding or by a voluntary surrender by the tenant who willingly yields up to him the limited right which was carved out. Therefore, it is immaterial that the transfer is for valuable consideration and the surrender for no consideration at all. [p. 212, col. 1.]

The principle that a person cannot be permitted to derogate from his own grant is not of universal application and cannot apply to the case of a landlord where, by a *bona fide* surrender by the tenant, he acquires a statutory right of re-entry into the land which was originally demised in favour of the tenant. [p. 212, col. 1.]

Mohsenuddin v. *Bhagaban Chandra*, 61 Ind. Cas. 443; 25 C. W. N. 29; 32 C. L. J. 286; 48 C. 605 (P C.), distinguished.

No equitable considerations would arise in favour of a transferee of a non-transferable holding for he, with his eyes open and knowing the limited interest of the tenant and his unquestionable right under sections 72 and 73 of surrender and abandonment—the holding being non-transferable without the consent of the landlord—takes the grant. He must, therefore, have foreseen the possible result of surrender, or abandonment, by the tenant. There is no reason why the landlord should be prejudiced unless he is a party to any fraud or dishonesty committed by his *raiyat* in surrendering the holding. [p. 212, col. 2]

A surrender like any other act in order to be operative must be *bona fide*, and if it is tainted with fraud, it confers no right upon the landlord and need not be avoided. [p. 212, col. 2.]

Where fraud is relied upon it must be expressly pleaded: positive facts and circumstances must be set out clearly giving rise to the application of fraud. [p. 213, col. 1.]

Appeal from a decision of the Subordinate Judge, Ranchi, dated the 18th April 1921, reversing that of the Munsif, Ranchi, dated the 27th June 1919.

Mr. *A. B. Mukharji*, for the Appellant.

Messrs. *P. K. Sen*, *Ragho Prasad*, *G. S. Prasad* and *Raghunandan Prasad*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of a suit in ejectment. The lands in question appertain to the holding of one Husaini Gorait, the defendant No. 5 in this case. On the 21st November 1916 he gave a major portion of it in usufructuary mortgage to defendant No. 2 for a term of five years from 1973 to 1977 (corresponding roughly to 1916-1920) in consideration of a loan of Rs. 800. A similar plot of his holding No. 460 he had mortgaged to other persons who are not parties to this case. His holding consisted of 7·06 acres of land which included his homestead plots Nos. 239 and 247 and 497 amounting to about ·08 acre. Husaini surrendered his holding in favour of the Manager of the Encumbered Estates on the 19th June 1917, reserving thereout homestead *parti* lands amounting to ·7 acre for himself. The surrender was, therefore, one of all the cultivated lands in the holding. The surrender was effected by means of a registered *istifanama*, Exhibit 3. The plaintiff obtained settlement of the lands from the Manager of the Encumbered Estates in September 1917. Having come to know of the intention of Husaini to surrender the holding he approached the Manager by means of a letter from the Roman Catholic Priest at Dighia who recommended the settlement of the land with him, which, he said, Husaini was going to surrender. After the surrender, the settlement question was started in the office of the Manager of the Encumbered Estates on the 28th June 1917, and, ultimately, as observed above, it was settled with the plaintiff in September who paid rent for the same on account of 1973 per receipt, Exhibit 2. The plaintiff was,

however, resisted by the defendants Nos. 1, 2 and 3 in taking possession of the land. The defendants No. 1 and 3 were the *sajhadars* having taken *batai* settlement of the land from the mortgagee. The plaintiff, therefore, commenced his action for recovery of possession of the land by filing his plaint on the 19th July 1918. The Munsif decreed the suit; but the learned Subordinate Judge on appeal set aside the decision of the Munsif and dismissed the suit Hence the plaintiff has come here in second appeal.

On behalf of the plaintiff-appellant the decision of the learned Subordinate Judge is assailed. The Subordinate Judge held that Husaini, in making the surrender, "could not have been actuated by anything less than a dishonest and improper motive. He had already come to an understanding with the plaintiff and that unmistakably shows how his conduct came to be influenced in the matter and that Husain having given the land in *zurpeshgi* could not fairly be permitted to put an end to this interest which he himself created by surrendering the land." In support of his view the learned Subordinate Judge has relied upon the Full Bench decision of the Calcutta High Court *Mohs nuddin* v *Bhagaban Chandra* (1). That was a decision in a case governed by the Bengal Tenancy Act. But the decision was based upon the general principle of law that a person cannot be permitted to defeat or derogate from his own grant and consequently if a *raiyat* has dealt with his holding in such a manner as to create an interest in favour of a third person, he has lost the power conferred upon him under section 86 of the Bengal Tenancy Act of surrendering the holding to the landlord and thus defeating the previous transfers already made by him of the entire holding, or a portion thereof.

The present case is governed by the Chota Nagpur Tenancy Act. The provisions contained in section 72 of the Chota Nagpur Tenancy Act are similar to those contained in section 86 of the Bengal Tenancy Act with this difference that the provisions contained in clause (6) of the Bengal Tenancy Act do not find place in section 72 of the Chota Nagpur Tenancy Act. That provision is stated in the following terms: "When a holding is subject to incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer." Now, a mortgage, as distinguished from a sale, is an incumbrance, and the mortgage in the present case of the defendant No. 2 is secured by a registered instrument. Therefore, if the Bengal Tenancy Act applied to the present case the surrender would have been invalid unless it was made with the consent of the landlord and the mortgagee. That clause, as observed above, has been omitted from the Chota Nagpur Tenancy Act, and the reason probably is that the Legislature did not consider it desirable, in the peculiar circumstances of the tenancy of Chota Nagpur, to recognise the right of transfer in the tenants with respect to their holdings. This intention is also to be gathered from the restrictions imposed upon tenants under Chapter VIII of the Chota Nagpur Tenancy Act, namely, section 46. A *raiyat* is not permitted to transfer his holding or a portion thereof by mortgage or lease for a longer period than five years, or to sell or make a gift of his holding by any contract or agreement. Be that as it may, the absence of a provision similar to clause (6) of section 86 of the Bengal Tenancy Act from section 72 of the Chota Nagpur Tenancy Act leaves the power of surrender conferred by the section unhampered by the existence of any incumbrance over the property. It, therefore, logically follows that, in spite of a prior sale or mortgage by a *raiyat*, he is free to exercise his right of surrender of the holding in favour of the landlord, for, under clause (2) of section 46, no transfer by a *raiyat* of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing. This is a complete answer to the contention of the learned Vakil on behalf of the respondents that the

(1) 61 Ind. Cas. 443; 25 C. W. N. 291; 32 C. L. J. 286; 48 C. 605 (F. B.).

surrender must be deemed to be subject to the prior mortgage executed by the *raiyat* in favour of the defendant No. 2. Whatever the value of a transfer by a *raiyat* of his non-transferable holding be so far as the transferee or any other person in the world is concerned, it is absolutely to be ignored and considered to be non-existent so far as the landlord is concerned. The landlord is the owner of the property, and the *raiyat's* interest was carved out of it only for limited purposes and the right of reversion which the landlord undoubtedly has in the land cannot be affected except by express statutory provision. That reversion is recognised in the right which accrues to the landlord by an abandonment of the holding or by a voluntary surrender by the tenant who willingly yields up to him the limited right which was carved out. Therefore, it is immaterial that the transfer is for valuable consideration and the surrender for no consideration at all. The principle upon which the decision of his Lordship Mookerjee, Acting C. J., in the Full Bench case referred to above is based, namely, that a person cannot be permitted to derogate from his own grant, is not of universal application and certainly cannot apply to the case of a landlord where, by a *bona fide* surrender by the tenant, he acquires a statutory right of re-entry into the land which was originally demised in favour of the tenant. Now that the aforesaid principle upon which the decision in the Full Bench case of the Calcutta High Court is based does not obviously apply universally as observed above is clear from the provisions contained in sections 72 and 73 of the Chota Nagpur Tenancy Act. It has been held, and is now recognised as settled law, that if a *raiyat* transfers his entire holding either at once or piecemeal he loses all his rights therein and he ceases to be a *raiyat* and the tenancy is deemed to have been abandoned giving the right of re-entry to the landlord. In such a case the landlord has the right to ignore the transfers, though for valuable considerations, made by the *raiyat* in favour of third persons. The tenant by his act destroys the previous transfers of the holding and, therefore, he derogates from his own grant. There is no reason why the same should not be the fact when the tenant exercises his right of surrender conferred upon him by section 72. On the other hand, no equitable considerations would arise in favour of a transferee of a non-transferable holding, for he, with his eyes open and knowing the limited interest of the tenant and his unquestionable right under sections 72 and 73 of surrender and abandonment—the holding being non-transferable without the consent of the landlord—takes the grant. He must, therefore, have foreseen the possible result of surrender or abandonment by the tenant. There is no reason why the landlord should be prejudiced unless he is a party to any fraud or dishonesty committed by his *raiyat* in surrendering the holding. He never permitted the previous transfers, and the *ratyat* and his transferee of their free will and choice entered into transactions behind his back and probably to his prejudice. Why should he not have the benefit of a *bona fide* transfer in his favour and exercise his right of re-entry simply because his *raiyat* had previously transferred the whole or a portion of the holding?

As I have already said, a surrender, like any other act, in order to be operative must be *bona fide*, and if it is tainted with fraud, it confers no right upon the landlord and need not be avoided. The learned Vakil on behalf of the respondents submits that the surrender in the present case has been held by the Courts below to have been tainted with fraud and dishonesty and consequently the plaintiff cannot be permitted to derive any benefit from it. In support of his contention he relies upon the view taken by the Court below and expressed in the passage already quoted from its judgment. The learned Subordinate Judge infers fraud from the statement made in the *istifanama* as to the reasons which induced the *raiyat* Husaini Gorait to surrender his holding. He says that Husaini Gorait stated, "that he had no plough and cattle to enable him to cultivate the land; but that "the ques-

tion of cultivation could not arise before the expiry of the *zarpeshgi* period." Says the learned Subordinate Judge: "He was, therefore, by no means in such a desperate condition as to drive him to the necessity of adopting a course which was so manifestly unfair to the persons who had advanced money on the security of his land." He, therefore, says that his motive must be dishonest and improper. This is not a finding of fraud. Nothing has been said against the landlord as being party to the evil intentions, if any, of the tenant, and from the way in which the learned Subordinate Judge has put it, it seems to me that he was influenced largely by the decision in the Full Bench case of the Calcutta High Court in which it has been held that every surrender after a prior transfer of the entire or part of a holding must be to the prejudice of the prior transferee. On the other hand, no clear case of fraud seems to have been made out in the pleadings. No doubt it has been stated in the written statement of the defendant No. 2 that, "Husaini Gorait never surrendered his *raiyati* holding. If Hosaini Gorait surrendered his *raiyati* holding he has done so in collusion with the Manager of the Encumbered Estates and his subordinates with a view to prejudice this defendant's *zarpeshgi* right and to deprive him of the *peshgi* money." Now this is not a statement of a man who knows, as a matter of fact, that the surrender was fraudulent, for according to the defendant no surrender had taken place and his attack of the surrender on the ground of fraud is conditional upon the surrender having taken place and is inferred from the fact that it was prejudicial to his *zarpeshgi* right and calculated to deprive him of the *zarpeshgi* money. Fraud, as has been laid down, must be expressly pleaded: positive facts and circumstances must be set out clearly giving rise to the application of fraud. Nothing of the sort was done in this case. That is the reason why no issue of fraud was raised in the case, nor does it seem to have been urged before the Munsif, for he does not seem to have said a word about it in his judgment. The Munsif's judgment is dated the 27th June 1919, and the decision in the Full Bench case of the Calcutta High Court was on the 3rd August 1920. The decision, however, came out when the appeal was being argued before the learned Subordinate Judge. The question of fraud was made more prominent probably in the argument of the Bar. There being no issue upon the subject, the evidence must, therefore, have been slender and the learned Subordinate Judge had to content himself with such facts as he could gather from the contents of the *istifanama* and the consquences of the surrender which necessarily would deprive the defendant No. 2 of his *zarpeshgi* money. The fraud pleaded has not been found, namely, of there being any collusion between Hussaini and the Manager of the Encumbered Estates. Therefore, the finding of the learned Subordinate Judge of the surrender being actuated by "dishonest and improper motive" is not a real finding of fact binding upon this Court.

There is no necessity of pursuing the matter further, for the appeal must succeed upon a still more substantial ground. The mortgage lease in favour of the defendant-respondent was for five years from 1973 to 1977 and expired in 1920. Under section 46 of the Chota Nagpur Tenancy Act the mortgage could not be for a term exceeding five years and, therefore, it came to an end *ipso facto* in 1920. Thereafter, the defendant was not entitled to remain in possession of the property as *zarpeshgidar*. His only remedy, if any, was to hold the executant of the mortgage personally liable to him. No doubt the surrender took place in 1917 and the plaintiff's action was commenced in 1918; but the defendant had all along been in possession of the property for the full term of his mortgage. Therefore, by the surrender in the present case, the defendant is not at all prejudiced. The tenant defendant No. 5, on the other hand, has filed a written statement. He still adheres to the surrender and impugns the mortgage upon the ground that the consideration money though promised was not paid. Hence, the mortgage, whether for consideration or not, terminated in 1920 and the land reverted to the original tenant, and he does not dispute the right

of the plaintiff based upon the surrender and settlement by the Manager of the Encumbered Estates. Therefore, the plaintiff is entitled to recover possession of the property.

Under these circumstances, the appeal must succeed. The decision of the lower Appellate Court is set aside, the judgment of the Munsif is restored, and the plaintiff's suit is decreed with costs throughout.

Ross, J.—I agree.

Z. K. *Appeal allowed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 38 OF 1922.

May 11, 1923.

Present:—Mr. Pipon, J. C.

GHULAM KHAN—DEFENDANT—PETITIONER

versus

GHULAM HAIDER KHAN—RESPONDENT.

Custom—Ancestral property—Gift to female—Property, whether remains ancestral—Reversion.

Land gifted by a proprietor to a wife or daughter retains its ancestral character, and, on the failure of male heirs of the donee, reverts to the family of the donor and the *onus* lies heavily on a person alleging otherwise to show that a special custom exists in the tribe to the contrary. [p. 215, col. 1.]

Petition for revision of an order of the Additional Divisional Judge, Peshawar, dated the 27th January 1922, whereby an order of the Munsif, First Class, Charsadda, dated the 30th June 1920, confirmed.

Kazi *Mir Ahmad Khan*, for the Petitioner.

Mr. *Saaduddin Khan*, K. S., for the Respondent.

JUDGMENT.—The present suit relates to the estate of *Musammat* Rehana, deceased, who was the daughter of Ibrahim Khan. The parties are Muhammadzais of the Charsadda Tahsil, and a pedigree table* showing their relationship is appended to this judgment. Ibrahim Khan made a gift of his landed estate to his wife and his four daughters, one of whom was *Musammat* Rehana. *Musammat* Rehana, at a later date, married her first cousin, Ghulam Khan. Ibrahim Khan died and *Musammat* Rehana remained in possession of the estate gifted to her. She has now also died and the plaintiff, Ghulam Haidar Khan, brings the present suit for possession of half her estate on the contention that it reverts to the line of the donor, Ibrahim Khan, in respect of half of whose estate he would have been a reversioner if the gift had not been made. The suit is resisted by Ghulam Khan, the husband of *Musammat* Rahena, who, though also a reversioner, claims to succeed to the whole as the sole heir of his deceased wife. The other reversioners were impleaded as defendants, but the suit was only resisted by Ghulam Khan and by Nasar Khan, defendant No. 10. The position of Nasar Khan is easily intelligible when it is seen that his mother was also one of the four daughters of Ibrahim Khan, and that, therefore, he is interested in supporting Ghulam Khan's contention that the sole heirs of the female donees are their husbands. It has been found by the two Courts below that property gifted by a father to a daughter does not lose its ancestral character, and that, on the death of the donee without male issue, it reverts to the line of the donor. The sole point before me for decision is whether this finding on the question of custom is or is not correct.

It is perhaps curious that we have singularly few direct precedents to govern a case of this nature, and the reason is to be found in the fact that gifts by fathers to daughters are obviously of extremely rare occurrence in the community to which the parties belong. The Trial Court issued a Commission with a view to discovering mutations of such transfers recorded in Revenue Records, but none came to light. We have, however, certain general principles established by judicial authority which govern the devolution of property gifted to females. We have also a certain rather incomplete record of the custom prevailing among special tribes in the Peshawar District in Lorimer's Customary Law and in the local records of the *Riwaj-i-am* prepared at the Settlement of 1870. To take first the question of general principle, the most relevant ruling is one of

*See Pedigree Table on page 217—[*Ed.*]

this Court published as Judicial Record No. 87 of 1917. That case related to a gift made by a husband in favour of his wife amoug "Khalil Mohmands" of the Peshawar District. It is not quite clear which of these two distinct tribes (Khalils or Mohmands) is referred to. In that judgment Mr. Barton referred to the general principle established in the Punjab that land does not ordinarily lose its ancestral character when gifted to a female. He mentioned, however, in passing that Judicial Record No. 26 was authority for regarding the proprietorship of Pathans in the Peshawar District as more absolute than that obtaining in the Punjab. At the same time, it may be remarked that this theory of the absolutism of Pathan ownership which Mr. Bunbury enunciated in Judicial Record No. 26, was one from which Mr. Barton himself had, in other cases, expressed a marked divergence of opinion. That the proprietorship of Pathans of the Peshawar District tends to be more absolute than that obtaining in the Punjab is, as a matter of fact, a proposition which can hardly be denied. It is one to which I have given a general adherence in the ruling published as Judicial Record No. 111 of 1922, which deals with the power of Will making, in the Peshawar District. I do not consider, however, that, in the present case, it is necessary to base the decision, in any way, upon a general consideration of the character of Pathan ownership. So far as the general custom of the Peshawar District, as opposed to the special customs of particular tribes, is concerned, there is overwhelming authority for the view that land gifted by a proprietor to a wife or a daughter retains its ancestral character, and, on the failure of male heirs of the donee, refers to the line of the donor. Judicial Record No. 87 is itself an authority for this view. Another less direct authority is Judicial Record No. 50. That case was certainly a peculiar one, and its ultimate decision was somewhat in the nature of a compromise, and has never been followed by any Court in this Province. The case then in suit was one where a gift had been made to a male stranger. The property gifted had remained with this stranger's widow during her lifetime, and, after her death, was claimed by the reversioners of the original donor. The ultimate decision of the suit was to the effect that the original gift was invalidated except as regards one third which the donor was held to be competent to gift under Muhammadan Law, the remaining two-thirds being treated as invalidly transferred and thereby reverting to the heirs of the donor. While it may be impossible to defend this decision, it is clear from the judgment that the Chief Court of the Punjab had already, in a previous suit between the same parties, held that when the line of the male donee became extinct, the reversioners of the donor could control the action of the donee's widow exactly as they would have been entitled to control a life tenant subject to their direct reversionary rights. Mr. Tucker, in his judgment, alludes to that finding of the Chief Court as an *obiter dictum*. With all due respect to him, however, I have some difficulty in understanding how a perfectly direct finding of this nature, which went to the whole root of the dispute between the parties could possibly be regarded as nothing more than an *obiter dictum*. On the contrary, I should regard it as a definite finding upon a definite question of custom. We have then the concurrent authority of the Chief Court of the Punjab, of Judicial Record No. 50, and of Judicial Record No. 87 for the proposition that when landed estate is gifted to a female, such estate, on the death of the donee without direct male issue, reverts to the family of the donor.

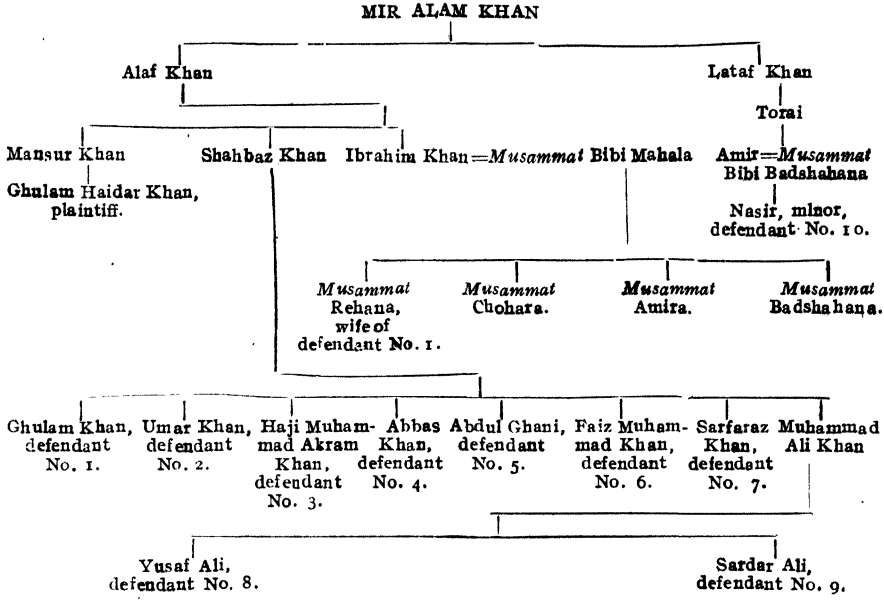
It is contended, however, for the petitioner that in this case there is evidence of a special custom among the community to which the parties belong. The only evidence which we have of this custom, is that to be derived from answers Nos. 67 and 110 of Lorimer's Customary Law and section 22 of the *riwaj-i-am* of the Charsadda Tahsil. Answer No. 67, as Mr. Barton pointed out in Judicial Record No. 87, is somewhat vague and unsatisfactory. The various tribes consulted were not unanimous, and seemed to have had the greatest difficulty in expressing any definite opinion at all. The tribe with which we are now concerned, the Muhammadzais of the Charsadda Tahsil, are not even mentioned in that answer at all. The learned Counsel for the petitioner lays stress upon the fact that the Gigiani tribe, which is domiciled

in the same region as the Muhammadzais of Charsadda, stated that the heirs of a woman's estate would be first her sons, after them her husband, and after him her "other heirs." Now, so far as answer No. 67 is concerned, the result must be treated as inconclusive. Apart from the fact that we have no pronouncement by the tribe with which we are now dealing, it is extremely doubtful whether the persons consulted were directing their attention at all to the question of gifts by fathers to daughters. This doubt is increased by the fact, to which I have already alluded, that gifts by fathers to daughters, at any rate where there is no question of marriage portion, seem almost unknown. Answer No. 110 refers to the devolution of the property of a woman received in gift from her father, but is specifically confined to cases where such property is given to her by her father in dowry. Now, it is fully admitted that, in the present case, there was no question of dowry involved. It is not denied that Ibrahim Khan made the gifts to his four daughters without any connection or bearing upon their marriages. I must regard answer No. 110, therefore, as having no effect upon the present case, or as establishing a special custom among this trite as against the general principle of devolution which I have dealt with above. The position on which the learned Counsel for the petitioner falls back is that, even if it be conceded that property gifted to a female retains its ancestral character and *ultimately* reverts to the donor's family, it is, nevertheless, an accepted fact that the husband intervenes as an heir between direct male issue and the reversion of the property to the donor's line. In support of this contention he relies upon the wording of answer No. 22 given in section 6 of the 1870 *riwaj-i-am* of the Charsadda Tahsil. The answer is recorded as one by the Muhammadzais, the tribe with which we are now concerned. It states that *stridhan* property owned by a woman goes first to her children, and, in the event of there being no children, to her husband. The salient feature, however, of this answer is that it very definitely refers to property of three kinds only, (1) property purchased by a woman, (2) *jahez* property, or that given by a father on marriage in dowry, and (3) property given by a husband as *mahr* or dower. Now, this classification of property cannot be regarded as meaningless. I can see no explanation of the wording of that answer except that it was intended to refer to the three classes of property enumerated and to no others. Purchased property is of course self-acquired, and the question of the devolution of purely self acquired property is, in no way, material to the present case. Property given by a husband to his wife as *mahr* or dower would very naturally revert to the husband on the decease of his wife without issue. The only property, therefore, which would have a common analogy to that with which we are now dealing is property gifted as *jahez* by a father. Now, I cannot agree for a moment with the contention of the petitioner's Counsel that the term *jahez* extends to any property other than that given solely on the occasion and for the purposes of marriage. There is not the least doubt that in 90 per cent. of cases *jahez* property is in the form of clothes or jewelery given by a father to his daughter on marriage, or what is generally known in Europe as her "trousseau." Tyabji, in his Treatise on Muhammadan Law, defines *jahez* as "The marriage outfit." I am, therefore, unable to understand how it can be possibly argued that the gift made by Ibrahim Khan in favour of *Musammat* Rehana in the present case was in the nature of *jahez* A further peculiarity in this section of the *riwaj i-am* is that it refrs to *stridhan* of females. *Stridhan* is a word peculiar to Hindu Law, and cannot really be properly used in respect of property held by Muhammadans. Its use, no doubt, is to be traced to the prevalence of Hindu terms when applied to Muhammadans in the original records of the Moghal Empire complied by Todar Mal. Whatever the origin of the term may be, it is an undoubted fact that its very use to a certain extent presumes that the property in question is the sole and unqualified property of the female. If a female's property can be described as *stridhan* at all, it is hardly necessary to state that it is not property which would revert to the line of the donor. It follows from this that answer No. 22 of the *riwaj-i-am* is of no assistance in determining the issue

now in suit. It appears to me that when the general principle has been firmly established that landed property gifted to a woman by her father reverts to the line of the father when the woman dies without male issue, the onus lies heavily upon the petitioner to show that, nevertheless, a special custom exists in the tribe now concerned under which a husband intervenes before such reversion takes place. What I have said above will show sufficiently that the petitioner has failed, in any way, to discharge this onus. Such special custom as he has been able to put forward, does not relate to gifts of the character now in suit. I hold, therefore, that the present petition for revision must fail, and I agree with the finding arrived at by the Divisional Court. The petition for revision is, therefore, dismissed with costs.

K. S. D.

Petition dismissed.



RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 252 OF 1922.

February 20, 1923.

Present:—Mr. Justice Heald.

MA SHA MA—APPELLANT

versus

L. S. M. SAMASUNDRAM CHETTY—RESPONDENT.

Court-Fees Act (VII of 1870), s. 7 (v), (b) and (d)—Suit for recovery of land not an entire holding—Court-fee payable.

The Court-fee payable on a plaint in a suit for the recovery of land which is not an entire holding or a definite share or fractional part of a holding separately assessed to revenue but consists of individual field plots which form part of a holding but which are not separately assessed, is that prescribed by section 7 (v) (d) of the Court-Fees Act.

Appeal against the decree of the District Court, Bassein, in Civil Appeal No. 43 of 1922.

Mr. *Thein Maung*, for the Respondent.

JUDGMENT.—The parties are holders of adjoining holdings of paddy land and appellant alleges that respondent by his tenant has encroached on her holding to the extent of four field plots. She has

accordingly sued him to recover those four field plots.

The first point which I notice about the proceedings is that Court fees have been calculated on five times the annual revenue payable, and not on the market-value of the land as they should have been.

The property in dispute is not an entire holding or a definite share or fractional part of a holding separately assessed to revenue, but consists of individual field plots which form part of a holding but which are not separately assessed, and, therefore, Court-fees were payable under section 7 (v) (*d*) and not under section 7 (v) (*b*) of the Court Fees Act.

I am constantly dealing with cases in which the same mistake is made, and it is not creditable to the lower Courts that the matter so often escapes notice, particularly when their attention has been called to it in the Chief Court's General Letter No. 5 of 1919.

There is no mention of the market-value of the land in the plaint or in the Trial Court's record, and the only reference to it which I find in the proceedings is in the heading of the Memorandum of Appeal in the District Court, which is a valuation by one of the defendants and not by the plaintiff.

I have no means of discovery of the market-value of the land and the case must go back to the Trial Court for enquiry and report on this point.

Meanwhile, the appeal will be stayed.

W. C. A. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 48 OF 1921.

May 17, 1922.

Present :—Justice Sir John Woodroffe, KT., and Mr. Justice Cuming.

HARI RAM SINGH CHOUDHURY—APPELLANT

versus

RAM RAM SINGH CHOUDHURY AND ANOTHER—RESPONDENTS.

Will—Two executors—Application for Probat by one—Renunciation of executorship by other—Probate, grant of—Subsequent application to withdrawal of renunciation, whether competent.

H, one of the two executors appointed under a Will, appeared on notice of an application for Probate by the other executor, and stated that he did not agree to be an executor under the Will. He prayed that his objections to the Will might be noted and the suit might be decided. Eventually, Probate was granted to the applicant. Sometime afterwards, *H* applied to withdraw his previous application renouncing the executorship and prayed that he might be appointed executor along with the other person. This application having been rejected, *H* appealed:

Held, that inasmuch as the grant of Probate had already been made at the time when the appellant asked to withdraw his renunciation of the executorship, that application came too late and the appellant was not entitled to any relief. [p. 219, col. 1.]

Appeal against the decree of the District Judge, Murshidabad, dated the 8th of October 1920.

Babu *Dwarka Nath Chakravarti* and *Kali Kinkar Chakravarti*, for the Appellant.

Mr. *B. Chakravarti* and Babu *Nagendra Nath Ghose*, for the Respondents.

JUDGMENT.

Woodroffe, J.—A preliminary objection was raised in this appeal as to its competency. It has been contended that the appeal is directed against an order refusing an application for a review, that is taking it that the Probate was granted by the Court on the 7th of August 1920. It is not necessary, in my opinion, to decide that point because I think the appeal fails upon the second ground.

The appellant is a son of the testator, one Gobinda Sundar Singh Choudhury. The respondent also is another son. These two sons were appointed executors under the Will of their father. There were also other persons executor and executrix. An application for Probate was made by the respondent, Ram Ram Singh, on the 8th June 1920. On the 12th June 1920 the application was registered and notice was directed to issue to the persons named in the order of that date requesting them either to renounce the executorship or to join in the application. On the 3rd July an application was made by the appellant before us stating that he was willing to be an executor under the Will. In that petition, however, he

further stated that it would be necessary to file a petition of objection to the suit. On the 17th July 1920 he made an application asking for further time until the 27th July 1920 for the purpose of filing objections. Then, on the 27th of July, the date up to which he had got an adjournment, an application was made by the appellant in which he said, contrary to his previous statement, that he did not agree to be an executor under the Will. In that petition he also says that he has come to know that the Will contains various illegal provisions and that he will have to bring a suit for setting aside the Will, that he does not admit the clauses of the said Will, nor does he intend or agree to be an executor thereof. He prayed that his objections might be noted (on protest) and the suit might be decided. Then, after certain other orders to which I need not refer, on the 7th of August an order was passed, as I read it, granting Probate. The appellant's name was not included among the Probate holders. Then there were some further orders and on the 27th of September 1920 the appellant prayed that he might be allowed to withdraw his application of the 27th July 1920 and be appointed an executor along with his two brothers. That application was supported by a petition in which it was stated that that objecto , that is, the appellant, was always ready and willing to be an executor and that he had never refused to do so. This application was opposed and on the 8th of October 1920 the learned Judge gave his decision holding that he was not satisfied that the petition of the appellant renouncing executorship was filed through mistake as alleged. He also pointed out that the appellant did not file his petition of withdrawal until two months after the petition of renunciation had been filed. He accordingly dismissed the petition. Against that order the present appeal has been made.

I think the decision of the learned Judge must be supported on the ground that, at the time when the appellant asked to withdraw his renunciation of the executorship, the grant of Probate had already been made on the 7th of August 1920 and, therefore, that application came too late. It has been argued that we should hold that the Probate was granted on the 8th of October 1920. On that date the order was that Probate should issue. The Probate had been granted some time previously. This distinguishes the present case from that cited to us. Therefore, the appeal fails and must be dismissed with costs. Hearing fee five gold *mohurs*.

Cuming, J.—I agree.

Appeal dismissed.

K. S. D.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 161 OF 1922.

March 6, 1923.

Present:—Justice Sir Francis Oldfield, Kt., and Mr. Justice Devadoss.

BALUSAMI IYER—RESPONDENT—1ST PLAINTIFF—APPELLANT

versus

VENKATASAMI NAICKEN *alias* T. S. RANGASWAMY AIYANGAR, OFFICIAL RECEIVER, MADURA—PETITIONERS NOS. 1 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLV, r. 15—Orders of Privy Council, execution of—Procedure—Persons interested in execution, whether must apply separately—Execution, limitations on.

Order XLV, r. 15, Civil Procedure Code, makes it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission. But it is not necessary that each person interested in the execution of a particular order should obtain a separate transmission, when that order has already been transmitted at the instance of one of the successful parties.

In the absence of any restrictions founded on the actual language of the decree or order of the Privy Council, it cannot be said that only the successful appellant can apply for execution. [p. 220, col. 2.]

Kassim Saib v. *Luis*, 17 M 82; 6 Ind. Dec. (N. S.) 56, *Natesa Ayyar* v. *Annasami Ayyar* 25 M. 426, distinguished.

Appeal against the order of the Court of the Additional Subordinate Judge, Ramnad, at Madura, in Execution Appeal No. 24 of 1922.

Mr. *A. Krishnaswamy Aiyar* (with him Mr. *M. Subbaraya Aiyar*), for the Appellant.

Messrs. *C. V. Ananthakrishna Aiyar* and *S. R. Muthuswamy Ayyar*, for the Respondent.

JUDGMENT.—The lower Court's order is objected to, first, on the ground that the respondents before us, petitioners before it, were not entitled to apply for restitution when they had not, under O. XLV, r. 15, obtained transmission of the order of His Majesty in Council to the lower Court, the order being the basis of their claim. Order XLV, r. 15, no doubt, does make it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission. But in the present case transmission has already been obtained by the 27th defendant, the successful appellant in the Privy Council. It would be inconvenient, if not impossible, to hold that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted. This ground of appeal is not sustainable.

The next ground on which the appeal is argued, is that the petitioners are not entitled to apply for execution of the order by way of restitution or otherwise, because they were not parties to the Privy Council Appeal. It is true that they were not impleaded as parties, the 27th defendant, the successor-in-interest of the 26th defendant, having been the appellant; and it is true that they claim as lessees from the deceased 26th defendant. But we cannot accept either generally or with reference to the particular circumstances of this case, the principle that only the successful appellant can execute the order. That principle has been supported by reference to *Kassim Saib* v. *Luis* (1) and *Natesa Ayyar* v. *Annasami Ayyar* (2). But those decisions turned on the special circumstances in each case, and on reference to the record in the second we find that the decree under execution did contain an explicit limitation sufficient to justify the conclusion reached. We have not been shown how it is consistent with any general principle that any limitation should be applied to the execution of the decree resulting from the order unless such restrictions can be founded by the actual language of the decree or order itself.

Turning to the decree and order in this case, in order to see whether the contention before us is sustainable with reference to the particular circumstances, we find that the order is without qualification and the Subordinate Judge also in the decree, which it restored without qualification refused the relief which the plaintiff asked against the defendants Nos. 1 and 2 except in respect of a small sum claimed for quit-rent cocoanuts, etc., with which we are not concerned. In view of the unqualified language used, we cannot read into either order or decree any intention to exclude from the relief granted to the present respondents. It is said that the case as between them and the plaintiffs were not on the same footing as the case between the successful appellant, 27th defendant, and the plaintiffs, because in their case a plea of estoppel might have prevailed against them. We do not feel called upon to enter into that when (as we have stated) the result of the Privy Council Appeal is clear and amounted to an adjudication that the plaintiff was not entitled to retain against them the land or the profits or the sum of money representing the profits, which the lower Court awarded to them in restitution.

The appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 17 M. 82; 6 Ind. Dec. (N.S.) 56.
(2) 25 M. 426.

JAMES MACKINTOSH *v.* SCINDIA STEAM NAVIGATION CO., LTD.

BOMBAY HIGH COURT.

ARBITRATION CASE No. 18 OF 1922.

May 19, 1922.

Present:—Mr. Justice Marten.

In re SS. *Maritime*.

JAMES MACKINTOSH AND COMPANY—APPLICANT

versus

THE SCINDIA STEAM NAVIGATION CO., LTD.—OPPOSITE PARTY.

Arbitration—Private reference to arbitration—Examination of witnesses—Commission, Court, whether can issue—Civil Procedure Code (Act V of 1908), ss. 75, 151, Sch. I—Inherent powers of Court, when exercised—Consent of parties, whether can confer jurisdiction—Arbitration Act (IX of 1899), applicability of.

When parties to a dispute refer it to a private arbitration without the intervention of a Court of Law, the Court has no jurisdiction to issue a Commission for the examination of witnesses in the matter referred to arbitration. [p. 224, col. 2.]

In re Shaw and Ronaldson, (1892) 1 Q. B. 91; 61 L. J. Q. B. 141 and *In the matter of an arbitration Dreyfus and Sons and R. and W. Paul*, (1893) 9 T. L. R. 358, referred to.

Rabiabai v. *Rahimabai*, 7 Bom. L. R. 560, and *Hayward* v. *Mutual Reserve Association*, (1891) 2 Q. B. 236; 65 L. T. 491; 39 W. R. 624, distinguished.

The powers regarding the granting of Commissions for examination of witnesses are expressly given by the Code of Civil Procedure, the Indian Arbitration Act and the Rules of the High Court and do not depend upon any implied or alleged inherent powers of the Court. [p. 222, col. 2.]

Section 75 of the Code of Civil Procedure should be read subject to the rules in the First Schedule to the Code and cannot be read as giving a Court power to issue Commissions to examine anybody anywhere before any private person, whether or not any suit has been instituted. [p. 222, col. 2.]

The Arbitration Act (IX of 1899) does not apply to all cases and where certain events arise which are not covered by the Act, then the parties are left without any remedy and the Court has no jurisdicton to remedy the defects under the Arbitration Act. [p. 225, col. 1.]

Gopalji v. *Morarji*, 50 Ind. Cas. 411; 21 Bom. L. R. 308; 43 B. 809, referred to.

In re Babaldas Khemchand, 57 Ind. Cas. 987; 22 Bom. L. R. 842; 45 B. 1, explained.

Where the Court has no jurisdiction to pass an order, the consent of the parties cannot give it jurisdiction. [p. 225, col. 1.]

Mr. *Little* of Messrs. *Crawford, Bayley & Co.*, for the Applicant.

JUDGMENT.—I have to thank Mr. Little, the Solicitor for the applicants, for his interesting and valuable argument in Chambers on a point which is both novel and important. The application is for the issue of a Commission to Calcutta for the examination of witnesses in a private arbitration, and the point is, whether this Court has any jurisdiction to make the order.

Now, in India parties who wish to resort to arbitration have two alternatives. They can either get the direct assistance of the Court from the outset, or they can arbitrate without the intervention of the Court. In the former case, they can proceed under the Second Schedule to the Civil Procedure Code. In that event, the present difficulty would not arise, for, under section 7 of that Schedule, the Court would have power to issue the same processes to the parties and witnesses whom the arbitrators desire to examine, as the Court might issue in suits tried before it. Accordingly, in *Rabiabai* v. *Rahimabai* (1), Mr. Justice Tyabji decided that in such an arbitration case it was competent to the Court to issue a Commission for the examination of witnesses.

But the present case is not one of that description. It is an arbitration without the intervention of the Court and it comes under the Indian Arbitration Act, 1899, the preamble of which runs: "Whereas it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice." That Act, however, does enable the parties to get the assistance of the Court in certain limited particulars. For instance, under section 10 the arbitrators have power to administer oaths to witnesses and to state a case for the opinion of the Court. Under section 12 the Court has power to enlarge the time for making an award, under section 13, to remit the award for re-consideration, under section 14, to set aside the award for misconduct, etc., and under section 16, to remove arbitrators for misconduct. Then, under section 15, when an award has been filed in Court, it is enforceable as if it were a decree of the Court. Section 20 provides for rules to be made by the Court.

Then the First Schedule to the Act provides for certain matters to be implied in submissions to arbitration, unless otherwise negatived.

Clause 6 provides that the parties to the reference and all persons claiming

(1) 7 Bom. L. R. 560.

through them shall "submit to be examined" by the arbitrators on oath, and to produce documents. Clause 7 runs: "The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath."

It will be noted, therefore, that there is not a word about the compulsory summoning of witnesses; nor a word about Commissions, and that this is in direct contrast with section 7 of the Second Schedule to the Civil Procedure Code which I have already mentioned. Further, we know that the Indian Arbitration Act is largely a copy of the English Arbitration Act, section 8 of which provides that, "Any party to a submission may sue out a writ of *subpœna ad testificandum*, or a writ of *subpœna duces tecum*." No such provision for the issue of *subpœnas* by this Court in a private arbitration is provided in the Indian Act.

Next, I turn to our own rules of this High Court. They are rules 351 to 360 under the Indian Arbitration Act. There is nothing there about summoning witnesses in this way nor about a Commission. The only rule I need notice is rule 352 which provides for all applications being "made by petition except as hereinafter otherwise provided." Therefore, it would seem, from a technical point of view, that this particular application should have been made by petition and not on a mere request contained in an affidavit. However, that is merely a technical point, and could easily be put right by the presentation of a petition.

Then, if we turn to rules 340 to 345 they provide for the examination of witnesses *de bene esse* and for a Commission under O. XVIII, r. 16, and O. XXVI, r. 1, of the Civil Procedure Code. There is nothing else to which my attention has been drawn in our rules which are material to be mentioned on this point. Then, if I return to the Civil Procedure Code, I find it is perfectly clear that these examinations *de bene esse* under O. XVIII, r. 16, and also any Commissions under O. XXVI, rr. 1 and 4 are only to be granted in "suits." I may refer to the note which I think is correct in Mr. Mulla's Code (7th Edition) at page 697 where he says: "A Commission can only be issued in the cases specified in this rule and rules 4 and 5 below, and in no other case." Similarly, when one considers the question of summoning witnesses one finds that under O. XVI, r. 1, there is power to summon witnesses after "the suit is instituted." The present application is clearly not in a suit.

Next, if one turns to O. XXVI, rr. 16 and 17, dealing with Commissions, one finds that any commissioner who is appointed has express power to examine witnesses and "any other person whom the Commissioner thinks proper to call upon to give evidence." Under rule 17 the provisions of this Code relating to the summoning, attendance and examination of witnesses shall apply to persons required to give evidence under this order, and that "for the purposes of this rule the Commissioner shall be deemed to be a Civil Court." Then sub-rule (2) provides for certain powers to the Commissioner to apply to Local Courts other than the High Court for issuing processes against a particular witness where necessary. Once more, then, one finds these powers expressly given, and not depending on any implication or alleged inherent powers.

Now, there is a section in the Civil Procedure Code, section 75, which is in rather wider terms. Section 75 provides that, "Subject to such conditions and limitations as may be prescribed, the Court may issue a Commission (*a*) to examine any person; (*b*) to make a local investigation; (*c*) to examine or adjust accounts; or (*d*) to make a partition." Section 76 gives power to issue a Commission to another Court not being a High Court. Section 77 deals with Letters of Request in lieu of Commissions for the examination of witnesses at any place not within British India. Section 78 provides for commissions issued by Foreign Courts. But it must be remembered that under section 121 the rules in the First Schedule are enacted as part of the Act, and section 75, in my opinion, cannot be read as giving this Court power to issue a Commission to examine anybody anywhere and before any private person whether or not any suit has been instituted. For instance, I do not think, this section would give the Court power where there was no pending suit to direct a private citizen to appear before say a *Punchayet*

of some particular caste to give evidence on some caste dispute. Nor, I think, could the Court require a private citizen in a similar case to appear before a Club Committee or any other private domestic tribunal. Nor, for the matter of that, before, say, a Government Departmental Commission. I think then that this section must be qualified by the rules in the First Schedule which I have referred to, subject of course to such further rules as may be found in our own High Court Rules. Therefore, as far as the rules and the express powers of this Court are concerned, I find nothing express which would enable me to grant this present application.

An appeal is next made to the inherent jurisdiction of the Court under section 151 of the Civil Procedure Code. When such an appeal is made, I think, the Court must be particularly careful to consider the principles involved and what the application really means. I have, in my mind, a judgment given sometime ago by Mr. Justice Chitty in a case under the Settled Land Acts, where, after an application under the ordinary provisions of the Settled Land Acts for leave to do something in relation to the settled property had failed, Counsel Mr. Upjohn next applied to the Court to sanction the proposal under the inherent jurisdiction of the Court, Mr. Justice Chitty then gave a forcible and salutary warning against too great a readiness to accept such an argument, however specious.

In the present case, I think, the Court has to be particularly careful in making the order, because there is no opposition from any of the parties to this arbitration; and if it was a case under the Second Schedule to the Civil Procedure Code, the facts would undoubtedly justify the Commission being granted. On the merits, and irrespective of jurisdiction, I am quite satisfied that it is a proper case for the assistance of the Court. I may say at once that if I felt myself able to grant this assistance, I would undoubtedly give it to these business men.

Now, going back to principles, when a party appeals to the alleged inherent jurisdiction of the Court to grant a Commission in a private litigation, what do our Courts exist for? Our Law Courts exist for deciding the litigation of the country. For that purpose it is reasonable and necessary that the Court should have power to summon witnesses before it and to examine them. But summoning a private citizen to give evidence before another private citizen seems to me to be quite another matter. I do not see where the inherent jurisdiction comes in there at all. No doubt, in course of time this difficulty was felt in arbitrations, and that is why there has been legislation both in England and in India to assist in some respects parties resorting to a private arbitration. It is perfectly clear that in some cases that may be a convenient and speedy way of settling disputes, for instance, in disputes as to whether goods are up to sample. But the Legislature in granting this assistance in private disputes has been extremely careful to limit the Court's powers. I will not repeat it again but I have already contrasted section 7 of the Second Schedule of the Civil Procedure Code with the very limited powers given in the Indian Arbitration Act about witnesses.

Further, it is perfectly clear that the Arbitration Act does not apply to all cases. You have got to bring your arbitration within the four corners of the Act, and if certain events arise which are not covered by the Act, then the parties are left without any remedy, and the Court has no jurisdiction to remedy the defects under the Arbitration Act. This is exemplified by a case decided by the Court of Appeal in our Courts in 1919 *Gopalji* v. *Morarji* (2). That was a case where three arbitrators were appointed. They all, after entering on the arbitration, either retired or refused to continue, and then there was an application made to the Court to appoint new arbitrators in their place. If it was a case of doing justice or of the inherent powers of the Court, supposing the express provisions of the Act did not apply, you would have thought that was eminently a case where the power should be exercised because otherwise the whole of the arbitration would be entirely abortive. The case came before me in the first instance, and although it was clear that one coach and

(2) 50 Ind. Cas. 411; 21 Bom. L. R. 808; 43 B. 809.

four had already been driven through the Act, I thought I could see my way, to prevent another gap being made in the useful provisions of the Act, and that I could construe the provisions in such a way as to fill up the vacancies. However, the Court of Appeal took a different view, and held that the Act only enabled the Court to fill up vacancies in the case of a single arbitrator or two arbitrators but not in the case of three. Consequently, the arbitration proved abortive. Mr. Justice Hayward in his judgment pointed out that the Act conferred special powers on the Court, and that those powers do not exist under the inherent jurisdiction. He says at page 832*:

"The appeal involves a point of importance. The Indian Arbitration Act applies to the appointment of a single arbitrator and in certain cases to the appointment of two arbitrators. Does it apply in any case to the appointment of three arbitrators? It is important to remember in solving this point that the Act is an Act to amend the law relating to Arbitration. It does not deal with the whole Law of Arbitration and it must be construed strictly in that it confers special powers of interference not otherwise inherent in the Court."

That statement of the law is, I think, directly opposed to the argument which has been addressed to me as to the inherent jurisdiction of the Court. If it is necessary for the ends of justice in the present case to grant a Commission to examine witnesses, surely it was also necessary for the ends of justice to fill up the vacancies in the arbitrators in the other case. And I may point out, as showing the niceties of the distinctions which this badly drawn Act has caused, that in *In re Babaldas Khemchand* (3). Mr. Justice Pratt stayed an action where there were three arbitrators and refused to adopt the argument that the Act did not apply at all where there were three arbitrators. In other words, he held that an arbitration, where there are three arbitrators, may be a good arbitration under the Act, although in certain cases you cannot fill up vacancies that may occur in those arbitrators.

(3) 57 Ind. Cas. 997; 22 Bom. L. R. 842; 45 B. 1.
* Page of 43 B.—(*Ed.*)

I next turn to English authorities which, I think, I may fairly do, because, as I have said, the Indian Arbitration Act, is practically taken from the English Act, and there is much in common between the two rules of procedure. There the exact point has been decided in a manner adverse to the present application. I refer to *In re Shaw Ronaldson* (4), where the head-note is as follows: "Where parties agree to refer their disputes to arbitration, no action having been brought in respect of those disputes, the Court or a Judge has no power under O. XXXVII, r. 5, to order the issue of a Commission for the examination of witnesses in the matter referred to arbitration." That was decided by Mr. Justice Mathew and Mr. Justice Collins, as they then were. As we all know, few people knew more about the Law of Arbitration and Commercial Law generally than Lord Justice Mathew. He was indeed the originator and the first Judge who sat in the modern Commercial Court in the High Court in England. Mr. Justice Collins, who was afterwards the Master of the Rolls, was also, if I may say so with all respect, a brilliant Commercial and Common Law Lawyer. When then I find these two learned Judges holding that the Court has no jurisdiction, that decision, in my opinion, is entitled to the greatest weight. In that case they decided that a private arbitration was not a "cause" or a "matter" under the rules or Acts there cited. The corresponding word in our Code is "suit." There is no "suit" before me. It is only a private arbitration.

Then there is another case of *In the matter of an arbitration Dreyfus and Sons and R. and W. Paul* (5). In that case Mr. Justice Collins refused in a private arbitration to grant a Commission to examine witnesses. The case went on appeal where from the interlocutory observations made by the learned Judges, it was clear they had the greatest doubt as to the jurisdiction. Eventually, the appeal was dismissed on the ground that the application on its merits showed no ground for the exercise of the Court's discretion. That case can in no wise help the present application. If anything, it is against it.

(4) (1892) 1 Q. B. 91; 61 L. J. Q. B. 141.
(5) (1893) 9 T. L. R. 358.

In England, just as in the case decided by Mr. Justice Tyabji which I have referred to, it has been held that where once there has been a suit and the suit has been referred to a Referee for trial, then the Court has power to issue a Commission. [See *Hayward* v. *Mutual Reserve Association* (6).]

Then, if I turn to the recognized text books, I find in Russell on Arbitration, 10th Edition, at page 138, it is stated definitely that "in the case of a reference by consent, the Court has no power to order a Commission to issue for the examination of witnesses abroad." Similar statement appears in Halsbury's Laws of England, Vol. I, page, 458, note (*h*) and on other pages.

Now, against all that, the only precedent or authority for the order which I am asked to make is an order made by Mr. Justice Kanga in Chambers a short while ago when he was acting temporary Judge of this Court. I am told the learned Judge did raise the question of jurisdiction and considered the papers for some three or four days. But there is no delivered judgment, and I am not aware what were the reasons which induced the learned Judge to grant the Commissio in that particular case. In any event, a decision of that sort in Chambers, where no note of the judgment has been kept and where I have no notes of the argument (if any) is not in any way a precedent binding upon me, least of all when it is a question of jurisdiction. And, with due respect to the learned Judge, I find myself unable to follow the decision.

One other argument urged upon me was that the consent of the parties would give the Court jurisdiction. That to my mind is an extremely dangerous argument to use. It was admitted that I could not issue this Commission, supposing there was opposition. Let me test this admission. If it is necessary for the ends of justice that, under the inherent jurisdiction of the Court, I should grant a Commission to examine witnesses in Bengal, then what possible difference can it make whether all the parties consent to it or not. If, for instance, it is essential for the plaintiff to call certain witnesses, surely it is only right that they should be called quite irrespective of whether the defendant agrees that they should be called. I cannot see what the defendant's consent has got to do with the power of the Court.

Many people are carried away with the erroneous idea that, because two parties agree on any particular course, that necessarily gives the Court jurisdiction to make the order. They sometimes go so far as to suggest that the Court is bound to make the order in such a case. Here I am asked to affect the rights of private citizens who occupy certain important public posts, *viz.*, certain officers of the Port of Calcutta. They are not parties to the arbitration. So it is not a question merely between the parties to a private arbitration. I am asked in effect to allow private litigants to summon these particular Port Officers before them and to oblige them to produce documents and so on. So I am affecting the rights of other citizens, and it is not merely a question, of what these particular parties want me to do.

After considering carefully all the arguments that have been addressed to me, I am of opinion, there is no jurisdiction in this Court to grant a Commission to examine witnesses in a private arbitration and still less so, when the Commission is to be sent to another Province.

I accordingly refuse the application.

As regards costs, costs of all parties will be costs in the arbitration.

R. N. *Application refused.*

(6) (1891) 2 Q. B. 236; 65 L. T. 491; 39 W. R. 624.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 104 OF 1922.

November 28, 1922.

Present:—Sir Sidney Robinson, KT., Chief Judge, and Mr. Justice Macgregor.

CHAN PYU—PETITIONER

versus

CHAN CHOR KHINE—RESPONDENT.

Succession Certificate Act (VII of 1889), s. 5—Certificate, grant of—Jurisdiction.

CHAN PYU *v.* CHAN CHOR KHINE.

Under section 5 of the Succession Certificate Act, the only Court which has jurisdiction to grant a certificate is the Court within whose jurisdiction the deceased at the time of his death ordinarily resided, unless at that time he had no fixed place of residence at all.

The provisions of the Act granting jurisdiction ought to be strictly construed and not so as either to enlarge or restrict jurisdiction.

Miscellaneous Civil Appeal.

Mr. *Higinbotham*, for the Petitioner.

Mr. *Keith*, for the Respondent.

JUDGMENT.—One Chan Ma Phee died in Rangoon leaving a Will, and an application for grant of a certificate under Act VII of 1889 was made to the District Court of Hanthawaddy.

Chan Ma Phee ordinarily resided in Strand Road, Rangoon, outside the limits of the ordinary jurisdiction of the District Court. Objection was taken that the District Court had no jurisdiction to grant the certificate, reliance being placed on the provisions of section 5 of the Act. The learned District Judge, however, decided that the Court had jurisdiction and a certificate has been granted. This is an appeal against that decision.

The Court's jurisdiction is granted by section 5 which runs as follows:—

"The District Court within the jurisdiction of which the deceased ordinarily resided at the time of his death, or if, at that time he had no fixed place of residence, then within the jurisdiction of which any part of the property of the deceased may be found, may grant a certificate under this Act."

It is perfectly clear that, under this section, the oridnary circumstance which gives rise to jurisdiction is that of residence within the local limits of the Court's jurisdiction. There is no doubt that Chan Ma Phee ordinarily resided outside the limits of that jurisdiction. He did not reside within those limits, and the Court would, *prima facie*, therefore, have no jurisdiction. The second provision granting jurisdiction rests on the words, "or if at that time he had no fixed place of residence, then within the jurisdiction of which any part of the property of the deceased may be found." This branch is clearly an alternative. It says distinctly and in so many words that it applies only in cases in which the deceased at the time of his death had no fixed placed of residence within the jurisdiction.

It is clear that provisions granting jurisdiction must be strictly construed. The language used is not to be interpreted so as either to e large the jurisdiction or to restrict it. This is the only section in the Act which confers jurisdiction on the District Court in this matter, and we think it is clear that, where the deceased did not at the time of his death ordinarily reside within the jurisdiction, the Court would have no jurisdiction to grant a certificate unless the deceased had at that time no fixed place of residence at all. The section clearly provides for all cases, including those few cases in which there was no fixed place of residence. We have been referred to corresponding sections in the Succession Act and in the Probate and Administration Act. The wording of those two Acts is different, and so clearly framed to grant an alternative jurisdiction in one or other of two cases. Either case would give the Court jurisdiction, whereas the present section clearly gives the Court no jurisdiction in the second branch unless and until the jurisdiction conferred by the first branch would not arise.

We have been referred to the provisions of section 6 (1) (*b*) of the Act, and we have been asked to use this provision so as to give it an extended jurisdiction under section 5. In the first place, the section deals merely with the procedure to be adopted in the moving Court. It is not a section which deals with jurisdiction at all, but it is sought to use its terms to show that the meaning of the words employed in section 5 is not as we have set out, but that the words should be interpreted to mean something else.

Now, in the first place, it is an ordinary rule of the interpretation of Statutes that, where there are apparently conflicting provisions that interpretation should be assigned, if it can be assigned, without straining the language which would bring them into accord and this is not particularly the case when we are dealing with a matter of jurisdiction and considering whether that jurisdiction can be enlarged by a provision which applies to a different branch of the subject altogether.

It is no doubt the case that, on one reading of the language of section 6 (1) (*b*), that language would give some colour to the suggestion that the words used in section 5 may have a different meaning, but it is possible without any straining of language, to interpret them so far as to agree with the provisions of section 5 and without extending or restricting the jurisdiction given by it.

Under these circumstances, we are of opinion that the Court below was clearly wrong and that it had no jurisdiction to grant the certificate. The appeal will be accepted with costs throughout, and the certificate revoked, and we fix Advocate's fees at five gold mohurs.

W. C. A. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 178 OF 1922.

March 20, 1923.

Present:- Mr. Simpson, A. J. C.

DHAUNTAL KHAN AND OTHERS—DEFENDANT—APPELLANTS

versus

RAM LAL KALWAR—PLAINTIFF, DAN BAHADUR SINGH AND OTHERS—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Presumption—Separation—Presumption, whether exists as to date of separation—Partition, proof of—Cesser of commensality.

There is undoubtedly a presumption that every Hindu family is joint. But if the family is no longer joint, there is no presumption as to the date on which separation was effected. [p. 228, col. 2.]

Suraj Bakhsh v. *Raghuraj Kunwar*, 11 O. C. 381, *Mendana* v. *Jagan Nath Bakhsh*, 25 Ind. Cas. 689; 17 O. C. 235 at p. 237 and *Tika* v. *Mahabir Prasad*, 36 Ind. Cas. 629; 19 O. C. 92, referred to.

Nagashar Bakhsh Singh v. *Ganesha*, 56 Ind. Cas. 306; 23 O. C. 1; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 42 A. 308; 13 L. W. 622; 47 I. A. 57 (P. C.), distinguished.

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property. [p. 229, col. 1.]

Ganesh Dutt Thakoor v. *Jetwach Thakoorain*, 1 C. 262; 14 M. L. J. 8; 31 I. A. 10; 8 C. W. N. 146; 8 Sar. P. C. J. 575; 6 Bom. L. R. 1 (P. C.), followed.

Appeal against the decree of the District Judge, Fyzabad, dated the 21st March 1922, upholding that of the Additional Sub-Judge, Fyzabad, dated the 1st April 1921.

Mr. *M. Wasim*, holding the brief of Mr. *Nizmat Ullah*, for the Appellant.

Messrs. *A. P. Sen*, *H. K. Ghosh* and *M. H. Kidwai*, for the Respondents.

JUDGMENT.—This is a defendants' appeal One Dhup Narain had five sons who were defendants Nos. 4 to 8. He executed a possessory mortgage of one-anna fractional share in village Mondhara in favour of defendant No. 1 for Rs. 2,100 dated 10th May 1909. This is an Exhibit, A-1. The defendant No. 1 has transferred his mortgagee's right to his sons, defendant No. 2 and defendant No. 3. Dhup Narain is dead, and defendants Nos. 4 to 8 are his heirs. They have sold the property (or the equity of redemption) to the plaintiff, and the plaintiff has brought the present suit to set aside this mortgage on the ground that it was executed without the consent of his sons and without family necessity.

Various pleas were taken in the Court of Trial. But the main issue in the lower Appellate Court, and the only point which the appellants' Counsel presses now, is, that at the date of this mortgage the joint family was broken up, and Dhup Narain had become by partition the sole owner of the property which he mortgaged. It is common ground that, about the year 1900, Dhup Narain, whose first wife, the mother of defendants Nos. 4 to 8, was dead had married a second wife *Musammat* Lakhpati, and that some kind of partition took place between Dhup Narain on one side and his five sons on the other. This much is certain from Exhibits A-15, A-17, A-18 and A-19, that in the year 1308 *Fasli*, corresponding to 1901, the name of Dhup Narain was expunged from the *khewat* in respect of six villages and mutation was effected in favour of his five sons who were then minors under the guardianship of *Musammat* Hansraj Kuar, the mother of Dhup Narain and consequently the grandmother of these boys. It has been held by both the Courts below that this transaction, whatever it was,

did not amount to a partition so as to destroy the co-parcenary rights of the sons in the remaining property which continued to stand in the name of Dhup Narain. But it is not quite clear from either of the judgments what they considered this transaction to be. Various phrases have been used to describe it. It has been called an "*Intizami* partition;" it has been called a "family arrangement;" it has been called a "division of right" as opposed to the division of property by metes and bounds or as opposed to specific and formal partition. But these phrases do not draw any real and vital distinction. A family arrangement, properly entered into, would confer title on Dhup Narain in the same way as a partition would. Apparently, the real dispute is whether the effect of this transaction was merely to entitle the father on the one side to enjoy the profits of six villages and the sons on the other to enjoy the profits of six other villages, without destroying the joint ownership of the corpus of the estate. That would be an unusual state of things which would require to be proved by cogent evidence.

The question of separation of jointness is one of fact, and I should not have interfered with the decree in second appeal, were it not that the learned District Judge has fallen into an error of law which vitiates his conclusion. He quotes from *Suraj Bakhsh* v. *Raghuraj Kunwar* (1) these words:

"The presumption that a joint Hindu family continues to remain joint until the contrary is proved by cogent evidence must be applied in this case."

And he goes on to express an opinion that the evidence in the present case cannot be regarded as cogent and gave this as a ground for holding that the family was joint at the time of the mortgage. But it was found by the Court of Trial and also by the lower Appellate Court that the family was no longer joint at the date of institution. The learned Subordinate Judge has rightly apprehended the effect of this finding when he says that the presumption of jointness is broken and that the plaintiff must prove when the division of right in the family took place. If authority is required for this proposition it will be found in *Mondana* v. *Jagan Nath Bakhsh* (2) and *Tika* v. *Mahabir Prasad* (3). There is undoubtedly a presumption that every Hindu family is joint. But if the family is no longer joint there is no presumption as to the date on which separation was effected. It becomes necessary, therefore, for me to consider the effect of the evidence afresh, making no presumption that the family is joint, but, on the contrary, throwing upon the plaintiff the burden of proving a fact necessary to be proved before he can get a decree.

Now, the first strong point in favour of a real partition is the mutation. The Courts below have referred to *Nageshar Bakhsh Singh* v. *Ganesha* (4). But that decision proceeded on many transactions with regard to the property, against which evidence there was only an entry showing that one of the three widows had 8-annas and the other two 4-annas each. That entry, taken by itself, pointed to a previous division of the family property. Their Lordships of the Privy Council proceeded on the ground that this Court "which is no doubt acquainted with entries in such records does not attach to them the importance which the appellant seeks." They also said: "That the inference as to the partition from such entry may be weak or may be strong according to circumstances."

Now, in the present case the inference is very strong. This is not an ordinary definition of the share to which each member of the joint family would be entitled on partition, such as is very frequently found in the *khewat* although there has been no partition. Here is an express expunging of the name of the father, although he is still alive, and substitution of the name of the sons, though they were all minors. If there was a partition of the family property this is

(1) 11 O. C. 381.

(2) 25 Ind. Cas. 689; 17 O. C. 235 at p. 237.
(3) 36 Ind. Cas. 629; 19 O. C. 92.
(4) 56 Ind. Cas. 306; 23 O. C. 11; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 42 A. 368; 13 L. W. 622; 47 I. A. 57 (P. C.).

exactly what would happen. But if there was anything short of such a partition it is exceedingly difficult to account for the mutation. If, as happens commonly enough, a particular member of a joint family undertakes the management of a particular isolated estate he does not get mutation. I have never known this done. He manages in the name of the family. And the reason is plain. To combine in the same hand the actual possession, in the shape of management, and the recorded title in relation to the payment of Government Revenue, comes very near to conferring a complete title. Commonly enough, a particular property is bought in the name of one member of the family. Commonly enough, a particular property is managed by one member of the family. But I know of no case in which the two things are united in the same hand. I think the Courts below have allowed themselves to be misled by the decisions in other cases where the facts were different.

The next point is separation, as regards commensality and residence. This is always an important point. As was said in *Ganesh Dutt Thakoor* v. *Jewash Thakoorain* (5):

"Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property."

There are several stages between the status of complete jointness and the status of complete separation. If two members of a joint family separate in residence and in board then, necessarily, separate funds have to be provided out of which these separate expenses are met. This does not of itself destory the joint interest in the family property since a manager can make an allowance for the expenses of the member who is living separate. But it may fairly be said that the family is not so joint as it used to be and that a step has been taken towards separation in estate. But in order to decide what took place at the time when Dhup Narain left the ancestral house, and the mutation of eight villages was effected in the names of his sons, it is necessary to look at the dealing of the parties afterwards. No family accounts were produced and, if I understand the case rightly, it is not the case of the defendants that there were any such accounts. They say that there was an arrangement under which the sons lived upon the income of the six villages and the father was allowed to appropriate the income of the other six villages but that the joint ownership of the property remained unbroken. This, as I said above, would be a curious state of affairs and one which would require to be proved by cogent evidence. As soon as the partition has been effected, we find Dhup Narain proceeding to alienate the property allotted to him. There are ten earlier mortgages all of which have been brushed aside by the Courts below with the words:

"As many of these have been consolidated in Exhibit A-1, which is the bone of contention in this suit, it looks rather like arguing in a circle to use them as proof of separation."

This reasoning is fallacious. The mortgage-deed in suit is dated 10th May 1909. If it stood alone it might be explained. But the earliest of these mortgages A-11 is dated 8th July 1904. There are four others in the year 1906 and two in the year 1907. The present suit would have been beyond time to impugn any of these. But, apart from that conside ation, eleven instances in which Dhup Narain has dealt with the property as his own, are cummulative evidence that the property is his own.

Then there is the transaction evidenced by Exhibits A-40 A 41 and A-43. A-43 is an order of mutation in respect of some land in village Mustafabad. Dhup Narain's name is to be expunged and the name of his mother, *Musammat* Hansraj Kuar, is to be substituted. A-41 is the deposition of Dhup Narain in which he acquiesces in this mutation. A-40 is an objection filed by Dhup Narain in the same matter in which he says that mutation ought not to be in favour of his sons but it ought to be in favour of his mother.

(5) 31 C. 262; 14 M. L. J. 8; 31 I. A. 10, 8 C. W. N. 146; 8 Sar. P. C. J. 525; 6 Bom. L. R. 1 (P. C.).

The sale-deed itself was filed in this suit. It is Exhibit A-55. But it has been rejected as unproved. However, the documents that are on the record are sufficient to prove the following facts:—

1. That Dhup Narain executed a sale-deed of some of the property in favour of his mother Hansraj Kuar.

2. That mutation in her favour was effected on the basis of this sale.

3. That the question of the sons' rights in the matter came up, but was decided against them so far as mutation went.

Now it must be remembered that *Musammat* Hansraj Kuar was not only the mother of Dhup Narain, and consequently the grandmother of his five sons, but she was also their guardian at the time of the partition. This mutation matter was much later. The actual order of mutation is dated 6th June 1910, about a year later than the mortgage in suit. But it is good evidence that the partition of 9 or 10 years earlier was a real partition which conferred sole ownership upon the father of the villages which he kept, otherwise he would have had no title to make his conveyance in the teeth of an objection by his sons. It has been suggested in the judgments of both the Courts below that the transaction may have been one for family necessity. But in the face of eleven known mortgage-deeds which were not for family necessity (for this is part of the plaintiff's case) there seems no reason to assume that there was family necessity for this transfer.

There is another alienation in favour of one Didar Khan. But, so far as I can ascertain from the record, it is evidenced only by a certain written statement, Exhibit A-39. This is a written statement filed by Ram Lal. This Ram Lal is defendant No. 1, the original mortgagee. I do not think that facts can be proved by a party producing some old written statement of his own. So much for the alienations by Dhup Narain. They constitute very strong evidence of an actual partition.

Another piece of evidence tending in the same condition is Exhibit A-48, although it has been treated in the Court below as evidence in favour of the plaintiffs. This is a deed of partition between the five sons. Now, if there was no earlier partition, the five sons ought to have divided not only the villages in which mutation has been effected in their favour, but also the villages which still stood in their father's name.

The case of the plaintiffs now is that the sons never lost their rights in these villages and in particular of Mondhara in respect of which the mortgage was executed. The date of Exhibit A-48 is 13th May 1919. The present suit was instituted on 9th September 1919. Yet, so late as 1919, the sons made no claim to any village which was in their father's name. Exhibit A-48 does not include Mondhara. Exhibit A-48 deals with six villages. There is no actual evidence on the record, at least I have not found any, of mutation in respect of one of these, Jalalpur. But Exhibits A-15, A-17, A-18 and A-19 show that mutation was effected with regard to the other five villages and as it is in evidence that there was a mutation of six villages, presumably Jalalpur was the 6th. But in any case the present village Mondhara was not treated in the sons' partition as belonging to them. It is unnecessary to consider the other evidence on the record. It is not important. The Courts below in coming to the conclusion that there was no real partition have attached weight to two conditions. The first is, that the evidence of an actual partition, (the oral evidence of arbitration and the division of moveables) was late in making its appearance in Court. But it must be remembered that the defendants Nos. 1, 2 and 3 who are the appellants are not themselves members of the family. They are only mortgagees. They might have known vaguely that there had been a partition without knowing the details. What happened was that they summoned Sardar Khan as their witness (he is D. W. No. 2) because he was an attesting witness to the mortgage-deed Exhibit A-2. The plaintiffs were foolish enough to examine him as regards the partition, and it then appeared that he knew all about it having been himself one of the *punches*,

He was able to name the other *punchas* and the defendants thereupon summoned them and examined them. I do not think that this, in any way, weakens the evidence of actual partition. The other point is that, at the time of the partition, the joint family consisted of the father and five sons and that the father's legal share would have been 1-6th only whereas he obtained one half. But under the circumstances this was not at all unlikely. The sons were all minors. It would have been difficult for them to force partition against their father's will. They themselves and their guardian may have been ready to accept less than their legal share in order to obtain separation from their father which they evidently desired. The father had just married again. He may have expected to have a second family. Where a man has two wives and two families an equal division between the two families is very far from being uniform. Under the circumstances of the case, the partition under which the father took half of the property was quite likely. I may add that, as a matter of fact, the father's wife *Musammat* Lakhpati would also have been entitled to the same share as a son so Dhup Narain and his wife between them would have been entitled to 2-7th and not 1-6th.

For these reasons, I allow the appeal, set aside the judgment and decree of the learned District Judge and dismiss the plaintiffs' suit with costs in all the three Courts.

K. S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 516 OF 1922.

January 8, 1923.

Present:—Mr. Justice Rankin.

Choudhuri JAMINI NATH MULLICK AND OTHERS—DEFENDANTS—PETITIONERS

versus

MIDNAPUR ZEMINDARY COMPANY—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 10—Stay of suit—"Suit," whether includes appeal—Suits for different debts, whether covered.

For the purposes of section 10 of the Civil Procedure Code the word "suit" includes appeal, [p. 232, col. 1].

Bepin Behary Mozumdar v *Jogendra Chandra Ghosh*, 36 Ind. Cas. 641; 24 C. L. J. 514, followed.

Where the suits are for distinct and different debts, for instance where the suits are for recovery of successive rents, section 10 does not apply.

Balkishan v. *Kishan Lal*, 11 A. 148; A. W. N. (1899) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N.S.) 523, referred to.

Rule against an order of the Sub-Judge, First Court, Midnapur, in Rent Suit No. 4 of 1922.

Babu *Khirode Narain Bhuian*, for the Petitioners.

Mr. *N. N. Sen Gupta*, Counsel, and Babu *Probodh Kumar Das*, for the Opposite Party.

JUDGMENT.—In this application for revision the decision of the learned Subordinate Judge of Midnapur is complained of on the ground that he has refused, under section 10, Civil Procedure Code, to stay the trial of a rent-suit. The case made by the defendants-petitioners is that the plaintiffs, the Midnapur Zemindary Company, are the proprietors of a certain *towji* and are also the *darputnidars*; that the defendants are the *putnidars*; that the dispute in question is as to whether in these circumstances the plaintiffs are entitled to make the defendants, *putnidars*, pay certain cesses. It appears that a rent-suit (No. 9 of 1916) was brought by the plaintiffs and was decreed *ex parte*; that to counteract this, the defendants brought a title suit (No. 262 of 1919); that the plaintiffs thereafter brought a rent suit (No. 80 of 1918), and that at the present moment the position is that although the defendants have lost at the trial of these

suits, these two suits are pending in appeal. In these circumstances, they say that in the present suit which is a suit of 1922 and which concerns the cesses alleged to be due from Aswin 1326 to Falgoon 1329, the defendants are entitled to claim the benefit of section 10, Civil Procedure Code. Now the learned Subordinate Judge has decided the matter upon the ruling that as the prior suits are pending in appeal they are not suits within the meaning of section 10 of the Code. As to that, I am of opinion that that decision is erroneous; and I may observe that if it has ever been held under the old Code that the reference to 'Courts whether superior or inferior' was a reason for holding that section 10 applied, where the previous suit is at the appellate stage, that is an instance of a correct conclusion arrived at for an entirely inadequate reason. The presence or absence of those words—'whether superior or inferior' does not in my judgment affect the question one way or the other. I think that the reference at the end of the section to 'His Majesty in Council' shows that for this purpose "suit" includes appeal; and in a case which was not referred to in the argument, but which I have discovered from Mr. Sen's book on the Bengal Tenancy Act, a Division Bench of this Court has before now dealt with this question and has ruled to that effect. I refer to the case of *Bepin Behary Mozumdar* v. *Jogendra Chandra Ghosh* (1). It remains, therefore, for me to say whether section 10 applies to the case before me. I am of opinion that it does not. The case to which I have just referred is, in my judgment, an authority completely covering that point also. The position is this. The present suit is for cess which has accrued due after the institution of the last of the pending suits. It is a suit for a different debt altogether, for a debt which was not in existence when the last of the previous suits was brought. When I come to apply section 10 it does not appear to me that any of the changes made in the Code of 1908 has any effect so as to make the section applicable where the suits are for distinct and different debts. It is quite true that in a very well-known judgment of that distinguished learned Judge Mr. Justice Mahmud, which is reported as *Balkishan* v. *Kishan Lal* (2), he under the former Code dealt with this question by saying that the former and the later suits were for different reliefs and it is quite true that certain words about the relief have been omitted from the later version of the Code. The observations made by Mr. Justice Mahmud were sufficient to show that under the old Code such a suit as I have now to deal with was not affected by section 10. But it must be observed that judgment for the recovery of subsequent cesses does not differ merely as being for a different form of relief. It is the same kind of relief for an entirely separate subject-matter; namely a debt which was not in existence at all at the time of the previous suit. It does not follow because the words "the same relief" are no longer in the section that section 10 is applicable to suits for recovery of successive rents. I will draw attention in this connection to one further point. Under the new Code it is clear that the section will not apply unless the previous suit is before a Court which is competent to grant the relief claimed in the present suit. That by itself shows that the section cannot apply to claims for rent due at successive periods altogether. Nobody can doubt that, whatever may be the result of the suits now pending in appeal, the Court cannot possibly give judgment thereunder for cesses that fell due long after the institution of the suits. For these reasons I am of opinion that the learned Subordinate Judge reached the right result when he held that section 10 had no application. I will only say that if at any subsequent stage an application apart altogether from section 10 is made to the Court below upon terms which that Court shall think reasonable,

(1) 36 Ind. Cas. 641; 24 C. L. J. 514.

(2) 11 A. 148; A. W. N. (1899) 42; 13 Ind. Jur. 309; 6 Ind. Dec., (N. S.) 523.

then that Court will be in no way prejudiced by anything that I have said if it is minded to exercise any power in favour of the defendant other than the power given by section 10. The Rule is discharged with costs—one gold *mohur*.

Rule discharged.

N. H.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 213 OF 1919.

July 3, 1923.

Present:—Mr. Justice Mulla.

CHOTALAL LALLUBHAI AND OTHERS—PLAINTIFFS

versus

CHAMPSEY UMERSA & SONS—DEFENDANTS.

Contract—Stipulation empowering one party to rescind, effect of—Contract, whether valid.

Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. [p. 234, col. 1.]

Such a stipulation should be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of its own wrong. [p. 234, col. 1.]

New Zealand Shipping Company v. *Societe Des Ateliers Et Chantiers De France*, (1919) A.C. 1; 87 L. J. K. B. 746; 118 L. T. 731; 14 Asp. M. C. 291; 62 S. J. 519; 34 T. L. R. 400, relied upon.

In re Starr-Bowkett Building Society and Simm, (1889) 42 Ch. D. 375; 58 L. J. Ch. 651; 61 L. T. 346; 38 W. R. 1, *In re Jackson and Haden's Contract*, (1905) 1 Ch. 603; 74 L. J. Ch. 389; 53 W. R. 428; 92 L. T. 591, affirmed in Appeal (1906) 1 Ch. 412; 25 L. J. Ch. 226; 54 W. R. 434; 94 L. T. 418, *Cuinion* v. *Horne*, (1906) 1 Ch. 596 at p. 603; 75 L. J. Ch. 293; 54 W. R. 344 and *Greaves* v. *Wilson*, (1858) 25 Beav. 290; 27 L. J. Ch. 546; 4 Jur. (N. S.) 271; 5 W. R. 482; 53 E. R. 647; 119 R. R. 420, referred to.

In a contract of sale and purchase of goods if the seller refuses to deliver the goods sold to the buyer, he would be liable for breach of contract unless he assigns some reason which would justify his refusal to give delivery. [p. 235, col. 1.]

A stipulation empowering the seller "to cancel or not to cancel the goods for any reasons whatever," does not, however, destroy the mutality of the contract which would be valid and binding in spite of the stipulation. [p. 235, col. 1.]

Mr. *Kanga*, Advocate-General, (with him Mr. *Munshi*), for the Plaintiffs.

Mr. *Kania* (with him Mr. *Lalji*), for the Defendants.

JUDGMENT.—This is a suit for the price of twenty five bales of Japanese yarn agreed to be sold by the plaintiffs to the defendants, and, in the alternative, for damages for failure on the part of the defendants to pay for and take delivery thereof.

By a contract dated 2nd February 1918 (Exhibit A) the plaintiffs agreed to buy from Messrs. Gosho Kabooshiki Kaisha twenty-five bales of Japanese yarn of February-March 1918 shipment, but the shipment was not guaranteed.

By a contract in the Gujrati language, dated 21st August 1918, the plantiffs agreed to sell the said twenty-five bales to the defendants. The following is an official translation of the material portions of the said contract:—

"This day we have purchased from you the goods of the below written details in accordance with the Bazaar rules of which you please take note. To cancel or not to cancel the sold goods for any of the reasons solely depends upon you. Cotton yarn No. 60-2 of Japan shipment for February-March 1918 bought of Messrs. Gosho Kaisha; (the delivery of the same) is to be given whenever the same may arrive earlier or later, (and) on the safe arrival (of the same) by steamer."

It may be observed that there is no word in the vernacular corresponding to "solely" in the above translation.

On 25th September 1918, the defendants addressed a letter to the plaintiffs stating that unless the goods were delivered within eight days from the receipt thereof the contract should be treated as cancelled. To the said letter the plaintiffs replied on 26th September 1918 stating that, having regard to the terms of the contract, the defendants were bound to accept the goods even if the goods arrived late. The eight days period expired on 3rd October 1918. The goods arrived in Bombay on 12th October 1918, and on the same day the plaintiffs wrote to the defendants informing them of the arrival of the goods and enquiring whether the plaintiffs should take delivery of the goods on behalf of the defendants or whether they should send the goods direct to the defendants. The defendants, by

their letter of 15th October 1918, stated that the eight days' period having already expired the contract stood cancelled, and they refused to pay for and take delivery of the goods. The plaintiffs thereupon got the goods sold by public auction and thereafter they instituted the present suit.

The bales offered to the defendants were shippped from Japan in September 1918. On arrival of the said goods the plaintiffs took delivery thereof and they were taken to their godown. There is no doubt that the plaintiffs were ready and willing to deliver the goods to the defendants.

The principal defences to the suit are—

(*a*) that there was no valid contract between the plaintiffs and the defendants; and

(*b*) that the goods offered being of September shipment the shipment could not be said to be a shipment within a reasonable time.

As regards the first defence, the argument of Counsel for the defendants was that, inasmuch as the writing (Exhibit B) gave an option to the plaintiffs to rescind the contract for any reasons whatsoever, the writing did not amount to an agreement in law. On the other hand, Counsel for the plaintiffs relied on the judgment of the Court of Appeal in *Chunilal Dayabhai & Co.* v. *Ahamedabad Fine Spinning & Weaving Company* (1) as affording a complete answer to the defendants' contention.

As regards the first defence it is well-established that parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency: Fry on Specific Performance, 6th Edition, page 486. Such a stipulation is to be construed according to its natural meaning subject to the principle of law that a party shall not take advantage of his own wrong: *New Zealand Shipping Company* v. *Societe Des Ateliers Et Chantiers De France* (2). It has thus been held that, where there is a stipulation in a contract for the sale of land enabling the vendor to rescind the contract if the purchaser makes a requisition on title with which the vendor is unable or unwilling to comply, the vendor cannot rescind capriciously and arbitrarily, that is to say, without any reasonable cause, such a stipulation does not entitle the vendor to neglect to remove the objections to title raised by the purchaser, and then on the strength of his own neglect to annul the contract, *In re Starr-Bowkett Building Society and Sibun* (3), *In re Jackson and Haden's Contract* (4), *Culnion* v. *Horne* (5) and *Greaves* v. *Wilson* (6).

But the point raised by Counsel for the defendants is that the contract in the present case differs from those in the cases referred to above in that the option to rescind the contract is not made dependent on the happening of any specified contingency, but that it is an option to terminate the contract for any reasons whatsoever, and that the contract is, therefore, void for want of mutuality. But this point also is covered by authority. In *New Zealand Shipping Company* v. *Societe Des Ateliers Et Chantiers De France* (2) in dealing with the question whether a stipulation in a ship-building contract which enabled the builders to rescind the contract in certain specified circumstances, Lord Atkinson said (at page 9):

"Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it."

In *Chunilal Dayabhai & Co.* v. *Ahamedabad Fine Spinning & Weaving Company* (1), which was a case of a contract for the sale of goods, the contract contained the following stipulation:—

"If you are not in a position to deliver the goods or if there be any dispute in respect

(1) 67 Ind. Cas. 223; 24 Bom. L. R. 295; (1922) A. I. R. (B.) 44; 46 B. 806.

(2) (1919) A. C. 1; 87 L. J. K. B. 746; 118 L. T. 731; 14 Asp. M. C. 291; 62 S. J. 519; 34 T. L. R. 490.

(3) (1889) 42 Ch. D. 375; 58 L. J. Ch. 651; 61 L. T. 346; 38 W. R. 1.

(4) (1905) 1 Ch. 603; 74 L. J. Ch. 389; 53 W. R. 428; 92 L. T. 591, affirmed in Appeal (1906) 1 Ch. 412; 25 L. J. Ch 226; 54 W. R. 434; 94 L. T. 418.

(5) (1906) 1 Ch. 596 at p. 603 75 L. J. Ch. 293; 54 W. R. 344.

(6) (1858) 25 Beav 290; 27 L. J. Ch 546; 4 Jur. (N. S.) 271; 5 W. R. 482; 53 E. R. 647; 119 R. R. 420.

of the goods or if the Company do not give delivery for any reason, the utmost that will be the result will be that the *'Soda'* will be cancelled b.t we shall not ask for damages arising from the same from you in any way."

Under the said contract the plaintiffs took delivery of ninety bales out of one hundred and fifty-one bales mentioned in the contract. The defendants declined to give further delivery without giving any reason for such refusal and the plaintiffs sued the defendants for damages. The defence was that the defendants were not obliged, having regard to the terms of the contract, to give any reasons for refusing to deliver the remaining bales. This contention prevailed in the Court of first instance and the suit was dismissed. The plaintiffs appealed from the decree and the decree of the lower Court was reversed by the High Court of Bombay on appeal. In delivering the judgment of the Court, Macleod C. J. said (page 297*):

"It seems to me that the clause evidently means that some reason must be given by the defendants which would justify their refusing to give delivery, and that they were not entitled merely to say that the contract was off because they did not wish to deliver any more goods under it."

Similarly, in the present case, if the plaintiffs refused to deliver the goods without assigning any reasons, they would, I think, be liable to the defendants for breach of the contract unless they assigned some reason which would justify their refusal to give delivery. I do not think that the stipulation in the contract in the present case, namely, "to cancel or not to cancel the sold goods for any reasons depends upon you' destroys the mutuality necessary for the formation of a contract. I think that the writing, Exhibit B, contains all the elements of a contract, and that the stipulation referred to above confers upon the plaintiffs the power to determine the contract if they could assign good reasons for so doing. I, therefore, hold that the contract, Exhibit B, is not void, but that it is a valid and binding contract.

The next point urged on behalf of the defendants is that the goods having been shipped in September 1918, the shipment could not be said to be one within a reasonable time and that it was not, therefore, contract shipment. In considering the question whether the shipment was contract shipment it is important to note the date and the terms of the contract between the parties. The goods are described in the contract as being those agreed to have been purchased by the plaintiffs from Messrs. Gosho Kabooshiki Kaisha. They are to be of February-March 1918 shipment, but the defendants are bound to take delivery thereof "whenever the same may arrive earlier or later, (and) on the safe arrival (of the same) by steamer." The contract was made on the 21st August 1918, that is, about five months after the last date for February-March 1918 shipment. It is significant to note that, though the contract was made after that long interval, it was thought necessary to provide for late shipment in the contract. There is nothing in the evidence to suggest that either party had at the date of the contract any reason to believe that the goods had already been shipped. The words "whenever the same may arrive earlier or later" did not occur in the contract between the plaintiffs and their vendors. I think they were designedly used in the contract (Exhibit B) to provide for late shipment. Such late shipment may be in August 1918 at any time after the date of the contract, or it may even be in September 1918. I say late "shipment" for, as held by the Court of Appeal in *Vallabhdas Kanji* v. *Runchordas Mathuradas* [Original Civil Jurisdiction Suit No. 1717 of 1919: Appeal No. 18 of 1920, decided by Macleod and Fawcett J. on 8th July 1920] the word 'late' has reference to "shipment" and not to 'arrival'. The provisions for late shipment had to be made in view of the War conditions prevailing at the time. The fact that those conditions were present to the minds of the parties appears from the contract itself. The goods were to be delivered on the safe arrival thereof by steamer. Those conditions cannot be ignored in determining the question before us. The existence of those conditions influenced the judgment of the Court of Appeal in the aforesaid case.

Let us now turn to what actually happened after the date of the contract. It

* Page of 24 Bom. L. R.—[*Ed.*]

seems that there was no communication between the plaintiffs and defendants after the date of the contract until the 25th September 1918. On that date the defendants for the first time addressed a letter to the plaintiffs stating that, unless the goods were delivered within eight days from the receipt thereof, the contract should be treated as cancelled. The eight days' period expired on the 3rd October 1918 and the goods arrived on the 12th October 1918. The defendants stated in their evidence that had the goods arrived on or about the 3rd October 1918 they would have taken delivery thereof. They said that they had to write the letter of the 25th September 1918 because their purchasers told them that they would not take delivery of the goods unless they were delivered to them within eight days. It seems to me that the real reason for the action of the defendants in repudiating the contract was not because they or their purchaser wanted the goods within eight days but because there was a fall in the piece-goods market.

The defendants in their evidence cited instances of goods of March-April 1918 shipment ordered out by them from Japan having arrived in Bombay in June 1918. They also mentioned other instances in which the goods arrived within a month or two from the date of the shipment mentioned in the contracts. But those goods were glassware, hardware, canvass, toilet, etc. None of the goods were piece-goods. The defendants, though they say they are merchants in a very large way of business, have not adduced evidence of a single case in which piece-goods from Japan arrived within the same short period. In the present case the defendants knew that the goods had not arrived at the date of the contract. It can ot, therefore, lie in their mouths to say that they expected the consignment of the twenty-five bales to arrive in Bombay within the same short period.

There is one more point to be noted in this connection. The correspondence between the parties commenced on the 25th September 1918 and it ended on the 12th November 1918. The position first taken up by the defendants in correspondence was that they were prepared to take delivery of the goods if the plaintiffs proved that the goods were of February-March 1918 shipment (*vide* defendant's letter of 22nd October 1918). Where the plaintiffs pointed out by their letter of the 30th October 1918 the clause as to late shipment, the defendants turned round and by their letter of the 5th November 1918, they set up a new case altogether. In that letter they stated that the contract (Exhibit B) was entered into through brokers and that that defendants were clearly given to understand that the goods would arrive by any one of the large batches of steamers expected to arrive shortly in Bombay and that, though one such batch did arrive in Bombay within a week or so from the date of the contract, the goods did not arrive. There is not a word about this representation in the written statement of the defendants; nor was any issue raised on it by Counsel for the defendants. In the course of the cross-examination of the plaintiffs Mr. Lalji introduced the alleged representation by the brokers, but as the defendant's case, as disclosed in their written statement, was not based on any such representation, I disallowed all questions bearing on that point.

On the whole, I hold that when the parties entered into the contract (Exhibit B) on the 21st August 1918, the late shipment contemplated by them was not only the shipment made subsequent to March 1918 and prior to the date of the contract (if any such shipment was made at all), but a shipment made within a reasonable time from the date of the contract. I hold, therefore, that the shipment that arrived, *viz.*, September 1918 shipment, was contract shipment which the defendants were bound to accept. No doubt the interval between the last date for February-March shipment and the second or third week of September 1918 in which the goods must have been shipped was about five months and a half; but the date of the contract between the parties, which was made a little less than five months from the last date for February-March shipment cannot be ignored. In other words, the date of the contract is also a material factor to be considered and coupled with it the terms of the contract.

The only other question is as regards damages. It was conceded by Counsel

for the plaintiffs that the property in the goods did not pass to the defendants, and that the plaintiffs were entitled to damages only. The date of the breach is 15th October 1918 on which day the defendants first repudiated the contract. No doubt, the defendants wrote on 25th September 1918 stating that unless the goods were delivered within eight days the contract should be treated as cancelled, but it was not followed as it ought to have been, by any notice of cancellation. I find that the rate on 15th October 1918 was Rs. 2-4-0 per piece. The damages, therefore, amount to Rs. 10,000.

The result is that there would be a decree for the plaintiffs for Rs. 10,000 costs, interest on judgment at six per cent.

R. N. & K. S. D. *Suit decreed.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 317 OF 1922.
February 12, 1923.
Present—Mr. Justice Heald.
MA HLA KYU AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
MAUNG NYUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 4—Suit for value of paddy due to deceased landlord—Certificate, whether necessary—"Debt," meaning of.

A suit to recover the value of paddy from the tenants of a deceased landlord is not a claim in respect of a "debt" within the meaning of section 4 of the Succession Certificate Act, and is maintainable without a Sucession Certificate.

Second appeal against a decree of the Divisional Court, Myaungmya, in Civil Appeal No. 136 of 1921.

Mr. *Kyaw Htoon*, for the Appellants.

JUDGMENT.—Respondents sued appellants to recover the value of 1,400 baskets of paddy, of which, as they alleged, appellants had despoiled them.

Both the lower Courts have given respondents a decree.

Appellants now come to this Court on second appeal and their learned Advocate admits that the only question which he can now raise is whether or not the suit could be maitained without a Succession Certificate.

Respondents case was that one Maung Lat and his son, the first respondent, cultivated certain lands as appellant's tenants, that Maung Lat died before the crops were reaped, that appellant wrongfully took possession of all the crops, and that they being Maung Lat's widow and children were entitled to recover from appellants the value of the crops less the amount payable as rent.

It is suggested that respondent's claim, in so far as it was a claim by them as heirs and legal representatives of Maung Lat, was a claim in respect of a debt within the meaning of section 4 of the Succession Certificate Act but I have no hesitation in holding that such a claim as that in the present case is not a claim in respect of a "debt" within the meaning of the Act, and I dismiss the appeal under the provisions of O. XLI, r. 11, read with O. XLII, r. 1.

I note that it strikes me as peculiar that the Trial Court having found that the area leased by Maung Lat and his son was 50 plots and having charged the respective rent, on 50 plots, and having found, further, that appellants took all the crops from all the 50 plots, calculated the value of the produce in respect of which respondents were entitled to recover on the basis of only 35 plots.

Presumably the Judge thought that respondents were not entitled to recover in respect of the crops on the 15 plots worked by respondents' sub-tenant. Respondents have not appealed, so it is unnecessary for me to consider the matter, but it seems possible that the sub-tenant may still be entitled to claim from appellants in respect of his loss of the crops on his 15 plots.

W. C. A. *Appeal dismissed.*

BALWANT SINGH *v.* LAIQA BEGAM.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 492 OF 1922.

July 10, 1923.

Present:—Mr. Justice Kanhaiya Lal.

BALWANT SINGH—DEFENDANT—APPELLANT

versus

Musammat LAIQA BEGAM AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144, scope of—Auction-purchaser not decree-holder—Restitution, whether allowed—Judgment-debtor having no saleable interest—Sale, whether valid—Suit for recovery of possession, whether maintainable.

Section 144, Civil Procedure Code, allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed on appeal. It does not allow restitution to be made against a third party, and does not apply where the auction-purchaser is not the decree-holder. [p. 238, col. 2.]

One *P*, had a money decree against *A*. in execution of which he attached certain property. *A*. had died before the attachment and his daughter-in-law *L*. was impleaded as his legal representative. She objected to the attachment and the objection was eventually upheld by the High Court. Meanwhile the property had been sold by auction in execution of the decree and purchased by the defendant. *L*. then sued for recovery of possession:

Held, (1) that the suit was not barred by section 144, Civil Procedure Code, as the plaintiff was no party to the decree; [p. 238, col. 2.]

(2) that the original judgment-debtor had no saleable interest in the property and consequently it was immaterial whether the decree was subsisting or not because the Court holding the sale had no jurisdiction to sell the property; [p. 238, col. 2.]

(3) that the plaintiff was entitled to recover the property but was liable to refund the surplus sale-proceeds which she had withdrawn from the Court. [p. 239, cols. 1 & 2.]

Second appeal against a decree of the Subordinate Judge, Meerut, dated the 18th of February 1922.

Mr. *Panna Lal*, for the Appellant.

Messrs. *Hamid Husan* and *S. K. Dar*, for the Respondents.

JUDGMENT.—Premsukh Das held a decree for money against Anwarul Hasan, in execution of which he attached certain property. Before that attachment Anwarul Hasan had died and his daughter-in-law, the present plaintiff-respondent, had been impleaded as his legal representative. The plaintiff respondent objected to the attachment of the said property, contending that it did not belong to Anwarul Hasan, the deceased judgment-debtor. Her objection was disallowed by the Court executing the decree but on appeal that objection was upheld and the order of the Appellate Court was finally confirmed by this Court.

Meanwhile the property attached had been sold by auction in execution of that decree and purchased by the defendant-appellant Balwant Singh. The present suit was filed by the plaintiff-respondent for the recovery of possession of that property or in the alternative for the recovery of Rs 500 the value of the said property. Both the auction-purchaser and the decree holder were made parties to the suit. The Court of first instance dismissed the claim but the lower Appellate Court decreed it.

The first question for consideration is, whether section 144 of the Code of Civil Procedure barred the claim. That provision allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed on appeal. It does not allow restitution to be made against a third party. The auction-purchaser in the present instance was not the decree-holder and section 144, Civil Procedure Code, has therefore, no application. The object of that section is to place the parties to a decree in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and the relief allowed by that provision can only be claimed against the party to such a decree obtaining the benefit prior to such variation or reversal.

The next point for consideration is, whether a suit can be maintained under the circumstances against a *bona fide* auction-purchaser for value who purchased in execution of a decree or order which was subsisting on the date on which the execution sale was held. The original judgment-debtor was not, however, found to have had a saleable interest in the property sold and if he had no saleable interest it was immaterial whether the decree was subsisting or not because the Court holding the sale would have in that event no jurisdiction to sell the property. The decisions in *Rewa*

SAT RAM v. GURDAS MAL.

Mahton v. *Ram Kishen Singh* (1) and *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan* (2) do not apply because in the former case there were cross-decrees, one of which was sufficient to satisfy the other in execution of which the sale was effected, while in the latter case the decree had been reversed on appeal, the judgment-debtor having in either case a saleable interest in the property, which could have been conveyed by sale to the auction-purchaser. In the present case the finding of the Appellate Court in the proceeding instituted by the present plaintiff against the sale of the attached property was that it was not liable to sale in execution of the decree; or, in other words, that the original judgment-debtor had no saleable interest therein. The decisions in *Peare Lal* v. *Hanifunnissa Bibi* (3) and *Lulla* v. *Shib Lal* (4) also do not apply. In the former the judgment debtor had a saleable interest. In the latter the omission to raise an objection prior to the sale operated as a bar to the suit.

It is also contended that the plaintiff-respondent had withdrawn the surplus sale-proceeds and was thereby precluded from suing for the dispossession of the auction-purchaser. But that money was withdrawn before the objection of the plaintiff to the sale of the disputed property was allowed by the Appellate Court. The learned Counsel for the plaintiff-respondent is willing to refund that money to the auction-purchaser either in this suit or in any proceeding which may hereafter be instituted by the auction-purchaser for the refund of the sale-proceeds. It is open to the auction-purchaser to seek his remedy by a separate proceeding, but so far as the present plaintiff-respondent, who is the legal representative of the deceased judgment-debtor, is concerned, it is desirable that she should not be allowed to obtain possession without refunding the surplus sale-proceeds which she had received and appropriated before her objection was finally allowed. The amount so obtained by her was Rs. 63-6-0. The appeal is, therefore, dismissed except in so far that the plaintiff respondent will not be allowed to obtain possession of the disputed property without refunding to the defendant-appellant the sum of Rs. 63-6-0 obtained by her out of the sale-proceeds. In view of the *bona fides* of the auction-purchaser, the parties are directed to bear their own costs throughout.

K. S. D. *Decree modified.*

(1) 13 I. A. 106; 14 C. 18; 10 Ind Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.).
(2) 15 I. A. 12; 10 A. 166; 5 Sar P. C. J. 1291 6 Ind. Dec. (N. S.) 112 (P. C.).
(3) 34 Ind. Cas. 393; 14 A. L. J. 302; 38 A. 240.
(4) 36 Ind. Cas. 281; 14 A. L. J. 846; 39 A. 47.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 83/30 of 1922.
June 15, 1923.
Present:—Mr. Pipon, J. C.

SANT RAM AND OTHERS—PLAINTIFFS—APPELLANTS
versus
GURDAS MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law — Joint family — Alienation —Manager, powers of — Sons challenging alienation by father—Burden of proof—Antecedent debt, nature of.

The manager of joint Hindu family property may alienate the interest of himself and also of the co-parceners for family necessity, and when the manager is also the father he may alienate those interests to satisfy an existing debt provided that the debt is an antecedent debt and that it was not incurred for immoral purposes. [p. 241, col. 2.]

Bhagat Singh v. *Ram Parkash*, 69 Ind. Cas. 602, followed.

When sons attempt to challenge an obligation contracted by their father, the *onus* lies upon them to prove immorality. [p. 241, col. 2.]

In order to validate an alienation for antecedent debt not only antecedency in time but real dissociation in fact is required. [p. 242, col. 2.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.), *Lakhu Mal* v. *Bishen Das*, 66 Ind. Cas. 408; 3 L. 741 (1922). A. I. R. (L.) 291, followed.

It is not open to the manager of a joint family estate to embark upon purely new and specula-

tive business under the plea that the expansion of business in general will be beneficial to the estate. [p. 244, col. 1.]

First appeal from an order of the District Judge, Abbottabad, dated the 31st of May 1922.

Lala *Ram Labhaya Mal*, for the Appellants.

Lala *Parma Nand*, R. S., for the Respondents.

JUDGMENT.—The material facts of this case are as follows. The parties to this suit are the descendants of Jawahirmal, who carried on business as a money-lender and shop-keeper at Nawanshehr, near Abbottabad. He left two sons, Gurdas Mal and Karam Chand. During his lifetime a partition of moveable, but not of immoveable, property was effected between Gurdas Mal and Karam Chand. The amount of the share of Gurdas Mal in the moveable property was about Rs. 8,000. Gurdas Mal was twice married and had three sons, Santram by the first wife and Gokal Chand and Bodhraj by the second. There is considerable difference of age between Santram and his brothers. He was a major at the time of the institution of this suit, but his two brothers are still minors. Karam Chand proved a successful man of business and appears to be in easy circumstances. Gurdas Mal, on the other hand, was singularly unsuccessful. He embarked upon a number of different business ventures, such as dealing in the timber trade (in which Karam Chand was a partner with him), contract for earthwork in the Military Works Department, wholesale liquor business, a wholesale shop in Abbottabad and a cloth shop in Nawanshehr. In addition to these ventures, he constructed in 1906 a new bungalow in the Abbottabad Cantonment at a cost which has not been clearly proved from the record. It would appear, however, that the most probable cost of this bungalow was about Rs. 11,000. By 1913 Gurdas Mal was in considerable financial difficulties. His main creditors were Rai Sahib Chuhar Lal, Banker of Abbottabad, and Chaudhri Surajbhan. He owed each of these a sum of Rs. 3,500. In the case of Rai Sahib Chuhar Lal a portion of this debt, Rs. 3,000, was secured by a mortgage, dated the 25th of January 1910. The mortgage in question was not, as a matter of fact, in favour of Rai Sadib Chuhar Lal himself, but of the Anglo-Vernacular Sanskrit High School of which he is the President. The remaining Rs. 500 was due on book-accounts which had been going on since 1904. Of the debt of Rs. 3,500 due to Chaudhri Surajbhan Rs. 2,000 was secured by a mortgage, dated the 10th of May 1906 and Rs. 1,500 represented unsecured cash advances. To liquidate the total liability of Rs. 7,000, Gurdas Mal, on the 26th of June 1913, executed a sale-deed of his share in six shops situated in Abbottabad in favour of his brother Karam Chand.

The consideration for the sale was the transfer of the liability of Rs. 7,000 towards the creditors from Gurdas Mal to Karam Chand. Karam Chand paid off the amount gradually and by 1917 the whole amount was liquidated. At the time of this transaction the three sons of Gurdas Mal were minors. They now come forward with the present suit for a declaration to the effect that the sale by their father of the 26th of June 1913 is void as against their rights as co-parceners in the joint family estate. Gurdas Mal has been impleaded as a defendant but supports the plaintiff. The suit is resisted by the vendee Karam Chand. The suit proceeds on the contention that a co-parcener in a Hindu joint family, even when both father and manager, is not competent to alienate his own or any other co-parcenary share unless the alienation was made for legal necessity or to satisfy an antecedent debt. It is also contended that, even if an antecedent debt be proved, the alienation was made for immoral purposes and is, therefore, void under Hindu Law. The contention has also been set up that the sale in suit is void in itself as without consideration. On all these points the Trial Court has found against the plaintiffs and has dismissed the suit. They appeal to this Court.

It will be simpler to deal first with the contention that the sale was without consideration. It is argued that the transfer of the liability from Gurdas Mal

to Karam Chand was a purely fictitious transaction intended to defeat other creditors, and that the re-payment of the debts to the creditors was made not by Karam Chand, but by Gurdas Mal himself through the agency of Karam Chand. I have had some difficulty in following the argument of the learned Counsel for the appellants upon this point. It can hardly be denied that, so far as the creditors were concerned, they assumed, by the sale in suit, a complete lien against the vendee Karam Chand in substitution for the original debtor Gurdas Mal. This was one which they could legally enforce, and the sale to Karam Chand was unmistakeably consideration for his assuming this heavy liability. Again, there is overwhelming evidence to show that it was actually Karam Chand and not Gurdas Mal who re-paid the creditors. Some stress has been laid by the learned Counsel for the appellants on the fact that Rai Sahib Chuhar Lal did not open a fresh account debiting the sum to Karam Chand, but continued to show it as before as due from Gurdas Mal. The entry of the first payment made after the sale is also entered as a payment made by Gurdas Mal. On the other hand, we have the evidence of Rai Sahib Chuhar Lal himself, a witness who must be regarded as entirely above suspicion in the present case, to the effect that this entry was purely an error made by his clerk, and that he is personally aware that the payment was made by Karam Chand. He also testifies to the fact that all subsequent payments were made by Karam Chand and not by Gurdas Mal, and that the whole debt was liquidated by Karam Chand alone. We have on the record demands for payment addressed to Karam Chand and receipts given to Karam Chand for payments. We have the same evidence in the case of the other creditor Chaudhri Surajbhan who, it is shown, not only attests the re-payments made by Karam Chand, but actually credited in his accounts a sum of Rs. 3,500 as received on behalf of Gurdas Mal and simultaneously opened a fresh account in which he debited Karam Chand with the same sum; and it is to this latter account that all subsequent recoveries were credited. We have, again, the fact that possession of the shops was actually transferred from Gurdas Mal to Karam Chand from the date of the sale. It is shown that, prior to the sale, the two brothers, who were joint owners, had recovered rent in alternate months: from the date of the sale Karam Chand alone recovered the rent. The evidence, therefore, is overwhelming to establish the fact that, whether or not the sale can be invalidated for other reasons, it cannot possibly be impugned on the ground of failure of consideration.

The law on the subject of the alienation of joint family property by a manager is well-established. I have recently had occasion to go in some detail into the law on this point in the case of *Bhagat Singh* v. *Ram Parkash* (1), decided by this Court on the 31st of July 1922 and published as 69 Indian Cases 602. It is clear that the manager of joint Hindu family property may alienate the interests of himself and also of other co-parceners for family necessity, and that when the manager is also the father, he may alienate those interests to satisfy an existing debt provided that the debt is an "antecedent debt" as defined in the case-law on this subject, and provided also that the debt was not incurred for immoral purposes. If, therefore, in the present case it can be shown that the debt to liquidate which the sale in suit was effected, was an "antecedent debt," and that it was not incurred for immoral purposes, the question of family necessity does not arise.

To clear the ground, it would be as well to take, first, the pure question of fact as to whether the debt in question was, or was not, incurred for immoral purposes. There is a consensus of authority for the view that when sons attempt to challenge an obligation contracted by their father, the onus lies upon them to prove immorality. Now nothing whatever has been shown in the present case to show that the debts in

(1) 69 Ind. Cas. 602.

question were actually incurred for immoral purposes. There is, perhaps, a slight conflict of authority between various High Courts in India as to the degree of proof which is required to establish that debts are immoral. *Dattatraya Vishnu* v. *Vishnu Narayan* (2) is an authority for the view that it is not sufficient to show that the alienor was leading an immoral life, but that a direct connection should be established between the debts and the alleged immorality. On the other hand, there are a number of authorities for the proposition that it is sufficient to prove that the alienor was living a licentious life beyond his means, and that there was no business or moral occupation on which the funds could have been expended. This latter view was that adopted by me in the case of *Bhagat Singh* v. *Ram Parkash* (1) quoted above. The question, however, is not very material in the present case, as there is not only no evidence to show that the debts in question were incurred for immoral purposes, but there is also no evidence that Gurdas Mal was living an immoral life at all. The very most that has been shown is that he was a heavy drinker. All witnesses concur in saying that he never went in for immorality with prostitutes. It cannot be said that a man who has a certain failing in the direction of drinking to excess is necessarily leading an immoral life. On the contrary, Gurdas Mal appears to have been a perfectly respectable member of society and, further, there are any number of explanations for his losses, apart from any supposed expenditure on drink. The weakness of the plaintiffs' case in this case may be illustrated by the fact that they have put Gurdas Mal himself into the witness-box to say that the losses which he incurred in his liquor business were due to his own hard drinking. The idea, it may be remarked, is far-fetched and almost fantastic when it is remembered that the liquor business in question was a wholesale business. I, therefore, entirely agree with the finding of the lower Court on this question of fact that it has not been proved that the debts were incurred for immoral purposes.

I now turn to what is undoubtedly the most difficult question in the case, and that is, whether the debts are to be treated as "antecedent debts." In the first place, they must, of course, be antecedent in point of time. That they were so is undoubted. There is conclusive proof that long prior to the 26th of June 1913 Gurdas Mal had actually contracted a legal obligation to re-pay the sum of Rs. 7,000 to his creditors. It has been laid down, however, in the Privy Council ruling, *Sahu Ram Chandra* v. *Bhup Singh* (3), that the debt must have been incurred irrespective of the credit obtained from the joint family property, and that in order to validate an alienation for an antecedent debt, not only antecedency in time, but real dissociation in fact is required. This view has been since followed by many High Courts in India, and in a recent ruling of the Punjab High Court published in 1922 as *Lakhu Mal* v. *Bishen Das* (4) the expressions used that the debt must have been incurred wholly apart from the ownership of the joint estate. This view was followed by me in *Bhagat Singh* v. *Ram Parkash* (1). It may be admitted, however, that the expression used by the Punjab High Court is not perhaps a very happy one. It is a little difficult to understand exactly what is meant by the dissociation of a debt from the ownership of property. It is, indeed, almost impossible to realize that a person who borrows money on any particular occasion, or for any particular purpose, can in some way entirely divest himself of the fact that he is, at the time, owner of immoveable property. The idea postulates a sharply cut separation of personal conditions and sentiments which in actual life can hardly be regarded as practical. A man, for instance, who buys a Motor Car at a price which is somewhat

(2) 12 Ind. Cas. 949; 13 Bom. L. R. 1161; B. 66.

(3) 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 141 (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.)

(4) 66 Ind. Cas. 408; 3 L. 741 (1922)=A. I. R. (L.) 291.

in excess of his means, may never disclose to the seller or to any one else his reasons for thinking that the expenditure is financially justified. He may give the seller no kind of promise that the sale money is ultimately to be secured on house property which is owned by him. At the same time, he himself, in thinking over the question as to whether he can or cannot afford this luxury, may perfectly well be influenced by the fact that he is the owner of house property which has been hitherto unencumbered. It has been pointed out in a ruling of the Judicial Commissioner of Nagpur, published as *Dileshwar Ram Brahman* v. *Nohar Singh* (5), that an actual intention of charging the antecedent debt upon the property must be proved, and that the mere hope entertained by the creditor that he will be able to enforce his claims against immoveable property, is not sufficient to constitute the required connection. There is, it may be admitted, some conflict of authority between High Courts in India as to whether a debt, though antecedent in point of time, is nevertheless not an antecedent debt when it has been previously secured upon a hypothecation of the property itself. The Trial Court has quoted a ruling of the Full Bench of the Patna High Court published as *Mathura Misra* v. *Raj Kumar Misra* (6) in which it was held that the Privy Council ruling referred to above did not intend to make any distinction between secured and unsecured debts. Now, I consider that the existence of this distinction is really immaterial in the present case. Out of the debt of Rs. 7,000, Rs. 5,000 had been secured by previous mortgages, namely, Rs. 3,000, in the case of Rai Sahib Chuhar Lal and Rs. 2,000 in the case of Chaudhri Surajbhan. It appears to me that there is complete evidence to show that, even if we go back to the original mortgages themselves, apart from the sale deed of 1913, we find that they too were executed for debts which were obviously and legitimately antecedent. It cannot be denied, in any case, that the unsecured debts amounting to Rs. 2,000, Rai Sahib Chuhar Lal Rs. 500 and Chaudhri Surajbhan Rs. 1,500, were genuinely antecedent debts. Rai Sahib Chuhar Lal is unable to state definitely for what purpose the loan of Rs. 3,000 was raised in 1910, but we know that Gurdas Mal had, by that time, been engaged in a large number of unsuccessful business ventures which have been alluded to above, and nothing has been shown to rebut the presumption that the loan was purely to finance him in his business operations. In the case of the Rs. 2,000 advanced by Chaudhri Surajbhan on the mortgage of 1906 we have much more definite evidence. We know that the loan was raised primarily to finance the construction of a bungalow in Abbottabad Cantonment. It is further shown that Gurdas Mal had a perfectly legitimate reason for embarking upon this construction, and that it was not a case of wanton speculation. It is shown that he was, at the time, anxious to obtain the position of a Regimental Chaudhri and the possession of house property in the Cantonment was an obligatory condition of the appointment. Quite apart, therefore, from the question as to whether the debt of Rs. 7,000 is to be treated as an antecedent debt at the time of the execution of the sale on the 26th of June 1913, it is clear that such portions of that debt as were already secured upon the property, were in respect of debts actually antecedent and unconnected with that property at the time when the property was originally hypothecated. I am in agreement, therefore, with the finding of the Trial Court to the effect that the debts for which this alienation was made were "antecedent debts" within the meaning of Hindu Law and were, therefore, debts for which a father-manager was legally competent to alienate joint family property.

It having been found that the alienation was to liquidate a valid antecedent debt and a debt not incurred for immoral purposes, the question of necessity does not arise. It has been argued, however, before me at some length by the learned Counsel for the appellants, and there is no doubt that his contentions would, if the question were material to the deci-

(5) 48 Ind. Cas. 193.
(6) 62 Ind. Cas. 132; 2 P. L. T. 407; (1921) Pat 245; 6 Pat L. J. 526 (F. B.).

sion of the case, have considerable weight. He has quoted good authority for the proposition that expenditure upon business undertakings, in order to constitute family necessity, must be for the continuation or development of pre-existing family business. There are a number of authorities for the view that it is not open to the manager of a joint family estate to embark upon purely new and speculative business under the plea that the expansion of business in general will be beneficial to the estate. There can be little doubt that, so far as this consideration alone is concerned, Gurdas Mal would not have been entitled to expend family funds upon the various undertakings detailed above which were wholly unconnected with the original business carried on by his father Jawahirmal. As I have already said above, however, this question is not material to the decision of the present case, and I do not consider it necessary to discuss it further. The consideration for the sale in suit having been proved to be valid as an alienation made by a father to satisfy a valid antecedent debt, the present suit must necessarily fail. On the above findings, I uphold the order of the Trial Court and dismiss this appeal with costs.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 263 OF 1921.

July 11, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

RAGHUNANDAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

TULSHI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Equity—Alienation by Hindu widow—Mortgage in favour of reversioners redeemed by alienee—Suit to declare alienation invalid by reversioners—Declaration as to liability of reversioners to pay mortgage-debt, grant of.

Plaintiffs alleging themselves to be the presumptive reversioners of one *G.* sued for a declaration that a deed of gift executed by the widow of *G.* in favour of the defendant was invalid as against them. It appeared that after the gift had been executed the defendant donee redeemed a mortgage executed by *G.* in favour of the plaintiffs and some other persons:

***Held*, that in the event of the gift being declared invalid, the Court could very properly make a declaration in this very suit to the effect that the plaintiffs surviving the widow of *G.* would be entitled to actual possession of their share of the property only on payment to the defendant or his legal representatives of their share of the mortgage-debt.** [p. 245, col. 2; p. 246, col. 1.]

Ghansham Singh v. *Teg Bahadur Singh*, 13 Ind. Cas. 191; 9 A. L. J. 496, distinguished.

Moulvee Mahomed Shumsool Hooda v. *Shewukram* 22 W. R. 409; 2 I. A. 7; 14 B. L. R. 226; 3 Sar. P. C. J. 405 (P. C.), followed.

First appeal against the decree of the Subordinate Judge, Jaunpur, dated the 21st April 1921.

Mr. *Hanumandan Prasad*, for the Appellants.

Mr. *Haribans Sahai* for the Respondents.

JUDGMENT—We think that on the main question decided in the Court below the judgment of the Subordinate Judge is correct. The suit was a suit brought by two persons Jesri Singh and Tulshi Singh who alleged themselves to be the presumptive reversioners of one Gaya Din Singh who died some time ago and was succeeded by his widow, *Musammat* Sonkali.

On the 7th of February 1914 *Musammat* Sonkali, the widow of Gaya Din, executed a gift by which she purported to transfer the entire estate left by her husband in favour of Jagannath Singh who is also one of the presumptive reversioners.

Jagannath Singh was impleaded in this litigation as defendant No. 1. He has since died and is now represented by his descendants.

The case for the plaintiffs was that this deed of gift was an invalid document and they prayed for a declaration of its invalidity as against them after the death of the executant *Musammat* Sonkali.

Jagannath Singh and certain other reversioners who were impleaded as defendants put up the defence that this deed had been executed with the consent of the plaintiffs. Some of the defendants who are reversioners gave evidence to this effect but the learned Judge of the Court below has refused to believe

them and we think, having regard to all the circumstances, that he was perfectly right. The document itself does not refer to any consent given by the other reversioners. On the contrary, the gift purports to have been made by *Musammat* Sonkali in favour of Jagannath in consideration of services which Jagannath Singh had rendered to her. We have already adverted to the fact that the gift comprised the entire estate which was left by *Musammat* Sonkali's husband.

One of the plaintiffs, Jesri Singh, died while the suit was pending. The other plaintiff, his brother Tulshi Singh, gave evidence in the case and denied that he had ever given any consent to the execution of this deed of gift. We may also mention another circumstance which is of some importance. In the year 1916 some other reversioners, one of whom was Khunkun Singh, brought a suit for a declaration of the invalidity of this very same document. At page 24 of the paper-book we find the written statement of Jagannath which was filed by way of defence in that case. Not a word was said there about the consent of the other reversioners and we think it may rightly be inferred that this defence of consent was an after-thought. On the whole, we are quite satisfied that there was no consent and that the plaintiffs' suit was not barred on this ground.

There is, however, one other matter to be considered. It is proved that while Gaya Din Singh was still alive two usufructuary mortgages were executed by his mother in favour of certain mortgagees. One of these mortgages was for Rs. 40 and the other for Rs. 948.

This latter mortgage was in favour of a number of persons including the plaintiffs in the present suit and it was stated by Tulshi in his evidence that he and his brother Jesri Singh were in possession of the entire mortgaged property under this latter mortgage of Rs. 948.

It is proved that after the deed of gift was executed in favour of Jagannath he redeemed this mortgage. That fact is admitted by Tulshi Singh and is also proved by the evidence of one Mahabir Singh.

In the Court below the defendant Jagannath pleaded that, if the plaintiffs were found to be entitled to the declaration they were seeking, that declaration ought to be qualified with some provision for Jagannath's interests. Jagannath Singh pleaded that having freed the family property from these mortgages he should be held entitled to be reimbursed by the reversioners who may eventually become entitled to actual possession of the property. The learned Judge of the Court below thought there was no need to make any declaration in favour of Jagannath.

The point has been argued at great length before us and we find that a similar case came before a Bench of this Court [*Ghansham Singh* v. *Teg Bahadur Singh* (1)]. In that case the learned Judges refused to make a declaration in favour of the defendant such as was sought here by Jagannath and is now sought by Jagannath's legal representatives.

We think, however, that there is one fact which distinguishes the case we are now dealing with from the case just referred to. The mortgagees who have been redeemed are the plaintiffs themselves and it certainly appears to us that there can be no injustice in declaring in the present suit that, in the event of these plaintiffs surviving *Musammat* Sonkali and becoming entitled to immediate possession of the property, they ought not to be allowed to get possession from Jagannath or his legal representatives without paying their proportionate share of the mortgage-debts. This equitable principle was recognised in the case reported as *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (2). That was a case decided by their Lordships of the Privy Council.

While we hold, therefore, that the judgment of the Court below is correct and that the decree should stand we think it proper to modify the decree by inserting the following declaration, namely, that in the event of the present plaintiffs

(1) 13 Ind. Cas. 191; 9 A. L. J. 496.
(2) 22 W. R. 409; 2 I. A. 7 1 14 B. L. R. 226; 3 Sar. P. C. J. 405 (P. C.).

surviving *Musammat* Sonkali they will only be entitled to actual possession of their share of the property which was mortgaged on payment to Jagannath or to Jagannath's legal representatives of their quota of the mortgage-debt. With this variation in the decree of the Court below we dismiss this appeal.

Parties will pay their own costs.

N. H. *Appeal dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 107/45 OF 1922.

September 1, 1923.

Present:—MR. Pipon, J. C.

ZABTA KHAN—DEFENDANT—APPELLANT

versus

SAID HABIB—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Limited owner—Alienation—Consent of some of several reversioners—Alienation, validity of—Transfer of Property Act (IV of 1882), s. 6 (a)—Specific Relief Act (I of 1877), s. 18—Alienation of reversionary rights—Executory contract.

Any reversioner can sue to set aside a sale made by a limited owner and the consent of other reversioners to the sale does not debar him from doing so. [p. 246, col. 1.]

Section 6 (*a*) of the Transfer of Property Act makes a transfer of a right in expectancy, such as a reversionary right, absolutely null and void as barred by Statute. [p. 248, cols. 1 & 2.]

Kabal Shah v. *Muhammad Baqa*, 73 Ind. Cas 120, followed.

Gujar v. *Auliya*, 23 Ind. Cas. 835; 78 P. R. 1914; 184 P. L. R. 1914; 119 P. W. R. 1914, dissented from.

A transfer of reversionary rights made in the form of a sale may be valid as an executory contract which will take effect when a title to the property has opened out to the vendor both by a rule of equity and by the application of section 18 of the Specific Relief Act. [p. 248, col. 2.]

Bhagwati v. *Chaoli*, 55 Ind. Cas. 698; 2 U. P. L. R. (L.) 79; 2 L. L. J. 689, followed.

The true test of the operation of a sale of reversionary rights is, that it deals with non-existent property and that it, therefore, creates no rights *in praesenti*, but at the same time it establishes against the vendor an equity from which he cannot escape and which may be enforced by the vendee against him by the operation of section 18 of the Specific Relief Act when the vendor's title to the property matures. [p. 249, col. 1.]

The consent of a single reversioner does not in any way increase the power of a widow with a limited life interest to make an alienation. A sale made by her is in no way validated by such consent, and, therefore, no specific share of the property sold is conveyed to the alienee by the action of the consenting reversioner. [p. 249, col. 2; p. 250, cols. 1 & 2.]

Second appeal from the judgment and decree of the Additional Divisional Judge, Peshawar, dated 26th June 1922, setting aside the judgment and decree passed by the Sub-Judge, Mardan, dated the 23rd March 1922.

Lala *Diwan Chand*, R. B., for the Appellant.

Lala *Parma Nand*, R.S., for the Respondents.

JUDGMENT.—The facts of this case are these. Alyas, a proprietor in Garhi Daulatzai, in the Mardan Tahsil of the Peshawar District, died without male issue. His widow, *Musammat* Rukiya, assumed possession of his estate with a widow's limited life interest. The only reversioners to the estate were Said Habib and Nur Habib, two brothers, first cousins of the deceased proprietor. On the 2nd of September 1916 Nur Habib sold his reversionary rights by a deed to Said Habib. On the 8th of November 1921 *Musammat* Rukiya sold an area of 6 *kanals* 3½ *marlas chahi* land to Zabta Khan. Nur Habib joined in the sale deed, and it was described as a sale of proprietary title by *Musammat* Rukiya and also a sale of Nur Habib's reversionary rights in the same. Said Habib then came into Court with the present suit asking for a declaration that the sale of the 8th November 1921 was inoperative against his reversionary rights and also that the sale of Nur Habib's reversionary rights was null and void. He contended that Nur Habib, in view of the sale in plaintiff's favour of the 2nd of September 1916, had nothing to sell to Zabta Khan. He contended also that the sale by the widow was without legal necessity and, therefore, inoperative as against reversioners by the custom governing the parties. The suit was resisted by the vendee Zabta Khan. He urged that the sale of reversionary rights by Nur Habib to the plaintiff in 1916 was null and void under

the principles of the Transfer of Property Act and by judicial precedents. He also contended that Said Habib could not challenge the sale by *Musammat* Rukiya because he was only one out of two reversioners, and that the other reversioner had consented to the sale. The sale by *Musammat* Rukiya was of only half the land owned by her deceased husband, and it was argued that the half which had been sold was that which would accrue to Nur Habib and, therefore, could not, in any case, affect the plaintiff's interests. The Trial Court held that the sale of reversionary rights in 1916 by Nur Habib to Said Habib was null and void, reversionary rights not being capable of alienation. It also held that the plaintiff could not sue, because the other reversioner had consented to the sale and had not consented to the suit, and, further, that the plaintiff had no cause of action, because his own share was unaffected by the sale. On appeal the Divisional Court held that the sale of reversionary rights by Nur Habib to the plaintiff in 1916 was valid, and that, in any case, the plaintiff could sue for a declaration to set aside the alienation by the life-tenant. It, therefore, granted the plaintiff a decree that the sale to Zabta Khan was invalid as against his reversionary rights. The vendee Zabta Khan appeals to this Court.

It is conceded by the learned Counsel for the appellant that the first Court was wrong in holding that one reversioner could not sue for a declaration merely because the other reversioner had consented to the sale impugned. There is a consensus of authority for the view that any reversioner can sue to set aside a sale made by a life-tenant, and that the consent of other reversioners does not debar him from doing so. The appellant does not, again, challenge the actual decree passed by the Divisional Court. It is admitted that the plaintiff is entitled to a declaration that the sale will not affect his own reversionary rights. The appeal is against the finding that the sale of reversionary rights by Nur Habib to the plaintiff in 1916 is valid. The position is thus described by the appellant's Counsel. If it can be shown that the sale of reversionary rights in 1916 is invalid, the following contingencies may arise when succession opens by the death of the life-tenant :—

(1) Both reversioners may be surviving. In that case the two reversioners will succeed equally in half shares. The plaintiff will be entitled to partition of his own share on the strength of the declaration granted to him. Nur Habib, however, will be estopped from claiming his share by having joined in the sale-deed of 1921, and, therefore, the vendee Zabta Khan will be able to retain possession of Nur Habib's share.

(2) Nur Habib only may be surviving. In this case there will be no other reversioner to claim the estate, and the vendee will get a full title to the land sold to him, Nur Habib being again estopped from claiming it.

(3) There may be no reversioners in existence. In this case, again, either no person will be holding a decree, and the vendee's possession will be undisturbed, or if Said Habib and Nur Habib left heirs, the heirs of Said Habib may claim under the decree and obtain their half share which has not been the subject of the sale, while the heirs of Nur Habib will be estopped by the consent of their predecessor-in-interest.

The Divisional Court also found that the sale by *Musammat* Rukiya was invalid as made without legal necessity. This finding has been challenged on appeal, but it is now no longer argued that the whole of the sale can be validated by necessity. Appellant's Counsel confines himself to the contention in this respect that one item of the consideration of Rs. 3,000, namely, a prior mortgage charge of Rs. 600, is a valid charge against the estate, and constituted necessity, and that, if a decree setting aside the alienation be passed, that decree must be subject to a charge of Rs. 600 being placed on the land.

It will be convenient to deal briefly first with this last contention. It being admitted that the bulk of the consideration for the sale cannot be validated on grounds of necessity; the question for determination is, whether the widow had

a legal necessity which obliged her to procure a loan of Rs. 600 upon the land. The appellant's contention in this respect is clearly untenable. No fresh sum of Rs. 600 was advanced by the vendee on a mortgage. There was a prior mortgage of Rs. 600 to one Muhammad Ali the liability for redeeming which was taken over by the present vendee. The vendee has not actually redeemed that mortgage. If any question, therefore, as to the liability of the estate for this mortgage charge of Rs. 600 arises, it is one which concerns the original mortgage made to Muhammad Ali and not the transfer now in suit to the vendee. It is not, therefore, competent in the present case for the vendee to claim any such charge upon the land if he has failed to show that the consideration received by the widow from him was not the outcome of legal necessity. This point, therefore, must go against the appellant.

I now turn to the more important question involved. The learned Additional Divisional Judge, in holding that the sale of reversionary rights by Nur Habib to Said Habib is a valid and operative transaction, has followed the ruling of the Chief Court of the Punjab published as *Gujar* v. *Auliya* (1) which lays down that, though the sale of reversionary rights to a stranger may be invalid, one reversioner can legally transfer his rights to another reversioner. The learned Counsel for the appellant impugns this authority on the ground that it merely represents an unjustifiable inference drawn from an earlier ruling of the Punjab Chief Court published as *Tota* v. *Abdulla Khan* (2). The whole question has recently been discussed by me in considerable detail in the case of *Kabal Shah* v. *Muhammad Baqa* (3) and in that judgment the authorities on this question are reviewed at length. It may be taken now as settled law that in those Provinces where the Transfer of Property Act is in force, section 6 (*a*) of the Act makes a transfer of a right in expectancy, such as a reversionary right, absolutely null and void as barred by Statute. This was the view taken by the Privy Council. On the other hand, as pointed out in the case of *Kabal Shah* v. *Muhammad Baqa* (3), the statutory application or non-application of section 6 of the Transfer of Property Act is vital. There are numerous authorities for the view that in Provinces to which this Act does not apply, the rule governing the transfer of rights in expectancy is an equitable and not a statutory rule. In other words, as was held by the High Court of Lahore in the case of *Bhagwati* v. *Chaoli* (4) a transfer of reversionary rights made in the form of a sale may be valid as an executory contract which will take effect when a title to the property has opened out to the vendor both by a rule of equity and by the application of section 18 of the Specific Relief Act. In some cases, however, in the Punjab where the transfer of reversionary rights has been held valid, an entirely different test has been taken. This was notably the case in the ruling *Tota* v. *Abdulla Khan* (2) referred to above. In that case the vendee of reversionary rights had claimed to control the action of the widow, as transferee of the right of control. The learned Judges disallowed the vendee's claim by referring the question to the test of custom. They held that it was against the custom of the parties for a stranger to be engrafted upon the family, and that the claim of a vendee of reversionary rights to control the action of a widow was repugnant to such a custom. It is argued by the learned Counsel for the appellant that this somewhat peculiar method of deciding the question is responsible for the later ruling, *Gujar* v. *Auliya* (1). The learned Judges there held that, if the transfer of reversionary rights to a stranger was invalid, simply because this implied the engrafting of a stranger upon the family, it necessarily followed that the transfer by a number of reversioners to one of themselves was valid, as it did not

(1) 23 Ind Cas 835; 78 P. R. 1914; 184 P. L. R. 1914; 119 P. W. R. 1914.
(2) 66 P. R. 1 897 (F. B.).
(3) 73 Ind. Cas. 120.
(4) 55 Ind. Cas. 698; 2 U. P. L. R. (L.) 79; 2 L. L. J. 689.

conflict with any principle of Customary Law. He, further, points out that in the latter case the suit was not one for a declaration during the lifetime of the widow, but one for possession after her death, and he would distinguish the transfer of the right to sue for possession when succession had fallen in from the right to control the widow by a declaration that her action was *ultra vires*. He argues that in the former case the transfer of reversionary rights is one of a right *in futuro*, and is, therefore, of no binding effect, but that in the latter, succession having opened, the right, if any, has become one *in præsenti*. I must admit to some extent the force of this argument. It seems to me somewhat difficult to refer the whole question of the operation of a transfer of a right in expectancy merely to the test of local custom. I have been shown nothing to induce me to alter the view which I have expressed in the case of *Kabal Shah* v. *Muhammad Baqa* (3). It appears to me that the true test of the operation of a sale of reversionary rights is that it deals with non-existent property, and that it, therefore, creates no rights *in præsenti*, but that, at the same time, it establishes against the vendor an equity from which he cannot escape, and that his vendee might enforce that equity against him by the operation of section 18, Specific Relief Act, when the vendor's title to the property matures. In the present case, therefore, I must regard the sale by Nur Habib to Said Habib in 1916 as one by which Said Habib is bound and which, if succession falls in to him, he will be obliged to act upon.

It remains to consider what effect this view has upon the position of the present vendee. It may be argued, of course, that, if we regard the sale of 1916 as conferring no right *in præsenti*, it cannot affect any thing which took place in 1921, when the position was the same and succession had not opened. Possibly, this view is correct so far as it goes, but the inference to be drawn from it can hardly assist the vendee. It is perfectly certain, and for this there is a consensus of authority, that the consent of a single reversioner does not in any way increase the power of the widow to make an alienation. A sale made by her is in no way validated by such consent. Now, it is only on the ground of consent by Nur Habib that the argument in favour of the vendee can really be sustained at all. He can hardly contend that Nur Habib was incompetent to convey any right in 1916 to Said Habib and that yet he was competent to convey a similar right to the vendee in 1921. The theory upon which this argument really rests is, that Nur Habib will be estopped, when succession falls in, from contesting the vendee's title. We are, therefore, dealing with a future situation as it will exist on the death of the widow. If the vendee takes his stand upon that situation in which Nur Habib, if surviving, will be estopped from denying the sale of 1921, he must also recognize that Said Habib will be equally estopped from denying the sale of 1916. If both reversioners survive, there will be two cases of estoppel in operation. I fail to understand how it can be assumed that the estoppel which arises from a later transaction will be in operation while that from the earlier will not. In other words, the vendee, in my opinion, cannot take advantage of any action taken by Nur Habib in his favour before the succession fell in. It may be admitted that the learned Additional Divisional Judge, in holding that the transfer of 1916 is valid and in operation, may have expressed a view of the law which should preferably have been expressed in another manner. I would prefer to express it thus. By the transaction of 1916 Nur Habib deprived himself of the right to contest Said Habib's claim to his share in the reversion if it ever accrued to him. Having deprived himself of this right, he could not again surrender his future rights in favour of any other person. It appears to me immaterial whether we regard Nur Habib's action as one of surrender or as one of estoppel. In either case if he is bound by two different actions in this respect, it must be the prior and not the subsequent which binds him.

The learned Counsel for the appellant has also laid stress on the fact that the property transferred to the vendee was only a half share and that this was the share which would accrue to Nur Habib. I cannot accept this argument, because it starts from wholly wrong premises. There are no such things as shares in reversionary rights. The right of reversion is a right in expectancy in which a number of persons may have an interest and in which the persons interested may be changed from time to time. There is no question, until succession opens up, of any specific shares. The plaintiff is admittedly entitled to a declaration that the alienation does not affect his reversionary rights, and the learned Counsel for the appellant goes so far as to concede that a single reversioner who obtains a decree of this nature, is acting in a representative capacity so far at least as regards other reversioners who have not consented to the sale. He argues, however, that he does not in any way represent a consenting reversioner. This view is not really quite accurate. A declaration of this description is representative as regards all reversioners, even those who have consented so far as regards the validity of the alienation. The position of the consenting reversioner is not that his consent validates the sale, or makes the decree inoperative as regards the share which eventually may fall to him, but simply that when that share actually has fallen to him, his consent may prevent him by reason of estoppel and by reason of the operation of equity under section 18 of the Specific Relief Act from refusing to surrender to the vendee an interest co-extensive with the property which he has obtained on succession opening out. The decree holds the sale invalid as against reversionary rights, although a particular reversioner or his heirs may be estopped from claiming any benefit by such decree by reason of their own action. I have already pointed out that consent of one reversioner does not in any way validate the alienation. He has, again, no right *in præsenti* to confer upon the alienee. It must necessarily follow that no specific share is conveyed to the alienee by the action of the consenting reversioner. The practical result of this view undoubtedly is, that the plaintiff, by reason of the decree now obtained, will be able, if surviving, to obtain possession of the whole of the property which is the subject-matter of this suit. He has succeeded in setting aside the sale as invalid by reason of the widow having made it without lawful necessity and without the consent of all her reversioners. When succession opens, he holds an equity against his co-reversioner, Nur Habib, which he can enforce under section 18 of the Specific Relief Act, and Nur Habib will have no title against him. No person claiming to derive a title from Nur Habib, whether by transfer or by estoppel, will be able to affect that right.

On the above findings I do not consider it necessary to interfere with the decree of the Divisional Court or to overrule any finding upon an issue. The result of the finding arrived at by the Additional Divisional Judge and of the finding upon this appeal is the same. I have already said that the view taken by the learned Additional Divisional Judge is possibly not expressed in correct terms. It is, nevertheless, a correct finding so far as regards its effect on the present suit. This appeal is dismissed with costs.

Appeal dismissed.

K. S. D. & N. H.

MADRAS HIGH COURT.

CIVIL SUIT NO. 83 OF 1922.

December 5, 1922.

Present:—Mr. Justice Coutts-Trotter.

E. E. MACK—PLAINTIFF

versus

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY, LIMITED—DEFENDANTS.

Tort—Dangerous and unprotected pit on Railway platform—Platform not lighted—Injuries caused by fall in pit—Railway Company, liability of.

MACK *v.* MADRAS AND SOUTHERN MAHARATTA RAILWAY CO., LTD.

The plaintiff while he was waiting for a train on the platform at a Station of the defendant Railway Company, on a dark night, fell into an unprotected and unlighted pit on the platform when he was endeavouring to use the urinal near it and sustained serious personal injuries. None of the lights on the platform was lighted. The plaintiff who was an active young man became a cripple for two months and a partial cripple for many months more. In a suit for damages against the defendant Company:

***Held*, that the Company were guilty of negligence in keeping the platform in total darkness and in keeping a dangerous place unprotected and were, therefore, liable in damages.**

Mr. *Nugent Gran.*, instructed by Messrs. *King* and *Partridge*, for the Plaintiff.

Mr. *Vere Mocketi*, instructed by Messrs. *Brightwell* and *Morseby*, for the Defendants.

JUDGMENT.—This is an action by Mr. Edmund Elmar Mack, a Member of the Indian Civil Service, against the Madras and Southern Mahratta Railway Co., Ltd., for damages for personal injury sustained by him on the early morning of the 30th August 1921 and alleged to be due to the negligence of the defendant Railway Company in keeping an unprotected and unlighted pit on the platform of Nellore Station. At that time Mr. Mack was stationed at Nellore and had been instructed to join a survey party at Bellary. On the night of the 29th August he dined at the house of Mr. Bateman, Deputy Director of Survey, at Nellore, and the party consisted of Mr. Bateman and Mrs. Bateman, Miss Baxely, Mr. Lewis, District Superintendent of Police, Mr. Ramamurthi, the Acting Collector, and the plaintiff. The trian by which the plaintiff was to go to Madras *en route* for Bellary was due to arrive at 2-15 A. M. and depart 8 minutes later. At about 1-30 Mr. Lewis, the plaintiff and the two ladies left in a *jutka* to go to the Station, the plaintiff to catch the train and the others to see him off, and they arrived at the station a few minutes after 2 o'clock. When they arrived at the Station, the ladies stayed below, and the plaintiff and Mr. Lewis went upstairs to the platform. The plaintiff's luggage was on the platform in charge of a servant, and it seems probable that the servant had a hurricane-lantern with him. If he had, I think it is quite clear that its light afforded no assistance to the plaintiff in the events which followed. The account that the plaintiff has given in the box is, that he wanted to relieve himself, and that he had an idea that somewhere at the north end of the platform there was a gentleman's urinal. He says that he had noticed it before when he had been on the platform but had never gone into it but had a general idea where it was situated. He says that all the lamps on the platform were extinguished and that it was in complete darkness. When he got where he thought the urinal was he left Mr. Lewis and walked towards it, and then he says that his foot struck the parapet of the urinal, that he put his left foot on the parapet which at this point was about a foot high or a little more, then he felt about with his right foot for step or something to lead him down to it, and that he then fell vertically and landed on his right foot. He fell, as we know from the photographs and plans, a sheer drop of 6 feet. He was unable to use his right foot and called out to Mr. Lewis after hobbling up the stairs which he found on his left-hand side. Mr. Lewis came towards the sound of his voice and he helped him along the platform till they got a chair for him in which he sat until the train came in rather more than two hours late. Mr. Lewis entirely corroborates the plaintiff's evidence. He says that the plaintiff said to him when he got to the platform that he wanted to make water and that he walked towards the back wall of the platform on which Mr. Lewis says there were no lights. He goes on to say that the plaintiff seemed to get up on something and that he saw his figure dimly silhoutted against the wall which he was facing and then suddenly disappear from view. Mr. Lewis says that he called out, "Mack where are you?" and walked towards the place where he saw him disappear, that he found the plaintiff hopping up the stairs on one foot and that then by lending his shoulder to lean on he helped him down the platform still hopping on one foot to somewhere near the Waiting Room where he got a chair for him and placed him on it. Mr. Lewis is as

pos tive as the plaintiff that none of the lights on the platform were lighted, and adds that there was no moon and that he was only able dimly to see the plaintiff's figure by a little star light. These two gentlemen are the only people who can speak as to what actually happened, and on their evidence and the known facts as to the state of the platform as revealed by the drawings and plans, I have to determine whether a *prima facie* case of liability has been made out. I have no doubt whatever from the photographs and, above all, from the drawing put in evidence by the Railway Company that this latrine was a most dangerous place, and ought either to have been protected by a wall at least 3 or 4 feet high or ought to have been lighted by lamp No. 7 on the platform which stands in front of it. It is useless to spend words on such a subject. The sketch speaks for itself.

I now turn to the written statement, and on the question of liability as distinguished from the question of the amount of liability, it appears to raise the following contentions. Paragraph 3 appears to suggest that it was the duty of the plaintiff or any other passengers to betake themselves to the Waiting Room forthwith and there remain until the train by which they were travelling should come in, however late, and that to walk up the platform in its unlighted state affords good ground for a plea of contributory negligence—which has been set up in this case. Paragraph 6 suggests that the plaintiff was imprudent and careless in finding himself in the neighbourhood of the urinal except he were attempting to use it, and that again is alleged as contributory negligence. I have the plaintiff's evidence, which I believe, that he found himself there because he did desire to use it, though it may be that at the time they put in this plea the defendant Railway Company were not aware of this, because it is not stated in the plaintiff's first letter of complaint dated the 17th September that he was endeavouring to enter the urinal. But I desire to say that, in my opinion, that would afford no defence whatever to this action, even if it were a fact. I do not think that any Railway Company is entitled to set traps upon its premises and to keep the place in total darkness and take the attitude that passengers who are waiting for trains which are late walk up and down the platform, when waiting for the train, at their own peril. The remaining pleas in the written statement, if I understand them aright, go rather to the question of the amount of damages than to the question of liability.

The Railway Company called two witnesses, Chinnaswamy Naidu, the Station Master, and Raghaviah, the Ticket Collector. The only material thing they say is that lights Nos. 3 and 5 one opposite to the third class Waiting Room and one opposite to the main station building, were alight at the time of the accident. The Ticket Collector's evidence is worthless, as he merely says that these lights were lighted on this night because it was the rule generally that they should be lighted. The Station Master is obviously unworthy of belief, because his evidence is that all the 9 lamps on the platform should be kept lighted 25 minutes before the time when the train is expected, and kept alight till its departure and he goes on to say that it was not until 2-30 A.M. that he was informed from up the line that the train was running late. The obvious suggestion is that all the lights were on at the time of the accident. That is now nobody's case, and I do not for a moment believe it. Further discrediting, as I do, the evidence of these two witnesses, I accept the statement of the plaintiff and Mr. Lewis that there was no light on the platform, and I do not believe that the defendants' witnesses were speaking the truth when they said that lights Nos. 3 and 5 were lighted. Even if they were, it seems quite clear that they could not have thrown any appreciable light on the entrance to the latrine.

I now follow the history of the plaintiff. He managed to get into the train to Madras at about 4-30 A. M., with the help of his servant He says he suffered great pain during the journey, that when he arrived at Madras he was put in a chair and wheeled in a trolley to the Waiting Room where he remained all day waiting

for his train to Bellary. He was helped into the train to Bellary and arrived there on the 31st August. It is quite clear that at that time he thought that he was suffering from nothing worse than a sprained ankle which, however painful, would cure itself fairly rapidly and that opinion was shared by Dr. Verghese whom he saw 2 or 3 days after he arrived at Bellary because he found his foot no better. Dr. Verghese, as I see, appears to have thought, like the plaintiff, that it was nothing worse than a severe sprain and so he put the foot in Plaster of Paris and got the plaintiff crutches from the Hospital which he advised him to use. The plaintiff went through his survey course with the help of hired conveyances and the use of crutches when his foot got tired, and on the 1st December he finished his course and came back to Madras and then he saw Col. Symons. Col. Symons examined him on that date and found Swelling on outer side of the right ankle which gave pain on pressure and in his own words was "bony hard." Col. Symons at once had him X-rayed, and the Skiagraphs were produced before me. They conclusively show, as Col. Symons explained, that there had been a fracture of the small bone of the ankle, that the ligaments of the heel had been torn and that new bone had been thrown out from the position of the injury. Col. Symons has seen him comparatively recently again and finds that the trouble caused by the fracture is now over but that torn ligaments are not yet completely restored to their normal state and that he is unable to say when they will be completely restored.

The plaintiff did not make any claim against the Railway Company until the 17th September from motives which one can readily understand. Gentlemen in the plaintiff's position are naturally reluctant to make claims for injuries which they do not anticipate to be serious. Until the 1st December he was ignorant that he had suffered from anything worse than a severally sprained ankle, and when he wrote in September he only claimed on that footing. The letter of the 17th September is now complained of by the Railway Company as not apprising them of the true facts, namely, that the plaintiff was endeavouring to reach the urinal over the parapet of which he fell. The exact words he used in his letter are these: "I was walking up the platform, the greater part of which was in total darkness, with Mr. E. H. H. Lewis, Acting District Superintendent of Police, who was seeing me off. I suddenly fell six feet sheer over the side of an unprotected latrine which is set in the platform and sustained a badly sprained ankle." That letter was acknowledged by the Agent of the Railway on the 28th September, and was, I believe, ignored until Mr. Mack reiterated his claim by his letter of the 2nd November. That, in it turn, was not acknowledged till the 21st November, when Messrs. Brightwell and Morseby wrote a letter to the plaintiff which contained the following remarkable statement:—"You complain that the platform was in darkness, but the Company is under no obligation to illuminate its platform until just prior to the reception of trains; those of the public who elect to wander about them do so at their own risk, and it would seem that in the present case the accident could have been avoided by the exercise of ordinary care." The writers of the letter seem to have overlooked the fact that the train was running two hours late, a matter which perhaps was within the knowledge of the Railway servants but was not within the knowledge of the plaintiff.

The plaintiff in this case has put in a claim for Rs. 3,005 of which Rs. 255 was special damages which is not challenged. I think the claim was a moderate one. The plaintiff was a young active man who was a cripple for two months and who was a partial cripple for many months more. He says, and I accept it, that he tried to go on snipe-shooting in January but had to give it up and (is) not completely healed yet. I am at a loss to understand why the defendant Railway Company have elected to fight this case, either on the question of liability or on the question of the *quantum* of damages. In support of their plea that the plaintiff's letter of the 17th September did not reveal to them the real facts, on which they now say that they would have met the claim

which the plaintiff had made, in the middle of the trial they tendered to the plaintiff's legal advisers a cheque for Rs. 750 the sum which he claimed when he was in ignorance of the extent of his injuries. So transparent a device could deceive nobody, and the tender was, in my opinion, most properly rejected.

I need only make a passing allusion to the fact that a number of reports from the Officials of the Railway were disclosed in the defendant's affidavit of documents and inspection of them was given to the plaintiff's Solicitors. The affidavit having been signed by the Agent of the Railway, I entertain no doubt that though they are doubtless privileged documents the privilege was thereby completely waived. The documents are damaging to the Railway Company but I desire to say that, in the conclusion to which I have come, I place no reliance on them whatever. I am acting on the evidence of Mr. Mack and Mr. Lewis which I do not consider to have been shaken in the slightest degree.

I think that the whole history of this case discloses a lamentable failure on the part of the Railway Company to realise the nature and extent of their obligations to the travelling public, and though only a small sum of money is at stake I trust that the result of this case may tend to bring home to the Railway Officials some increased realisation of those obligations.

There will be a decree for the plaintiff for the amount claimed with costs. The fee of the expert witness will be fixed at Rs. 150.

V. N. V. *Suit decreed.*

ALLAHABAD HIGH COURT.

APPLICATION IN SECOND APPEAL NO. OF 1923.

July 9, 1923.

Present:—Mr. Justice Daniels.

Musammat MAHTAB KUER—DEFENDANT—APPELLANT

versus

Musammat BIRHMO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time, admission of—Negligence of appellant's agent or of Pleader's clerk, whether 'sufficient cause.'

Negligence of an appellant's agent or of his Pleader's clerk is not 'sufficient cause' within the meaning of section 5 of the Limitation Act for the admission of an appeal filed beyond limitation.

Budhu v. *Dewan*, 28 Ind. Cas. 265; 37 A. 267; 13 A. L. J. 286 and *Sarat Chanaer Bose* v. *Saraswati Debi*, 34 C. 216; 5 C. L. J. 380, relied upon.

Rustomji's Limitation Act (3rd Edition) p. 43, referred to.

Second appeal from a decree of the District Judge, Meerut, dated the 28th March 1923.

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

JUDGMENT.—This is an application for admission, under section 5 of the Limitation Act, of an appeal which was filed on the 6th July, three days beyond time. As the reasons given by the defendant appeared to me, on the face of them, insufficient, I have heard appellant's Counsel in support of the application. He has failed to satisfy me that the application should be allowed.

The appeal was decided in the Court below on the 28th March. About six weeks later, according to the facts stated in the affidavit, the appellant's agent went to a Pleader's clerk and deposited Rs. 6 with him to obtain copies. He does not say that he gave any instructions to the Pleader himself. A week later, the Subordinate Court closed for thirty days for the vacation. The copies were not applied for till 27th June, a week after the Courts re-opened, and were obtained on July 3. Even then the copy of the judgment of the Trial Court was not applied for and this was obtained between July 3 and July 5.

This is not a case of an appeal being filed too late or in the wrong Court owing to a *bona fide* mistake of law or to wrong advice given by a Pleader.

It is a case of gross negligence on the part of the plaintiff's agent and of the Pleader's clerk whom the latter employed to get the copies for him. A Pleader's clerk in this country is not a person to whom obtaining of copies could be safely left without any supervision. The plaintiff, through her agent, appears to have taken no steps to find out whether the copies had been obtained until almost the very day that limitation would in the ordinary course expire. Even if the negligence was that of the Pleader himself, it would make no difference. As Mr. Rustomji says on page 43 of his Limitation Act of 1922 (3rd Edition) "Negligence of Counsel or Solicitor stands on the same footing as that of any other person and negligence by him is not sufficient cause." A somewhat similar case to the present is that of *Budhu* v. *Dewan* (1) decided in Letters Patent Appeal. There a fee and some papers were left with a Legal Practitioner in order to file an appeal. He failed to file it and returned the papers to the client after the period of limitation had expired. It was held that this was not a sufficient ground for admitting the appeal beyond time under section 5. Even the case on which the appellant chiefly relies *Sarat Chander Bose* v. *Saraswati Debi* (2) is really against him. The words on which he relies are that the expression "sufficient cause" should receive a liberal construction *when no negligence or inaction or want of bona fides is imputable to the appellant.*

In my opinion the ground alleged for admitting the appeal beyond time in this case is inadequate, and I, therefore, reject the appeal as time-barred.

M. A. A. & N. H. *Appeal rejected.*

(1) 28 Ind. Cas. 265; 37 A. 267; 13 A. L. J. 286.
(2) 34 C. 216; 5 C. L. J. 380.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 110 OF 1919.

June 9, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

RAJANI KANTA ROY AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja JYOTI PROSAD SINGH DEO—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 10—Application for substitution, whether can be made in appeal—Assignment of interest pending suit—Limitation for substitution application.

An application under O. XXII, r. 10 of the Civil Procedure Code can be made on appeal. [p. 256, col. 1.]

Three months' limitation prescribed for bringing on the record the legal representatives of a deceased party does not apply to a case of assignment or devolution of interest pending the suit. [p. 256, col. 1.]

Appeal against a decree of the Subordinate Judge, Second Court, Burdwan, dated the 19th of December 1918.

Babus *Dwarka Nath Chakravarty* and *Bankim Chandra Mukherjee*, for the Appellants.

Dr. *Dwarka Nath Mitter*, Babus *Karunamoy Ghose*, *Sukhomoy Chatterjee* and *Krishna Chaitanya Ghose*, for the Respondents.

Babu *Shib Chandra Palit*, for the Deputy Registrar.

JUDGMENT.—This appeal is against the final decree in a suit for partition of a *Mouza*, called Ismail.

There is a preliminary objection to the hearing of the appeal on the ground that the defendant No. 2, Rakhal, died and no substitution was made within time; that another defendant No. 41, Sibani Debya, also died and no substitution was made in time, and that the suit being one for partition the appeal cannot proceed.

Rakhal died on the 24th May 1920. The application for substitution of his heirs was made on the 5th February 1921 and substitution was ordered to be made subject to objection at the hearing.

It appears that Rakhal's interest was sold away in execution of a decree in 1918. On Rakhal's death, therefore, the interest was not in his heirs but devolved on a third party. It was re-purchased on the 23rd January 1921 by his heirs and they were brought on the record on the 5th May 1921 subject to objection at the hearing. The appellant was not bound to recognise the purchaser and could have proceeded against the heirs of the deceased; but there was a devolution of interest of Rakhal, and before the appeal came on for hearing the persons on whom the interest devolved were made parties to the case. Three months' limitation does not apply to a case of assignment or devolution of interest pending the suit.

It is contended for the respondents that the application, even if treated as one under O XXII, r. 10, not having been made in the Court below in the suit cannot be made in this Court and that, as a matter of fact, the application was not under that rule but for substitution of the heirs of the deceased.

So far as the first point is concerned, it has been held by a Division Bench of this Court. (Civil Rules Nos. S-147 and S-148 of 1920 disposed of on the 11th March 1921) that the application can be made on appeal.

With regard to the second contention there is no doubt that the application was not under O. XXII, r. 10. But the application can be allowed to be amended and, having regard to all the circumstances, we were not inclined to dismiss the case on such a ground when all the parties are before the Court, and the application for substitution may be allowed to be amended. As for Sibani, her heirs are already on the record and it is only necessary to have a note made on the record that her interest survives to those respondents.

The appellant is accordingly allowed to amend the application dated 5th May 1921 by adding a prayer under O. XXII, r. 10, and we direct that the persons mentioned in the application be added as respondents in supersession of the order for substitution passed on the 5th May 1921. We also direct that a note be made in the record that the interest of the deceased Sibani survives against the defendant No. 37.

The appellant, however, must pay the costs of this application for amendment, five gold *mohurs*, to the respondents on or before the 12th July in this Court. The plaintiff-respondent will be entitled to withdraw the said amount if it is deposited in this Court. If the said costs are not paid within the time aforesaid this appeal will stand dismissed with costs.

This disposes of the preliminary objection.

The first contention raised in this appeal is, that a number of defendants died while the suit was pending in the Court below and their heirs were not substituted.

It appears that some of these deaths took place before the case came on for hearing. It also appears that certain minors were represented by the Deputy Registrar when the case came up to this Court in Appeal No. 197 of 1910. When the case went back on remand no guardian *ad litem* was appointed for them in the Court below and the decree bears the name of Mr. Joyce as their guardian *ad litem*. Those of them who have attained majority after the decree of the lower Court have (along with others) preferred this appeal and two of them are still minors and are respondents represented by the present Deputy Registrar in this appeal. It is accordingly contended that the partition proceedings and the decree are bad as there was no substitution of the heirs of the deceased and the minors were not properly represented.

The Court below observed "There is nothing to show that any of the defendants died before the Commissioner did the survey work and the *khanapuri* work." But if the partition affects 15 annas co-sharers, a question which we will deal with presently, the decree for partition should not have been made in the absence of the legal representatives of the deceased defendants and without the minors being properly represented.

But it was not only the plaintiff but the Court below also seem to have been

under the impression that substitution of the heirs was not necessary as no death appeared to have taken place before the survey and *khanapuri* works were finished. The fact of the death of the defendants does not appear to have been brought to the notice of the Court below except the death of one of them incidentally in an application filed on the 7th September 1908 objecting to the Commissioner's proceedings, and it does not appear that the plaintiff had any knowledge of these deaths. All the heirs of the deceased defendants have now been made parties to the appeal and all persons interested in the property are before the Court. In these circumstances, we think that the suit should not be dismissed on the ground that the heirs were not substituted.

It is unnecessary to make any further order for substitution seeing that all the heirs have already been substituted and all the necessary parties are before the Court.

The second contention is that there should have been a partition of the *Mouza* among all the co-sharers and not merely of the plaintiff's one-anna share. It is urged that the judgment of the High Court, dated the 25th August 1915, must be given effect to only so far as the share of the plaintiff is concerned, but that it did not prevent a partition of the shares of the other co-sharers nor prevent a determination of the other issues in the suit.

It appears that the plaintiff purchased one-anna share of one Ramanuj and Elokeshi in *Mouzah* Ismail and a certain share in Barathol and asked for a partition of those shares. The Court below originally dismissed the claim for partition of Ismail on the ground that the share of Ramanuj had previously passed to one Danesh who preferred a claim to 2 annas 4 *gandas* share which had been attached by the plaintiff's ancestor and the claim was allowed. This share subsequently passed by successive transfers to Jogendra, the son of Ramanuj, and that, therefore, Ramanuj had no share in Ismail which could pass to the plaintiff under his purchase, and the Court merely declared the plaintiff's right to 8-*gandas* share in Barathol which was let out in *mokarari*.

On appeal to this Court (R. A. No. 197 of 1910) it was held that Ramanuj had other shares which he obtained from another branch of the family, sufficient to meet the claim of the plaintiff. This Court directed that "there must be a partition by metes and bounds of Ismail, it being declared that the plaintiff is entitled to the one-anna share he claims in Ismail and two-annas five *gandas* in Barathole." After this decision, the other issues raised in the case cannot be gone into, nor can the shares of other co sharers be partitioned as those shares were not defined by the High Court, and the High Court did not direct the lower Court to determine those shares. It is no doubt hard that the co-sharers should not have their shares partitioned in this suit for partition but they did not ask the High Court for such an order. They did not do so probably because most of the lands were in the separate possession of each co-sharer. However that may be, having regard to the decision in R. A. No. 197 of 1910, the other issues cannot be gone into, nor can the shares of other co-sharers be partitioned. The decree passed in that appeal must be taken to be the preliminary decree which is to be worked out. This contention, therefore, must be overruled.

The third contention relates to the allotment of the lands of *Mouzah* Ismail to the plaintiff. It is strongly pressed before us that the partition has seriously prejudiced the defendant No. 37, Jogendra.

There are 158 *bighas* of *khas kanali* lands. The plaintiff purchased only one-anna share of Ramanuj, and 2 annas 4 *gandas* share is alleged to have been acquired by his son Jogendra. The Commissioner classified the lands under various classes. There are, as stated above, 138 *bighas* of *khas kanali* lands but Ramanuj alone was recorded as the owner of 12 *bighas* 9 *cottas* and nothing was recorded in the name of Jogendra. The total area of *khas danga* land is 115 *bighas*. The plaintiff under his one anna share would be entitled to about 7 *bighas* and Ramanuj was recorded as being in possession of 8

bighas 8 *cottas*, nothing being recorded in the name of Jogendra.

It is contended that Jogendra's share was more than the share of Ramanuj; that a proportionate quantity of land should have been left for him, and that the whole of the lands should not have been given to the plaintiff.

It appears that Jogendra, on the 7th September 1918, put in a petition to the Court below in which he complained as follows: "The Commissioner instead of dividing and partitioning into shares according to the classification of lands is allotting the lands and *jamas* in the rightful possession of this defendant to the share of the plaintiff separately. He is not listening to any objections and is not admitting any documents and is expressing the opinion that he is not finding any land in the rightful possession of this defendant in the said *Mouzah*. This defendant has got 3 annas 4 *gandas mokarari* interest and 3 annas 4 *gandas lakharaj* interest in the said *Mouzah*, and there are many lands in *khas* possession and there is a *Mouzah*, Chak Aral, at a permanently fixed rent. The plaintiff has been admitting the said rights in the possession of the defendants over and over again. But the Commissioner, without noticing that and by dividing the lands in the rightful possession of the defendant is about to allot them to the share of the plaintiff. On representing it to the Commissioner, he said that he would make the division accordidg to the convenience of all the parties and for that reason he asked all the parties to be present. The Pleader for this defendant having appeared before the Commissioner in accordance herewith, he said that the other parties had not been attending and so he would do as he pleased, and would refuse to take any documents on behalf of this defendant. This defendant would be greatly prejudiced by that. By classifying all the lands of the *Mouzah* and by delineating the plaintiff's share at one definite extremity, the convenience of all parties would be met and justice would be done."

The Court directed the Commissioner to be informed of the said petition, and the latter reported as follows:— "During *khanapari* work I could not ascertain which lands are in possession of Ramanuj and which are in possession of Jogendra Narain Roy; nor did they point out those lands to me at that time. So far as I could ascertain from local inquiry I recorded the lands in possession of defendant, Ramanuj Roy. And as plaintiff purchased the share of Ramanuj Roy, I think, plaintiff should be given lands in possession of Ramanuj Roy as far as possible and on that principle I have allotted the lands to plaintiff's share."

The Court by its order, dated 9th September 1918, held that, under the circumstances, no action could be taken in respect of Jogendra's application.

It is contended that an inquiry should have been made into the allegations against the Commissioner, and that the matter should not have been disposed of in the manner it has been done.

In the absence of any enquiry on the point we are not in a position to determine the merits of the application of Jogendra. But he does not appear to have acted promptly, as the application was made after the Commissioner had finished the field work. At the same time, it does appear that, although Jogendra has a share, no land has been recorded in his name. We think, therefore, that Jogendra has been prejudiced.

The Commissioner appears to have given notice to the co-sharers by post as well as by beat of drum several times. The Commissioner says that only some of them appeared before him occasionally. But there were certain minors; they were not properly represented in the Court below and their interests do not appear to have been properly looked after in the partition proceedings as the Commissioner himself says that only some of the defendants attended and that not regularly. In his report of the 19th September 1918 he says:— "I have allotted the plaintiff's one-anna share mostly from the lands in possession of defendant, Ramanuj Roy, whose share the plaintiffs purchased. In a few cases I departed from this rule—one in case of partitioning tanks held in *khas*

possession by the co-sharers and another in case of *patit danga* lands. In the first case I found no tank exclusively in *khas* possession of Ramanuj Roy. So I allotted one entire tank which was held in *khas* possession jointly by all the co-sharers. I did so because in giving one entire tank to plaintiff instead of one-anna share in all the tanks, it would be convenient to the plaintiff as well as to the defendants to use and enjoy the tanks. In the second case as the *patit danga* lands in possession of the tenants under Ramanuj Roy did not meet the demands of the plaintiff, so I allotted to plaintiff the small portion of *khas patit* lands in possession of Ramanuj which was left after giving the plaintiff his share of the same class. But this even did not make up the deficiency. So I had to take a portion of the *ejmali patit danga* land (plot No. 859) and I allot the same to the plaintiff's share."

The tank and the *patit danga* lands being joint, the allotments certainly affected the minors.

The suit was instituted in 1907 about 15 years ago and a large sum has been spent in the partition proceedings, and although under the circumstances we are reluctant to remand the case, we think that the minors as well as Jogendra have been prejudiced though Jogendra himself is partly responsible for it. Having regard to the fact that the minors have not been properly represented, that the partition affects their interests and that the heirs of the deceased were not brought on the record before the decree, we think that the final decree should be set aside.

The *khanapuri* of the classified lands made by the Commissioner will stand. But the Commissioner will proceed to record the lands in the possession of Ramanuj and Jogendra separately in the presence of all the defendants after giving notice to them and then proceed to allot lands in one anna share of the plaintiff. There will also be a partition of the tanks and *patit danga* lands in the plaintiff's one-anna share in the presence of all the defendants. To this extent only the proceedings of the Commissioner are set aside and there will be a fresh partition, as indicated above.

As regards *Mouzah* Barathol the Commissioner (Bibhuti Babu) reported (as would appear from the judgment of the Court below) that the plaintiff should get a certain sum as his share of the rents of the *Mouzah* and neither party took any objection to the same.

As regards Chak Aral the Commissioner says: "The men present stated it to be a separate *Mouzah* and not a part and parcel of *Mouzah* Ismail but the Revenue Survey Map shows that it is a part of Ismail. Defendants did not produce any document before me to show that it was a separate *Mouzah*. So I could not leave it aside. But I have made a separate list of the lands in this Chak and have partitioned these lands separately so that if this Chak be not a part of Ismail, this portion of the partition work may be left aside without affecting the partition of the rest of the *Mouzah*.

It is contended on behalf of the appellant that *Mouzah* Ismail is held under the Raja of Pachait, whereas in the petition of claim made by Ramesh Chandra Mukherjee on the 24th April 1896 in Execution Case No. 293 of 1896 in which the ancestor of the plaintiff was the decree-holder and Ramanuj and Ram Gopal were the judgment-debtors, it was asserted that Chak Aral was held under one Priya Sakhi Debi and that it was released from attachment. Now, if this assertion is true (we cannot decide that point here) *prima facie* it would not form part of *Mouzah* Ismail. This question does not appear to have been gone into fully by the Court below. The learned Subordinate Judge merely says that "Aral Chak being within *Mouzah* Ismail is liable to partition."

We accordingly direct the Court below to go into this question and if that Court finds that Chak Aral is not a part and parcel of *Mouzah* Ismail then it will be excluded from partition. If, on the other hand, it finds that it is part and parcel of *Mouzah* Ismail as purchased by the plaintiff, then it

must be partitioned along with the *Mouzah*.

The Court will decide this question of Chak Aral before the Commissioner is directed to make fresh allotments.

The final decree of the Court below is accordingly set aside and the case sent back to that Court in order that fresh partition may be made as directed above and the case then disposed of according to law.

The appellant must put in the costs of the fresh partition within the time to be fixed by the Court below, failing which, the partition already effected will stand.

So far as the costs of Chak Aral are concerned, we assess the hearing fee at three gold *mohurs* which will abide the result, and as regards the rest of the lands, we assess the hearing fee at Rs. 100.

The plaintiff-respondent must pay the costs of this appeal to the appellant.

As the case has been pending for a very long time, we trust that the Court below will take it up at an early date.

K. S. D.

Decree set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 168 OF 1922.

March 23, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.

A. R. NARAYANA IYER AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

THE SOUTH INDIAN RAILWAY CO., LTD., BY THEIR AGENT IN INDIA, SOUTH INDIAN RAILWAY CO., LTD., TRICHINOPOLY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 76—Risk Note in Form H—Suit for damages for loss—Burden of proof.

Where goods are consigned by a Railway Company under a Risk Note in Form H and are lost or damaged in transit, the *onus* is on the consignor claiming compensation to prove that the loss or damage was occasioned by any act or neglect of the Company or its servants.

The incidence of such burden of proof is in no way affected by section 76 of the Railways Act.

Smith Limited v. *Great Western Railway*, (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359, *East Indian Railway Company* v. *Nathmal Behari Lal*, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321, *East Indian Railway Company* v. *Nilkanta Roy*, 22 Ind. Cas. 679; 41 C. 576; 19 C. W. N. 951; 19 C. L. J. 142, followed.

Ghelabhai Punsi v. *East Indian Railway Company*, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 225, *Curran* v. *Midland Great Western Railway Company, of Ireland*, (1896) 2 Ir. R. 183; 2 Ir. L. R. 739, not followed.

Madras and Southern Maharatta Railway Company v. *Mattai Subba Rao*, 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, South Malabar, at Calicut, in Small Cause Suit No. 244 of 1921.

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

Messrs. *Brightwell* and *Morseby*, for the Respondents.

JUDGMENT.—Two questions have been raised on this petition. First, whether the burden of proof is on the consignee or the consignor under the Risk Note, Form H; second, whether the incidence of the burden of proof is affected by section 76 of the Indian Railways Act.

We deal first with section 76. We have not been shown any case in which there is a special contract or Risk Note in question and in which section 76 has been applied. Reference has been made to *Nanku Ram* v. *Indian Midland Railway Company* (1) and *Sesham Patter* v. *L. S. Moss* (2). But it is not clear that in either of these cases there was any Risk Note or was anything on which it could be said that a question of the effect of a special contract apart from the ordinary law was raised.

Turning to the incidence of the burden of proof, we find that in such a case as the present authority seems to be clearly

(1) 22 A. 361; A. W. N. (1900) 111; 9 Ind. Dec. (N. S.) 1274.

(2) 17 M. 445; 6 Ind. Dec. (N. S.) 308.

against the petitioners. *Ghelabhai Punsi* v. *East Indian Railway Company* (3), relied on by and referred to in the lower Court's judgment is open to question, because it is founded very largely on the decision in *Curran* v. *Midland Great Western Railway Company of Ireland* (4), and that decision has been regarded with suspicion in the recent case, *Smith Ltd.*, v. *Great Western Railway* (5). More particularly the former can, in our opinion, be distinguished in any event from the present case on the ground on which Lord Buckmaster was disposed to distinguish it from the case before the House of Lords with reference to the nature of the property in question. The bags of rice lost by the plaintiffs before us more closely resemble the boots referred to in the English case than the pigs referred to in the Irish. The form of contract in question in the case before the House of Lords was, if anything, however, worded more adversely to the Railway Company than the Form now under discussion, and yet the conclusion was clear that the burden of proof was entirely on the plaintiff. A similar conclusion had been reached in India in *East Indian Railway Company* v. *Nathmal Behari Lal* (6), *East Indian Railway Company* v. *Nilkanta Roy* (7) which no doubt has been dissented from by this High Court in *Madras and Southern Mahratta Railway Company* v. *Mattal Subba Rao* (8), but only on another point not now under consideration. In accordance with those authorities we decide for the defendants and dismiss the revision petition with costs.

V N. V. *Petition dismissed.*

(3) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 225.
(4) (1896) 2 Ir R. 183; 2 Ir. L. R. 739.
(5) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.
(6) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.
(7) 22 Ind. Cas. 679; 41 C. 576; 19 C. W. N. 95; 19 C. L. J. 142.
(8) 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1451 OF 1922.
March 12, 1923.

Present:—Mr. Justice Moti Sagar.

KAPURA—PLAINTIFF—APPELLANT

versus

HARDIT SINGH—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 41—Sale by minor—Suit to avoid sale—Restoration of benefit—Power of Court.

Courts of Justice in India in the exercise of their mixed jurisdiction as Courts of Equity and Law are always at liberty to pass a conditional decree upon equitable principles to suit the exigencies of each particular case. [p. 262, cols. 1 & 2.]

Amir Ali v. *Iqbal Ali*, 61 Ind. Cas. 312 at p. 314; 24 O. C. 22; 8 O. L. J. 287, relied on.

In a suit for the recovery of property alleged to have been alienated by the plaintiff during his minority, on the ground that the alienation was void owing to his minority, it is open to the Court to make a decree in favour of the plaintiff conditional on his restoring, under section 41 of the Specific Relief Act, to the alienee the benefit which he had received as consideration for the alienation. [p. 262, col. 1.]

Balak Ram v. *Dadu*, 7 Ind. Cas. 1000; 76 P. R. 1910; 112 P. W. R. 1910; 98 P. L. R. 1910, followed.

Second appeal from the decree of the District Judge, Ludhiana, dated the 14th February 1922, reversing that of the Subordinate Judge, First Class, Ludhiana, dated the 7th November 1921.

Mr. *Bishen Narain*, for the Appellant.

Mr. *Anant Ram*, for the Respondent.

JUDGMENT.—On the 10th November 1919 Kapura, plaintiff, sold 18 *bighas* 19 *biswas* 2 *biswansis* of land at *Mauza* Khirnih, in the Samrala Tahsil of the Ludhiana District, to the defendant, Hardit Singh, for Rs. 1,320, shortly after the sale he brought this suit for a declaration that the sale deed in question was void inasmuch as he was a minor at the time of its execution, and that it had been obtained by fraud by the defendant. He also alleged that the sale was without consideration. The defendant denied the claim and contended that the plaintiff was a major at the time of the execution of the sale-deed and that it was for full consideration. The allegation as to fraud was also repudiated, and it was stated that the transaction was a perfectly *bona fide* one. The following issues were framed:—

(1) Did the plaintiff, Kapura, represent to the defendant that he was of age?

(2) If so, was he not estopped from pleading his minority?

(3) Did the defendant know that the plaintiff was a minor and hence no question of estoppel arose in this case?

(4) If the plaintiff was estopped from pleading his minority, was he entitled to ask for the cancellation of the sale-deed for want of consideration or fraud as stated in paragraph 2 of the plaint?

(5) If so, was the sale-deed for consideration?

(6) What relief was the plaintiff entitled to?

The Trial Court found in favour of the defendant on all these issues, and, following *Wasinda Ram* v. *Sita Ram* (1), dismissed the plaintiff's suit. The learned District Judge on appeal held that it had not been proved that the plaintiff had been guilty of any misrepresentation as to his age, or that the defendant was in any way misled by any s ch representations. He further found that the full consideration of Rs. 1,320 had been paid by the defendant to the plaintiff and that the latter was bound in equity to refund the purchase-money before he could get possession of the land in suit.

The plaintiff has now come up in second appeal to this Court, and the sole question for consideration is, whether he can get back the property without restoring the price. In my opinion he certainly cannot do so. There is ample authority for holding that in such a case as this the minor who seeks to recover the property must restore the benefit. There is a distinction between the case of a suit in which the creditor is seeking to enforce an agreement entered into by a minor, and one in which the minor himself as plaintiff seeks the assistance of the Court. It has been repeatedly held that in the former case the creditor cannot recover but that in the latter case it is open to the Court to make the relief conditional on the minor restoring the benefit. In *Amir Ali* v *Iqbal Ali* (2) it was laid down that Courts of Justice in India in the exercise of their mixed jurisdiction as Courts of Equity and Law were always at liberty to pass a conditional decree upon equitable principles to suit the exigencies of each particular case. In the present case it would be clearly repugnant to the principles of justice, equity and good conscience to allow the plaintiff to recover the property and retain the price as well. The case of *Balak Ram* v. *Dadu* (3) is a direct authority on this Court for the view that the minor, who seeks to recover the property, is bound in equity to refund the purchase-money under section 41 of the Specific Relief Act as a condition precedent to obtaining a decree for possession. On these authorities I have no hesitation in maintaining the decree of the lower Appellate Court.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 59 Ind. Cas. 393; 1 L. 389; 51 P. W. R. 1920.

(2) 61 Ind. Cas. 312 at p. 314; 24 O. C. 221.

(3) 7 Ind. Cas. 1000; 76 P. R. 1910; 112 P. W. R. 1910; 98 P. L. R. 1910.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 127 OF 1921 WITH RULE No 397 OF 1921.

August 3, 1921.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Chotzner.

Srimati HAIMABATI DEVI—OPPOSITE PARTY—APPELLANT

versus

PRAN KRISHNA BANERJEE—PETITIONER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 1, 7—Indian Soldiers (Litigation) Act (IX of 1918), s. 10—Soldier, decree against—Application for review—Application to set aside decree—Soldier serving under War conditions—Admission of application beyond time—Decree, whether can be set aside against all defendants.

It is a sufficient groun for admitting an application for review of jud ment filed after the period of limitation that the applicant is certified by the Adjutant-General to have been serving under War conditions, immediately after which

HAIMABATI DEVI v. PRAN KRISHNA BANERJEE.

P, one of the defendants in a suit, left India in August, 1918 to serve under War conditions, and returned at the end of October, 1919. Meanwhile, the suit had been disposed of adversely to him in July, 1919. Immediately after his return, he made an application under section 10 of the Indian Soldiers (Litigation) Act and also for a review of the decree passed in his absence:

Held, that under the circumstances of the case, the Court could set aside the decree either under the latter part of section 10 of the Act or under its general powers of review contained in O. XLVII, r. 1 of the Civil Procedure Code. [p. 264, col. 2.]

Where a soldier who has been serving under War conditions applies to have a decree or order passed against him set aside, if the decree or order is of such a nature that it cannot be set aside as against such a soldier only, it may be set aside as against all or any of the parties against whom it is made. [p. 264, col. 2.]

Appeal against an order of the Subordinate Judge, Nadia, dated the 29th of March 1921.

Babus *Rupendra Kumar Mitter, Mrityonjoy Chatterjee*, for the Appellant.

Dr. *Jadu Nath Kanjilal*, Babus *Jyotish Chander Sarkar* and *Harendra K. Sarbadhikary*, for the Respondent.

JUDGMENT.—This appeal arises out of an application under section 10 of the Indian Soldiers (Litigation) Act (IX of 1918) and also for a review of a decree said to have been passed by consent.

It appears that the plaintiff appellant brought a suit against a certain lady for partition and that on her death six persons were substituted in her place, one of them being Pran Krishna Banerji. Pran Krishna left India to serve in Mesopotamia in August 1918 and returned to India towards the end of October 1919. The suit was disposed of on the 28th of July 1919 upon a petition of compromise filed on behalf of all the defendants. Pran Krishna before his departure from India executed an *ammukhtarnama* in favour of his four brothers, three of whom signed this petition of compromise, the name of the fourth brother having been signed by the attorney of the latter. In November 1919 the present application was made by Pran Krishna on the ground, amongst others, that the compromise had been affected without his knowledge and authority and that the suit ought not to have been proceeded with in his absence; that his interests were not properly looked after although he had left a power-of-attorney in favour of his brothers before he left India. The Court allowed the application and set aside the decree. The plaintiff has appealed to this Court.

The order was passed not only under section 10 of Act IX of 1918 but also upon an application for review. The review having been granted an appeal would lie only on the ground specified in O. XLVII, r. 7 (*c*), no other clauses of that rule being applicable to the case. Clause (*c*) would apply if the application for review was admitted after the prescribed period and without sufficient cause. Under section 10 of the Indian Soldiers (Litigation) Act an application can be made within three months from the date on which a soldier ceases to serve under War conditions. It is contended by the learned Pleader for the appellant that the War conditions ceased in November 1918 and that, therefore, the application was out of time. On the other hand, it is contended on behalf of the respondents that the War conditions in Mesopotamia have not yet ceased. However that may be, there is a certificate by the Adjutant-General that Pran Krishna served under War conditions from 25th July 1918 to 5th November 1919. The application was made on 3rd December 1919, *i. e.*, within a short time after he ceased to serve under War conditions. Apart from the proviso (*a*) to section 10 of the Act, the Adjutant-General's certificate that Pran Krishna was serving under War conditions would be a sufficient ground for admitting the application for review after the period of limitation, and we are not inclined to hold that there was any unreasonable delay in making the application after his return to his place of residence. That being so, the appeal must fail.

It is contended, however, that we ought to interfere under section 115 of the Civil Procedure Code. The main ground on which we are asked to do so, is that the learned Subordinate Judge was in error in holding that there was no compliance with the provisions of section 6 of Act IX of 1918. Section 6 of that Act lays down,

"If the Collector has certified under section 5, or if the Court has reason to believe, that an Indian soldier who is a party to any proceeding pending before it, is unable to appear thereon, and if such soldier is not represented by any person duly authorised to appear, plead or act on his behalf, such Court shall suspend the proceeding and shall give notice thereof in the prescribed manner to the prescribed authority." It is pointed out that, as a matter of fact, the learned Subordinate Judge did write to the Collector of 24-Pergunnahs, who at that time was the prescribed authority in this matter, and that the latter refused to certify and left it to the discretion of the Subordinate Judge to act in the way he thought proper. Reference was made on behalf of the respondent to certain rules published in the *Calcutta Gazette* in December 1918 to show that the Adjutant General was the prescribed authority under Act IX of 1918 in place of the Collector of the 24-Pergunnahs who was the prescribed authority under the former Act of 1915. But the correspondence between the Subordinate Judge and the Collector took place before the rules were published and although the suit did not terminate until July 1919 it does not appear that these rules were brought to the notice of the Subordinate Judge.

But, assuming that there was no default made in complying with the provisions of section 6, the Court under the latter part of section 10 of Act IX of 1918 may make an order setting aside a decree or order against a soldiers "if the interests of justice require such a course in any other case." In the present case, the *am mukhtearnama* executed by Pran Krishna was in favour of his four brothers. It as a joint power given to them and there was no power given to them to act separately. Admittedly, the petition of compromise was not signed by all the four. It is contended on behalf of the appellant that the fourth brother Sarat, although he did not sign the petition, took part in the deliberations and agreed to the terms of the compromise, though he was not present at the time of signing the petition of compromise. But he was at Shillong at the time and the learned Subordinate Judge finds that "there is no satisfactory evidence to show that Sarat himself agreed to all the terms embodied in Exhibit 5." In these circumstances, the signing of the petition of compromise by an *am mukhtear* of Sarat would not bind Pran Krishna.

Then, again, it apperas that the Pleader for Pran Krishna informed the Court by a petition in August 1918 that he had no instructions from Pran Krishna and was unable to act on his behalf. Another petition was presented on behalf of the four brothers in which they stated that the interests of Pran Krishna were not being properly looked after, that they could not properly look after his interests, and prayed that the trial of the suit might be stayed until his return. We have already stated that Pran Krishna did not return to India until October 1919. Under these circumstances, we think that the learned Judge was justified in setting aside the decree either under the latter part of section 10 of the Act or, under the general powers of review contained in O. XLVII, r. 1, Civil Procedure Code.

The last point is, whether the Court was right in setting aside the decree not only against Pran Krishna but against the other defendants also. But where the decree or order is of such a nature that it can be set aside as against such a soldier only it may be set aside as against all or any of the parties against whom it is made. Here it was a suit for partition including the family dwelling house and evidently the Court below held that, in these circumstances, the entire decree should be set aside. We are unable to hold that the Court was wrong in doing so.

The learned Pleader for the petitioner endeavoured to show that the compromise was a fair one; but we have no power to go into the evidence on the point, and it is unnecessary to consider that question as the decree must be set aside upon the grounds stated above.

The result is that the appeal must fail and is accordingly dismissed with costs; hearing fee one gold *mohur*.

The Rule is discharged. We make no order as to costs in the Rule.

Let the record be sent down as soon as the decree is signed.

Appeal dismissed;
Rule discharged.

N. H.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 56 OF 1923.
April 18, 1923.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Ross.

Moulvi Syed MOHAMMAD MOIN-UD-DIN ASHRAF—APPELLANT
versus
Moulvi MOHAMMAD ISHAQ ASHRAF AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Time, requisite for obtaining copies—Decree signed long after judgment—Limitation, commencement of.

Appellant applied for a copy of the decree to be appealed against, but he was unable to obtain it as no decree had been prepared and signed. A decree was prepared several months later, and the appellant then made a fresh application for a copy of the decree and filed the appeal after obtaining the copy:

Held, that the appellant was entitled to compute the period of limitation for the appeal from the date of the signing of the decree. [p. 266, col. 1.]

Ram Asray Singh v. *Sheonandan Singh*, 35 Ind. Cas. 868; 1 P. L. J. 573; 1 P. L. W. 35; (1917) Pat. 21 (F. B.), followed

Jyotindra Nath Sarkar v. *Lodna Colliery Co., Limited*, 62 Ind. Cas. 649; 6 P. L. J. 350; 2 P. L. T. 361; (1921) Pat. 177 (F. B.), distinguished.

ORDER.—The question as one of limitation. The appeal is against the decree for partition. The judgment of the lower Court was delivered on the 18th November 1920. An application for copy of the judgment was made on the 4th February 1921, the 5th February 1921 was fixed for notifying the requisite number of stamps and folios which were supplied on the 8th February 1921. The copy was ready for delivery on 10th February and was delivered on the 11th February 1921.

An application for copy of the decree, according to the note in the tabular statement on the back of the decree, was made on 17th January 1923, the requisite stamps and folios were supplied on the 18th, 24th, 29th and 31st January; the copy was ready for delivery on 3rd February and was delivered on the 6th February. Computing the time taken in obtaining copies of the judgment and the decree from the aforesaid dates, the Stamp Reporter reports that the limitation expired on 27th February 1923. The appellant filed an application on the 12th March praying that the period between the delivery of judgment and the preparation and signing of the decree be excluded from the period of limitation prescribed for filing the appeal stating that, if this be done, the appeal will be well within time.

Now the question is, whether the aforesaid prayer can be granted.

It appears from the certified copies of the previous applications filed by the appellant for obtaining copy of the decree that an application for copy of the decree was made by him on the 9th March 1922, but the copy was not granted with a note on the application that the Commissioner's fee was not deposited and, therefore, no decree was prepared. Similar applications were made on the 5th September and 6th December 1922, with similar orders.

Therefore, the appellant tried to obtain copy of the decree but he could not get it, inasmuch as no decree was prepared and signed by the Court. The decree was prepared and signed on 12th December 1922. The appellant relies upon a Full Bench decision of this Court in *Ram Asray Singh* v. *Sheonandan Singh* (1) where it was held that, under section 12 of the Limitation Act, 1908, an appellant is entitled to deduct the time between the delivery of judgment and the signing of the decree in computing the period of limitation prescribed for an appeal. This decision was dissented from in a subsequent Full Bench case: *Jyotindra Nath Sarkar* v. *Lodna Colliery Co., Limited* (2), and the learned Vakil on behalf of the respondent relies upon this case. In that case it was held that (1) the time requisite for obtaining a copy of the decree within the meaning of

(1) 35 Ind. Cas. 868; 1 P. L. J. 573; 1 P. L. W. 35; (1917) Pat. 21 (F. B.).
(2) 62 Ind. Cas. 649; 6 P. L. J. 350; 2 P. L. T. 361; (1921) Pat. 177 (F. B.).

section 12 of the Limitation Act, 1908, does not begin until the actual application for a copy has been made, and further that (2) if the appellant does not apply for a copy until after the expiration of the period prescribed by the Limitation Act, provided copies were obtainable within that period, he is not entitled to deduct the time between the actual signing of the decree and the delivery of judgment. This ruling obviously does not apply to the present case, inasmuch as copy of the decree was not obtainable until after the 12th December 1922 when the decree was signed, and the application for copy was made long before the decree was ready and signed. In the aforesaid Full Bench case the decree was drawn up and signed on the 18th August 1920 and the application for copy was not made until the 3rd January 1921. Therefore, on both grounds, that the copy of the decree was not obtainable before the 12th December 1922, and that the application for copy of decree in this case was made long before the aforesaid date of preparation and signing of the decree, the decision is not applicable to the present case.

The appellant is, therefore, entitled to computation of the period of limitation from the date of the signing of the decree. In any view of the case, he is entitled to enlargement of the time for filing the appeal.

The appeal is, therefore, filed within time.

The application is allowed. In the circumstances of the case, we make no order as to the costs of this application.

Z. K.

Application allowed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 26 OF 1922.

July 6, 1923.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

MUHAMMAD SHAFI—DEFENDANT—APPELLANT

versus

Babu BINDESHRI SARAN SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 144—Trees planted on land of another without his consent—Suit for removal of trees and possession of land—Limitation.

The defendant planted trees on the plaintiff's land without having any right to do so and the plaintiff sued for the removal of trees and for possession of the land :

Held, that the period of limitation applicable to the suit was 12 years.

Musharaf Ali v. *Iftkhar Husain*, 10 A. 634 ; A. W. N. (1888) 257; 6 Ind. Dec. (N. S.) 427, distinguished.

Letters Patent Appeal against the judgment of Mr. Justice Walsh, dated the 10th February 1922, and published as 70 Ind. Cas. 483.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—In our opinion there is no force in this appeal. The plaintiff in his plaint claimed the ownership of the land on which the defendant had planted certain trees and he asked for the removal of the trees and for possession of the land. He also asks for further reliefs. It has been found that the land belongs to the plaintiff; that it is waste land; and that the defendant had planted trees on the plaintiff's land without having any right to do so. It was further found that the trees were planted within twelve years prior to the institution of the suit. The claim being one for possession it was clearly within time, the period of limitation applicable being twelve years. Reliance was placed on behalf of the appellant on the ruling of this Court in *Musharaf Ali* v. *Iftkhar Husain* (1). In that case the real question was whether the limitation applicable was that prescribed by Art. 32. It does not appear that the claim in that case was one for possession and, therefore, that case cannot be deemed to be an authority in favour of the appellant's contention. The appeal, in our opinion, is untenable. We accordingly dismiss it with costs.

K. S. D.

Appeal dismissed.

(1) 10 A. 634; A. W. N. (1888) 257; 6 Ind. Dec. (N. S.) 427.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL REGISTER NO. 35 OF 1922.

August 6, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

Sheikh ALI ABBAS—DEFENDANT—APPELLANT

versus

Raja KUNWAR SHER BAHADUR SINGH—PLAINTIFF—RESPONDENT.

U. P. Local Rates Act (I of 1914), s. 8 (a)—U. P. Local and Rural Police Rates Act (II of 1906), s. 14—Rural Police rates, liability for—Contract, meaning of—Wajib-ul-arz, *whether record of contract—Settlement Officer, whether agent of landlord—Court, functions of—Ambiguous document, interpretation of.*

The term "Contract" as used in section 14 of U. P. Local and Rural Police Rates Act of 1906 means a contract between the landlord and the under-proprietor or permanent lessee, as the case may be, and means further a contract in its legal sense, presupposing the existence of two parties thereto. [p. 268, col. 1.]

Kushari Din v. *Rani Chandar Kuar*, 7 O. C. 35, referred to.

A *Wajib-ul-arz* may be a record of a contract though generally it is treated as a record of custom founded either on the investigation made by the Settlement Officer or the opinions of the body of the proprietors of the village. [p. 268, col. 1.]

A Settlement Officer cannot be regarded as an agent of the landlord so as to represent him as one of the parties to a contract embodied in the *wajib-ul-arz*. [p. 268, col. 1.]

A Court is nobody's agent. It is a Tribunal to decide disputes between two parties and must, with a view to perform its functions justly and properly, act independently of any of the two parties engaged in a litigation before it. [p. 268, col. 1.]

It is a well-known rule of interpretation that in a case where there is any ambiguity in the terms of a document, there is no safer guide to come to a true conclusion than to see how the parties have acted under that document. [p. 268, col. 2; p. 269, col. 1.]

Appeal against a decree of the District Judge, Lucknow, dated the 14th November 1922, confirming that of the Assistant Collector of the First Class, Lucknow, dated 24th November 1921.

Messrs. *Wasim, Niamatullah, Najmuddin Siddqi* and *Brij Narain Chakbast*, for the Appellant.

Mr. *Ram Parshad*, for the Respondent.

JUDGMENT.—This is a second appeal by the defendant under the Oudh Rent Act. The plaintiff is the superior proprietor of village Mukhtarpur Jurya. The defendant-appellant is the under-proprietor. The suit out of which this appeal has arisen was for the recovery of arrears of revenue and certain cesses for a certain number of years due to the plaintiff from the defendant. The suit has succeeded. The dispute in appeal is with regard to a certain sum which represents the amount of cess called the Police Rural Rate. There is no dispute as to the amount of this Rate. The dispute relates to the liability of the defendant to pay it. It is agreed that the liability, if any, arises under the provisions of section 8 of the United Provinces Local Rates Act, 1914. It is further agreed that the appeal must succeed if clause (*a*) of section 8 does not apply to the present case. On the other hand, it is again agreed that the appeal must fail if that clause applies. Now, whether that clause applied or not depends upon the provisions of the United Provinces Local and Rural Police Rates Act, 1906, which Act was repealed by the United Provinces Local Rates Act, 1914. The question, therefore, for determination is whether, at the date of the commencement of the United Provinces Local Rates Act, 1914, the defendant was liable to pay Rural Police Rate under the repealed Act. Liability to pay such a Rate under the repealed Act arose only in cases which fell within the limits of section 14 of that Act. That section is as follows:—"The Rural Police Rate shall be recoverable wholly or in part by the landlord from an under-proprietor or permanent lessee who is bound by the law, decree or contract to provide wholly or in part for the maintenance of Rural Police." It is common ground that the defendant-appellant is not bound to provide wholly or in part for the maintenance of Rural Police either by any law or decree. The question, therefore, narrows itself to this: Whether he is bound so to provide under a contract. The Courts below have held that the defendant-appellant is liable by a contract. The only evidence in support of the finding at which the Courts below have concurrently arrived is contained in the *wajib-ul-arz* of the village. The history bearing on the legislation relating to the matter of Rural Police Rate is so exhaustively dealt with in the judgment of Mr., afterwards Sir, Edward Chamier in the case of *Kushari Din* v. *Rani Chandar Kuar* (1), that nothing remains to be

(1) 7 O. C. 35.

added to it. A preliminary observation with regard to the terms of section 14 must be made. "Contract" as used in that section must mean a contract between the landlord and the under-proprietor or permanent lessee, as the case may, and, further, it must mean a contract in its legal sense. It would be pedantic to quote several provisions of the Indian Contract Act to show the elements of a valid contract, but I take leave to say one thing any how. There must at least be two parties to a contract. The learned Judge from whose decree this appeal is preferred says that there were two parties in this sense that the Settlement Officer was the agent of the landlord who, according to the finding of the same learned Judge, was neither present nor otherwise represented at the time of the preparation of the *wajib-ul-arz*. The verification clause attached to this *wajib-ul-arz* which is before me also shows that the landlord or any person on his behalf took no part in the consummation of the proceedings relating to the preparation of the *wajib-ul-arz* or in the final act of its being perfected as a record of the matters mentioned therein. I am prepared to concede that a *wajib-ul-arz* may be a record of a contract, though generally it is treated as a record of custom founded either on the investigation made by the Settlement Officer or the opinions of the body of the proprietors of the village. Paragraph 11 of the *wajib-ul-arz* under consideration is relied upon in the present case as evidence of the alleged contract. I am unable to treat it as evidence of any contract whatsoever. As pointed out before, the landlord was no party to it and I am unable to agree with the learned Judge that the Settlement Officer acted as the agent of the landlord. This would be a very dangerous theory to set upon in the administration of civil justice and there is no precedent in any book that I am aware of for such a theory. Court is nobody's agent. It is a Tribunal to decide disputes between two parties and must, with a view to perform its functions justly and properly, act independently of any of the two parties engaged in a litigation before it. Nor do I find in that clause any ground for the suggestion that it is a record of a contract between the landlord and the under-proprietors. As it reads, it only records existing conditions of things. It states that the *chaukidar* who is mentioned therein by name is in possession of certain plots of land of which the area and the rental are also stated and then occur the words so *balastur pata rahega*. These words merely connote that the existing conditions of things will be maintained. This entry seems to me to be more consistent with the usage obtaining in the village with regard to the arrangement for the remuneration of the *chaukidar* than with a contract involving the elements of offer and acceptance by the under-proprietors and the landlord respectively.

The conclusion at which I have reached, that is, no contract is proved by which the defendant is bound to pay the Rural Police Rate, is supported by the conduct of the parties. When the repealed Act of 1906 was in force the defendant paid and the plaintiff accepted only as much local rates as represented rates other than Rural Police Rate and after the repeal of that Act and the passing of Act I of 1914 the defendant has paid only as much Rate to the plaintiff and the plaintiff has accepted as is covered by the first paragraph of section 8 of the last mentioned Act, that is to say, the payments have been so much in amount as would exclude the liability for Rural Police Rate. It is true that for two years, since the passing of Act I of 1914, there is a slight increase and Rs. 5 over the exact amount of rent of rate which would be payable under the first paragraph of section 8 of that Act. But it would be more reasonable to suppose that this increase is due to a mistake in calculations which are obviously complicated but had to be made with a view to determine the exact amount payable under paragraph 1 of section 8 than to presume that by payment of Rs. 5 and odd the defendant was accepting a liability for a sum of Rs. 51, per year. Be that as it may, the construction which I am placing on paragraph 11 of the *wajib-ul-arz* is, as I have shown above, strongly supported by the conduct of the parties. It is a well known rule of interpretation that in a case where there is any ambiguity in

the terms of a document there is no safer guide to come to a true construction than to see how the parties have acted under that document.

I, therefore, accept this appeal and modify the decrees of the Court below by reducing from the amount decreed by those Courts a sum of Rs. 153-12-0. In other respects the decree of the Courts below will stand. The appellant will be entitled to his costs in all three Courts in proportion to the success of his plea just now decided.

M. D. J.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, NO. 2774 OF 1922.
March 12, 1923.

Present:—Mr. Justice Moti Sagar.

KAPURA—PLAINTIFF—APPELLANT
versus
ARJAN SINGH—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 115—Contract Act (IX of 1872), s. 11—Specific Relief Act (I of 1877), s. 41—Contract by minor—Fraudulent misrepresentation—Estoppel—Restoration of benefit.

A plaintiff seeking to avoid a transaction on the ground that he entered into it during his minority is not estopped from setting up the plea of minority by reason of a fraudulent misrepresentation as to his age made by him at the time of entering into the transaction. [p. 269, col. 2.]

Mahomed Syedol Ariffin v. *Yeoh Ooi Gark*, 39 Ind. Cas 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678; 43 I. A. 256 (P. C.) and *Leslie Limited* v. *Sheill*, (1914) 3 K. B. 607; 83 L. J. K. B. 1145; 111 L. T. 106; 58 S. J. 453; 30 T. L R. 460, followed.

Wasinda Ram v. *Sita Ram*, 59 Ind. Cas. 393; 1 L. 389; 51 P. W. R. 1920, distinguished.

A plaintiff in such a case, however, cannot avoid the transaction without restoring the benefit received by him thereunder.

Second appeal from a decree of the District Judge, Ludhiana, dated the 1st April 1922, affirming that of the Munsif, First Class, Samrala, District Ludhiana, dated the 14th December 1921.

Mr. *Bishen Narain*, for the Appellant.

Mr. *Anant Ram*, for the Respondent.

JUDGMENT.—The plaintiff in this case, seeks to set aside a sale-deed executed by himself on the 7th of October 1919 in respect of certain lands at *Mauza* Sihala in the Samrala Tahsil of the Ludhiana District in favour of the defendant on the ground that he was a minor at the time the sale-deed was executed. Both the Courts below have concurrently found that the plaintiff was guilty of fraudulent misrepresentations as to his age at the time of the execution of the sale-deed, and that the defendant had been induced to enter into this transaction because of these false representations. It has accordingly been held that the plaintiff was estopped from setting up the plea of minority, and, as a result of this finding, his suit has been dismissed in its entirety.

The plaintiff has now come up in second appeal to this Court, and it has been contended on his behalf that the finding of the Courts below on the question of estoppel is erroneous. In my opinion, this contention is well-founded and must succeed. There is no doubt that in a recent case reported as *Wasinda Ram* v. *Sita Ram* (1) it has been laid down by a Division Bench of this Court that where an opposite party has been misled by false representations made by a minor, section 115 of the Evidence Act is applicable and that the plea of minority cannot be heard. The authority of this decision, however, is considerably shaken by two recent cases, one decided by their Lordships of the Privy Council and reported as *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2), and the other a decision of the King's Bench Division of the High Court of Justice in England and reported as *Leslie Limited* v. *Sheill* (3). I am doubtful if the learned Judges of this Court would have come

(1) 59 Ind. Cas. 393; 1 L. 389; 51 P. W. R. 1920.

(2) 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678; 43 I. A. 256 (P. C.).

(3) (1914) 3 K. B. 607; 83 L. J. K. B. 1145; 111 L. T. 106; 58 S. J. 453; 30 T. L. R. 460.

to the conclusion at which they did if their attention had been drawn to these two cases. Both these judgments clearly lay down that a case of fraudulent misrepresentation by a minor on the subject of his age cannot be given effect to, and that the plea of minority would prevail in spite of the minor's fraudulent misrepresentation. In *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2) their Lordships of the Privy Council observed :—"A case of fraud by the appellant on the subject of age was set up, but it cannot be doubted that the principle recently given effect to in the case of *Leslie Limited* v. *Sheill* (3) would apply, and such a case would fail." In the latter case the learned Judges of the King's Bench Division, while discussing the question of the non-applicability of the principle of estoppel in the case of a minor, observed :—"To do otherwise would be nothing but enforcing a void contract as it would be a simple thing for those who prey upon infants to obtain from them materials which could be used to support a charge of fraud quite as easy as obtaining the usual promissory-note. The result would be that the infant would have both to establish his infancy and to face a charge of fraud." In view of these authorities it is impossible to hold that section 115 of the Evidence Act is applicable or that minority cannot be successfully pleaded in this case.

The minor, however, in this case is the plaintiff and seeks to set aside the sale-deed without restoring the benefit that he has received thereunder. This he is clearly not entitled to do. As held in Civil Appeal No. 1451 of 1922 decided by me to-day, [*Kapura* v. *Hardit Singh* (4)] the plaintiff must restore the price before he can get back the property in suit.

I accordingly accept the appeal in part and give the plaintiff a decree for recovery of the property subject to his depositing in Court within three months of this date the sum of Rs. 400, the consideration entered in the sale-deed, for payment to the defendant. If he does so, the parties shall bear their own costs throughout; if not, his appeal will stand dismissed with costs.

Appeal partly allowed.

Z. K.

(4) 75 Ind. Cas. 261 (1923) A. I. R. (L.) 510

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 8 OF 1922.

May 2, 1923.

Present:—Mr. Justice Gokul Prasad.

Musammat BAKHSHI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HYDER KHAN—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 56—Cess—Amount payable by weavers for occupation of abadi *site, nature of*—Wajib-ul-arz, *entry in, effect of.*

The amount payable by the weavers of a village to the *zemindar* in respect of each handloom kept by them is in the nature of ground rent for the occupation of the site of the *abadi*. [p. 271, col. 1.]

Abdul Hai v. *Nathua*, 1 A. L. J. 537, followed.

The *wajib-ul-arz* of a village contained the following clause: "*Mohtarifa* is realised from *raiyats* carrying on profession according to the agreement and is taken into account of the village income." The *zemindar* of the village sued certain weavers to recover the amount payable by them under this clause in respect of certain handlooms kept by them;

Held, (1) that the suit was one for the recovery of ground rent for the occupation of the *abadi* site; [p. 271, col. 2.]

(2) that even if the amount sued for be regarded as a "cess" the clause in the *wajib-ul-arz* amounted to a sanction for realisation of the cess. [p. 271, col. 2.]

Second appeal against the decree of the District Judge, Moradabad, dated the 22nd of August 1921.

Mr. *Kashi Narain Malaviya*, for the Appellants.

JUDGMENT.—This is a defendants' appeal arising out of a suit by the plaintiff *zemindar* against the respondent for recovery of a certain amount as an artisan cess, as the plaintiff himself calls it in paragraph 2 of the plaint. The defendants are weavers and they have four handlooms. The plaintiff claims Re. 1 per handloom as artisan cess and says it is payable every year at the end of the month of June. He goes on to

say that some years ago there was a criminal case between the *zemindar* and weavers and since then all the weavers have formed a clique and stopped the payment of the artisan cess. The present suit was, therefore, brought for recovery of Rs. 66 as artisan cess from the 30th of June 1919. The contention of the defendants was that they were licensees of the *zemindars* and they settled long ago with the permission of the former *zemindars* without payment of any rent as artisan cess, and they constructed three houses and one loom house at their own cost; that neither they nor their predecessors in-title had ever paid any rent or cess, and that there was no such custom as was pleaded by the plaintiff; that the *zemindars* of the village had improperly decided to assess rent on the sites of the houses and this was the way they had found out for enforcing this illegal cess.

In the Trial Court the suit was tried out on the ground that it was a suit for ground rent and the learned Judge of the First Court came to the conclusion that the question of the defendants' liability to the plaintiff was concluded in the plaintiff's favour because of a decree passed in a previous suit between the predecessors-in-title of the parties to this suit and it accordingly decreed the plaintiff's claim.

The defendants went up in appeal and contested the finding of the First Court that the previous suit of 1866 was between the anscestors of the parties to this suit and operated as *res judicata*. They further pleaded that there was no proof of the receipt of artisan cess after the year 1866 and the suit was time barred. They also pleaded that no suit for artisan cess could lie without the sanction of the Government and that the custom set up by the plaintiff had been negatived. The learned Judge of the lower Appellate Court fixed an omnibus issue to the following effect. "Whether the appellant was liable to pay the rent claimed." He has found that the previous suit was between the predecessors-in-title of the parties to this suit and that the decree in that suit was for rent at Re. 1 per handloom. On the question of a suit being maintainable without the sanction of the Government he came to the conclusion that the amount was not a cess but ground rent which was realisable from such of the residents as were not cultivators and carried on some other occupation. He also went on to say "The *wajib-ul-arz* clearly records that *mohtarifa* was realised in this village." On these findings the learned Judge confirmed the decree of the First Court and dismissed the appeal.

The defendants come here in second appeal, and I have had the disadvantage of hearing this appeal *ex parte*, the respondent not being represented. I have looked at paragraph 12 of the *wajib-ul-arz* and the relevant portion runs thus : "*Mohtarifa* is realised from *raiyats* carrying on profession according to the agreement, and is taken into account of the village income." This entry in the *wajib-ul-arz* of 1869 supports the plaintiff's case and, in my opinion, amounts to a sanction for realisation of this item, even if it comes within the meaning of the word 'cess'. I hold, however, in accordance with the view taken in the case of *Abdul Hai* v. *Nathua* (1), that this is not really a cess. Whatever the parties might choose to call it, it is really ground rent charged from the various artisans in the village according to the number of handlooms they have kept and is really a ground rent for the occupation of the site of the *abadi*. I accordingly confirm the decree of the Court below and dismiss this appeal but without costs as the respondent is not represented.

Z. K.

Appeal dismissed.

(1) 1 A. L. J. 537.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL NO. 136/83 OF 1921.

August 29, 1923.

Present:—Mr. Pipon, J. C.

AHMADJI KHAN—PLAINTIFF—APPELLANT

versus

GULMIR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 22—

AHMADJI KHAN *v.* GULMIR.

Price fixed or paid in good faith, proof of—Onus—*Payment, meaning of*—*Market-value, method of determining*—*Test.*

The *onus* of proving that the consideration for a pre-emptible sale entered in the sale-deed was fixed and paid in good faith, rests solely upon the vendee and it rests upon him from the very outset and not by reason of the burden having shifted by evidence, slight or otherwise, produced by the pre-emptor. [p. 274, col. 2.]

Gulab v. *Ram Singh*, 102 P. R. 1890, followed.

The word "payment" means more than a public transfer of cash from hand to hand. A genuine payment implies that this transfer is permanent and real and that the vendor is really parting with and the vendee really acquiring something of value. [p. 276, col. 1.]

A reference to record sales is a very unsatisfactory method of determining market-value and the results of such a calculation should be regarded with the utmost caution. [p. 277, col. 2.]

A calculation based on an actually existing lease is certainly one of the best methods which can be adopted for calculating the market-value of the leased property. [p. 278, col. 1.]

The price proved actually to have been paid is the best test of market-value. [p. 278, col. 1.]

Further civil appeal from the judgment and decree passed by the Divisional Judge, Peshawar, dated the 30th August 1921, modifying the decree passed by the District Judge, Peshawar, dated the 31st May 1921.

Mr. *Saad-ud-din*, K. B., for the Appellant.

Mehta *Mangal Sain* and Mian *Zia ud-din*, for the Respondent.

JUDGMENT.—The material facts of this case are these. On the 7th of February 1920 Sherdil, a proprietor in Takhtabad Awal, a village situated in the Daudzai tract, in the Peshawar Tahsil, executed a sale-deed by which he transferred an area of 634 *kanals* and 5-12th of the *mianas* or houses connected with the whole estate to two vendees Gulmir and Saiyid Manawar Shah for the ostensible sum of Rs. 10,000. The joint vendees are shown to have been contractors in partnership. Gulmir is a Kukikhel Afridi, living in the transborder tract adjoining the Peshawar District, and Saiyid Manawar Shah is a contractor of Wadpaga near Peshawar City. The sale-deed was registered on the 16th of February 1920 and on that day a sum of Rs. 10,000 was actually paid over in cash by the vendees to the vendor in presence of the Sub-Registrar of Peshawar. The present suit, which was instituted on the 14th February 1921, is lodged by Ahmadji Khan, one of the proprietary body of Takhtabad, to pre-empt the sale on payment of Rs. 6,500. The right of the plaintiff to pre-empt is not denied. The pre-emptor claims that the ostensible consideration, Rs. 10,000, was not fixed in good faith, but was recorded merely to defeat pre-emption. He alleges also that it was not paid in good faith, inasmuch as a sum of Rs. 3,500 was immediately returned to the vendees and that the balance of Rs. 6,500 was all that actually changed hands. He claims, under section 22 of Act II of 1905, on the ground that the ostensible price was not fixed or paid in good faith, to pre-empt at the market-value, and he claims, following judicial precedents, that the best test of this market-value and that which should override all other considerations, is the amount proved to have been actually fixed and actually paid between the parties to the transaction. The contention that Rs. 3,500 were immediately returned to the vendees, rests mainly upon the fact that on the same day that the sale was executed, a bond was executed by two relatives of the vendor in favour of Gulmir, one of the vendees. It is alleged that this bond was for Rs. 3,500, and that its execution represented a guarantee that the vendor would be obliged to return that sum of money to the vendees immediately after registration. The bond in question has not been produced, and it is sought to be proved by the production of the deed-writer's register. The Trial Court held that Rs. 3,500 had been returned by the vendor to the vendees, and granted the plaintiff a decree for pre-emption on payment of Rs. 6,500. The Divisional Court on appeal held that the ostensible consideration of Rs. 10,000 represented approximately the market-value of the land, the *Patwari* having shown that on the average of five years recorded sales the market-value would be Rs. 10,651; that there was nothing to show that Rs. 3,500 had been returned to the vendees, and that the sum of Rs. 10,000 must be treated as having been both fixed and paid in good faith. It, therefore, granted the plaintiff a decree for pre-emption on payment of Rs. 10,000. The plaintiff appeals to this Court.

I have heard Counsel at considerable length upon the issues involved in this case, and I consider that it is one which has a certain importance as a precedent. There are two questions involved in which I consider that the learned Divisional Judge has not truly appreciated the method in which such suits should be dealt with. The first question is whether, in dealing with a registered sale-deed of this nature, the *onus* of proving that the consideration entered in the deed was not fixed and not paid in good faith rests upon the plaintiff pre-emptor, or whether it is for the vendee in the first instance to show that the ostensible consideration was fixed in good faith and that it was actually paid. There has undoubtedly been a certain conflict of opinion between Judicial Authorities on this subject, or there has been, perhaps, less a conflict of opinion than a variation in the manner in which such transactions are regarded. The course of judicial rulings on this subject is dealt with on pages 377, 378 and 379 of Mr. Ellis's Law of Pre-emption in the Punjab, 4th Edition. One of the earliest rulings on this subject was that passed in 1864 (W. R. January—July 1864, page 304) [*Sheikh Mahomed Noorul Hossein* v. *Sheikh Hyder Buksh* (1)] which laid down very definitely that, where a party claiming a right of pre-emption impugns the correctness of the price stated in the deed of sale, the *onus probandi* is on him to show that the property had in fact been sold below the stated price. The High Court of Allahabad dissented from this ruling in a number of subsequent judgments on the ground that the principle had been stated in too unqualified terms. The tendency of the learned Judges of that High Court was to regard the *onus* as resting upon the plaintiff in the first instance, but resting, one might say, in a very light degree. It appears to have been an accepted principle that very slight evidence was ordinarily sufficient to shift the *onus* from the pre-emptor to the vendee. On the other hand, the principle was affirmed again in another ruling that, *prima facie*, the consideration in the sale-deed is to be taken as the true consideration [*Bhagwan Singh* v. *Mahabir Singh* (2), *Sheopargash Dube* v. *Dhanraj Dube* (3), *Tawakkul Rai* v. *Lachman Rai* (4), *Agur Singh* v *Raghuraj Singh* (5) and *Abdul Majid* v. *Amoluk* (6)]. As against these rulings, there is a well known and important judgment, published as *Gulab* v. *Ram Singh* (7), which appears to me to deal with the situation from an aspect which has been frequently overlooked. In that judgment Sir Meredyth Plowden remarked, "It is evidently desirable to place the question of burden of proof on a sound footing. The price entered in a deed of sale whether registered or not, is no evidence whatever as between a pre-emptor and the vendee that that price was paid. It is some evidence between the vendor and the vendee who are parties to the deed, but the pre-emptor is a stranger. The particular fact whether the price so entered was paid is a fact especially within the knowledge of the vendee, and when the suit goes into Court, the vendee is the person who wishes the Court to believe in its existence and, consequently, under sections 103 and 106 of the Evidence Act the burden of proving that the price entered was paid lies upon the vendee as against the pre-emptor. The rule of law is perfectly rational and just in reference to pre-emption cases". In other words, this ruling seems almost to stand alone in recognizing the fact that the pre-emptor is no party whatever to the execution of the deed, and that he cannot be prejudiced by statements which were made by persons beyond his control and who may even be regarded as potentially hostile to him. There is yet another aspect of the case which, in my opinion, cannot possibly be overlooked by Courts of Law. The Law of Pre-emption has now been in force for a number of years, and in districts, such as the Peshawar District, where pre-emption cases are extremely common and may be

(1) W. R. 1864, 304.

(2) 5 A. 184; A. W. N. (1882) 213; 3 Ind. Dec. (N. S.) 154.

(3) 9 A. 225; A. W. N. (1887) 39; 5 Ind. Dec. (N. S.) 584.

(4) 6 A. 344; A. W. N. (1884) 110; 4 Ind. Dec. (N. S.) 23.

(5) 9 A. 471; A. W. N. (1887) 95; 5 Ind. Dec. (N. S.) 751.

(6) 29 A. 618; 4 A. L. J. 531; A. W. N. (1907) 202.

(7) 102 P. R. 1890.

numbered by tens of thousands, it may almost be said that no deed of sale of pre-emptible property is ever drawn up without some eye to a possible suit of pre-emption. No doubt, this situation has been created gradually, and it is only in recent years that the cumulative effect of considerations of this nature has become crystallized into a universal custom. But it would be idle any longer to attempt to overlook the fact that such a custom now exists. I cannot help feeling that Courts in this Province are failing to face the position with that directness which is really required, possibly because it can hardly be stated in its crudest form without some unpalatable reflection upon the character of the public concerned and of the situation which has been created by the existence of the law. Indeed the custom of protecting sales from pre-emption by multifarious devices has been to some extent encouraged by judicial pronouncements. It has been laid down from time to time, for instance, that the pre-emptive right is an onerous right "which may be defeated by all lawful means." It would be superfluous to discuss here a theory which doubtless attempts to express a legitimate view, but which is to a large extent a truism. It might be said that any thing *can* be lawfully defeated if the means employed are themselves lawful. Any theories or conflicts of view upon this question are beside the question. At the most they relate only to the respective qualities of the plaintiff and the vendee, and the creation, existence, or disappearance of the right to pre-empt. They have no bearing upon the simple question of fact as to whether an ostensible price has been "fixed or paid in good faith." The Act contemplates that the pre-emptor may decline to recognise a price not so fixed or paid, and no mere device or misrepresentation, however "lawful," can deprive him of this statutory right. If such devices are shown to be universally employed, where other means of defeating pre-emption are not available, it is only logical to throw the *onus* of proving good faith upon the person in whose particular knowledge it lies. There are recorded rulings of this Court which appear to me to give some colour to the attitude ordinarily adopted by Courts. For instance, in a published ruling of this Court, J. R. 92 of 1917, my learned predecessor remarked, "At the same time, I fully endorse the Additional Divisional Judge's view that, where *mala fides* is alleged, it lies on the person who makes the allegation to establish it. Thus, if the plaintiff in a pre-emption suit alleges that the price was not paid and fixed in good faith, he should be called upon to prove this." I confess that I can only dissent from this view. It appears to me to overlook the very just exposition of the law which was laid down by Sir Meredyth Plowden in *Gulab* v. *Ram Singh* (7) and it also overlooks the universal existence of the custom to which I have alluded above. In other words, I must state definitely my opinion that the *onus* of proving that the consideration for a pre-emptible sale entered in the sale-deed was fixed and paid in good faith, rests solely upon the vendee, and that it rests upon him from the very outset and not by reason of the burden having shifted by evidence, slight or otherwise, produced by the pre-emptor.

The other question which I have alluded to as important, and which I think, has been at least partially overlooked by the learned Divisional Judge, is the proper method of ascertaining the market-value of land. Courts in this Province have been long accustomed to adopt the routine method of calculating this price upon the average of five yearly sales. Six methods of determining the market-value are given in section 27 of the newer Punjab Act I of 1913 (which, though not in force in this Province, may well be taken as a guide based upon long experience), and it may be remarked that a computation by prices realized in previous sales is the 6th or last of these methods. What appears consistently to have been overlooked is that practically every one of the recorded sales, upon which such calculation is based, is vitiated by exactly the same considerations as have vitiated the transaction in suit. If the fact be faced that the custom of inflating the ostensible price in pre-emptible sales is extremely common, we are really dealing with nothing more

than a record in which many prices have been so inflated. This was recognized by the Punjab Chief Court as long ago as in 1898 (vide *Ramsukh Das* v. *Fazl-ud-din* (8). The market-value of land in pre-emption suits is usually relevant in two ways. It is relevant in the first instance simply as evidence as to whether a certain price has or has not been fixed in good faith. It is also relevant, when that price cannot be accurately determined, as showing the price at which the Court shall decree pre-emption. I may remark that in his judgment the learned Divisional Judge has devoted very little attention to the accuracy of the market-value. He has noticed, in passing, that the market-value, as brought out by the *Patwari's* calculation, is over Rs. 10,000, but he has treated this fact as of minor importance in view of the finding that Rs. 10,000 was the price actually paid. Now, in determining what price was actually paid, the market-value must always be not conclusive, but certainly important evidence. It is, therefore, to some extent to argue in a circle to use a market value, ascertained by any means, as evidence of the price actually paid and then to pass by the question of market-value as one of little importance in view of the finding that the same sum was actually paid. I say that this is, to some extent, arguing in a circle because the finding that the full sum was actually paid was necessarily influenced by the assumption that that sum approximately represented the market-value.

It is now possible to deal with the issue in the present case as to whether Rs. 10,000 were fixed and paid in good faith as consideration for the sale. The *onus*, as I have shown, rests initially upon the vendee. Further, it rests more heavily upon him, when, as in the present case, there were no other means of defeating pre-emption. It is clear that not only was the sale pre-emptible, but that a suit for pre-emption must have been anticipated or at least its possibility recognised. I have been shown another case where the same vendee Gulmir attempted to defeat pre-emption by putting up Ghulam Haidar as vendee and taking a mortgage from the latter. Pre-emption was, however, decreed to one *Musammat* Rakhmania, the transaction being held collusive. It is objected that this transaction was subsequent to the sale now in suit, but, as a matter of fact, it was only a few days later, and I consider that it is evidence to show the position of Gulmir at least as a vendee whose intrusion was prevented and had to be protected by some device. One might have expected to find in the present case some attempt to protect the sale by manoeuvres such as mentioned above or by some alleged agreement by way of waiver of pre-emptive right. The vendee, however, had no other means actually available except inflation of price. He has, therefore, to discharge to the full the *onus* of proving that it was fixed and paid in good faith.

He seeks to discharge it in the first instance by the recital of the consideration in the sale-deed and by the fact that Rs. 10,000 undoubtedly changed hands in the presence of the Sub-Registrar. The recital in the sale-deed is, as has been shown at some length above, of no practical value and does not in itself shift the *onus*. The payment of cash before the Sub-Registrar is important. But here again we are confronted with a situation arising in the first instance from judicial rulings and gradually crystallized by custom. In the ruling of the Punjab Chief Court quoted above [*Gulab* v. *Ram Singh* (7)] that portion of the price which had been paid in cash before the Sub-Registrar was alone accepted as valid, the alleged private payments being ruled out. It has been argued, with some justice, by the learned Counsel for the appellant, that the judgment in question was largely responsible for the practice which long obtained both in the Punjab and in this Province, of regarding payment before the Sub-Registrar as conclusive. Unfortunately, however, a rule of thumb method of ascertaining facts is inevitably exploited, and there can be no possible doubt that the public have adjusted their methods in order to profit by what is

(8) 19 P. R. 1898.

believed to be the attitude of the Courts. Cases too numerous to mention have come to notice in which among various items composing consideration, that of payment made before the Sub-Registrar is not the least but the most open to suspicion. The word "payment" means more than a public transfer of cash from hand to hand. A genuine payment implies that this transfer is permanent and real, and that the vendor is really parting with and the vendee really acquiring something of value. When both parties collude to disguise a transaction, the physical manoeuvre of passing coins from one hand to the other is a device to transparently easy to be a conclusive test of payment. The view that the test is conclusive is usually based on the argument that it raises a presumption which can only be defeated by the pre-emptor proving to the hilt that a particular sum was subsequently re-paid to the vendee. Now, it is obvious that the pre-emptor cannot possibly produce direct evidence of a secret transaction to which he was no party and in which precautions were taken to avoid his knowing of it. In other words, to regard the transfer of cash before the Sub-Registrar in this manner is merely to make such transfer a conclusive test. In my opinion, a presumption of genuine payment certainly arises, but arises purely from one fact, and that is that the vendee would not risk letting a large sum of cash remain even temporarily with a person not entitled to it unless he had some guarantee that he would get it back again. The pre-emptor, therefore, can rebut the presumption, if he can show, not necessarily that the sum was re-paid (a fact beyond the possibility of his knowledge) but that some guarantee existed which would be sufficient to enforce re-payment. This is what he attempts to do in the present case. He alleges that two near relatives of the vendor, Alam Khan and Dilawar, executed, simultaneously with the deed of sale, a bond for Rs. 3,500 in favour of one of the vendees Gulmir, the possession of which enabled the vendees to force the vendor to return to them a similar sum. The bond itself is not forthcoming, and in this connection it is important to notice that Alam Khan and Dilawar are, from the evidence, clearly endeavouring to support the vendee. The vendor, on the other hand, sides with the pre-emptor. The vendee eventually admitted that a bond was executed by Alam Khan and Dilawar in his favour on the same day as the sale. The bond was written by the writer of the sale-deed, and witnessed by the same persons. It is entered in the deed-writer's register but the amount is there shown as Rs. 1,500. On the other hand, the deed-stamp is Rs. 15 sufficient for a bond of Rs. 3,000 but not for one of Rs. 3,500. The serial numbers of the bond and sale-deed are Nos. 106 and 107. The period for re-payment of the loan advanced on the bond was apparently a week Now, the most suspicious feature of the transaction relating to the bond is the attitude adopted by the vendee himself. It was only after considerable prevarication that he admitted that the bond had been executed at all. He then said that he did not remember for what amount it was executed, but that the money had been certainly re-paid and the bond returned to the executants. He admitted that the money had been advanced from the joint funds belonging to the firm in which he and the co-vendee Manawar Shah were partners. He said, however, that he could not produce the accounts in question as they had been destroyed on dissolution. The evidence of Alam Khan on the subject shows clearly that he is on the side of the vendees and that he is endeavouring to assist them. Nevertheless, he admits that the bond was for Rs. 3,500, but says that only Rs. 3,000 were obtained under it. He puts forward the rather belated explanation that the money was raised by him and Dilawar Khan for the purpose of purchasing some land from one Ghulam Rasul. It has been shown that the latter sale took place on the 3rd of March 1920, about a fortnight after the bond was executed, and Rs. 2,500 were paid before the Sub-Registrar. At the same time, this explanation is most unconvincing. If the money was really raised for the sale, it is difficult to see how it could have been re-paid either before or almost simultaneously with the sale, and the whole story has to me the appearance

of an afterthought which was not put forward by the vendee Gulmir in the first instance. I am forced to the conclusion that this bond was inseparably connected with the sale now in suit, and that a deliberate atttempt was made to conceal its existence in the first instance, because it was realized that it might disclose the real facts of the transaction between the parties. The vendee has chosen to say that he cannot even recollect the amount covered by this bond. As it was written on a stamp of Rs. 15 in value, there is a strong presumption, even as against the entry in the deed-writer's register, that it was actually for Rs. 3,000. We also have the very important admission of Alam Khan, who is nevertheless seeking to support the vendee, that the amount paid under it was Rs. 3,000. I am afraid that I cannot agree with the learned Divisional Judge where he remarks, "The executers of the bond are distant connections of the vendor. Dilawar is the son of his maternal aunt and Alam Khan is his maternal uncle. There is no reason to suppose that they had any sufficient motive to make themselves a party to a fraud to defeat pre-emptors." Devices of this kind are unfortunately too common to be regarded as frauds which the relatives of parties to a pre-emptible sale would hesitate to perpetrate. There is nothing in the least improbable in Alam Khan and Dilawar having colluded with the vendor and vendees to give a guarantee that a certain portion of the ostensible price should be immediately refunded. I can only regard the facts connected with this bond as raising a strong presumption that Rs. 3,000 out of the sale-money were intended to be immediately re-transferred by the vendees to the vendor; that it formed a guarantee for this transaction, and that the guarantee was duly acted upon.

But even the above presumption might be rebutted if the vendees were able to show that the sum of Rs. 10,000 represented, nevertheless, a price not inconsistent with the market-value of the land. They are perfectly entitled to show this and even to contend that any excess over the market-value represented a "fancy price" which they were ready to pay for personal reasons. The validity of fancy prices has been recognized by Judicial Authority, and we are not dealing at this stage with the question of market-value as determining the price of pre-emption, but its bearing upon the question of what sum actually changed hands as the price of the transaction. Now, I have already alluded to the unsatisfactory nature of determining market-value merely by a reference to recorded sales. I consider that Courts should regard the results of such a calculation with the utmost caution. We have, in the present case, one excellent test of market-value which appears to have been entirely overlooked by the Divisional Judge. The property in suit was admittedly leased for a period of 5 years for Rs. 250 per annum by a deed dated the 20th of January 1919. When the present sale was concluded, this lease had still four years to run. To capitalize the value of a lease, 16 years' purchase was taken on one occasion by the Allahabad High Court. Cases have been before the present Court in which 20 years' purchase has been taken as a guide. The latter calculation is in most cases undoubtedly too high, as it assumes that a vendee will only get a return of 5 per cent. on his outlay. We may reasonably take into account, however, the increase in the value of land, and the anxiety of the vendees to acquire it. To assume that the value has doubled since 1919 would certainly be to exaggerate the enhancement of values. It must, further, be remembered that when the sale was effected, the lease had still four years to run, and that, if the vendees really paid Rs. 10,000 for it, they would be getting at least for four years the wholly inadequate return of 2½ per cent. on their outlay. The vendees, one of whom is a contractor of Peshawar City, would not have had the least difficulty, as a matter of fact, in investing their money on perfectly reasonable security at as high interest as 12 per cent. It seems to me, therefore, practically impossible that they could have paid Rs. 10,000. In arriving at the market-value, we may go as far as to assume that the annual income expected from the land has risen from Rs. 250 per mensem to Rs. 500 per annum. Following the most reasonable basis of calculation which has

been adopted in such cases, a capitalized value of 16 years' purchase may reasonably be taken. This would imply a market-value of Rs. 8,000. But as against this, the fact must be set off that the vendees could not for four years obtain more than 250 per annum. So far, therefore, as this method of calculation is concerned, the approximate market-value would be about Rs. 7,000.

A calculation based on an actually existing lease is certainly one of the best methods which can be adopted. A calculation on the basis of land revenue may, however, be also legitimately considered. The revenue assessed on the land in suit is Rs. 86-3-9. Various ratios between land revenue and market-value have been adopted from time to time by the Chief Court of the Punjab. In 1901 65 to 72 times the revenue was taken as a basis. Since then a proportion of 80 or 90 times was taken in 1908, 100 times in 1912, and 199 times in 1920. I believe, as shown by other cases which have been before this Court, that the latter calculation is not a safe guide for the North-West Frontier Province. A hundred times the revenue may not be far short of the mark. This would make the value Rs. 8,600. But the fact must, again, be taken into account that the land was encumbered with a lease which had still four years to run, and I am, again, forced to the conclusion that Rs. 7,000 was in excess, rather than in defect of the market-value. I consider, therefore, that the vendees have by no means succeeded in rebutting the presumption raised by the existence of the bond alluded to above that Rs. 7,000 was the sum which actually and permanently changed hands.

When it has once been found that the price was not fixed or paid in good faith, the Court has to decree pre-emption at the market price. I agree, however, with the view taken by the Divisional Judge, and it is one which is supported by a consensus of Judicial Authority that the price proved actually to have been paid is the best test of market-value. As I have held that the price paid was Rs. 7,600, this sum will be taken as the market value on which pre-emption is to be decreed.

On the above findings I accept this appeal to the extent that the price for pre-emption be reduced from Rs. 10,000 to Rs. 7,000. The plaintiff sued to pre-empt for Rs. 6,000, and it would be inequitable to grant him costs on more than the above sum. The defendants-vendees will pay the plaintiff's costs in the Courts below upon a sum of Rs. 6,500, and in the present appeal upon Rs. 3,000.

K. S. D. *Appeal accepted.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 3, 1921.

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

KSHETRABASHI MAHANTI—DEFENDANT—APPELLANT

versus

RATNAKAR MAHAPATRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 174—Orissa Division—Sale for arrears of rent—S. 174, applicability of.

The provisions of section 174 of the Bengal Tenancy Act apply to the sale of a holding for arrears of rent in Orissa.

In Orissa, section 174 of the Bengal Tenancy Act applies to suits that originate in the Civil Court as well as to those that originate in the Collector's Court under the law as it stood in Orissa before the section was there introduced.

Bathal Parida v. *Jogendra Nath Bose*, 11 Ind. Cas. 239; 14 C. L. J. 168; 16 C. W. N. 511, approved.

Appeal from the Calcutta High Court.

JUDGMENT.

Lord Dunedin.—On the 12th January 1907, a person got a decree for arrears in respect of rents of lands in Orissa. In respect of that decree, the lands were sold on the 27th June 1907 and on the 27th September 1907 the father of the appellant, whom he now represents, was declared the purchaser. Within thirty days thereafter, the judgment-debtor deposited the full sum and costs and accordingly on the 23rd December 1907, the sale was set aside under the terms of section 174 of the Bengal Tenancy Act of 1885. Against that setting aside an appeal was taken to the Collector, who reversed the judgment of the Deputy Collector and confirmed the sale. An appeal from his decision was taken to the Commissioner, who, on the 15th

July 1908, upheld the decision of the Collector, and on the 16th February 1909, a sale certificate was granted. On the 26th May 1909, the present suit was raised in the Civil Court by the judgment-debtor, and the Subordinate Judge, taking the same view as the Commissioner had taken, by his decree dismissed the suit. An appeal was taken to the Calcutta High Court, and the Calcutta High Court dealt with it as follows:—

"The point as to whether section 174 of the Bengal Tenancy Act applies to sale of a holding in Orissa is concluded by authority in the case of *Baikal Parida* v. *Jogendra Nath Bose* (1), decided in this Court." And they accordingly reversed the decree of the Subordinate Judge. An appeal has now been taken to His Majesty in Council against the decree of the High Court. It is, therefore, practically an appeal against the judgment in the case just cited. The whole point is this. The Bengal Tenancy Act, as originally passed, by section 1 (3) did not apply to the Division of Orissa; but by section 2 (2) it was contemplated that it might be eventually extended to Orissa, and it is there enacted:—

"When this Act is extended to the Division of Orisa or any part thereof, such of those enactments as are in force in that Division or part, or, where a portion only of this Act is so extended, so much of them as is inconsistent with that portion, shall be repealed in that Division or part." Besides that there is a general repealing section. In this section Act VIII of 1865 is not included among the Acts repealed. The Bengal Tenancy Act was extended to Orissa by order published in the *Calcutta Gazette* on 9th January 1907.

Section 174 of that Act deals with applications to set aside a sale. It says:—

"Where a tenure or holding is sold for an arrear of rent due thereon, then, at any time within thirty days from the date of sale, the judgment-debtor may apply to have the sale set aside, on his depositing in Court,.....the amount recoverable under the decree" and so on. Then it provides that there shall be an order setting aside the sale. It is quite obvious that those words apply to the facts in this case, because the amount was deposited within thirty days of the sale. The sale being in June 1907 was after the extension to Orissa of the Bengal Tenancy Act. Accordingly, the whole argument really turns on this: that section 174 can only apply to suits that originate in the Civil Court, and cannot apply to suits that originate in the Collector's Court under the law as it stood in Orissa before this section was introduced. Under the law as it stood in Orissa under Act VIII of 1865—the sections need not be gone through, because the result of them can be given quite shortly—the period is eight days for setting aside a sale like this instead of thirty.

The matter was dealt with by the Calcutta High Court in the judgment already cited. They say at page 312 of XVI Calcutta Weekly Notes [*Baikal Parida* v. *Jogendra Nath Bose* (1)] :—

"It has been argued that if the intention of the Legislature was that the extension of any portion of the Bengal Tenancy Act would by implication operate as a repeal of the provisions of Act VIII of 1865 (B. C.), mention would have been made of the latter Act in the First Schedule. In our opinion there is no force in this contention." Then they go on to say it would be meaningless to hold that section 174 of the Bengal Tenancy Act has been extended to the Division of Orissa, but that it has no application to a sale held there under that Act. Their Lordships think that is plain common sense, and that to hold that section 174 did not apply would really be to render the legislation meaningless.

They will, therefore, humbly advise His Majesty to dismiss the present appeal with costs; but they add that, inasmuch as it has been represented to them that the purchase-money has not been returned, nothing that they are here saying must be understood as in any way preventing an application to the proper Court in India for the return of the purchase-money.

Solicitor for the Appellant:—Mr. *E. Dalgado.*

W. C. A. & N. H. *Appeal dismissed.*

(1) 11 Ind. Cas. 239; 14 C. L. J. 168; 16 C. W. N. 311.

ADYA SARAN *v.* KALI CHARAN.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 137 OF 1922.

April 25, 1923.

Present:—Mr. Justice Piggott.

B. ADYA SARAN—PLAINTIFF—APPLICANT

versus

KALI CHARAN AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Agra Tenancy Act (II of 1901), s. 167—Suit cognisable by Revenue Court—Appeal—Revision—High Court, power of.

The High Court has, by virtue of the provision contained in section 167 of the Agra Tenancy Act, no jurisdiction to entertain a revision petition against the order of a District Judge refusing to entertain an appeal against a decree of an Assistant Collector in a suit of the nature specified in the Fourth Schedule of the Act.

Parbhu Narain Singh v. *Harbans Lal*, 35 Ind. Cas. 279; 14 A. L. J. 281 at pp. 291, 292, *Jumna Prasad* v. *Karan Singh*, 46 Ind. Cas. 338; 41 A. 281 16 A. L. J. 859 and *Gaj Kumar Chander* v. *Syed Salamat Ali*, 52 Ind. Cas. 756; 42 A. 83; 17 A. L. J. 1057; 1 U. P. L. R. (A.) 142, followed.

Kesho Das v. *Morat Pandey*, 23 Ind. Cas. 320; 12 A. L. J. 367, distinguished.

Civil revision from an order of the District Judge, Cawnpore, dated the 19th of July 1922.

Mr. *U. S. Bajpai*, for the Applicant.

Mr. *N. P. Asthana*, for the Opposite Parties.

JUDGMENT.—This is an application in revision against an order by which the District Judge of Cawnpore refused to entertain a petition of appeal presented to him against the decree of an Assistant Collector in what was beyond question a suit under the Local Tenancy Act, II of 1901. The suit, as originally brought, was a suit of the description covered by Serial No. 36, group C, of the Fourth Schedule to the said enactment and under the provisions of sections 150 and 154 of the said Act. It is possibly an arguable point whether the particular decree against which the petition of appeal was presented in the Court of the District Judge, was really a decree in the suit as originally instituted, or whether it could be treated as a decree in a separate suit or proceeding which had arisen out of the former one and fell under the purview of Serial No. 38 of group C of the Schedule already mentioned, being governed by the provisions of section 150/158 of the Tenancy Act. In any event, the petition of appeal to the District Judge invited him to take cognizance "in the way of appeal," within the meaning of section 167 of the Local Tenancy Act, II of 1901, of a matter in respect of which a suit of the nature specified in the Fourth Schedule of the Act, not only might have been brought, but had actually been brought. The District Judge held that the provisions of section 177 of the aforesaid Tenancy Act, II of 1901 did not give him jurisdiction to entertain the appeal.

The application before me is in revision against an order returning the petition of appeal which followed upon the above mentioned decision.

A preliminary objection is taken that this Court has no jurisdiction to take cognizance of this matter by way of a petition of revision. I stand committed to the view that the cognizance of this Court is barred by section 167 of the Local Tenancy Act already referred to. I gave my reasons for this conclusion in the case of *Parbhu Narain Singh* v. *Harbans Lal* (1). My view was subsequently adopted by another learned Judge of this Court in a decision which has found its way into the authorised reports, *vide Jumna Prasad* v. *Karan Singh* (2). On the other side my attention has been drawn to a number of instances in which this Court has assumed jurisdiction to interfere in revision with orders such as the one now before me. Most of these cases are unreported and I do not find any of them in the authorised reports. I am, however, referred to the case of *Kesho Das* v. *Morat Pandey* (3). The jurisdiction of this Court to interfere in revision was, in this and in similar cases, taken for granted, but not judicially affirmed upon objection raised. In this state of the authorities I might have felt disposed to refer the question of jurisdiction to a Bench of two Judges, but I find that this has already been done. The case of *Gaj Kumar Chander* v. *Syed Salamat Ali* (4) is one in which the question of principle, about which another learned Judge of this Court had dissented from me in *Parbhu Narain's case* (1) was expressly referred to a Bench of two Judges for de-

(1) 35 Ind. Cas. 279; 14 A. L. J. 281 at pp. 291, 292.

(2) 46 Ind. Cas. 338; 41 A. 281; 16 A. L. J. 859.

(3) 23 Ind. Cas. 320; 12 A. L. J. 367.

(4) 52 Ind. Cas. 756; 42 A. 83; 17 A. L. J. 1057; 1 U. P. L. R. (A.) 142.

termination. The learned Judges have in terms adopted the view affirmed by me in *Parbhu Nara n's case* (1). I feel bound, therefore, to hold that the question of the entertainability of this application is concluded by authority. I hold that it is not entertainable and on this ground dismiss it with costs.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1244, 1245, 1247, 1248, 1249, 1281, 1322 AND 1323 OF 1919.

August 2, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

IN APPEAL NO. 1244 OF 1919.

Shaikh JABEDALI AND OTHERS—DEFENDANTS NOS. 1, 9, 10 AND 11—APPELLANTS

versus

PRASANNA KUMAR NAG AND ANOTHER—PLAINTIFFS—AND OTHERS—DEFENDANTS NOS. 2, 4, 5, 6, 7, 8 AND 12—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 43, applicability of—Sale by Hindu widow as owner—Sale-deed signed by sons—Sons, whether bound—Hindu Law—Widow, transfer by—Transfer void or voidable.

A Hindu widow having only a limited estate transferred as owner certain property of her deceased husband. The document of transfer was also signed by her two major sons. In a suit challenging the sale after the death of the widow the transferee urged that, even if the sale by the widow was void, he acquired under section 43 of the Transfer of Property Act title to the shares of the sons who had signed the document:

Held, that, inasmuch as the sons did not make any erroneous representation and did not profess to transfer, the section in question did not apply and the transferee did not acquire any title *qua* their shares.

A transfer by a Hindu widow having a limited interest is not void but voidable at the hands of the reversioners and no body except the said reversioners or persons claiming through them has any right to question the validity of the transfer.

Appeals against the decrees of the Subordinate Judge, Second Court, Mymensingh, dated the 10th of March 1919, modifying and affirming those of the Munsif, Second Court, Tangail, dated the 8th of December 1917.

Babus *Dawarka Nath Chukrabutty* and *Tarakeswar Pal Chowdhury*, for the Appellants in Nos. 1244, 1245, 1247, 1248 and 1249 and for the Respondents in Nos. 1281, 1322 and 1323.

Babus *Mohendra Nath Roy*, *Surendra Nath Ghosal* and *Haripada Ghose*, for the Respondents in Nos. 1244, 1245, 1247, 1248 and 1249 and for the Appellants in Nos. 1281, 1322 and 1323.

JUDGMENT.

Walmsley, J.—The plaintiffs in the suits from which these appeals arise are Prasanna Kumar and Chandra Kumar, sons of the late Krishna Kumar Nag; they instituted five suits, two of them relating to land situated in *Mouza* Balina, three relating to land situated in *Mouza*, Dubail. In the first Court they won in the two suits relating to *Mouza* Balina while they lost the other three. That decision gave rise to five appeals, three by the plaintiffs, and two by the defendants. In the lower Appellate Court, the defendants' appeals were dismissed, and the plaintiffs' appeals decreed almost in full.

There are now eight appeals before us. Three are preferred by the plaintiffs, and they are in respect of that part of their claim regarding the land in *Mouza* Dubail which has been dismissed. They are Appeals Nos. 1281, 1322, 1323. The other five are preferred by the defendants, they are Nos. 1244, 1245 and 1247 relating to Dubail and Nos. 1248 and 1249 relating to Balina. The plaintiffs claim the entire sixteen annas interest in the land in *Mouza* Balina. They say that they held it as *Khamar* and enjoyed possession through *bargadars* until 1318 B. S. when the defendants began to interfere with their possession, and that the latter after getting themselves wrongly described as *raiyats* in the Record of Rights dispossessed them in 1320 B. S.

The defendants say that the land in the suits belongs to the Baliati Babus, and that they, the defendants, have been holding them as *raiyats* since 1309 B. S.

In regard to the land in Dubail the plaintiffs claim an interest of 3-annas 13-*gandas*, and say that the plots described in the three suits were abandoned by the occupancy *raiyats* who held them, and that, as those *raiyats* had not the right of transfer they attempted to take possession but were resisted by the defendants.

In these suits also the defendants pleaded that the land was the *Khamar* land of the Baliati Babus, and that they held the land as *raiyats* under them.

Many questions were raised in the Courts below, but it would be tedious to set them out, and I do not think it necessary. It is enough to deal with the points pressed in this Court.

For the defendants it is urged in all their appeals that the plaintiffs' share is less than what they claim. The argument, however, is applicable only to the lands in Dubail, because the Courts below are agreed in finding that the Balina lands lay in the exclusive *Khamar* of Krishna Kumar and of his sons after him.

It is conceded that in the 3-annas 13-*gandas* share of the *taluk*, Krishna Kumar, father of plaintiffs, had a share of ten-annas while his brother Ram Kumar had the remaining six-annas. That division was made by a deed of settlement in 1282. Ram Kumar died in 1283, leaving a widow Siva Sundari and minor son Kumini, and a daughter Mon Mohini, the child of an earlier wife. This daughter had two sons Nalini and Jogendra at the time of Ram Kumar's death, and later gave birth to three more sons Harendra, Surendra and Narendra. On the day of Ram Kumar's Sradh, Siva Sundari sold two-annas out of Ram Kumar's six-annas to Krishna Kumar, and in 1286 she sold the remainder to him. On the first occasion she purported to be selling as guardian of the minor in order to provide for his maintenance. In the interval he died leaving his mother Siva Sundari as his heir and in the second document she said that she was selling the property for her own wants. Siva Sundari died in 1311.

In 1306 Mon Mohini sold one-and-a-half-annas out of Ram Kumar's six-annas to the Baliati Babus; her two elder sons also signed the document, but Mon Mohini purported to sell the share as owner.

In 1314 Mon Mohini's five sons then being all of age sold the remaining four-and-a-half-annas to the plaintiffs, in the names of their wives.

For the defendants it is urged that Siva Sundari having only a limited interest could not confer title on the plaintiffs, and that, therefore, the plaintiff's purchased interest must be limited to the four-and-a-half annas bought from Mon Mohini's five sons, the reversioners to Ram Kumar's estate on the widow's death.

The plaintiffs, on the other hand, say that the most that can be urged against Siva Sundari's sale is that the transactions were voidable, and that as they have not been avoided by the reversioners, the plaintiffs have secured a good title.

The learned Judge in the Court below does not appear to have come to a decision about the validity of the purchases from Siva Sundari: he regards such a finding as immaterial in view of the fact that the plaintiffs afterwards bought four-and-a-half-annas from the reversioners. In regard to the remaining one-and-a-half he holds that the Baliati Babus acquired a good title to the shares of Nalini and Jogendra who signed the deed of sale, by virtue of section 43 of the Transfer of Property Act. The shares of the younger brothers, who were not of age when Mon Mohini purported to sell the share, did not pass, he finds, to the Baliati Babus, and the latter did not take possession of them; so to that extent the plaintiffs can plead adverse possession. The result is that he fixes the plaintiff's share at fifteen-annas eight *gandas*, that is, ten annas by inheritance, four-and-a-half annas by purchase from the reversioners and eighteen *gandas* by adverse possession.

So far as the application of section 43 of the Transfer of Property Act is concerned, I think the learned Judge is clearly wrong: because the sons made no erroneous representation and did not profess to transfer: it was their mother who claimed to be owner and professed to make the transfer and that she never was the owner of the property is not questioned.

It follows that there is no halting place between fourteen-and-a-half annas and sixteen annas: and it is necessary to decide the question whether Siva Sundari's transfers were operative. The documents purport to have been executed for legal necessity, or, at any rate, for good cause and they are not void but voidable. The persons who are entitled to seek to avoid them are the reversioners, but they have never done so, and it is not open to the defendants who do not claim through the reversioners to raise the question. I think, therefore, that the plaintiff's father acquired good title by the purchases from Siva Sundari and that in consequence their share must be fixed at sixteen annas.

The other question, affecting the Dubail lands only, is in regard to the nature of the relief to be given to the plaintiffs. For the defendants it is said that if the Baliati Babus were in possession, not in denial of the plaintiff's rights, and if the defendants took settlement from them in good faith, they, the defendants, cannot be ejected, and the plaintiffs cannot get anything more than the right to recover rent proportionate to their share. The Baliati Babus, however, were not entitled to the entire interest in the land, and they had no right to grant settlement to the defendants with regard to the share of the plaintiffs. The latter are, therefore, entitled to recover *khas* possession of the land to the extent of their share jointly with the defendants, and in view of the finding recorded above that share is not fifteen-annas eight *gandas* of three-annas thirteen *gandas* but the whole of three annas thirteen gandas.

The result is that the plaintiffs' appeals are decreed with costs, that is to say, their three Suits Nos. 2045, 2046 and 2049 are decreed with costs in all Courts and the defendant's appeals are dismissed with costs.

Ghose, J.—I agree.

N. H. *Suits decreed.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 184 OF 1921.

June 15, 1922.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

LAKSHMIBAI JAGANNATH JOSHI AND OTHERS—APPLICANTS

versus

YESHWANT VITHAL BAGKAR —OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9, O. XXIII, r. 1—Limitation Act (IX of 1908), s. 5—Abatement of suit—Application to bring legal representatives on record—Setting aside of abatement, whether condition precedent—Limitation—Ignorance of change in period of limitation, whether excusable—Withdrawal of suit—Permission to file fresh suit when can be given.

An omission to set aside the abatement of a suit before bringing on record the heirs of a deceased defendant is a mere formal defect not affecting the merits of the case.

A delay in making an application to bring on record the heirs of a deceased defendant, due to a change in the period of limitation, of which the applicant was ignorant, can be rightly excused.

A plaintiff cannot be allowed to withdraw a suit with liberty to bring a fresh suit simply because the heirs of the defendant who has died cannot be served.

Civil Extraordinary Application from an order passed by the Subordinate Judge, Dapoli, in Suit No. 242 of 1919.

Mr. *P. V. Kane*, for the Applicants.

Mr. *K. H. Kelkar*, for the Opponent.

JUDGMENT.—Two points have been urged in support of this application. First, it is urged that the defendant's heirs were brought on the record more than three months after the death of the original defendant, and that they should not have been so brought on the record without formally setting aside the abatement of the suit which resulted in consequence of the lapse of three months from the date of the defendant's death. We do not think that there is any substance in this point. The application was made within six months, which was the period allowed by the Indian Limitation Act of 1908, and the change in the period of limitation which was effected by Act XXVI of 1920 may not have been and probably was not known to the parties. The delay was rightly excused and the omission to set aside the abatement was a formal defect not affecting the merits of the

order. Secondly, it is urged that after the parties were brought on the record, the lower Court wrongly allowed the plaintiff to withdraw this suit with liberty to bring a fresh suit on the 28th July 1921. The application for that purpose was based upon the ground that notices on the heirs could not be served. This is hardly a ground for allowing the plaintiff to withdraw a suit with liberty to bring a fresh suit. It was a suit of 1919 and in July 1921 the heirs were already on the record. There is no reason why the plaintiff should not have made proper efforts to serve the notices upon the heirs and proceeded with the suit. In any case, no valid ground for allowing the withdrawal with liberty to bring a fresh suit has been made out. We set aside the order allowing the plaintiff to withdraw the suit and direct the papers to be sent back to the Trial Court in order that the suit may be proceeded with and tried according to law.

Costs of this application to be costs in the suit.

Order set aside.

R. N. & N. H.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 245 OF 1922.

May 15, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Babu SURAJDEO NARAIN SINGH AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

Babu PARTAP RAI AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal—Dismissal for default—Appeal, fresh, whether can be entertained—Res judicata—Ladlord and tenant—Non-transferable occupancy holding—Sale in execution of money-decree.

An order dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit and can in no sense be regarded as adopting or confirming the decision appealed from. It merely recognises authoritatively that the appellant has not complied with the condition under which the appeal was open to him and, therefore, is in the same position as if he had not appealed at all. [p. 285, col. 2.]

Abdul Majid v. *Jawahir Lal*, 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 171 (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.), followed.

An order dismissing an appeal for default does not amount to a decree and does not operate as *res judicata*. R. 19 of O. XLI of the Civil Procedure Code gives an option to an appellant whose appeal has been dismissed for default to apply for re-admission of the appeal, but it does not take away any other remedy that may be available to him. The omission of a provision as to the competency of a fresh appeal in the rule cannot have the effect of taking away such right, if it is not otherwise barred. [p. 286, col. 1.]

There is nothing in law to prevent the entertainment of a fresh appeal on the dismissal for default of a previously filed appeal, provided the later appeal is otherwise in order and is filed within the period of limitation. [p. 286, col. 2.]

Raghu Prasad Singh v. *Jadu Nandan Prasad Singh*, 59 Ind. Cas. 896; 6 P. L. J. 27; 2 P. L. T. 28, (1921) Pat. 34, *Abeda Khatun* v. *Majubali Chowdhury*, 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304, distinguished.

A non-transferable occupancy holding can be sold in execution of a money-decree obtained by a co-sharer landlord. [p. 287, col. 1.]

Jugeshar Misra v. *Nath Koeri* [*Sundermohan Panigrahi Ghana Rout*], 65 Ind. Cas. 335; 3 P. L. T. 205; (1922) Pat. 49; 4 U. P. L. R. (Pat.) 9; (1922) A. I. R. (Pat.) 19 & 114; 1 Pat. 317 (F. B.), followed.

Appeal from an order of the Subordinate Judge, Muzaffarpur, dated the 10th July 1923, confirming that of the Munsif, Hajipur, dated the 14th May 1921.

Messrs. *P. C. Ray* and *S. N. Ray*, for the Appellants.

Mr. *S. Dayal*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the decree-holders against the order of the Subordinate Judge of Muzaffarpur, dated 10th July 1922, dismissing their appeal on the ground that the appeal was not maintainable.

The decree-holders are co-sharer landlords and they obtained a money-decree against the respondents who are their tenants. In execution of this decree they sought to sell certain trees and bamboos standing on the occupancy holding of the respondents. The respondents thereupon filed an objection under section 47, Civil Procedure

SURAJDEO NARAIN SINGH v. PARTAP RAI.

Code, on the ground that the trees and bamboos being attached to the land of their non-transferable occupancy holding, were not liable to attachment and sale in execution of the money-decree. The learned Munsif allowed the objection and dismissed the execution case by his order dated the 14th May 1921. Against this order the decree-holders preferred an appeal before the District Judge, which was registered as Miscellaneous Appeal No. 75 of 1921. This appeal was dismissed for default on the 3rd June 1921. The dismissal was under O. XLI, r. 18 Civil Procedure Code, on account of the failure of the appellants to deposit the process-fees for service of notice on the respondents. Thereupon the appellants, instead of applying for re-admission of the appeal under O. XLI, r. 19, Civil Procedure Code, filed a fresh memorandum of appeal before the District Judge within the period of limitation for appeal, with a prayer that the copies of order and decree of the First Court filed by them in the previous appeal might be attached to the fresh memorandum of appeal. The learned District Judge allowed this prayer and the fresh appeal was registered as Miscellaneous Appeal No. 85 of 1921. This Appeal No. 85 came on for hearing before the Subordinate Judge when an objection was taken by the respondents to the effect that the appeal was not maintainable. The learned Subordinate Judge has given effect to this objection and has dismissed the appeal although he was of opinion that on the merits the appellants were entitled to succeed. The decree-holders preferred this second appeal against the order of the Subordinate Judge and it is contended on their behalf that the decision of the learned Subordinate Judge that the appeal was not maintainable is wrong in law.

In my opinion the view taken by the learned Subordinate Judge cannot be supported. There is nothing in law to prevent the entertainment of a fresh appeal on the dismissal for default of a previously filed appeal provided the later appeal was otherwise in order and was filed within the period of limitation. The only ground upon which a fresh appeal can be held to be barred is that the order of dismissal of the previous appeal would operate as *res judicata* to the hearing of the fresh appeal. The question is, what is the effect of the order of dismissal for default? The order does not amount to a decree within the definition of the term as given in the Code of Civil Procedure. The appeal was not heard and decided on the merits. As was pointed out by the Judicial Committee of the Privy Council in the case of *Abdul Majid* v. *Jawahir Lal* (1), the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as adopting or confirming the decision appealed from. It merely recognised, authoritatively, that the appellants had not complied with the condition under which the appeal was open to them and, therefore, they were in the same position as if they had not appealed at all. The learned Subordinate Judge seems to hold that the only remedy available to the appellants was an application for re-admission of the appeal under O. XLI, r. 19, Civil Procedure Code. This rule gives an option to the appellants to apply for re-admission of the appeal, but it does not take away any other remedy that may be available to them. Reliance has been placed by the learned Vakil for the respondents on the case of *Raghu Prasad Singh* v. *Jadu Nandan Prasad Singh* (2), where it has been held by a Division Bench of this Court that, where there has been an appeal and that appeal is dismissed for default on the part of the appellants for failure to pay the printing cost, an application for execution of the decree awarding costs to the respondents passed by the first Court was within time, if presented within three years from the date of dismissal of the appeal, and it has been contended, that the effect of the decision is that, although an appeal is dismissed for default, the position is not the same as if no appeal had been filed at all. The decision of that case turned upon the interpretation of Art. 182, clause (2), of the Limitation Act and it was held that, where there has been an appeal and where that

(1) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

(2) 59 Ind. Cas. 896; 6 P. L. J. 27; 2 P. L. T. 28; (1921) Pat. 34.

appeal has been properly presented and is within time, any order of the High Court dismissing the appeal or putting an end to the appeal in any way is either a decree or an order within the meaning of Art. 182, clause (2) of the Limitation Act. Clause (2) of Art. 182 provides that where there has been an appeal, the period of limitation for execution of the decree or order of any Civil Court not provided for by Art. 183 or by section 48 of the Code of Civil Procedure is three years from the date of the final decree or order of the Appellate Court or the withdrawal of the appeal, and their Lordships held that, although an appeal might be dismissed for default, the order of dismissal is an order within clause (2) of Art. 182 and the period of limitation would run from the date of the order of dismissal of the appeal. Their Lordships did not hold that the order dismissing the appeal would amount to a decree and this case is no authority for the proposition that the order would operate as a bar to the entertainment of a fresh appeal, if presented within time. As I have already said, the decision turned entirely upon the interpretation of clause (2) of Art. 182 and does not, in my opinion, help the respondents in the present case.

Reference has been made by the learned Vakil for the respondents to the provisions O. IX, r. 4 of the Code of Civil Procedure and it is argued that, inasmuch as the right to bring a fresh suit is given by that rule to a plaintiff whose suit is dismissed for default under r. 2, O. IX in addition to his right to apply to set aside the dismissal, and inasmuch as no right to prefer a fresh appeal has been given to an appellant under O. XLI, r. 19, it follows by analogy that an appellant, whose appeal is dismissed under O. XLI, r. 18, has no right to prefer a fresh appeal and his only remedy is by an application for re-admission of the appeal. I cannot agree with this contention. The omission of a provision for fresh appeal in O. XLI, r. 19 cannot have the effect of taking away such right, if it is not otherwise barred.

It is next contended by the learned Vakil for the respondents that section 96 of the Code of Civil Procedure contemplates only one appeal. The words used are "an appeal shall lie from every decree" and it is contended that an appeal having been once preferred and dismissed although for default, a fresh appeal cannot be maintained. To my mind the interpretation put upon section 96 by the learned Vakil is not correct. The words "an appeal" do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. Reliance has been placed by the respondents upon the case of *Abeda Khatun* v. *Majubali Chowdhury* (3). In that case the plaintiffs made an application under section 105 of the Bengal Tenancy Act for enhancement of rent of a tenure. Subsequently, the plaintiffs appeared and stated that they did not wish to prosecute the proceeding under section 105 whereupon the proceeding was dismissed for non-prosecution. Subsequently, the plaintiffs brought a suit in the Civil Court for enhancement of rent. It was contended by the defendant that the suit was barred by section 109 of the Bengal Tenancy Act and their Lordships held that the suit was so barred although the application under section 105 of the Bengal Tenancy Act had been withdrawn and the proceeding was dismissed for non-prosecution. In the course of their judgment their Lordships observed: "An application which has been made, whether it is withdrawn or whether it is dismissed for non-prosecution is nevertheless an application made within the meaning of the provisions of section 109." The decision of that case depended on the interpretation of section 109 of the Bengal Tenancy Act which provides that a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken under sections 105 to 108. Section 109 clearly operates as a bar to the entertainment of any application or suit by the Civil Court, where the subject-matter of the application or suit has already been the subject of an application made or suit instituted under sections 105 to 108 of the Act and the applicant whose application under section 105 is dismissed, cannot avoid the consequence merely by not

(3) 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020;

prosecuting the application or suit. Their Lordships did not hold that a fresh application under section 105 of the Bengal Tenancy Act was not maintainable. This case is clearly distinguishable from the facts of the present case.

The order of the learned Subordinate Judge holding that the appeal was not maintainable must, therefore, be set aside.

As regards the merits, the learned Subordinate Judge has come to the conclusion that the order of the Munsif was wrong. After the decision of the Full Bench of this Court in the case of *Jugeshar Misra* v. *Nath Koeri* [*Sundermohan Panigrahi* v. *Ghana Rout* (4)] the objection raised by the judgment-debtors cannot be sustained. The law is now settled that a non-transferable occupancy holding can be sold in execution of a money-decree and the learned Vakil for the respondents frankly admits that the decision of the learned Subordinate Judge on the merits is correct.

The result is, that this appeal is allowed, the order of the learned Subordinate Judge is set aside, the objection of the judgment-debtors respondents to the execution of the decree is dismissed and it is ordered that the execution do proceed according to law. The appellants are entitled to their costs in this Court and in the Courts below.

Das, J.—I agree.

Z. K. *Appeal allowed.*

(4) 65 Ind. Cas. 335; 3 P. L. T. 205; (1922) (Pat.) 49; 4 U. P. L. R. (Pat.) 9; (1922) A. I. R. (Pat.) 19 & 114; 1 Pat. 317 (F. B.).

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

April 27, 1923.

Present:—Viscount Haldane, Lord Shaw, Lord Parmoor and Mr. Ameer Ali.

HENG MOH AND COMPANY—
PLAINTIFFS—APPELLANTS

versus

LIM SAW YEAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage—Deposit of title-deeds—Equitable mortgage.

H. entered into partnership with one *C.* for the making and sale of oil. There was an existing mortgage on one of the mills brought into the partnership by *C*, and in order to pay it off *C.* asked *H.* to raise a certain sum of money. It was provided in the deed of partnership that the mortgage should be paid off out of the share of profits of *C.* Under instructions from *H*, his clerk paid off the mortgage and brought back the title-deeds. There was no proof that *C.* had agreed verbally to create any equitable mortgage in favour of *H.* On the other hand, *H.* admitted that he took charge of the books as manager and, further, there was no entry in his books of any transaction by way of mortgage:

Held, that the deposit of title-deeds did not create any equitable charge in favour of *H.*

Appeal from a decree and judmgent of the Chief Court of Burma at Rangoon.

Messrs. *A. M. Dunne* and *G. Sanders*, for the Appellants.

Messrs. *De Gruyther, K.C.*, and *K. Brown*, for the Respondents.

JUDGMENT.

Viscount Haldane.—Their Lordships are in a position to deal with this appeal at once.

The question is a short one. It is, whether an equitable charge was created in favour of the appellant firm by deposit of certain title-deeds to secure a sum of Rs. 25,000 with interest. The Court of first instance decided that such a charge was constituted. The Court of Appeal has reversed the decision.

The appellant was a money-lender and Banker and he also carried on business, under another firm name, as a merchant. His mercha.t firm entered into partnership with one, Chwa Chwee Gee, who is now dead, but who is represented among the respondents. It was a business for the making and sale of oil. It is not necessary to go into the history of that business. It is enough to say that there was an existing mortgage on one of its mills for Rs. 25,000; the mortgagee was pressing for the money and Chwa Chwee Gee, who was the other active partner in the oil firm besides the appellants, went to the appellant and asked him to raise the Rs. 25,000 which was necessary to meet the mortgagee's claim. Under Art. 9 of the articles of partnership between the appellant and

Chwa Chwee Gee and the other persons in the firm, it was provided that the mortgages to which the mills were subject should be paid off, out of the share of profits of Chwa Chwee Gee. The reason for that was that Chwa Chwee Gee and another partner had brought the mills into the partnership subject to these mortgages, while the appellant, who had nothing to do with the mills, had brought in Rs. 60,000 of capital; and it was only right that the mills should be cleared so as to put the appellant on the same footing as Chwa Chwee Gee and the other partner. The articles of partnership provided, as has been said, that the profits of Chwa Chwee Gee were to go to pay off these mortgages. When Chwa Chwee Gee went to him the appellant sent his clerk to the office of the original mortgagee's lawyer, where the clerk paid off the mortgage and brought back the deeds and handed them over to the appellant. Now, it is not suggested that on that occasion, when Chwa Chwee Gee was present, there was any verbal agreement come to about the mortgage. The clerk says that what was done was done the day before, and the question is, whether this is true.

The Court of Appeal, differing from the learned Judge, has said this in its judgment, at page 68 of the record:—

"Having regard, therefore, to the evidence, oral and documentary, and to the undoubted facts of the case and the conduct of the parties, I am of opinion that plaintiff has entirely failed to prove that defendants' mortgaged the property in suit to him as alleged."

The view taken was that this was a mere partnership transaction, an advance from one partner to another to be paid off, like other advances already existing out of profits, and there was a very good prospect of profits; indeed, it is suggested that enough profits had come in to pay off everything. Whether that was so or not, it was a transaction which might very well have been entered into having regard to the state of the business and to clause 9 of the articles of partnership.

The Court of Appeal negatives the alternative view that this was a transaction of mortgage independently between the appellant and Chwa Chwee Gee, and they proceed on various grounds. One of the is an important admission, which it h been contended was a mistake, but st stands, made by the appellant in cro examination. He said he was manag of the firm in which he and Chwa Chw Gee were partners, and that as such manage in-chief, he "took charge of all books a papers as such," that is, as manager the partnership firm, "I took char of title-deeds from Raman Chetty," th is, the original mortgagee, "when t mill was redeemed. The title-deeds ca to me because I lent the money as He Moh's." That may or may not be so, b he said it was in the capacity of manage in-chief of the partnership firm that he to charge of the deeds, and this is borne o by the documents, which show that t debt is one which is treated as a debit Chwa Chwee Gee in the partnersh accounts, both as regards the capital Rs. 25,000 and also as regards the interest

Then there is another very significa fact, and that is that in the appellant own books the books of his own busines which he, a shrewed man of business, the Court of Appeal said, carried on money-lender or Banker, there is not a entry of a transaction by way of mor gage, equitable or otherwise. What found there fully supports the view th their Lordships take of the transactio in regard to which they are in agre ment with the Court of Appeal.

Under these circumstances, their Lor ships conceive that the judgment of t Court of Appeal was right and they w humbly advise His Majesty that the appe should be dismissed with costs.

There was a petition by the responden to bring further proceedings on the recor Their Lordships have not found it necessa to refer to those proceedings and the petitio will be formerly dismissed and the respon ents must pay their own costs of it.

Appeal dismissed.

Solicitors for the Appellants:—Mr. *M. Bramall.*

Solicitors for the Respondents.—Messr *Sanderson* and *Orr Dignam.*

K. S. D.

SANT RAM v. DIWAN CHAND.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 107 OF 1921.

March 13, 1922.

Present:—Mr. Pipon, J. C.

SANT RAM—PETITIONER

versus

DIWAN CHAND—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (7)—Penal Code (Act XLV of 1860), s. 182—Magistrate, First Class, whether subordinate to Sessions Judge—Person deliberately giving false information to public servant—Public servant not legally entitled to take action—Informant, whether liable.

First Class Magistrates, when acting as a Court, are, for the purposes of sub clause (7) to section 195, Criminal Procedure Code, subordinate to the Sessions Judge. [p. 290, col. 2.]

When a person gives false information to a public servant deliberately asking that public servant to take certain action, it cannot be said that he is not punishable under section 182, Penal Code merely because the public servant was not legally entitled to take the action requested. [p. 291, col. 2.]

Manohar v. *Emperor*, 47 Ind. Cas. 91 16 A. L. J. 614; 19 Cr. L. J. 895, dissented from.

One *D*, purporting to act on behalf of his father, *G*, applied to a Cantonment Magistrate to have two shops opened and the property found in them placed in deposit. *G* was the owner of these shops and it was alleged that the tenant *S* had disappeared and that his whereabouts were not known. The application was granted and the shop was opened by the Police under direction from the Magistrate. Subsequently, an application was made by one *G D* acting on behalf of his brother *S* objecting that false information had been given and stating that a civil suit was pending regarding the title to the shops. The Magistrate thereupon cancelled his previous order and directed that *S* should be put in possession. *S* then applied for sanction to prosecute *G* under section 182, Penal Code. The Cantonment Magistrate granted sanction to prosecute both *G* and *D*. They appealed to the Sessions Judge who revoked the sanction. *S* applied for revision:

Held, that the Magistrate purported to act as a Court and that the Sessions Judge had authority to hear the appeal against that order and if necessary to revoke it. [p. 291, col. 1.]

Criminal revision of an order of the Sessions Judge, Peshawar, dated the 5th October 1921.

Lala *Hukam Chand*, for the Appellant.

Lala *Gokal Chand Dhawan*, for the Respondent.

JUDGMENT.—This order will dispose of two applications Nos. 107 and 108. The facts of this case are as follows. On the 25th of June 1921 an application was made to the Cantonment Magistrate, Peshawar, by one Diwan Chand purporting to act on behalf of his father, Gurdit Singh, that the Cantonment Magistrate would have two shops Nos. 86 and 87 in the R. A. Bazaar opened and the property found in them placed in deposit. Gurdit Singh was the owner of these shops and it was alleged in the application that the tenant, Sant Ram, had disappeared, and that his whereabouts were unknown. The Cantonment Magistrate forwarded the application to the Police directing the shops to be opened. The Police complied, opened the shops in the presence of witnesses and handed over the property found in them with a list to a third person called Duni Chand for safe custody. An application was then made by Gurdiyal acting also for his brother, Sant Ram, objecting that false information had been given to the Cantonment Magistrate and that the real facts were that there was a dispute between Gurdit Singh and another person regarding the sale of the shops and that Gurdit Singh had called upon Sant Ram to pay rent to him instead of to a vendee, and that a civil suit was pending regarding the title. On this the Cantonment Magistrate cancelled his order and directed that Santram should be put in possession of the shops. Sant Ram made an application to the Cantonment Magistrate for sanction to prosecute Gurdit Singh under section 182, Indian Penal Code. The Cantonment Magistrate under section 195, Criminal Procedure Code, granted the sanction to prosecute both Gurdit Singh and Diwan Chand. The two latter appealed to the Sessions Judge, who revoked the sanction to prosecute. As regards Diwan Chand the learned Sessions Judge held that the sanction could not be given as no application to prosecute Diwan Chand had been made and that as Gurdit Singh had not made the application himself, he could not be held criminally liable for the action of his agent. He further found that a prosecution under section 182, Indian Penal Code, could not be successful inasmuch as the action which a Magistrate takes on false information must be a legal one in order

to make section 182, Indian Penal Code operative. Sant Ram has preferred two petitions to this Court asking for the order of the Sessions Judge to be cancelled against each of the respondents, Gurdit Singh and Diwan Chand, and for the original order of the Cantonment Magistrate sanctioning their prosecution to be restored.

The first ground on which this application is argued is that the Sessions Court had no jurisdiction on the appeal. It is argued that the Cantonment Magistrate, Col. Barry, was not acting as a Judicial Court but in his executive capacity and that, therefore, Sessions Judge was not the authority to which he was subordinate. As against this, it is argued for the respondents that he purported throughout, rightly or wrongly, to be acting as a Judicial Court. He entered Diwan Chand's application in his criminal registers and throughout the proceedings signed himself as a Magistrate of the First Class. I have to decide whether or not, for the purposes of these proceedings, the officer in question was or was not subordinate to the Sessions Judge. It is argued for the petitioner that he could not possibly have been acting as a Judicial Court inasmuch as Schedule III of the Criminal Procedure Code does not cover the order which he passed for the opening of the shops. I do not think that this point can be pressed. He was certainly acting not as a Secretary of the Cantonment Committee but as Cantonment Magistrate. It is a fact, too well known to be contested, that applications of this nature for the opening of buildings, where the occupant has disappeared are frequently made to other Magistrates and that action is often taken upon such applications. Under section 25 of the Police Act the Police have authority to take charge of unclaimed property. There are cases where closed buildings contain property of which the owner had genuinely disappeared and there is no doubt that the intervention of Magistrates to direct the safe custody of this property may be in some cases advantageous to the public whether or not their action is strictly covered by the provisions of the Criminal Procedure Code. A Magistrate also has a general power of directions to the Police and although, under section 25 of the Police Act, it is for the District Magistrate to give final orders as to the disposal of unclaimed property, there would appear to me nothing illegal in a Magistrate directing the Police to take preliminary action in this respect provided that the property is genuinely unclaimed property. The present case is of course a different one. The property was not unclaimed nor had the owner disappeared. At the same time, Diwan Chand in his application made representations which substantially amounted to a demand that the property found in those shops was unclaimed property of which the owner could not be traced. I am not here, dealing with the question as to whether the Cantonment Magistrate's action in directing the shops to be opened was legal. It was probably not a strictly legal order, but it appears to me to be one passed essentially in a Magisterial capacity and not in that of "Secretary to the Cantonment Committee."

The petitioner then urges that in any case it was the proceedings of a Magistrate acting in his executive capacity as a Magistrate and not as Court. This is not a very easy point to determine. I do not think that it can be seriously argued that because a Magistrate's order is an illegal one, an appeal against it does not lie to the authority which would hear an appeal against his legal orders. There are not uncommonly cases where a Magistrate passes an order which is illegal and which as a Court he has no authority to pass. But an appeal lies against such order and the Appellate Court can correct it. Now, there is a consensus of rulings to show that First Class Magistrates, when acting as Courts, are subordinate, for the purposes of sub-clause (7) to section 195, Criminal Procedure Code, to the Sessions Judge inasmuch as although certain appeals lie to a District Magistrate, the majority of appeals from such Magistrate's orders lie to the Sessions Court. I think, therefore, the only test to be applied is the character which the Magistrate was assuming when passing the order. He purported to be acting as a Court and I consider that the Sessions Judge had

authority to hear an appeal against that order and, if necessary, to revoke it.

It remains to consider whether there is any reason to intefere on other grounds in the order passed by the Sessions Court. On one point I do not agree with the learned Sessions Judge although he has a high authority to support him. I refer to the question as to whether a prosecution under section 182, Indian Penal Code, lies at all where the action which a public servant was asked to take, was not a legal action. The learned Sessions Judge has apparently followed the Allahabad High Court ruling in the case of *Manohar* v. *Emperor* (1). It was there held that the construction to be put on section 182 *(a)*, Indian Penal Code, is this. To make a prosecution lie under that section the public servant must have been asked to do something which he ought to do if the information given to him were true, and that where he is asked to do some thing which he ought not to do in any case, (whether the information were false or true) no prosecution lies. The case dealt with in that ruling was very parallel to the present one. Now, with the greatest deference to the high authority which has passed that ruling, I am unable, I confess, to agree with it. The words of section 182, Indian Penal Code are:—"knowing it to be likely that he will thereby cause such public servant to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given, were known to him." It cannot be contested that if the Magistrate had known that the information given to him were false, he ought not to have had the shops opened. But the wording of the section does not go as far as the ruling quoted implies. It does not say specifically that if the Magistrate ought not to have taken the action in any case, the person who gives him the false information is not punishable under this section. I may note that this ruling appears to be a perfectly isolated one. It does not refer to any previous decision of the same nature. It appears to me to be a *reductio ad absurdum* of section 182, Indian Penal Code, to hold that when a person gives false information to a public servant deliberately asking that public servant to take certain action, he is not punishable under this section because the public servant was not legally entitled to take the action requested. It would be more than ever *reductio ad absurdum* in a case like the present one where the application was nothing unusual but was one of a kind constantly made to Magistrates on which Magistrates were in the habit of taking the action requested. The applicant believed that the Magistrate had power to take the action requested and the Magistrate himself believed it. So far as this point goes, therefore, I cannot but hold that the persons making an application of this nature based upon deliberately false information are certainly liable to prosecution under section 182, Indian Penal Code.

On another point, however, I consider that the order of the learned Sessions Judge must clearly be upheld. It cannot be presumed that Gurdit Singh ever instructed his son Diwan Chand to make the application. There is nothing on the record to show that he did so instruct him and it is perfectly possible that Diwan Chand may have been acting purely on his own motion. As regards Diwan Chand himself, I cannot agree for a moment with the petitioner's Counsel that Sant Ram made an oral application for Diwan Chand's prosecution. It is perfectly possible that he made no such application. On this ground the sanction was rightly revoked as against both Gurdit Singh and Diwan Chand and I, therefore, reject these petitions for revision.

K. S. D. *Petitions rejected.*

(1) 47 Ind. Cas. 91; 16 A. L. J. 614; 19 Cr. L. J. 895.

EMPEROR *v.* JAGMOHAN DAS.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 25 OF 1923.

August 7, 1923.

Present:—Mr. Wazir Hasan, A. J. C.

EMPEROR—PROSECUTOR

versus

JAGMOHAN DAS—ACCUSED.

Penal Code (Act XLV of 1860), s. 447, offence under—Intention—Question of inference—Court, duty of—Summary trial—Clear finding, necessity of.

The essence of an offence under section 447, Penal Code, lies in the intent of the accused to commit an offence or to intimidate, insult, or annoy any person in possession of the property with reference to which the trespass is made. [p. 293, col. 1.]

A man is presumed to intend the natural consequences of his acts, and if any annoyance must inevitably attend his acts and he does those acts without any reasonable justification, he must be held to intend to annoy, even though he had no desire to do so and his only desire is to obtain some advantage for himself. [p. 293, col. 1.]

Ram Saran v. *King Emperor*, 12 P. R. 1906 Cr. J 54 P. L. R. 1907; 4 Cr. L. J. 295 (F. B.), referred to.

The question whether a man should be presumed to have intended the natural consequences of his acts when the intention impelling the commission of the act is stated to be one by the prosecution and another by the accused, is a question of inference to be drawn from all the circumstances of the case and to do that is the primary duty of the Trial Court. [p. 293, col. 1.]

In summary trials it is all the more important that there should be clear findings on questions of fact because it is only through such findings that the Court of revision can form its own judgment with regard to the legality or otherwise of the proceedings of the Trial Court. [p. 294, col. 1.]

Reference made by the Sessions Judge, Lucknow.

ORDER.—This is a reference under section 438 of the Code of Criminal Procedure by the learned Sessions Judge of Lucknow with recommendation that the conviction of the accused Jagmohan Das, under section 447 of the Indian Penal Code and the sentence passed thereunder be set aside. The ground of recommendation stated by the learned Judge in his Order of Reference is, that there is no finding in the judgment of the Trial Court that the accused's intention in trespassing upon the complainant's property was to commit an offence or to intimidate, insult or annoy the complainant. The learned Judge adds that, in view of the circumstances of the case, it is not likely that the accused had any of these intentions. According to him the trespass wears all the appearance of having been a purely civil one. Side by side with the reference I have before me an explanation furnished by the Trial Court. In that explanation it is pointed out that the required finding may be discovered in the last paragraph of the judgment.

Before I deal with the legal aspect of the question that has been argued before me at the hearing of this reference, I should like to state precisely what was the issue which the learned Magistrate placed before himself for decision in the case and what his decision is with regard to that issue. As to the former, it may best be expressed in his own words:—"I have to see whether the complainant was in possession of the house at the time that the gate was removed and, if so, did the accused order the removal of the gate frame and the house trespass was committed thereby." It will be seen that the issue involves the determination of two and two questions, only,

1. Was the complainant in possession of the house?

2. Did the accused enter the house and order the removal of the gate frame?

With regard to the first point the learned Magistrate found that it was admitted that the complainant was living in the house in question for the last 2 or 2½ months. With regard to the second point, the position taken by the accused was that, though he ordered the removal of the gate frame because it was in a dilapidated condition yet he did not do so by entering the complainant's house. The finding of the learned Magistrate on this disputed question is that the accused committed house trespass. From what can be gathered from the judgment the finding seems to be based on circumstantial evidence and probabilities surrounding the situation in which the accused was while ordering the removal of the gate frame. Be that as it may, I must accept the finding that the accused entered the complainant's house. To the finding last mentioned is tacked on an observation to the following effect:—"There was no justification for the accused to enter into

the house whether his title to the house was good or bad." In this observation I can find no improvement on the finding already recorded. The word "justification" is as much consistent with a sense of moral obligation as with the absence of criminal intention. This then is the substance of the judgment of the Trial Court. It should be remembered that the accused was tried summarily and consequently I have no record of evidence before me. My opinion with regard to the propriety or otherwise of the conviction of the accused must be based in the circumstances upon the judgment alone.

It was strenuously argued by the learned Counsel for the accused that, with a view to maintain a conviction under section 447 of the Indian Penal Code, it is essential that there must be a finding of the Trial Court that the trespass was committed with one or the other of the intents mentioned in section 441 of the same Code. I agree with the learned Counsel so far that the essence of the offence for which a man can be convicted under section 447 of the Indian Penal Code lies in the intent of the accused to commit an offence or to intimidate, insult or annoy any person in possession of the property with reference to which the trespass is made. A trespass as an actionable wrong giving rise to a cause of action for a claim in a Civil Court must be distinguished from criminal trespass and it is only criminal trespass which is defined by section 441 and is made punishable by section 447 of the Indian Penal Code. So far there is no divergence of authority, as will be seen from the dissentient but the learned judgments of Mr. Justice Rattigan and the Chief Judge Clark in the case of *Ram Saran* v. *King-Emperor* (1). The point of disagreement between the two learned Judges may be expressed in the language of the learned Chief Judge. According to the learned Chief Judge the opinion which Mr. Justice Rattigan held was "that in order to be an intent to annoy within the meaning of the section there must be a primary desire and wish to annoy." The learned Chief Judge then proceeds to observe. "It is with this proposition that I am unable to agree. I think that there may be an intent to annoy without any primary desire to annoy. A man is presumed to intend the natural consequences of his acts, and if annoyance must inevitably attend his acts, and he does those acts without any reasonable justification, he must be held to intend to annoy, even though he has no desire to do so, and his only desire is to obtain some advantage for himself." Whatever may be my own views on the point of difference between the two learned Judges, I am prepared to take the view in the present case consistently with the opinion expressed by the learned Chief Judge. Now the question whether a man should be presumed to have intended the natural consequences of his acts, when the intention impelling the commission of the act is stated to be one by the prosecution and another by the accused, is a question of inference to be drawn from all the circumstances of the case, and to do that, I must hold, is the primary duty of the Trial Court.

In the present case the explanation of the accused was that the act which he committed was with the intention of asserting his civil rights in the house in question. The circumstances may reasonably lead to the inference that the explanation furnished by the accused as to the intention of his act is a proper one as the learned Sessions Judge seems to hold or the Court may find that the intention attributed by the prosecution to the accused is the only reasonable explanation of the conduct of the accused. When, therefore, either of the two explanations of the act of the accused is equally or more or less reasonable the finding must be one of doubt as to the intention of the accused. The learned Magistrate has given no finding on the point at all. In fact, he refused to consider the explanation offered by the accused, not for the reason that it is either unreasonable or not supported by other circumstances and the facts of the case but for the reason that in the opinion of the learned Magistrate he had nothing to do with the claim of the accused that he had a right to the house. This to my mind is a very narrow view to take of the jurisdiction of a

(1) 12 P. R. 1906 Cr.; 54 P. L. R. 1907; 4 Cr. L. J. 293 (F. B.).

Court in determining the intent of the accused in a case of cirminal trespass under section 441 of the Indian Penal Code. I was pressed by the learned Government Pleader that I myself should draw the inference that in committing this house trespass the accused had one or the other of the intents specified in section 441 of the Code. He strongly pointed out to the circumstances that the house in dispute was occupied by *parda-nashin* ladies, and that the accused spread his *charpai* in that house and sat defiantly in the presence of the *parda* ladies and refused to vacate when required to do so.

It is true that these facts or similar facts are alleged in the petition of complaint to which my attention was drawn by the learned Pleader for the Crown. But allegations are not proofs and the trial having been summary I am not in a position to say whether there was any evidence in support of those allegations. In those circumstances, my only guide is the judgment of the Trial Court. That judgment gives no finding as to any of those facts on which the learned Pleader for the Crown relies. In narrating the story for the prosecution the learned Magistrate of course recites the allegations, to which I have just now made reference, but such a recital cannot be accepted by me as equivalent to findings. It may be an unfortunate thing from the complainant's point of view that the accused should escape punishment but it is no part of my business either to rejoice or to grieve at the result. My duty is to administer the law as I find it.

Before I take leave of the case it is necessary for me to point out that in summary trials it is all the more important that there should be clear findings on questions of fact because it is only through such findings that the Court of revision can form its own judgment with regard to the legality or otherwise of the proceedings of the Trial Court.

I, therefore, accept the recommendation of the learned Sessions Judge, set aside the conviction of the accused and direct that the fine, if paid, be refunded to him.

K. S. D. *Reference accepted.*

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 172-B OF 1923.

April 5, 1923.

Present:—Mr. Justice Heald.

HAMID—PETITIONER

versus

EMPEROR—RESPONDENT.

Reformatory Schools Act (VIII of 1897), s. 4—Order for detention, when can be made—Youthful offender, who is.

An order for detention in a Reformatory School can only be made in the case of a youthful offender, *i.e.*, a boy below the age of 15 years, as, technically, under section 4 of the Reformatory Schools Act, a boy ceases to be a youthful offender, when he reaches that age.

Reference made by the District Magistrate, Rangoon, in his Criminal Revision No. 52 of 1923.

ORDER.—Hamid, who has been found to be 16 years of age, has been convicted of abetment of theft and sentenced to three months' rigorous imprisonment, which has been commuted under the provisions of section 8 of the Reformatory Schools Act to detention in a Reformatory School till he is 18. He was convicted of theft three years ago and sentenced to whipping by way of school discipline.

The order for detention in a Reformatory School is illegal, because such an order can only be made in the case of a youthful offender, and under section 4 of the Reformatory Schools Act a boy ceases to be technically a youthful offender at the age of 15.

I note that the Sub-Divisional Magistrate seems to have overlooked the provisions of section 35 of the Indian Penal Code, and that the conviction under section 109 of the Code was wrong, not only by reason of the provisions of that section but also because, on the view which the Magistrate himself took, section 114 should have been applied.

The Magistrate must not trust to his memory but must verify his references to enactments before applying them. In this case he has apparently not taken the trouble to refer either to the definition of "youthful offender" in the Reformatory Schools Act or to the provisions of the Penal Code regarding abetment. He must also record the evidence so as to

show to which of the accused the statements of the witnesses refer. In view of the alteration of the numbering of the accused on the cover of the record it is difficult to tell which was the "first accused" and which the "second accused" at the time when the evidence was recorded, and such descriptions as "the tall man" or "the short man" are useless to an Appellate or Revisional Court unless the Magistrate also enters the name of the accused who is so described.

W. C. A. *Order accordingly.*

RANGOON HIGH COURT.

CRIMINAL APPEAL NO. 143 OF 1923.

March 26, 1923.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

APALU—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 300—Culpable homicide amounting to murder, constituents of—Finding, nature of.

In order to constitute the offence of culpable himicide amounting to murder, there should be a finding that the act which caused death was done with the intention of causing death, or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. An injury that is merely likely to cause death does not of necessity amount to murder. [p. 296, col. 1.]

Shwe Ein v. *King-Emperor*, 3 L. B. R. 122; 3 Cr. L. J. 355, followed.

In all such cases the Sessions Judge should consider and come to a finding which must be clearly recorded that the degree of probability of death ensuing is so great as to bring the case within either the first or third clause of section 300 of the Penal Code. [p. 295, col. 2.]

Criminal appeal from an order of the Sessions Judge, Mergui, in Sessions Trial No. 5 of 1922.

JUDGMENT.—On the night of the 6th October at about 9 P. M., the deceased Malaya was stabbed in the side and he died on the 10th as the result of septic peritonitis set up by this wound. The appellant has been convicted and sentenced to death for his murder. The parties have had previous fights, one 6 months before the murder, once about a month before over a quarrel about payment for certain washing deceased had done for the accused. At about 6 P. M. on the night in question, the accused had come to the deceased's house and had hammered on the door, and used abusiv language. Deceased, his wife, and his brother, Nawkata, and another man, who had come to buy curry-powder, were outside the house, talking at about 9 P. M. They intended apparently to go to a *pwe*, and the deceased was just outside the gate near the road, which is only a few feet from his house. His wife was at the bridge leading from the house on to the road, the other two men were standing outside the house when they saw the accused come up, stab the deceased and run away. They knew the accused very well. They were within a few feet of him when he stabbed. There was a light in the house, and there was a bright moon, and there is no reason whatever to suppose that they could not see and identify the assailant if they knew him. An outcry was immediately raised that the accused had stabbed the deceased. Those who came were told that the accused was the stabber, and he was charged in the First Information Report made very shortly afterwards by the deceased's wife. The deceased was taken to hospital that same night and the Doctor sent for a Magistrate to record his dying declaration. The accused had been immediately arrested and was present, and cross-examined the deceased. There are some discrepancies in the evidence which have been pointed out by Mr. Loo Nee. The witnesses are ignorant Coringhees, and they were speaking of the events that occurred over a certain length of time. The substance of the discrepancies is very small and they in no way detracted from the value of the evidence as to who was the assailant. We are satisfied that the appellant did stab the deceased that night.

He stabbed him in the left side in a position where he was very likely to cause very dangerous injury to the internal organs. He did cause injury and septic peritoritis supervened. The inference is clear that he did cause death with the intention of causing death, or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. It is said that both the deceased and the accused were slightly drunk. But there is nothing whatever to show that the accused was in such a state of drunkenness

as to in any way affect the crime with which he is charged. Nor does it in any way affect the sentence which should be passed. The learned Sessions Judge has, however, committed one error to which we must call his attention. He says "A stab with a downward direction in the lower part of the body given with sufficient force to penetrate the abdominal cavity is known even by an ignorant Coringhee cooly to be an injury likely to cause death." That is not a sufficient finding to constitute the offence of culpable homicide amounting to murder, and we would call the learned Judge's attention to the case of *Shwe Ein* v. *King-Emperor* (1). There must always be a finding in such cases that the act which caused death was done with the intention of causing death, or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. An injury that is merely likely to cause death does not of necessity amount to murder. In *Po Sin* v. *Emperor* (2) Sir Charles Fox said—"The distinction between the intention to cause injury sufficient in the ordinary course of nature to cause death, and the intention to cause injury likely to cause death, depends upon the degree of probability of death resulting from the act committed. Apart from cases falling within the second clause of section 300, if from the intentional act of injury committed, the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death, and the conviction should be of murder, unless one of the exceptions applies; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death, and the conviction should be of culpable homicide not amounting to murder."

That part of section 299 which runs "or with the intention of causing such bodily injury as is likely to cause death," amounts to murder only when it can be held that the likelihood of death is so great that the bodily injury intended to be inflicted must be held to be an injury sufficient in the ordinary course of nature to cause death so as to bring the case within the third clause of section 300. Where the degree of likelihood is not sufficiently high, the intention does not exceed the intention of causing such bodily injury as is likely to cause death, and the offence is that of culpable homicide not amounting to murder; It is, therefore, essential that in all these cases the Sessions Judge should consider, and come to a finding which must be clearly recorded that the degree of probability of death ensuing is so great as to bring the case within either the first or third clause of section 300.

In the present case the offence clearly amounted to murder, and we can find no extenuating circumstances. The appeal will, therefore, stand dismissed, and the sentence of death be confirmed.

W. C. A. & N. H. *Death sentence confirmed.*

(1) 3 L. B. R. 122; 3 Cr. L. J. 355.
(2) 3 Ind. Cas. 710; 2 Bur. L. T. 111; 5 L. B. R. 801; 10 Cr. L. J. 359.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 128 OF 1923.
March 21, 1923.
Present:—Mr. Justice May Oung.
BAGH AND ANOTHER—PETITONERS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 367, 424—Judgment of Appellate Court, requisites of.

The provisions of section 424, read with section 367, Code of Criminal Procedure, are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically, and that the Appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the Trial Court, but should, without being a long and elaborate one, be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record. [p. 297, col. 1.]

Review of an order of the Head Quarter's Magistrate, Meiktila.

ORDER.—Having admitted the appeal, it became necessary for the Appellate Court to set out the case in its judgment sufficiently fully to enable the High Court in revision to form an opinion as to the merits. Especially is this required where, as in the present case, the sentence passed by the

Trial Court has been enhanced by the Upper Burma Criminal Justice Regulations, 1892.

The provisions of section 424, read with section 367, Code of Criminal Procedure are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically, and that the Appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the Trial Court, but should, without being a long and elaborate one, be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record.

In the present case, the evidence shows that the petitioner, deliberately and with premeditation, stabbed the complainant several times with a dagger. Had not medical aid been given promptly, the complainant would most probably have bled to death. The sentence of one year's rigorous imprisonment, even though coupled with an order to execute a bond to keep the peace for one year after release, was manifestly inadequate. I, therefore, see no reason to interfere with the order of the Court of Session and reject the petition.

W. C. A. & N. H. *Petition dismissed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 43 OF 1923.

May 26, 1923.

Present:—Mr. Pipon, J. C.

GHULAM YUSAF AND ANOTHER —ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 362, 366—Abduction when becomes offence—Kidnapping, whether continuing offence—Abetment, when can take place.

Abduction in itself constitutes no offence and only becomes an offence when certain criminal intents are proved. [p. 298, col. 1.]

An offence under section 366, Indian Penal Code, is not a continuing offence. [p. 298, col. 2.]

The actual kidnapping or abduction may be abetted but when the offence is complete, abetment cannot be proved against persons who may have taken a subsequent part in the proceedings of the parties. [p. 298, col. 2.]

B, aged 25, left her husband's house of her own free will and to all intents and purposes took up the life of a prostitute. Later on, she lived with the accused to whom she had been handed over by *N* (with whom she had contracted a liaison) on payment of Rs. 300. The accused was proceeded against under sections 366-109, Indian Penal Code;

Held, that inasmuch as *B* had left her husband's house of her own free will and no force or inducement had been used to seduce her, no offence of any kind had been proved against the accused. [p. 298, col. 2.]

Criminal appeal from an order of the Additional District Magistrate, Hazara; dated the 31st January 1923.

Mr. *Ghulam Rabani*, for the Accused.

Mehta *Mangal Sain*, for the Crown.

JUDGMENT.—The appellants, Ghulam Uusaf, *Musammat* Zarjan and Nur Ahmad, have been convicted under section 366 and section 366-109, Indian Penal Code of kidnapping or adbucting *Musammat* Begamjan, wife of Abdul Aziz, with intent to force or seduce her to illicit intercourse and have been sentenced each to five years' rigorous imprisonment.

There is not the least doubt about the main facts of the case. *Musammat* Begamjan is aged 25. Her husband, Abdul Aziz, had gone off on service leaving her in his village Bahrkund in the Hazara District. She got tired of her life there and proceeded to wander about in search of work. It can hardly be denied that the term "work" is probably a euphemism. However that may be, she met the accused Nur Ahmad in Malia, a hamplet of Giddarpur, where he happened to be visiting his aunt while on leave. He induced her to accompany him to D. I. Khan. In D. I. Khan she and Nur Ahmad represented themselves to be husband and wife. While there they got into touch with two apparently very disreputable persons Ghulam Yusaf and his divorced wife *Musammat* Zarjan (both appellants in the present case) who appear to have made a regular business of trafficking in women. *Musammat* Begamjan to all intents and purposes took up the life of a prostitute. A so called deed of divorce was executed between her and Nur Ahmad, and it was arranged that she should be handed ove to Ghulam Yusaf on payment of Rs. 300, she then lived with *Musammat* Zarjan and ce tainly acted as a prostitute. She eventually went to the

Police and made a report. All the above facts are fully established. There are, however, one or two material facts which require adjudication. The Additional District Magistrate has found that when *Musammat* Begamjan left Malia for D. I. Khan in company with Nur Ahmad, she did so because the latter had duped her into the belief that she was going to look for her husband. Now, with this finding of fact I must unhesitatingly disagree. Nothing is more obvious than that *Musammat* Begamjan was a woman of loose character who had contracted a love affair with Nur Ahmad and who deliberately and of her own free will ran away with him. Apart from the inhernt improbability of her present story, we have also the facts that she took no steps whatever to inform her husband's relatives of her intention to search for him, and she certainly would have done so if she had been acting in good faith. Again, I must entirely disbelieve her story, that she was, in any way, kept by force in *Musammat* Zarjan's house. In fact, I fail to see the least evidence that the woman was ever an unwilling agent at all in the course of the very sordid proceeding to which she made herself a party. Indeed, she actually reported to the Police herself in D. I. Khan that she had adopted the life of a prostitute.

On the above facts it remains to consider whether any criminal offence is proved against any of the accused. The learned Public Prosecutor who has appeared for the Crown on this appeal, does not attempt for a moment to support the convictions. On the contrary, he has very rightly pointed out to me certain legal defects in the conviction which are insuperable. In the first place, it is obvious that convictions under section 366, Indian Penal Code, could not possibly lie. There was no case of kidnapping. Kidnapping is defined in section 360, Indian Penal Code, and clearly does not apply, as no force was used. Abduction is defined in section 362, Indian Penal Code, but it must be remembered that abduction in itself constitutes no offence and only becomes an offence when certain criminal intents are proved. It cannot be said for a moment that *Musammat* Begamjan was ever forced or seduced to illicit intercourse, or that there was any intention of forcing or seducing her. On the contrary, she was obviously a perfectly free agent. She was 25 years of age, and had already left her husband's house and adopted a wandering life on her own initiative. Again, an offence under section 366, Indian Penal Code, is not a continuing offence and there is a consensus of rulings to this effect. The actual kidnapping or abduction may be abetted, but when the offence is complete, abetment cannot be proved against persons who may have taken a subsequent part in the proceedings of the parties. The question then arises as to whether any other offence under the Indian Penal Code can be proved against the accused, and I am unable to see that any section of that Code applies. Section 372 certainly does not apply as *Musammat* Begamjan was not a minor and there is no question of trafficking in minors. Section 370 which relates to slavery, certainly does not apply, and there is a consensus of rulings which exclude cases of this sort from the operation of that section. Section 498, again, cannot possibly apply because it is an essential ingredient in that offence that the woman should be taken or seduced from the custody of her husband or from some person having her custody on his behalf. In the present case *Musammat* Begamjan was not in her husband's house, nor was she in charge of any person on his behalf. On the contrary, she had left his house of her own free will, and was wandering about the country in search of what I have alluded to above as "work." Further, no conviction under section 498, Indian Penal Code, could, in any case, be sustained in view of the operation of section 199, Criminal Procedure Code, which makes a complaint by the husband essential. There has been no complaint by the husband in the present case. The above facts are sufficient to show that no offence of any kind has been proved against the present appellants. The fact that they are undoubtedly morally culpable, as indeed is *Musammat* Begamjan herself, is immaterial. I accept all the appeals and setting aside the convictions and sentences, acquit the accused and order them to be released.

K. S. D. *Appeals accepted.*

EMPEROR V. HASRAT MOHANI.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 30 OF 1922.

July 11, 1922.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

EMPEROR—PROSECUTOR

verusus

HASRAT MOHANI—ACCUSED.

Penal Code (Act XLV of 1860), ss. 71, 121, 124A—Waging of War—Offence, when complete—Inflamatory speech—Effect on audience sole test—Two offences by one speech—Sentence—High Court, power of—Criminal Procedure Code (Act V of 1898), ss. 35, 307 (3), 423 1 (d).

So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitelvand clearly incites to action that he is guilty of instigating and, therefore, abetting the waging of war. [p. 303, col. 2.]

Emperor v *Ganesh Damodar Sava kar*, 5 Ind. Cas. 854; 34 B. 394 at p. 408; 12 Bom. L. R. 105, 11 Cr. L. J. 264, followed.

Per *Shah, A. C. J.*—It is not neces a y that as a result of the abetment the war should be waged in fact. But the main purpose of the instigation should be the 'waging of war.' It should not be merely a remote and incid ntal purpose, but the thing principally aimed at by the instigator. [p. 300, col. 1.]

Per *Crump, J.*—Instigation is active suggestion or stimulation of another to do an act.

The test, the only test, is to read the words, and to decide what is the probable effect on the audience to whom they were addre sed. [p. 302, col. 2.]

The accused was charged of abett ng the waging of war and of sedition under sections 121 and 124-A of the Penal Code in respect of a sp ech made as President of the Muslim League. The accu ed in his speech had plea ded for a change in the wording of the aims and objects of the Muslim League which were "The attainment of Swaraj by the people of India by all peaceful and legitimate means" and for substituting the words "possible and proper" for the words peaceful and legit mate. He had also advocated the immediate set ng up of a para lel Government on the lines of a Republic of the United States of India, independent of all British control and the establishment of Natio al Courts, Schools and Army. He had further remaked that in case of a declaration of Martial Law by the Established Authority, a necessary consequence of the decla ation of independence, the people of India and the Muhammadans at any rate, would carry on a gue illa warfare because none could remain non-viol nt after the resort to machine guns and the gallows by the British Government. On the charge under section 124-A, the Trying Judge d sagreed with the assessors and convicted and sentenced the accused. There was no appeal from this conviction. As regards the other offence which was tr ed with the assessors as jurors, he disagreed with the verdict of 'not guilty' and referred the case to the High Court under section 307 of the Criminal P ocedure Code

Held, (1) that if the worst construction were put upon the speech it amounted to a prophecy or even a threat that violence may be necessary in future but it did not constitute a direct and clear incitement to violence and, therefore, the accused was not guilty of an offence under section 121, Penal Code; [p. 304, col. 1.]

(2) that in view of the Explanation to section 35 of the Criminal Procedure Code and the provisions of section 71, Penal Code, the accused was liable to one punishment only in respect of the speech. [p. 302, col. 1.]

Queen-Empress v. *Malu*, 23 B. 706; 1 Bom. L. R. 142; 12 Ind. Dec. (N. S.) 472 (F. B.), followed.

(3) that had the reference been allowed, the High Court would have been competent, in view of the provisions of section 307 (3) and section 423 (1) of the Criminal Procedure Code, to set aside the sentence under section 124A of the Penal Code, although that part of the case was not before it, and to award sentence under section 121 of the Code.

Criminal reference made by the Sessions Judge, Ahmedabad.

Mr. *Kanga* (Advocate-General), with him Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Shah, Ag. C.J.—This is a Reference under section 307, Criminal Procedure Code, by the Sessions Judge of Ahmedabad.

The accused in this case was charged in respect of three speeches: two of these speeches were made by him at a meeting of the Indian National Congress, and the third was made by him as the President of the All-India Muslim League, in December last at Ahmedabad. In respect of the fi st two speeches he was charged under section 124A, and in respect of the third under sections 124 A and 121, Indian Penal Code. The offences under section 124A were triable with the aid of Assesso s and the offence under section 121 was triable by a Jury in that District. He was accordingly tried by the Sessions Judge and a Jury in respect of the offence under section 121 and with the aid of the jurors as assessors as regards the other offences. The Jury returned a verdict of 'not guilty' under section 121 and as Assessors they were of opinion that the accused was not guilty under section 124 A. The learned Sessions Judge was competent to deal with the case so far as it related to section 124 A and, differing from the Assessors, he found the accused guilty under that section in respect of all the three speeches, and sentenced him to

suffer rigorous imprisonment for two years on each count directing the sentences to run concurrently. There has been no appeal from these convictions and sentences and we are not concerned with that part of the case. The Sessions Judge did not agree with the verdict of the Jury as regards the charge under section 121 and as he considered it necessary for the ends of justice to refer the case to the High Court he has done so.

We have to consider the entire evidence in the case, to give due weight to the opinions of the Jury and the Judge, and to decide whether the speeech in question offends against section 121.

The accused wanted to present his case in person; and this Court ordered that he may be allowed to do so. We have now heard the learned Advocate-General for the Crown and the accused, who appeared in person.

The charge against him is that by making the speech in question he abetted the waging of war against the King within the meaning of that section, that is, he instigated his audience to wage such war. Whether the accused did so or not is a question of fact to be decided mainly upon the speech itself. There can be hardly any evidence outside the speech in a matter of this kind; and it is not suggested that there is any evidence except the evidence of the witness Durgadas, representative of the Associated Press (Exhibit 12). I doubt whether his opinion as to the effect of the speech is relevant; and even if it be relevant it has hardly any real value. The learned Advocate-General has mainly relied, and in my opinion rightly, upon the speech itself.

Before dealing with the speech, I may mention that, as pointed out by Heaton, J. in *Emperor* v. *Ganesh Damodar Savarkar* (1), "so long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and, therefore, abetting the waging of war." It is perfectly true that it is not essential that as a result of the abetment the war should be waged in fact. But the main purpose of the instigation should be the 'waging of war'. It should not be merely a remote and incidental purpose, but the thing principally aimed at by the instigator. The mere fact that a person may try to do it in an indirect and disguised manner would not be sufficient to save him from the operation of the section; but I think that the Court ought to be satisfied that he has instigated the waging of war, *i.e.*, the use of violence for the purpose of effecting innovations of a general and public nature. I have no desire to attempt to lay down any general proposition as to what is sufficient to constitute an abetment of the waging of the war against the King within the meaning of section 121. Having regard to the facts of this case it is sufficient to bear in mind what I have said above in determining the question of fact arising for our decision.

Coming to the speech itself, it may be stated at once that the appeal or instigation to violence, such as it is, is to be found in the two paragraphs at page 11 of the print, to which I shall refer presently. Apart from those paragraphs, it could not be said that the speech is open to the construction that the accused meant to instigate his hearers to violence. His plea for the change in the wording of the aims and object of the League by substituting the words "possible and proper" for the words "peaceful and legitimate," and his appeal for starting immediately a parallel Government independent of all British control, by setting up on a separate and permanent foundation, Courts, schools, art, industry, commerce, army, police, and national Parliament, would not constitute by themselves the "waging of war" within the meaning of section 121 though those ideas would be open to other objections. This speech is fairly long and it is not necessary to refer to all other matters in the speech in detail. But when it was put to the learned Advocate-General, he fairly, and I think rightly, conceded that but for the two paragraphs it would be difficult to bring the case within section 121. His argument, however, is that the speech should be read as a whole and that the above ideas coupled with the said two paragraphs amount to a sufficiently clear and direct incitement to violence for

(1) 5 Ind. Cas. 854; 34 B. 394 at p. 408; 12 Bom. L. R. 1051; 11 Cr. L. J. 264.

the purpose of overthrowing the Government established by law in this country. The accused has also argued that the speech should be read as a whole; and he contends that if it be so read it is nothing more than a plea for the amplification of the scope of the present aims and objects of the League, and for starting a parallel Government with a view to obtain complete Swaraj, that his object was not to dissuade the members of the League from the creed of non-violence but to persuade them to adhere to it as far as possible, and to so modify the aims and objects of the League as to leave it open to any member to depart from non-violence when absolutely necessary for his self-defence. He has argued that he definitely rejected the alternative of upsetting the present Government by 'sword'; and has throughout pleaded for another alternative for establishing an independent parallel Government by peaceful means resorting to violence only if it becomes necessary to do so in self-defence in future for maintaining such a Government.

It will be convenient to quote the material paragraphs instead of attempting to summarize them:—

"People are no doubt prepared to bear and suffer gladly the hardships of a few days of imprisonment. But on the declaration of Martial Law the non-violent non-co-operation movement will prove totally insufficient and useless. Amongst the Mussalmans at least there will hardly be found a man who will be prepared to sacrifice his life uselessly—man can have only one of two feelings in his heart when faced by the barrel of a gun, either to seek refuge in flight or to take advantage of the law of self-preservation and despatch his adversary to hell, the third alternative, that of cheerfully yielding up one's life to the enemy and considering it to be one's real success will remain confined to Mahatma Gandhi and some of his adherents and fellow thinkers. I on my part fear that in general the reply to the Martial Law will be what is commonly called guerilla warfare or in the words of the Quran 'Kill them wherever you find them.' The responsibility for all this bloodshed will rest on the shoulders of the Government.

"Consequently, as representatives of Mussalmans the members of the All-India Muslim League should consider it their duty either to refrain from adopting non-co-operation as their creed or free it from limitation of keeping it either of violence or non-violence, for it is not in our power to keep non-co-operation peaceful or otherwise. So long as the Government confines to the use of chains and fetters non-co operation can remain peaceful as it is to-day but if things go further and Government has recourse to gallows or machine guns it will be impossible for the moment to remain non-violent. At this stage some people would like to ask: how is it that while the Hindus are content to adopt non-violent non-co-operation as the means for attaining independence that the Mussalmans are anxious to go a step further? The answer is that the liberation of Hindustan is as much a political duty of a Musalman as that of a Hindu. Owing to the question of Khilafat it has become a Mussalman's religious duty also."

Reading these paragraphs it is difficult to say that they are not susceptible of the construction which the accused seeks to put upon them. In any case, I am unable to say that they constitute a direct and clear incitement to violence. Taking the speech as a whole, and taking the broad effect of these paragraphs in relation to the main theme of his speech as indicated above, *viz.*, the change in the aims and objects of the League and the immediate starting of a parallel government, I am not satisfied that it is sufficient to bring the case within the scope of section 121, that is, to constitute a clear and direct incitement to action as distinguished from a state of mind.

I have considered the reasons given by the learned Sessions Judge in support of his view. Even taking the summary of the speech as given in paragraph 8 of his charge to the Jury I cannot say that it amounts to a clear and direct incitement to violence. The learned Judge has observed that "step by step the speaker maps out the stages which are to culminate in possible resistence to the Government established by law." That seems to me to constitute the weakness of the prosecution case, for it shows that the immediate and direct object is not the use of violence; but it indicates a realisation on the part of the accused as to the probable

use of violence in future under certain circumstances which no doubt the accused thinks will arise, but which in fact may or may not arise. After giving my best consideration to all the arguments and the speech itself I am unable to hold that it constitutes such an incitement to action as would bring the case within the meaning of section 121. At its best it is a doubtful case: and it was open to the Jury under the circumstances to find the accused not guilty.

I do not express any opinion about the exact meaning and scope of the quotation from the Quran in relation to its context in the holy book as to which there was some argument before us and upon which the accused laid some emphasis: for, after all, the effect of the quotation has to be considered in relation to its context in the speech in which the words are quoted; and, secondly, in the view I take of the case it is not necessary to do so.

I need hardly add that on the present reference I am only concerned with the question as to whether the speech amounts to an abetment of the waging of war: and my observations as to the speech are made with reference to that question only.

I would, therefore, acquit the accused of the charge under section 121, Indian Penal Code.

It is desirable to point out that, in view of the Explanation to section 35 of the Criminal Procedure Code and the provisions of section 71 of the Indian Penal Code as interpreted by a Full Bench in *Queen-Empress* v. *Malu* (2), the accused would be liable to one punishment only in respect of the speech. The learned Sessions Judge found him guilty under section 124 A and sentenced him to two years' rigorous imprisonment in respect of the speech in question. In case this reference had been allowed, we could not have imposed a second penalty without setting aside the sentence already passed. Though at one stage I thought that there might be some difficulty in doing so, I am satisfied that in view of the provisions of section 307, sub-section (3) and section 423, sub-section (1), clause (*d*), of the Code of Criminal Procedure, there would be no insuperable difficulty in dealing with the case under section 121 as regards the sentence, and in setting aside the sentence under section 124 A for that purpose, if it were necessary to do so.

Crump, J.—This is a Reference by the Sessions Judge of Ahmedabad under section 307 of the Code of Criminal Procedure. It is for us to form our own opinion on the case after giving due weight to the opinions of the Judge and the Jury. The nature of the case is such that these opinions cannot be of much assistance, for we have to deal not with facts but solely with the correct interpretation of a single speech, which is Exhibit 7 in the case.

It is a common place, but one which requires to be re-stated from time to time, that criminal charges must be strictly proved and that the benefit of any reasonable doubt must be given to the accused. The question here is whether the accused has committed the offence of abetting the waging of war against the King. The abetment charged is abetment by instigation, and the point for decision is whether the speech (Exhibit 7) discloses such instigation. Instigation is active suggestion or stimulation of another to do an act. The act here is the waging of war, and the waging of war is the attempt to accomplish by violence any purpose of a public nature. As to the purpose here there is no disguise. It is to bring about complete independence by establishing a republic. If the accused actively suggested to his audience that they should use violence, or stimulated them to use violence in order to achieve that purpose he is guilty. It is immaterial that he may have sought to disguise his meaning so long as the meaning is clear. On the other hand, it is equally immaterial that the speech is within the scope of section 124 A, if it does not contain any active suggestion or stimultation to the use of violence.

The test—the only test—is to read the words, and to decide what is the probable effect on the audience to whom it was addressed. The words must be taken in their natural meaning and in the order in which they stand. If the result charged is not clear beyond reasonable doubt then the offence is not made out. If it is not possible to say affirmatively that the accused

(2) 23 B. 708; 1 Bom. L. R. 142; 12 Ind. Dec. (N. S.) 472 (F. B).

ntended to instigate his audience to violence, then he must be acquitted, however mischievous the speech may be.

The opening portion of the speech may be summarized as follows:—

(1) It would have been better had an abler President been selected.

(2) The All India Muslim League is in a weak condition.

(3) The existing objects of the League are set out. The first is "the attainment of Swaraj by the people of India by all peaceful and legitimate means."

(4) The causes of the weakness of the League are analysed. The main cause is that Swaraj is not defined in accordance with Muslim desires.

(5) In order to remove this cause of weakness "Swaraj" should be defined as "complete independence." The form of government should be "an Indian Republic on the lines of the United States of India." further the words "peaceful and legitimate" should be deleted and the words "possible and proper" be substituted.

(6) The advantanges of an Indian Republic are explained. The main advantage is the removal of the English power which is a hindrance to the removal of misunderstanding between Hindus and Mussalmans as is shown by the Mopalah troubles in Malabar as to which a long digression is introduced.

(7) After this digression the speaker returns to his main theme, *viz.*, the amplification of the definition of Swaraj and the necessity of substituting "possible and proper" for "peaceful and legitimate" in defining the means by which 'Swaraj' is to be attained. The reason given for this change is that it is necessary to open the League "to those who do not honestly believe non-co-operation alone as the sole path of salvation and recognizing the possibility of other methods adopt them also." Also, it is necessary to "remove the complaint of those who believe that non-co-operation can under no circumstances remain peaceful to the last and refuse to remain non-violent even in intention."

The portion of the speech summarized above leads up to the passage on which the prosecution mainly rely. So far the meaning is shortly this:—"Let us define as our goal complete independence, and widen the definition of our means so as to admit all shades of opinion violent or non-violent." Up to this point the speaker advocates no line of action.

It is unnecessary for me to set out again the passage which follows. I propose to give briefly the meaning of it as I understand it. The speaker says that there are only two possible means of re-placing one government by another: one destruction by the sword: the other by setting up a parallel government. So far as he advocates either, it is the latter. "Friends, to achieve this object we must immediately set up on a separate and permanent foundaton our own Courts, schools etc., etc." He then goes on to point out that ultimately a stage will be reached when action on peaceful lines will become impossible because the existing Government will undoubtedly interfere. When Government interferes and if and when Martial Law is declared non-violent non-co-operation will become utterly useless. For the Mussalmans at least will defend themselves "when faced by the barrel of a gun." "I on my part fear," the speaker says, "that in general the reply to Martial Law will be what is commonly called guerill warfare, or, in the words of the Quoran, 'Kill them whenever you find them' the responsibility for all this bloodshed will rest on the shoulders of Government." The meaning may be further illustrated by a passage which follows: "So long as the Government confines itself to the use of chains and fetters non-co-operation can remain peaceful as it is to-day, but if things go further and Government has recourse to gallows and machine guns it will be impossible for the movement to remain non-volent."

The substance of the matter is this. "Let us continue by peaceful means: probably in the future Government will proclaim Martial Law and use machine guns. If so certain persons will use violence in self-defendce. The blame will rest on Government."

Does such language amount to instigating the waging of war? I adopt the words of Heaton, J., on this matter: "So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action

that he is guilty of instigating and, therefore, abetting the waging of war" *Emperor* v. *Ganesh Damodar Savarkar* (1). I cannot find here any incitement to action. The accused says no more than this. "Let us proceed on peaceful lines as long as we can. In the future some of us will be compelled to use violence in self-defence." Such language is gross sedition, but it is not to my mind an offence under section 121 for the plain reason that there is no incitement to action. If the worst construction is put upon the speech it amounts to a prophecy or even a threat that violence may be necessary in future. It does not suggest action here and now, or stimulate any one to such action. The distinction is clear enough if reference is made to any of those cases in which there has been a conviction under section 121. I hold, therefore, that the accused cannot be held guilty of that offence.

I would only add that I agree with my learned brother as to the applicability of section 307, read with section 423, to the circumstances of this case.

R. N. & N. H. *Order accordingly.*

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 23-B OF 1923.

February 15, 1923.

Present:—Mr. Justice May Oung.

MAUNG TUN YIN—PETITIONER

versus

MA THEIN SHIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488 (6)—Order for maintenance—Jurisdiction of Magistrate to revise order of predecessor.

A Magistrate has power under section 488 (6) of the Criminal Procedure Code to re-open a case in which maintenance has been awarded by his predecessor, and to revise the order granting maintenance where the petition is presented within three months of the order.

Reference made by the Sessions Judge, Pegu, in his Criminal Revision No. 23 of 1923.

Reference made by the Sessions Judge, Pegu, in his Criminal Revision No. 2] of 1923:

REFERENCE.

The Additional Magistrate of Thanat pin (Mg. Tha Tun First Class) on December 7th 1922, passed an order under section 488, Criminal Procedure Code, for the applicant to pay Rs. 18 monthly for the support of his wife and Rs. 5 monthly for the support of their child. The Magistrate determined the case *ex parte* after recording that repeated notices failed to secure the applicant's attendance. On the 20th December applicant presented a petition to the Additional Magistrate's successor (Mg Tun Mra U, First Class), alleging that he had no notice of the case against him and that he was in a position to prove that he had no work and was dependent on his parents. The new Magistrate endorsed this petition with the remark that he had no power to revise the order of his predecessor and directed the applicant to apply to a competent Court. The applicant's petition was presented within three months of the maintenance order and the Additional Magistrate had power to interfere under the proviso to section 488 (6) of the Criminal Procedure Code. His order was incorrect, therefore, and as the applicant may well have been prejudiced, under section 438 of the Criminal Procedure Code. I report the case for the orders of the High Court of Judicature recommending that the Additional Magistrate's order be reversed and the Magistrate be directed to consider the cause which the applicant may be able to show for modification of the maintenance order.

Mr. *C. K. Tambe*, for the Petitioner.

ORDER.—Respondent does not appear. The Magistrate was clearly wrong in supposing that he had no power to re-open the case. Section 488 (6) gives him the power. The case will be re-opened and disposed of according to law.

W. C. A. *Order reversed.*

KESHO PRASAD SINGH *v.* LAKHU RAI.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 397 OF 1921.

July 11, 1923.

Present:—Mr. Justice Foster and Mr. Justice Kulwant Sahay.

Maharaja Bahadur KESHO PRASAD SINGH—DEFENDANT—APPELLANT

versus

LAKHU RAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Suits Valuation Act (*VII of* 1887), *s.* 11—*Undervaluation of suit—Appeal to Court not competent to hear it—Objection, absence of—Prejudice—Adjudication of appeal, whether null and void.*

By reason of the undervaluation of a suit, plaintiff filed an appeal against the decree of the Trial Court to the District Judge, whereas, on the correct valuation, the appeal lay to the High Court. Defendant did not object to the valuation either in the Trial Court or before the District Judge. On a second appeal being preferred to the High Court by the defendant, the undervaluation was discovered by the Stamp Reporter and both parties accepted the correct valuation pointed out by that officer. Defendant thereupon objected that plaintiffs' appeal to the District Judge was incompetent and the latter's decree was, therefore, null and void for want of jurisdiction:

Held, that, in the absence of any objection by the defendant to the undervaluation in the Trial Court or the lower Appellate Court and of anything to show that the undervaluation had prejudicially affected the disposal of the appeal on the merits, the defendant's objection could not be entertained in second appeal in view of the provisions of section 11 of the Suits Valuation Act.

Ledgard v. *Bull*, 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.), *Rajlakshmi Dasee* v. *Katyayani Dasee*, 12 Ind. Cas. 464; 38 C. 639, distinguished.

Appeal from a decision of the District Judge, Shahabad, dated the 24th July 1920, reversing that of the Subordinate Judge, Shahabad, dated the 31st March 1919.

Mr. *Nirsu Narain Sinha* (with him Mr. *Bhuvaneshwar Pd. Singh*), for the Appellant.

Mr. *Siva Sharan Lal*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendant against the decree of the District Judge of Shahabad, reversing a decree of the Subordinate Judge of that place and decreeing the suit with costs. The facts of the case are shortly these:

The defendant is the proprietor of *Mauza* Isarpur, Tauzi No. 883, in the District of Shahabad. In this *mauza* the plaintiffs had a holding of 32 *bighas* 19 *dhurs* of land which, according to survey measurement, came to 20.26 acres in area. In the year 1899 the predecessor-in-interest of the defendant brought Rent Suit No. 18 of 1899 for recovery of arrears of rent for the years 1303 to 1306. On the 26th September 1899 a decree for rent was passed in that suit and in execution of that decree the plaintiffs' residential house was sold and purchased by the decree-holder on the 4th of February 1913. Subsequently, the holding of the plaintiffs was sold in execution of the same decree on the 2nd of February 1914 and was purchased by the decree-holder himself. Objections were subsequently made to the delivery of possession to the decree-holder, auction-purchaser, on the ground that the executoin was time barred and that the decree itself was fraudulently obtained. These objections were disallowed and the decree-holder was put in possession of the properties in suit. The present suit was brought by the plaintiffs for a declaration that the decree, dated the 26th September 1899, was obtained fraudulently and surreptitiously without the knowledge and information of the plaintiffs; that the proceedings in execution of the said decree were taken secretly in collusion or concert with the Court peons and by suppression of all the processes and that the auction-sale in execution of the decree was illegal and invalid on the ground of these irregularities and also on the ground that the price fetched at the sale was grossly inadequate causing substantial loss to the plaintiffs. The plaintiffs, therefore, prayed for a declaration that the decree and the sale were not legally binding on them, that the sales held on the 4th of February 1913 and on the 2nd of February 1914 were altogether inoperative and the defendant had not and could not in law acquire any right under the sales. The suit was originally valued at Rs. 5,500 which was the valuation of the house and the holding as fixed by the plaintiffs. The plaint was presented in the Court of the Subordinate Judge of Shahabad on a Court-fee stamp of Rs. 10 on the 3rd of February 1917. On the 4th of February 1917 a report was made by the office to the effect that the proper Court-fee payable on the plaint was *ad*

valorem fee on Rs. 5,500. The Subordinate Judge thereupon ordered *ad valorem* Court-fee to be paid, or cause to be shown why *ad valorem* fee should not be paid. Pleaders were heard and the Court decided that the Court-fee payable on the plaint was *ad valorem* on the value of the properties, which formed the subject-matter of the suit. The plaintiffs thereupon filed a petition reducing the valuation of the suit from Rs. 5,500 to Rs. 2,300. The Court apparently accepted this valuation and ordered the deficit Court-fee to be paid calculated on the valuation of the suit at Rs. 2,300. The deficit Court-fee was made good by the plaintiffs on the 1st of May 1917 and the plaint was admitted and duly registered. The defendant appeared and filed a written statement traversing the allegations of the plaintiffs as regards the illegalities and irregularities in obtaining the decree and in taking the execution proceedings. No objection was taken as regards the valuation of the suit and at the trial no issue was framed as regards the undervaluation of the suit. The learned Subordinate Judge, however, dismissed the suit on merits. The plaintiffs, thereupon, preferred an appeal before the District Judge of Shahabad. The Memorandum of Appeal was valued at Rs. 2,300 which was the valuation fixed in the Court below and Court fee was paid o this valuation upon the Memorandum of Appeal before the District Judge. Again no objection was taken by the defendant and the appeal was heard on its merits and the learned District Judge set aside the decree of the Subordinate Judge and decreed the suit. Against this decree the defendant has preferred this second appeal to this Court.

An objection was taken by the Stamp Reporter that the valuation of the suit was improperly fixed at Rs. 2,300 that the true valuation should have been at Rs. 5,500 as alleged by the plaintiffs themselves originally in their plaint, and that, therefore, the Court-fee payable on the Memorandum of Appeal to this Court as well as the Court fee payable on the plaint and on the Memorandum of Appeal to the District Judge ought to have been upon the valuation of Rs. 5,500. He, therefore, reported that there was a deficiency in the Court-fee paid on the Memorandum of Appeal to this Court to the extent of Rs. 155 and that the plaint and the Memorandum of Appeal to the District Judge were also insufficiently stamped by Rs. 155 each. The matter came for decision before the Taxing Officer and he held that the Court-fee payable on the Memorandum of Appeal to this Court was *ad valorem* on Rs. 5,500 which was the value of the property in dispute and he ordered the appellant to pay the deficit Court-fee of Rs. 155 which was duly paid by the appellant and the appeal was registered. As regards the valuation of the plaint and the Memorandum of Appeal to the lower Court the Taxing Officer ordered that the same will be considered when the respondents appeared in the appeal. When the respondents entered appearance in this appeal, the matter was again brought before the Registrar and on the 2nd of December 1921 he allowed time to the plaintiffs-respondents up to the 13th of December to pay the deficit Court fee. No objection seems to have been taken by the plaintiff-respondents as regards the valuation and the payment of the deficit Court fees. The respondents, however, did not pay the deficit Court fee as directed by the order of the 2nd of December 1921 and on the 15th of December 1921 an order was made by the Registrar to the effect that the question whether the plaint should be rejected should be determined by the Bench at the time the appeal came on for hearing. When the appeal came on for hearing before us the learned Vakil for the respondents raised no objection to the valuation, but paid the deficit Court-fee on the plaint as well as the Memorandum of Appeal before the District Judge. This was accepted and the appeal was heard.

At the hearing of the appeal the learned Vakil for the appellant takes the objections that the valuation of the suit being now determined to be Rs. 5,500, the appeal to the District Judge was incompetent; that the decree made by the District Judge was without jurisdiction and is void. He relied on the Privy Council case of *Ledgard* v. *Bull* (1) and also upon the case of *Rajlakshmi Dasee* v. *Katyayani Dasee* (2).

(1) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.).
(2) 12 Ind. Cas. 464; 38 C. 639.

Now, there can be no doubt that, having regard to the value of the properties forming the subject-matter of the suit as now fixed and accepted by the plaintiffs-respondents, the appeal to the learned District Judge was incompetent. The appeal against the decree of the Subordinate Judge lay to the High Court and not to the District Court. The question is, whether the decree passed by the learned District Judge can be treated as a nullity. Section 99 of the Code of Civil Procedure provides: "No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court." Here the jurisdiction of the Court of Appeal below is affected by the alteration of the value of the suit. Section 11 of the Suits Valuation Act, however, provides that "Notwithstanding anything in section 99 of the Code of Civil Procedure an objection that by reason of the overvaluation or undervaluation of a suit or appeal a Court of first instance or lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless.—

"(*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in the Memorandum of Appeal to that Court; or,

"(*b*) the Appellate Court is satisfied for reasons to be recorded by it in writing, that the suit or appeal was overvalued or under valued, and that the over valuation or undervaluation thereof has prejudicailly affected the disposal of the suit or appeal on its merits."

Sub-section (2) of section 11 of the Suits Valuation Act provides: "If the objection was taken in the manner mentioned in clause (*a*) of sub-section (1), but the Appellate Court is not satisfied as to both the matters mentioned in clause (*b*) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisd ct on in the Court of the first instance or lowet Appellate Court."

Now, as I have indicated above, no objection as regards the valuation or jurisdiction of the Court was taken by the defendant either in the Trial Court or in the Court of Appeal below. The objection was taken for the first time in this Court by the Stamp Reporter. Moreover, nothing has been shown by the defendant-appellant before us that the undervaluation of the suit and of the appeal to the District Judge has in any way prejudicially affected the disposal of the suit or of the appeal on its merits. In the case of *Ledgard* v. *Bull* (1) objection as regards the jurisdiction of the Court was taken from the very beginning. It was taken before the Subordinate Judge and again before the District Judge and it was reiterated in the High Court, and their Lordships of the Privy Council referred to this matter and to the fact that the defendant in that case had done nothing to waive that objection since it was stated in the written statement in answer to the plaint and held that the Court had no jurisdiction to try the suit. In the case of *Rajlakshmi Dasee* v. *Katyayani Dasee* (2), a decree was filed in evidence by one of the parties to the suit which was objected to by the other party on the ground of its being a nullity for the reason that it was passed by a Court which had no jurisidiction to pass it. Their Lordships in that case held that the decree was fraudulently obtained on a deliberate undervaluation of the subject-matter of the suit and that the Court which passed the decree had no jurisdiction to pass it and, therefore, it was a nullity and could not be used in evidence against the other party who was not a party to that decree. As to what the effect of that decree would have been between the parties to that decree, their Lordships expressed no opinion. On page 668* of the report their Lordships observe, "We are not now called upon to consider what the effect of such lack of jurisdiction would be upon the decree, in so far as the parties thereto were concerned. It is manifest that so far as a stranger to the decree is concerned, who is interested in the property affected by the decree, he can obviously ask for a declaration that the

*Page of 38 C.—[*Ed.*]

decree is a nullity, because made by a Court which had no jurisdiction over the subject-matter of the litigation." The provisions of section 11 of the Suits Valuation Act were not considered in the case of *Rajlakshmi Dasee* v. *Katyayani Dasee* (2), and the case of *Ledgard* v. *Bull* (1) was decided before the enactment of the Suits Valuation Act of 1887. Having regard to the provisions of section 11 of the Suits Valuation Act, I am of opinion that there being no proof of prejudice, the objection cannot be entertained that the decree of the learned District Judge is null and void for want of jurisdiction.

As regards the merits, it appears that before the rent decree of the 26th of September 1899, mentioned above, was passed the defendant's predecessor-in-interest had in the year 1893 obtained an *ex parte* rent decree for arrears of rent due for a prior period. This *ex parte* decree was subsequently set aside and the suit was restored and a fresh rent decree on contest was passed in favour of the defendant's predecessor-in-interest in the year 1898. Execution of this decree was taken out and the holding of the plaintiffs was sold on the 17th of November 1900, and purchased by the decree-holder. Possession was delivered to the decree-holder auction purchaser on the 27th of February 1903. In the year 1910 a suit was brought by the predecessor-in-interest of the defendant against the present plaintiffs for possession and mesne profits of the holding on the ground that the plaintiffs had dispossessed the defendant's predecessor-in-interest from the said holding. Mesne profits were claimed for the years 1315 to 1317. This was Suit No. 81 of 1910. This suit was referred to the arbitration of the present defendant. On the 2nd of December 1912 the present defendant as an arbitrator made an award to the effect that the present plaintiffs should be allowed to retain possess on of the holding on payment of a sum of Rs. 1,400 on account of arrears of rent and mesne profits and a sum of Rs. 100 on account of costs. These two sums were apparently paid in due time and the plaintiffs continued in possession until they were dispossessed as a result of the sale held on the 2nd of December 1914 in execution of the decree of the 26th of September 1899 as mentioned above.

Two questions have been raised; first, as to what was the effect of the purchase by the predecessor-in-interest of the defendant in the year 1900; and, secondly, what was the effect of the award of the 2nd of December, 1912.

It is contended on behalf of the plaintiffs-respondents that the effect of the sale of the 17th of November 1900 was to extinguish the decree of the 26th of September 1899 and, secondly, that by the award of the 2nd of December 1912 the sum of Rs. 1,400 was fixed to represent all sums on account of arrears of rent and mesne profits outstanding up to that time and that by the payment of Rs. 1,400 nothing remained due under the decree of the 26th of September 1899. The learned Subordinate Judge found these points in favour of the defendant and dismissed the suit. On appeal the learned District Judge has held that by the sale of the 17th of November 1900 the encumbrance on the property under the decree of the 26th of September 1899 was extinguished. He apparently relies on the provisions of section 101 of the Transfer of Property Act; but, under that section, the charge will not be extinguished if the owner of the charge declares by express words or necessary implication that it should continue to subsist or such continuance would be for his benefit. The learned District Judge has not considered the evidence on this point.

As regards the second point, namely, the effect of the award of the 2nd of December 1912 that also depends upon the evidence in the case which has not been considered by the learned District Judge.

Under the circumstances we, in the ordinary course, would have remanded the case to the District Judge for a finding upon these two points upon the evidence; but, having regard to the circumstances of the case and the valuation of the suit as now fixed, we consider it undesirable to make a remand to the District Judge. We, therefore, think it desirable that this Court should determine these points upon a consideration of the evidence in the case under the provisions of section 103 of the Civil Procedure Code.

We, therefore, direct that this appeal do stand over for a month. The appellant should prepare either a typed or a printed copy of all the evidence on the record bearing on these two points which he wishes this Court to consider. He should, within a week, give a list of all the documents and the evidence which he proposes to print to the Vakil for the respondents; and if the respondents' Vakil wishes to refer to any other document besides those included in the appellant's list he shall give notice thereof to the appellant's Vakil within three days of his receiving the appellant's list. The appellant will then print the papers which the respondents wish to print. The printed or typed copy of the papers should be filed by the appellant's Vakil in this Court on or before the 6th of August 1923.

Foster, J.—I agree.

Z. K. *Order accordingly.*

affidavit of respondent that the appellant is a pauper and a woman, and that he believes that she is being financed by somebody with a suggestion that she may have made a champertous agreement.

On a perusal of the judgment it is obvious that the appellant has a *bona fide* claim, which she is entitled to have heard. In *Seshayyangar* v. *Jainulavadin* (1) it was held that very special grounds should be required before a suitor *in forma pauperis* should be required to give security for costs. I do not think that such grounds have been shown in this case. It would be absurd to suggest that the fact that a relative is supposed to be assisting appellant would be such a ground. The application is rejected with costs with two gold *mohurs*.

W. C. A.

Application rejected.

(1) 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 328 OF 1922.

March 13, 1923.

Present:—Mr. Justice Lentaigne.

MA SAW—PLAINTIFF—APPELLANT

versus

MAUNG SHWE GON—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXV, r. 1—Application to sue as pauper—Security for costs.

A suitor *in forma pauperis* should not be required to give security for costs except on some very special ground. The fact that the applicant is being assisted by a relative is not such a ground.

Seshayyangar v. *Jainulavadin*, 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603, relied on.

Mr. *Shaw*, for the Appellant.

Mr. *Vertannes*, for the Respondent.

JUDGMENT.—This is an application by the respondent that the plaintiff-appellant be called upon to give security for the costs of the lower Courts and of this second appeal. The grounds on which such application is made are stated in the

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 304 OF 1920.

July 2, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

BANSIDHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BABU LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 25—Suit to recover debt—Unauthorised promise of payment by defendant's Pleader—Statement not signed by Pleader—Fresh contract—Defendant, whether bound.

In a suit for recovery of money the Pleader for the defendant stated that if the plaintiff presented Probate or Letters of Administration or a Succession Certificate, the defendant would have no objection to paying the amount. This suit was dismissed on the ground that the plaintiff had failed to obtain a Succession Certificate. Subsequently, the plaintiff obtained the certificate and brought a second suit:

Held, that in the absence of any proof that the Pleader in the first case had any general or special authority from the defendant which would

BANSIDHAR v. BABU LAL.

entitle him to enter into a contract on behalf of the defendant to pay the debt, section 25 of the Contract Act had no application; [p. 312, col. 1.]

(2) that the section was further inapplicable in the absence of anything to show that the record of the statement made by the Pleader was signed by him or by any other agent of the defendant. [p. 311, col. 1.]

First appeal from a decree of the Subordinate Judge, Farrukhabad.

Messrs. *Girdharilal Agarwala* and *Uma Shankar Bajpai*, for the Appellants.

Mr. *Kailas Nath Katju*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought to recover a sum of Rs. 17,000 odd, the defendants in the case being Babu Lal and Kishun Gopal, sons of Kedar Nath. These defendants apparently are the owners of the firm called "Babu Lal and Kedar Nath," carrying on business at Cawnpore. The firm has become insolvent and the estate of the defendants is now represented by the Official Receiver.

The plaintiffs in the suit are the descendants of one Bhawani Shanker who died on the 12th of February 1912. This man, Bhawani Shanker, owned a business at Farrukhabad which was carried on in the name of Mahanand Ram Bhawani Shanker.

On the 27th or 28th of December 1911 Bhawani Shanker sent certain *hundis* to the defendant firm at Cawnpore for realisation and credit to his account.

It is stated that the directions to the defendant firm were that the money should be treated as a fixed deposit payable six months after date.

On the 8th of February 1912 Bhawani Shanker wrote a letter to the defendant firm with respect to this deposit. He directed the defendants to open a fresh account in his name and to credit him with a sum of Rs. 12,000, and in his letter he stated that this sum was to be applied for the purpose of educating five boys of his community to enable them to pass the LL.B and Pleadership examination of the High Court.

This letter was received by the defendant firm and was answered by a letter dated the 9th February 1912 which is to be found at page 1 of the supplemental book A.

Four days after he wrote this letter, Bhawani Shanker died. After this, certain claims were presented to the defendant firm in respect of this money, and one of the claimants was Mohan Lal who apparently had succeeded to the business of Bhawani Shanker of Farrukhabad.

The defendant firm having these several claims made against it refused to pay until one or other of the claimants had established his title to the money.

The result of all this was that a suit was filed on the 29th June 1915 by Mohan Lal against the defendant firm claiming this money.

That suit was resisted on several grounds. One of the pleas in defence taken was that the money was trust money and that the plaintiff Mohan Lal could not recover it. Another plea was a plea of limitation.

In the course of the trial of that suit a certain statement was made on behalf of the defendant firm by the Pleader who was engaged to conduct the defence.

On the 23rd November 1915 while the suit was still pending, the Pleader for the defendants stated that if the plaintiff Mohan Lal presented Probate or Letters of Administration or a Succession Certificate, the defendants would have no objection to pay him the amount in dispute with interest thereon for six months.

The suit was, however, dismissed by the Subordinate Judge on the 27th January 1916 on the ground that the plaintiff, Mohan Lal, had failed to obtain a Succession Certificate. This order dismissing the suit was confirmed in appeal by this Court.

At the time the suit brought by Mohan Lal was pending in the Court of the Subordinate Judge, proceedings were going on in the Court of the District Judge for the purpose of obtaining a Succession Certificate. For one reason or another this Certificate was not obtained till the month of December 1918 Mohan Lal has since died and now we have the present suit instituted on the 27th January 1920.

We have to deal here with two pleas which were raised in defence. One was that the money held by the defendant firm was trust money which Bha-

wani Shanker had made over for the purpose specified in his letter of the 8th February 1912. It was pleaded that the present plaintiffs had no right to have the money. The other plea taken was that the suit was barred by time.

The learned Subordinate Judge was of opinion that the suit was not barred by limitation. On the other hand, he was of opinion that the money had been dedicated in trust for the purpose specified in the letter of Bhawani Shanker which he wrote in the month of February 1912. The result of the proceedings in the Court below was that the suit was dismissed.

In appeal two points are raised before us. It is argued on behalf of the plaintiffs-appellants that the Court below was wrong in holding that a trust had been created and that the plaintiffs were not entitled to the sum in dispute. On the other hand, the learned Advocate who represents the Official Receiver supports the judgment of the Court below on the ground that the suit was barred by limitation.

We will deal with this latter point first. On the face of it, the suit as a suit for recovery of money which was deposited in December 1911, and which was payable in June 1912, is time-barred but the plaintiffs claim to be suing on a fresh cause of action arising out of what took place in the earlier suit on the 23rd of November 1915. The plaintiffs founded their cause of action upon the statement made by the Pleader for the defendant firm in that earlier case, the statement to which we have already referred. It was not pleaded that anything contained in this statement amounted to an acknowledgment which would extend the period of limitation. Obviously, no such plea could be taken for the statement, whatever it amounted to, was made after the period of limitation had expired.

But what the plaintiffs say is this. They contend that the statement made by the Pleader on the 23rd November 1915 gave rise to a new contract under section 25 of the Indian Contract Act.

Under the section in question a promise made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of limitation is a valid and binding contract.

And so it is argued that, when the Pleader stated that the defendant firm had no objection to pay the money claimed to the plaintiffs if the plaintiffs succeeded in getting Probate or Letters of Administration or a Succession Certificate, a fresh contract was entered into, and it is further argued that a suit on this contract is within time on the ground that the promise was conditional upon the plaintiffs obtaining a Succession Certificate. As that Certificate was not obtained till the month of December 1918, it was argued that this suit instituted in January 1920 was within limitation.

In our opinion, the judgment of the Subordinate Judge on this issue is erroneous.

In order to establish a valid contract under section 25 of the Contract Act it is necessary to show that a promise was made in writing and that this writing was signed by the person to be charged therewith or was signed by his agent generally or specially authorised in that behalf.

It is argued for the respondents, in the first place, that there is no proof on the record that the Pleader who made this statement was either generally or specially authorised to represent the defendants for the purpose of making a fresh contract under section 25. We have here to notice what happened in the Court of the Subordinate Judge in the earlier suit. We have already mentioned that the defendants' Pleader made the statement, upon which the plaintiff now rely, on the 23rd of November 1915.

On the 17th January 1916 the defendants presented a petition in Court repudiating the statement which had been made on their behalf. It was stated in this petition that one Salik Ram, the general attorney, gave certain instructions to the Pleader who was conducting the defence, and that he had given these instructions without any authority. It was stated clearly in this petition that the defendant firm had not relinquished any of the pleas which they had raised in their written statement of defence. An affidavit was put in in support of this application.

The Subordinate Judge at that time dealt with this application in his order of 17th January 1916 which is printed at page 33 of the paper-book. He rejected the petition saying that the Vakil had not exceeded his authority inasmuch as he was "competent to abandon any issue or plea."

As the case stands, we have no proof at all that the Pleader who made the statement relied upon had any general or special authority from the defendant firm which would entitle him to enter into a contract on their behalf to pay a time-barred debt. The Pleader's authority was confined to the conduct of the case and the Subordinate Judge rightly observed that he was competent to abandon any issue or plea. All that his statement amounted to was that if, during the pendency of the suit, the plaintiff Mohan Lal obtained a Succession Certificate the defendants were ready to submit to a decree for the amount claimed together with interest for six months. We have already mentioned that the suit was dismissed, a couple of months later, on the ground that the plaintiff had failed to take out a Succession Certificate. We cannot, therefore, treat this statement as showing in any way that the Pleader who made it had authority to bind the defendant firm by a fresh contract under section 25 of the Contract Act.

Another point which has to be noticed is this. In order that a valid contract may be constituted under section 25 (3) of the Contract Act it is necessary that the statement should be in writing and should be signed by the person to be charged therewith or by his agent generally or specially authorised. There is nothing whatever before us to show that the record of the statement made by the Pleader on the 23rd November 1915 was signed by the Pleader or by any other agent. All we have got before us is a certified copy of an entry which we take to have been written on the Order-sheet recording the statement made by the Pleader. There is nothing whatever to show that this statement is signed by anybody except perhaps the Subordinate Judge who is responsible for initialling the entries on the Order-sheet. This matter seems to have escaped the notice of the learned Subordinate Judge, and we think, therefore, that he was wrong in holding that the statement made by the Pleader on the 23rd November 1915 gave rise to a new contract and to a fresh cause of action.

This being so, the plaintiffs can only fall back upon the original cause of action, and, as we have already pointed out, a suit on that cause of action is long time-barred.

In this view of the case it is not necessary for us to discuss the other question, namely, whether there was good dedication of this fund to trust purposes, and we, therefore, abstain from saying anything beyond this, namely, that Dr. Katju who represents the Official Receiver, admits that this money was held in trust by the defendant firm.

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

N. H.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 171 OF 1922.

July 17, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Justice Sir John Buchanan, Kt.

Babu KISHORI MAL AND ANOTHER—OPPOSITE PARTY—APPELLANTS

versus

JAGDISH NARAYAN SINGH—APPLICANT—RESPONDENT.

Limitation Act (IX of 1908), s. 14, Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), O. XXI, r. 11—Execution petition—Prayer for superfluous relief, effect of—Petition, whether step-in-aid of execution—Misjoinder of causes of action in petition—Time spent in prosecuting petition, whether deducted.

An incorrectness or superfluity as to the reliefs asked for in an application for execution of a decree does not vitiate the application to such an extent as to debar the decree-holder from claiming it to be a step in-aid of execution. [p. 315, col 1.]

An application for execution of a mortgage decree was filed on the 20th February 1919 but

KISHORI MAL *v.* JAGDISH NARAYAN SINGH.

that the relief asked for was not in accordance with the decree. An appeal to the High Court against that order was dismissed on the 2nd July 1920. A second application for execution was filed on the 11th May 1922. The mortgagor again objected by a petition dated the 16th June 1922, and the application was dismissed on the 13th July. On appeal by the decree-holder to the High Court:

Held, (1) that the application of the 20th February 1919 did not offend against the provisions of O. XXI, r. 11 of the Civil Procedure Code and was a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act; [p. 314, col. 2; p. 315, col. 1.]

Gopal Chunder Manna v. *Gasain Das Kalay*, 25 C. 594; 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392, *Bando Krishna Kanbargi* v. *Narsinha Konher Deshpande*, 17 Ind. Cas. 210; 37 B. 42; 14 Bom. L. R. 861 and *Ramayyan* v. *Kadir Bacha Sahib*, 31 M. 68; 3 M. L. T. 254; 17 M. L. J. 596, referred to.

Amrit Lal v. *Murlidhar*, 67 Ind. Cas. 538; 3 P. L. T. 422; (1922) Pat. 229; (1922) A. I. R. (Pat.) 188; 1 Pat. 651, distinguished.

(2) that the basis of the decision of the Subordinate Judge and of the High Court in appeal was that it was not right for the Execution Court to entertain an application in which the legitimate prayer for the execution of the decree was joined with a prayer which the Court thought it was not competent to grant and which related to relief given by another decree; [p. 315, col. 2.]

(3) that, consequently, the defect was one in the nature of a misjoinder of causes of action and was covered by section 14 of the Limitation Act; [p. 315, col. 1.]

(4) that, therefore, the decree-holder was entitled to the benefit of the time which was taken in prosecuting the previous execution proceeding from the 20th February 1919 to the 2nd July 1920. [p. 315, col. 2.]

Appeal from an order of the Subordinate Judge, Gaya, dated the 18th July 1922.

Messrs. *Hasan Imam* and *Kailaspati*, for the Appellants.

Mr. *N. C. Sinha*, for Messrs. *S. N. Ray*, *Brij Kishore Prasad* and *Nawal Kishore Prasad*, for the Respondent.

JUDGMENT.

Mullick, J.—This appeal arises out of an order made by the Subordinate Judge of Gaya in Execution Case No. 207 of 1922. It appears that in 1900 the judgment-debtor, Jagdishnarayan Singh, mortgaged certain immoveable property to one Genda Singh. In 1908 he mortgaged a part of the same property to the appellant, Kishori Mal, and in 1911 he again mortgaged either the whole or part of the same property to the appellant. Genda Singh sued upon his mortgage and got a decree in 1912, but subsequently to this there was yet another mortgage by Jagdishpur of the same property in 1913 in favour of one Jadubans who applied a portion of the consideration money in paying off Genda Singh's mortgage-decree and became subrogated to the position of Genda Singh and acquired priority over the mortgages in favour of the appellant Kishori Mal. Kishori Mal and Jadubans thereafter in 1915 instituted Mortgage Suits Nos. 131 and 132 respectively of that year against the mortgagor. A preliminary decree was made in favour of Kishori Mal on the 23rd December 1915, which was followed by a final decree on the 2nd June 1917, while Jadubans obtained his preliminary decree on the 21st July 1916. The first execution application made by Kishori was filed on the 20th February 1919 in the Court of the Subordinate Judge of Gaya. On the 1st of May 1919 the judgment-debtor filed an objection which was allowed on the 12th May of the same year, the Court holding that the execution could not proceed as the relief sought was not in accordance with the decree. Against that order there was an appeal to the High Court at Patna, where a Division Bench, on the 2nd July 1920, affirmed the order of the Subordinate Judge and dismissed the appeal.

The second application for execution, out of which the present appeal arises, was filed on the 11th May 1922. The mortgagor again objected by a petition dated the 16th June 1922, and the application was again dismissed on the 18th July of that yea .

In the present appeal it is contended on behalf of the decree-holder that the decision of the Subordinate Judge was erroneous and that his application was not barred by limitation. Now, the question of limitation arises in this way. If the application of the 20th February 1919 was a step-in-aid of execution then the decree-holder, by applying on the 11th May 1922, was out of time, because more than three years had elapsed from the last step-in-aid of execution. The decree-holder, however, invokes the aid of section 14 of the Limitation Act the application of which will be presently explained. It is admitted that if that section applies and if the application of the 20th February 1919 was a step in-aid of execution, then limitation is saved. It is contended on

behalf of the respondents that the application of the 20th February 1919 was not in accordance with law and, therefore, it was not a step-in-aid of execution within the meaning of Art. 182 of Sch. I of the Limitation Act. The reply of the decree-holder is that it was in accordance with law and that the relief claimed in the present application being covered by section 14 of the Indian Limitation Act, he is entitled to deduct the period during which he was prosecuting the previous execution proceedings, namely, from the 20th February 1919 till the 2nd of July 1920.

In regard to the question whether the application of the 20th February 1919 was in accordance with law, the decisions cited before us, exhibit a great conflict of opinion, some having gone so far as to hold that it it happens that the relief asked is eventually refused on the ground that that Court cannot or should not give it, then the application is not in accordance with law. On the other hand, it has been held that minor errors and even omission to state the relief are not sufficient to make the application contrary to law and that, for the purposes of limitation, these defects are immaterial. It has also been held that, even where the decree does not specifically give the relief which is asked for, the application is not contrary to law and; in my opinion, the matter must be judged upon the facts of each particular case, and no general rule can be laid down. Here we must refer to the terms of O. XXI, r. 11, in order to see whether the application in form and substance complies with the requirements of the law. Now, it is admitted that, so far as the form of application goes, it fully complies with r. 11. There is nothing in any of the prayers asked in the application which offends against the terms of that rule and so much was the Court satisfied that the application was in conformity with the law that he caused it to be registered and a notice to issue under the provisions of r. 22. Therefore, it is clear that at the outset the application was, in the opinion of the Execution Court, fully in accordance with law.

When the Court came to adjudicate upon the merits of the application, the Court found that, although in the earlier part of the heading which requires the applicant to state the mode in which the assistance of the Court is required, particulars were given as to the mode under which the decree under execution was to be enforced, yet the applicant had in the latter part incorporated the contents of the decree obtained by Jadubans on the 21st July 1916. Now that decree and the present decree were indissolubly connected. The appellant's decree contained a direction that the money due to Jadubans by reason of the priority acquired by him in respect of Genda Singh's mortgage should be ascertained in Jadubans's suit and after it had been so ascertained the appellant's decree would be executed subject to that prior charge. Next, the same learned Judge in Jadubans's suit proceeded to give what was practically a joint decree; he gave detailed directions as to the order in which the two properties, namely, Abhaipur and Reola, were to be sold, and in what proportions Kishori Mal and Jadubans were to share in the proceeds; and, therefore, it seems to me that not only was there no prejudice to the respondents nor any attempt to deceive the Court which are the two most material things in considering the validity of an execution application but here it was essential for the decree-holders to state in their application the directions given in Jadubans's decree of the 21st July 1916. It may be said that the Execution Court which dismissed the execution application of the 20th February 1919 was not bound to regard these directions and it was competent to him to give a general order for the sale of the mortgaged properties subject to the prior charge of Jadubans; but though the application was held by the Court to be defective the defects, in my opinion, were not such as to preclude it from being classed as one in accordance with law. It was at least in accordance with law as to a part and as to the other part, if we were to go so far as to hold that the inclusion of a relief not specifically granted by the decree under execution is fatal, even in that case it seems to me that the application did not offend against the provisions of O. XXI, r. 11 for the purposes of the Limitation Act. That being so, I cannot see how it can be objected that the appli-

cation in question was not a step-in-aid of execution sufficient to attract the provisions of Art. 182 of the Limitation Act. It is not necessary, in the view I take, to cite authorities, but the general propositions on which I rely have been accepted in *Gopal Chunder Manna* v. *Gosain Das Kalay* (1) and in *Bando Krishna Kanbargi* v. *Narsinha Konher Deshpande* (2) and *Ramayyan* v. *Kadir Bacha Sahib* (3). Reference has also been made to *Amrit Lal* v. *Murlidhar* (4). In that case a Division Bench of this Court held that where the decree-holder had asked the Execution Court to transfer the decree to a Court which had no jurisdiction to hear the execution case, the application was not a step-in-aid of execution being not in accordance with law; but here the point is whether any incorrectness or superfluity as to the reliefs asked for in the application vitiates the application to such an extent as to debar the decree-holder from claiming it to be a step-in aid of execution. In my opinion, the answer to this should be clearly in the negative.

Now, if that is found the further question arises whether this is a case to which section 14 of the Indian Limitation Act applies. The relevant portion of that section runs as follows:—"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of Appeal against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

The matter before us turns upon the words "or other cause of a like nature." The question is, whether in the present case the dismissal of the previous execution application on the ground that the relief asked for was not in conformity with the decree was cause of a nature similar to defect of jurisdiction. Now, it had been held before 1908, when the Limitation Act was last amended, that the dismissal of an application on the ground of misjoinder of parties or of causes of action in a suit was cause similar to defect of jurisdiction and for this reason Explanation III was added to section 14 as amended. That amendment runs as follows:—"For the purposes of this section, misjoinder of.... causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction." It is clear that in the present case the basis of the decision of the Subordinate Judge and of the High Court in appeal was that it was not right for the Execution Court to entertain an application in which the legitimate prayer for the execution of the decree was joined with a prayer which the Court thought it was not competent to grant, and which related to relief given by another decree. That defect appears to me to be a defect in the nature of a misjoinder of causes of action and, in my opinion, the defect is covered by section 14.

Therefore, the decree-holder is, in my opinion, entitled to the benefit of the time which was taken in prosecuting the previous execution proceeding from the 20th February 1919 to the dismissal of his appeal in the High Court on the 2nd July 1920.

In this view of the case, it is not necessary to examine the other contention of the decree-holders, namely, that he would be entitled to count time from the 12th May 1919 on which date he filed a certain application, which has not been printed but the substance of which is recorded by the Execution Court as follows:—"Decree-holder files petition stating that the proceeding in this case be kept along with Execution Case No. 49 of 1919." If that application was an application for the execution of the decree simultaneously with the execution of Jadubans's decree, then, in my opinion, it was a step-in-aid of execution from which time could run. If, on the other hand, it was merely an application to keep the execution proceedings pending till the disposal of the other case, then the case could

(1) 25 C. 594; 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392.
(2) 17 Ind. Cas. 210; 37 B. 42; 14 Bom. L. R. 861.
(3) 31 M. 68; 3 M. L. T. 254; 17 M. L. J. 596.
(4) 67 Ind. Cas. 538; 3 P. L. T. 422; (1922) Pat. 229; (1922) A. I. R. (Pat.) 188; 1 Pat. 651.

be covered by *Abdool Hakim* v. *Shaikh Aseentoollah* (5), and the decree-holder would not be entitled to count it as a step-in-aid of execution; but in the present case it is not necessary to go any further into this point because in the view that I take the application of the 8th February was a proper application and the decree-holder's application of the 11th May 1922 was within time.

The appeal will, therefore, be decreed with costs.

Bucknill, J.—I agree.

K. S. D. *Appeal allowed.*

(5) 25 W. R. 94.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 478 OF 1922.

May 29, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

SITLA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat CHAMELI BAHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law — Joint family — Mortgage by father—Sale in execution—Sons, whether can recover their share.

Under the Mitakshara Law a judgment against a Hindu father cannot be executed against the whole of the family property if the debt in respect of which the judgment has been obtained was one incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. [p. 317, col. 1.]

Sripat Singh Dugar v. *Prodyot Kumar Tagore*, 39 Ind. Cas. 252; 44 C. 524; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 I. A. 1 (P. C.), followed.

Dalip Narain Singh v. *Parmaoti Bibi*, 67 Ind. Cas. 931; 42 A. 58; 17 A. L. J. 982; *Mohan Lal* v. *Bala Prasad*, 69 Ind. Cas. 754, 44 A. 649; (1922) A. I. R. (A.) 310, *Madhusudan Das Mohant* v. *Iswari Devi Debi*, 61 Ind. Cas. 25; 48 C. 341; 24 C. W. N. 949, referred to.

Where joint family property has passed out of the family under a sale in execution of a decree for the father's debt, his sons cannot recover the property without showing that the debt was contracted for immoral purposes and that the purchaser had notice that it was so contracted, irrespective of the fact whether the father is dead or alive. [p. 316, col. 2.]

Suraj Bunsi Koer v. *Sheo Persad Singh*, 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.), followed.

Saku Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), referred to.

Second appeal from a decree of the Sessions and Subordinate Judge, Jaunpur, dated the 30th of November 1921.

Mr. *Kumuda Prasad*, for the Appellants.

Mr. *N. Upadhia*, for the Respondents.

JUDGMENT.—The question in this appeal is whether Hindu sons can recover joint family property which has been sold in execution of a mortgage-decree against their father without showing that the mortgage-debt was for illegal or immoral purposes. The mortgage was executed by the common ancestor Parmeshar Dayal in 1908. A suit was brought for sale on the basis of the mortgage and a final decree obtained on the 29th of August 1917. The sale took place on the 20th of January 1917 and was confirmed shortly after the institution of the present suit. The auction-purchaser was a stranger to the suit. The suit was filed on 2nd April 1919 by the sons and grandsons of Parmeshar Dayal for a declaration that the sale was not binding on them on the ground that the mortgage-debt was incurred without any legal necessity.

The Court below has dismissed the suit on the rule laid down by Sir James Colvile in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) "that where joint ancestral property has passed out of the joint family under a sale in execution of a decree for the father's debt, his sons cannot recover that property without showing that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted," and, further, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings.

The appellants' contention is that this rule has been modified by the decision

(1) 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

in *Sahu Ram Chandra* v. *Bhup Singh* (2) and that it now only holds good when the father is dead at the time of the proceedings. In this case Parmeshar Dayal is still alive. The case is, however, exactly covered by the decision in the case of *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3). This was also a case in which property was sold under a decree on a mortgage passed against the father to which the sons were not made parties, it also resembles the present case in that the father was alive at the time of suit. The case was goverened by Mitakshara Law and the question for decision was whether the entire joint family property passed by the sale or only the interest of the father. The law was thus laid down by the Lord Chancellor: "The property in question was joint property governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. *In every other event* it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." In face of this clear and recent pronouncement of their Lordships, which exactly covers the facts of the present case, it is useless to enter into speculations as to the inferences which may be drawn from the decision in *Sahu Ram Chandra's case* (2). The decision just quoted is on all fours with the facts before us; the decision in *Sahu Ram Chandra's case* (2) is not. The same view has been taken in a number of cases of simple money-decrees, in several of which *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3) has been relied on. Such cases are:

1. *Dalip Narain Singh* v. *Parmaoti Bibi* (4)

2. *Mohan Lal* v. *Bala Prasad* (5).

3 *Madhusudan Das Mohant* v. *Iswari Deyi Debi* (6).

It is impossible to distinguish these cases on the ground that they were cases of simple money-decrees, for the simple reason that the Privy Council case on which they relied was, like the present case, a case of a mortgage-decree.

For these reasons we are of opinion that the decree of the Court below is correct and we accordingly dismiss the appeal with costs, including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C).

(3) 39 Ind. Cas. 252; 44 . 524; 32 M. L. J. 138; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 I. . 1 (P. C.).

(4) 67 Ind. Cas. 931; 42 A. 58; 17 A. L. J. 982.

(5) 69 Ind. Cas. 754; 44 A. 649; (1922) A. I. R. (A) 310.

(6) 61 Ind. Cas. 25; 48 C. 341; 24 C. W. N. 949.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1338 OF 1920.

March 13, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

MEHAN SINGH, MINOR, THROUGH HIS REAL BROTHER RULDU SINGH—
—DEFENDANT—APPELLANT
versus
KEHAR SINGH—PLAINTIFF AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Custom—Adoption—Sonless proprietor—Proof of adoption—Registered deed.

In a case where the power of customary adoption by a sonless proprietor is not disputed, all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention is the execution and registration of a deed of adoption, coupled with a clear declaration in Court and subsequent treatment as adopted son. The proof of such subsequent treatment cannot, however, be reasonably demanded in a case where, very soon after the execution of the deed of adoption, the reversioners of the

adoptive father sue for a declaration that the adoption did not in fact take place.[p. 318, col. 2.]

Gurbachna v. *Bujha*, 9 Ind. Cas. 821; 42 P. R. 1911; 63 P. W. R. 1911; 99 P. L. R. 1911, followed.

Second appeal from a decree of the District Judge, Ambala, dated the 20th February 1920, reversing that of the Junior Subordinate Judge, Ambala, dated the 4th July 1919.

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

Mr. *Kunwar Narain*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the District Judge, Ambala, decreeing the plaintiff's claim that the deed of adoption, dated the 23rd of January 1919, executed by Arjan Singh in favour of Mehan Singh, defendant-appellant, is illegal and fictitious and that the plaintiff shall succeed to the property of Arjan Singh upon the latter's death. The District Judge bases his decree on the finding that the deed was executed merely in order to defeat the claims of the reversioners and was fictitious. Arjan Singh mortgaged some land to *Musammat* Bholi, mother of Mehan Singh, on the 27th of August 1918. On the 20th of November 1918 Kehar Singh sued for a declaration that the mortgage-deed should not affect his reversionary rights. While his case was pending, the deed of adoption, which forms the subject of the present suit, was executed and duly registered. In the declaratory suit about the mortgage two issues were framed, *viz.*, (1) whether the mortgage was for necessity, and (2) whether Arjan Singh adopted Mehan Singh eight years previously. The Court found the adoption proved and it also found that the mortgage was for necessity, and dismissed the suit on the 15th of November 1919. From that order no appeal was instituted, but a petition for reveiw was filed on the 10th of February 1920 and was dismissed on the 5th of July 1920. The present suit was decided by the First Court on the 4th of July 1919 and the appeal was filed on the 4th of August 1919. The decision on the question of adoption arrived at in the first suit was in force when the learned District Judge decided the appeal in the present suit, and the first contention raised by Mr. G. C. Narang on behalf of the defendant-appellant is that the decision operates as *res judicata*.

Now, it is clear from the decision in the first case that the real point at issue there was whether the mortgage was for necessity or not. It was found as a fact that the mortgage was for necessity and, therefore, there was no necessity to arrive at any decision, upon the question whether Mehan Singh was the lawfully adopted son of Arjan Singh. We doubt whether it can be said that the question of adoption was directly and substantially in issue in that suit, within the meaning of section 11, Civil Procedure Code. We proceed, however, to dispose of the appeal before us upon another ground. The decision of the District Judge that the deed of adoption was a fictitious one appears to us to be based entirely on conjectures. In the first suit Arjan Singh appeared in Court and clearly stated that he had adopted Mehan Singh eight years previously. That was prior to the execution of the deed of adoption which was merely a further indication of Arjan Singh's intention. The case reported as *Gurbachna* v. *Bujha* (1) is on all fours with the present suit. It was held there, following *Budh Singh* v. *Mula Singh* (2): "that in a case where the power of customary adoption by a sonless proprietor is not disputed all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention is the execution and registration of the deed of adoption coupled with a clear declaration in Court and subsequent treatment as adopted son." It is also pointed out that the "proof of such subsequent treatment cannot, however, be reasonably demanded in a case where, very soon after the execution of the deed of adoption, the reversioners of the adoptive father sue for a declaration that the adoption did not in fact take place." The present suit was brought within two months of the execution of the deed of adoption and, therefore, it is impossible to offer any proof of continuous subsequent treatment by Arjan Singh of Mehan Singh as his son. The other two essentials referred to in *Gurbachna* v. *Bujha* (1) are present,

(1) 9 Ind. Cas. 821; 42 P. R. 1911; 63 P. W. R. 1911; 99 P. L. R. 1911.

(2) 40 P. R. 1905; 18 P. L. R. 1905; 46 P. W. R. 1905.

namely, the execution and registration of the deed of adoption and a clear declaration by Arjan Singh in Court in the first suit that he had adopted Mehan Singh. We, therefore, hold that the adoption is clearly proved and that there is no reason for considering it to be a mere paper adoption. An objection was raised on behalf of the respondent that the finding of the learned District Judge was one of fact and could not be contested in second appeal, we hold that there is no force in this objection because the District Judge's finding was based upon no evidence but merely upon conjectures.

We, therefore, accept the appeal and, setting aside the order of the lower Appellate Court, restore that of the first Court and dismiss the plaintiff's suit with costs throughout.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 155 OF 1920.

April 9, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

TARAPRASANNA SARKAR AND ANOTHER —DEFENDANTS—APPELLANTS

versus

KALIKAMOHAN SARKAR AND OTHERS —PLAINTIFFS—RESPONDENTS.

Compromise—Decree in accordance with compromise, when binding—Partition, suit for—Preliminary decree not appealed against, effect of—Final decree, whether can be attacked—Appeal—Preliminary decree not capable of enforcement—Procedure.

There can be no compromise binding upon all the parties to a partition suit until and unless all the parties have joined in the compromise. [p. 320, col. 1.]

Gobind Chandra v. *Bhagabat Sardar*, 27 Ind. Cas. 242, referred to.

It is not open to an appellant n an appeal against the final decree in a partition suit to attack the preliminary decree, which might have been directly challenged by an appeal. [p. 320, col. 1.]

Loke Nath Singh v. *Gaju Singh*, 31 Ind. Cas. 426; 22 C. L. J. 333; 20 C. W. N. 178.

In a suit for partition of joint properties, a petition of compromise was filed stating that certain specified properties were self-acquired of one or other of the parties and claiming partition of what was admitted to be joint. Two of the defendants did not join in the petition. A preliminary decree was passed in terms of the compromise, when the actual petition was undertaken those two defendants objected, but their objection was overruled and a final decree was made in accordance with the terms of the compromise. The defendants appealed:

Held, that as all the parties to the suit did not join in the compromise it was not binding, but that since the defendants had not challenged the preliminary decree, they could not appeal against the final decree; [p. 320, col. 2.]

(2) that since, however, the preliminary decree as it stood was indefinite and not capable of enforcement, the final decree must be vacated. [p. 320, col. 2.]

Appeal against a decree of the Subordinate Judge, Murshidabad, dated the 14th April 1920.

Babu *Nagendra Nath Ghose*, for the Appellants.

Babu *Mahendra Nath Ray*, with him Babus *Dwijendra Nath Mookerjee* and *Santosh Kumar Basu*, for the Respondents.

JUDGMENT.—This is an appeal by the third and fourth defendants against the final decree in a suit for partition. The two plaintiffs and the four defendants are the six sons of one Ramkrishna Sarkar. The plaintiffs instituted this suit on the 31st January 1918 for the partition of what they alleged were joint properties. They also stated that if at the time of trial any other undivided property should be found out, the Court might be pleased to direct a partition thereof. The first two defendants filed written statements in which they made allegations as to the nature of the properties mentioned in the schedule to the plaint. The third and fourth defendants did not enter appearance. On the 18th February 1919 a petition of compromise was filed on behalf of the two plaintiffs and the first two defendants. This petition stated, with regard to the properties specified, that they were the self-acquired properties of one or other of the parties to the suit. The petition also set out a claim for partition of what was admitted to be joint properties. The third and fourth defendants did not join in this application. Thereupon the following judgment was recorded:

"The plaintiffs and defendants Nos. 1 and 2 have compromised the suit. Defendants Nos. 3 and 4 are absent after service of summons. Claim is proved. The suit shall be decreed on compromise against defendants Nos. 1 and 2 and *ex parte* against defendants Nos. 3 and 4 in a preliminary form for partition. Parties to bear their own costs. At the request of the parties, Babu Nrisingha Prosad Tribedi and Kabiraj Sitanath Sen Gupta are appointed Commissioners to effect the partition between the parties according to terms of compromise."

When the Commissioners proceeded to effect the partition, the third and fourth defendants objected. Their objection was overruled and a partition was made in accordance with the terms of compromise which had been agreed to by the two plaintiffs and the first two defendants. The propriety of this final decree has been questioned in the present appeal.

There is no room for controversy that the preliminary judgment was wrong. There can be no compromise binding upon all the parties to a partition suit until and unless all the parties have joined in the compromise: *Gobind Chandra* v. *Bhagabat Sardar* (1). This was overlooked by the legal advisers of the partition and by the Court. But it is not open to the appellants in an appeal against the final decree to attack the preliminary decree, which might have been directly challenged by an appeal: *Loke Nath Singh* v. *Gaju Singh* (2). This course was not adopted by the appellants. The Trial Court might also have been invited to vacate that judgment either on an application for review or on an application under section 151 or section 153, Civil Procedure Code. That course was not pursued and the Court below proceeded to make a final decree on the basis of the preliminary decree.

We are bound to consider, however, in this appeal, whether the preliminary decree was capable of enforcement; in other words, whether it afforded an adequate basis for the final decree as actually made. It is clear that the preliminary decree was made on the terms of compromise against the first two defendants. The terms of the decree as between the plaintiffs and the first two defendants are consequently to be gathered from the petition of compromise. As between the plaintiffs and the third and fourth defendants, the decree was made *ex parte*. The terms of this *ex parte* decree were not set out in the judgment, and we have been asked to presume that they are identical with the terms set out in the petition of compromise between the plaintiffs and the first two defendants. This is not explicitly stated in the judgment and it would be absurd to hold that the Subordinate Judge intended to bind the third and fourth defendants by the terms of a compromise to which they had never consented. We are of opinion that the preliminary decree as it stands is indefinite and cannot be carried out. Consequently, the final decree must be vacated.

The question next arises, what further direction should be given. The plaintiffs have obtained a preliminary decree which, in the view we have taken, is of no value to them. It is consequently to their interest to have that judgment vacated. That is precisely the course desired by the third and fourth defendants. We, therefore, set aside the preliminary judgment also. The Subordinate Judge will take up the suit and re-try it in accordance with law.

The result is that this appeal is allowed, the decree of the Court below discharged and the suit remanded for re-trial *de novo*. There will be no order for costs up to this stage as both the parties are responsible for the difficulties that have arisen.

K. S. D. *Appeal allowed.*
Case remanded.

(1) 27 Ind. Cas. 242.
(2) 31 Ind. Cas. 426; 22 C. L. J. 333; 20 C. W. N. 178.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 124 OF 1923.

August 16, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Justice Sir John Bucknill, Kt.

BHAYA JAGDEO NATH SAH DEO —APPELLANT

versus

Maharaja PARTAP UDAINATH SAH DEO—RESPONDENT.

**Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of one of several defendants—Decree proved against all defendants—Surviving defendants, whether can object to decree—Abatement of suit.*

It is not necessary that in order to enable the legal representatives of a deceased defendant to take the objection that a decree passed against the said defendant is a nullity on the ground that the defendant was dead at the time when the decree was made, the deceased defendant should have been the sole defendant in the suit. Such an objection can be taken by any of the surviving defendants. [p. 311, col. 2.]

Imam-ud-din v. *Sudarat Rai*, 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228, followed.

In the case of a sale in execution of an *ex parte* decree, one of the judgment-debtors objected to the sale on the ground that two of the judgment-debtors had died long before the institution of the suit and, therefore, the decree was a nullity:

Held, (1) that the judgment-debtor was competent to raise the objection that the decree was a nullity on the ground that it was made against two dead persons;

(2) that, however, the judgment-debtor could not succeed unless he could show that the decree was incapable of execution against him and the other surviving judgment-debtors;

(3) that the property having been purchased by a third party, the sale could not be set aside.

Appeal from an order of the Judicial Commissioner, Chota Nagpur, dated the 19th March 1923, confirming that of the Deputy Collector, Ranchi, dated the 13th November 1923.

Mr. *Atul Krishna Ray*, for the Appellant.

Messrs. *S. M. Mullick* and *B. C. De*, for the Respondent.

JUDGMENT.

Mullick, J.—On the 9th May 1919 the Maharaja of Chota Nagpur obtained an *ex parte* decree for arrears of rent against five persons, namely, Jagdeo Nath Sah Deo, Kuldeo Nath Sah Deo, Kirpal Nath Sah Deo, Baldeo Nath Sah Deo and Anbika Prasad. Execution was taken out on the 11th of March 1922, and on the 15th of May 1922 Jagdeo Nath Sah Deo objected to the sale on the ground that two of the judgment-debtors, namely, Kirpal Nath Sah Deo and Baldeo Nath Sah Deo had died long before the institution of the suit. In consequence of that objection, the heirs of these two judgment debtors were, at the instance of the decree-holder, added as parties to the execution proceedings but eventually the Deputy Collector who was the Execution Officer rejected the objection and caused the defaulting tenure to be sold. The auction-purchaser was a party other than the decree-holder, and the sale was duly confirmed. The judgment-debtor, Jagdeo Nath Sah Deo, then appealed to the District Judge, but without success, and the present second appeal is filed against the District Judge's order of the 19th of March 1923.

Now, no objection was preferred in the execution proceedings by the heirs of the deceased defendants, and the question is whether in those proceedings the judgment-debtor, Jagdeo Nath Sah Deo, was competent to raise the objection that the decree was a nullity on the ground that it was made against two dead persons. In my opinion it is not necessary that, in order to enable the legal representative of a deceased defendant to take the objection that the decree is a nullity on the ground that the defendant was dead at the time when the decree was made, the deceased defendant should have been the sole defendant in the suit. There is authority for the proposition that such an objection can be taken by any of the surviving defendants. *Imam-ud-din* v. *Sudarat Rai* (1) is authority in support of this view. The next question is whether the decree was in fact a nullity in this case. It is true that the lower Appellate Court has not investigated the truth of the allegation whether the defendants, Kirpal Nath Sah Deo and Baldeo Nath Sah Deo were dead at the time of the decree, but that omission is immaterial. Assuming that the allegation is correct, the appellant can not succeed unless he can show that the decree is incapable of execution against him and the other two surviving judgment-debtors. Now, it has been

(1) 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228.

found as a fact that the heirs of the deceased never attempted to have their names registered in the office of the landlord, who under the law is not bound to sue any one who is not on his register. The suit, therefore, would seem to have been properly constituted. It has been contended in support of the District Judge's decree that under section 43 of the Indian Contract Act the decree-holder would be entitled to a money-decree against any one of the co-tenants, and reliance is placed upon *Krishna Das Roy* v. *Kali Tara Chowdhurani* (2) but to render section 43 of the Indian Contract Act applicable the terms of the contract must be investigated and it must be shown that there was a several liability as well as a joint liability. The appellant also points out that the family was a joint Mitakshara family and that the Revenue Officer was empowered only to try rent-suits and that he was not competent to give a money-decree.

It is, however, in my opinion, not necessary to rely upon section 43 of the Indian Contract Act at all. The landlord was entitled to sue his recorded tenants and the decree was on the face of it a good decree. The death of two of the defendants previous to the decree did not in any way affect the liability of the tenure, as the landlord had no notice; the objection of Jagdeo Nath Sah Deo was rightly rejected.

It is further to be observed that the property having been purchased by a third party the present appeal is infructuous and the sale could not be set aside.

The result is that the appeal is dismissed with costs.

Bucknill, J.—I agree.

K. S. D. & N. H. *Appeal dismissed.*

2) 44 Ind. Cas. 801 22 C. W. N. 289.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NO. 103 OF 1922.

November 22, 1922.

Present:—Mr. Justice Pratt.

MA THEIN TIN AND ANOTHER—APPELLANTS

versus

MA HTOO—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Attachment, removal of—Fresh attachment.

Where an order is made for the removal of an attachment on certain property, so long as that order is not set aside, a fresh application for attachment of the same property is not maintainable, even though the order removing the attachment was made *ex parte*, and the proceedings were irregular.

Civil revision against the order of the Township Court, Kayan, in Civil Miscellaneous Case No. 10 of 1922.

JUDGMENT.—In Civil Execution Case No. 87 of 1922 Mg. San Ya and Ma Htu, decree-holders, attached a house as property of their judgment-debtors. Ma Thein Tin and Ma Saw Nyun applied for removal of attachment on the ground that the house was their property.

An order for removal of attachment was passed in Civil Miscellaneous Case No. 9.

The decree-holder, without taking steps to have the *ex parte* order for removal of attachment set aside, made a fresh application for execution and attachment of the house.

The application was granted on the ground that the order in Civil Execution Case No. 87 of 1922 had the effect of dismissal of the application for default and the merits of the case had not been gone into. The Judge ignores the fact that the execution proceedings were closed because the attachment had been removed on the application of third parties. This is not the same thing as dismissal for default.

The attachment may have been removed because decree-holders failed to support attachment, but that is no reason for ordering attachment, whilst the order for removal remains in force. Rule 63 of O. XXI is quite clear. When a claim or objection has been preferred the order passed thereon is conclusive subject to the result of any suit that may be brought.

The proceedings in the miscellaneous suit may have been irregular and the order

passed without due inquiry, but the order has not been set aside and cannot be ignored.

The ruling cited in support of the order appears to have no application to the facts of the present case.

I am of opinion that the Court had no jurisdiction to order the attachment now complained of.

The order is set aside with costs.

Advocate's fees 2 gold *mohurs*.

W. C. A. *Order set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 750 OF 1922.

March 6, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

RAM CHANDER AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHHABBU LAL—PLAINTIFF—RESPONDENT.

Partition—Birt jajmani, *partition of—Building on joint land—Compensation to other co-sharers.*

Future income from *birt jajmani* when the same consists of offerings made by Ganges pilgrims cannot be partitioned by the allotment of clients either by locality or family, and the only method of partitioning such property is by dividing the various paraphernalia attached to it, namely, the books in which pilgrims enter their names, the *ghat*, the *chauhi*, the platform, the shed etc., and to allow the parties to use a similar flag.

Beni Madho Pragwal v. *Hira Lal*, 59 Ind. Cas. 873; 18 A. L. J. 679; 2 U. P. L. R. (A.) 227; 43 A. 20, *Lohiya* v. *Sulli*, 57 Ind. Cas. 315; 43 A. 351; 18 A. L. J. 835; 2 U. P. L. R. (A.) 278 and *Narayan Lal Gupta* v. *Chulhan Lal Gupta*, 14 Ind. Cas. 677; 15 C. L. J. 376, referred to.

Where a portion of joint land is built upon by a co-sharer and on partition the building is allotted to such co-sharer, the other co-sharers must be given compensation or land equivalent to the occupied by the site of the house.

Second appeal from an order of the District Judge, Allahabad, dated the 13th February 1922.

Mr. *N. C. Vaish* and Dr. *K. N. Katju*, for the Appellants.

Messrs. *U. S. Bajpai* and *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal raises an interesting and difficult question. Chabbu Lal, the plaintiff, sued his cousin, Ram Chander, and the two sons of Ram Chander for partition of the joint family property. The parties are descended from a common ancestor, Ganga Prasad, who was a *pragwal*. The family property consisted of land, houses and *bir jajmani*. The defendants admitted that the family had been joint and that the plaintiff was entitled to partition but pleaded that a partition had in fact already taken place and that a suit would not lie for a second partition. With regard to this *birt jajmani* the defendants pleaded that it had already been partitioned in the only way in which partiton was possible, that is to say, it had been agreed to divide the income. In this appeal we are only concerned with two items (1) a certain house built on land bounded by the letters B. C. H. E. on the map on the record, and (2) the *birt jajmani*. Dealing with the second item first, the Trial Court held that it was impossible to give a decree for partition of this *birt jajmani* and gave a declaration to the effect that the parties were entitled to enjoy the income of it half and half. The plaintiff appealed, and the learned District Judge held that the *birt jajmani* was property which had been held to be heritable and, therefore, should be capable of division. He said:—

"There may be a little difficulty in arriving at a fair division, but that is after all a matter of procedure and the difficulty cannot be said to amount to an impossibility. When steps are taken consequent on the preliminary decree, care will be taken to make the division as far as possible either by distribution of clients or of localities" and he modified the decree of the Court below by ordering that partition should be made of the *birt jajmani* as well as of the other property.

From this decree the defendants have appealed and it is urged on their behalf that it is impossible to divide once and for all this *birt jajmani* and they urged that the decree of the First Court merely declaring the parties entitled to a moiety of the *birt jajmani* be restored. There is no doubt that in *Beni Madho Pragwal* v. *Hira Lal* (1) and *Lohiya* v.

(1) 59 Ind. Cas. 873; 18 A. L. J. 679; 2 U. P. L. R. (A) 227; 43 A. 20.

Sulli (2), it has been held by a Divisional Bench of this Court that this class of property, namely, *birt jajmani*, has been the subject-matter of decision by the various Courts in India, that the right of owners of *birt jajmani* had repeatedly been upheld, and that such rights are heritable and sometimes transferable. The latter case is really very similar to this, the only distinction being that there the plaintiffs only asked for a declaration of their right to a given share in the *birt jajmani* and did not ask for partition of it. The case which seems to us most in point is *Narayan Lal Gupta* v. *Chulhan La Gupta* (3) where the whole question is considered in an elaborate judgment by Mr. Justice Mookerjee. The *birt jajmani* in this case consists of the offerings given to the descendants of Ganga Prasad by pilgrims when they come to bathe in the Ganges at Allahabad, for the ministrations of *pragwals*. It is obvious that it would be impossible to partition the future income from this source or to allot certain clients either by locality or family to one or other of the parties, for the simple reason that no pilgrim can be forced to accept the services of any particular *pragwal* and, obviously not being parties to this litigation, pilgrims either as a body or individually could not be bound by it. We find, however, in the schedule attached to the plaint various paraphernalia belonging to this particular *birt jajmani* described, namely, the *pothis* or books in which pilgrims enter their names, the *ghat*, the *chauki*, the platform, the shed and the distinctive flag which indicates to the pilgrims on their arrival, where this particular *pragwal* owning the *birt* can be found. We see no reason why these articles should not be divided, and the result of this will be, in practice, a division of the *birt*. In the Calcutta case Mr. Justice Mookerjee suggested that a possible partition could be arrived at by allocating to the parties their proportionate share of the names entered in these books. He suggested that the three claimants in that case should each get a third of the original entries and certified copies of two-thirds of the rest of the entries. Whether it will be necessary in this case to give certified copies is a matter which will be in the consideration of the officer who makes the actual partition. We do not suggest that the method we have indicated is the only method that can be employed. It is to be hoped that the parties will come to some agreement between themselves, because, unless they do come to some agreement amongst themselves, it seems impossible to indicate any plan which will ensure peace.

Turning now to the first point which is raised in a cross-objection by the plaintiff, it has been found by both Courts that the house in question was built on land which is joint family property, but it was built some eleven years ago at a time when the members of the family had ceased to live jointly, although there had been no actual separation by metes and bounds. The house was built by a son of the defendant Ram Chander, since deceased, out of funds of his own. Both Courts, therefore, held that this house could not be partitioned at the suit of the plaintiff and have refused to have it partitioned. The cross-objection refers more to the wording of the decree than anything else. It is pointed out that, as the decree stands, there is nothing to indicate that at the actual partition the joint land, *i. e.*, the site on which this house is built, is not now capable of partition and, therefore, when the rest of the land is being partitioned it must be borne in mind that the defendants have already received in their share the site on which this house has been built and account must be taken of that fact in partitioning the remainder of the joint land. In making the final partition the officer will take care to give to the plaintiff land or compensation equivalent to that occupied by the site of the house.

We modify the lower Court's decree to this extent that we declare that the division of the *birt jajmani* cannot be carried out by allotting clients to one party or the other but only by the division of books and other accessories referred to in the schedule to the plaint. In the case of accessories such as flag, etc., which are not capable of divi-

(2) 57 Ind. Cas. 315; 43 A. 351; 18 A. L. J. 835; 2 U. P. L. R. (A) 278.
(3) 14 Ind. Cas. 677; 15 C. L. J. 376.

s on, it will be open to the officer making the partition to allow each party to use a similar flag. In other respects the appeal is dismissed.

We allow the cross-objection to this extent that we declare that the site of the house in question shall be taken into cons deration at the time of making the final partition and the plaintiff will be given an equivalent in land or compensation for the site of the house. Under the circumstances, we direct the parties to bear their own costs.

Z. K. & N. H. *Decree modified.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 763 OF 1921.

May 15, 1923.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Walmsley.

GIRIS CHANDRA GANGOPADHYAY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Sri KRISHNA DE NAG AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Adverse possession—Non-payment of rent.

The mere non-payment of rent or discontinuance of payment of rent does not by itself create adverse possession. So long as the relationship of landlord and tenant exists, the tenant cannot acquire an adverse title as against his landlord. [p. 327, col. 1.]

Bykant Nath Shaha v. *Rajendra Narain Rai*, 12 C. 333; 6 Ind. Dec. (N. S.) 227, *Ram Narain Singh* v. *Mina Koery*, 25 C. 46; 13 Ind. Dec. (N. S.) 32 and *Prosonna Kumar Mukherjee* v. *Srihant Raut*, 16 Ind. Cas. 365; 40 C. 173; 16 C. L. J. 202; 17 C. W. N. 137, relied on.

One who enters as tenant is not, merely because of that fact, precluded from subsequently holding adversely to his landlord. But to enable him to do so, it is necessary for him to renounce the idea of holding as tenant and to set up and assert an exclusive right in himself. It is further essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious and hostile character that the landlord must have known of it. Such conduct on the part of the tenant necessarily furnishes the landlord with the legal right to enter and re-possess himself of the premises. Hence an adverse possession by the tenant cannot be predicated from the mere fact of non-payment of rent or discontinuance of payment of rent, unless in connection therewith the landlord has been apprised that the tenant claims title in himself. When the tenant thus disclaims the title of the landlord, claims title in himself, and the landlord has notice of that fact, it has the effect of an ouster and disseisin, even though this has happened during the continuance of the term of the tenancy. The theory on which adverse possession becomes a perfect title is that the true owner has, by his own fault, failed to assert his right against the hostile holder: Consequently, where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the Statute of Limitations. [p. 327, col. 2.]

A possession commencing under the authority of or in subordination to the true title does not become transformed into a hostile one by a mere change in mental attitude. It must be shown that the true owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him. [p. 328, col. 1.]

Appeal against a decree of the Subordinate Judge, 24-Perganahs, dated the 4th February 1921, affirming that of the Munsif, Alipur, dated the 11th May 1915.

Babu *Dwarka Nath Chuckerbutty*, (with him Babus *Brojo Lal Chakrabarti*, *Pramatha Nath Banerjee* and *Rama Prosad Mookerjee*), for the Appellants.

Babu *Mahendra Nath Ray* and *Amarendra Nath Bose*, for the Respondents.

JUDGMENT.

Mookerjee, J.—This is an appeal by the defendants in a suit which was commenced by the plaintiffs-respondents so far back as the 14th April 1909 for apportionment of rent and for recovery of arrears. The litigation has had a chequered career during the last thirteen years. The Trial Court dismissed the suit on the 17th January 1910. The District Judge affirmed this decision on the 21st November 1910. On second appeal to this Court, the suit was remanded for re-consideration on the 14th March 1913, by Jenkins, C. J., and Mullick, J. On the 9th January 1914 the District Judge remitted the case to the Court of first instance for re-trial. On the 11th May 1915 the Trial Court decreed the claim in part. On the 23rd August 1916 the Subordinate Judge on appeal reversed this decision and dismissed the

suit. On second appeal to this Court. N. R. Chatterjea and Newbould, JJ., set aside the decision of the Subordinate Judge on the 22nd March 1920, and remanded the case for re-consideration. On the 4th February 1921 the Subordinate Judge decreed the suit. The primary Court has thus decided on one occasion in favour of, and on another occasion against, the plaintiffs, while the lower Appellate Court has decided on one occasion in favour of, and on two occasions against, the plaintiffs. The last decision of the Subordinate Judge, which is in favour of the plaintiffs, has been assailed before us as vitiated by an error upon the question of adverse possession.

The facts material for the determination of the one point now in controversy lie in a narrow compass and may be shortly narrated. One Sibasundari Debi was the proprietor of a three-annas share of a tract of *mal* and *lakhraj* lands, measuring 1827 *bighas* 11 *cottahs* in 761 plots. On the 8th July 1884 the first two defendants took a lease of this three-annas share, which would comprise 342 *bighas* 10 *cottahs*; the annual rent was fixed at Rs. 793. The interest of Sibasundari Debi as landlord devolved on her death upon one Nilmadhab Chatterjee. On the 13th September 1892 the right, title and interest of Nilmadhab Chatterjee in 123 plots, which included an area of 248 *bighas*, was sold in execution, and was purchased by the plaintiffs. The sale was confirmed on the 24th November 1892 and symbolical possession was delivered to the purchasers on the 6th June 1895. On the 10th January 1893 the right, title and interest of Nilmadhab Chatterjee in the entire tract of 1827 *bighas* 11 *cottahs* was sold, in another execution, in a different Court of higher grade, when one Radhanath Sarkar became the purchaser. This sale was confirmed on the 10th April 1893 and symbolical possession was delivered to the purchaser on the 31st January 1896. The defendants took a conveyance on the 4th February 1896, from Radhanath Sarkar, of the title acquired by him at the second execution sale. On the 14th April 1909 the plaintiffs commenced the present action against the defendants for apportionment of rent and recovery of arrears in respect of the three-annas share of 248 *bighas* purchased by them at the execution sale held on the 15th September 1892. The plaintiffs assigned to the defendants the position of tenants under the lease of the 8th July 1884. The only defence which is material at this stage and requires consideration is, that at the date of the suit, the plaintiffs had no subsisting title, as the defendants had acquired a good title by adverse possession since the 4th February 1896, when they took the conveyance from the purchaser at the second execution sale.

It is incontrovertible that Radhanath Sarkar, the purchaser at the execution sale held on the 10th January 1893, did not acquire a title which could prevail against the plaintiffs. No doubt, his purchase was at a sale held by a Court of a grade higher than that of the Court which held the sale of the 15th September 1892, when the plaintiffs became the purchasers. It may further be conceded that the sale was held in contravention of the provisions of section 285 of the Civil Procedure Code of 1882, which prescribed that when a property was under attachment by two Courts of different grades, the sale should be held by the Court of higher grade. It is well-settled, however, that a contravention of this provision did not invalidate the sale, if any, held by the Court of lower grade: *Bykant Nath Shaha* v. *Rajendra Narain Rai* (1), *Ram Narain Singh* v. *Mina Koery* (2), *Gopi Chand* v. *Kasimunnessa Khatun* (3). This view, it may be noted, has received legislative approval in section 63 of the Code of 1908. Consequently, when the sale in favour of the plaintiffs was confirmed on the 24th November 1892 the title vested in them as auction-purchasers, and nothing was left in the judgment-debtor Nilmadhab Chatterjee which could pass to the purchaser at the subsequent sale. There is thus no escape from the position that the purchaser at the second sale could not convey a valid title in the superior interest to the defendants by his convey-

(1) 12 C. 333; 6 Ind. Dec. (N. S.) 227.
(2) 25 C. 461; 13 Ind. Dec. (N. S.) 32.
(3) 34 C. 826; 6 C. L. J. 130.

ance of the 4th February 1896. The only result of the conveyance was that the defendants, who were lessees under the grant of the 8th July 1884, were placed in a position to set up an unfounded title to the superior interest. The plaintiffs, as already stated, did not, however, institute the present action till the 14th April 1909, in other words, after the lapse of more than twelve years from the 4th February 1896, when the defendants claimed to have acquired the superior interest in derogation of the purchase of that very interest by the plaintiffs on the 15th September 1892. The question thus arises, whether the title of the plaintiffs has been extinguished by the hostile possession on behalf of the defendants for the statutory period.

It has been found by the Subordinate Judge that neither the plaintiffs after their purchase on the 15th September 1892, nor Radhanath Sarkar after his purchase on the 10th January 1893, ever realised rent from the defendants; in other words, the defendants have occupied the lands without payment of rent either to the rightful proprietors or to the rival claimant. This, however, is clearly insufficient to constitute adverse possession, because, as ruled in *Prosonna Kumar Mukherjee* v. *Srikant Raut* (4), which was approved by the Judicial Committee in *Jagdeo Narain Singh* v. *Baldeo Singh* (5), mere non-payment of rent or discontinuance of payment of rent does not by itself create adverse possession. We have, consequently, to consider the principles applicable to questions of adverse possession between landlord and tenant.

As a general rule, the possession of a tenant is that of his landlord and will be so deemed until the contrary appears. This fundamental rule affects all who may succeed to the possession, immediately or remotely, through or under the tenant. From this point of view, it is clear that, so long as the relationship of landlord and tenant exists, the tenant cannot, subject to the qualification presently to be stated, acquire an adverse title as against his landlord. This is merely one application of the rule that the tenant cannot deny his landlord's title; see the decisions in *Bhaiganti Bewa* v. *Himmat Bidyakar* (6) and *Reajuddin Bepari* v. *Chand Baksha Haji* (7). It is equally well settled, however, that one who enters as tenant is not, merely because of that fact, precluded from subsequently holding adversely to his landlord. But to enable him to do so, it is necessary for him to renounce the idea of holding as tenant and to set up and assert an exclusive right in himself. It is further essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious and hostile character that the landlord must have known of it. Such conduct on the part of the tenant necessarily furnishes the landlord with the legal right to enter and re-possess himself of the premises. Hence an adverse possession by the tenant cannot be predicated from the mere fact of non-payment of rent or discontinuance of payment of rent, unless, in connection therewith, the landlord has been apprised that the tenant claims title in himself. When the tenant thus disclaims the title of the landlord, claims title in himself, and the landlord has notice of that fact, it has the effect of an ouster and disseisin, even though this has happened during the continuance of the term. The theory on which adverse possession becomes a perfect title is that the true owner has, by his own fault, failed to assert his right against the hostile holder. Consequently, where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the Statute of Limitations. Without this, the length of the occupation is immaterial and does not affect the title; possession

(4) 16 Ind. Cas. 365; 40 C. 173; 16 C. L. J. 202; 17 C. W. N. 137.
(5) 71 Ind. Cas. 984; 49 I. A. 399; 36 C. L. J. 499; 3 P. L. T. 605; (1922) A. I. R. (P. C.) 272 32 M. L. T. 1; (1923) M. W. N. 361; 2 Pat. 38; 27 C. W. N. 925; 45 M. L. J. 460 (P. C.).
(6) 35 Ind. Cas. 7; 24 C. L. J. 103; 20 C. W. N. 1335.
(7) 33 Ind. Cas. 28; 24 C. L. J. 453.

for the full period of limitation must have elapsed after repudiation before title based thereon can be acquired. If the rule were otherwise, the greatest injustice might be done; without such knowledge of the repudiation, the landlord has the right to rely upon the fiduciary relation under which the possession was originally taken. As has been well said, a possession commencing under the authority of or in subordination to the true title does not become transformed into a hostile one, by a mere change in mental attitude. It must be shown that the true owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him.

The case before us has not been considered from this point of view, and such facts as are found in the judgment of the Subordinate Judge are not sufficient to enable us to decide the question. The plaint in a previous rent suit filed by the plaintiffs on the 19th March 1895 shows that they were then aware of the purchase made by Radhanath Sarkar at the execution sale held on the 10th January 1893. The plaint filed by the plaintiffs in the title suit on the 3rd November 1902 shows that they were at that date aware of the purchase made by the defendants from Radhanath Sarkar. But we are unable to determine, when the plaintiffs were first apprised of the conveyance. If the plaintiffs became aware of the conveyance more than twelve years before the institution of the present suit, that is, between the 4th February 1896 and 13th April 1897, they had knowledge of the adverse claim for longer than the statutory period. This question must be investigated before a decree is made in favour of the plaintiffs. We regret that another remand is necessary, but we cannot overlook that the plaintiffs are in a large measure responsible for their difficulties. They have created a cobweb of fictitious titles which has effectively obscured the real question at issue.

The result is that this appeal is allowed, the decision of the Subordinate Judge set aside and the case remanded to him for re-consideration of the following question only:

"Did the plaintiffs become first aware of the conveyance executed by Radhanath Sarkar on the 4th February 1896 in favour of the defendants, more than twelve years before the 14th April 1909 when the present litigation was commenced."

If the question is answered in the affirmative, the suit will stand dismissed. If the question is answered in the negative, the suit will stand decreed.

The Subordinate Judge will take such additional evidence on this point as may be adduced by the parties. Costs will abide the result.

Case remanded.

W. C. A.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 25 OF 1922.

March 13, 1923.

Present:—Mr. Justice Heald and Mr. Justice Lentaigne.

MAUNG CHIT U—DEFENDANT No. 1 —APPELLANT

versus

BANSI DHAR BAZAZ—PLAINTIFF —RESPONDENT.

Vendor and purchaser—Sale of moveable property —Notice of encumbrance—Burden of proof—Priority of title.

Where a purchaser of moveable property alleges that he purchased without notice of an encumbrance on the property, the onus of proof that he had no notice lies on him. Where he fulfils that onus, the fact that he has obtained possession would give him prior title.

Raman Chetty v. *Steel Brothers & Co. Ltd.*, 2 Ind. Cas. 351; 5 L. B. R. 8; 2 Bur. L. T. 69, referred to.

First Civil appeal from the judgment and decree of the District Court, Amherst.

Mr. *Kyaw Din*, for the Appellant.

Mr. *Patkar*, for the Respondent.

JUDGMENT.—This is an appeal against the judgment of the District Court of Amherst granting plaintiff-respondent a decree for Rs. 4,500 with interest thereon calculated up to date of suit and with costs against the appellant—first defendant (Maung Chit U), and against the third defendant one K Yenkana as the legal representative of Sattla, deceased. The judgment and decree also granted the plaintiff the right to sell the boat No. 174 in order to satisfy the amount declared due after deducting therefrom the sum

of Rs. 234 then in deposit in Court on account of another boat, which sum plaintiff was permitted to draw out.

The material facts of the case are, that Sattia was the onwer of the said boat No. 174 and another boat which he mortgaged on the 16th November 1915 to Babu Johar Mal Khemka as security for loans due under promissory-notes which were from time to time renewed and of which the last renewal, dated the 12th October 1919, was executed after the death of Khemka, and is the promissory-note now sued on. These two boats were registered in the Port Office at Moulmein; and Khemka had taken the precaution of having the boa ts registered in his name as if he were owner. On the 21st September 1917 Sattia who had remained in possession of the boats, sold the boat No. 174 to Maung Chit U, the appellant, who then obtained possession of the boat and has remained in possession ever since. The appellant was joined as a defendant in the suit because he was in possession of the boat. Appellant was not a signatory of the promissory-note, but his boat was held to be security for the re-payment of the loan, and as the value of the boat was admittedly considerably more than the amount claimed, no harm was caused to appellant by the passing of the money-decree against appellants if appellant's boat is rightly held to be security for the loan. No objection has been raised to this aspect of the judgment.

The only ground on which the judgment of the lower Court is challenged by the appellant is by a contention that the lower Court should have held that appellant had obtained from Sattia a Tindal's license for the boat, and that, at the time of the purchase of the boat by appellant, appellant had no notice of the mortgage to Khemka. The onus of proof that appellant had no notice of the mortgage lay on the appellant in accordance with the ordinary rule which applies to a purchaser for value without notice equally in the case of moveable property and of immoveable property. If appellant had fulfilled that onus, the fact that he obtained possession would have given him a prior title in accordance with the decision in *Raman Chetty* v. *Steel Brothers & Co., Ltd.* (1). Appellant has sworn that, when he bought the boat, he did not know that it was mortgaged to Khemka and he denied the allegation that he had gone to the Port Office to make enquiries; but his witness Naidu admits that Khemka's permission and signature had to be obtained before he could get the Tindal's license from the Port Office, and Naidu also swears that he told appellant that the boat was mortgaged to Khemka before the appellant bought the boat. This fact becomes significant when taken also with appellant's admission that, though he bought the boat for the price of Rs. 3,600, he only paid Rs. 1,200 in cash and executed two promissory-notes for the balance of Rs. 2,400. Plaintiff's witness, R. Lecerf, who was formerly a clerk in the Port Office and was a clerk in Census Office when he gave evidence, has stated that in September 1917, Sattia had come to him with a Burman stating that the Burman was buying the boat and that on looking up the register, he had found that the boat stood in the name of Khemka and had so informed the Burman, and that he also informed the Burman that unless he brought Khemka to sign the transfer, the boat could not be transferred to the (Burman) Chit U's name. He also states that subsequently Sattia and Chit U came to him again and asked for a Tindal's license and produced a petition to that effect which was also signed by Khemka. Witness had thought it strange that the Burman, who had first applied for a transfer of the boat to his name should subsequently apply for a Tindal's license, and, therefore, the fact was impressed on his memory. On this evidence we are bound to hold that appellant had completely failed to prove that he had no notice of Khemka's mortgage when he entered into the agreement and made the purchase of the boat. His Advocate has urged no other point in support of the appeal, and the appeal must be and is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 2 Ind. Cas. 351; 5 L. B. R. 8; 2 Bur. L. T. 69.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1782 OF 1921.
April 19, 1923.
Present;—Mr. Justice Kanhaya Lal.

KUNDAN LAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BASANT RAI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 165—U. P. Land Revenue Act (III of 1901), s. 4—Lambardar, position of—Co-sharer in possession of sir or khudkasht—Suit to recover excess profits, maintainability of.

A *lambardar* is not only a co-sharer but also the agent of the other co-sharers and is authorised to represent them in all transactions appertaining to the administration of the *mahal* and the collection of its profits. [p. 330, col. 2.]

A *lambardar* can sue, on his own behalf and on behalf of the other co-sharers, such co-sharers of the village who hold *sir* and *khudkasht* land for a refund of the profits realised by them in excess of their shares. [p. 331, col. 1.]

Bishambhar Nath v. *Bhola*, 12 Ind. Cas. 920; 34 A. 98; 8 A. L. J. 1245, dissented from.

Ganga Singh v. *Ram Sarup*, 33 Ind. Cas. 119, 38 A. 223; 14 A. L. J. 252, followed.

Second appeal against a decree of the District Judge, Shahjahanpur, dated the 5th July 1921.

Messrs. *Gulzari Lal* and *Harnandan Prasad*, for the Appellants.

Mr. *G. Agarwala*, for the Respondent.

JUDGMENT.—Basant Rai is the sole respondent in this appeal. The question for consideration in this appeal is whether a *lambardar* can sue the other co-sharers of the village, who hold *sir* or *khudkasht* land, for a refund of such profits as they may have realized in excess of their share.

The suit was filed by the *lambardar* in this instance against two co-sharers Kundan Lal and Misri Lal, who have been found to have held *khudkasht* land in excess of their share. The Court of first instance confined its decree to the share of the *lambardar* in such excess. The lower Appellate Court allowed the decree for the entire excess. One of the defendants-appellants died during the pendency of this appeal and his heirs did not apply for substitution within the time allowed by law, his appeal, therefore, has abated. The other appellant wants to contest the right of the *lambardar* to realise anything in excess of his share, as a co-sharer, under section 165 of the Agra Tenancy Act (II of 1901). A *lambardar* is not merely a co-sharer but also the agent of the other co-sharers and he is authorised to represent them in all transactions appertaining to the administration of the *mahal* and the collection of its profits. Section 4 of the U. P. Land Revenue Act (III of 1901) defines a *lambardar* as co-sharer of a *mahal* appointed to represent all or any of the co-shares in that *mahal*. If he were not authorised to collect the rents from all the tenants he would obviously not be in a position to render accounts to his co-sharers under section 164 of the Agra Tenancy Act in such a manner as to close the determination of his and their liability for the period in question with any finality. If he is entitled to collect the rents from the co-shares, he is equally entitled to charge any of the co-sharers who may hold *khudkasht* land in excess of their share, with a liability for the excess. On behalf of the surviving defendant-appellant, reliance has been placed on the decision in *Bishambhar Nath* v. *Bhola* (1). But the correctness of that decision has been questioned in a later decision in *Ganga Singh* v. *Ram Sarup* (2) where, referring to the above decision, the learned Judges who decided the latter case observed (page 225*):—"It seems to us that, if the case of *Bishambhar Nath* v. *Bhola* (1) was rightly decided, it follows that the *lambardar* could not even sue a tenant for rent without joining all other co-sharers. There is no special section in the Tenancy Act which provides for a suit by a *lambardar* as such against a tenant and yet we know that it is the regular practice in *lambardari* villages that the *lambardars* sue the tenants for rents and that it is frequently made a ground for making them liable upon the gross rental that they have neglected to bring such suits. If the *lambardar* is the agent of the co-sharers to bring a suit for rent he seems to be equally their agent for the purpose of bringing a suit against co-sharers who hold *sir* and *khudkasht* in excess and who have refused to allow the *sir* and *khudkasht*, which they hold to be taken into account." It is well-recognised that in an undivided *mahal* a co-sharer is entitled as against the *lambardar* to have

(1) 12 Ind. Cas. 920; 34 A 98; 8 A. L. J. 1245
(2) 33 Ind. Cas. 119; 38 A 223; 14 A L. J. 252

*Page of 38 A.—[*Ed.*]

taken into account the profits of the *sir* and *khudkast* land held by the other co-sharers in the village; and, if he is so entitled, the *lambardar* ought to have the right to collect such profits as any of his co-sharers may have realized in excess of their share either from the tenants or from the *sir* and *khudkasht* land in thei possession taken together. Section 165 of the Agra Tenancy Act (II of 1901) does not exclude the general authority, which the *lambardar* possesses to represent his co-sharers in such a litigation.

It is also urged that the claim about 1324 *Fasli* is barred by limitation. The suit was filed on the 30th July 1920. It ought to have been filed within three years from the date when the right to accounts accrued and the share of the profits became payable. According to the *dastur dehi* the accounts are to be rendered in *Asarh*, which ended in that year on the 4th of July 1920. The suit for 1324 *Fasli* was, therefore, barred by limitation.

The appeal is accordingly allowed in so far that the claim for 1324 *Fasli* will stand dismissed as far as it affects the surviving defendant-appellant, with proportionate costs appertaining thereto. The rest of the decree of the lower Appellate Court will stand confirmed. The successful defendant-appellant will get one-third of his costs from the plaintiff-respondent who will get two-thirds of his costs from the surviving defendant-appellant in this Court.

Z. K. *Appeal partly allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 103 AND 104 OF 1922.

September 22, 1922.

Present:—Mr. Wazir Hassan, A. J. C.

BADRI PRASAD—PLAINTIFF—APPELLANT

versus

MUKANDI AND OTHERS—DEFENDANTS—RESPONDENTS.

BADRI PRASAD—PLAINTIFF—APPELLANT

versus

RAM SHANKER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Additional evidence in Appellate Court, production of—"Requires," meaning of—"Any other substantial cause," meaning of—Appeal, second—Discretion, exercise of, whether can be challenged—Additional evidence, refusal to admit, in Court of first appeal—Second appeal, competency of.

A party cannot claim admission of additional evidence, oral or documentary, as a matter of right. O. XLI, r. 27 of the Civil Procedure Code gives a discretion to the Court of Appeal to allow the production of such evidence, and lays down definite limits. [p. 333, col. 1.]

The word "requires" in O. XLI, r. 27 of the Civil Procedure Code means "needs or finds needful." [p. 333, col. 2.]

Kessowji Issur v. *Great Indian Peninsula Railway Company*, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.), relied on.

The words "any other substantial cause" occurring in O. XLI, r. 27 of the Civil Procedure Code mean a *causa ejusdem generis* to the grounds already mentioned; or, in other words, as meaning a case analogous to those specified previously. [p. 333, col. 2.]

Chhaju Ram v. *Neki*, 72 Ind. Cas. 556; 26 C. W. N. 697; 30 M. L. T. 295; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.), referred to.

Where a lower Court is invested with a discretion in a matter and it has exercised it in one way, it is not open to a Court of second appeal to interfere with that discretion. [p. 333, col. 2.]

Vaithinatha Pillai v. *Kuppa Thevar*, 53 Ind. Cas. 274; 42 M. 737; 10 L. W. 122; 37 M. L. J. 125; (1919) M. W. N. 525; 26 M. L. T. 246, referred to.

The refusal of a Court of first appeal to admit additional evidence is not open to challenge in second appeal. [p. 334, col. 1.]

Appeal from a decree of the Additional Subordinate Judge, Lucknow, dated the 31st January 1922, confirming that of the Munsif, Lucknow, dated the 31st May 1921.

BADRI PRASAD *v.* MUKANDI.

Messrs. *Bisheshwar Nath Srivastava* and *Gokul Prasad*, for the Appellant.

Mr. *Brij Nath, Sharga*, for the Respondents.

JUDGMENT.—The two suits out of which these two appeals respectively arise were instituted by the plaintiff-appellant, Badri Prasad, against Mukandi and others in one suit, and in the other suit against Ram Shanker and another, defendants. The plaintiff's case in both the suits is that he is the owner of house No. 517, compound No. 672, situate in Ranikatra in the City of Lucknow in virtue of successive assignments from the original owner. The defendants in both the suits own and occupy houses separated from the house No. 517 by partition walls. The defendants in the one case have opened a door and a window and those in the other have opened a window in their own houses. This door and these windows infringe the plaintiff's right of privacy in his own house. Hence the suits for the relief that the door and the windows be ordered to be closed.

The defence in both the suits is the same. The only part of it with which I am now concerned is that the plaintiff is not the owner of the house No. 517, compound No. 672, because it being a public place of worship, is not susceptible of private ownership and that the plaintiff or his predecessor-in-interest has not been in possession of the house in question. Both the suits were tried together and both have been dismissed by the Courts below.

Under section 4 of the Indian Easements Act, 1882, the plaintiff can maintain the suits which he has brought if he is either the owner or the occupier of the house in question. The Courts below have, however, decided that he is neither the one nor the other. The lower Appellate Court dismissed the appeal on that ground alone. The conclusions of that Court are *prima facie* findings of fact which are not liable to be challenged in second appeal but the manner in which they have been attacked will appear from this judgment as it proceeds.

The dimensions of the house in question, as found by the Court below are:—

North and South 49 feet 2 inches.

East and West 15 feet 8 inches.

About the centre of the area there is a temple in existence covering an area of 5 feet 10 inches square with a platform 1 foot 10 inches broad round it.

The Court below finds *inter alia* that "there is no direct evidence of dedication, but none is necessary under the circumstances of this case, where the real aim of construction and public use establish it to be *'waqf'*. I hold that the so-called house in dispute is a public endowment."

It is contended that as the public character of the house in question is presumed merely by user, the finding must be taken to cover the temple in the centre alone to which only the user relates. I took time to consider the evidence and the judgments of the lower Courts in the light of the argument thus advanced and have come to the conclusion that the contention is unsound. There is ample evidence as regards the user extending over the whole area apart from the evidence indicating the character of the whole of the house as being a place of public worship. I may here quote what the Court below says as to a portion of the house in the north-west corner of it:—"I am convinced that this cell represents the remains of an old temple." It also refers, among other matters, to Exhibit A-1 which is the *khasra* of the old Settlement. In this document, to quote the words of the lower Court, "this place is recorded as *shivala* with two *pipal* trees. It is not recorded to be a residential house with a small temple." I am, therefore, of opinion that the finding of the lower Court covers the whole house in question. Indeed, there are express words to that effect:—"I hold that the so-called house in dispute is a public endowment."

The second line of attack in this Court was directed against the finding of the Court below on the question of possession. The finding is:—"I am entirely in accord with the finding of the lower Court and hold that the plaintiff is now in possession of the *shivala* in contest." The argument against this finding is that since the institution of these suits there has been a decision of Criminal Court relating to possession arising out of proceedings under section 145 of the Code of Criminal Procedure, and a copy of the judgment in that case was tendered before the Appellate Court but that Court wrongly refused to admit it.

Now, the judgment of the Criminal Court was delivered while the evidence of the defendants' witnesses was being recorded in the Trial Court and after the evidence was closed arguments were addressed and then the Court took time to deliver judgment. No reasonable explanation was offered in the Court below, and none was offered here, as to why the judgment in question was not produced in the Court of first instance. In rejecting the appellant's application for the admission of this, among other documents, in evidence the learned Subordinate Judge says:—"After having inspected the locality and gone through the evidence and contentions of parties, I am of opinion that I do not require any fresh document of the sort desired to be introduced on record to enable me to pronounce judgment, and that there is no other substantial cause to justify me in taking these documents on record." This, to my mind, is a valid ground for the order which the Court below has passed. Production of additional evidence in Appellate Courts is regulated by r. 27 of O. XLI of the Code of Civil Procedure. Sub-rule (1) of r. 27 is as follows.—"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined."

It is perfectly clear that a party cannot claim admission of additional evidence, oral or documentry, as a matter of right. The rule, however, gives a discretion to the Court of Appeal to allow the production of such evidence. The grounds upon which such discretion will be exercised are stated in clauses (*a*) and (*b*) of the rule quoted above. Clause (*a*) is not applicable to this case because the documents now sought to be introduced, except perhaps one, were not tendered in the Court of first instance. As to clause (*b*) the word "requires" used therein is significant. In the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1), Lord Robertson observed as follows:—

"It plainly means 'needs or finds needful'.....the legitimate occasion for section 568 (old Code) is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent." It was contended that the present case may fall within "any other substantial cause" I am of opinion that this contention is untenable. According to my judgment, r. 27 of O. XLI lays down definite limits within which additional evidence may be produced in Appellate Courts. This being the construction which I place on the rule as a whole, it follows that the words 'any other substantial cause' mean a *casus ejusdem generis* to the grounds already mentioned; or, in other words, (to use the language of Lord Haldane with necessary modification) as meaning a case at least an logous to those specified previously. [*Chhajju Ram* v. *Neki* (2).] The precise point for determination in the case just now mentioned was the interpretation of the words 'any other sufficient cause' occurring in r. 1 of O. XLI of the Code of Civil Procedure.

Further, as already pointed out, the Court below is invested with a discretion in the matter. It has exercised its discretion in one way and it is not open to a Court of second appeal to interfere with that discretion. In this connection, I may refer to the recent Full Bench decision of the Madras High Court in the case of *Vaithinatha Pillai* v. *Kuppu Thevar* (3), and I wish to add respectfully that I am in complete agreement with the views expressed

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).

(2) 72 Ind. Cas. 566; 26 C. W. N. 697; 30 M. L. T. 295; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.).

(3) 53 Ind. Cas. 274; 42 M. 737; 10 L. W. 122; 37 M. L. J. 125; (1919) M. W. N. 525; 26 M. L. T. 246.

by the majority of the learned Judges who decided that case. As the learned Chief Justice remarks, there is a strong *catena* of decisions in Calcutta and in Allahabad to the effect that the refusal of the Court of the first appeal to admit additional evidence is not open to challenge in second appeal.

These appeals, therefore, fail and are dismissed with costs.

N. K. *Appeals dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 60 OF 1922.
April 11, 1923.
Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.
PAKKIRI KANNI—PLAINTIFF—APPELLANT
versus
Haji MOHAMMAD MANJOOR SAHIB BY AGENT HABIBULLA SAHIB—DEFENDANT—RESPONDENT.

Partition—Common property—Suit for partial partition, maintainability of—Procedure.

Though suits for partition of common property (as distinct from joint property) in which the whole of the property available for partition has not been included are inexpedient, they are not unsustainable on that account. It is always open to the defendant in such a case, if he thinks himself prejudiced by the exclusion of any property, himself to bring a suit in respect of it and have it tried with the suit already pending.

***Mahomed Fazlur Rahman Chowdhri* v. *Mahomed Fayzur Rahman Chowdhri*, 10 Ind. Cas. 354; 15 C. W. N. 677, *Moideensa Rowthen* v. *Mahammad Kasim Rowthen*, 28 Ind. Cas. 895 and *Korumbakkatparkum Vengalasheri Moideen Kutti* v. *Thuniyilandiyal Mariamumma*, 70 Ind. Cas. 1131; 14 L. W. 502; 41 M. L. J. 457, distinguished.**

Appeal against the order of the Court of the Additional Subordinate Judge, Tanjore, dated the 11th August 1921, in Appeal Suit No. 59 of 1921 (A. S. No. 332 of 1920 on the file of the District Court, Tanjore), preferred against the decree of the Court of the District Munsif, Tiruthuraipundi, dated the 18th May 1920, in Original Suit No. 382 of 1919; (Original Suit No. 50 of 1919 on the file of the Court of the District Munsif, Nagapatam).

Mr. *R. Kuppuswami Iyer*, for the Appellant.

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

JUDGMENT.—Objection has first been taken to the lower Appellate Court's findings that two items of common property are available for partition, but are not referred to in the plaint. Those findings are findings of fact, and we have not been shown any ground on which we can interfere with them in second appeal.

The second appeal is then argued against the lower Appellate Court's order remanding the suit with a direction to the District Munsif to give the plaintiff an opportunity to amend his plaint by including a prayer for relief in respect of the properties just referred to and other properties, if any, left by the deceased; and in case he does not so amend to dismiss the suit. We have not been shown any direct authority that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the joint property in respect of which it might have been brought has not been included. Shortly, we have not been s own that the objection founded on what is usually described as the plea of partial partition is available, when a suit for division of a common property, not joint property, is in question. It is true that in *Mahomed Fazlur Rahman Chowdhri* v. *Mahomed Fayzur Rahman Chowdhri* (1), *Moideensa Rowthen* v. *Mahammad Kasim Rowthen* (2) and *Korumbakkatparkum Vengalasheri Moideen Kutti* v. *Thuniyilandiyal Mariamumma* (3), an opinion was expressed against the expediency of suits for partition of common property in which the whole of the property available for partition was

(1) 10 Ind. Cas. 354; 15 C. W. N. 677.
(2) 28 Ind. Cas. 895.
(3) 70 Ind. Cas. 1131; 14 L. W. 502; 41 M. L. J. 457.

not included. But we have not been shown any decision that such suits are actually unsustainable and we are not prepared to hold that they are so. It is, we may point out, always open to the defendant in such a case as the present, if he thinks himself prejudiced by the exclusion of any property himself to bring a suit in respect of it and have it tried with the suit already pending. Taking this view, we must allow the appeal to the extent that we set aside the lower Appellate Court's order and direct it to disposeo of the appeal in the light of the foregoing and with reference to the District Munsif's findings on the issues. Costs in this Court will be costs in the cause and will be provided for by the lower Appellate Court in the decree to be passed.

It is pointed out to us that the Additional Sub-Court of Tanjore, from which this appeal came, has been abolished in consequence of the bifurcation of the District into Tanjore East and Tanjore West for judicial purposes and that, therefore, our order of remand to the lower Appellate Court requires explanation. So far as we can ascertain, the District Court of Tanjore East now exercises appellate jurisdiction over Tiruturaipundi District Munsif's Court to which this case belongs. The remand must, therefore, be to the District Court of Tanjore East and our order must be read accordingly.

V. N. V.

Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1432 OF 1920.
May 8, 1922.
Present:—Mr. Justice Lindsay and
Mr. Justice Kanhaiya Lal.
Sri THAKURJI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
HIRA LAL—DEFENDANT—RESPONDENT.

U. P. Court of Wards Act (IV of 1912), s. 55, applicability of—Disqualified proprietor—Manager of endowed property, status of.

Section 55 of the U. P. Court of Wards Act has no application where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to property which he owns and not to that which he holds as trustee. The manager of endowed property is not the owner of that property, nor does he hold any beneficial interest therein. He cannot be regarded as a disqualified proprietor in respect of that property and the idol in whom the endowed property is supposed to be invested, cannot be treated as a ward within the meaning of section 55 of the Act above quoted.

Second appeal from a decree of the District Judge, Cawnpore, dated the 7th of June 1920, reversing that of the Subordinate Judge, Cawnpore, dated the 10th of February 1919.

Munshi *Gulzari Lal*, for the Appellants.

Babu *Harendra Krishna Mukerji*, for the Respondent.

JUDGMENT.—The dispute in this case relates to a plot of land situate in the village Sisamau in the Cawnpore District. The plaintiffs claimed to be co-sharers of a *mahal* to which this land appertains. One of the plaintiffs is an idol whose property is under the management of Ajodhya Prasad. The other two plaintiffs are Ajodhya Prasad and Baldeo Prasad, whose property is under the management of the Court of Wards. There is another co-sharer, Sheo Prasad, whose property is also under the management of the Court of Wards. The allegation of the plaintiffs was that the defendant Hira Lal had taken wrongful possession of the disputed land and started making constructions thereon without any right. The defence of Hira Lal was that the plaintiffs had not been in possession of the disputed land and that he had been in possession thereof for more than twelve years. The Court of first instance found

against him and decreed the claim. On appeal one of the pleas taken up for the first time on behalf of Hira Lal was that the plaintiffs had no right to maintain the suit because their property was under the management of the Collector of Cawnpore as Manager of the Court of Wards. An issue was thereupon remitted by the lower Appellate Court to the Court of first instance to ascertain whether the property of the plaintiffs was under the superintendence of the Court of Wards. The finding on that issue was that Ajodhya Prasad and Baldeo Prasad had been declared to be disqualified proprietors and that their property had been taken possession of by the Court of Wards under its superintendence along with that of Sheo Prasad. It was found, however, that the property of the idol, who is the first plaintiff, was not under the superintendence of the Court of Wards. On that finding the learned District Judge proceeded to dismiss the suit, holding that Ajodhya Prasad, who was the *Sarbarahkar* of the property of the idol, was not entitled to maintain the suit on behalf of the idol, any more than the other plaintiffs, under section 55 of the Court of Wards Act (IV of 1912). That section has, however, no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as a trustee. A person who happens to be the manager of an endowed property is not the owner of that property and holds no beneficial interest therein. He cannot be regarded as a disqualified proprietor in regard to the property which he so holds as manager, and the idol, in whom the endowed property is supposed to be vested, cannot be treated as a ward within the meaning of section 55 of the Act. The property of the idol was never in fact taken over by the Court of Wards under its management. The plea was clearly untenable. Indeed, as pointed out in *Mannu* v. *Nasratullah Khan* (1), one of the co-sharers can sue to eject a trespasser from the joint land, and the suit was maintainable.

(1) A. W. N. (1901) 36.

We accordingly allow the appeal, set aside the order of the lower Appellate Court and remand the case under O. XLI, r. 23, to that Court with a direction to reinstate it on its file of pending cases and dispose of it according to law. The costs here and hitherto will abide the result.

Appeal decreed.

W. C. A.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 99 OF 1921.

March 22, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

CHEVRAYA GOUNDAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ATHAPPA GOUNDAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. VI, O. I, r. 8—Representative suit—Leave to sue on behalf of others not obtained—Compromise decree—Res judicata.

Explanation VI to section 11 of the Civil Procedure Code is not confined only to cases where leave of the Court has been granted under O. I, r. 8 of the Code, nor does the explanation become inapplicable because the decree on the previous suit was based on a compromise and was not passed after contest. [p. 337, col. 2.]

A decree in a suit brought by the plaintiffs as trustees on behalf of themselves, and the whole body of persons worshipping or interested in a temple operates as *res judicata* in a subsequent suit filed under O. I, r. 8 of the Civil Procedure Code by certain other representatives of the village against the same parties notwithstanding that the prior suit was not brought under O. I, r. 8 and the decree was a compromise decree and not one passed after contest. [p. 338, col. 1.]

Srooman Madabushi Gopalacharlu v. *Emmani Subbamma*, 55 Ind. Ca. 984; 43 M. 487; 38 M. L. J. 493; (1920) M. W. N. 435; 27 M. L. T. 219, *Godimella Raiganmi* v. *Panchangam Narasimhacharyulu*, 35 Ind. Cas. 116; 31 M. L. J. 26; (1916) 2 M. W. N. 258, followed.

CHEVRAYA GOUNDAN v. ATHAPPA GOUNDAN.

Jenkins v. *Robertson*, 1 H. L. Sc. 117, *In re South American and Mexican Company, Ex parte Bank of England*, (1895) 1 Ch. 37; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131, *Kumara Venkata Perumal* v. *Thatha Ramaswamy Chetty*, 9 Ind. Cas. 875; 35 M. 75; (1911) 1 M. W. N. 290; 9 M. L. T. 487; 21 M. L. J. 709 and *Madhavan* v. *Keshavan*, 11 M 191; 4 Ind. Dec. (N. S.) 133, followed.

Second appeal against a decree of the Court of the Subordinate Judge, Salem, in Appeal Suit No. 42 of 1919, preferred against a decree of the Court of the Additional District Munsif of Salem, in Original Suit No. 2056 of 1915.

Messrs. *T. L. Venkatrama Iyer* and *P. Sankaranarayana*, for the Appellants.

Dr. *S. Swaminadan*, for the Respondent.

JUDGMENT

Odgers, J.—This suit was brought by the four plaintiffs for the recovery of certain lands alleged to belong to the Mariamman Temple of Chettipatti under O. I, r. 8 of the Code of Civil Procedure and for a declaration that the decree in Original Suit No. 934 of 1911, is not binding on the plaintiffs. The District Munsif found that the plaint property belonged to the temple, that the temple had possession of the plaint property within twelve years of the suit, and that there was no *res judicata* by reason of Original Suit No. 34 of 1911, and gave the plaintiffs a decree.

On appeal the Sub-Judge found that there was *res judicata* and that a certain compromise (to be referred to later) was not fraudulent or *ultra vires* and reversed the Munsif's decree. The question in second appeal is whether the Sub-Judge is right on both these points.

In the previous suit, which was brought by the present defendants Nos. 1 to 3 and two others, they sued as the Periadhanakars of the Chettipatti village to recover the same land as is in suit in the present case. The former suit was compromised by two of the plaintiffs and the suit was dismissed as against two others.

The former suit was not brought under O. 1, r. 8, but the plaintiffs there (Nos. 1 to 4) were Periadhanakars of the Padayachies of the Chettipati village. In their plaint paragraph 4 (p. 14 of the papers in Second Appeal No. 786 of 1914) they stated "the suit *inam* land has been in possession of the Periadhanakars, plaintiffs Nos. 1 to 4, since the time of their forefathers. Since the time of the plaintiffs' forefathers the Puja festival, etc., affairs of the Mariamman temple in the said Chettipatti village have, for many a year, been conducted with the funds made up of the income derived from the suit *inam* land and of the collection of tax, Vattam, etc., from among the Padayachi *ryots* alone, who are of the same caste as the plaintiffs." The plaintiffs therein contended that the suit land belonged to the Mariamman temple at Chettipatti, while the defendants therein contended it belonged to a similar temple at Uppupalayam—another hamlet in the same village. In my opinion, it must be taken that the plaintiffs in the former suit were suing as trustees on behalf of themselves and the whole body of persons worshipping or interested in the temple at Chettipatti.

The first point taken for the appellants is that if the prior suit was to recover as a right held in common with others, it was incompetent as it was not brought under O. I, r. 8. Explanation 6 to section 11 of the Code of Civil Procedure says that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating. In *Srooman Madabushi Gopalacharlu* v. *Emmani Subbamma* (1) it was held that this explanation is not confined only to cases where leave of the Court has been granted under O. I, r. 8. In that case a suit by some of the Agraharamdars of a village against the *zemindar* and the other Agraharamdars was held *res judicata* against the representative of one of the latter who was a defendant, but who died pending the appeal and whose legal representative had not been brought on the record. Wallis, C. J. held in that case that though "he would hesitate to hold that any litigation had been *bona fide* within the meaning of the explanation in which there had been a substantial departure from the accepted rules as, to the joinder of parties, as, for instance, by suing without the leave of the

(1) 35 Ind. Cas. 984; 43 M. 487; 38 M. L. J. 493; (1920) M. W. N. 435; 27 M. L. T. 219;

Clourt in a case properly falling under O. I, r. 8.....", there was a cas for *res judicata* established.

The decison follows that in *Godimella Rangamma* v. *Panchangam Narasimhacharyulu* (2), where the contention for the appellants was that Explanation 6 of section 11 makes the decision in the first suit *res judicata* only if the first suit was a represe tative one under O. I, r. 8. It was held that the Explanation does not become inapplicable because the suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right was concerned. It appears to me that the prior suit though not brought under O. 1, r. 8 was brought in respect of a right claimed by the plaintiffs as trustees of the temple in common with themselves and others. If this is correct it would, on the authority of the two cases quoted, above, appear to make no difference whether it was in fact brought under O. I, r. 8 and that the observation of Wallis, C. J., referred to above would be inapplicable to a case where, as here, the trustees represented the whole body of the worshippers of this particular temple in the suit. It was further argued that a decree by way of compromise can never constitute a *res judicata* by reason of the fact that the mind of the Court had not been brought to bear upon it, and reliance was placed on *Jenkins* v. *Robertson* (3). This case is, however, explained by Vaughan Williams, J., in *In re South American and Mexican Company, Ex parte Bank of England* (4), where he holds that *Jenkins* v. *Robertson* (3) is no decision on the general law. "All that the House of Lords decided was that such a result (*i.e.*, binding the public at large under the Scots Law) would not bind the public at large unless it was a result arrived at after judicial consideration, and that it would not bind the public if it was a result arrived at by consent, and *a fortiori* if such a consent was a purchased consent." Again, "It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter." This decision was approved by the Court of Appeal, where Lord Herschell, L. C., said: "the truth is a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end."

In *Kumara Venkata Perumal* v. *Thatha Ramaswamy Chetty* (5) it was held that the test for *res judicata* arising from a compromise is to be found in the construction of the decree in each case and that, whatever is necessarily involved in the decree cannot be re-opened by either party.

Madhavan v. *Keshavan* (6) was a suit by one trustee out of five to recover property alleged to have been illegally alienated by three of the others to a stra ger. This suit was dismissed and was held to be a bar to a suit by the fifth trustee as he must be held to have claimed under the plaintiff in the former suit.

I am, therefore, of opinion, on the authority of the above cases that the compromise decree as to two of the defendants in the former suit and the dismissal of the suit as against two of the others (fifth was nly a tenant) constitute a *res judicata* under section 11, Explanation 6, and I, therefore, agree with the Sub-Judge that the present suit cannot be maintained unless the compromise ca be attacked in some effective manner. The only point urged before us on this part of the case is t at the compromise was effected by only two of the trustees and it is said that there was no evid nce of authority to bind the others. The latter, however, allowed the suit to be dismissed against them and in fact did not appear when judgment was pronounced. The Sub-Judge sent the case down to the District Munsif, for a finding as to the *bona fides* of this compromise, whether defendants Nos. 1 to 3 in the former suit acted within the ambit of their powers as trustees of the temple or whether they

(2) 35 Ind. Cas. 116; 31 M. L. J. 26; (1916) 2 M. W. N. 258.
(3) 1 H. L. Sc. 17.
(4) (1895) 1 Ch. 37; 64 L. J. Ch. 189; 12 R; 1; 71 L. T. 594; 43 W; R; 132.
(5) 7 Ind. Cas. 875; 5 M. 35; (1911) 1 M. W. N. 290; 9 M. L. T. 48; 21 M. L. J. 709.
(6) 11 M; 1911; 4 Ind; Dec; (N. S.) 133.

acted fraudulently with the other defendants. The Munsif found that the trustees acted *bona fide* in the interests of the institution and within the ambit of their powers and that there was no fraud or collusion with the other defendants. This appears to me to be a question of fact on which both the Munsif and the Sub-Judge (see paragraph 9 of the latter's judgment) are agreed. I see no reason to interfere with these findings. In my opinion, the second appeal, therefore, fails on both the grounds urged by the appellants and must be dismissed with costs.

Ayling, J.—I agree.

V. N. V. *Appeal dismissed.*

Z. K.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE NO. 223 OF 1923.

July 2, 1923.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Pigott.

In the matter of LALLA MAL-HARDEO DAS COTTON SPINNING MILLS—APPELLANT.

Income-Tax Act (XI of 1922), s. 10 (2) (iii)—"Allowance," what is—Capital put into firm by certain partners—Sum paid as interest, whether allowance—"Registered firm," meaning of—Application for registration filed beyond time but prior to assessment, effect of.

A sum paid as interest to partners for capital put into a firm represents merely an assignment of a part of the net profits for the year in favour of partners who are regarded as entitled to such assignment by reason of special advances of capital made by them in the course of the year and is not an "allowance" admissible under section 10 (2) (*iii*) of the Income-Tax Act. [p. 340, col. 1.]

When a firm does not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year is due it cannot be held to be a registered firm for the year in question by filing the application prior to the assessment. [p. 340, cols. 1 & 2.]

The mere blunder of an Income-Tax Officer cannot make a firm a "registered firm" for the purposes of assessment during a certain financial year, if they are not such within the meaning of the definition. [p. 341, col. 1.]

Reference made by the Commissioner of the Income-Tax, United Provinces.

Dr. *Surendro Nath Sen*, for the Applicant.

Mr. *Lalit Mohan Banerji*, for the Crown.

JUDGMENT.—This is a Reference by the Commissioner of Income-Tax, under section 66 (2) of the Indian Income-Tax Act, XI of 1922. The assessees, at whose instance the Reference has been made, are a firm carrying on business at Hathras, in the Aligarh District, under the style of the "Lalla Mal-Hardeo Das Cotton Spinning Company" they may be conveniently referred to hereafter as "the objectors."

In the petition which led to the Reference, they sought to raise sundry questions of detail in respect of which no reference had been made. The Commissioner's action in this respect has been perfectly correct. The Commissioner is required to refer to the High Court any question of law arising out of any order made by him under section 32 of the Act. The objectors are seeking to raise questions not referred to in their petition of appeal to the Commissioner; obviously no reference can be made to the High Court on any such question.

There remain two points set forth in the Reference. One of these is of no great practical consequence and may be disposed of at once. The objectors were being assessed to Income-Tax for the financial year 1922-23 on the basis of the profits disclosed by their accounts for the calendar year 1921. In those accounts a total sum of Rs. 42,882 was shown as interest paid on account of money advanced during the year by partners in the firm for the purpose of carrying on the business. The objectors claim that this interest should be treated as an "allowance" admissible under section 10(2) (*iii*) of the Indian Income Tax Act, and should, therefore, be deducted from the net profits of the year before these are assessed to Income-Tax.

The Assistant Commissioner, who examined the books of the firm, reports that the money in respect of which this interest is charged in the account was not really "capital borrowed for the purposes of the business," but represented, "Only an advance of capital by the partners." This is so nearly a pure question of fact that it is not easy to formulate any question of law arising thereon in respect of which we can give an opinion. In the Order of Reference itself the question is stated thus:—

"Is the sum paid as interest to partners for capital put into a firm an allowance admissible under section 10 (2) (*iii*) ?"

To the question, as thus stated, our answer is:—"No : such interest represents merely an assignment of a part of the net profits for the year in favour of partners who are regarded as entitled to such assignment by reason of special advances of capital made by them in the course of the year."

The question whether there has been an advance of capital by particular partners, or a *bona fide* borrowing of money by the firm, in which the lender happens to be a partner in the firm, must be treated as one of fact in each case. We are not called upon to enter into questions of fact; but we feel bound to add that the facts laid before us in the course of arguments on both sides have not left us under the impression that the objectors have suffered injustice in this matter.

The other question raised by this Order of Reference is one of great importance to the objectors. They have been required to pay no less a sum than Rs. 81,641-9-0 as super-tax on account of the year under assessment. They contend that they are not liable to super-tax, because they were, during the financial year 1922-23, a "registered firm", within the meaning of that expression as defined in section 2 (14) of the Indian Income-Tax Act. The Commissioner, affirming the order of the Assistant Commissioner, has held that they were not; and the question has been referred to us in the following form:—

"Whether, when the firm did not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year was due, it can be held to be a registered firm for the year in question by filing the application prior to the assessment."

Here, again, the question of law has been stated to us in a form which only admits of one answer, and that answer a negative.

By definition, a "registered firm" is one "constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-Tax Officer in the prescribed manner."

By clause (10) of the same section 2 the word "prescribed" means "prescribed by rules made under this Act." It is not denied that certain rules have been made by competent authority, and duly published so as to "have effect as if enacted in this Act" (*vide* section 59 (4) of the same) which "prescribe" the manner in which a firm entitled to do so can get itself "registered". Those rules have been laid before us. In rule 2 it is laid down that the application to the Income Tax Officer must be made "on or before the date on which a return is due under sub-section (2) of section 22 of the Indian Income Tax Act." In rule 3 it is laid down that the application must be in a prescribed form and be accompanied by the original instrument of partnership under which the firm is constituted, together with a copy thereof. The Income-Tax Officer is empowered in special cases to dispense with the production of the original instrument, but a properly authenticated copy must always be produced.

Now, in the present instance, it is not denied that the very latest date on which a return was due from the objectors under sub-section (2) of section 22 of the Indian Income-Tax Act was the 5th of July 1922. On this date there was not even in existence "an instrument of partnership specifying the individual shares of the partners" in the Lalla Mal-Hardeo Das Cotton Spinning Company: such an instrument only came into existence on July 20th 1922. Not only, therefore, is it a fact that the objectors did not apply to the Income-Tax Officer within the period limited by r. 2; but that period actually expired before they had put themselves in a position to make such an application by executing the "In-

strument of partnership " necessary to entitle them to do so. It follows inevitably that the objectors never brought themselves within the definition of a "registered firm " by getting the "prescribed particulars registered with the Income-Tax Officer in the prescribed manner."

These considerations are sufficient to dispose of the Reference; but it is perhaps expedient that we should go into certain points a little further. In the course of an exceedingly able, and indeed exhaustive, statement of the case on behalf of his clients, Dr. Sen, who represented the objectors, raised two points which are not exactly covered by the remarks hitherto made.

First, he contended that, even though his clients may not have presented their application to the Income Tax Officer within the prescribed period, that Officer had condoned the irregularity by accepting an application presented to him, in the first instance, on January 2nd 1923, and once more presented after amendment on January 5th 1923; that the said Officer did actually register their firm by an order which purports to effect registration from January 30th to March 31st 1923; that such registration, once effected, necessarily operates from the commencement of the financial year 1922-23, and that, in any event, the effect of this certificate is to entitle the objectors to immunity from the super-tax for two months of the financial year.

Secondly, Dr. Sen represented, in various forms and in connection with different parts of his argument, the contention that his clients were entitled to a generous interpretation in their favour of a fiscal enactment; that they were the victims of chicanery on the part of the officials of the Income-Tax Department; and, generally, that the equities of the case were entirely in their favour.

To the first point it would be almost a sufficient answer to say that the mere blunder of an Income-Tax Officer could not make the objectors a "registered firm" for the purposes of assessment during the financial year 1922-23, if they were not such within the meaning of the definition. Indeed, the exigencies of Dr. Sen's argument brought him perilously near the position that a formal certificate of registration, dishonestly or corruptly issued by an Income-Tax Officer in flat defiance of the rules, would bind the Income-Tax Authorities and carry with it a right of exemption from super-tax. In the present instance, of course, there is no suggestion of intentional misconduct on the part of the Income-Tax Officer. Indeed, it is obvious that he did not himself regard the certificate granted by him as of any effect prior to the 30th of January 1923. Nor could it have any such effect, supposing it to be otherwise valid; for in rule 5 of the rules on the subject it is expressly laid down that such a certificate of registration "shall have effect from the date of registration." Obviously, this certificate was never intended to affect the liability of the objectors to payment of super-tax which was being levied in respect of the earnings of their firm during the calendar year 1921. That liability could not be split up so as to be enforced for part only of the financial year 1922-23; the objectors had finally lost their right to the privileges of a "registered firm" for that year, when the 5th of July 1922 went by without their even having executed an instrument of partnership. The certificate issued by the Income-Tax Officer on January 30th 1923 may have been intended to save the objectors trouble by enabling them, during the next financial year, to apply for a renewal of the certificate, instead of having to take out a new one: it could have no other possible effect.

We can make these matters even clearer by dealing briefly with Dr. Sen's next point.

On April 5th 1922 the objectors were served with a formal notice calling on them to put in a return of their income for the calendar year 1921, and giving them a month in which to do so. On May 4th 1922 the objectors obtained a month's extension of time.

On June 3rd 1922 they put in two applications. One of these asked for another month's time in which to prepare and submit the return of income; it was on this application that they were given till the 5th of July 1922. The other was an intimation that the firm intended to apply for registration; but it contained an admission that no instrument of partnership

had yet been executed, and asked for information on points of procedure, which information was duly furnished.

The 5th of July 1922 passed without any return having been furnished, and on July 17th, 1922 the Assistant Commissioner wrote to the firm and told them plainly that their chance of obtaining registration was over for that year.

On July 20th 1922 the objectors at last got their instrument of partnership executed ; but at the time they seemed inclined to accept the intimation that it was now too late to be of any use for that year.

On October 27th 1922 the objectors were at last compelled to submit their books for examination ; and on December 22nd, 1922 the Income-Tax Officer was able to report the result of his examination. The Assistant Commissioner, whose duty it was to make the assessment, by reason of a general order lawfully issued under section 5 (4) of the Indian Income-Tax Act, completed his work on January 26th 1923. One would have assumed that the same general order would have transferred to the Assistant Commissioner from the Income-Tax Officer the duty of dealing with any application for registration which the firm might make. We do not know whether this was the case or not; the point is one which the Commissioner might do well to note, so that no such complication may again arise as was permitted in this case. It appears that, while the question of their assessment was before the Assistant Commissioner, the objectors went, behind his back to the Income-Tax Officer with an application for registration, first presented on January 2nd 1923 and again on January 5th 1922 after the instrument of partnership had been returned for certain amendments. It was on this application that the Income-Tax Officer's certificate of registration was obtained on January 30th 1923, The Assistant Commissioner was in complete ignorance of these proceedings when he made his assessment on January 26th 1923. On that date the objectors were beyond all question an "unregistered firm" and very properly assessed as such.

this statement of the facts it is the objectors were to blame for any return of their income, and also for the delay in the production of their books of account. There are no merits whatever in their case. They had lost the right to be dealt with as a "registered firm" for the financial year 1922-23 , for the simple reason that they had failed even to provide themselves with an instrument of partnership within the extended period allowed them for the presentation of their return of income. The obvious intention of the rules, as shown by the wording of the prescribed form of certificate, is that such applications should ordinarily be presented in the month of April the first month of the financial year. Where, as in the present case, the period for making a return of income has been extended, there can be no objection to a certificate being issued bearing the correct date of some other month. It will take effect from the date specified therein. When the assessment comes to be made, the Officer charged with that duty will have to determine simply whether the firm with whose return, or with whose accounts, he is dealing, is or is not a "registered firm" within the meaning of the definition. The objectors had been plainly told that they would be dealt with, for the year 1922-23, as an "unregistered firm" their attempt to escape from this position by going to the Income-Tax Officer at the beginning of January 1923 was wholly futile. It is they who are attempting to evade a just liability by raising technical pleas and pressing for a strained, and indeed impossible, interpretation of one or two details in the rules.

Our answer, therefore, to the principal question referred to us is, as we have already intimated, in the negative.

Under clause (6) of section 66 of the Indian Income-Tax Act (XI of 1922) we order the assessees to bear the costs of this Reference, including the fee certified by the Government Advocate who has appeared to support the assessment.

K. S. D. & N. M.

Order accordingly.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 98 OF 1922.

December 7, 1922.

Present:—Mr. Justice Pratt.

ABDUL HAKEIM AND ANOTHER—APPELLANTS

versus

NGA NI GRI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Sale, stay of, effect of—Fresh proclamation, necessity of—Abuse of jurisdiction.

Where a Court stays a sale pending further orders, such stay does not amount to an adjournment of the sale, so as to dispense with the necessity of issuing a fresh proclamation of a sale, and if the Court orders the sale to take place without issuing a fresh proclamation, its action amounts to an abuse of jurisdiction.

Civil revision against an order of the Divisional Court, Arakan, in Civil Miscellaneous Appeal No. 3 of 1922.

Mr. *Lambert*, for the Appellants.

Mr. *Ba Dun*, for the Respondent.

JUDGMENT.—Proclamation of sale of mortgage land was made by the Sub-Divisional Court for November 26th 1921

On the 23rd November the judgment debtors filed an application to have the sale postponed till April 1922 to give them an opportunity of paying off the mortgage-decree. The Court passed orders staying the sale till further orders. On the 26th November, the date originally fixed for the sale, the decree-holder filed an application objecting to the postponement, pointing out that if the sale was postponed for more than seven days, a fresh proclamation of sale would be necessary, and asking that the matter might be put down for argument on the 28th or 29th of the month.

The Judge accordingly put the matter down for argument on the 29th and, after hearing Advocates on that day, passed orders on December 2nd for sale the follwing day.

The judgment-debtors applied to have the sale set aside alleging that the property had not realised much more than one-third of its value.

This allegation was not controverted, but the Court held there had been no material irregularity and refused the application.

An appeal to the District Court was unsuccessful. It seems to me there has undoubtedly been a very serious irregularity.

The Court stayed the sale pending further orders. This was obviously not an adjournment to a specified date under O. XXI, r. 69. The sale having been stayed and not adjourned to a fixed date the action of the Court in ordering on December 2nd that the sale should take place the following day without issue of fresh proclamation was extremely irregular not to say high-handed. It was not to be expected that bidders would attend an auction which had not been duly advertised for a reasonable time. Advocate for respondent does not wish the case sent back for inquiry into the actual value of the land at the time of sale.

I consisder the Court has abused its jurisdiction in ordering the sale to take place without proclamation.

The sale is accordingly set aside with costs.

Advocates fees two gold *mohurs*.

W. C. A. *Sale set aside.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1386 OF 1921.

August 16, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

Maharani JANKI KUER—APPELLANT

versus

Babu THAKUR RAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Decree, ex parte, application to set aside, dismissal of—Suit to set aside decree on ground of fraud, whether maintainable—Non-service of summons, whether can be proved—Fraud, when presumed:

The fact that the plaintiff applied and failed to have an *ex parte* decree set aside under O. IX, r. 13 of the Civil Procedure Code does not prevent him from maintaining an action for setting aside the decree on the ground of fraud, and incidentally proving, as an index of the fraud, that summons was not served on him in the previous suit. [p. 344, col. 2]

Radha Raman Shaha v *Pran Nath Roy*, 28 475; 5 C. W. N. 757, followed.

Khagendra Nath Mahata v. *Pran Nath Roy*, 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.), referred to.

JANKI KUER v. THAKUR RAI.

Jangal Chaudhary v. *Laljit Pasban*, 60 Ind. Cas. 124; 6 P. L. J. 1; 1 P. L. T. 735; (1921) Pat. 3; 3 U. P. L. R. (Pat.) 1, discussed.

The failure to serve summons on a defendant may be accidental or deliberate; and where the Court finds as a fact, that there was no foundation for the suit itself, it is open to the Court to hold that the suppression of the summons was deliberate with the object of snatching a decree from the Court in the absence of the defendant. [p. 345, col. 2.]

Appeal from a decision of the Subordinate Judge, Chapra, dated the 6th July 1921, reversing that of the Munsif, Gopalganj, dated the 26th June 1920.

Messrs. *H. L. Nandkeolyar* and *Jadubans Sahay*, for the Appellant.

Mr. *L. N. Singha*, for the Respondent.

JUDGMENT.

Das, J.—The appellant instituted a rent-suit, being Suit No. 1392 of 1918, against the respondent on the footing that the rent payable by the appellant was produce rent; and on the 14th March 1919 the respondent obtained an *ex-parte* decree against the appellant. The appellant thereupon presented an application to have the *ex parte* decree set aside, but failed in the attempt. On the 22nd July 1919 he instituted the suit out of which the appeal has arisen for setting aside the *ex parte* decree on the ground that it was obtained by fraud. The learned Judge in the Court below has found, first, that there was no foundation for the rent-suit in the form in which it was instituted; and, secondly, that summons in the former proceedings was not a fact served on the appellant. On these findings he came to the conclusion that the decree obtained by the appellant against the respondent on the 14th March 1919 was fraudulent, and he has given the respondent a decree as claimed by him. Two arguments have been advanced before us on behalf of the appellant; first, that it was not open to the learned Judge in the Court below to find that summons in the former suit was not served on the respondent, having regard to the fact that the respondent attempted to have the *ex parte* decree set aside under the provisions of O. IX, r. 13, and failed in the attempt; and, secondly, that it was necessary for the Court below to find that there was fraud in relation to the proceedings of the suit before it could assume jurisdiction to examine the propriety of the previous judgment.

So far as the first point is concerned, the argument in the form in which it has been advanced, is covered by the decision of this Court in the case of *Jangal Chaudhary* v. *Laljit Pasban* (1). For the reasons which I shall state presently, it is unnecessary to consider whether the case of *Jangal Chaudhary* v. *Laljit Pasban* (1) was rightly decided. Speaking with all respect, it seems to me that that case does not recognize that it is not an issue in a suit to set aside a decree on the ground of fraud whether summons was in fact served in the suit which resulted in the decree sought to be set aside. The questions which are agitated in an application made under O. IX, r. 13 may indeed form the subject-matter of an investigation in the suit itself, but, as Lord Robertson pointed out in *Khagendra Nath Mahata* v. *Pran Nath Roy* (2), such questions "are here treated as parts and indicia of a whole." The main defence to the suit before their Lordships was that the action could not be maintained, because the plaintiff applied under section 108 of the Code to have the decree set aside, and the application was refused, and the plaintiff did not appeal against the refusal. No doubt the fraud in that case was much more violent than in the present case, but the degree or the comparative heinousness of the fraud perpetrated can make no difference to the point of law which is, whether the fact that the plaintiff applied and failed to have an *ex parte* decree set aside under O. IX, r. 13 of the Code prevents him from maintaining an action for setting aside the decree on the ground of fraud, and incidentally proving as an index of the fraud, that summons was not served on him in the previous suit. To this question, Lord Robertson gives an unhesitating reply: "This is a case," said his Lordship, "generically different from any which

(1) 60 Ind. Cas. 124; 6 P. L. J. 1; 1 P. L. T. 735; (1921) Pat. 3; 3 U. P. L. R. (Pat.) 1.
(2) 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).

was or indeed could be determined under sections 108 and 311 of the Civil Procedure Code. Those sections limit the attention of the Tribunal to specific matters, and, instead of subjecting to enquiry the radical question now involved, they assume the existence of a real suit. But here the suit itself is attacked as a fraud, and the fraudulent and violent incidents of its progess as, for instance, at the stage of service and in the abduction of the respondent, while they may individually have founded an application under sections 108 and 311, are here treated as parts and *indicia* of a whole." If I may suggest respectfully, it was recognized by the Judicial Committee that "the radical question" involved in such a suit as this could not be determined by the Court in an application under O. IX, r. 13, and that the issues in the two suits are entirely different.

But I do not intend to decide that point in this appeal. It is sufficient to say that we have nothing before us but the bare fact that the plaintiff endeavoured to get an *ex parte* decree set aside under O. IX, r. 13 of the Code. To quote the words of Lord Hobhouse in the case of *Radha Raman Shaha* v. *Pran Nath Roy* (3): "We are not told what went on before the Court upon that occasion, and it is impossible to say that the matter now alleged as fraudulent matter came in any way before the Court under the application which was made by virtue of section 108" (O. IX, r. 13 of the present Code). The case in *Radha Raman Shaha* v. *Pran Nath Roy* (3) is exactly in point, and I must overrule the first argument which has been advanced before us.

The other point is equally without substance. The learned Counsel has relied on various cases in which there was appearance by the plaintiff in the former suit, but in which the plaintiff nevertheless contended that the decree in the former suit was obtained by fraud. Clearly, if summons was served on the plaintiff in the former suit, it could not be urged by him that there was initially an attempt to prevent him from making his defence. Consequently, the whole endeavour in these cases has been to induce the Court to examine the propriety of the previous judgment, and the Courts have declined to do so, holding, in my opinion rightly, that, before they could do so, they must be satisfied that there was some fraud in relation to the proceedings of the suit. These cases have no bearing on the present case in which there was an attempt to prevent the plaintiff from making his defence. The failure to serve summons on a defendant may be accidental or deliberate; and where the Court finds, as a fact, that there was no foundation for the suit itself, it is open to the Court to hold that the suppression of summons was deliberate with the object of snatching a decree from the Court in the absence of the defendant.

I must dismiss this appeal with costs.

Macpherson, J.—I also would dismiss this appeal with costs. On the second argument advanced in support of it I am in entire agreement with the view expressed by my learned colleague. As to the first argument I am of opinion that, apart from the decision of this Court in *Jangal Chaudhary* v. *Laljit Pasban* (1), the correctness of which I am, as at present advised, not prepared to doubt, the contention cannot prevail. There is some authority for the view that even if the allegation in an unsuccessful application under O. IX, r. 13 has been non-service of summons that point is not necessarily *res judicata* in a suit such as the plaintiff-respondent brought in this instance to have the *ex parte* decree set aside on the ground of fraud including fraudulent suppression of summons, when his application was dismissed for default without going into the merits. (See *Golap Singh* v. *Indra Kumar* (4). But in the present instance it is not even necessary to rely on that view, for there is no evidence whatever on the record of this litigation as to the contents of the application of the plaintiff-respondent under O. IX, r. 13 and as an application under that provision of law may be made on a ground other than non-service of summons, the first contention in this

(3) 28 C. 475; 5 C. W. N. 757.

(4) 1 Ind. Cas. 86; 9 C. L. J. 367 at p. 87; 13 C. W. N. 493; 8 M. L. T. 260.

application is completely covered by the decision of the Judicial Committee in *Radha Raman Shaha* v. *Pran Nath Ray* (3).

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 75 OF 1922 IN SUIT No. 579 OF 1922.

January 29, 1923.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

CORPORATION OF CALCUTTA—DEFENDANT—APPELLANT

versus

THE CALCUTTA IMPROVEMENT TRUST—PLAINTIFF—RESPONDENT.

Calcutta Improvement Act (B. C. V of 1911), ss. 42 (a), 54 (1)—Improvement Scheme—Acquisition of land from Calcutta Corporation for recoupment—Board of Improvement Trustees, power of—Land required for "executing Improvement Scheme," meaning of—Land "affected by execution of scheme," whether covered.

The Board of Trustees for the Improvement of Calcutta cannot in connection with an Improvement Scheme, acquire under section 54 (1) of the Calcutta Improvement Act, lands vested in the Corporation of Calcutta, which are "affected by the execution of the Scheme" within the meaning of section 42 (*a*) of the Act and are required for purposes of recoupment. Such lands are not lands required for "executing the Improvement Scheme" within the meaning of section 54 (1) of the Act. [p. 347, col. 1.]

Per *Richardson, J.*—Under clause (*a*) of section 42 of the Calcutta Improvement Act it is open to the Board of Trustees to make provision in an Improvement Scheme for the acquisition, for purposes of recoupment, of land which will, in their opinion, be affected or improved in value by the execution of the Scheme. [p. 349, col. 1.]

Trustees for the Improvement of Calcutta v. *Chandra Kanta Ghosh*, 56 Ind. Cas. 32; 47 C. 500; 47 I. A. 45; 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 32 C. L. J. 65; 24 C. W. N. 881; 2 U. P. L. R. (P. C.) 98 (P. C.), referred to.

Appeal from the judgment of Mr. Justice Greaves.

Mr. *B. L. Mitter* (with him Mr. *D. N. Basu*), for the Appellant.

Mr. *Langford James* (with him Mr. *T. Ameer Ali*), for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves which was given with reference to a special case stated by the Board of the Calcutta Improvement Trust and the Calcutta Corporation under the provisions of O. XXXVI of the Code of Civil Procedure.

When the matter was before my learned brother there were several schemes for his consideration, but on the hearing of the appeal the argument has been limited to one scheme which is Scheme No. IVA, and the plan relating to it, is marked Exhibit D3. The plots of land to which this case relates, are situated between Kalighat New Road and Kalidas Patitandi Lane. The scheme was a Street Scheme and the works comprised in the scheme are shown on the map Exhibit D3. Part of the land, which lies between Kalighat New Road and Kalidas Patitandi Lane, was required for making a new street running from Kalidas Patitandi Lane to Kalighat New Road; part of it was required for widening Kalighat New Road and part of it was required for widening Kalidas Patitandi Lane and Russa Road South. There remained six plots, which on the plan are numbered 17, 18, 19, 20, 21 and 22 which were not required for the making of the new street or for the widening of the old streets. With regard to the scheme in question, we were referred to a statement of the purpose for which the land was required, and it is as follows: "This is practically a case of recoupment," and, the learned Counsel, Mr. Langford James, appearing for the Improvement Trust, stated that he was willing that it should be treated, for the purpose of this case only, as a case of recoupment.

The only question, therefore, which arises is whether the Improvement Trust was entitled to deal with those plots which I have mentioned, under the provisions of section 54 of the Calcutta Improvement Act, 1911.

The learned Judge in dealing with this case as well as the others said, "The matter is not, I think, free from doubt and if section 54 had stood alone I should have been inclined to think that the con-

tention of the Corporation was well-founded but it seems to me that section 62 (5) does contemplate that after executing the scheme the Board may have portions of the land acquired under section 54 still vested in them and it is rather difficult to see what this land would be unless it is land acquired under section 54 in excess of the land actually required for executing the engineering portions of the scheme." The learned Judge then held that, under the provisions of section 54, the Board might acquire land in excess of that actually required for executing the engineering portions of the scheme, that is to say, land required for lay-out or for recoupment.

As I have already said, this Court in this case has not to consider the question of land which is required for lay-out, having regard to the agreement which was arrived at by the learned Counsel in the case. Our decision is confined to the plots of land which I have mentioned and which it is agreed, were included in the scheme for the purpose of recoupment.

For the purpose of my judgment it is necessary to refer to a few sections of the Act. Section 41 is as follows:—"Every Improvement Scheme *shall* provide for—(*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will in their opinion, be required for the execution of the scheme." Then are set out in the section certain matters which are connected with the Improvement Scheme, such as laying out or re-laying of the land in the said area; the demolition, alteration or re-construction of buildings situated on land which it is proposed to acquire in the said area; the construction of any buildings which the Board may consider it necessary to erect for any purpose other than sale or hire; the laying out or alteration of streets, etc., if required; and levelling, paving, metalling, etc. Then section 42 provides: "Any Improvement Scheme *may* provide—(*a*) for the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme." The Improvement Trust by reason of the provisions in Chapter IV of the Act, when dealing with parties other than the Calcutta Municipality or other Municipalities referred to in section 54, may have recourse to the Land Acquisition Act of 1894 for carrying out any of the purposes of the Improvement Act. But when the Improvement Trust are dealing with any building, or any street, square or other land or any part thereof which is situated in the Calcutta Municipality and is vested in the Corporation, and which is required for executing any Improvement Scheme, the Board may have recourse to the procedure provided by section 54 (1) of the Act, and the Board may give notice accordingly to the Chairman of the Corporation in accordance with the section.

It is provided that *thereupon* any such building, street, square, land or part shall vest in the Board, subject, in the case of any building or any land (not being a street or square), to the payment to the Corporation of such sum as may be required to compensate them for actual loss resulting from the transfer thereof to the Board. The section then provides that if any question or dispute arises as to the sufficiency of the compensation paid or proposed to be paid under sub-section (1), the matter shall be referred to the Local Government, whose decision shall be final.

The learned Counsel for the Improvement Trust informed the Court that if the land in question had been acquired under the provisions of the Land Acquisition Act, 1894, the compensation which would be awarded to the Corporation would be considerably larger than the compensation which the Corporation would recover under section 54. Further, it was agreed that if section 54 applied to these plots of land the Corporation could not avail themselves of section 78 which deals with "Abandonment of Acquisition," and the provisions of which might be of considerable value to the party or parties whose land has been taken for the purpose of recoupment.

The question, in my judgment, lies within a narrow compass, and it is this, whether the lands which were vested in the Corporation and which were included in the scheme, on the grounds that they were "affected by the execution of the scheme" within the meaning of section 42 (*a*) and for the purpose of recoupment

can be said to be lands which were "required for executing the Improvement Scheme" within the meaning of section 54 (1). The words which are used in section 54 are "required for executing any Improvement Scheme." The words which are used in section 41 (*a*) are "required for the execution of the scheme." It was admitted that the words used in section 41 (*a*) "land which will be required for the execution of the scheme" referred to land which is in a different category to "land . . . which will . . . be affected by the execution of the scheme" as described in section 42 (*a*) and that the former description does not include the latter. The material words used in section 41 (*a*) and 54 (1) are not quite the same, but I am unable to ascertain any difference in the meaning of them. The conclusion, therefore, would naturally be that the provisions of section 54 (1) do not apply to land which is affected by the execution of the scheme, and which is included for the purpose of recoupment only. The learned Counsel for the Improvement Trust, however, argued that when the draftsman of this Act and the Legislature were considering section 54, they were not thinking of the two categories of land which are described in section 41 (*a*) and section 42 (*a*) but that they intended to include in section 54 (1) all lands comprised in the Improvement Scheme, and that the words "land which is required for executing any Improvement Scheme" included not only land which was required for the execution of the scheme but also land which would be "affected by the execution of the scheme In my judgment, the Court ought to give the material words in section 54 (1) their natural meaning: and, if their natural meaning is applied to these words, in my judgment, they do not comprise lands which have been included by the Improvement Trust in the scheme, not because they are required for the execution of the scheme, but because in their opinion they are "affected by the execution of the scheme" and are included for the purpose of recoupment only. In my judgment it would be straining the natural meaning if we were to hold that the words "required for executing any improvement scheme" would cover not only lands which were required for the actual execution of the scheme but also lands which were not required for the execution of the scheme but which were affected by the execution of the scheme.

It would have been easy for the Legislature to have inserted in section 54 (1) words which would have covered lands affected by the execution of the scheme if they had so desired. It may be that the Legislature may have considered that when the Board of the Improvement Trust was dealing with another public body such as the Calcutta Corporation, it would not be right to enable the Improvement Trust to acquire from the other public body lands, which were not actually required for the execution of the scheme, but which were included in the scheme for the purpose of recoupment only. This, however, is nothing more than speculation, and I do not base my judgment upon that ground, but upon the natural meaning of the words which are used in section 54 (1) to which I have already referred.

In my judgment the provisions of section 62 (5) are not inconsistent with the construction, which I have placed upon the material words in the above-mentioned sections.

The question which this Court has to decide, relates merely to Scheme IVA and the plots which I have already mentioned and which are to be taken as land required for the purpose of recoupment, and in my judgment, the answer should be that the Improvement Trust were not entitled to deal with those plots under section 54 (1) of the Calcutta Improvement Act, 1911.

The result is that the learned Judge's decision and decree will stand as regards the schemes other than IVA and with regard to Scheme No. IVA the judgment and decree must be varied in accordance with our judgment. The decree, therefore, with respect to Scheme No. IVA, will be that the Board are not entitled to proceed under the provisions of section 54 (1) in respect of land vested in the Calcutta Corporation and situated in the Calcutta Municipality which is required for the purpose of recoupment only, and that the Board are not entitled to retain the plots Nos. 17 to

22 described in Exhibit D3 and included in Scheme No. IVA and such plots are to be restored by the Improvement Trust to the Corporation, or if the same have been sold the Board will pay the Corporation the net proceeds of such sales in accordance with paragraph 7 of the case stated.

We make no order as to costs.

Richardson, J.—I agree. The learned Standing Counsel appearing for the appellants, the Corporation of Calcutta, has abandoned the appeal so far as this case stated relates to Corporation land included in Improvement Schemes Nos. I, II, IV and V as being required for lay-out. The result is that we are concerned only with the land included in Scheme No. IVA, which the Board require for the purposes of recoupment. Scheme No. IVA is a street scheme for the widening of the Russa Road South at its junction with the Hazra Road and the land in question is the land at the side of a road on which there are buildings or foundations of buildings.

Under clause (*a*) of section 41 of the Calcutta Improvement Act, 1911, every Improvement Scheme must provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be required for the execution of the scheme. Under clause (*a*) of section 42 an Improvement Scheme may provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be affected by the execution of the scheme. It is well-settled that under the latter clause it is open to the Board to make provision in an Improvement Scheme for the acquisition for purposes of recoupment, of land which will, in their opinion, be affected or improved in value by the execution of the scheme—[*Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1)]. A distinction, therefore, is drawn in these sections between land compr sed in a scheme because it is required for the execution of the scheme and land compr sed in a scheme because it will be affected by the execution of the scheme and is required for the purpose of recoupment.

By section 54 of the Act a short method is provided for the acquisition by the Board of "any building, or any street, square, or other land, or any part thereof" which is vetsed in the Corporation and which the Board require "for executing any Improvement Scheme." The question put to us, with particular reference to the land in quetsion in Scheme No. IVA is—Does this section enable the Board to acquire by this short method instead of under the Land Acquisition Act, land vested in the Corporation which the Board require for purposes of recoupment?

The draftsman, it is true, has not used precisely the same expression as that in clause (*a*) of section 41. It is said that the difference in the language shows that the draftsman when framing section 54 was not thinking of the distinction between land which must be included in a scheme under section 41 and land which may be included in a scheme under section 42 for purposes of recoupment. It is accordingly argued that the words in section 54 should be understood in a wide sense as including all land comprised in a scheme for whatever purpose it may be required. It is also said that some of the purposes for which provision may be made in a scheme under section 42, such as raising, lowering, or levelling particular areas, or the formation of open spaces, would bring the land required for those purposes within the description, land required for "executing the scheme." In this appeal the latter point may be conceded without expressing a definite opinion upon it. But land required for purposes of recoupment would still stand in a different category. And as to the differences in language between section 41 and section 54, the expression "land required for executing a scheme" is *prima facie*, at any rate, the equivalent in meaning of the expression "land required for the execution of the scheme." I can see no good reason why these equivalent expressions should receive a different interpretation. Both expressions, according to the natural meaning of the language, appear to me to exclude land comprised in a scheme because it is thought that it will be beneficially affected by the execu-

(1) 56 Ind. Cas. 321; 47 C. 500; 47 I. A. 45; 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 32 C. L. J. 65; 24 C. W. N. 881; 2 U. P. L. R. (P. C.) 98 (P. C.).

tion of the scheme and is accordingly required for purposes of recoupment. In my opinion, therefore, such land is not land required for the execution of or for executing the scheme within the meaning of the Act and cannot be acquired by the Board under section 54.

On behalf of the Corporation some reference has been made in the argument to section 78 under which the owner of land not required for the execution of a scheme may apply to the Board requesting that the acquisition of the land should be abandoned in consideration of the payment by him of a sum to be fixed by the Board in that behalf. Application may be made under this section in respect of land required by the Board for purposes of recoupment and it is said that owing to the terms of sub-section (2) (*a*) the Corporation would be deprived of the benefit of section 78 if section 54 be construed as applicable to Corporation land required for purposes of recoupment. If the argument is correct, the result may furnish some ground, if not a strong ground, for rejecting the construction of section 54 suggested by the Board. There seems no reason, why as regards land required for purposes of recoupment, the Corporation should not have the same right under section 78 as other owners of land.

The learned Judge who had to deal not only with land required for purposes of recoupment but also with land required for "lay-out", was influenced by the provision contained in sub-section (5) of section 62 and I will quote his words:

"The matter," he says, "is not I think free from doubt and if section 54 had stood alone I should have been inclined to think that the contention of the Corporation was well-founded, but it seems to me that section 62 (5) does contemplate that after executing the scheme the Board may have portions of the land acquired under section 54 still vested in them, and it is rather difficult to see what this land would be unless it is land acquired under section 54 in excess of the land actually required for executing the engineering portions of the scheme, that is to say, land required for lay-out or for recoupment. I accordingly find, in view of what I have already stated, that in each of the instances set out in the Schedule to the case before me the Board is entitled to retain the land acquired by it under the provisions of section 54 irrespective of whether such land is actually required for the engineering portions of each scheme."

Section 62 gives the Board power to turn or close in whole or in part public streets or squares vested in them. And sub-section (5) provides:—"When any public street or square vested in the Board, or any part thereof, is permanently closed under sub-section (1) the Board may sell or lease so much of the same as is no longer required."

The reasoning seems to be that if, under section 54, public streets and squares can only be required for executing what the learned Judge describes as the engineering portions of a scheme; then the power given to the Board by section 62 sub-section (5), when a public street or square is permanently closed, "to sell or lease so much of the same as is no longer required," would be meaningless. This reasoning, however, seems to raise questions of construction, possibly of some difficulty, which it is not necessary for us in this appeal to decide. In the first place, the Act speaks not of the engineering portions of a scheme but of executing schemes, and a question may arise as to the different ways in which land may be required under section 54 for executing a scheme. Something may depend on the mode in which a particular scheme is framed by the Board or sanctioned by the Local Government. Without expressing a definite opinion, it may be suggested that whatever limitation be put on the language of section 54, cases may occur in which public streets or squares vested in the Board under section 54 are closed and become "no longer required" within the meaning of section 62, sub section (5). Another point occurs. It will be obsersved that section 62 makes no express reference to section 54. It speaks of public streets or squares "vested in them," that is, in the Board.

The words may mean—I do not say they do—vested in the Board under section 54 or otherwise. Again, this part of the Act does not deal only with public streets and squares vested in the Corporation but also, in section 55, with private

streets and squares required by the Board, as in section 54, "for executing any improvement scheme." In the case of a private street or square or part thereof, after giving the prescribed notice and considering objections, "the Board may take over charge of such street, square or part from the owner thereof; and the same shall thereupon vest in the Board." In the event of a private street or square or part thereof being altered or closed, sub-section (3) provides for the payment of reasonable compensation to the owner for the loss of his rights, and sub-section (4) for compensation in certain cases to the owners of adjacent property and residents in the neighbourhood. The consideration arises that a power of this summary nature ought not to be extended beyond what the language of the Act clearly warrants. On the whole, therefore, with great respect to the learned Judge, these provisions relating to streets and squares seem to favour rather than to militate against the construction of the Act which we adopt. We go no further than this, that to require lands for purposes of recoupment is not one of the ways in which land may be required under section 54 for executing an Improvement Scheme. As the Board have large powers to acquire land under other provisions of the Act, the decision, it may be hoped, will not cause them any great inconvenience.

It was suggested that the Corporation was equally interested with the Board in the Improvement of Calcutta and ought to facilitate the Board's operations. Doubtless the schemes of the Board, when they come to fruition, enure to the benefit of the Corporation. Meanwhile, however, these high authorities are independent, and they have separate interests. If they cannot agree, we must interpret the Act as best as we can.

In the result, the decision of the learned Judge that the land included in the Schemes Nos. I, II, IV and V as being required for lay-out is land required for executing the scheme within the meaning of section 54, has not been effectively challenged and will stand. I agree that the appeal should be allowed as regards the land included in Scheme No. IVA as required for purposes of recoupment and I concur in the order which my Lord has proposed.

K. S. D. & N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 40 AND 144 OF 1922.

May 7, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Thakur HARGOBIND SINGH—PLAINTIFF—APPELLANT

versus

HUKUM CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Procedure—Plaint describing defendant as minor—Defendant contesting suit as major—Plaint not amended—Suit, whether can proceed—Conduct of parties, whether cures irregularity.

A defendant was originally impleaded as a minor and an application made for appointment of his mother as guardian. The defendant, however, appeared and stated he was of age. The Trial Court went into the question and found he was of age. He was actually represented by a Vakil and contested the suit. No application for amendment of the plaint was, however, made nor was any amendment ordered by the Court, and his name continued in the plaint as a minor under the guardianship of his mother. On appeal to the lower Appellate Court he was represented as major and was again represented by a Vakil. The lower Appellate Court finding other issues in favour of the plaintiff-appellant dismissed the suit on the technical ground that the defendant-respondent had been treated in the Court of first instance as a minor, whereas in fact he was of age. In second appeal to the High Court:

Held, that as the defendant had full knowledge of the proceedings in Court, having actually appeared and been represented by Vakils in both the Courts, the suit could not be dismissed merely on the technical ground urged, and that assuming there was any irregularity it was fully cured by the conduct of both the parties. [p. 352, col. 2.]

Ramachari v. *Duraisami Pillai*, 21 M. 167; 7 Ind. Dec. (N. S.) 474 and *Ganga Ram* v. *Mihin Lal*, 28 A. 416; 3 A. L. J. 187; A. W. N. (1906) 73, relied on.

Second appeal from a decree of the Subordinate Judge, Agra, dated the 22nd September 1921.

Mr. *M. L. Sandal*, for the Appellant.

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

JUDGMENT.—Second Appeal Nos. 40 of 1922 and 144 of 1922 are connected appeals and arise out of two suits for pre-emption. On the 27th February 1919 one Ant

Ram executed a sale-deed of certain shares in *Mauza* Pawaoli in favour of Hukum Chand, Sukhdeo and Rup Singh defendants vendees. On the 25th February 1920 Har Gobind who was a co-sharer in the village instituted a Suit No. 149 of 1920 for pre-emption of this property. This was followed by another suit instituted on the 27th February 1920 by Ram Dial, Bansidhar and Jagram, numbered as Suit No. 159 of 1920. The two plaintiffs, Bansidhar and Jagram, have since withdrawn from the suit. These two suits were instituted in the Court of the Munsif.

A third suit was instituted in the Court of the Subordinate Judge by Ram Dial, the second, but we do not know the date on which it was filed. Ram Dial, the second, was impleaded in the two suits first mentioned but the plaintiffs of those suit were not impleaded in the suit by Ram Dial the second. The first two suits were decreed by the Munsif on the 15th of September 1920 and the third suit was decreed on the 10th of August 1920.

The Munsif dismissed the plaintiffs' suit on the ground that both sets of plaintiffs had notice of the sale and had refused to purchase the property. In the Court of the Munsif Ram Dial, the second, who was the plaintiff in the third suit was impleaded as a *pro forma* defendant. He was originally alleged to be a minor and an application was made that he should be brought on the record under the guardianship of his mother. Ram Dial, the second, however, appeared in both the suits and stated that he was of age. The Court of first instance went into the question of his minority and found that he was of age. Ram Dial, the second, was actually represented by a Vakil in the Court of first instance and contested the suit. No application for amendment of the plaint was, however, filed by the plaintiff nor was any amendment ordered by the Court. The name of Ram Dial, the second, therefore, continued in the plaint as a minor under the guardianship of his mother. When the plaintiffs appealed to the lower Appellate Court they impleaded Ram Dial, the second, as major and he was again represented by a Vakil. The lower Appellate Court found in favour of the plaintiffs that it had not been established that they had any knowledge of the sale or that they had refused to purchase the property. It also found that the real sale consideration was Rs. 1000. Both the suits were however, dismissed on the technical ground that Ram Dial had been treated in the Court of first instance as a minor whereas in fact he was of age.

We are of opinion that the decrees of the lower Appellate Court cannot stand. It is true that no amendment of the plaint was made and the name of Ram Dial continued to be entered as a minor. All the same, he had full knowledge of the proceedings in Court. He actually appeared in Court and was represented by his Vakil as major and was also represented as such before the lower Appellate Court. Assuming that there was any irregularity, it was fully cured by the conduct of both the parties. We, therefore, think that this ground was no sufficient ground whatsoever for dismissing the suits altogether. The case of *Ramachari* v. *Duraisami Pillai* (1) and that of *Ganga Ram* v. *Mihin Lal* (2) are authorities in favour of the view we have taken.

It is found by the lower Appellate Court that all the three pre-emptors had equal rights and none had a preferential right. They, therefore, are entitled each to a ⅓rd share in the pre-empted property.

We accordingly allow these appeals, set aside the decrees of the lower Appellate Court and decree the plaintiffs' suits as directed below. In view of the circumstances however each party should bear its own costs. The decree shall be prepared in accordance with O. XX, r. 14.

The claim of each of the two plaintiffs is, therefore, decreed for ⅓rd share of the property on payment of ⅓rd of the sale consideration as found above within 60 days from this date. In case of non-payment it would be open to the plaintiff in the connected suit to deposit that amount within an additional period of 30 days and claim that ⅓rd share also. On failure of payment by either of the two plaintiffs the appeals will stand dismissed with costs.

M. A. A. *Appeals allowed.*

(1) 21 M. 167; 7 Ind. Dec. (N. S.) 474.
(2) 28 A. 416; 3 A. L. J. 187; A. W. N. (1906) 73.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS NO. 104 OF 1923.

June 8, 1923.

Present:—Mr. Justice Kanhaiya Lal.

GIRDHAR DAS—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 179, 181, 185, scope of.

Section 179 of the Code of Criminal Procedure is controlled by section 181 in respect of the offences mentioned in the latter section.

No question of convenience or expediency can be considered under section 185 of the Criminal Procedure Code. That section deals with the questions of competency only when they are involved in doubt.

Charu Chandra v. *Emperor*, 37 Ind. Cas. 145; 44 C. 595; 21 C. W. N. 820; 25 C. L. J. 165; 18 Cr. L. J. 81, followed.

Criminal miscellaneous application under sections 439 and 185, Criminal Procedure Code.

Mr. *K. N. Laghate*, for the Applicant.

Mr. *U. S. Bajpai*, for the Opposite Party.

JUDGMENT.—This is an application under section 185 of the Code of Criminal Procedure for the determination of the question of the competency of the Magistrate at Basti to try a complaint against an accused under sections 406 and 420 of the Indian Penal Code. The allegation of the complainant is that the accused sent notices to different persons, including the complainant, offering to act as a Commission Agent at Bombay for such persons as may choose to entrust their business to him, and that in pursuance of that notice the complainant appointed the accused as a Commission Agent and advanced to him Rs. 10,000 on the understanding that the accused was to purchase and sell goods at Bombay on his behalf. The complaint was, that the accused had no *bona fide* intention to carry on the business of a Commission Agent at Bombay, and that he dishonestly obtained money from the complainant under the pretext that he would carry on such business and wrongfully appropriated what was paid to him from time to time, including any profits derived from the purchase and sale of the goods on behalf of the complainant. The entire negotiation between the parties is said to have been carried on by correspondence. So far as the charge of cheating is concerned, if the allegations made by the complainant are true, the offence, if any, is triable as much at Bombay as at Basti; but, so far as the charge of a criminal breach of trust goes, it can only be enquired into and tried by the Court within the local limits of whose jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained by the accused. The Magistrate at Basti had, therefore, jurisdiction to try the former charge but not the latter. The learned Counsel, who appears for the complainant, states that the complainant is prepared to proceed with the former charge in the Court of the Magistrate at Basti and to drop the latter for the present. Section 179 of the Code of Criminal Procedure is controlled in respect of certain offences by section 181 of the Code of Criminal Procedure; and, as pointed out in *Charu Chandra* v. *Emperor* (1), no question of convenience or expediency can be considered under section 185 of the Code of Criminal Procedure. That section deals only with questions of competency when they are involved in doubt. There is no such doubt in this case. The Court below is, therefore, directed to proceed with the trial under section 420 of the Indian Penal Code and to drop, so far as that Court is concerned, the charge under section 406 of the said Code.

K. S. D. *Order accordingly.*

(1) 37 Ind. Cas. 145; 44 C. 595; 21 C. W. N. 820; 25 C. L. J. 165; 18 Cr. L. J. 81.

RANGOON HIGH COURT.

CRIMINAL REVISION NO. 689 B OF 1922.

January 12, 1923.

Present:—Mr. Justice Lentaigne.

MAUNG SHWE KU—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 441—Criminal trespass, what constitutes—Offence, relat-

MAUNG SHWE KU *v.* EMPEROR.

to public property—Court, duty of—Thandika *erty, whether public property.*

person who has a right of entry into a building not be held to be a trespasser by reason of his ire to obtain the consent or permission of the y in occupation, or by reason of anything h he does in such building, unless it is vn that the thing so done was an offence, or otherwise of such a nature as to bring the re proceedings within the definition of cri- al trespass in section 441 of the Penal . [p. 355, col. 1.]

handika property is public property and any stigation of the question of title may be one considerable complexity. Consequently, cases lving criminal offences in relation to such erty ought not to be tried summarily. Be- issuing a process in such a case, the com- it and complainant should be closely examined der to ascertain whether it is a proper case Criminal Court, and still more so before lecting an accused. [p. 354, cols. 1 & 2]

riminal revision reviewing an order of Third Additional Magistrate, Rangoon, ed in Summary Trial No. 648 of .

JDGMENT.—The petition before me in application to revise the proceed- of the Third Additional Magistrate Rangoon in Summary Trial No. 648 922 in which the Magistrate passed ntence of fine of Rs. 50 or in default month's rigorous imprisonment against tioner under section 448, Indian Penal , for house trespass alleged to consist s going on the *Zayat* at Bahan and giv- orders to certain carpenters to break n the roof of the kitchen and the whole he bath-room. A very cursory glance he proceedings will show that it was itted by the complainant that the *t* in question was a *Thandika Zayat* that any investigation of the questions who would be entitled to enter and ir the *Zayat* from time to time might lve most complicated questions as to ights and titles to *Thandika* property ted to religious purposes or the use persons going there for religious oses.

reference to Chan Toon's Treatise Buddhist Law at pages 164 and 165 to Mr. (Justice) May Oung's Treatise Buddhist Law at pages 177 and 178 will ufficient to indicate that *Thandika* erty is public property and that the tion of title may be one of consider- complexity. It is obvious that a nary trial is not the proper procedure for the trial of such cases even when they are of a kind involving questions of criminal offences in relation to property.

Moreover, when parties come to a Criminal Court with complaints raising questions as to the title or possession of such class of property, it will very often be found that the object is to establish a civil claim to property with full knowledge that the other party has no criminal intent and is only exercising or endeavouring to exercise a *bona fide* claim of right. Consequently, Magistrates would be well advised to closely examine such complaints and complainants in order to ascertain whether it is a proper case for a Criminal Court before issuing process (other than a process to prevent a breach of the peace, etc.,) and still more so before convicting an accused.

In the present case, the complainant started with what was subsequently shown to be an obviously incorrect and presumably a false allegation in paragraph 1 of the complaint to the effect that she was the owner of the *Zayat*. When examined before the issue of process, she said that she got the property from "aunt Ma Pwa," but later on, when she is examined at the hearing of the case, she apparently no longer alleges any relationship with Ma Pwa, and endeavours to base her claim solely on an alleged possession for several years, and an alleged verbal request or permission from Ma Pwa, for her to live in the *Zayat* and to repair it, and in cross-examination she has to admit that it is a *Thandika Zayat*. When it was put to her that any permission she got to live in the *Zayat* was given to her by Po Oh, a witness for the defence and a brother of Ma Pwa, she denies that allegation. However, in addition to the admission that it is *Thandika* property, there are also admissions on the record that, any members of the public who wish to go to the *Zayat* and to keep sabbath there, are permitted to do so, and also that other families besides the plaintiff live in the *Zayat*.

If the *Zayat* is public property or property of a section of the community, it becomes very questionable whether the complainant can have any right to exclude any person from entering upon it, and I am of opinion that, having regard to such admis-

sions that it is *Thandika* the *onus* lay on the complainant to specifically show that she had the right to exclude either the accused (who is said to be a relative of Ma Pwa) or the other relative of Ma Pwa on whose behalf the accused was alleged to be acting. *Prima facie,* on the admissions referred to above, the petitioner would appear to have such right of entry, and if he has such right of entry and to the use of the building, his mere entry without the consent of the complainant, or even in defiance of the complainant, would not be a criminal trespass or an offence. This is a most important aspect of the case, for a person who has a right of entry into a building cannot be held to become a trespasser by reason of his failure to obtain the consent or permission of the other party, or by reason of anything which he does in such building, unless it is shown that the thing so done was an offence or was otherwise of such a nature as to bring the entire proceedings within the definition of criminal trespass in section 441, Indian Penal Code.

The Magistrate has held that it is not clear that the dismantling of the kitchen amounted to criminal mischief, or any other criminal offence, which is in effect a finding that it was not shown that the petitioner accused had not the right to dismantle the kitchen.

The Mgistrate obviously realised the above difficulty and that the entry must under that section be shown to have been made with the intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. Having held that the intent to commit an offence was not proved the Magistrate endeavours to bring the case within the latter alternative and states that "the accused's arrangement was to force the complainant to quit the building." Clearly, this intent was more than to annoy the "person in possession." The Magistrate avoids making the express finding that the entry or act was done *with intent* to annoy, and, rightly so, because there is nothing in the evidence as recorded to justify any such finding. But he finds that the object of dismantling, etc., was to break down the building which would have the effect of compelling complainant to leave, and he treats that result as intended. It is quite true that such result may have the effect of annoying the complainant, but there are authorities that such a result and consequent annoying is not sufficient for the offence, unless there was in fact the intent to annoy, etc.

It is obvious, therefore, that the reasons as given by the Magistrate and his actual finding do not justify a conviction for house trespass on what is admitted to be *Thandika* property. A close scrutiny of the following facts will also show that the probabilities of the case as regards right of entry and right to repair the *Zayat* are in favour of the defence.

The land on which the *Zayat* was built is shown in the map, Exhibit 1, as being in Po Oh's name and Po Oh has given evidence to this effect for the defence. He is the brother of Ma Pwa, whilst the accused petitioner is a grandson of another sister of Ma Pwa, and if he did enter the *Zayat* as alleged he was obviously acting on behalf of the family. Ko Po states that Po Oh had looked after the *Zayat* and obtained the sanction of the Municipality to repair it, and that he had arranged to rebuild it in order to make it fit for public use. Exhibit B. was also written to complainant on behalf of Ko Po Sein giving notice to complainant of the intention to rebuild it, and Exhibit C was written in reply by or on behalf of complainant disputing the right of the relative to repair, etc., the *Zayat.*

I am of opinion that if the complainant has any real ground of complaint against the accused petitioner or against any other relative of Ma Pwa, the proper remedy of the complainant is a suit in a Civil Court and not a prosecution of this nature in the Criminal Court. It is still open to the complainant to file such suit.

I hold, that the conviction of the accused for house trespass under section 448, Indian Penal Code, was not justified either on the facts of the case or on the reasons as given by the Magistrate. I set aside the conviction and sentence and I direct that the accused be acquitted and that the fine of Rs. 50; if recovered from the accused, be refunded to him.

W. C. A. & N. H. *Conviction set aside.*

SEWA SINGH *v.* RANJHA.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1710 OF 1922.

March 23, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

SEWA SINGH—COMPLAINANT—PETITIONER

versus

RANJHA AND OTHERS—CONVICTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 34, 439—Sentence passed by Magistrate under s. 34—Enhancement, limit of—Procedure.

Clause (3) of section 439 of the Criminal Procedure Code limits the power of enhancement and lays down that where the sentence dealt with under the section has been passed by a Magistrate acting otherwise than under section 34 of the Code, the Court shall not inflict a greater punishment for the offence, which in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate of the First Class. This limitation does not apply to a sentence which has been passed by a Magistrate acting under section 34 of the Code.

At the same time, except in very exceptional cases, a sentence by the High Court under its powers of enhancement should not, where the sentence has been imposed by a Magistrate, exceed one of seven years' rigorous imprisonment, which a Magistrate acting under section 34 has power to pass, the usual course when a Court thinks that a sentence of seven years' rigorous imprisonment would not meet the ends of justice would be to set aside the trial and order the case to be committed to the Court of Session.

Petition, under section 439, Criminal Procedure Code, for enhancement of the sentences passed upon the respondents by the Magistrate, First Class, Montgomery, dated the 4th May 1922, and upheld by the Sessions Judge, Montgomery, dated the 8th August 1922.

JUDGMENT.—Ranjha, Sadiq and Manak, respondents, were convicted by a Magistrate invested with powers under section 30 of the Criminal Procedure Code of the attempt of murder of Sewa Singh under section 307, Indian Penal Code, and were sentenced to four years' rigorous imprisonment and a fine of Rs. 300 each. Their appeal was dismissed by the Sessions Judge of Lahore on the 8th August 1922 and an application for enhancement of sentences was rejected by the same officer on the same date. The three convicts applied to this Court on the revision side and their application was rejected. At the same time, Sewa Singh, the person whose life was attempted, applied to this Court for enhancement of sentences. The case came up before a Single Judge who was of opinion that the sentences were inadequate and that, if enhanced, they should be enhanced to more than seven years and sent the case for orders to a Division Bench.

After considering the medical evidence we are of opinion that the sentences imposed are quite inadequate and should be enhanced. Clause (3) of section 439 of the Criminal Procedure Code limits the power of enhancement and lays down that, where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a Presidency Magistrate of the First Class. This limitation does not apply to a sentence which has been passed under this clause by a Magistrate acting under section 34 of the Code. It does not appear, therefore, that our powers of enhancement are limited to such sentence as could have been passed by the Magistrate. At the same time, we think that, except in every exceptional cases, the sentence passed by this Court under its powers of enhancement should not, where the sentence has been imposed by a Magistrate, exceed one of seven years' rigorous imprisonment which a Magistrate acting under section 34 has power to pass. The usual course where the Court thinks that a sentence of seven years' rigorous imprisonment would not meet the ends of justice would be to set aside the trial and order the case to be committed to the Court of Session. We do not think that this course should be adopted in the present case because an appeal and an application for revision have both been rejected. The offence, moreover, took place on December 27, 1921, and the order of the Trying Magistrate was passed ten months ago. After such an interval it would not be advisable to order a re-trial. We accept the application and enhance the sentence of imprisonment to seven years' rigorous imprisonment in the case of each of the respondents,

The rest of the Magistrate's order will stand.

Z. K. *Application accepted.*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 715-B OF 1922.

January 8, 1923.

Present :—Mr. Justice Lentaigne.

NGA SAN DUN—PETITIONER

versus

EMPEROR—RESPONDENT.

Burma Gambling Act (I of 1899), s. 12—Conviction when justified.

Where a person is charged under section 12 of the Burma Gambling Act, the mere fact that on one occasion he received a sum of money from one of the players, or from the winner, would not be sufficient to justify his conviction: there ought to be evidence of other incriminating circumstances in order to prove the offence.

Reference made by the Sessions Judge, Bassein, his Criminal No. 385 of 1920, reviewing that of the Township Magistrate, Zalun, passed in Criminal Regular Trial No. 288 of 1922.

FACTS appear from the following reference made by the Sessions Judge of Bassein, in his Criminal Revision No. 385 of 1922, reviewing the order of the Township Magistrate of Zalun, passed in Criminal Rergular Trial No. 288 of 1922 :—

The applicantwho is a Village Headman, has been convicted of an offence under section 12 of the Gambling Act. The prosecution alleged that there was gambling with dominoes in the house of one Ma Thin Yon and that the appellant took a commission of one anna on each game. The complainant, a Police Constable, admits that he saw the applicant take one anna only. There is no suggestion beyond his taking of one anna, that the applicant took any part in the game. The Magistrate has disbelieved the prosecution evidence as regards the 5th, 6th, 7th and 8th accused, but convicted the first four accused. He gives no reason for making this illogical distinction. The applicant has called credible evidence to prove that, while he was going round collecting capitation tax; he saw persons from whom he had to collect the tax in this house and so went up to the house and demanded the tax from them. The Magistrate has not discussed this evidence at all. On the evidence, it is not, in my opinion, proved that the applicant took any part in the gambling and his conviction cannot be sustained. The Magistrate describes the case as a trivial one, but this conviction is a matter of considerable moment to the applicant who is a Headman. Proceedings are submitted to the Chief Court with a recommendation that the conviction of the applicant be set aside, and the fine paid by him be ordered to be refunded.

ORDER.—I have perused the records in the above case and I am satisfied that, for the reasons given by the Sessions Judge of the Bassein Division in his order dated 11th December 1922 in Criminal Revision No. 385 of 1922, the conviction of the Village Headman Nga San Dun under section 12 of the Burma Gambling Act cannot stand. He was not the owner of the house, and the mere receipt of a sum of money from one of the players or from the winner on a single occasion would not be sufficient to prove an offence under section 12 without evidence of other incriminating circumstances and such evidence is wanting. Moreover, Nga San Dun has explained the reason of his visit to the house, and this evidence has not been properly considered by the Magistrate. I direct that the conviction and sentence to a fine of Rs. 15 or in default to seven days' simple imprisonment passed against the said Nga San Dun in Criminal Regular Trial No. 288 of 1922 of the Court of Township Magistrate of Zalun be set aside and I direct that the said fine, if paid, be refunded to the said Nga San Dun.

W. C. A. *Conviction set aside.*

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 762 OF 1922.
October 3, 1922.
Present:—Mr. Justice Young.
MA MI—APPELLANT
versus
EMPEROR—RESPONDENT.

Opium Act (I of 1878), s. 9 (c)—Illegal possession—Prosecution, duty of.

To justify a conviction under section 9 (c) of the Opium Act, of being in illegal possession of opium, the prosecution must prove that the premises where the opium was found were in the occupation of the accused.

Criminal appeal against an order of the Eastern Sub-Divisional Magistrate, Rangoon, passed in Criminal Regular Trial No. 435 of 1922.

ORDER.—The appellant has been convicted of the illegal possession of opium because it was found in an inner-room to which she withdrew when the search party entered an outer-room where she was being shampooed.

The learned Magistrate finds that the Excise Inspector did not know who was in occupation of the room in question; the only evidence on the point is that of the defence which is to the effect that she was a mere visitor residing temporarily in the front room.

It was for the prosecution to prove that she was in the occupation of the inner-room where the opium was found and it is impossible to convict her just because opium was found under a bed, which is not shown to have been hers, and in a pair of men's boots, which could not have belonged to her.

The conviction and sentence must be set aside and the appellant acquitted. The fine, if paid, must be refunded.

W. C. A. *Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 224 OF 1923.
May 31, 1923.
Present:—Mr. Justice Daniels.
SITA RAM AND OTHERS—
APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 4, 5, 6—Police raid—Gaming going on—Instruments of gaming found—Common gaming house, presumption as to—Direct evidence, whether necessary.

The Police, having obtained a warrant, raided a house in which they found the accused persons, gaming was going on and there were instruments of gaming:

Held, that, under the circumstances, the presumption contained in section 6 of the Act applied and dispensed with the necessity of direct evidence that a commission was being taken by the keeper of the house.

Lachchi Ram v. *Emperor*, 65 Ind. Cas. 852; 20 A. L. J. 218; 23 Cr. L. J. 196; (1922) A. I. R. (A) 61, distinguished.

Criminal revision from the order of the Sessions Judge, Saharanpur, dated the 29th of November 1922.

Mr. *A. P. Dube*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against the conviction of the applicants under section 4 of the Gambling Act. The Police made a raid on the house of one Surja, a gaming was going on, the accused were found present and instruments of gaming were found. The warrant had been duly obtained, the presumption contained in section 6 of the Gambling Act, therefore, applied. It has been suggested, on the authority of the case of *Lachchi Ram* v. *Emperor* (1), that it was necessary for the Police to give direct evidence that the gambling was being carried on for the profit of the keeper of the house. I have examined that judgment and find that it contains no reference to section 6. Here the presumption contained in that section was clearly applicable and dispensed with the necessity of direct evidence that a commission was being taken by the keeper of the house. The revision accordingly fails and I dismiss it.

K. S. D. *Application dismissed.*

(1) 65 Ind. Cas. 852; 20 A. L. J. 218; 23 Cr. L. J. 196; (1922) A. I. R. (A.) 61.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1215 OF 1922.

March 22, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

WARYAM SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Death caused by dangerous weapon—Murder—Sentence.

Two persons who were armed with *chhavis* attacked the deceased, who was their enemy, and inflicted two incised wounds on his head, one of which fractured his skull and caused his death;

Held, that both of them were equally responsible for the result of their joint assault, and were guilty of an offence under section 302 of the Penal Code the appropriate sentence being one of death. [p. 360, col. 2.]

In a case of murder the sentence of death should ordinarily be imposed unless there is a mitigating circumstance which would justify the Court in awarding the lesser sentence prescribed by the law. The mere fact that only one blow proved fatal does not furnish any adequate ground for not inflicting the sentence of death. [p. 360, col. 2.]

Criminal appeal from an order of the Sessions Judge, Gujranwala at Sheikhupura, dated the 19th October 1922.

Messrs. *B. R. Puri* and *Mul Chand*, for the Appellants.

Mr. *Jai Lal*, Government Advocate, for the Crown.

JUDGMENT.—On the afternoon of the 24th April 1922 one Teja Singh, a Jat of the village Masanda, in the District of Sheikhupura, was assaulted by several persons who were armed with *chhavis* and *dangs*. The victim became unconscious immediately after the assault and died on the 30th April without regaining consciousness. The medical witness, who treated him in the hospital, found, besides several contusion marks, two incised wounds on the head, one of which caused a fracture of the skull and led to the death of the victim. Six persons, five belonging to the same village and the sixth a resident of a neighbouring village, have been convicted of having participated in the assault and two of them, namely, Waryam Singh and Labh Singh, have been sentenced under section 302, read with section 149, of the Indian Penal Code to transportation for life, and the remaining four, under section 325, read with section 149, Indian Penal Code, to various terms of imprisonment.

Now, there is ample evidence upon the record that there was a bitter enmity between the deceased Teja Singh and his father Ishar Singh on the one side and Waryam Singh and Labh Singh on the other. It appears that, about three months previous to the date of the incident, Teja Singh had given evidence in a security case under section 110, Criminal Procedure Code, against both Labh Singh and Waryam Singh and that the other prisoners are either their friends or related to them. There can, therefore, be no doubt that they had an adequate motive for committing the assault which resulted in the death of Teja Singh.

The deceased's cousin Mohar Singh (P. W. No. 4) deposes that on the afternoon in question he was coming from his field to the village and that on the way he saw the six prisoners and also one Mohan Singh, who is fugitive from justice, sitting under a *shisham* tree armed with *chhavis* and *dangs*. The witness apprehending an assault upon his relative Teja Singh proceeded towards the latter's cattle-pen where he was lying on a *charpoy*. But before he could reach there all the seven persons pursued him and some of them gave him a beating. Mohar Singh thereupon raised an alarm in order to warn Teja Singh who got up and ran towards the houses of some Chamars. He was, however, overtaken in front of the house of one Kirpal Singh where Labh Singh and Waryam Singh, who were armed with *chhavies*, inflicted a blow each on his head which felled him to the ground. Their comrades then assaulted the unfortunate man with blunt weapons while he was lying wounded on the ground.

The evidence of Mohar Singh is fully corroborated by the testimony of Sohan Singh who, on hearing the former's outcry, hastened to the place where Teja Singh was sleeping on his *charpoy* near his cattle-pen and saw the culprits pursuing their victim and attacking him in the lane outside Kirpal Singh's house. Another witness, Sardar Singh (P. W. No. 6), whose house is situate at a short distance from that of Kirpal Singh, also came up and saw Waryam Singh and Labh Singh striking the deceased with *chhavis* and their companions beating him with *dangs* after he

had fallen down on the ground. The wounded man's father, Isher Singh also heard a noise and hastened to the spot where he found his son lying on the ground. He states that, though Waryam Singh and Labh Singh, who were armed with *chhavis*, did not strike his son in his presence, they were standing there along with their five companions who were at that time beating the victim.

The three eye-witnesses, Mohar Singh, Sohan Singh and Sardar Singh, are all nearly related to Isher Singh, and they cannot, therefore, be described as disinterested persons. We have, however, subjected their testimony to a careful scrutiny, and we find that the story related by them was disclosed at the earliest possible opportunity. It appears that two Policemen, Allah Ditta Head Constable, and Nur Din, Constable, who were deputed to investigate a case of burglary in the village, arrived there at about 3 P. M. on the afternoon in question, and, upon hearing a noise in the village ran to the spot where they saw all the seven persons surrounding the deceased's father Isher Singh. The appearance of the Policemen frightened the culprits who went away without causing any injury to Isher Singh. Now, both these men say that Isher Singh and the other eye-witnesses gave them a complete account of the whole transaction, and mentioned the names of all the assailants. The Head Constable first took down the statement of Isher Singh and forwarded it to the Police Station at Manawala where it was registered at 9-45 P. M. as the Initial Report of the affair. He then recorded the statements of the other witnesses, and there is absolutely no reason for thinking that these statements have been ante-dated, or that he and his companion have falsely implicated innocent persons.

All the prisoners, except Waryam Singh and Labh Singh, profess their ignorance of the whole transaction, and invoke the usual plea of *alibi*. They have, however, produced no evidence in support of their defence. Waryam Singh and Labh Singh, while admitting that they had a fight with the deceased Teja Singh, deny having inflicted any injury upon him. They explain that it was Teja Singh and two other persons who pursued them into the house of Kirpal Singh where there was a fight between the two parties, in the course of which Teja Singh fell down on a brass bowl and received the injuries which resulted in his death. In support of this version our attention has been invited to the fact that the medical witness who conducted the *post mortem* examination, found the fatal injury to be " semi-lunar " (crescent shape) and it is argued that the shape of this injury indicates that it was caused, not by a straight edged weapon, but by a circular article like a bowl. The medical witness himself, however, makes it absolutely clear that any straight edged weapon could cause that injury, and he explains that " as the head is circular shaped, a deep cut would be semi-lunar, even if it is inflicted with a straight-edged weapon." In view of this evidence we are of opinion that the shape of the injury is in no way incompatible with the prosecution version. On the other hand, we have reliable evidence to the effect that a large quantity of blood was found in the lane outside Kirpal Singh's house, and this circumstance runs counter to the defence theory according to which the deceased received all his injuries inside the house.

The evidence of the eye-witnesses, reinforced, as it is, by the testimony of the two Police Officers, leaves no doubt that all the prisoners participated in the assault in the course of which the fatal injury was inflicted. It is clear that Waryam Singh and Labh Singh, who were armed with *chhavis*, inflicted the two incised wounds on the head; and, though only one of the blows fractured the skull, we consider that both of these prisoners are equally responsible for the result of their joint assault. They have, therefore, been rightly convicted of an offence under section 302, Indian Penal Code, and their appeal must fail. As regards the application for the enhancement of the sentences, preferred by the Crown, we are of opinion that the mere fact that only one blow proved fatal does not furnish any adequate ground for not inflicting the sentence of death which should ordinarily be imposed unless there is a mitigating circumstance which would justify the Court in awarding the lesser sentence prescribed by the law. There can be little doubt that, when two persons

armed with dangerous weapons like *chhavis* attack their enemy on the head, they must be deemed to intend to cause his death and the only appropriate sentence in a case of this character is one of death. We accordingly accept the application for revision and sentence each of these two convicts to the penalty of death.

Nor do we think that the learned Sessions Judge was justified in holding that the remaining four persons were guilty, not of murder, but of only grievous hurt. The circumstances of the case show that all the members of the unlawful assembly must have known that murder was likely to be committed in the prosecution of their common object, and it seems to us that all of them would be guilty of murder. At any rate, the learned Judge was wholly wrong in inflicting light sentences upon these prisoners. It appears that they have understated their ages, but we do not think that they are so young as they try to make out. They are all guilty of a violent crime and deserve a susbstantial term of imprisonment. Accordingly, while maintaining the conviction, we enhance the sentence in the case of each of these four prisoners to one of rigorous imprisonment for seven years.

The appeal preferred by the convicts is dismissed.

Appeal dismissed;
Sentences enhanced.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 152 OF 1923.
April 19, 1923.
Present:—Mr. Justice Walsh and Mr. Justice Ryves.
NANHU AND ANOTHER—
APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 299, 300, paras. 3 and 4—Dhatura poisoning—Bodily injury likely to cause death—Offence whether amounts to murder.

Where a person administers *dhatura* poison to another, it is likely or at least probable that he intended to cause such bodily injury as was likely to cause death and, therefore, he is guilty of murder. [p. 362, col. 1.]

Emperor v. *Gutali*, 1 Ind. Cas. 765; 6 A. L. J. 129; 31 A. 148; 9 Cr. L. J. 383, *Jeoni* v. *Emperor*, 36 Ind. Cas. 473; 15 A. L. J. 13; 17 Cr. L. J. 505; 39 A. 161, referred to.

Criminal appeal against an order of the Additional Sessions Judge, Bareilly, dated the 19th of January 1923.

The Government Pleader, for the Crown.

JUDGMENT.—Nanhu and Bhagga were convicted by the learned Additional Sessions Judge of Bareilly under section 304 of the Indian Penal Code with reference to the death of one Tika and under section 328 of the Indian Penal Code for administering *dhatura* poison in the food served to Gopal and Raghbar. They were sentenced to seven years' rigorous imprisonment under each section, the sentences to run concurrently. They appealed from jail and a learned Judge of this Court directed that notice should issue to the appellants to show cause why they should not be convicted under section 302 of the Indian Penal Code for poisoning Tika, and why their sentences should not be enhanced or other suitable order passed. Notice has been served but no appearance had been made. The facts of the case admit of no dispute. On the 26th May 1922 these two accused, who are Kurmis by caste, but who represented themselves to be Banias, made friends with three young men Tika, Gopal and Raghbar, who were returning to service, at the *Dharamsala* adjoining the Bareilly Junction. They got into conversation with them; and in the evening they proposed to cook *dal* and *roti* for them and did so. Shortly after partaking of this food all three became more or less insensible. Tika died eventually. Gopal and Raghbar were taken to Hospital and they ultimately recovered after treatment. The case of Tika's death was *dhatura* poisoning. The property which these persons had had been removed by the accused. Subsequently, the accused were arrested and property which had belonged to their victims was recovered from their possession. There can be no doubt of these facts. In our opinion, the charge should have been framed under section 302. Under section 299 of the Indian Penal Code, which defines the offence

of culpable homicide, it is said "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." And, having regard to the 3rd and 4th paragraph of section 300, such culpable homicide is murder. Now, there cannot be the slightest doubt that these two persons knew when they administered *dhatura* recklessly in the food they had prepared for these persons that it was likely, probable at least, to cause such bodily injury as was likely to cause death. If authority is wanted for this proposition see *Emperor* v. *Gutali* (1) and *Jeoni* v. *Emperor* (2). We do not, however, propose to order a fresh trial in this case under section 302. We content ourselves with passing the maximum sentence under section 304, namely, transportation for life. If people deliberately and recklessly poison travellers with the intention of robbing them while they are insensible under the effects of the drugs given to them and take advantage of the facilities provided by the Railway authorities for the comfort of passengers and cause death, they must take the consequences. We, therefore, enhance the sentence under section 304 of Nanhu and Bhagga to transportation for life with effect from the date of their conviction. We retain the conviction and sentence under section 328. The terms of imprisonment will be concurrent. The appeal is dismissed.

K. S. D. *Appeal dismissed.*

(1) 1 Ind. Cas. 765; 6 A. L. J. 129; 31 A. 148; 9 Cr. L. J. 383.
(2) 36 Ind. Cas. 473; 15 A. L. J. 13; 17 Cr. L. J. 505; 39 A. 161.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1134 OF 1922.
February 23, 1923.
Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

PRASANNA CHANDRA MAJUMDAR—PETITIONER
versus
UPENDRA NATH SHAW—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Acquittal, setting aside of—Appellate Court, power of.

Accused was charged with offences under sections 143 and 379 of the Penal Code. He was convicted under section 143 and acquitted of the offences under section 379. On appeal, the Sessions Judge upheld the conviction under section 143 and also passed an order setting aside the acquittal in respect of the offence under section 379:

Held, that the Sessions Judge had no jurisdiction to set aside the acquittal as this was not a case of altering conviction within the meaning of section 423 of the Criminal Procedure Code.

Criminal revision against an order of the Additional Sessions Judge, Pubna, dated the 18th September 1922, modifying that of the Deputy Magistrate, Bogra, dated the 30th June 1917.

Babu *Bir Bhusan Dutt*, for the Petitioner.

JUDGMENT.—The petitioner in this case was convicted by the Deputy Magistrate of Bogra under section 143, Indian Penal Code, and sentenced to pay a fine of Rs. 100. On appeal to the Sessions Judge of Pabna he upheld the conviction and sentence and further passed an order setting aside the order of acquittal of the offence under section 379, Indian Penal Code, which had been passed by the Trying Magistrate. The learned Sessions Judge had clearly no jurisdiction to set aside the acquittal of the petitioner when he upheld conviction under section 143, Indian Penal Code. It was not a case of altering the conviction which was within his powers under section 423, Criminal Procedure Code. We accordingly make this Rule absolute and set aside the order of the Sessions Judge so far as it sets aside the acquittal of the petitioner under section 379, Indian Penal Code, by the Trying Magistrate.

Z. K. *Rule made absolute.*

RAMBARAI RAI *v.* SAGINA RAI.

PATNA HIGH COURT.

CRIMINAL REVISION No. 41 OF 1923.
March 23, 1923.
Present:—Mr. Justice Kulwant Sahay.
RAMBARAI RAI—PETITIONER
versus
SAGINA RAI AND OTHERS—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceeding under—Decree of Civil Court, effect of.

A Magistrate in deciding the question of possession under section 145 of the Criminal Procedure Code is not in every case bound by the previous order of a Civil or Criminal Court relating to the possession of the subject-matter of the dispute and the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case before him. [p. 364, col. 1.]

Shahabaj Mandal v. *Bhajahari Nath*, 75 Ind. Cas. 75; 25 C. W. N. 743; 49 C. 177; (1922) A. I. R. (C.) 364, *Kulada Kinkar Roy* v. *Danesh Mir*, 33 C. 33 C. L. J. 271; 10 C. W. N. 257; 2 Cr. L. J. 670 (F. B.) *Parmessar Singh* v. *Kailas Pati*, 35 Ind. Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1, referred to.

Where, however, there is a recent order of a Civil Court delivering possession to a particular party, that order ought to be respected and given effect to by a Magistrate acting under section 145 of the Criminal Procedure Code, unless and until there is something shown which might induce the Magistrate to hold that, subsequent to the delivery of possession, something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court. [p. 364, col. 1.]

Messrs. *G. C. Pal* and *S. Dayal*, for the Petitioner.

Messrs. *S. M. Mullick* and *S. N. Bose*, for the Opposite Party.

JUDGMENT.—This is an application by the second party in a proceeding under section 145 of the Code of Criminal Procedure. The dispute related to the possession of about ten plots of land lying in *Mauzas* Kudaria and Parasrampur. Babu Hit Narayan Singh of the first party is the admitted landlord and one Otar Rai was the *raiyat* of these plots. At the time of the Survey the lands in dispute were found in the possession of Ganpat Sao and other mortgagees of Otar Rai. Ganpat Sao assigned the mortgage to one Ganendra Prasad in August 1911, and Ganendra Prasad in his turn assigned one plot bearing plot No. 485 to one Ramkaran Rai and the rest to Rambarai Rai of the second party. The landlord, Babu Hit Narayan Singh, brought a suit for rent against Srikishen Rai, the heir of Otar Rai. He obtained a rent-decree, took out execution thereof, sold the holding and purchased it himself in March 1922. Delivery of possession was given to him by the Civil Court in April 1922 and since then he claims to have been in possession. Babu Hit Narayan Singh had applied to annul the encumbrance against Hira Sao and others, the heirs of the original mortgagee, Ganpat Sao. The second party raised various objections in the Court below as regards the decree and sale being illegal inasmuch as Srikishen Rai against whom the rent-decree was obtained was not the heir of Otar Rai; and as regards Ganendra Prasad and the assignees from him not being parties to the proceeding for annulling the encumbrance; they also stated that after the delivery of possession Ramkaran Rai, the assignee of plot No. 485, had made an application to the Civil Court under O. XXI, r. 100 of the Code of Civil Procedure and he was restored to possession by order of the Civil Court of plot No. 485, and, therefore, in so far as Ramkaran Rai was concerned, he was in possession and he was entitled to retain possession of the said plot No. 485.

The learned Deputy Magistrate carefully considered the contentions of the parties and he held that the objection as regards the validity or otherwise of the decree or the proceedings to annul the encumbrance were matters beyond the scope of an enquiry in a proceeding under section 145 of the Criminal Procedure Code; and, in my opinion, he was right in the view taken by him. He gave effect to the delivery of possession of the Civil Court and declared the first party to be in possession of the plots other than plot No. 485 in respect whereof he made an order in favour of Ramkaran Rai. It has been argued by the learned Vakil for the petitioners that the learned Deputy Magistrate was wrong in giving effect to the delivery of possession without coming to an independent finding upon the evidence adduced before him as regards the fact of actual possession. He argues that it is not always incumbent upon the Magistrate to give effect to a decree or a proceeding of a Civil Court relating to delivery of possession

but that it was his duty to consider the evidence produced before him in order to find as to which party was in actual possession on the date of the institution of the proceedings. He relies on the cases of *Shahabaj Mandal* v. *Bhajahari Nath* (1) *Kulada Kinkar Roy* v. *Danesh Mir* (2) and *Parmessar Singh* v. *Kailaspati* (3). Now, all that these cases lay down is, that Magistrate in deciding the question of possession under section 145 of the Code is not in every case bound by the previous order of a Civil Court or Criminal Court relating to the possession of the subject-matter of dispute and that the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case before him. In my opinion, when there is a recent order of a Civil Court delivering possession to a particular party, that order ought ordinarily to be respected and given effect to by a Magistrate under section 145 of the Code of Criminal Procedure unless and until there was something shown which might induce the Magistrate to hold that, subsequent to the delivery of possession, something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court. In the present case there is no such allegation. The learned Vakil argues that, as a matter of fact, there was no actual delivery of possession, but the finding of the Court is that there was actual delivery of possession. In this view of the case the learned Magistrate had full jurisdiction to make the order that he has made.

This application is, therefore, dismissed.

Z. K. *Application dismissed.*

(1) 75 Ind. Cas. 75; 25 C. W. N. 743; 49 C. 177; (1922) A. I. R. (C.) 364.
(2) 33 C. 33; 2 C. L. J. 271; 10 C. W. N. 257; 2 Cr. L. J. 670 (F. B.).
(3) 35 Ind. Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NOS. 150 AND 150A OF 1922.

December 8, 1922.

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

Sheikh SAMIR AND OTHERS—COMPLAINANT
versus
BENI MADHAB GOPE AND ANOTHER—ACCUSED.

Procedure—Cross-cases—Trial by one Magistrate.

It is desirable that cross-cases arising out of the same occurrence should be tried by the same Magistrate.

Criminal Reference made by the Sessions Judge, Dacca, dated the 28th October 1922.

ORDER OF REFERENCE.—On 17th July last there was a dispute regarding some land between the two parties—the complainant and the accused party. Both parties alleged to be *raiyats* but one party claims a prior right to the others. On that very day Judisthir Gope of one party complained before the Magistrate and the Magistrate at once issued summons against Samir and others of the other party under sect on 147, Indian Penal Code. Then, on 18th July 1922, Samir lodged a counter-case which was sent to the Police for report and on 25t July 1922 on Police report Beni and Gayanath of Judisthir's party were summoned under section 323, Indian Penal Code. Then it appears the two cases were made over to two different Magistrates for disposal. Up to date in Judisthir's case all the prosecution witnesses seven in number, have been examined and charge has been framed against the accused under section 147, Indian Penal Code. In the other case up to date only one witness for the prosecution has been examined.

Both parties are agreed, in fact both parties have filed applications to the effect that the simultaneous trial of the two cases over one and the same occurrence is undesirable and unsatisfactory, and each party has claimed that the trial of the other party's case should be deferred till the disposal of his case.

The order recomended for revision:—In my opinion the trial of Judisthir's case should be proceeded with

and proceedings in Samir's case should be stayed till the disposal of Judisthir's case.

Irregularity and illegality and grounds for revision:—It being admitted by both parties that simultaneous trial of two cases by two different Magistrates is unsatisfactory and undesirble, I need not expatiate on the point. The ruling in *Bachu* v. *Sia Ram* (1) clearly and very fully points out the irregularity, amounting to illegality, of such a course. Now the point is, which case should be proceeded with and which should wait. In this matter I have given preference to Judisthir's case for the following reasons:—

1. Judisthir's complaint is prior to that of Samir's in time.

2. In Judisthir's case already the prosecution case is closed and charge has been framed, whereas practically very little has been done in Samir's case.

No explanation has been submitted by the lower Court.

Babu *Ramgati Sarkar*, for the Accused.

JUDGMENT.—On the facts stated in the letter of reference, we think it desirable that both the cases should be tried by one Magistrate, and the learned Sessions Judge's suggestion as to the order of trial accepted. We accordingly transfer the case in which Sheikh Samir is the complainant and Beni Madhab Gope and another accused from the file of Babu J. C., Mazumdar, Deputy Magistrate of Manikgunge, to the file of Babu J. Chakraverty, Sub-Deputy Magistrate of Manikgunge, and we also direct that the trial of the case in which Judisthir Gope is the complainant and Samir Sheikh and others accused be proceeded with and the proceedings in the case in which Sheikh Samir is the complainant be stayed until the disposal of the other case.

Z. K. *Reference accepted.*

(1) 14 C. 358; 7 Ind. Dec. (N. S.) 237.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 454 OF 1922.

September 20, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

SHER MUHAMMAD—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 337—'*Inquiry*", *meaning of—Pardon tendered during investigation, validity of.*

The word "inquiry" in section 337 of the Criminal Procedure Code is meant to include everything done in a case by a Magistrate, whether the case has been *challaned* or not. [p. 366, col. 1.]

When a case has been reported to a Magistrate by the Police, and he is asked to tender a pardon and does so, there is an "inquiry" within the meaning section 337 of the Criminal Procedure Code, and the tender of pardon is perfectly valid. [p. 366, col. 1.]

Bhallu Singh v. *Queen-Empress*, 3 P. R. 1897 Cr., followed.

Motilal Hiralal v. *Emperor*, 64 Ind. Cas. 401; 23 Bom. L. R. 884; 46 B. 611; 22 Cr. L. J. 728; (1922) A. I. R. (B.) 138, dissented from.

Appeal from an order of the Sessions Judge, Lyallpur, dated the 27th April 1922.

Messrs. *Mukand Lal Puri* and *Badri Nath Kapur*, for the Appellant.

Mr. *D. C. Ralli*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.— On the night of the 1st January 1922 a dacoity was committed by six men at the shop of Kirpa Ram in *Chak* No. 562 G. B., in the Lyallpur District. Two of the dacoits had pistols, which they fired and a number of villagers collected on hearing shots and were encouraged by Khaire Khan, *lambardar*, (P. W. No. 12) to attack the dacoits. A fight took place in which one of the villagers, named Allah Rakha and one of the dacoits named Usman were mortally wounded and another dacoit, who is the appellant Abdul Kader, was captured together with a revolver with which he was armed. The other four dacoits escaped. The three appellants, Sher Muhammad, Sultan and Abdul Kadir, were sent up for trial and have been sentenced to transportation for life for an offence under section 396, Indian Penal Code. Their Appeals Nos. 454, 455 and 481 may be disposed of by one judgment.

Suleman (P. W. No. 11) to whom a pardon was tendered by Sardar Hakam Singh, Magistrate First Class, under the authority of the District Magistrate, has given a full account of the docoity in which he says that he, the three appellants, the deceased, Usman, and one other man were concerned. It has been contended that the pardon was not legally tendered to Suleman under section 337, Criminal Procedur Code, because at the time when it was tendered the offence was not under inquiry by the Magistrate but was only under investigation by the Police, and that, therefore, the approver's evidence is inadmissible. A ruling of the Bombay High Court published in 64 Ind. Cas. 40 [*Motilal Hiralal* v. *Emperor* (1)] is relied on in support of this contention. It appears to us that in that case a too narrow construction has been placed on the word 'inquiry" in section 337. In *Bhallu Singh* v. *Queen-Empress* (2) it was held by a Division Bench that when a case has been reported to a Magistrate by the Police, and he is asked to tender a pardon, and does so, there is an inquiry within the meaning of section 337, Criminal Procedure Code, and that the word "inquiry" is meant to include everything done in a case by a Magistrate, whether the case has been *challaned* or not. We agree with that view of the law and hold that the approver's evidence is admissible.

About the guilt of Abdul Kadir there can be no question for he was captured on the spot with a revolver and cartridges in his possession as is perfectly clear from the evidence. He says that he had gone to *Chak* No. 562 to beg, and slept at night in the mosque, and that some men came and beat him and made up a false case. That story needs no comment.

Against Sultan, who lives at *Chak* No. 587, where the approver also lives, the principal evidence corroborating the statement of the approver is that of Hakim (P. W. No. 23), who is a brother of the deceased dacoit, Usman, and lives at *Chak* No. 568. Hakim says that he and his brother were having their evening meal when Abdul Kadir came and called out to Usman, upon which Usman went out and the witness followed and found Abdul Kadir, Sultan and Suleman, all of whom he knew before, standing in the lane in front of the house. Usman went with those men, saying that he would be back soon, but he did not return, and in the morning, Hakim went to make inquiries about him and on his asking Suleman where they had taken his brother the previous night Suleman told him that they had gone to *Chak* No. 502 on a thieving expedition and that some men had been caught. On this Hakim told his *kamin* Raushan to go to that *Chak* and enquire. Raushan went there and brought back word that Usman had been killed. When the *thanedar* came to *Chak* No. 568 Hakim gave him all this information.

Raushan (P. W. No. 18) corroborates Hakim as to the enquiry made from Suleman and Sulemen's reply and says that he went and ascertained that Usman had been killed and brought the information to Hakim.

There are also the statements of some witnesses as to their indentifiying Sultan as one of the dacoits. The learned Sessions Judge does not rely on their evidence, but even if it be excluded, the evidence of Hakim, which there is not the slightest reason for disbelieving, is sufficient to corroborate the approver's testimony as against Sultan. In fact Hakim's statement alone, even without that of the approver is, in our opinion, sufficient proof of Sultan's participation in the dacoity, taking into consideration that Abdul Kadir and Usman, who went with Sultan on the night in question, took part in it. There is nothing whatever to support Sultan's assertion as to a false case having been made up against him by Hakim Khan.

With regard to Sher Muhammad, Ahmad Khan (P.W. No. 16) proves the close association existing between that appellant and Abdul Kadir who both lived at *Chak* No. 568, and he says that they left the *Chak* together in *Poh* last and came back after ten or twelve days, and that the dacoity occurred four or five days after their return. The evidence of P' W. No. 9 and 10 shows that Sher Muhammad and Abdul Kadir

(1) 64 Ind. Cas. 40; 23 Bom. L. R. 884; 46 B. 611; 22 Cr. L. J. 728; (1922) A. I. R. (B). 138.
(2) 3 P. R. 1897 Cr.

had been to Mianwali and that they returned together on the 27th December. It was in consequence of a statement made by Abdul Kadir that the Sub-Inspector went to *Chak* No. 568 and, questioned Sher Muhammad, who then gave the information that Sultan, Suleman and Usman knew about the dacoity, and it was this which led the Sub-Inspector to question Usman's brother Hakim, from whom the further information, already mentioned, was obtained. In addition to these facts we have the evidence of Kahire Khan, *lambardar*, who as soon as he saw Sher Muhammad on his being brought to *Chak* No. 562, told the Sub-Inspector that he was one of the dacoits. Sher Muhammad has produced no witnesses and we are satisfied on the evidence that he took part in the dacoity. All the three appellants have been rightly convicted and we dismiss their appeals.

Z. K. *Appeals dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 164 OF 1922.
December 11, 1922.
Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

HAMID ALI—COMPLAINANT
versus
SRIKISSEN GOSSAIN AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused at conclusion of prosecution evidence, absence of, effect of—Illegality—Re-trial.

A Trial Magistrate took down the statement of the accused after recording the evidence of some of the prosecution witnesses. The evidence of several prosecution witnesses was recorded thereafter and a charge was framed but no further examination of the accused took place:

Held, that the failure to comply with the provisions of section 342 of the Criminal Procedure Code had vitiated the trial, and that the trial must be resumed from the point where the Court examined the accused. [p. 368, col. 1.]

Where the terms of the Criminal Procedure Code are clear there is no excuse for a deliberate disregard of them. [p. 368, col. 1.]

Criminal reference made by the Additional District and Sessions Judge, Sylhet, dated the 25th November 1922, for revision of an order of the Extra Assistant Commissioner, Karimganj, dated the 30th August 1922.

ORDER OF REFERENCE.—On the evening of 7th *Baisakh* last, while complainant Hamid Ali was passing by the Local Board road by the front of Chatradhari's house, he was called there. He refused. The accused Srikrishna and Ganesh Sonar with two others thereupon came up and seized and carried him to Chatradhari's house by force where he was horse-whipped and kicked by Chatradhari causing injuries. Complainant was, under Chatradhari's order, tied in the waist with a rope and kept confined in his bungalow for the whole night. On the following day at noon he was released by Udoy Chand *Sarpanch*, and with Arit, *Chaukidar*, he went to Patharkandi Police Station and lodged *Ezahar*. The Police after enquiry, submitted charge sheet and the petitioners with two others were convicted for offence under section 342, Indian Penal Code, and each sentenced to pay a fine of Rs. 40 in default one month's rigorous imprisonment.

Order recommended for revision.—The order of Maulvi Mohammad Chaudhuri, Extra Assistant Commissioner of Karimganj, dated the 30th August 1922, convicting the petitioners under section 342, Indian Penal Code, and sentencing them each to pay a fine of Rs. 40 in default one month's rigorous imprisonment.

In what particular portion of that order the Court making the reference considers an error on a point of law to exist? The whole of it.

The ground upon which, in the opinion of such Court, the order should be reversed. The conviction and sentence by the Trial Court has become vitiated and liable to be set aside inasmuch as requirements of section 342, Criminal Procedure Code, have not been complied with. The Trial Court, after recording the depositions of P. W. Nos. 1 and 2, recorded the statements of the accused persons on 12th July 1922. P. W. Nos. 3, 4, 5 and 6 were examined on the 7th July 1922 and charge framed on that date; but since then no further

statements of the accused persons were recorded. It has been repeatedly ruled by the Hon'ble Judges of the High Courts that this omission is an irregularity which cannot be cured by section 537 of the Code of Criminal Procedure. It is contrary to the provisions of section 342, Criminal Procedure Code., and, according to the recent ruling of the Calcutta High Court in Revision Case No. 569 of 1922 (Sylhet), it has been clearly laid down by the Hon'ble Mr. Justice Walmsley and Justice Ghosh, on the 31st of August last, that all the proceedings after the statements of the accused persons had been recorded were vitiated in law and the case came on remand to be taken up after the examination-in-chief of these witnesses have been over [The cases of *Mitarjit Singh* v. *Emperor* (1) and *Tilak Gope* v. *Bhaya Ram* (2) are also to the point.]

The provisions of section 342, Criminal Procedure Code, are mandatory. The explanation of the Trial Court that "the accused when examined made.....a definite statement" cannot alter the plain words of the law: [*Jyotish Chandra* v. *Emperor* (3) and *Queen* v. *Issur Raut* (4)]. This is an error in law which prejudiced the accused persons in the trial. I, therefore, consider that the conviction and sentences of the petitioners cannot stand and should be set aside.

JUDGMENT.—We have no alternative but to accept this reference in view of the recent rulings of this Court.

The finding and sentence must, therefore, be set aside and the trial resumed from the point where the Court examined the accused persons after the examination of the prosecution witnesses concluded. We would impress on the learned Magistrate the necessity for a strict observation of the provision of the Code of Criminal Procedure and where the terms of the Code are perfectly clear there is no excuse whatever for a deliberate disregard of them.

Z. K. *Reference accepted.*

(1) 63 Ind. Cas. 825; 2 P. L. T. 520; (1922) Pat 71; 22 Cr. L. J. 697; 6 P. L. J. 644; (1922) A. I. R. (Pat.) 158.

(2) 62 Ind. Cas. 870; 22 Cr. L. J. 598.

(3) 4 Ind. Cas. 416; 36 C. 955; 14 C. W. N. 882; 10 Cr. L. J. 581;

(4) 8 W. R. Cr. 63 at p. 64.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 292 OF 1922.

May 19, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice.

FATTU *alias* BADRA—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Enhanced punishment—Penal Code (Act XLV of 1860), ss. 369, 411—Conviction under s. 399, whether may be considered in awarding enhanced punishment under s. 411.

Where an accused person is convicted under section 411 of the Penal Code the fact that he was previously convicted under section 369 of the same Code cannot be taken into consideretion in awarding enhanced punishment, as the latter is not punishment under Chapter XII or Chapter XVII of the Code.

Criminal appeal from an order of the Magistrate, with section 30 powers, Jullundur, dated the 24th February 1922.

JUDGMENT.—It is common ground that a large number of clothes, vessels, and other articles were recovered from the house of the prisoner Fattu, and the only question is, whether they have been proved to be stolen property. Now, several witnesses for the prosecution have identified these articles as their property, and they state that they were stolen from them sometime before the date of the recovery. The prisoner, on the other hand, claims them as his own property, but he has produced no evidence whatsoever in support of his claim.

In view of the evidence produced by the prosecution, I am of opinion, that the prisoner has been rightly convicted under section 411, Indian Penal Code, but I consider that the Trial Magistrate was not justified in relying upon the previous conviction of the prisoner under section 369, Indian Penal Code, because it is not an offence, punishable under Chapter XII or Chapter XVII of the Indian Penal Code. Three other convictions under Chapter XVII, Indian Penal Code, have, however, been proved, and in view of these convictions, I do not think that the sentence of five years' rigorous imprisonment is excessive. The appeal is, therefore, dismissed.

W. C. A. *Appeal dismissed.*

PAMIDIMARRI GNAMMA *v.* KETTIREDDI KRISHNA REDDI.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 149 OF 1922.

March 15, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.

PAMIDIMARRI GNAMMA AND ANOTHER —PETITIONERS—APPELLANTS

versus

KETTIREDDI KRISHNA REDDI AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 54, 90—Execution sale— Inquiry into validity of proclamation before sale—Subsequent application to set aside sale—Res judicata—Enfranchised shrotriem land whether land paying revenue to Government—"Revenue," meaning of.

The Code of Civil Procedure does not provide for any inquiry into the validity of the publication of a sale until after the sale has been held. If the Court does hold such an inquiry it must be regarded as having done so for its own satisfaction. [p. 370, col. 1.]

Where an inquiry is not prescribed by law but is undertaken by the Court only to decide on a collateral matter there is no security for the Court's application of the standard of proof appropriate to a judicial proceeding or for its having acted judicially and for its decision being a judgment. [p. 370, col. 2.]

Sivagami Achi v. *Subrahmania Ayyar*, 27 M. 259; 14 M. L. J. 57 (F. B.), referred to.

The policy of the law is to postpone the consideration of the objections to the publication and conduct of a sale until after it has been held, when the essential issue whether loss has been caused can also be tried. [p. 370, col. 2.]

Where, after a proclamation of sale, an application was made by the judgment-debtor to postpone the sale and the Court, while allowing the sale to proceed, held an inquiry and found that the publication of the sale proclamation was proper:

Held, that the order was not a sufficient answer to, nor did it operate as *res judicata* in, a later application under O. XXI, r. 90 of the Civil Procedure Code to set aside the Court sale on the ground of fraud and material irregularity in publishing and conducting the sale.

A *shrotriem* village paying quit-rent or *jodi* to Government is land paying "revenue" to Government within the meaning of O. XXI, r. 54 of the Civil Procedure Code, and where such a village is brought to sale in Court auction, notice of sale ought to be affixed in the Collector's Office under O. XXI, r. 54, read with r. 67, of the Code. [p. 371, col. 1; p. 373, col. 1.]

Per *Oldfield, J.*—In construing the words of a Statute, recourse to other Statutes is not legitimate when they are not in *pari materia* with the Statute under interpretation and it is unnecessary when the *prima facie* interpretation of the words is consistent with the circumstances and object of the provision. [p. 374, col. 1.]

Per *Devadoss, J.*—The word 'revenue' in r. 54 of O. XXI of the Civil Procedure Code is used in its ordinary and natural sense as meaning the share of the produce of the land which the Government expects to get. [p. 374, col. 1.]

Appeal against an order of the District Court, Nellore, dated the 28th January 1922, in E. A. No. 123 of 1921 (in O. S. No. 58 of 1917 of the Sub-Court, Nellore, E. P. No. 12 of 1920).

Messrs. *M. Patanjali Sastry* and *A. Sundaram Aiyar*, for the Appellants.

Messrs. *A. Krishnaswamy Aiyar* and *B. Sommayya*, for the Respondents.

JUDGMENT.

Oldfield, J.—This is an appeal by the petitioners, judgment-debtors, against an order dismissing their petition under O. XXI, r. 90, Civil Procedure Code.

The majority of the grounds, on which the publication and conduct of the sale were impugned, were rightly held unsustainable by the lower Court because they either had been or might have been taken in the proceedings for framing proclamation, of which the petitioners had notice, and, so far as they were taken, were either not established or were not material. We, therefore, can confine ourselves to two points, (1) the lower Court's failure to enquire into the allegation that the sale was not proclaimed in the village, (2) its conclusion, adopted from a previous order, that no publication at the Collector's Office was required, because the property was not *ryatwari* land.

That previous order is in fact material on both points, because as regards publicat on in the village also the conclusion in it was adopted, no further enquiry being held. It was passed on a previous petition by the present petitioners, Execution Application No. 71 dated 2nd April 1921 in which publication in two newspapers was asked for and also a postponement of the sale until 9th July 1921, apparently after the vacation. The sale had been fixed for 4th April 1921 and the petitioners object to gain time was sufficiently clear. In spite, however, of the decree-holder's opposition, referred to in the diary in the record, to a postponement and his presumable readiness to support the sale in case

of proceedings under O. XXI, r. 90, the lower Court took the exceptional course of allowing the sale to continue, but at the same time holding an enquiry into the validity of the proclamations, concluding the sale only when that enquiry had ended in the decree-holder's favour. That enquiry included the taking of evidence as to the publication in the village, which had been denied in the affidavit accompanying the petition; and the decision that the proclamation was duly published has been adopted in the order before us.

One ground, on which this adoption has been supported, is that the lower Court merely utilized the evidence already taken, as though the previous proceeding during the sale had not been completed and based its present finding on it. But that does not correspond with the facts, that the previous proceeding was completed by the refusal to adjourn the sale and that the lower Court does not now profess to have applied its mind to the evidence or to have done more than adopt the previous decision.

It is then necessary to consider whether, as is further argued, that previous decision concludes the parties as *res judicata*. Certainly, the evidence for and against publication was taken fully and the order of 7th May 1921 refusing adjournment, or postponement, discussed fully; and, certainly, the judgment-debtor had invited the Court to decide and the decree-holders acquiesced in its deciding the question, the latter producing their evidence. It may, moreover, be said that if there had been no proper publication, the sale would clearly have been ineffective, since on application it would have had to be set aside. But those considerations do not entail that the Court had jurisdiction to reach, or the judgment-debtors the right to ask it to reach, a conclusion on the point at that stage, or that in doing so it acted otherwise than officiously. The Code does not provide for any enquiry into the validity of the publication of proclamation until after the sale has been held. If the Court holds one, it must be regarded as doing so for its own satisfaction. Whether, in case it is not satisfied that there has been proper publication, it would be entitled to refuse to proceed and to call upon the decree-holder to pay for a fresh publication, in spite of his readiness to take the risk of failure in proceedings under O. XXI, r. 90, need not in the present case be considered. What is material is that, when the enquiry is not prescribed by law, but is, as here, undertaken only to decide on the necessity for a postponement there can be no security for the Court's application of the standard of proof appropriate to a judicial proceeding, or, shortly, for its having acted judicially and for its decision being a judgment. There is naturally no authority applicable to an exceptional incident of this description. But it is material that in *Sivagami Achi* v. *Subrahmania Ayyar* (1) the policy of this part of the law was regarded as being to avoid the difficulties and delays, which even now occur in obtaining the execution of decrees and to postpone consideration of objections to the publication and conduct of sales, until after they have been held, when the essential issue whether loss has been caused can also be tried. In the circumstances, it is not possible to hold that the proper publication of the sale proclamation was *res judicata* or that the lower Court was justified in refusing to take evidence and adjudicate on it.

The lower Court further did not take evidence as to the publication at the Collector's Office because it adopted the previous conclusion that such publication was requisite under O. XXI, r. 67, read with r. 54 (2), only in the case of *raiyatwari* land and not in the case of enfranchised *shrotriem* villages, such as are in question according to petitioner's affidavit dated 2nd April 1921 and the sale proclamation and the admission made before us. For this construction of r. 54 (2) we have been shown no authority and in ordinary parlence, the quit rent payable to the Government would be as clearly revenue as any other money payable to it for use in the ordinary course of administration. Revenue, however, has not been, so far as we have been shown, defined, except in section 1, Madras Act VI of 1867. True, according to that provision, revenue means: "Assessment, quit-rent, ground rent or other charge upon the land payable to Government" and in the Revenue Re-

(1) 27 M. 259; 14 M. L. J. 57 (F. B.).

covery Act (II of 1864) the machinery for the collection of revenue is, by sections 1 and 3, explicitly applied to *shrotriemdars*. The argument on the other side is, however, that a distinction, is recognised in other statutes, for instance, by the reference to "*Lakhiraj* lands and all other lands paying favourable quit-rents" in section 4 Regulation XXV of 1802 and in the reference to "land charged with any fixed payment in lieu of revenue" in section 7 (v) (c) of the Court-Fees Act, (VII of 1870) between revenue and such payments as a *shrotriemdar* has to make and that this distinction should be applied before the *shrotriem* villages in the proclamation before us are treated as land paying revenue to Government. But as regards the Regulation it is material that "lands paying favourable quit rents" are one of a number of "articles of revenue" enumerated in the section and that it is not clear, the result for the purpose of Court-fee being the same, whether *shrotriem* lands would not fall under the description in section 7 ( ) (*e*) of the Court-Fees Act as "land partially exempt from the payment of the revenue." In any case, the foregoing reference to the two Madras Acts shows that no decisive result can be reached by recourse to other statutes. The real answer to the decree-holder, moreover, is that recourse to other Statutes is not legitimate when, like those here relied on, they are not in *pari materia* with the Statute under interpretation and that it is unnecessary, when, as in this case, the *prima facie* interpretation of the word used is consistent with the circumstances and the object of the provision. For it is easy to understand the division of land in private ownership under two heads that for which directly or indirectly payments are made to Government and that for which there are none, land available for cultivation falling under the first and land not so available, for instance, house sites backyards, and other urban or village sites under the other; and it is easy to understand the necessity for advertisement of the sale of the former at the public office concerned with two important incidents of ownership, the liability and the right to recognition of liability for public dues. the lower Court's conclusion that publication at the Collector's Office was unnecessary cannot, in these circumstances, be sustained.

The result is that the appeal must be allowed, the lower Court's decision being set aside and the petition remanded for re-hearing after enquiry on the issues (1) whether the proclamation was published in the village, (2) whether it was affixed in the Collector's Office, (3) whether, if the finding on either or both of these points is in the negative, the applicant in consequence sustained substantial loss. Costs to date here and in the lower Court will be costs in the cause and be provided for in the order to be passed.

Devadoss, J.—This appeal is against the order of the District Judge of Nellore declining to set aside an auction sale held on 7th May 1921. The petitioners are the 2nd and 3rd defendants, and respondents Nos. 1 to 4 are the plaintiffs, in Original Suit No. 58 of 1917. The 6th respondent is the auction-purchaser. The plaintiffs obtained a mortgage-decree against the first defendant (the husband of the 2nd defendant) and the 3rd defendant, her son. The properties were brought to sale and were purchased for a sum, which the petitioners allege to be considerably below the value of the properties. They applied to have the sale set aside on the ground of irregularity and fraud on the part of the plaintiffs and the auction-purchaser. The learned District Judge declined to take evidence as regards the irregularities complained of as, in his opinion, they had already been found against the petitioners in a previous enquiry and held that there were no grounds for setting aside the sale.

In this appeal several contentions were put forward. The first is that the amount of income derived from the properties was not mentioned in the sale proclamation and that no particulars were given for ascertaining the value of the properties. The petitioners were served with notices to be present at the time when the sale proclamation was settled and they did not chose to be present. They cannot, therefore, reasonably complain that a certain piece of information, which, according to them, would have given data to the purchaser as regards the value, have been omitted

There is nothing, therefore, in this contention.

It is next urged that the properties were grossly undervalued in the sale proclamation. It is in evidence that the two properties were valued at Rs. 7,000 each and there is no reliable evidence to show that the value of the propeties was anything more than that mentioned in the sale proclamation. As a matter of fact, we find that the upset price had to be reduced as there were no bidders to bid up to the amount mentioned in the sale proclamation. This objection also fails.

The contention that there was a combination among the bidders and that they conspired not to raise the bid is not seriously pressed. It is not illegal for a number of intending bidders to arrange among themselves not to bid above a certain figure. The other allegations in the petition are not seriously pressed.

The contention that needs consdieration is, was the learned Judge justified in refusing to take evidence as regards the allegations made in the petition? In his judgment, in paragraph 5, he says: "Paragraph 4 refers to four circumstances in connection with the publication of the proclamation. 1, 2 and 3 were dealt with in the order of the Court on the previous petition and were found against the petitioners," and in paragraph 8, he observes: "For the foregoing reasons I am of opinion that it is unnecessary to take evidence for disposing of the petition." The enquiry referred to was held by the District Judge on a petition presented by the present petitioners on 2nd April 1921 in which they prayed for orders" (1) for publishing the proclamation in the case duly in the *Andhra Patrika* and the Hindu papers, (2) for stopping the sale in this case till 9th July 1921, and (3) with such other reliefs as the Court may deem fit according to circumstances. The sale was advertised to be held on 4th April 1921. The pelition was opposed by the plaintiffs and the learned Judge passed the following order on 16th April 1921: "The sale will continue from day to day till 30th April. Petitioner to pay *batta*. His witnesses must be ready that day. Adjourned to 30th April for evidence." The petitoners stated in paragraph 9 of the affidavit filed in support of the petition that, "the proclamation was not published by tom-tom beat of the drum even in the two villages. Therefore, the proclamation is not proper and maintainable." Evidence was taken on both sides and the Judges passed an order on the 7th May 1921 that, "There are no grounds, therefore, to suppose that there was no proper proclamation;" with regard to the allegation that notice was not affixed in the Collector's Office, he remarked, "the properties being *shrotriem* lands, it was not necessary to affix a copy of the notice of sale in the Collector's Office" and he concluded his order by saying, "I see no grounds to hold that there has been no proper publication of the sale. I, therefore, dismiss the petition with costs."

It is contended on behalf of the respondent that that order is binding on the parties and that it was not, therefore, necessary for the Judge to enquire again into that matter after the sale had been held. This application is made under O. XXI. r. 90. That rule can only apply to cases where there has been a sale and where the petitioners seek to set aside the sale. No doubt the Executing Court has power to satisfy itself whether a proclamation of sale was duly published or not, when an allegation is made by a party that it was not duly published. It is urged that, inasmuch as the petitioners invited the learned Judge to hold an enquiry they are bound by the result of that enquiry whether the learned Judge had power or not to hold such an enquiry. The question is, whether the parties are bound by the result of an enquiry which could not be held before the sale. The mere fact that the petitioners adduced evidence or consented to the enquiry and even asked the Judge to hold an enquiry would not be a sufficient compliance with the provisions of r. 90 of O. XXI, whereby a party has got a right to go before the Executing Court and ask that Court to hold an enquiry and set aside a sale on the ground of material irregularity or fraud in publishing or conducting it. No authority is shown for the contention that the finding of the learned Judge is either *res judicata* between the parties or that that decision is a sufficient answer to an application under r. 90. In

this case the petition was mainly intended to get a sale adjourned and to have the proclamation of sale published in some of the well-known papers, so that well-to-do people, or people who wanted to invest in land, might bid at the sale. There is no prayer in the petition of 2nd April 1921 for an enquiry as regards the irregularity or the absence of publication by beat of tom-tom in the village. It cannot be contended that, by making an application for adjournment of a sale and by consenting to have evidence adduced as regards one of the allegations in the petition, the petitioners either abandoned their right to have the sale set aside under r. 90 of O. XXI, Civil Procedure Code, or under any other provision of law open to them. The object with which the learned Judge held the enquiry on the petition of April 1921 was only for the purpose of satisfying himself as regards the truth or otherwise of the allegations made in that petition in order to consider whether the sale should be adjourned or not. In these circumstances, the lower Court erred in not taking evidence and disposing of this petition on the merits.

In this connection, it is necessary to notice the contention that it is not necessary to affix the notice of sale in the Collector's Office. It is difficult to say with what materials the learned Judge had for saying in his order of the 7th May 1921, that the properties being *shrotriem* lands, it was not necessary to affix a copy of the notice of sale in the Collector's Office. Under O. XXI r. 54 "a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house and also, where the property is a land paying revenue to Government in the Office of the Collector of the District in which the land is situate." It is argued for the respondent that, inasmuch as the properties brought to sale are *shrotriem* villages, it was not necessary to affix the notice in the Office of the Collector of the District, for *shrotriem* villages pay only quit rent or *jodi* and what is paid is not revenue and, therefore, O. XXI, r. 54, clause (2), does not apply to them. Mr. Krishnaswamy Aiyar, in support of his argument, refers to the Court-Fees Act, section 7, clause (v) (*e*), and contends that 'revenue' there means revenue which is collected from *raiyatwari* lands or from permanently settled estates and where a certain amount is paid as quit rent it is not revenue but it is in lieu of it and, therefore, r. 54 does not apply to a case like this. It has to be remembered that a Civil Procedure Code is an enactment of the Imperial Legislature and we have to see whether the Legislature intended to use the expression "land paying revenue to Government" in the sense in which it is ordinarily understood or in any particular sense.

From the earliest days of the East India Company, the Revenue Administration of the territory ceded to it formed an important portion of its activities. The word "revenue" meant the share of the produce of the land which the Government, either the East India Company or its predecessor, took from the *raiyat* or the cultivator. There is no definition of the word "revenue" in the Civil Procedure Code or in the General Clauses Act, but in the Madras Revenue Recovery Act of 1864 'public revenue' is said to include, for the purpose of the Act, cesses or other dues payable to Government on account of water supplied for irrigation. It is admitted that *shrotriem* villages are liable to pay road-cess. The short answer to the respondent's contention is that *shrotriem* villages pay road-cess and, therefore, they are lands paying revenue to Government but the discussion need not end here as the word "revenue" in the Madras Regulations as well as in Bengal and Bombay Regulations always meant the assessment which the Government levied from the occupier for the occupation of the land. In the Madras Regulation XXV of 1802, known as the Permanent Settlement Regulation, the words 'land revenue' are used to denote the amount payable by the *zemindars* to the Government. It is, therefore, clear that what a *zemindar* pays to Government is revenue. Whether land held in *inam* or on other favourable tenures could be said to be land paying revenue to Government is a question which is not free from difficulty. In Bengal Law Reports, Supplementary Volume, page 75 at p. 87, there is a case, *Peerzeerooddeen* v. *Modhoosoodun Paul Chowdhry* (2) in which the ques-

(2) B. L. R. Sup. Vol. 75 at p. 87; 2 W. R. 15

tion was whether a *zemindar* could grant a piece of land rent-free out of his *zemindari*. In the course of the judgment, Mr. Justice Shamboonath Pandit, one of the Judges who formed the Full Bench, observes: "In India that portion of the produce of lands which goes to the ruling power as its share is called revenue, and the produce (in money or kind) received from the cultivators by the persons entitled to collect, as well as the collections made (in kind or money) by other intermediate holders of different grade from those who are above those persons that collect, from tenants of the lowest grade up to those who pay the revenue directly to Government, is called rent." In another case, *Mahomed Akil* v. *Assadun-nissa Bibee* (3), Sir Barnes Peacock, C. J., observes at page 831: "If the construction which I put upon the words of section 10 is correct, the word 'revenue' will be read in its ordinary and natural sense. The provisions of the section are natural and consistent with justice, and force and effect will be given to every word of the section." The word 'revenue,' therefore, means ordinarily the share which the Government gets from the occupier as its claim upon what the Indian Raja and Government gets from the tillers of the soil. Considerable light is thrown upon this in the Fifth Report on the East India Affairs, at page 34 of the second volume of this report, there is this passage: "To form a correct judgment of the weight of the assessment upon the country generally, we ought to possess the following data. First, a knowledge of the rent actually paid by the *raiyats* compared with the produce of their labour. Secondly, accurate accounts of what the *zemindars* and farmers collect and their payments to Government. Thirdly, detailed accounts of the alienated lands showing the quantity of them, the person to whom they were granted, the dates of the grants and those by whom they are now held.

As I have said above, from the earliest days of the East India Company a good portion of its activities was directed towards the Revenue Settlement of the territory ceded to it by the Native Princes or, acquired by it under treaties, or otherwise, and, in all the correspondence and earliest documents and papers, the word 'revenue' is used to denote what the East India Company or the Government expected to get from the lands as its share of the produce. In the third volume of the Fifth Report, at page 252, there is an extract from the proceedings of the Board of Revenue at Fort St. George of the 8th September 1806. It is addressed to the Subordinate Collector of Tanjore. It begins thus: "You will be pleased to commence in the settlements of the revenues on your respective divisions without delay and on the following grounds:—Para. *Nanja*. You first take the produce of each village in *Fasli* 1210-1211 and 1212 and ascertain therefrom the average produce per *veli*. This average you wil consider as the medium standard produce of the village," and various directions are given as to how the Government's share was to be ascertained.

It is contended that certain cesses are not revenue; no doubt they are not land revenue but anything which is made payable by reason of possession of land or that which is levied upon land may be taken to be revenue. In other words, whatever is payable to Government either by way of cess or by way of dues by a holder of land as such would be revenue.

The policy of O. XXI, r. 54 is patent. It is for the purpose of informing the Collector of the District as to the change of ownership of land so that he may proceed, in case of default of payment of revenue, against the person who is the owner of the land. Though land is primarily responsible for the payment of the revenue yet it is necessary for the Revenue Department to know who is the owner so that it may have its remedies against him. That being so, it is not possible to accept the content on that a *shrotriem* village is not land paying revenue to Government simply because it does not pay the revenue which an ordinary *raiyatwari* holding pays or which a *zemindari* pays. The learned Judge has erred in thinking that the *shrotriem* in question is not land paying revenue to Government and that, therefore, notice of sale need not be affixed to the Collector's Office.

(3) B. L. R. Sup. Vol. 774; 9 W. R. 1 (F. B.).

The appeal is allowed and the learned Judge is asked to take evidence and dispose of the etition as directed by my learned brother.

V. N. V. *Appeal allowed.*
N. H.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1669 OF 1919.
March 17, 1923.
Present—Mr. Justice Scott-Smith and Mr. Justice Fforde.

BUDHU RAM *alias* SAT NARAIN AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
NIAMAT RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Covenant to pay interest on cost of improvements—Term fixed for redemption—Post diem *interest, liability to pay—Covenant, absence of—Damages, rate of—Preliminary and final decrees—Appeals against both decrees—Court-fee payable.*

In the case of a mortgage with possession it may be unusual for a mortgagor to agree to pay interest on the cost of improvements, because the mortgagee in possession himself reaps the benefit of such improvements, but where the mortgagor expressly agrees to pay such interest, he is bound by the covenant. [p. 376, col. 2.]

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

When a mortgage-deed contains no express stipulation for the payment of interest after the due date, the correct rule is that the law raises no presumption either in favour of or against an implied intention to pay interest after the due date. The determination of the question rests entirely upon the interpretation of the instrument and no definite rule of construction can be laid down except that the deed must be viewed as a whole, and the Court should avoid an interpretation which would ascribe to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest and that the creditor shall have no remedy provided by the contract, but shall be driven to treat the contract as broken and to seek for damages. It is more reasonable to ascribe to the parties the intention of making a perfect contract. [p. 377, col. 1.]

Where, however, there is no stipulation, and no implied intention to pay *post diem* interest, the mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties. but the Court has discretion to reduce the rate if it is found to be unusual. [p. 377, col. 1.]

Moran Lal v. *Muhammad Bakhsh*, 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 (P. B.) and *Chajmal Das* v. *Brij Bhukan Lal*, 17 A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652 (P. C.), followed.

A stipulation to pay interest at the rate of Rs. 1-8 per mensem both on the mortgage-money and on the cost of improvements is an unusual one, within the meaning of the above rule. [p. 377, col. 1.]

A preliminary decree in a redemption suit directed redemption on payment of a certain sum. The plaintiff appealed seeking to reduce the sum on payment of which redemption was allowed by the Trial Court and paid *ad valorem* Court-fees on the amount by which he sought the decretal amount to be reduced. He paid the decretal amount into Court and a final decree in the suit was made, against which a similar appeal was preferred by the mortgagor but the Court-fee paid on the memorandum of appeal was only Rs. two. On objection being taken by the respondent as to the amount of the Court-fees paid on the latter appeal :

Held, that the final decree was a mere corollary to the preliminary decree and followed it as a matter of course and that the appeal from that decree was really of a formal nature, which did not contest anything beyond what was contended in the appeal from the preliminary decree, and *ad valorem* Court-fees having been paid on the latter appeal, the appellant could not be required to pay a similar fee on the appeal from the final decree. [p. 376, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Multan, dated the 24th June 1919.

Bakhshi *Tek Chand* and Kanwar *Dalip Singh*, for the Appellants.

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

JUDGMENT.—Plaintiffs in the suit out of which the present appeal arises sued for redemption of a mortgage effected by Khushi Ram, their grandfather, on the 26th September 1890. The Court below passed a preliminary decree in which the amount payable by the plaintiffs was fixed at Rs. 39,340-11-7 on the 24th June 1919. The plaintiffs having paid the amount fixed into Court together with an additional sum of Rs. 409-8 interest accruing up to the date of payment, a final decree was passed on the 29th April 1920. The plaintiffs have filed appeals from both these decrees asking for reduction of the

amount fixed in the preliminary decree by Rs. 32,225-11-7. On the appeal from the preliminary decree the plaintiffs paid Court-fees *ad valorem* on the sum by which they wished the amount fixed therein to be reduced. On the appeal from the final decree they paid a Court-fee of Rs. 2 only. A preliminary objection was raised, though not seriously pressed, by Counsel for the respondents to the effect that the appeal from the final decree had not been sufficiently stamped. He did not cite any authority in support of his objection which, in our opinion, has no force. The preliminary decree decided what the amount payable was and in the appeal from it the appellants contested the amount and paid full Court-fees on the relief claimed by them. The final decree is a mere corollary to the preliminary decree and followed it as a matter of course, the plaintiff having paid into Court the amount fixed. There was nothing fresh for the Court to decide before it passed that decree, and the appeal from that decree is really of a formal nature, and does not contest anything beyond what is contested in the appeal from the preliminary decree. Another way of looking at the matter is this. The decree in this redemption suit was passed in two parts. Similarly, the appeal is made in two parts. Full Court-fee has been paid on the amount claimed in the two appeals, and we do not consider that the Legislature could ever have intended that in a case of this sort the appellant should have to pay the Court-fees twice over. We notice that when the decree for redemption was originally passed by Rai Damodar Das and the defendants-respondents filed two appeals, they stamped their appeals in exactly the same way as the plaintiffs have now done. We overrule the preliminary objection.

The facts are fully stated in the judgment of the Court below and we need not repeat them. The first point raised is as to the interpretation of clauses 2 and 3 of the mortgage-deed, which will be found on page 2 (*b*) of the main paper-book, which we call A. These clauses show that out of the consideration of Rs. 4,000, the produce of the property under mortgage was to counterbalance the interest on Rs. 1,000, the rate of Rs. 1-8-per cent. per mensem. The third clause provides that the mortgagor was to bear the costs of improvements and ordinary repairs. The mortgagees were to incur the costs and enter the same in a ledger account against the name of the mortgagors. The money thus spent, together with interest at Rs. 1-8 per cent. per mensem, was to be paid in a lump sum at the time of redemption. The contention on behalf of the appellants is that the produce of the property under mortgage referred to in clause 2 of the mortgage-deed was intended to be the produce of the property beore it was improved. It was contended that the mortgagor was to be entitled to any extra produce which was the result of the improvements. The lower Court has decided against this contention and, in our opinion, correctly. It may be unusual for the mortgagor to agree to pay interest on the cost of improvements because the mortgagee in possession himself reaps the benefit of such improvements by an increase in the produce. But in the present case the mortgagor did agree that the produce of the property should be realised by the mortgagees in lieu of interest on Rs. 1,000 and also agreed to pay the cost of improvements together with interest thereon at the date of redemption. Counsel for the appellants referred us to *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1) where their Lordships of the Privy Council referred to the construction of documents executed by the people of India. In our opinion, their Lordships' remarks do not apply to a case like the present where the conditions of the mortgage-deed are perfectly clear, and there is no room for doubt as to the intention of the parties. We, therefore, consider that the lower Court has decided qute correctly that the produce of the property, even after it had been improved, was to be realised by the mortgagees in lieu of interest on Rs. 1,000.

The second point deals with the question of *post diem* interest. The mortgage was for 20 years, and there could be no redemption until the expiry of that time. Nothing is stated in the mortgage-deed

(1) 6 M. I. A. 393; 18 W. R. 81 *n.*; Sevestre 253 *n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 1

as to the payment of *post diem* interest. It was held by a Full Bench of this Court in the case of *Motan Lal* v. *Muhamm d Bakhsh* (2) that when the mortgage-deed contains no express stipulation for the payment of interest after the due date, the correct rule is that the law raises no presumption either in favour of or against an implied intention to pay interest after the due date. It was also stated that the determination of the question rests entirely upon the interpretation of the instrument and no definite rule of construction can be laid down except that the deed must be viewed as a whole, and the Court should avoid an interpretation which would ascribe to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest and that the creditor shall have no remedy provided by the contract but shall be driven to treat the contract as broken and to seek for damages. It is more reasonable to ascribe to the parties the intention of making a perfect contract.

We have carefully considered the terms of the deed and, in our opinion, there is not only no express stipulation for the payment of interest after the due date, but there is also no implied stipulation for payment of interest at the rate of Rs. 1-8 per cent. per mensem. In such a case, however, as was pointed out at page 205* of the Full Bench ruling referred to above, the mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties, *vide Chaimal Das* v. *Brij Bhukan Lal* (3). It was also pointed out that there is no rule of law making that rate necessarily the measure of damages, and the Court has discretion to reduce the rate if it is found to be unusual. Now, in our opinion, the present case is one in which it must be held that the rate of interest is unusual. The condition to pay interest on the cost of improvements is undoubtedly not a usual one and presses very onerously upon the plaintiffs, representatives of the mortgagor, and, therefore, we think that in equity we should reduce the rate. We think it will be fair to allow interest at 9 per cent. per annum after the due date, which was the 26th September 1910.

The third point taken on behalf of the appellants was that they gave the defendants-mortgagees a notice to redeem on the 29th April 1911, and that they are not liable to pay interest after that date. To that notice the defendants replied that the deed was really one of sale and not of mortgage, but at the same time they asked for the sum which they claimed, which was the same as the sum now claimed by them except that they fixed Rs. 6,379 as the cost of improvements. (This was reduced to Rs. 4,000 by mutual consent during the trial.) The mortgagors never asked for further details of this sum of Rs. 6,379 and made no counter offer. When they sued, nearly two years later, they did not offer any specified sum in the plaint or pay anything into Court, and, therefore, we hold that they made no legal tender within the meaning of section 84 of the Transfer of Property Act, see in this connection *Chetan Das* v. *Gobind Saran* (4) and *Muhammad Mushtaq Ali Khan* v. *Bankey Lal* (5). We, therefore, hold that the mortgagees are entitled to interest up to the date of redemption.

Now, as we are reducing the rate of interest from the 26th September 1910, and as the date of the final decree is 29th April 1920, interest for a period of nine years and seven months has to be deducted on Rs. 7,000 at the rate of 9 per cent. per annum. This amounts to Rs. 6,037-8-0. We, therefore, accept the appeals so far as to reduce the amount payable by the mortgagors by the sum of Rs. 6,037-8-0 and we direct that the parties shall bear their own costs throughout.

Z. K. *Appeals partly allowed.*

(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 P. B.).
(3) 17 A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652 (P. C.).
*Page of 3 L.—[*Ed.*].

(4) 22 Ind. Cas. 659; 36 A. 139; 12 A. L. J. 111.
(5) 55 Ind Cas. 991; 42 A. 420; 18 A. L. J 440.

HIT LAL MAHTON *v.* JIBOO MAHTON.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1315 OF 1921.

July 31, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

HIT LAL MAHTON AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JIBOO MAHTON AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage taken by some members of Hindu joint family—Advance made out of joint funds—Suit on mortgage—All members, whether necessary parties—Mortgagee, benamidar, *position of.*

A person who is named in a mortgage-deed as the mortgagee, although in fact merely a *benamidar* for those beneficially interested, can institute a suit in his own name, either for sale or foreclosure, and the suit cannot be dismissed merely because the beneficial owner is not added as a party. [p. 378, col. 2; p. 379, col. 1.]

Vaitheeswara Iyer v. *Srinivasa Raghava Iyengar*, 50 Ind. Cas. 309; 42 M. 348; 36 M. L. J. 296; 9 L. W. 362; 25 M. L. T. 351; (1919) M. W. N. 299 (F. B.) and *Sachitananda Mahapatra* v. *Baloram Gorain*, 24 C. 644; 12 Ind. Dec. (N. S.) 1099, followed.

Plaintiffs, certain members of a Hindu joint family, advanced to the defendants a certain sum and took from them a mortgage of certain property to secure re-payment of the advance together with interest. The deed of mortgage did not indicate whether the advance was made by the plaintiffs out of their separate funds or whether it was part of the family property. They sued to recover the principal and interest and asked for the realisation of the same by the sale of the mortgaged properrty:

Held, (1) that there was no ground on principle why the plaintiffs who had a beneficial interest in the mortgage and who represented both themselves and other members of the family should be regarded as on a different footing from a *benamidar* who has no beneficial interest at all: [p. 379, col. 1.]

(2) that the question was simply one of authority; if the plaintiffs were authorised to enter into the transaction on behalf of the family, it must be taken that they were equally authorised to institute a suit to enforce it. [p. 379, col. 1.]

Appeal from a decision of the Subordinate Judge, Purnea, dated the 30th June 1921, reversing that of the Munsif, Purnea, dated the 25th May 1920.

Mr. *L. N. Singh*, for the Appellants.

Mr. *Janak Kishore*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the plaintiffs from a decision of the Subordinate Judge of Purnea reversing a decision of the Munsif. The main question for decision in the appeal is whether the plaintiffs, two members of a joint family, consisting of themselves and others, are competent to institute the suit in their own names without joining the other members of the family as parties. The two plaintiffs advanced to the defendants the sum of Rs. 487-8-0 and on the 5th June 1913 took from them a mortgage of certain property to secure re payment of the advance together with interest at one per cent. per month. The principal was re-payable in May 1914. There is nothing in the mortgage-bond to indicate whether the advance made by the plaintiffs was out of their separate funds or whether it was part of their family property. On the 22nd August 1919 they instituted the present suit against the defendants claiming the sum of Rs. 900 as principal and interest and asking for realisation of the same by sale of the mortgaged property. The defendants objected, *inter alia*, that the sum advanced by the plaintiffs was their family property and that the suit was not maintainable unless the other members of the family who had an interest in the mortgage were joined as parties. It was found as a fact by the Munsif whose finding was accepted by the Subordinate Judge on appeal that the bond in suit was the joint family property of the plaintiffs and their co-parceners although it stood in the names of the plaintiffs alone. The Munsif was of opinion that the suit was maintainable by the plaintiffs who had advanced the money and with whom alone the defendants effected the transaction. He considered that their position could not on principle be distinguished from that of a *benamidar* or a trustee acting on behalf of those beneficially interested, and that the principle which should be followed in such a case was that laid down by the Privy Council in *Gur Narayan* v. *Sheo Lal Singh* (1).

The Subordinate Judge on appeal took a different view and considered that, under the provisions of O. XXXIV, r. 1 of the Civil Procedure Code, the suit was not maintainable unless all the members of the joint family were parties. From that decision the plaintiffs have appealed.

(1) 49 Ind. Cas. 11; 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. (P. C.) 11; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

KENARAM PAL *v.* KINU MANDAL.

It is now well-established that a person who is named in a mortgage-deed as to mortgagee, although in fact merely a *benamidar* for those beneficially interested, can institute a suit in his own name either for sale or foreclosure and that the suit should not be dismissed merely because the beneficial owner is not added as a party. See *Valtheswara Iyer* v. *Srinivasa Raghava Iyengar* (2) and *Sachitananda Mahapatra* v. *Baloram Gorain* (3). The only question is whether the plaintiffs in the present case, who had a beneficial interest in the mortgage-deed and who represented both themselves and the other members of the family in the transaction, should be regarded as on a different footing from a *benamidar*, who has no beneficial interest at all. I can see no ground on principle why any distinction should be drawn between the two cases. The mortgagors entered into the transaction with the mortgagees in the name of the latter alone, treating them as the other contracting party. If at the due date the mortgagors had tendered the principal sum advanced together with any interest remaining due to the plaintiffs as mortgagees it is conceded that the latter could have given a valid acquittance binding upon the other members of the family who were interested in the mortgage. It must be presumed that in entering into the transaction they were authorised to do so on behalf of all the members of the family, and if they could grant a valid discharge to the mortgagors on payment of the principal sum, I can see no reason why they should not be presumed to have implied authority to enforce payment by a suit. The question appears to me to be one of authority and if they were authorised to enter into the transaction on behalf of the family I think it must be taken that they were equally authorised to institute a suit to enforce it. In my opinion the plaintiffs were entitled to maintain the suit.

A further question, however, arises with regard to certain payments alleged to have been made by the defendants amounting to Rs. 303 between the years 1321 and 1325. The Munsif held that the plea of payment set up by the defendants was false. The learned Subordinate Judge considered that, as the whole claim failed, he need not go into the question of part-payment. The result is that the decision of the Subordinate Judge will be set aside and the case must be remanded to him to consider whether the plea of payment set up by the defendants is true or not, and having determined this question he will pass a mortgage-decree in favour of the plaintiffs after giving credit for the payments, if any, which may be found by him to have been made by the defendants. The plaintiffs are entitled to the costs of this appeal. They are also entitled to the costs of the appeal to the Subordinate Judge in proportion to the amount which may ultimately be found due.

Kulwant Sahay, J.—I agree.

K. S. D. & N. H. *Case remanded.*

(2) 50 Ind. Cas. 309; 42 M. 348; 36 M. L. J. 296; 9 L. W. 362; 25 M. L. T. 351; (1919) M. W. N. 299 (F. B.).

(3) 24 C. 644; 12 Ind. Dec. (N. S.) 1099.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 233 OF 1921.

January 25, 1923.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Cuming.

KENARAM PAL—DECREE-HOLDER—APPELLANT

versus

KINU MANDAL—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 60—*Non-transferable occupancy holding—Sale in execution of money-decree*—Raiyat *whether can object.*

The measure of liability of a property to involuntary alienation under section 60 of the Civil Procedure Code is the power of voluntary alienation.

Dwarka Nath Misser v. *Hurrish Chunder*, 4 C. 925; 4 C. L. R. 130; 2 Ind Dec. (N. S.) 585, referred to.

The transfer of the whole or part of a non-transferable occupancy-holding is operative as against the *raiyat* whether it is made voluntarily or involuntarily.

Chandra Benode Kundu v. *Sheikh Alla Bux*, 58 Ind. Cas. 353; 48 C. 184; 24 C. W. N. 818; 31 C. L. J. 510 (S. P.), followed.

A non-transferable occupancy-holding is liable as against the *raiyat* to be sold in execution of a money-decree held by an ordinary creditor who is not the landlord.

Bhiram Ali v. *Gopi Kanth*, 24 C. 355; 1 C. W. N. 336; 12 Ind. Dec. (N. S.) 904, dissented from.

KENARAM PAL v. KINU MANDAL.

Appeal against an order of the District Judge, 24-Parganahs, dated the 2nd July 1921, reversing a decree of the Munsif, Baraset, dated the 15th April 1921.

Babu *Prabodh Chandra Chatterjee*, for the Appellant.

Babu *Amulya Chandra Chatterjee*, for the Respondent.

JUDGMENT.

Chatterjea, J.—This appeal arises out of proceedings in execution of a decree for money.

The appellant in execution of a decree for money sought to put up to sale a non-transferable occupancy holding of the defendant. The defendant thereupon appeared and contended that the holding being a non-transferable occupancy holding could not be put up to sale in execution of a money-decree.

The Court of first instance, relying upon the Special Bench decision in the case of *Chandra Benode Kundu* v. *Sheikh Alla Bux* (1), held that it was saleable. On appeal, the learned District Judge was of opinion that he should follow the decision in the case of *Bhiram Ali* v. *Gopi Kanth* (2), until it was overruled by this Court and that the question whether an ordinary execution-creditor can put up a non-transferable occupancy holding to sale in spite of the objections of the *raiyat* was not referred to nor considered by the Special Bench.

No doubt, the question which was referred to the Full Bench was—"Is the sole landlord of a *raiyat* competent to sell, in execution of a money-decree against the *raiyat*, his occupancy holding unless the holding is transferable by usage or custom?" In order to decide that question, however, it was necessary to consider the correctness of the decision in *Bhiram Ali* v. *Gopi Kanth* (2), as regards voluntary alienations on non-transferable occupancy holdings. It was also necessary to consider the correctness of the decision of the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy* (3), in so far as it adopted the rule laid down in *Bhiram Ali* v. *Gopi Kanth* (2) as developed in the later cases, and that was the reason why the Special Bench was constituted. The Special Bench came to the conclusion that the case of *Bhiram Ali* v. *Gopi Kant* (2) was erroneously decided and that the decision of the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (3) required partial modification, namely, that the following should be substituted for the first proposition enunciated therein regarding the transfer for value of occupancy holdings apart from custom or local usage: "The transfer of the whole or a part is operative as against the *raiyat* whether it is made voluntarily or involuntarily."

Now, the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy* (3) laid down the proposition that the transfer of the whole or a part is operative against the *raiyat*—

(*a*) where it is made voluntarily;

(*b*) where it is made involuntarily and the *raiyat* with knowledge fails or omits to have the sale set aside.

The result of the modification by the Special Bench was stated to be as follows: "When voluntary and involuntary transfers are thus placed in the same category so far as the *raiyat* is concerned, no difficulty can arise under section 60 of the Civil Procedure Code which makes saleable in execution all property belonging to the judgment-debtor over which he has a disposing power thus prescribing precisely the same test as was formulated by Mr. Justice Jackson in *Dwarka Nath Misser* v. *Hurrish Chunder* (4), namely, that the measure of the liability to involuntary alienation is the power of voluntary alienation."

The learned District Judge has followed the decision of the Division Bench in *Bhiram Ali* v. *Gopi Kanth* (2). But, as stated above, the Special Bench held that it was erroneously decided, and that voluntary and involuntary transfers stand on the same footing so far as the *raiyat* is concerned.

Although, therefore, the question whether a non-transferable occupancy holding is liable to be sold at an execution sale (notwithstanding objections made by the *raiyat*) at the instance of an ordinary creditor

(1) 58 Ind. Cas. 353; 48 C. 184; 24 C. W. N. 818; 31 C. L. J. 510 (S. P.).

(2) 24 C. 355; 1 C. W. N. 396; 12 Ind. Dec. (N. S.) 904.

(3) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 972; 20 C. L. J. 52.

(4) 4 C. 925; 4 C. L. R. 130; 2 Ind. Dec. (N. S.) 585.

was not specifically referred to the Special Bench, the principle upon which the question is to be decided, had to be considered and was settled by the Special Bench.

I am accordingly of opinion that the order of the lower Appellate Court should be set as de and that of the Court of first nstance restored.

There will, however, be no order as to costs of this Court or of the lower Appellate Court.

Cuming, J.—I agree with the decision of my learned brother with a certain amount of hesitation. I am somewhat doubtful whether the Special Bench case in *Chandra Benode Kundu* v. *Shelkh Alla Bux* (1) can be held to have decided anything more than the point which was actually referred to it for decision, namely, "is the sole landlord of a *raiyat* competent to sell in execution of a money-decree against the *raiyat*, his occupancy holding unless the holding is transferable by usage or custom?"

The learned Chief Justice, in delivering the judgment of the Court, at page 223* remarked:

"In these circumstances, this Special Bench has been constituted to consider the question referred so that we may be free, in accordance with the rules of the Court, to examine the correctness of the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (3), in so far as it affects the present matter." I think, it must be presumed that the Special Bench looked at all the authorities and arguments urged before it from the point of view of the particular case, *viz.*, the case of the sole landlord. In the concluding words of the judgment, the learned Chief Justice states: "We hold accordingly that the question before the Special Bench should be answered in the affirmative and that the sole landlord of a *raiyat* is competent to sell in execution of a money-decree against the *raiyat*, his occupancy holding, whether the holding be or be not transferable by custom or local usage," and possibly in that view of what the Special Bench decided, the judgment of the learned District Judge is correct.

As, however, the view which has been taken by my learned brother coincides with the view which I have always held myself as to the transferability of holdings, I do not propose to differ from the judgment which has just been delivered by him. I, therefore, agree with him in decreeing the appeal.

N. H. *Appeal allowed.*

*Page of 48 C.—[*Ed.*]

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 164 OF 1922.

July 28, 1923.

Present:—Justice Sir B. K. Mullick, KT. and Justice Sir John Bucknill, KT.

HON'BLE *Maharajadhiraj* Sir RAMESHWAR SINGH BAHADUR, G. C. I. E., K. B. E., OF DARBHANGA—DEFENDANT—1ST PARTY—APPELLANT

versus

KUMAR GANGANAND SINGH AND OTHERS—PLAINTIFFS, KUMAR KALIKANAND SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIX r. 1—Execution of decree, stay of—Fraud, allegation of—Temporary injunction—Prima facie case—Jurisdiction of Court—Territorial jurisdiction, absence of—Injunction, grant of.

A temporary injunction staying a sale in execution of a decree on the ground that the decree was obtained by fraud cannot be granted unless there is a reasonable prospect of the allegation being proved.

A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits where he has property within its jurisdiction which can be proceeded against in the event of any contempt of the Court's authority.

Appeal from an order of the Subordinate Judge, Bhagalpur, dated the 29th April 1922.

Messrs. *P. N. Sinha, Murari Prasad* and *Hasan Imam*, for the Appellant.

RAMESHWAR SINGH *v.* KUMAR GANGANAND SINGH.

Messrs. *S. Sultan Ahmad, S. N. Palit* and *N. N. Sen*, for the Respondent.

JUDGMENT.

Mullick, J.—Raja Sri Nandan Singh of Srinagar had three sons, Nitya Nand, Kamla Nand and Kalika Nand. Kamla Nand died in 1910 leaving him surviving three sons, Ganga Nand, plaintiff No. 1, Ambica Nand (now deceased) and Achyuta Nand, plaintiff No. 2 Kalika Nand is still alive and has three sons, Abhaya Nand, plaintiff No. 3, Bijoy Nand, plaintiff No. 4; Ghana Nand, plaintiff No. 5. Nitya Nand died before 1896 in which year Kamla Nand attained majority and began to manage the two-thirds share in the ancestral family estate of himself and Kalika Nand. Thereafter, on the 7th May 1900, Kamla Nand and Kalika Nand executed a mortgage for Rs. 3,50,000 in favour of the Maharaja of Darbhanga, the defendant 1st party. In 1916 the Maharaja instituted Suit No. 172 of that year in the Court of the Subordinate Judge of Darbhanga against Kalika Nand and his three sons and against Ganga Nand and Achyuta Nand for the enforcement of his mortgage and on the 14th January 1919 obtained a preliminary decree on compromise for a sum of Rs. 7,42,121-2-3. On the 22nd March 1921 this decree was made final, but as soon as the mortgagee applied for execution by the sale of the mortgaged properties some of which are situated in the District of Bhagalpur, Ganga Nand Singh, Achyuta Nand Singh, Abhaya Nand Singh, Bijoya Nand Singh and Ghana Nand Singh instituted Suit No. 741 of 1921 in the Court of the Subordinate Judge of Bhagalpur for a declaration that the compromise decree in Suit No. 172 of 1916 was fraudulent and void on the ground that the plaintiff No. 1 Ganga Nand was a minor and that he was falsely alleged in the suit to have attained majority, to have signed a written statement and to have engaged a Pleader to appear on his behalf. It is also alleged by the plaintiffs that the Pleader appointed for the plaintiff Achyuta Nand was in collusion with defendant No. 1, the Maharaja, and defendant No. 2 Kalika Nand Singh and had assented to the compromise in order to defraud the minor. In addition to the declaratory relief a permanent injunction restraining the Maharaja from executing his decree was also prayed for. On the 26th April 1922 the Maharaja filed a written statement denying the material allegation as to fraud and collusion and also questioning the jurisdiction of the Subordinate Judge of Bhagalpur to issue an injunction against him, a defendant who was resident in the District of Darbhanga and over whom he had no territorial jurisdiction. An application for *ad interim* injunction restraining the Maharaja from executing his decree by the sale of the properties was also made and allowed by the Subordinate Judge on the 29th April 1922.

The present appeal is preferred against that order.

The first question is, whether there is a reasonable prospect that the plaintiffs will be able to prove the allegation that Ganga Nand Singh was, at the time of the compromise, a minor. Now it appears that after Kamla Nand's death Kalika Nand on the 9th July 1910 obtained a certificate of guardianship under Act VIII of 1890 from the District Judge of Purnea of the persons of Ganga Nand and Achyuta Nand, stating the dates of birth of the former to be 24th September 1898 and of the latter to be 31st March 1907. According to the dates given in this petition Ganga Nand would attain majority on the 23rd September 1919 and he was, therefore, 8½ months below age on the date of the compromise decree.

On the other hand, there are certain facts which indicate that he was not then a minor, and which, in my opinion, are of prime importance when a question of discretion is involved.

When Suit No. 172 of 1916 was first instituted the plaintiff Maharaja sued Ganga Nand and Achyuta Nand as being under the guardianship of their uncle Kalika Nand, but on the 18th July 1916 finding that the interests of Kalika Nand, who was defendant No. 2 in the suit, were adverse to those of his sons, the Court appointed a Pleader of the Court, named Babu Amrit Lal Mazumdar, as their guardian *ad litem*. As regards the other minor defendants, namely, Ganga Nand and Achyuta Nand,

their mother Rani Satrama on the 4th August 1916 applied to be made guardian *ad litem* and on the 16th August that prayer was granted. On the 11th December 1916 Rani Satrama filed a petition stating that Ganga Nand had attained majority and suggesting that he should be made guardian *ad lisem* for Achyuta Nand. The Court thereupon passed the following order: "It is ordered that defendant No. 5 be allowed to defend his case himself as major and to file written statement; that the prayer for appointing defendant No. 5 as guardian of his brother defendant No. 6 be disallowed and if Rani Satrama declines to act as guardian of defendant No. 6 steps be taken for the appointment of another guardian." On the 18th December the Court, finding that Rani Satrama was unwilling to act, appointed Babu Amrit Lal Mazumdar as the guardian *ad litem*. On the 5th April 1917, it being found that the interests of defendant No. 6 Achyuta Nand were adverse to those of the minor sons of Kalika Nand for whom Babu Amrit Lal was also guardian, the Court appointed Babu Khetrapada Basu to be guardian of the minor Achyuta.

Now, a signature purporting to be that of Ganga Nand appears on the written statement which Ganga Nand filed after he was entered on the record as a major. Apparently, there was great delay in effecting service of summons upon him as he was engaged in his studies in Calcutta; but on the 11th July 1917 we find the following order recorded by the Subordinate Judge: "Defendant Kumar Ganga Nand Singh files *vakalatnama* and applies for time to file written statement. Guardian *ad litem* also applies for time to file written statement. Written statement on behalf of guardian *ad litem* of Kumar Achyuta Nand Singh put in. Adjourned to 24th July 1917." On the 24th July 1917 there is an order recording that a written statement on behalf of Ganga Nand Singh has been filed and after that date Ganga Nand Singh appears to have been represented throughout the proceedings by his Vakil and to have been thoroughly cognizant of the proceedings of the Court. It is alleged that no application was ever made by his mother declaring him to have attained majority, that the signature on the written statement is a forgery, that the Pleader who agreed to the compromise decree on his behalf and signed the compromise petition was never instructed by him, and that the whole scheme which ended in the final decree was a fraud from beginning to end contrived by the Maharaja in collusion with Kalika Nand and the guardians *ad litem*. If Ganga Nand can prove this in Suit No. 741 of 1921 he will no doubt be entitled to get a decree; but it is impossible to say in the face of the evidence at present available that there is a *prima facie* case in his favour. It is certainly true that in the petition by which Kalika applied for the guardianship of Ganga Nand, Ganga Nand's date of birth is put down as 24th September 1898, but against this we have the statement of his mother that he was of age on the 11th December 1916 and his own conduct in the subsequent proceedings. It will be a matter of evidence whether Kalika's statement is to be preferred to the statement of his own mother and in the view of the publicity given to Suit No. 172 of 1916 by the appointment of a Receiver and the litigation connected therewith, and of the fact that defendant Achyuta Nand and the minor sons of Kalika were represented in Suit No. 172 of 1916 by legal practitioners of apparently established reputation, it is difficult to imagine that the fact that Ganga Nand was a minor and incapable of making his defence could have remained concealed. Further, whatever the age of Ganga Nand may have been at the time of the preliminary decree he certainly, upon his own showing, was of age at the time of the final decree and the omission on his part to attack the preliminary decree is a circumstance which must be taken into account against him.

This disposes of the main point in the case, and although the result of the sale of the mortgaged properties may

be that the plaintiffs will be unable to recover those properties in spite of their success in Suit No. 741, I do not think the circumstances were such as to justify the Subordinate Judge in issuing a temporary injunction which had the effect of staying the sale. The delay on the part of the Maharaja to bring his mortgage suit in the first instace is not, in my opinion, an argument for delaying the execution.

On behalf of the respondents a point has been taken to the effect that the Court had no jurisdiction to issue any injunction upon a defendant residing outside his territorial limits. In my opinion the contention is not well founded. Although the Maharaja denies the jurisdiction of the Court, it has been established that he has property in the Bhagalpur District against which the Court could proceed in the event of any contempt of the Court's authority. It is clear that the Court has means for enforcing any prohibitory order which it may think fit and proper to issue.

The result, therefore, is that the appeal must succeed and is decreed with costs.

Bucknill, J.—I agree.

N. H. *Appeal allowed.*

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 57 OF 1922.

May 29, 1923.

Present:—Mr. Pipon, J. C.

SUNDAR SINGH—DEFENDANT—APPELLANT

versus

RAGHBIR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Minor—De facto *guardian, powers of—Default by guardian* de jure—De facto *guardian, position of.*

Hindu Law fully recognizes a *de facto* guardian and an alienation made by him, if made in the interests of the minor, has exactly the same legal effect as that made by a *de jure* guardian. [p. 388, col. 1.]

When a *de jure* guardian has neglected to perform his duties, or has shown apathy or hostility as regards the interests of the minor, the position of a *de facto* guardian in this respect becomes materially stronger. [p. 386, col. 2.]

Appeal from an order of the Divisional Judge, Derajat, dated the 5th February 1922, reversing that of the District Judge, Kohat, dated the 25th August 1921.

Lala *Mathra Das*, for the Appellant.

Mr. *Aurangzeb Khan*, for the Respondents.

JUDGMENT.—This suit is one for possession of a shop situated in Kohat brought by the three minor sons of Attar Singh against their two uncles, Jaman Singh and Mohr Singh, and against Sundar Singh, who holds as vendee from the two latter defendants under a sale-deed dated the 28th of January 1919. The plaintiffs in their suit claimed that they were the sole owners of the whole of the property in suit, and that it had been illegal and contrary to their interests sold by their uncles to Sundar Singh. The material facts of the history of this case are that the parties are descendants of Prem Singh who died leaving 4 sons, Attar Singh, Jaman Singh, Mohr Singh and Hira Singh, and an estate consisting of nine shops. He also left considerable debts. After his death his four sons arranged to sell off seven of the nine shops to liquidate the estate. Another shop was allotted to Hira Singh who finally separated from the rest of the family and with whom we are no longer concerned. The remaining one shop remained the joint property of the three other brothers. This is the shop now in suit. Not the least evidence is produced to show that the plaintiffs were the sole owners of the shop, and it must be regarded as an established fact that they succeeded through their father Attar Singh to a ⅓rd share in it. Attar Singh died towards the end of 1917. At his death there were certain decrees outstanding against him and his brothers. These decrees were Rs. 1,000 held by Mathra Das against Attar Singh and Jaman Singh jointly, Rs. 250 held by Lorinda Singh against Attar Singh and Mohr Singh jointly, and Rs. 300 held by Gokul Singh against Attar Singh and Mohr Singh jointly. It is clear that there were no other means of meeting these decrees except some sale of

the family property. Amir Chund, the maternal uncle of Jaman Singh and Mohr Singh, attempted to arrange a settlement of the matter and prevailed upon Malik Deva Singh, a Municipal Commissioner of Kohat, to use his good offices to induce the decree-holders to make some reduction in their claims. The result of these negotiations was that Mathra Das consented to receive Rs. 800 in full satisfaction, Lorinda Singh Rs. 200 and Gokul Singh Rs. 250 reducing the total liability to Rs. 1,250 It was then arranged that the shop in suit should be sold for Rs. 1,200 to Sundar Singh, Jaman Singh and Mohr Singh, paying the extra Rs. 50 from their own pockets. Accordingly, the sale-deed of the 28th of January 1919 was executed by Jaman Singh and Mohr Singh both as regards their own shares and also as regards the share of their minor nephews. The present suit was not lodged until February 1921, or more than two years after the sale. In this suit the minors were represented by their mother, *Musammat* Shado, as next friend. Her allegations that she had been in actual possessinn of the shop since the date of the sale and that Sundar Singh had actually recently obstructed her from the recovery of rent were manifestly false. There is not the least doubt that Sundar Singh assumed possession on the date of the sale, that no person had exercised possession since that date on behalf of the plaintiffs, and also that the plaintiffs were not the sole owners of the property. The First Court dismissed the suit, holding that the sale of the minors' share had been validly made by their legal guardians, and that it was for the benefit of the minors as it represented a substantial reduction of the decrees outstanding against them which they would otherwise have been unable to obtain. The plaintiffs appealed to the Divisional Court, and the Divisional Judge, for a number of reasons, held that the sale in suit was not made by the legal guardians of the plaintiffs, and that it was not in their interests or for their benefit. On this finding he granted the plaintiffs a decree for possession of the property holding that the principle of *caveat emptor* applied, and that the vendee could not claim any equitable relief. Against that decree the vendee has appealed to this Court.

The main reasons which induced the learned Divisional Judge to come to the above finding may be summarised thus. The parties are admittedly governed by Hindu Law, and under that law their mother was the only legal guardian and had priority over the claims of uncles. In 1918 Mathra Das had lodged another suit for Rs. 580 against the minors and their uncle, Mohr Singh, claiming that the parties were jointly liable. Mohr Singh pleaded that he was not the guardian of the minors, that his interests were actually inimical to theirs, that the debt was contracted solely by their father, Attar Singh, and that he was not liable. The minors in that suit were sued through their mother, *Musammat* Shado. Another suit, the record of which was not produced either before the Divisional Judge or before me, was brought by another creditor against the plaintiffs and Jaman Singh. In that suit Jaman Singh succeeded in evading the service of summons. The learned Divisional Judge has drawn the inference that the interests of Mohr Singh and Jaman Singh were actually inimical to those of the minors, and that we have their own admissions to the effect that they were not the legal guardians of the minors. Another point which weighed with the Divisional Judge was the consideration for the sale. It is shown that when the same shop was auctioned in execution of decrees, a bid of Rs. 1,620 was put in on the 30th of April 1919, and that after these proceedings Mathra Das made an application on the 24th of May 1919 asking to purchase at Rs. 1,800. From this he draws the inference that the sale for Rs. 1,200 was one at a price below the market value of the property, and was, therefore, prejudicial to the minors' interests. Another point, not alluded to by the Divisional Judge but mentioned before me by the learned Counsel for the respondents, is that Amir Chand, who is described as having been responsible for the sale, is the father-in-law of the vendee Sundar Singh, and I am asked to draw the inference that he was favouring the latter at the expense of the minors.

On closer examination, these considerations appear to me to deserve considerably

less weight than has been attached to them by the learned Divisional Judge. It is to be noticed that in the suit by Mathra Das in 1918 *Musammat* Shado was equally, if not more, to blame as regards the sacrifice of the minors' interests. She refused to accept the service of summons, and it was in consequence of her refusal that an *ex parte* decree was passed against the minors. Now, the learned Counsel for the respondents, faced with the suggestion that *Musammat* Shado was a guardian more inimical to the minors even than their uncles, argues that her failure to contest the suit was due to the fact that she had no ground on which to contest it, Attar Singh having in his own handwriting executed the balance upon which the suit was based. Now, accepting this fact, it is difficult to see how the conduct of Mohr Singh in that suit can be described in any way as hostile to the minors. His admission that his interests were inimical to them, represented a perfectly straightforward attitude and was one which was rather in their favour than against them. He might have prejudiced their interests still more if he had pretended to any right to represent them and had given away their interests in that capacity. He was perfectly entitled to plead that he had no personal liability and, so far as one can see, his plea was a perfectly correct and justifiable one. I have not seen the file in which Jaman Singh was the co-defendant, and it is impossible to draw any inference from it. Again, the learned Divisional Judge has, I think, overlooked the fact that the powers of a *de facto* guardian, as regards the alienation of a minor's property, are co-extensive with those of a *de jure* guardian. He has remarked in his judgment that the uncles could not vest themselves with a legal status they did not possess. This, I think, is to overlook the clear provisions which are laid down in paragraph 65 of Gour's Hindu Law. Hindu Law fully recognizes a *de facto* guardian, and an alienation made by the latter, if made in the interests of minors, has exactly the same legal effect as that made by a *de jure* guardian. Further, it is undeniable that when a *de jure* guardian has neglected to perform his duties, or has shown apathy or hostility as regards the interests of the minors, the position of a *de facto* guardian in their respect must become materially stronger. This is especially the case where the *de facto* guardian has a personal interest in the estate which he may be expected to protect along with that of his minor co-sharers. I have already alluded to the conduct of *Musammat* Shado in the 1918 litigation, where she appears deliberately to have sacrificed the minors' interests. There is nothing indeed upon the record to show that she has ever considered those interests at all until she lodged the present suit. We have the statement of Mohr Singh to the effect that *Musammat* Shado consented to the present alienation, and this statement, though no doubt it is interested, has never been rebutted by any evidence from the other side. The present suit was lodged more than two years after the sale and in a form which bears the strongest impress of *mala fides*. I must hold, therefore, that if it can be shown that the sale was in the interests of the minors, it is not, in any way, invalidated by the fact that Mohr Singh and Jaman Singh were the *de facto*, but not the *de jure*, guardians of the minors. In this respect there is no doubt that the offer of Rs. 1,800 made for the shop in suit is far the most formidable argument which the plaintiffs have been able to put forward. At the same time, it is by no means a conclusive one. We have the evidence of Malik Deva Singh, an important and respectable witness, to the effect that *at the time of the sale* Rs. 1,200 represented the market-value of the property. It is also undeniable that the value of house property was tending to rise abnormally. I can see, therefore, nothing in the least improbable in the theory that Rs. 1,200 represented a fair market price at the time of the sale. Further, the two uncles were co-sharers in the shop and co-vendors, and they had their own interests to consider as well as those of the plaintiffs. It must be assumed that they were alive to their own interests, and that they would not have accepted a sum considerably below the value of the property in which they were interested. On the other hand, there is the very cogent argument that the plaint-

iffs were undoubtedly liable for the satisfaction of the decrees outstanding against them. Not only this, but they were liable for more than a ⅓rd share in those decrees, although only their ⅓rd share in the property was alienated. The decrees in question were not jointly against the plaintiffs and their two uncles, but jointly against them and one uncle in each case. The decrees amounted to no less than Rs. 1,550 of which plaintiffs were liable for at least Rs 775. Their complete release from liability for the sum of Rs. 400 was, therefore, a proceeding very materially in their interest. As against this, the learned Counsel for the respondents has quoted *Jagdip Singh* v. *Narain Singh* (1) and *Choghatta* v. *Aso Mal* (2) Those rulings, however, can clearly be distinguished from the present case. They relate to cases in which a deceased proprietor was bound by customary rules in respect of ancestral property, and it was held that, where he had himself made no charge upon that ancestral property, its alienation could not be said to be in the interests of his heirs. The present case is entirely different. The parties are not governed by custom, but by Hindu Law, and we are not dealing with ancestral land held by a Muhammadan agriculturist, but with shop property left by a deceased Hindu. There is not the least doubt that that property was liable to be attached in execution of decrees outstanding against the deceased Attar Singh, and that it was actually so attached. Nothing has been put forward to show by what other means the plaintiffs could have escaped from satisfying the decrees against their father. In other words, they were bound to lose the property in suit at some time, and it appears to me that they lost it in the most favourable circumstances possible. I must hold that the sale was in the minors' interests. It does not follow, however, from the above that the plaintiffs cannot, in equity, claim to be re-possessed of the property alienated by their *de facto* guardians, but it is clear beyond any shadow of doubt that section 41 of the Specific Relief Act must apply to the present case as well as the established principle that he who seeks equity must do equity. It is urged by the learned Counsel for the appellant that the plaintiffs must re-pay to the vendee, on assuming possession, the total amount from which they escaped liability by reason of the transaction in suit; or, in other words, their half share of the full decrees outstanding against them, or Rs. 775. I am unable entirely to follow this argument. I cannot see why the vendee should benefit by a transaction in which he was, in no way, interested and which exclusively concerns the plaintiffs and their creditors. It appears to me, however, that the vendee is equitably entitled to recover from the plaintiffs their proportionate share of the consideration for the sale. I, therefore, accept this appeal to the extent that the plaintiffs be given a decree for possession of ⅓rd of the shop in suit, provided that they pay to the defendant Sundar Singh within one month from the date of this order the sum of Rs. 400. In view of the plaintiffs' minority, I maintain the original order of the Trial Court which directs that parties shall bear their own costs in the original suit. The plaintiffs, however, will pay the costs of the defendant, Sundar Singh, in both the appellate proceedings

Appeal partly accepted.

K. S. D.

(1) 15 Ind. Cas. 806, 160 P. W. R. 1912; 4 P R. 1913; 173 P. L. R. 1912.
(2) 17 Ind. Cas. 371; 30 P. R. 1913; 270 P. L. R. 1914; 312 P. W. R. 1912.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 113 OF 1921.
May 9, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

RAM CHARAN LAL—PLAINTIFF—APPELLANT

versus

RAGHUBIR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVII, r. 2, O. IX, r. 13, scope of—Defendant entering appearance—Prayer for adjournment—Case decided on merits—Ex parte proceedings.

RAM CHARAN LAL *v.* RAGHUBIR SINGH.

On a proper interpretation of O. XVII, r. 2 of the Civil Procedure Code a Court cannot pass a judgment on the merits under that rule under cover of the words "make such other order as it thinks fit." [p. 389, col. 2.]

Phul Koer v. *Hashmat Ullah Khan*, 29 Ind. Cas. 553; 37 A. 460; 13 A. L. J. 679, followed.

There can, strictly speaking, be no *ex parte* proceedings against any defendant who has entered an appearance and filed a defence. [p. 389, col. 1.]

In a suit for possession of land, all the defendants combined to file a written statement, issues were framed and a date fixed for the evidence of the parties. When the case came on for hearing only one defendant, *R*, was present who asked for an adjournment. The Court made an order that if *R*. would deposit a certain sum of money within two hours, the adjournment would be allowed. The money was not paid. Then, after taking the plaintiff's evidence, the Court decreed his suit. Another defendant, *D*, then applied under O. IX, r. 13, Civil Procedure Code, to have the decree set aside:

Held, that, although strictly speaking there could be no *ex parte* proceedings against a defendant who has entered an appearance and filed a defence, yet under the circumstances as the Court could not have delivered a judgment under O. XVII, r. 2 of the Civil Procedure Code, it must be deemed to have taken action under O. IX of the Code and its judgment and decree should be treated as *ex parte* proceedings liable to be set aside under O. IX, r. 13 of the Code. [p. 389, col. 2.]

Enatulla v. *Jiban Mohan Roy*, 23 Ind. Cas. 769; 41 C. 956; 18 C. W. N. 775; 19 C. L. J. 535, referred to.

First appeal from a decree of the Additional Subordinate Judge, Mainpuri, dated the 23rd December 1920.

Mr. *Nehal Chand*, for the Appellant.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for possession of certain property.

It appears that the property in question had been sold by *Musammat* Reoti Koer on the 29th November 1916 to one Chandan Singh. The case for the plaintiff was that *Musammat* Reoti Koer had no authority to sell this property as she had only the estate of a Hindu widow.

Chandan Singh is dead and is represented on the record by his sons and grandsons. The defence put up to the suit was that *Musammat* Reoti Koer was full owner of the property under a Will executed by her husband in her favour. We have to deal, in the first instance, with the history of the suit in the Court of first instance.

It seems quite clear that after the plaint had been filed summons were issued to the defendants and a date was fixed for first hearing and for framing of issues.

It is not disputed that the defendants all combined to file a written statement embodying the defence to which we have just alluded. Issues were framed and a date was fixed some months ahead for final disposal of the case, the parties being directed to have their evidence in Court upon the date so appointed.

The case came up before the Additional Subordinate Judge on the 3rd of September 1920. On that date one of the defendants Raghubir Singh, (defendant No. 1) was present in Court. The Pleader who appeared for the defendant was also present. He informed the Court that he had no instructions to defend the case. Raghubir Singh asked the Court to adjourn the case for certain reasons and the Court made an order that if Raghubir Singh would deposit a sum of Rs. 100 in two hours an adjournment would be allowed. This order was not complied with by the defendant, Raghubir Singh.

The defendant, Dambar Singh, who is defendant No. 4, was absent on this date.

What happened then was this. The Subordinate Judge took the evidence which had been produced by the plaintiff and as there was no evidence on behalf of the defendant he disposed of the case at once coming to findings upon all the issues which had been framed. The result of his proceedings was that he gave the plaintiff a decree for possession and for mesne profits.

After this decree has been passed Dambar Singh, who was absent on the date on which the suit was decided, appeared before the successor-in-office of the Subordinate Judge who had decided the case and made an application to have the decree set aside, the application being treated as one under O. IX, r. 13.

Dambar Singh supported his application by an affidavit alleging that on the date in question he had been ill a d unable to attend the Court and to enforce the presence of his witnesses.

Notice having been issued to the plaintiff the latter filed a counter-affidavit. The Subordinate Judge, after considering the affidavits tendered by both parties, came to the conclusion that the former

decree should be set aside and exercised his power for that purpose. After the decree had been set aside certain evidence which was put forward by the defendants was received on record and the result was that the second judgment was passed in favour of the defendants. The final judgment dismissed the plaintiff's suit with costs to the defendants. The plaintiff now appeals and the first point which has been raised on his behalf is that the Court below was not competent to set aside the earlier decree under the provisions of O. XI, r. 13.

We have, in the first place, to consider what was the state of affairs when the Subordinate Judge passed his judgment on the 3rd of September 1920.

It seems clear, from what has already been set out, that on that date he had before him a case which fell within the purview of O. XVII, r. 2.

We think it is right to say that there can, strictly speaking, be no *ex parte* proceedings against any defendant who has entered an appearance and filed a defence. That to our mind is clear from the provisions of O. IX. Order XVII, r. 2, applies to the particular case where the hearing of the suit had been adjourned and where, on the adjourned date, the parties or any of them fail to appear.

In that case O. XVII, r. 2, enables the Court, if it so chooses, to deal with the case as being one under O. IX or to make such other order as it thinks fit.

It has to be considered here that there is nothing in the judgment of the 3rd September 1920 to indicate that the Additional Subordinate Judge was dealing with the case under O. IX. No mention of the provisions of O. XVII, r. 2 or of O. IX is made in the judgment and the contention, therefore, is that the decision was really a decision on the merits and that the decree which was based upon this judgment could not be set aside by an application made under O. IX, r. 13.

There has been a great deal of conflict of judicial decisions regarding the interpretation of the provisions of O. IX and O. XVII. We have, however, to notice a decision of a Bench of this Court which is reported as *Phul Koer* v. *Hashmat Ullh Khan* (1). It was there held that on the proper interpretation of O. XVII, r. 2, a Court cannot pass a judgment on the merits under cover of the words "make such other order as it thinks fit." The learned Judges of this Court were of opinion that the other order here referred to could only mean an order for further adjournment.

In the present case no order for further adjournment was made and a judgment was in fact delivered and it seems to us, therefore, that under the view of law taken by the learned Judges of this Court it must be deemed that the Additional Subordinate Judge was in reality taking action under O. IX and that his judgment and decree should be treated as *ex parte* proceedings. If that is so, then there can be no doubt that Dambar Singh was entitled to apply to the Court under O. IX, r. 13 to have this *ex parte* decree set aside. We agree with the view of the law which was taken by a Bench of the Calcutta High Court in *Enatulla* v. *Jiban Mohan Roy* (2).

So much for the first and second grounds of appeal. Coming to the merits, the case for the appellant here is that the defendants were not entitled to succeed inasmuch as there was no admissible evidence before the Court to show that Minda Lal, the husband of *Musammat* Reoti Koer, had left a Will in her favour constituting her the full owner of the property in dispute.

This plea is based upon the fact that the defendants were not able to produce in Court the original Will in favour of *Musammat* Reoti Koer. It is proved that on the date fixed for the first hearing of the case the defendants filed a certified copy of the Will obtained from the Registration Office.

In order to ascertain whether secondary evidence of the Will was allowable evidence was taken, and we have the statement of one Sundar Lal, a *Patwari*. He was one of the attesting witnesses of the Will

(1) 29 Ind. Cas. 553; 37 A. 460; 13 A. L. J. 679.
(2) 23 Ind. Cas. 769; 41 C. 956; 18 C. W. N. 775; 19 C. L. J. 535.

and deposed to its due execution. He stated that, after the death of the testator, the original Will came into the possession of one Din Dayal who was the brother of *Musammat* Reoti Koer and who acted as her *Mukhtar*. Sunder Lal further deposed that Din Dayal was dead and that no other members of the family either of Reoti Koer or of her husband were now in existence.

In these circumstances, the learned Judge of the Court below thought that a sufficient foundation had been laid for the admission of secondary evidence and, as he rightly observes, it was hardly possible for the defendants in this case who are the legal representatives of the transferee of the property to produce the original Will which was made by Minda Lal.

We are satisfied, therefore, that the judgment of the Court below cannot be attacked on this ground.

The last ground taken in the memorandum of appeal is that on a proper construction of the Will *Musammat* Reoti Koer was not the absolute owner of the property in dispute. Having read the document we think there can be no dispute as to this matter. The Will, in our opinion, clearly constitutes *Musammat* Reoti Koer the full owner of her husband's property after his death. The result, therefore, is that the appeal fails and is dismissed. We make no order as to costs as the respondents have not been represented before us.

K. S. D. & N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 397 OF 1922.

April 19, 1923.

Present :—Mr. Justice Devadoss.

D. K. KANNISA—DEFENDANT—PETITIONER

versus

DEVICHAND—PLAINTIFF—RESPONDENT.

Madras Small Cause Court Rules, O. XXXVII, r. 1—Suit on pro-note—Summons in Form No. 13—Direction to file application to defend three days before hearing, legality of.

A direction in a summons in Form No. 13 issued to the defendant under O. XXXVII, r. 1 of the Madras Small Cause Court Rules that the application for leave to defend the suit must be filed in the Office of the Registrar and copies thereof must be served on the plaintiff or his Pleader not later than three clear days before the date of hearing is unreasonable and invalid. [p. 391, cols. 1 & 2.]

In the absence of any provision giving power to the Court to extend the time fixed in the summons or any provision compelling service of notice sufficiently early to enable the defendant to comply with the direction, the direction in the summons must be held to be *ultra vires* and a Court acts without jurisdiction in enforcing such a direction. [p. 392, col. 2.]

Rules framed for the guidance of Courts of Justice should exhibit a greater degree of reasonableness and fairness than the rules and bye-laws made by statutory bodies. [p. 392, col. 1.]

Stiles v. *Galinski* [*Nokes* v. *Corporation of Islington*], (1904) 1 K. B. 615; 73 L. J. K.B. 485; 90 L. T. 437; 52 W. R. 462; 68 J. P. 183; 2 L. G. R. 341; 20 T. L. R. 210, *Arlidge* v. *Islington Corporation*, (1909) 2 K. B. 127, 78 L. J. K. B. 553; 100 L. T. 903; 7 L. G. R. 649; 73 J. P. 301; 25 T. L. R. 470, *Johnson* v. *Croydon Corporation*, (1886) 16 Q. B. D. 708, 55 L. J. M. C. 117; 54 L. T. 295; 50 J. P 487, *Quazi Mahmudar Rohman* v. *Sarat Chandra Dutt*, 5 C. W. N. 250, *British India Steam Navigation Company Limited* v. *Sharafally*, 70 Ind. Cas. 888; 44 M. L. J 100; 17 L. W. 705; (1923) A. I. R. (M) 435, considered

In the case of small causes expedition and saving of time are aimed at in framing the rules, but the rules should not be such as to make them impossible of compliance in some cases, however honest and *bona fide* may be the attempt of a party to comply with them. [p. 391, col. 1.]

Petition, under section 115 of Act V of 1908 praying the High Court to revise an order, dated 8th May 1922 of the Court of Small Causes at Madras, in U. C. S. No. 22 of 1922.

Mr. *S. Venkatarama Aiyar*, for the Petitioner.

Mr. *P. C. Sundaram Aiyangar, amicus curiæ*, for the Respondent.

JUDGMENT.—This is an application under section 115 of the Civil Procedure Code to revise the decree of the Court of Small Causes, Madras, in U. C. S. No. 22 of 1922.

The facts are these: The plaintiff brought a suit on a promissory-note executed by the defendant. Summons in Form No 13 was served upon the defendant on 3rd May 1922. He applied for leave to defend on 5th May 1922. The hearing of the case was fixed for the 8th May 1922. The

learned Chief Judge rejected the application for leave to defend on 8th May as not having been 'filed' three clear days before the date of hearing and decreed the plaintiff's suit. The defendant has preferred the civil revision petition.

The plaintiff does not appear to oppose the petition. It is contended that the direction contained in the summons is *ultra vires* and the decision, therefore, of the learned Judge is without jurisdiction. The direction in the summons is: "Leave to appear may be obtained on application to the Court supported by affidavit showing that there is a defence to the suit on the merits or that it is reasonable that he should be allowed to appear in the suit. The day..... of.....19..is fixed for your appearance before.....Judge of this Court and the said application and affidavit must be filed in the Office of the Registrar and copies thereof must be served on the plaintiff or his Pleader not later than three clear days before the said date." Order XXXVII, r. 1 (1), of the Rules of the Court of Small Causes, Madras, reads thus: "All suits upon Bills of Exchange, *hundis* or promissory-notes, may, in case the plaintiff desired to proceed hereunder, be instituted by presenting a plaint in the form prescribed. The summons shall be in Form No. 13 in Appendix I and it shall not be necessary to serve a copy of the plaint on the defendant." Rule 2 (1) is "The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient, to support the application." The question now is whether the direction in the summons that an application for leave to defend must be filed in the Office of the Registrar and copies thereof must be served on the plaintiff or his Pleader not later than three clear days before the said day is valid or not. In the first place, there is no provision that summons should be served upon the defendant sufficiently early to enable him to apply three clear days before the date of hearing. If the summons be served on the morning of the day of hearing giving no opportunity to the defendant to comply with the direction contained in the summons, could his right to apply for leave to defend be taken away. There is nothing in the rules which prescribes the penalty for not applying within the time fixed. In the case of applications coming under Art. 159 of the Limitation Act, the period is ten days, and the time begins to run from the date of the service of summons. But in this case the rule makes no reference to the date or to the time of the service of the summons, but insist upon an application for leave to defend being filed three clear days before the date of hearing. There is no remedy open to the defendant if he is not served so as to give sufficient time to apply three clear days before the date of hearing. Though Form No. 13 is sanctioned by O. XXXVII, r. 1, yet one has to see whether a direction given in the summons or a time fixed for doing an act by the Court is reasonable or unreasonable. If the rules provide for an extension of time for proper reasons, the direction would not be unreasonable: but where it gives no option to the Court to give relief in cases of real hardship where the defendant is not to blame it cannot be held to be reasonable. No doubt, in the case of small causes expedition and saving of time are aimed at in framing the rules; but the rules should not be such as to make it impossible of compliance in some cases however honest and *bona fide* may be the attempt on the part of the defendant to comply with the rule. As the plaintiff did not appear, I asked Mr. Sundaram Aiyangar to argue the case as *amicus curiæ* for the respondent and he did his work very satisfactorily. He has drawn my attention to the cases reported as *Stiles* v. *Galinski* [*Nokes* v. *Corporation of Islington*] (1), *Arlidge* v. *Islington Corporation* (2) *Johnson* v.

(1) (1904) 1 K. B. 615; 73 L. J. K. B. 485; 90 L. T. 437; 52 W. R. 462; 68 J. P. 183; 2 L. G. R. 341; 20 T. L. R. 219.

(2) (1909) 2 K. B. 127; 78 L. J. K. B. 553; 100; L. T. 903; 7 L. G. R. 649; 73 J. P. 301; 25 T. L. R. 470 (P. C.).

Croydon Corporation (3). Those are the cases in which the Court held that rules and by-laws made by statutory bodies should be reasonable; otherwise, they would be *ultra vires* and void. In the case of rules framed for the guidance of Courts of Justice one should look for a greater degree of reasonableness and fairness. He drew my attention to a case in *Quazle Mahmudar Rohman* v. *Sarat Chandra Dutt* (4) in which Stanley, J., sitting as a Single Judge, held that he had no power to extend the time prescribed for filing an application for leave to defend a suit under Chapter XXXIX of the Civil Procedure Code of 1882. The learned Judge quoted section 4 of the old Limitation Act and held that he had no power to extend the time. He distinguished a case decided by Pontifex, J., in which that learned Judge extended the time for filing an application for leave to defend on the ground that, "as the defendant lived at Peshawar, the time within which the defendant might obtain liberty to appear and defend should have been 28 days instead of 10 days, the time contained in the form described in the Fourth Schedule to the Code." In *British India Steam Navigation Company Limited* v. *Sharafally* (5) a Bench of this Court held that, as the Small Cause Court was open on certain days during the vacation for the receipt of plaints, petitions and other papers, the Court could not be treated as closed, and an application for appeal to the Full Bench which could have been filed on the days the Court was open, could not be filed after the close of the vacation. Though section 148 of the Civil Procedure Code, Madras, which is a new section giving power to a Court to extend any period of time fixed or granted by the Court for doing any act prescribed or allowed by the Code has been extended to Small Cause Courts yet, the learned Judge had no jurisdiction to extend the time fixed in the summons by the Court for filing an application for leave to defend by reason of the definition of the word Code in O. I (*a*) r. 4 (2). Though Form B is according to r. 1 of O. XXXVII, it cannot be said to form part of the rules. If the direction as regards the filing of an application for leave to defend is intended to be made part of O. XXXVII, r. 1, it should have been made clear and a provision should have been made to meet cases where the defendant could not possibly have three clear days owing to the service on him within three days of hearing. Taking all the circumstances into consideration, I hold that the direction in the summons is unreasonable and, therefore, *ultra vires* and the Court by complying with an illegal rule has acted without jurisdiction.

I, therefore, set aside the order of the learned Chief Judge and direct him to restore the case to his file and to receive the application for leave to defend and to dispose of it according to law.

The costs of this application will be borne by the plaintiff.

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

(3) (1886) 16 Q. B. D. 708; 55 L. J. M. C 117; 54 L. T. 295; 50 J. P. 487.
(4) 5 C. W. N. 259.
(5) 70 Ind. Cas. 888; 44 M. L. J. 100; 17 L. W. 705; (1923) A. I. R. (M) 435.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

June 7, 1923.

Present:—Viscount Haldane, Lord Phillimore and Lord Carson.

ALCOCK, ASHDOWN AND COMPANY, LIMITED—APPELLANTS

versus

THE CHIEF REVENUE AUTHORITY OF BOMBAY—RESPONDENT.

Income Tax Act (VII of 1918), s. 51—Revenue Authority, duty of—Refusal to state case—High Court, whether can compel reference.

When a capacity or power is given to a public authority, there may be circumstances which couple the power with a duty to exercise it. [p. 396, col. 1.]

Julius v. *Lord Bishop of Oxford*, (1880) 5 A. C. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600, referred to.

Under section 51 of the Income Tax Act, the Chief Revenue Authority is bound to state a case for the opinion of the High Court on the application of the assessee. In case the Revenue Authority improperly refuses to state a case, the High Court can compel it to do so. [p. 394, col. 2.]

ALCOCK, ASHDOWN & Co. *v.* CHIEF REVENUE AUTHORITY OF BOMBAY.

Chief Commissioner of Income Tax, Madras v. *Northern Anantapur Gold Mines, Limited*, 64 Ind. Cas. 682; 44 M. 718; 14 L. W. 108; (1921) M. W. N. 502; 41 M. L. J. 177, overruled.

Appeal from the Bombay High Court dated 21st October 1920.

Messrs. *Clauson, K. C., Watter* and *Cyril King*, for the Appellants.

Messrs. *A. M. Dunne, K. C.*, and *R. Hills*, for the Respondent.

JUDGMENT.

Lord Phillimore.—This is an appeal from an order made by the High Court of Judicature at Bombay on the 21st October 1920, discharging with costs a Rule *nisi* directed to the Chief Revenue Authority of Bombay, whereby the authority was called upon to show cause why he should not be ordered to refer to the Court for its decision certain questions stated in Exhibit D to a petition presented to him, or in the alternative why he should not hear and determine according to law the application of the petitioners.

The following is the matter in dispute. The applicants for the Rule, Alcock, Ashdown and Company, Limited, the present appellants, were called upon under the Indian Excess Profits Duty Act, 1919, to make a statement of their profits for the year 1918. Under the powers given them by the Act they elected to have the standard of their profits ascertained upon an average of the four years 1913, 1914, 1916 and 1917. They thereupon made a return of the average capital and the average profits of these four years and of their capital and profits for the year 1918, whereby they purported to show that the percentage of profit for 1918 was not in excess of the average profit on the average capital of the four standard years; and they claimed, therefore, to be exempt from excess profits duty.

The Collector of Income Tax, however, made an assessment upon them whereby he brought out their excess profits at upwards of 17 lacs of rupees, on which a 50 per cent. duty would have to be paid after some minor deduction had been made and he required the payment of this duty by three instalments.

The appellants appealed to the Chief Revenue Authority, and their appeal was heard on the 3rd August 1920. At the hearing of that appeal, Counsel for the appellants asked the Authority to state a case for the opinion of the High Court, and by letter dated the 5th, their agents set out the questions upon which they desired the case to be stated. In the meanwhile, and apparently before this letter had reached the Authority, he, by letter dated the 5th, informed them that at the hearing he had confirmed the assessment made by the Collector of Income Tax. In his letter he further said that it had been decided that as the law was quite clear on the point, it was unnecessary to refer the case to the High Court.

On the 11th August the Authority sent an answer to the agent's letter of the 5th —which, by some accident, is referred to as dated the 4th. This answer was to the following effect:—

"I have the honour to state that the appeal was finally decided by me on the 3rd instant. A reference to the High Court was deemed unnecessary.

"In calculating the income liable to duty, income from investments excluded from business capital has been specifically excluded. This is added as, from your letter under reply, you seem to be under some misapprehension and think that such income has also been charged with duty."

Thereupon the appellants obtained the Rule *nisi*. In their petition to the Chief Revenue Authority they had made the following averment:—

"The Collector has disregarded the first proviso to section 6 (1) of the Act, and has held that the investments of the petitioner did not form part of the business capital of the petitioner, notwithstanding that under section 6 (1) *(b)* *(iii)*, under which the petitioner is to be assessed, the interest on such securities is to be brought into account and, notwithstanding the nature of the petitioner's business. The Collector has arrived at his assessment by a compromise which is not justified by the provisions of the Act."

The application for the Rule was supported by an affidavit of which the following are material passages:—

"During the war it was impossible for Messrs. Alcock, Ashdown and Company, Limited, to expand their business by the erection of new buildings and it was impossible for them to obtain plant, machi-

nery, stock and materials, and that therefore part of their profits which were *bona fid* retained in the said business for the purpose of expanding the same had to be retained in the form of cash and investments pending such time as they were able to expend the same for the purposes aforesaid. In addition to such accumulated profits the said cash and investments included Rs. 22,07,984-5-3, which the Company owed.

"On the 31st December 1917 their cash and investments amounted to Rs. 23,70,478 and on the 31st December 1918 to Rs. 50,13,786.

"By the 31st December 1919, the said item of cash and investments had been reduced to Rs. 32,77,555 and now stands at the sum of Rs. 30,15,292."

And there was a further submission that an allowance of 6 lacs was the allowance of an arbitrary figure.

On showing cause, the Authority exhibited to an affidavit copies of "the decisions "—in other words, the reasons for the decisions, of the Primary Revenue Authority and of the Chief Authority on appeal. From these it appears that both the Revenue Authorities had purported to follow the principle of construction laid down by them in a previous case, whereby they had arrived at the conclusion that in calculating capital, only the capital actually employed in the business was to be taken into account; that in this case the Income Tax Collector found that 50 lacs of rupees were invested in securities or kept as fixed deposits in other concerns, that in his view this money was money employed in those concerns and not in the business of the Company, that from the statement of the representative of the appellants it appeared that at the most about 16 lacs would be required in the near future for the expansion of the business, that the whole of it could be safely disregarded in computing capital employed in the business, but, however that might be, he (the Collector) had taken an arbitrary figure of about 6 lacs which he thought might be regarded as captital temporarily set aside but required for business purposes, and regarding the rest as capital not to be employed in the business, had reduced the capital from over 56 lacs to about 16, and therefore brought out a huge profit.

The Chief Revenue Authority, while generally agreeing and confirming, said that he considered the Collector's allowance of 6 lacs was liberal.

When the matter came on for argument before the High Court, the first question to be decided was whether the Court had any jurisdiction to order the Authority to state a case. This was argued before the High Court upon the language of section 51 of the Indian Income Tax Act of 1918, which is made, by the Excess Profits Duty Act, applicable also to cases under this Act. But in the case prepared for their Lordships' Board and in the argument before their Lordships, the objection to the jurisdiction was put more broadly. The High Court of Bombay in considering this point merely applied itself to the question whether or not the Authority had a duty in the circumstances to state a case. But as the point was rasied before their Lordships. it took the form of saying that even if the Authority had a duty, the Court could not require him to exercise it; and for this purpose reliance was placed upon the well-known general purview of Indian legislation which excludes matters of revenue from the consideration of the ordinary Civil Courts, the principle being exemplified in the case of *Spooner* v. *Juddow* (1), decided in the year 1850, and upon section 106 (2) of the Government of India Act, and, lastly, upon a recent decision of the High Court of Madras, given since this case was before the Court of Bombay, *Chief Commissioner of Income Tax, Madras* v. *Northern Anantapur Gold Mines, Limited* (2).

Upon the point thus broadly stated, their Lordships have no difficulty in pronouncing a decision. To argue that if the Legislature says that a public officer, even a Revenue Officer, shall do a thing, and he without cause or justification refuses to do that thing, yet the Specific Relief Act would not be applicable, and there would be no power in the Court to compel him to give relief to the

(1) 4 M. I. A. 353; 6 Moo. P. C. 257; Perry O. C. 392; 1 Sar. P. C. J. 363; 18 E. R. 734; 13 E. R. 682; 4 Ind. Dec. (o. s.) 258.
(2) 64 Ind. Cas. 682; 44 M. 718; 14 L. W. 108; (1921) M. W. N. 502; 41 M. L. J. 177.

subject, is to state a proposition to which their Lordships must refuse assent. Section 45 of the Specific Relief Act enables any of the three High Courts to "make an order requiring any specific act to be done or forborne.....by any person holding a public office whether of a permanent or a temporary nature, or by any Corporation or by any Court of Judicature," provided that "such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character," and subject to other certain conditions not material to this case.

It is true that the section is not to authorise the High Court "to make any order which is otherwise expressly excluded by any law for the time being in force." The excluding law is suggested to be the already cited clause in section 106, sub-section (2), of the Government of India Act, which is in the following terms:—

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

In their Lordships' view, the order of a High Court to a Revenue Officer to do his statutory duty would not be the exercise of "original jurisdiction in any matter concerning the revenue," and the latter part of the clause need not be considered, for the proceedings in this case had not to do with the collection of the revenue, but with the preliminary assessment to ascertain what that revenue was.

There remains, however, the question which was also considered by the High Court of Madras, though rather as a branch of the question on which their Lordships have just pronounced their decision than as a separate point in itself, and which was considered by the High Court of Bombay in the present case and in another case which has recently been before their Lordships. This question the Bombay Court determined adversely to the Chief Revenue Authority, holding that there would be under section 51 of the Income Tax Act a duty to state a case if a point of law arose. Here it is necessary to refer somewhat in detail to the provisions of the two Acts. Section 15 of the Excess Profits Duty Act, 1919, says that the provisions of various sections, including section 51, "of the Indian Income Tax Act, 1918, shall apply, with such modifications, if any, as may be prescribed, as if the said provisions referred to excess profits duty instead of to income-tax, and every officer or authority exercising powers under the said provisions may exercise the like power under this Act in regard to excess profits duty as he or it exercises in regard to income-tax under the said Act."

Section 51 of the Indian Income Tax Act must be set out at length:—

"51. (1) If in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder, the Chief Revenue Authority may, either on its own motion or on reference from any Revenue Officer subordinate to it, draw up a statement of the case, and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee unless it is satisfied that the application is frivolous or that a reference is unnecessary.

"(2) If the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue Authority by which it was stated, to make such additions thereto or alterations therein as the Court may direct in that behalf.

"(3) The High Court upon the hearing of any such case shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Revenue Authority by which the case was stated, a copy of such judgment under the seal of the Court and the signature of the Registrar; and the Revenue Authority shall dispose of the case accordingly, or if the case arose on reference from any Revenue Officer subordinate to it, shall forward a copy of such judgment to such

officer who shall dispose of the case conformably to such judgment.

"(4) Where a reference is made to the High Court on the application of an assessee, costs shall be in the discretion of the Court."

It is said that, though under this section the Chief Revenue Authority may, if he thinks fit, draw up a statement of the case and refer it to the High Court, he is not bound to do so, even on the application of the person to be assessed, if he is satisfied that the application is frivolous or that the reference is unnecessary, and that the authority has in the present case shown that he is satisfied that the application was frivolous and the reference was unnecessary.

Their Lordships, however, agree with the Bombay High Court that this is too narrow a construction of the section. Take, first, the case which is last in the clause. If the assessee applies for a case, the Authority must state it, unless he can say that it is frivolous or unnecessary. He is not to wait for the Court to order him to do it; it will be a misfeasance and a breach of the statutory duty if he does not do it. Put that case aside. The rule here is supported upon the earlier part of the section. No doubt that part does not say that he shall state a case, it only says that he may. And as the learned Counsel for the respondent rightly urged, "may" does not mean "shall". Neither are the words "it shall be lawful" those of compulsion. Only the capacity or power is given to the Authority. But when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of *Julius* v. *Lord Bishop of Oxford* (3).

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

In their Lordships' view, always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court; and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case.

So far their Lordships are in agreement with the High Court. There remains the question which has led to this appeal. The High Court has apparently considered that there is no serious point of law involved in this case. It was, indeed, contended by Counsel for the respondent that the High Court had accepted the position that there was a question of law and then had gone on to decide it adversely to the appellants; but their Lordships think this contention inadmissible. If there is a point of law, it ought to be decided in a regular manner and upon proper materials; and here it should be said that the manner is not regular and that it is at least doubtful whether the materials are complete.

Their Lordships must, therefore, consider whether the High Court should have ordered a case to be stated. This, as it appeared to the learned Chief Justice, depended upon the question whether the Chief Revenue Authority had reasonable grounds for being satisfied that a reference was necessary. This is not quite the way in which their Lordships would put it. But to proceed: In the view of the Chief Justice profits not employed in the business are not capital for the purpose of this Act, and profits intended to be employed in the business are not, therefore, necessarily to be treated as capital, and finally, whether profits are or are not employed in the business is a question of fact to be determined by the Authority. Fawcett, J., agreed, and held that it was not shown to be clearly incumbent on the Chief Revenue Authority to refer these questions to the Court, and that he had reasonable grounds for being satisfied that the reference was unnecessary.

Quite recently, in the case of *Gas Lighting Improvement Company, Limited*

(3) (1880) 5 A. C. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.

v. *Commissioners of Inland Revenue* (4) before the House of Lords, a decision has been given on the English Excess Profits Act, the terms of which so far as they differ are less favourable to the present appellant than the terms of the Indian Act. In this case the House decided against the tax-payer that the question whether capital placed in a particular investment was capital employed in the business or was not, was not a pure question of fact upon which the decision of the Income Tax Commissioners would be conclusive but was a question of law or of mixed law and fact, the decision of the Commissioners upon which would be open to review; and accordingly it was reviewed, and judgment was given against the tax-payer that the particular investment in qestion did not form part of the capital of the business.

It follows that the decision of the Authority in this case could not be held to be conclusive as a decision upon a mere question of fact. Nor did the Chief Revenue Authority or his subordinate so treat it. They treated it as a matter of principle and refer to their judgments in a previous case as laying down the principle, that is, laying down the law upon the subject.

In their Lordships' view, an important question of law upon the construction of the Statute is involved. This may be most tersely expressed by asking the question, what are the interest-bearing securities which form part of the assets of the business and are, therefore, to be treated as part of the capital; and one guide in arriving at this conclusion may well be the difference of language between the later Indian and the earlier English Act.

It is true that these are not Acts of the same Legislature, and that the Indian Legislature and the draftsman whom it employed may have thought it unnecessary to introduce provisions like those contained in paragraphs 8 and 12 of Part I of the Fourth Schedule of the English Act, and may have meant no variation from the scheme of the English Act when it and he introduced the words "securities" and spoke of interest on certain securities as being profits from the business. Too much stress, therefore, should not be laid on these differences. At the same time, it is noteworthy that the Indian Act takes notice of the English Act in Schedule I, paragraph 4; and the Court may come to the conclusion that the reason for the differences between the two Acts is not a mere difference of drafting, but a deliberate variation due to the different conditions under which business is carried on in India and in England.

On the whole, their Lordships think that the Chief Revenue Authority should have been ordered to state a case, and they will humbly advise His Majesty that this appeal should be allowed, and that the Rule *nisi* should have been converted into an order absolute in the terms of the first alternative expressed in the Rule *nisi*, and that the appellants should have their costs in the High Court and before this Board.

F. S. D. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Rawle, Johnstone & Co.*

Solicitors for the Respondent:—*The Solicitor, India Office.*

(4) (1923) W. N. 156, affirming (1922) 2 K. B. 381; 91 L. J. K. B. 694; 127 L. T. 732; 38 T. L. R. 613.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 1 OF 1920.

June 20, 1923.

Present:—Mr. Pipon, J. C.

Maulvi MAZIUDIN—PLAINTIFF—APPELLANT

versus

HASSAN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Will—Muhammadzais of Charsadda District Peshawar—Disinheritance of sons—Will whether valid.

Under the custom obtaining among Muhammadzais of Charsadda Tahsil in the Peshawar District, a Will which completely disinherits the sons of the testator is, *ipso facto*, invalid. [p. 401, col. 2.]

First appeal from an order of the Sub-Judge, Charsadda, dated the 25th November 1919.

Maulvi *Allf Din*, for the Appellant.

Mr. *Saaduddin Khan*, K. B., for the Respondents.

MAZIUDIN *v.* HASSAN KHAN.

JUDGMENT.—The parties to this case are Mohammadzis of the Charsadda Tahsil in the Peshawar District. The dispute relates to the estate of Najaf Khan, deceased, who was a large proprietor owning land in a number of different villages in the Charsadda Tahsil. He was twice married. By his first wife he had three sons and three daughters, and by his second, three daughters. His second marriage was contracted many years after the first when he was already an old man. He died on the 2nd of November 1916 at a very advanced age. On the 16th of October 1916 he executed a detailed Will disposing of the whole of his estate. The execution of this Will is admitted. It was registered on the 17th of October 1916. On Najaf Khan's death his surviving heirs were Mohsan Khan and Hassan Khan, sons by his first wife, *Musammat* Habiba, widow of Hussain, another son by the first wife who predeceased Najaf Khan, three daughters by the first wife, three daughters by the second, and one surviving widow, namely, *Musammat* Naqiya Begam, the second wife. The Will recited that 33 *jaribs* of land had been given to *Musammat* Naqiya Begam in dower during the testator's lifetime, and that this area was already her property and was, therefore, excluded from the operation of the Will. The land granted in dower to the first wife was referred to, the testator admitting the rights of her sons to $\frac{3}{4}$ths of it and asserting that $\frac{1}{4}$th had reverted to the testator himself. The dower granted by the testator to the widow of his deceased son Hussain on her marriage was also referred to. The residue of the estate was divided into three portions. One portion, which was allocated to certain specified villages, was bequeathed to what purported to be a *waqf* or religious endowment. *Maulvi* Maziuddin, who is the brother of the deceased's widow *Musammat* Naqiya Begam, was constituted the *mutawalli* of this endowment under the Will, but the conditions prescribed were not those generally binding in the case of *waqf* property, as the *mutawalli* was specifically given an unrestricted power of alienation. The remaining 2-3rds of the estate was bequeathed to the natural heirs of the testator, all the surviving sons and daughters succeeding and the share of each son being double that of the share of each daughter. The bequest, however, to the two surviving sons, Mohsan Khan and Hassan Khan, was qualified by the conditions that they could not succeed unless they first repaid a sum of Rs. 21,000 to the estate which, it was recited in the Will, their father had advanced to them. They were made liable to pay this sum to each of the beneficiaries including the *mutawalli* Maziuddin according to the proportionate share bequeathed to each beneficiary, and in the event of the sum not being so paid, the estate bequeathed to Mohsan Khan and Hassan Khan was to remain mortgaged to the other beneficiaries. On the death of Najaf Khan, however, Mohsan Khan and Hassan Khan succeeded in obtaining possession of the whole of the estate. The first person to come into Court was the widow *Musammat* Naqiya Begam. On the 18th of December 1917 she lodged a suit for possession of the land described in the Will as her property by dower for her share in the estate as bequeathed to her by the Will and for possession of the share of Mohsan Khan and Hassan Khan as mortgagee of their interests under the last clause of the Will which I have dealt with above. The suit was resisted by Mohsan Khan and Hassan Khan who were supported by their own sisters. Throughout this litigation, indeed, the parties have divided themselves into two distinct sections, namely, the children by the first wife against the children by the second. As might have been expected, Maziuddin, the brother of *Musammat* Naqiya Begam, is on the side of his sister and her children. The validity of the Will in that suit was contested on a number of different grounds. It was pleaded that the testator was, at the time, of unsound mind, and that he was acting under undue influence. It was also pleaded that no valid *waqf* was created by the instrument, and that it exceeded the restrictions upon the power of will making imposed by custom upon the community to which the parties belonged. The District Judge who tried the case, held that the testator was of sound mind, but was acting under undue influence, and that the Will was invalid for this reason. He also held that the *waqf* in question could not be validly created by the Will. He further disallowed *Mu-*

sammat Naqiya Begam's claim to the property described in the Will as having been previously gifted to her in dower, and he held that the charge of Rs. 21,000 imposed upon the estate bequeathed to the two sons was invalid and illegal. On these findings he dismissed the suit. *Musammat* Naqiya Begam appealed to the Divisional Court. The Divisional Judge, in the course of a somewhat cursory judgment, dealt only with the question as to the validity of the Will and the *waqf* under Muhammadan Law and, finding that the Will was, in this respect, valid, reversed the finding of the District Judge and decreed the claim both to the dowered property and the bequeathed estate. He concurred, however, in the finding that the charge of Rs. 21,000 upon the son's share was invalid. He omitted to adjudicate upon the question of undue influence and gave no reasons for his reversal of the District Judge's finding that the alleged gift in dower had never been made. Against this finding both sides appealed to the Judicial Commissioner. The appeals were dealt with by the Officiating Judicial Commissioner, Mr. Copeland, in a detailed and closely reasoned order dated the 27th of June 1919. He overruled the findng of the Divisional Court that the dower of landed property was valid, but allowed the claim in respect of a house alleged to have been gifted to *Musammat* Naqiya Begam in dower. He agreed with the concurrent finding of the two Courts below that the charge of Rs. 21,000 against the sons' share was invalid. On the question of undue influence he found that undue influence had not been proved and that the Will, so far as this contention was concerned, was not invalid. It was already clear that the suit by *Musammat* Naqiya Begam was, to a great extent, a test case for the more important claim which would eventually have to be made by Maziudin. As regards the validity of the *waqf* bequest and the appointment of Maziuddin as *mutwalli*, Mr. Copeland expressly avoided passing a final decision. In considering the question whether the Will was valid under the custom governing the parties, he confined himself to its effect upon the widow, and he quoted a ruling of this Court, North-West Frontier Province Judicial Record N. 66 as authority for the view that a part of a Will could be upheld without necessarily upholding the whole. He remarked "in respect of the widow and the daughters, the Will, in my opinion, does not go beyond what is sanctioned by the custom of the Muhammadzai tribe, but in respect of defendant No. 10 (Maziuddin) it very probably does. However, all that has got to be decided finally in the present suit is as to whether the bequest in favour of the plaintiff is valid." Both sides endeavoured unsuccessfully to get this judgment reviewed by the permanent Judicial Commissioner, Mr. Rennie. On the 6th of October 1919 Maziuddin came forward with the present suit for possession of the ⅓rd share bequeathed as *waqf* under the Will. The Trial Court threw out the suit on the preliminary ground that the creation of a *waqf* was invalid under Suni Muhammadan Law unless possession was delivered by the donor. An appeal was preferred by the plaintiff to the Judicial Commissioner, who held, following the authority of the Privy Council as laid down in *Baqar Ali Khan* v. *Anjuman Ara Begam* (1), that the creation of a *waqf* by testamentary disposition and without delivery of immediate possession was valid. On this finding he decreed the plaintiff's claim on the 5th of May 1920. The defendants then applied for review on the ground that the bequest had been attacked in the Trial Court on many other grounds besides that upon which the Judicial Commissioner had alone adjudicated. My predecessor, Mr. Rennie, accepted the application to review his order and, recognizing the validity of the defendants' contention, on the 9th of July 1920 remanded the case to the Trial Court under O. XLI, r. 23 for decision upon its merits. The presiding officer of that Court had meanwhile been changed. On the 28th of November 1921 the new presiding officer dismissed the suit. Against the dismissal of the suit Maziuddin has preferred the appeal which is now before me.

The judgment of the Trial Court now under appeal cannot be regarded as very satisfactory. The findings of the Court amount to (1) that no *waqf* was created by the Will, (2) that a Muhammad-

(1) 25 A. 236; 30 I. relating to the *waqf*, 5 Bom. L. R. 410; 8 Sar.

zai proprietor cannot, under custom, disinherit sons and that the effect of the Will in suit is to disinherit them; (3) that the *waqf* is invalid because possession was not delivered, and (4) that the suit in respect of the *waqf* will not lie because permission for its institution has not been obtained under the provisions of section 92 Civil Procedure Code. It may be remarked at once that the third of these grounds cannot possibly be defended. The finding completely ignores the fact that this issue had been finally decided by Mr. Rennie in his order of the 5th of May 1920 and could not be re-opened. It is not, again, denied by the respondents on this appeal that the 4th finding, that the institution of the suit required permission under section 92, Civil Procedure Code, is clearly wrong. The main ground upon which this appeal is argued is that the creation of the *waqf* in suit is valid by the custom obtaining among the parties. It involves also the question of the restrictions upon the power of testamentary bequests among Muhammadzais of the Charsadda Tahsil. If the restriction hitherto recognized by Courts which disallows the disinheritance of sons, is to be accepted as binding, the appellant falls back upon the contention that the provisons of the Will in suit do not amount to disinheritance.

I do not propose to review the judicial precedents extending over many years which concern the power of Will making among Pathans in general in the Peshawar District and in particular among the Muhammadzai tribe, because I have recently had occasion to do so at great length in the case of *Abdu Manan* v. *Musammat Faroqa** decided by me on the 3rd July 1922 and published as North-West Frontier Province Judicial Record No. 111. That case also related to Muhammadzais of the same tract, and it has been quoted by both sides on the present appeal in support of their respective contentions. It is clear from the enquiry which was made in this case in the Trial Court, that we have really no precedent dealing with the question of the creation of *waqf* by Will among Muhammadzais. Admitting that the power to create a *waqf* by Will exists under Muhammadan Law, validity of a testamentary bequest of this nature by a Muhammadzai proprietor must turn upon the wider question of his power under custom to make a bequest to an outsider in the presence of sons. My recent ruling quoted above has laid down with finality certain propositions the correctness of which has not been shaken by any arguments adduced in the present appeal. One is that the power of a sonless proprietor to dispose of the whole of his estate by Will tends to be far more unrestricted than that of a proprietor with male issue. Another is that when a testator has surviving sons, he is not competent entirely to disinherit minor sons or major sons who are not guilty of disloyalty or disobedience. No disloyalty or disobedience has been alleged in the present case. I remarked at the conclusion of that judgment that "I have already stated that I am inclined to think that no restriction exists upon the testamentary power of a Muhammadzai proprietor except that which prohibits, in certain circumstances, the disinheritance of sons. This wider question, however, is not at issue in the present suit, and the above can only be regarded as an *obiter dictum*." The learned Counsel for the appellant has referred to this remark and to the general tenor of the judgment in support of the theory of the "absolutism" of Pathan ownership and the presumption that arises that restrictions upon testamentary bequest are either non-existent or are in process of disappearance. Another authority for this general proposition is the case of *Firdaus Khan* v. *Shah Sowar** decided by me on the 1st of May 1922 and published as North West Frontier Province Judicial Record No. 107. Now, whatever be the general trend of those rulings, they both recognize in unequivocal terms, the existence of a restriction which definitely disallows the complete disinheritance of sons. If, therefore, it can be shown in the present case that the Will in suit amounts, in fact, to disinheritance of the sons, that Will must be treated as invalid, quite apart from any question of the creation of a *waqf*, it the creation of that *waqf* in itself establishes the disinheritance. If this point goes against the appellant, it will be unnecessary for me to adjudicate upon any wider ques

*See 73 Ind. Cas. 79—[*Ed.*]

*See 69 Ind. Cas. 853—[*Ed.*]

tion, and indeed such an adjudication would be more appropriately left to a suit in which such an issue is its substantial *ratio decidendi*.

An examination of the provisions of the Will shows beyond a doubt that the creation of the alleged *waqf* is not really a religious endowment at all. It is, no doubt, *res judicata* that Najaf Khan was not, in making the Will, acting under undue influence. At the same time, it is perfectly obvious that he was, in his old age, completely in the hands of his second wife *Musammat* Naqiya Begam. The so-called *mutwalli* of this alleged *waqf* is *Musammat* Naqiya Begam's brother who was shown, in the suit brought by her, to have himself drafted the Will. Nothing has been shown to establish that Najaf Khan, during the whole of his lifetime, ever made a charitable donation of any kind, or that he was at any time particularly religious minded, or inclined to devote his patrimony to religious purposes. The provisions of the *waqf* which he purported to create, are such as are *prima facie* entirely inconsistent with a religious endowment, if they are not directly contrary to the provisions of Muhammadan Law. It will be observed that the *mutwalli* is placed under no restrictions of any kind. He is not obliged to give any account of his stewardship and he is even given an unqualified power of alienation. Paragraph 467 of Tyabji's Principles of Muhammadan Law has been quoted by the learned Counsel for the appellant as showing that the declaration of a *waqf* may validly include the power of alienation. At the same time, I have been shown no authority for the view that a *waqf* can include an unrestricted power of alienation by a *mutawalli* unless it is at least qualified by some provision which insists that such alienation must be for the benefit of a religious trust and a guarantee that the proceeds must be properly expended upon religious purposes. There is nothing in the present Will to this effect except a somewhat vaguely expressed pious hope that the *mutwalli* will devote the income to religious purposes. In other words, I consider that the learned Counsel for the respondents is justified when he describes this provision of the Will by the somewhat strong expression that there is no genuine *waqf* but merely a clumsy device to divert the estate from the natural heirs to the brother of the testator's favourite wife. It is, in fact, abundantly clear that such a criticism is fully justified. Now, it has been shown by evidence upon the record and by the discussion of this subject contained in Mr. Copeland's order of the 27th of June 1919, that the total value of the share bequeathed to the two sons is not more than about Rs. 16,000. This share is encumbered by the Will with a charge of Rs. 21,000. The details of this latter sum given in the Will are in themselves sufficient to show that it is purely fictitious. There is not the least evidence as to the receipt of any portion of this sum by the sons, nor is there any precedent for the view that when a father has expended certain monies upon the marriages of his sons, such expenditure should form a natural charge upon the estate which he has bequeathed to them. In fact this charge of Rs. 21,000 can only be regarded as nothing more or less than a device to prevent the sons ever obtaining possession of their share. From a financial point of view it is clear that they would be better advised to leave their estate in the hands of the other heirs in preference to redeeming it by the payment of an exorbitant sum out of all proportion to its value. I must definitely hold, therefore, that the provisions of the Will amount, in effect, to a direct disinheritance of the testator's two sons, and that, under the custom obtaining among the parties, a Will which completely disinherits sons is *ipso facto* invalid. The question as to whether it is, nevertheless, possible to accept the creation of the *waqf* irrespective of this charge does not appear to me to arise. It is true that this Court has already validated a portion of the bequest to *Musammat* Naqiya Begam and has accepted the proposition that a portion of the Will can be upheld without necessarily invalidating the whole. At the same time, that portion of the Will which constitutes the creation of the *waqf*, the sole subject-matter of the present suit, is inseparably bound up with the actual disinheritance of the sons and is the prime factor which contributes to that disinheritance. It appears to me that to attempt to validate any portion of the provision relating to the *waqf*, to

narrow its scope or to define it by qualifications, would be nothing more or less than to re-construct an entirely new Will for the testator. No Court has authority to deal with a Will in this manner, and I consider that, so far as regards the creation of the *waqf* and the interest of the present appellant, the Will must be treated as absolutely invalid. On this finding the suit must fail and was rightly dismissed. I, therefore, dismiss this appeal with costs.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 317 OF 1920 WITH RULE No. 667 OF 1920.

July 27, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

FANINDRA NATH ROY—JUDGMENT-DEBTOR—APPELLANT

versus

BHOLA DASSI DEBI—OPPOSITE PARTY—RESPONDENT.

Construction of document—Deed of gift—General words conveying property—Subsequent limitation to particular property—Natural meaning of words employed.

A deed of gift by a Hindu stated, "I give to my daughter the undermentioned properties worth Rs. 399; namely, the properties described in Schedule (*ka*) and the money-lending business mentioned in Schedule (*kha*) below. From this day she shall be competent to realise from the debtors under notes of hand or bonds, etc., the principal with interest either amicably or by law suit." The Schedule (*ka*) gave certain lands, "Cultivated in *nij jote*—Value Rs. 299." The Schedule (*kha*) gave, "Amounts due from various persons on account of money-lending business:—Out of the same Rs. 100 due from *N.* under a mortgage-bond." The deed wound up by saying, "This deed of gift is executed in respect of Rs. 399, being the value of the properties of Schedule (*ka*) and the dues from debtor mentioned in Schedule (*kha*)." It was common ground that the words, "cultivated in *nij jote*—Value Rs. 299," in Schedule (*ka*) and the words, "Out of the same Rs. 100 due from *N.* under a mortgage-bond," were interpolated by or with the authority of the donor after the remainder of the deed was written. The contention of the daughter was that these two passages were inserted in the deed for the purpose of ascertaining and specifying the stamp duty which was payable in respect of the deed, and that the deed in fact transferred to her all the debts which were due in respect of the money-lending business:

Held, rejecting the contention, that the natural and obvious meaning of the deed was that the donor intended to make a gift of the one particular debt specified in the deed, namely the debt due from *N.* and not of all the debts due in respect of the money-lending business.

Appeal against the decision of the First Subordinate Judge, Burdwan, dated the 31st July 1920.

Babu *Gopendra Nath Das*, for the Appellant.

Babu *Tarakeswar Pal Chowdhry*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal from a judgment of the learned Subordinate Judge, First Court, Burdwan in reference to an application under section 47 and O. XXI, r. 2 of the Code of Civil Procedure by the judgment-debtor, Phaniindra Nath Roy. It appears that one Trailokya Nath Banerjee had obtained a decree against the judgment-debtor, and Bhola Dassi Debi, who is one of his daughters, desired to execute the decree and the judgment-debtor objected that she had no title to execute the decree and further argued that the amount of the decree had been paid with the exception of a small sum of about Rs. 50.

The main question in the appeal, namely, whether Bhola Dassi Debi was competent to execute the decree, depends upon a deed of gift which was executed by her father on the 12th *Magh* 1325 B. S. The learned Subordinate Judge held, upon the construction of this deed, that the debt due from the judgment-debtor under the decree was assigned by the donor to his daughter and he consequently decided that point against the judgment-debtor, who is the appellant in this Court.

That deed after referring to the fact that the donor had made two separate deeds of gift in favour of eldest and his youngest daughters provides as follows:—"I being highly satisfied with your deep regard and nursing and service for me, give unto you my second daughter, of my free will, the under-mentioned properties, worth Rs. 399, namely, the remaining properties described in Schedule (*ka*) below, cultivated in *nij jote* and the money-lending business etc., mentioned in Schedule (*kha*) below. You being vested in my rights from this day, do continue to hold and enjoy the properties with great felicity, either in *nij jot* or by letting them out to tenants down to your

heirs with power to alienate by gift or sale, etc., and getting your name registered as owner in respect of the rent-free properties and by payment of cesses, etc. To this neither I nor any body else shall be competent to raise any objection. From this day you shall be competent to realise from the debtors under notes of hand or bonds etcetra the principal with interest either amicably or by law suit ".

The Schedule (*ka*) dealt with the immoveable properties setting out the areas of the respective properties; then the total which amounted to 12 *bighas* 9½ *cattahs*. Then appear the words " cultivated in *nij jote*—value Rs. 299 " It is common ground that the words—" cultivated in *nij jote*—value Rs. 299 " were interpolated in this deed, after the remainder of it was writte by or with the authority of the donor. Then Schedule (*kha*) is as follows :—

" Amounts due from various persons on account of money-lending business :—out of the same Rs. 100 due from Netai Baisnab under a mortgage-bond." Again, it is common ground that the words " ut of the same Rs. 100 due from Netai Baishnab under a mortgage-bond," were interpolated by or with the authority of the donor, after the remainder was written; and the last clause in the schedule is as follows :—

" This deed of gift is executed in respect of Rs. 399 being the value of the properties of Schedule (*ka*) and the dues from debtor mentioned in Schedule (*kha*)."

On the one hand, it has been argued that the words in the body of the deed are sufficient to transfer all the debts which were owing in respect of the money lending business. On the other hand, it has been argued that the words which are to be found in Schedule I mit the gift to the one debt specified in the Schedule, namely, the one hundred rupees due from Netai Baisnab under a mortgage-bond.

On behalf of the respondent it has been argued that the two passages, which I have mentioned as being interpolated, were inserted in the deed for the purpose of ascertaining and specifying the stamp duty which was payable in respect of this deed. I am not prepared to accept the argument that the natural and obvious meaning of the words in the deed is not to be given to them, merely because it is suggested that the words have been inserted in the deeds for the purpose of ascertaining and specifying the stamp-duty which was to be paid. If that were the object of inserting the words in the deed, in my judgment. it ought to have been so stated. Further in this particular case there is an additional reason why that argument should not be adopted, because I find that in the body of the deed the value of all the properties transferred, is stated to be Rs. 399; and in the last clause of Schedule (*kha*) it is again stated that the deed of gift was executed in respect of Rs. 399 being the value of the properties mentioned in both the Schedules. Consequently, in my judgment, that argument, in this case at all events, cannot be adopted.

The words which are to be found at the end of the last sentence but one in the deed of gift, " From this day you shall be competent to realise from the debtors under notes of hand or bonds, etcetra, the principal with interest, " in my judgment obviously refer to the debts which may be owing in respect of the money-lending business, and in respect of the money-lending business only, and that money-lending business, no doubt, is referred to in the body of the deed; but it is referred to in this way; the money-lending business, etc., mentioned in Schedule (*kha*). So that in order to ascertain what the donor intended to transfer, it is necessary to refer to the Schedule.

On reference to the Schedule, in my judgment, the natural and obvious meaning of the words is, that the donor intended to make a gift of the one particular debt, specified therein, namely, the debt due from Netai Baisnab which he intended to transfer to his daughter, the donee. The words "out of the same Rs. 100 due from Netai Baisnab under a mortgage-bond " in my judgment, having regard to the passage which preceded these words, must mean that out of the amounts due from various persons on account of money-lending business the donor intended to give the debt which was due from Netai Baisnab, namely, the sum of Rs. 100. In my judgment that is the obvious mean-

ing of those words. The donor intended to limit his gift to that particular debt. I am confirmed in this construction by the sentence which follows; "and the dues from debtors mentioned in Schedule (*kha*)." The learned Vakil at our request referred to the original deed and found that the Bengali word for "debtor" was in the singular, although it was suggested that perhaps it might be used sometimes in the singular and sometimes in the plural. But when we refer to the last sentence but one in the body of the deed there we find the word "debtors" and the Bengali word in the original deed undoubtedly was in the plural, so that the donor, in my judgment, intended to confine his gift in respect of the debts to the particular one specified in the Schedule.

With great respect to the learned Subordinate Judge, I am unable to accept the construction which has been put upon the deed. In my judgment the debt due from the judgment-debtor was not included in the deed. That is sufficient for the disposal of this appeal; but having regard to the fact that the learned Subordinate Judge did deal with the second point I think it desirable to refer to one matter with respect to the second point. That arises in this way. It was agreed by both parties that Trailokya Nath Banerjee had in fact realised Rs. 100 on this decree after the date of the deed. In my judgment that does not carry the matter much further, because it is quite possible that the decree being in his name he might have realised the amount and intended that it should be paid to his daughter. It is consistent with that view, or with the view that he realised the debt on his own behalf.

Then it was contended on behalf of the appellant that the further sum of Rs. 100 was paid and that a man named Narayan Chandra Chakravarty, who was the son-in-law of the donor had given a receipt for that sum of Rs. 100 on the 16th *Magh* 1326 B. S. and the learned Judge came to the conclusion that that receipt of the 16th *Magh*, to quote his own words, is "evidently a collusive document and I have not the least doubt that it was granted by him without any payment, with a view to put forward a claim to the debts of Trailokya on behalf of his wife Rajlakhi. The letter marked Exhibit C, which is in Narayan's own handwriting, conclusively shows that he was not at Shatinandi on the day on which it purports to have been granted, *viz.*, the 16th *Magh* 1326." On looking at that letter of the 18th *Magh*, with great respect to the learned Judge, I do not understand how that conclusively shows that Narayan could not have been at Shatinandi on the 16th *Magh*. The letter is dated the 18th *Magh* and was written from Kamarpara, which we are informed is about five miles from Shatinandi. It does not seem to me impossible that Narayan, having been at Shatinandi on the 16th *Magh*, could have been at Kamarpara on the 18th *Magh* which was only five miles away; nor is there anything in that letter, which, as far as I can see, is inconsistent with his having been at Shatinandi two days previously.

It is not necessary to decide, and I do not decide, the question whether the Rs. 100 referred to in the receipt of 16th *Magh* 1326 was, in fact, paid or not, but I think it right, having regard to the arguments, which have been addressed to us, to mention this particular matter.

On the ground, with which I dealt in the first instance, in my judgment, the appeal should be allowed and the judgment of the learned Subordinate Judge set aside.

The objection on the first ground mentioned in the Subordinate Judge's order is allowed and the execution proceedings set aside.

The appellant is entitled to his costs in this Court and in the Court of the Subordinate Judge. We assess the hearing fee in this appeal at one gold *mohur*.

The Rule is discharged without costs.

Richardson, J.—I agree.

N. H. *Rule discharged.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 100 OF 1922.

July 5, 1923.

Present:—Mr. Lindsay and Mr. Justice Sulaiman.

BHAIRO TEWARI—DEFENDANT—APPELLANT

versus

RAMNATH RAI—PLAINTIFF—RESPONDENT.

Construction of document—Perpetual lease—

BHAIRO TEWARI *v.* RAMNATH RAI.

Rent payable yearly—No right to eject tenant or enhance rent—Lease or sale.

Where a document purporting to be a perpetual lease of a certain plot of land provided that the lessee, generation after generation, would be entitled to remain in possession of the leased property as *pattadar* and would have the right to have his name recorded in the revenue papers as tenant and perpetual *pattadar*, that he would be liable to pay the rent reserved year after year and instalment after instalment and that in the event of the rent falling in arrears, the lessor would have all the rights of an owner with respect to its realizat on but that there would be no right to have the lease cancelled, the rent enhanced or to eject the lessee:

Held, that as under the terms of the document the proprietary interest of the lessor had not ceased and the liability to pay Government revenue rested on him, the document could not be construed as an out and out sale. [p. 405, col. 2.]

Lalji Misir v. *Jaggu Tiwari*, 7 Ind. Cas. 930; 33 A. 104; 7 A. L. J. 1022 and *Mohammad Niaz Khan* v. *Mohammad Idrees Khan*, 44 Ind. Cas. 227; 16 A. L. J. 233; 40 A. 322, distinguished.

Second appeal from a decree of the District Judge, Ghazipur, confirming that of the Munsif, Rasra.

Mr. *M. L. Agarwala*, for the Appellant.

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

JUDGMENT.—This is a defendant's appeal arising out of a suit to pre-empt two transactions, dated the 18th June 1919 and the 16th September 1919, in the form of perpetual leases. It was conceded on behalf of the plaintiff that there was no custom of pre-emption with respect to leases but his case was that these transactions were in effect sale-deeds in the garb of leases and were, therefore, liable to pre-emption.

On behalf of the defendant it was denied that these transactions were sale transactions. It may now be taken as undisputed that if these transactions were sale transactions, then the defendants admit that they were liable to pre-emption.

Both the Courts below, however, came to the conclusion that these two transactions were sale transactions and not leases. They accordingly decreed the suit.

The defendant Bhairo Tewari has come up in the appeal to this Court and on his behalf the finding referred to above is challenged.

Both these documents are similar in their nature and it will be quite sufficient for our purposes to consider any one of these.

The first one purports to be a perpetual lease of 5 *bighas* 5 *biswas* and 8 *dhurs* for a premium of Rs. 493, the rent reserved being Rs. 5-5-0. The lease goes on to provide that the lessee, generation after generation, shall be entitled to remain in possession of the leased property as *pattadar* and would have the right to have his name recorded in the revenue papers as tenant and perpetual *pattadar*; that he would be liable to pay the rent reserved year after year and instalment after instalment; in the event of the rent falling in arrears, the lessor would have all the rights of an owner with respect to its realisation, but that there would be no right to have the lease cancelled, the rent enhanced or to eject the lessee.

According to the calculation made by the lower Appellate Court the Government revenue came to about 12 annas per *bigha* and rent reserved at Re. 1 per *bigha*. It was on this calculation that the Courts below were of opinion that the rent reserved was a nominal one.

In our opinion it is impossible to construe these documents as sale-deeds.

It is clear that the lessor and his representatives would for all time to come have the right to recover the rent reserved though it may be small. They would also under the law have the right of reversion in case the line of the lessees became extinct. As under the terms of this document the proprietary interest of the lessor has not ceased, there could possibly be no escheat to Government. The liability to pay Government revenue rests on the lessor, and it is difficult to see how he can escape it. It is inconceivable how at any future time it could be open to any of the representatives of the lessee to deny that the transaction was anything other than a lease or to refuse to pay rent. In spite of the direction as to non-enhancement of the rent, it is clear that if, at the next Settlement, the Government revenue were to be increased the lessee would be bound under section 49 of the Agra Tenancy Act to submit to an enhancement of rent or allow the lease to be avoided. So long as these rights are reserved to the lessor, it is impossible to hold that this transaction is an out and out sale. It cannot be said that this document amounts to a deed of sale without also saying that the provision as to the payment

of rent was unenforcible. But it is not permissible for the lessee to urge this as it will be tantamount to pleading an agreement in variation of the terms of the registered document which section 92 of the Indian Evidence Act prohibits.

The learned Vakil for the plaintiff has strongly relied on the case of *Lalji Misir* v. *Jaggu Tiwari* (1). The decision in that case, however, turned on the word *'intigal'* which was held to be comprehensive enough to include leases. In the course of the judgment there was a remark that the transaction was in reality a sale. It is possible that the Court did not thereby mean anything more than that, for all practical purposes, it was a sale.

In the case of *Mohammad Niaz Khan* v. *Mohammad Idrees Khan* (2) the main consideration which influenced the judgment was that, although the question had been raised in the pleadings, and there was a clear finding by the First Court that the disputed transaction was a sale, the lower Appellate Court omitted to consider it. The case is really an authority for the view that a Court is bound on the issue being raised to consider the real nature of the transaction. We do not think that it could have been intended that the relation of the premium paid to the value of the property and the smallness of the rent would in themselves be sufficient to prove that the transaction was a sale and not a lease. In England pepper corn rents are well-known.

Of course, it is possible to conceive of a case where, for instance, soon after the lease, there is a subsequent registered agreement giving up the right to recover rent or where the lease is followed by a surrender. The Court may then come to the conclusion that the two agreements were part and parcel of one and the same transaction, namely, a sale. There may also be cases where a sale is clothed in the garb of a usufructuary mortgage, the money advanced being equal to the value of the property and the terms such as to allow interest to go on accumulating so that year after year it becomes more and more impossible to redeem it. Then, again, there may ostensibly be deeds of gift, where consideration is paid privately. It is obvious that in all such cases the finding that the transaction amounted to a sale does not involve any variation of the terms of the registered contract.

The only ground on which the lower Appellate Court has proceeded is the circumstance that a large premium has been paid and the rent reserved is very small. There are no other circumstances on which reliance has been placed. The inference drawn by the lower Appellate Court that the document must be construed as a deed of sale cannot, therefore, be treated as a finding of fact.

We accordingly allow this appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit with costs.

K. S. P. & N. H. *Appeal allowed.*

(1) 7 Ind. Cas. 930; 33 A. 104; 7 A. L. J. 1022.
(2) 44 Ind. Cas. 227; 16 A. L. J. 233; 40 A. 322;

MADRAS HIGH COURT.

CIVIL APPEAL No. 14 OF 1922.

March 21, 1923.

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

RAMASWAMI IYER AND OTHERS—DEFENDANTS—APPELLANTS

versus

A. S. VENKATARAMA IYER—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family — Alienation by manager—Suit by co-parcener to set aside alienation—Rights and equities of alienee—Partition—Mesne profits

Under the Mitakshara Law, an alienee from an undivided co-parcener of a specific item of family property is entitled to sue for a partition of the family property and for an equitable right in such partition to have that property assigned to his alienor's share if it is possible to do so consistently with the rights of the other co-parceners. But such equity is not restricted to a mere right to sue. Where a co-parcener has sued for recovery of the property alienated by another co-parcener or for partition, the alienee, as a defendant, is entitled to claim partition in that suit itself and have his alienor's share ascertained where it can be conveniently done, without driving the parties to a separate suit, so as to avoid multiplicity of litigation. [p. 410 col. 2.]

Aiyyagari Venkatarammayya v. *Aiyyagari Ramayya*, 25 M. 600 (F. B.), *Chinnu Pillai* v. *Kahmu hu Chetti*, 9 Ind. Cas. 596; 35 M. 47; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 2. 6, *Deendyal* v. *Jugdeep Narain Singh*, 3 C. 198; 1 C. L. R. 40; 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.), *Hardi Narain Sahu* v. *Ruder Perkash Misser*, 10 C. 626; 11 I. A. 26; 8 Ind. Jur. 211; 4 Sar. P. C. J. 510;

5 Ind. Dec. (N. S.) 420 (P. C.), *Kola Balabhadra Patro* v. *Khetra Doss*, 37 Ind. Cas. 168; 31 M. L. J. 275; 4 L. W. 99; (1917) M. W. N. 149, *Maharaja of Bobbili* v. *Venkataramanjulu*, 25 Ind. Cas. 585; 39 M. 265; 16 M. L. T. 181; 27 M. L. J. 400, *Subbe Goundan* v. *Krishnamchari*, 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112, *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal*, 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.), *Davud Beevi Ammal* v. *Ramakrishna Aiyar*, 72 Ind. Cas. 81; 17 L. W. 332; 44 M. L. J. 309; (1923) M. W. N. 202; 32 M. L. T. 263; (1923) A. I. R. (M.) 467 and *Nanjaya Mudali* v. *Shanmuga Mudali*, 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576, cons dered.

Where two out of thirteen Velies of joint family lands were improperly alienated by the managing member of a joint family consisting of father and son, in a suit after his death by his grandson, the only surviving co-parcener of the family, to set aside the alienation and to recover the property from the alienee:

Held, that the alienor, who was a half sharer in the family, having been entitled to property at least equal in value to the property alienated —the family property being a great deal more than double the extent sold—, the alienee was entitled to have the whole of the alienated item allotted to his alienor's share and the plaintiff was not entitled to a decree to any extent and his suit was, therefore, liable to be dismissed. [p 410, col. 2]

A sale by the manager of a Hindu joint family is not *prima facie* void but is only voidable at the instance of the other members of the family, and where a co-parcener succeeds in setting aside an alienation and getting a decree for possession, he is not entitled to mesne profits prior to the date of plaint. [p 410, col. 2.]

Hanuman Kamat v. *Hanuman Mundur*, 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.), *Subbe Goundan* v. *Krishnamachari*, 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112, followed.

Appeal preferred against a decree, dated the 2nd December 1921, of the Court of the Additional Subordinate Judge, Tanjore, in Original Suit No. 11 of 1920 (Original Suit No. 47 of 1918 on the file of the Sub-Court, Kumbakonam).

Messrs. *T. M. Krishnaswamy Iyer* and *A. Krisnnaswami Ayyar*, for the Appellant.—It is well established that an alienee from a member of an undivided Hindu family of a particular item of property is entitled in equity to a partition of the family of the alienor and to recover his alienor's share.

Aiyyagari Venkataramayya v. *Aiyyagari Ramayya* (1), *Chinnu Pillai* v. *Kaimuthu Chetti* (2)

Where it is possible to assign the whole of the alienated property to the alienor's share, without prejudice to the other members of the family such a course will be adopted.

The only short and narrow question here is whether it is necessary for the alienee to bring a suit himself or whether he cannot set up his equitable right in defence in this suit itself.

The decision of their Lordships of the Judicial Committee is an exact case in point, *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (3), the principle of which has been recognised and followed in a case in *Davud Beevi Ammal* v. *Ramakrishna Aiyar* (4) which lays down that in a son's suit to set aside an alienation by the father, the alienee, as defendant, could ask for a general partition in which the principle of equity should be applied and worked out.

In the present case, the alienation was by the plaintiff's grandfather. Both plaintiff's father and grandfather are dead. The total extent of family properties was about 13 Velies but the alienation was only of two Velies. Hence the grandfather was entitled to much more than 2 Velies for his share. There are no other co-parceners or any other persons who have to be added as parties in a general partition suit. It would be inequitable to drive the defendant to a separate suit when no injustice can possibly accrue to any member by allowing the defendant to enforce his equity as defendant.

The general principle of law is also clear that a defendant may by way of defence set up his equities and resist a suit based on a voidable transaction. See

(1) 25 M. 690 (F. B.).
(2) 9 Ind. Cas. 596; 35 M. 47; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246.
(3) 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.).
(4) 72 Ind. Cas. 81; 17 L. W. 332; 44 M. L. J. 309; (1923) M. W. N. 202; 32 M. L. T. 263; (1923) A. I. R. (M.) 467.

Lakshmi Doss v. *Roop Laul* (5) *Mut ukumara Chetty* v. *Anthony Udayan* (6).

It has been held by the Full Bench that it is open to an attaching creditor as defendant to set up by way of equitable defence the invalidity of the alienation. *Ramaswami Chettiar* v. *Mul appa Reddi r* (7) also *Clough* v. *London & North Western Railway Company* (8) and *Rees River Silver Mining Co.* v. *Smith* (9).

Messrs. *K. Bhashyam Aiyangar* and *V. C. Veera Raghavacharia*r, for the Respondent.—The decided cases in Madras establish the position that the right of the purchaser in a case where the alienation is not held to be binding, is only to obtain by a suit for partition his alienor's share.

See *Kota Balabhadra Patro* v. *Khetra Doss* (10), *Nanjaya Mudali* v. *Shanmuga Mudali* (11) *Maharaja of Bobbili* v. *Venkataramanjulu* (12).

The position of such an alienee is not that of a tenant-in-common. He has merely an equity to stand in his alienor's shoes and work it out in a separate suit. His right can be no better than the alienor who has to bring a suit for a general partition of the family properties. It is on this principle that it was held in *Maharaja of Bobbili* v. *Venkataramanjulu* (12) that an alienee has no right to mesne profits. See *Maharaja of Bobbili* v. *Venkataramanjulu* (12).

The decision in *Subbe Gundan* v. *Krishnamachari* (13) is a case directly in point where it was held that the alienees as defendants were not entitled to compel in that suit itself, the plaintiff to submit to a general suit for partition of the family properties. The only remedy of the vendee, it was held was to work out his right in a separate suit. In *Deendyal* v. *Jugdeep Narain Singh* (14) the Privy Council in giving possession to the co-parceners merely gave a declaration that the purchaser for one member acquired the interest of the judgment-debtor and was entitled to have that share determined. In *Suraj Bunsi Koer* v. *Sheo Persad Singh* (15) plaintiffs got possession of the whole subject "to such proceedings as the respondents may take."

In *Hardi Narain Sahu* v. *Ruder Perkash Misser* (16) where the High Court remarked that a decree such as plaintiff asks for here is beyond what was "necessary or proper."

A suit for possession cannot, it is submitted, be converted into one for a general partition at the instance of the defendant. The Privy Council decision in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (3) has been explained in *Subbe Goundan* v. *Krishnamachar* (13) and there is nothing against my present case.

The last of these decisions is a decision exactly applicable to the facts of the present case.

The only principle recognised is that the alienee is entitled to have his alienor's share ascertained, and this can be done only in a separate suit.

JUDGMENT.

Phillips, J.—In this case the plaintiff is the son of one Sambasiva Ayyar, the adopted son of one Sivaramma Ayyar, and he sues to recover possession of certain properties, sold by his grandfather, Sivaramma Ayyar, on the 29th of June 1901 to the 1st defendant who is the father of defendants Nos. 2 to 4 on the ground that the sale was not effected for any necessity and is not binding on him. The plaintiff's

(5) 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4 (F. B.).

(6) 24 Ind. Cas. 120; 38 M. 867; 29 M. L. J. 617; 15 M. L. T. 361.

(7) 59 Ind. Cas. 947; 43 M. 760; (1920) M. W. N. 572; 39 M. L. J. 350; 28 M. L. T. 170; 12 L. W. 475.

(8) (1872) 7 Ex. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.

(9) (1869) 4 H. L. 64 at p. 73.

(10) 37 Ind. Cas. 168; 31 M. L. J. 275; 4 L. W. 99; (1917) M. W. N. 149.

(11) 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576.

(12) 25 Ind. Cas. 585; 39 M. 265; 16 M. L. T. 181; 27 M. L. J. 409.

(13) 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112;

(14) 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.).

(15) 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(16) 10 C. 626; 11 I. A. 26; 8 Ind. Jur. 211; 4 Sar P. C. J. 510; 5 Ind. Dec (N S.) 420 (P. C.).

father and grandfather are now both dead and, therefore, the plaintiff claims to recover the whole of the suit properties.

The Subordinate Judge has found that there was no necessity for the sale and that it is, therefore, not binding on the plaintiff's share and he has given a decree to the plaintiff for a division of the property into two parts and for recovery of possession by the plaintiff of one-half with mesne profits from the date of the sale. The defendants now appeal and state that the decree is wrong and that the plaintiff's suit should have been dismissed on the ground that the first defendant acquired a right by the sale in his alienor's share of the family property and that he is in equity entitled to recover property not greater in value than his alienor's share, and that he is also entitled to ask for partition of the family property, and to have the specific item assigned to his alienor's share, if that is consistent with the rights of other co-parceners.

It is not disputed that an alienee from an undivided co-parcener has a right to sue for a partition of the family property and to recover his alienor's share, in the case of a sale of an undivided share, that share itself, and in the case of sale of a specific item of property an equitable right to have that property assigned, if possible, to his alienor's share. This principle was laid down in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1) and was followed in *Chinnu Pillai* v. *Kalimuthu Chetti* (2) where it was further held that the share of the alienor which passes to the alienee is the share to which the former was entitled at the date of alienation. This latter ruling disposes of the respondent's contention that the 1st defendant has lost all right to the property on the death of Sivaramma Ayyar. It is thus quite clear on all the authorities that the 1st defendant is entitled to a partition of the family property and to have the plaint property assigned to Sivarama Ayyar's share, if that can equitably be done, and can bring a suit for that purpose.

It is then argued for the respondent that relief cannot be given to the defendants in this suit and that they must be left to work out their rights in a subsequent suit; and reliance is placed on several cases cited, beginning with *Deendyal* v. *Jugdeep Narain Singh* (14). In that case it was held by the Privy Council that the purchaser of the right, title and interest of a co-sharer in joint ancestral estate at a sale in execution acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed. In a subsequent case *Hardi Narain Sahu* v. *Ruder Parkash Missir* (16) the same proposition was enunciated, but the Privy Council refused to interfere with the decree of the High Court ordering a partition and allotting a share to the purchaser, but observed that the decree ought to have been for the recovery of the whole property with the other co-parcener with a declaration of the rights of the purchaser. In neither of these cases was the equity of the purchaser to stand in his vendor's shoes with which we are now concerned fully discussed. There have also been observations in several Madras cases that the right of the purchaser is only a right to obtain by a suit for partition, the share to which his alienor was entitled *vide Kota Balabhadra Patro* v. *Khetra Doss* (10) to which one of us was a party; *Nanjaya Mudali* v. *Shanmuga Mudali* (11) and *Maharaja of Bobbili* v. *Venkataramanjulu* (12) and also a very recent case *Subbe Goundan* v. *Krishnamachari* (13). It is only in the last case, however, that the question really arose as to whether the purchaser was to be driven to a suit for partition, or whether relief could be given to him when defending a suit by another co-parcener. In this case the Privy Council ruling in *Ramkishore Kedarnath* v. *Jalnarayan Ramrachpal* (3) was interpreted as meaning that the Privy Council, while raising the point, expressed themselves unwilling to decide it. In *Ramkishore Kedarnath* v. *Jalnarayan Ramrachpal* (3) the suit was instituted by members of a Hindu joint family to set aside an alienation in favour of the 1st respondent who claimed to be adopted into the family and it was held that, as between the alienor Kedarnath and the alienee, Jaynarayan "the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to the former upon a partition; and that the Court, if that position were estab-

lished, would itself, at Jaynarayan's instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jaynarayan to set up such a case, but express no opinion as to its validity either in law or fact; that this pronouncement does relate to the competency of a Court to give a decree for partition in such a suit is, I think, clear from the succeeding passage, according to which, the suit is remanded for trial, "with a declaration that it is competent for the Court in the event of the respondent, Jaynarayan, failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interest in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath." This latter statement seems to me to lay down quite clearly that the Court to which the suit was remanded was competent to order partition and to give the decree accordingly and that the statement in the previous paragraph that their Lordships "express no opinion as to the validity either in law or fact" refers merely to the question of how much of his case Jaynarayan would be able to establish when it formed the subject-matter of enquiry and this is the view taken by the learned Chief Justice in *Davud Beevi Ammal* v. *Ramakrishna Aiyar* (4). In this latter case the suit was by a member of a family for general partition and it was held that the alienee from one of the co-parceners was entitled, if otherwise equitable, to retain property alienated to him as the share of his alienor. No doubt in many cases it would not be easy to enforce the alienee's equitable right in a suit brought by one of the co-parceners to recover the property, because it would be necessay to add all the co-parceners to the suit and ascertain the amount of family property available for division, etc., and consequently it would often be simpler to refer the alienee to a separate suit but that is not to say that, when the circumstances are favourable, the alienee must of necessity be driven to another suit. The principle originally laid down in *Deendyal* v. *Jugdeep Narain Singh* (17) is that the purchaser has the right to compel partition and it was held that he was entitled to take proceedings to have his alienor's share ascertained by partition.

This being the principle, where such share can be ascertained without driving the parties to a separate suit, it should be done in order to avoid multiplicity of litigation. The observations referred to above that the alienee has only a right to sue must be read with reference to the facts of the cases concerned, for, if an equity exists in the alienee and it can be enforced without a separate suit, there seems to me to be no reason for restricting that equity to a mere right to sue, a limitation which cannot be supported on equitable principles. As I read *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (3) that case is authority for the proposition that, in a suit by a co-parcener for recovery of the property or for partition, the alienee is entitled to claim partition if it can conveniently be done. In the present case the plaintiff is the only surviving member of his family and at the time of the alienation on the 1st defendant the plaintiff's grandfather was entitled to one-half share in the family property, he having only one son. The family property at that time was a great deal more than double the amount sold to the 1st defendant for by that sale about two Velies were sold at a time when the family properties amounted to something like 13 Velies of land. There is no necessity in the present case to implead any other co-parceners for they do not exist, and the partition, so far as the plaint property is concerned, can be effected without any trouble at all. Sivaramma Ayyar was entitled to property at least equal in value to the property alienated and there is no reason why it should not be allotted to his share and consequently to the 1st defendant.

The plaintiff has also claimed mesne profits, but he would not be entitled to such except from the date of the plaint. The sale was by a manager of the family and, as such, is not *prima facie* void but only voidable at the instance of other members of the family. [*Vide Hanuman Kamat* v. *Hanuman Mandur* (17) also *Subbe*

(17) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 911; 9 Ind. Dec. (N. S.) 527 (P. C.).

Goundan v. *Krishnamachari* (13).[1] The plaintiff is, therefore, not entitled to any mesne profits until the date of plaint and as it has been held that the defendants are entitled to retain possession of the property, it follows that he is not entitled to any mesne profits. The appeal is allowed and the plaintiff's suit dismissed with costs throughout. The Memorandum of Objections is also dismissed.

Venkatasubba Rao, J.—I agree.

V. N. V. *Appeal allowed.*

N. H.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1196, 1197, 1555-1564, 1566-1571, 1573-1602, 1604-1605, 1607-1622, 1624-1628, 1630-1634, 1636-1645, 1647-1660, 1662-1668, 1670-1681, 1683-1689, 1691-1699, 1701-1710, 1712-1726, 1728-1743, 1779 OF 1921 AND 67 OF 1922.

July 18, 1923.

Present:—Sir Dawson Miller KT., Chief Justice, and Mr. Justice Kulwant Sahay.

Babu RAMJI RAM—PLAINTIFF—APPELLANT

versus

RAM KUMAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 30, 31-B, 37, 115—Intention of Legislature—"Prevailing rate," meaning of—Method of ascertaining prevailing rate—Occupancy holding—Enhancement of rent.

Where more than 15 years have passed since the rents were last settled, the landlord of an occupancy holding is entitled to an enhancement if he can show that the rent paid by the *raiyat* in any particular case is below the prevailing rate paid by occupancy *raiyats* for lands of a similar description and with similar advantages in the same village or in neighbouring villages and that there is no sufficient reason for his holding at so low a rate. [p. 413, cols. 1 & 2.]

The intention of the Legislature in section 30 clause (*b*) of the Bengal Tenancy Act appears to be that when a prevailing rate, whatever may be the exact meaning of that expression, has once been determined as stated in the section, the rate so found shall be deemed to be the prevailing rate unless it can be shown that the actual prevailing rate has risen by an increase in the rents in the village generally owing to a rise in the price of staple food crops. [p. 415, col. 1.]

The expression "prevailing rate" as used in section 31-B of the Bengal Tenancy Act, must have the same meaning as the same expression when used in section 30, that is to say, it must be the prevailing rate paid by the occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages. [p. 415, col. 2.]

In ascertaining the prevailing rate regard must be had to the rents paid by occupancy *raiyats* holding similar lands in the whole of the village or in neighbouring villages and not to the rents paid by some of them only. [p. 415, col. 2.]

Appeal from a decision of the Subordinate Judge (First Court) Patna, dated the 6th June 1921, altering the decision of the Munsif, (First Court) Patna, dated the 20th June 1920.

Messrs. *Syed Hasan Imam, G. Das* and *B. N. Mitter*, for the Appellant.

Messrs. *S. Sultan Ahmed, A. N. Das*, and *S. N. Rai*, for the Respondents.

JUDGMENT

Miller, C. J.—These appeals arise out of a suit instituted by the appellant as plaintiff against a number of tenants claiming assessment of rent or, in the alternative, enhancement of rent under the provisions of section 30 of the Bengal Tenancy Act. The appellant is the proprietor of *Maha* Jahangirpur Mangarjal Zalti in the Patna District bearing *tauz* No. 3183. The *mahal* which consists of a single village comprises what were originally two separate estates. One known as Jehangirpur Mangarjal Zalti was permanently settled with proprietors in 1855 and was entered in the Collectorate Roll as *tauzi* No. 725. The other was known as Mangarjal Taufir bearing *tauzi* No. 746. It will be convenient to refer to these two estates as the Zalti and the Taufir estates. The Zalti estate was sold in 1897 for non-payment of Government revenue and was purchased by the plaintiff's father since deceased. The village in which the estate is situated is bounded on the north by the river Ganges. Within the boundaries of the village lie certain plots which were not included in the Settlement of 1855. These are scattered about in different parts of the village but for the most part have the river as their northern boundary. In the year 1867 they were formed into a separate estate known as Mangarjal Taufir bearing *tauzi* No. 746 as already

stated. This estate was also sold for non-payment of revenue and was purchased by Government in 1879. From that time up to the year 1915, when it was amalgamated with the Zapti estate in circumstances about to be stated, the Government remained the proprietor receiving rents from the tenants.

In 1903 a Cadastral Survey was held including both the Zapti and Taufir estates and in the finally published Record of Rights the plaintiff's father was recorded as the proprietor of the Zapti estate and the Government as the proprietor of the Taufir estate. It appears that the plaintiff's father had always had difficulty in collecting the rents from the tenants on his estate. The Record of Rights of 1903 recorded with regard to the rents payable by the tenants of the Zapti estate that up to that time no rents had been paid. During the Settlement Operations of 1903, after publication of the draft record, proceedings were taken under Part II of Chapter X of the Bengal Tenancy Act for settlement of fair and equitable rents for the tenants of the Government's Taufir estate. This was done under section 104 and the succeeding sections of Part II of Chapter X and rents were accordingly settled. After the final publication of the Record of Rights proceedings were also taken under Part III of Chapter X for settlement of rents payable by the tenants of the Zapti estate. This was done under section 105 and the succeeding sections of Part III of Chapter X. The rents then settled have been paid to the Government in the one case and to the plaintiff or his father in the other since that date.

The plaintiff's father, however, claimed that the lands of the Taufir estate really formed part of the Zapti estate settled with his predecessor-in-interest in 1855. This contention was raised during the Settlement Operations but he failed to establish his claim before the Revenue Authorities and in 1913 brought a suit against the Secretary of State to establish his title to the lands included in the Taufir estate. In the main his claim failed. The decree of the Trial Court give him a small portion only of what he claimed. He appealed to the High Court at Calcutta. In that appeal a compromise was come to by which the Government agreed to settle the disputed lands with the plaintiff at a revenue equal to 80 per cent. of the rental obtained from the tenants and to amalgamate the newly settled area with that of the Zapti estate. The plaintiff also agreed to forego his rights in that portion of the land in respect to which a decree had been passed in his favour by the Trial Court and to take a *patta* and execute a *kabuliyat* giving effect to the terms of the compromise. A decree was then passed in accordance with the terms of the compromise. The plaintiff's father thus recognised the Government's proprietary right in the lands in suit and took settlement from them of these lands which were amalgamated with the Zapti estate, the whole estate being entered in the Collectorate under a new *tauzi* No. 3183. The compromise decree is dated the 21st February 1916.

The plaintiff in the present suit claimed that the lands on the Taufir estate had all along formed part of the Zapti estate settled with his predecessor in 1855 and that the settlement of rents made at the instance of the Government under Part II of Chapter X of the Bengal Tenancy Act during the Survey Operations of 1903 was not binding upon him and that it was still open to him to ask for a settlement of fair and equitable rents.

There is a concurrent finding of both the Trial Court and the lower Appellate Court that the Taufir lands were not included in the lands settled in 1855. Moreover, in his suit against the Government the plaintiff accepted by his compromise the settlement of those lands at a certain revenue and acknowledged the Government's right to make such a settlement. In view of the findings of the lower Courts it is not open to us in second appeal to go into this question and we must hold that the plaintiff is bound by the proceedings of 1903 entered into by his predecessor-in-title.

The claim for enhancement of rent, however, stands upon a different footing. It is more than 15 years since the rents were settled and there is nothing in sections 37 or 113 of the Bengal Tenancy Act to

operate as a bar to a suit for enhancement.

The plaintiff's claim for enhancement is based upon section 30 of the Bengal Tenancy Act. He contends, in the first place, that the rent paid by the *raiyats* of the Taufir lands is below the prevailing rates paid by occupancy *raiyats* for lands of a similar description and with similar advantages in the same village or in neighbouring villages within the meaning of clause (*a*) of that section. In the alternative he claims that he is entitled to enchancement because there has been a rise in the average local price of staple food crops during the currency of the present rents within the meaning of clause (*b*) of the section.

The learned Munsif before whom the case came for trial was of opinion that the plaintiff had made out a case for enhancement under clause (*a*) of section 30 on the ground that the rents paid were below the prevailing rates.

The Subordinate Judge on appeal considered that the claim for enhancement under section 30, clause (*a*) was barred in the present case by the provisions of section 31-B. The view he took was that the proceedings for settlement of rents of the Taufir lands during the Survey Operations of 1903 amounted to a determination of the prevailing rate within the meaning of section 31-B and that the rents having been determined in accordance with that rate there could never afterwards be an enhancement on the grounds mentioned in section 3 (*a*). He considered, however, that there might be an enhancement at the ground of a rise in the average local price of staple food crops within the meaning of section 30 (*b*) and as this matter had not been considered by the Munsif he remanded the case to the Trial Court to determine whether the plaintiff was entitled to an enhancement under section 30 (*b*) and if so to what extent. From that decision the plaintiff has appealed to this Court.

It being more than 15 years since the rents were last settled the plaintiff is clearly entitled to an enhancement, if he can show that the rent paid by the *raiyat* in any particular case is below the prevailing rate paid by occupancy *raiyats* for lands of a similar description and with similar advantages in the same village or in neighbouring villages and that there is no sufficient reason for his holding at so low a rate. It is not disputed by the respondents that the plaintiff, if he should fail to make out a case under section 30 (*a*), is entitled to enahancement under section 30 (*b*) if he can prove a rise in the price of staple food crops during the currency of the present rent. The plaintiff, however, is not content with this and contends that the case falls within the provisions of section 30 (*a*) and that the rate of rent paid by the tenants is in fact below the prevailing rate. The real question is, what is the prevailing rate and how is it to be ascertained. The defendants rely upon the provisions of section 31-B. That section reads as follows: "When the prevailing rate has once been determined by a Revenue Officer under Chapter X or by a Civil Court in any suit under this Act, it shall not be liable to enhancement save on the ground and to the extent specified in section 30 (*b*) and section 32." Section 32 limits the extent to which an enhancement can be made on the ground of a rise in prices. I entirely agree with the learned Munsif when he says that the wording of section 31-B is not very happy. It refers to the determination of the prevailing rate by a Revenue Officer under Chapter X of the Act but on turning to Chapter X no provision will be found for determination of the prevailing rate by a Revenue Officer or anybody else and the expression prevailing rate is nowhere there used. Chapter X provides for the preparation and publication of a Record of Rights and for the settlement of rents in certain cases. Under section 102 the particulars to be recorded include the rent payable at the time the Record of Rights is being prepared.

Part II of Chapter X which begins with section 104 provides for the settlement of rents and preparation of a Settlement Rent Roll and disposal of objections in cases where a settlement of land revenue is being or is about to be made. Part III provides for settlement of rents and decision of disputes in cases where a settle-

ment of land revenue is not being or is not about to be made. Part II comes into operation after publication of the draft Record of Rights, under section 103A, sub-section (1). Part III comes into operation after the final publication of the record under section 103 A, sub-section (2), but in neither case is any provision directly made for ascertaining the prevailing rate. Under Part II, however, by section 104, the Revenue Officer is authorised to settle fair and equitable rents for tenants of every clause and to prepare a Settlement Rent Roll. Under section 105 A (*i*) (*c*) where the landlord and the tenant do not agree as to the fair and equitable rent the Revenue Officer may, if the circumstances are in his opinion such as to make it practicable, prepare a table of rates showing for any local area, estate, tenure or village or part thereof or for each class of land in any local area, estate, tenure or village or part thereof, the rate or rates of rent fairly and equitably payable by tenure holders and *raiyats* and under-*raiyats* of each class and may settle and record all or any of the rents on the basis of such rates in the manner hereinafter described. It is also provided in the same section that the Revenue Officer may settle the rents by maintaining the existing rentals recorded in the draft record or by enhancing or reducing such rentals and in making such settlement regard shall be had to the principles laid down in sections 69, 27 to 36 and other sections. Sections 27 to 36, no doubt, show how the prevailing rates may be arrived at. In the succeeding sections provision is made for the publication of a draft Settlement Rent Roll and for determination of objections thereto by the Revenue Officers and for the final publication of the Settlement Rent Roll after confirmation by the confirming authority. Section 104-H gives liberty to any person aggrieved by an entry of a rent settled in a Settlement Rent Roll or by an ommission to settle a rent for entry in such Settlement Rent Roll to institute a suit in a Civil Court within six months of the date of the certificate of final publication of the Record of Rights, and the Court has power to settle a fair rent in such cases being guided by the rents of other tenures or holdings of the same class comprised in the same Settlement Rent Roll. Somewhat similar provisions are made in Part III of Chapter X for settlement of fair and equitable rent upon the application of the landlord or the tenant within two months of the date of the certificate of the final publication of the Record of Rights. But in neither of these cases is any express provision made in terms for determining the prevailing rate. I can only suppose, however, that by using the expression prevailing rate in section 1-B it was intended to refer to the table of rates prepared by the Revenue Officer under Part II of Chapter X. If this is the correct interpretation of section 31 B it then provides that "it," that is, the prevailing rate, 'shall not be liable to enhancement save on the ground and to the extent specified in section 30, clause (*b*), and section 32." Here, again some difficulty arises as to the interpretation of this part of the clause. It seems hardly appropriate to speak about the enhancement of a prevailing rate of rent. The prevailing rate of rent in any particular village or local area is a question of fact and must depend upon the actual rents existing in that area from time to time. The prevailing rate increases or diminishes according to existing circumstances. The process is automatic. The prevailing rate is not enhanced in the sense in which the rent of an individual holding is enhanced, that is, by some act of the parties themselves or by the enforcement of some right. The existing circumstances no doubt may have to be determined by judicial enquiry but the prevailing rate automatically increases or diminishes according to the existing circumstances, and to say that it shall not be liable to enhancement except on the ground of an increase in the price of staple food crops without consideration of the actual rents existing appears to me to be tantamount to saying that the prevailing rate shall not be the prevailing rate. Again, it is difficult to see how the prevailing rate of money rents can be enhanced merely on the ground of a rise in the price of crops. The price may rise but the rents may remain the same. Unless the rents have increased, the prevailing rate of money rents cannot increase whatever may be the price of

food crops. The section does not say that the prevailing rate shall not be enhanced except on the ground of an increase in the rents in the village due to the rise in the price of staple food crops but merely that it; that is to say, the prevailing rate, shall not be liable to enhancement save on the ground specified in section 30, clause (*b*), that is, on the ground that there has been a rise in the staple price of food crops during the currency of the present rent. It seems obvious that the rise in the price of crops can have no effect on the prevailing rate of money rents unless these rents themselves have been increased.

Applying the best judgment I can to the interpretation of this unhappily worded section, the intention appears to me to be that when a prevailing rate, whatever may be the exact meaning of that expression in this section, has once been determined as stated in the section the rate so found shall be deemed to be the prevailing rate unless it can be shown that the actual prevailing rate has risen by an increase in the rents in the village generally owing to a rise in the price of staple food crops.

At the same time, I am by no means confident that I have arrived at a correct solution of the intention of the section, but, applying the interpretation which, to the best of my judgment, it appears to bear, it becomes necessary to consider whether, on the facts found in the case, the section is a bar to the plaintiff's claim for enhancement under section 30, clause (*a*), which reads as follows:—

"The landlord of a holding held at a money-rent by an occupancy-*raiyat* may, subject to the provisions of this Act, institute a suit to enhance the rent on one or more of the following grounds (namely):—

(*a*) that the rate of rent paid by the *raiyat* is below the prevailing rate paid by occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages, and that there is no sufficient reason for his holding at so low a rate."

Sections 31 and 31 A lay down certain rules to be followed in determining what is the prevailing rate and provide *inter alia* that regard should be had to the rates generally paid during a period of not less than three years before the institution of the suit. Section 31-A, which has not hitherto been applied to this Province, also lays down rules, by which the prevailing rate for any class of lands may be ascertained in a case coming under section 30, clause (*a*). These sections, as well as section 31-B, must be read together with section 30 and the expression 'prevailing rate' as used in section 31 B must, I think, have the same meaning as the same expression when used in section 30; that is to say, it must be the prevailing rate paid by the occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages. It follows, therefore, that in ascertaining the prevailing rate regard must be had to the rents paid by occupancy *raiyats* holding similar land in the whole of the village or in neighbouring villages and not to the rents paid by some of them only.

The learned Subordinate Judge was of opinion that when the rents of the Taufir lands were settled under Part II of Chapter X of the Act in 1903 a prevailing rate within the meaning of section 31 B had been ascertained by the Settlement Officer. On reference, however, to the proceedings which took place at that time it does not appear to me that his opinion was justified. What took place at that time appears to have been as follows: The Settlement Officer found that the lands were divided generally into two classes which he describes as inland and diara areas. In the former there existed some 12 different rates varying from Rs. 4-2-0 to 6 annas. These he reduced to one rate only, namely, Rs. 3. In the latter he found 8 rates varying from Rs. 3 to 6 annas. These he reduced to 3 rates, namely, Rs. 2, Rs. 1-8-0 and 8 annas and assessed the rents of the different descriptions of land accordingly. In assessing these rates he did not take into account the rate of rent paid by *raiyats* holding lands of similar description in the village in the Zapti estate. The rates found by him were based solely upon a consideration of the rents paid by the tenants of the Taufir estate. It cannot, therefore, be said that these rates represent the prevailing rate paid by occupancy

raiyats of lands of a similar description and with similar advantages in the same village. Still less can it be said to represent the prevailing rates paid for lands of a similar description in neighbouring villages. It was also urged before us on behalf of the appellant that it is notorious that the rates paid by the tenants of a Government *Mahal* are, as a rule, lower than those paid to an intermediate proprietor holding from Government. No evidence, however, was called to our attention in support of this argument and it is not a matter of such notoriety that we would, in my opinion, be entitled to take judicial notice of it in the absence of any evidence to support it.

In contrast to this method of arriving at a rate of rent payable by the tenants of the Taufir estate our attention was urgently drawn to the manner in which the rates of rent payable by the tenants of the Zapti estate were ascertained by the Settlement Officer shortly afterwards in proceedings under Part III of Chapter X. In assessing the rates of rent payable by the tenants of the Zapti estate under Part III of Chapter X very elaborate investigations took place. The rents payable by tenants of lands of a similar description not only in the Taufir lands of the same village but also in all the surrounding villages over a large area were taken into consideration and a rate of rent for the different classes of land was then arrived at and the rents settled accordingly. The rates of rent so arrived at formed the subject of appeal to the Special Officer and subsequently to the High Court with the result that in each case the rents so founded were affirmed. It was also found by the Munsif that the Taufir lands were not inferior to the adjoining Zapti lands but were similar in every respect and had similar advantages. This finding was not disturbed by the Officiating Subordinate Judge on appeal. The Munsif found that the rates payable by the tenants of the Zapti lands should be taken as the prevailing rates of the Taufir lands of a similar description and with similar advantages and with the certain exceptions with which we are not now concerned, decreed that the rents of the holdings in suit should be enhanced according to the rates given in Schedule I of the plaints which represented the rents payable by the tenants of the Zapti lands. He was also of opinion that the rates found with regard to the Taufir lands in 1903 were not the prevailing rates within the meaning of section 31-B. The learned Officiating Subordinate Judge was of opinion that the Trial Court's view of the effect of section 31-B. was a very narrow one and that the Settlement Officer acting under Part II of Chapter X of the Act had in fact settled fair and equitable rents with reference to the quality of the land at the rate already existing. He does not deal in terms with the fact that the rents payable by tenants in other parts of the village for lands of a similar description were not taken into account, but says: "When a fair and equitable rent was going to be settled it cannot be urged with any show of reason that the prevailing rate was not taken into consideration. I think a fair and equitable rent and the prevailing rates are hardly distinguishable because one seems to be impossible to be found out without having regard to the other, but because the Revenue Officer did not say in expressed terms that he settled a fair and equitable rent having regard to the prevailing rates in the village it cannot be urged with any force that no prevailing rate was taken into account." With great respect to the learned Officiating Subordinate Judge I think he laid too much stress upon the fact that the Settlement Officer purported to find what he considered a fair and equitable rent. What he in fact found was that the rents paid by the tenants of the Taufir lands were divided into a number of rates. These he reduced in number and settled the rents by increasing some and diminishing others so as to reduce them more or less to the same level. He did not take into consideration at all the rents paid or payable by the tenants of the Zapti lands of a similar description in the same village or by the tenants of neighbouring villages and, in my opinion, the prevailing rate within the meaning of section 31-B was not determined by the Revenue Officer on that occasion. The learned Officiating Subordinate Judge was also of opinion that the rates found as representing the prevailing rate under

Part III of Chapter X of the Act did not necessarily represent the prevailing rate at the time of the suit and that there was, therefore, no evidence before him upon which the actual prevailing rate could be ascertained. We have not the evidence in detail before us and I am not sure how far the learned Officiating Subordinate Judge was justified in concluding that there was not sufficient evidence on the record to enable the Court to ascertain the actual prevailing rate. It would appear that the rates found in 1903, both in respect of the Taufir lands and the Zapti lands, were before the Court and it appears to have been assumed that the rates then fixed had continued up to the date of the suit. If, however, the learned Judge was not satisfied, that this was so I think he ought to have remanded the case to the Trial Court for evidence upon this point.

Although I consider that on the main question the learned Munsif was right and the learned Officiating Subordinate Judge was wrong, I am not satisfied that the plaintiff is entitled to enhancement according to the rates given in Schedule I of the plaints. That Schedule apparently takes no account of the rates payable by the tenants of the Taufir lands. In ascertaining the prevailing rate of the different descriptions of land account should be taken not only of the rates payable by the tenants of the Zapti land but also of the rates payable by tenants of similar lands in what was previously the Taufir estate and the Court in ascertaining the prevailing rate should proceed according to the method laid down by Mullick, J., in *Brij Behari Singh* v. *Sheo Sankar Jha* (1). If upon the evidence on the record it is impossible to arrive at the prevailing rate of rent then the Court should issue a comission for a local investigation as ordered in that case. I hope, however, that on further consideration it will not be necessary to take this course.

In the result, I think, the decision of the lower Appellate Court must be set aside and the cases remanded to that Court to ascertain the prevailing rates according to the principles above indicated and to find to what extent, if any, the plaintiff is entitled to enhancement under section 30, clause (*a*), of the Bengal Tenancy Act. If, on further consideration, it should turn out that no case for enhancement is proved by reason of the present rents not being below the prevailing rates than the Subordinate Judge's order remanding the cases to the Munsif to ascertain whether the plaintiff is entitled to enhancement under section 30, clause (*b*), will take effect. The plaintiff is entitled to the costs of these appeals against the respective respondents who have appeared. The order for costs passed by the Officiating Subordinate Judge will stand as made by him.

Kulwant Sahay, J.—I agree.

K. S. D. *Case remanded.*

(1) 39 Ind. Cas. 851 2 P. L. J. 124 1 P. L. W. 434 (1917) Pat. 108.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 117 F. OF 1922.
February 28, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

Sri PRATAB CHANDRA DEO DHABAL DEB—DEFENDANT—APPELLANT
versus
Srl Raja JAGADISH CHANDRA DEO DHABAL DEB—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution pending appeal—Extensive estate—Receiver, appointment of.

During the pendency of an appeal relating to the succession to an extensive impartible estate the management of which had for nearly half a century been in the hands of the Court of Wards and which required to be developed and managed with special care, respondent took out execution of his decree seeking delivery of possession of the estate and defendant applied for the appointment of a Receiver to manage the estate:

Held, that having regard to the history of the estate and its present condition, the best interests of the estate would be served by the appointment of a Receiver who would act under the direction of the Court. (p. 419, col. 1.)

PRATAB CHANDRA DEO *v.* JAGADISH CHANDRA.

Babu *Dwarka Nath Chukrabutty*, Dr. *Dwarka Nath Mitter*, Babu *Pyarimohun Chatterjee*, (with him Babus *Roma Prosad Mookerjee* and *Krishna Lal Banerjee*), for the Appellant.

Sir *B. C. Mitter*, Babu *Ram Chunder Mozamdar*, (with him Babus *Brojo Lal Chakrabuty*, *Suresh Chunder Das* and *Pramatha Nath Bandopadhya*), for the Respondent.

JUDGMENT.—The subject-matter of the litigation, which has given rise to this Rule, is the Dhalbhum estate, described in these proceedings as an impartible *raj* subject to the operation of the Rule of lineal primogeniture among the members of a family governed by the Mitakshara School of Hindu Law. Raja Satrughandeo Dhabal Deo, the last holder of the *raj*, died on the 1st March 1916. He was at that time a disqualified proprietor and his estate was under the management of the Encumbered Estates Act authorities. Upon his death, disputes broke out as to the succession to the *raj*. The plaintiff claimed the estate under a testamentary instrument executed by the deceased so far back as the 11th May 1905. The defendant claimed title as the next ticker under the Hindu Law. There was the usual preliminary controversy in the matter of land registration before the Revenue Authorities. The Deputy Commissioner, the Commissioner, and the Board of Revenue successively upheld the claim of the present petitioner, and the estate continued in the possession of the Collector of Singbhum on behalf of the Court of Wards. The order of the Board of Revenue was passed on the 13th July 1917, and the present suit was instituted by the plaintiff on the 17th March 1921 for recovery of the estate upon establishment of title on the basis of the Will. After a protracted trial the suit was decreed on the 21st August 1922. An appeal was thereupon lodged in this Court on the 30th August 1922. The plaintiff meanwhile took out execution of the decree and had a notice issued on the Manager of the Court of Wards to deliver the estate to him. The present Rule was thereafter issued at the instance of the appellant in order that execution might be stayed and the subject-matter of the litigation placed in the hands of a Receiver.

The value of the property in dispute is stated in the plaint as Rs. 11,99,000. Besides moveable properties, it includes a sum of five and half lakhs invested in War Bonds and numerous villages situated in the Provinces of Bengal, Behar and Orissa. A considerable portion of the estate was granted in temporary *ijarah* by the lat proprietor on the 8th March 1905 to the Midnapur Zemindari Co. for a term of 25 years. Since the death of the grantor, there appear to have been negotiations between the Court of Wards and the Company for purchase of the remainder of the term, and an attempt was made to complete the transfer during the pendency of the litigation in the Court below. The completion of the transaction was, however, stopped by order of the Subordinate Judge. In this connection, our attention has been drawn to a passage from the volume on Singbhum in the Bengal District Gazetteers Series prepared by Mr. O'Malley and published by the Government.

"In the midst of these troubles, the proprietor Babu Satrughan Deo Dhubal Deb, an old man of 75, having incurred debts to the extent of four lakhs of rupees, the estate was, on the application of his heir, brought under the protection of the Chota Nagpur Encumbered Estates Act, VI (B. C.) of 1876. Meanwhile, the proprietor had leased out the whole estate for 25 years on terms which left no margin of profit to the lessees from existing assets of the estate, and were a direct incentive to illegal rent enhancement and to interference with established rights. Very serious administrative difficulties were apprehended, and, accordingly, on the recommendation of the local officers, the sanction of the Government of India was obtained to the initiation of the (Settlement) operations." Apart from the lands leased out to the Midnapur Zemindari Co., there is a considerable tract in the direct possession of the proprietor. The extent of such territory cannot be determined with precision from the materials on the record, but it has been stated that, in addition to the net rent of Rs. 59,435 annually payable by the Company, there

is a net annual profit of Rs. 35,145 derived from forests, minerals, markets and fisheries. The plaintiff contends that he should be placed in possession of the estate and offers to furnish security to such extent and of such description as the Court may direct. The defendant urges, on the other hand, that the management should be placed in the hands of a Receiver for the protection of the estate which requires to be developed and managed with special care. Our attention has also been drawn to the significant fact that, in the past, there have been such difficulties in connection with the management of the estate, which is situated in a backward tract inhabited principally by aborigines, that for nearly half a century the Government have been obliged to keep the management in the hands of the Court of Wards or of the Encumbered Estates Act authorities; thus, the Court of Wards had possession during the years 1867-83, 1886-89, 1920-22 and the Encumbered Estates Act authorities; during the years 1905-1920. The plaintiff himself, while anxious to be placed in possession, is not slow to hint that even under the administration of these public authorities, there has been danger of waste, and that suits for resumption instituted by the Court of Wards have not only to be continued and looked after but that fresh suits for the same purpose require to be instituted. The plaintiff, on the other hand, does not hesitate to assert that it is necessary to control and supervise the management of such influential lessees as the Company in their dealings with the aboriginal tenants. Steps have also to be taken to get back from the Company tenures and under-tenures purchased by them as *ijaradars*, and to recover from the representatives of Prince Bukhtiar Shah, valuable mining rights improvidently granted to him by the late proprietor. We have taken into consideration these and other facts connected with the history of the estate, as also its present condition, and we have arrived at the conclusion that the best interest of the estate will be served if, during the pendency of this appeal it is placed, in the hands of a Receiver who will act under the direction of this Court and we order accordingly. The plaintiff and the defendant will be at liberty to submit within two weeks the names of the suitable persons. A letter will also be addressed to the Board of Revenue, Behar and Orissa, with the request that one or more suitable names may be suggested. After the appointment of the Receiver, the Court will deal with such applications as may be made for directions as to the disposal of the corpus or of the income of the estate.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 89 OF 1923.

March 27, 1923.

Present:—Mr. Justice Scott-Smith.

P. W. FITZHOLMES—JUDGMENT-DEBTOR—APPELLANT

versus

WARYAM SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 151, O. XXI, r. 29—Execution of decree—Order prohibiting payment to decree-holder—Appeal—Payment order enforced by decree-holder through Bank—Power of Executing Court to prohibit Bank from making payment.

All orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed and relating to the execution thereof and are, as such, appealable. [p. 420, col. 2.]

Ghazidin v. *Fakir Bakhsh*, 7 A. 73; A. W. N. (1884) 226; 4 Ind. Dec (N. S.) 301, relied on.

A decree-holder attached certain money belonging to his judgment-debtor which was lying to his credit in a branch of a certain Bank, and obtained a payment order from the Executing Court which he presented to another branch of the same Bank and asked it to collect the money. The money was obtained by the latter branch but before it could be paid to the decree-holder the Executing Court issued an order prohibiting the Bank from making the payment;

Held, (1) that the Executing Court had no jurisdiction to make the order under O. XXI, r. 90 of the Civil Procedure Code, inasmuch as, at the time of making the order, there was no suit pending before it against the decree-holder on the part of the judgment-debtor; [p. 420, col. 2.]

(2) that after collecting the payment order the Bank held the money on behalf of the decree-

holder as his agent and that the Court had no power to interfere with the actual delivery of the money to the decree-holder. [p. 421, col. 1.]

Miscellaneous second appeal from an order of the District Judge, Lahore, dated the 2nd January 1923, reversing that of the Subordinate Judge, Second Class, Lahore, dated the 15th March 1922.

Malik *Barkat Ali*, for the Appellant.

Lala *Mehr Chand Mahajan* and Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The facts of the case out of which the present second appeal arises are fully stated in the judgment of the learned District Judge dated the 2nd January 1923 and in his order passed on review on the 8th of January 1923 and are briefly as follows:—Waryam Singh, respondent, in the execution of an *ex parte* decree obtained by him against Mr. Fitzholmes, the appellant, attached certain money belonging to the judgment-debtor which was at his credit in the Kasauli branch of the Alliance Bank of Simla. The decree holder obtained a payment order from the Executing Court in Lahore which he presented to the Lahore Branch of the Alliance Bank of Simla and asked it to obtain the money from Kasauli. The Lahore Branch got the money transferred to it on the 23rd January 1922 but on the same date it received a prohibitory order from the Executing Court directing it not to pay the money over to Waryam Singh. Waryam Singh moved the Executing Court to have this order set aside but the Court on the 15th of March 1922 refused to set it aside and directed that it should stand until further orders. From this order Waryam Singh appealed to the District Judge who held that the Executing Court acted *ultra vires* in issuing a prohibitory order on the 19th of January 1922, as on that date there was no suit pending in that Court between the parties within the meaning of O. XXI, r. 29 of the Civil Procedure Code. It should be mentioned that Mr. Fitzholmes' reason for asking for a prohibitory order was that the decree had been obtained against him by fraud and he said that he was about to institute a suit to have it declared that the decree was not of any force against him. The order of the 15th of March 1922 was treated as one under section 47 of the Civil Procedure Code and Waryam Singh appealed from it as such. In my opinion the objection now raised that no second appeal arises because the order is not one under section 47, Civil Procedure Code, has no force. It was held in *Ghazidin* v. *Fakir Bakhsh* (1) that all orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed, and relating to the execution thereof, and, as such, appealable. I hold that the present is a second appeal from an order passed under section 47, Civil Procedure Code. Now, it is quite clear that the Executing Court had no power to stay the execution under O. XXI, r. 29, of the Civil Procedure Code because at that time no suit was pending before it against the decree-holder on the part of the judgment-debtor. It is, however, contended that the Court had an inherent power under section 151 of the Civil Procedure Code to stay execution. In my opinion it had such a power.

In the District Judge's Court the judgment-debtor put in cross-objections in which he urged that the original attachment of the money at his credit in the Kasauli Branch was contrary to law because the Lahore Court had no jurisdiction to attach property outside the limits of its territorial jurisdiction. The learned District Judge refused to consider this question on the ground that it was not raised in the Executing Court and he also considered it doubtful whether the order of the Court attaching the property could be properly attached by means of cross-objections in connection with an appeal from an entirely different order. Mr. Barkat Ali says that the quesion of jurisdiction was raised in the Executing Court in an application of the 23rd February 1922. No such application is on the record of the Executing Court though it appears that there was such an application which was put upon the record of the original suit instituted by the judgment-debtor for a declaration that the *ex parte* decree was not binding upon him. It was said that the application was put by a mistake upon

(1) 7 A. 731 A. W. N. (1884) 226; 4 Ind. Dec. N. S.) 901.

the wrong record. It was incumbent upon the judgment-debtor to see that the application was put upon the right record, and I cannot take any account of an objection which is not on the record which is before me in the present appeal. Under O. XLI, r. 22, it was open to the judgment-debtor to support the order of the Executing Court on any grounds decided against him by that Court. If the Court had decided against him on the question of jurisdiction he could have raised that point again in the Appellate Court under r. 22 but the Executing Court did not decide the point at all. I, therefore, agree with the learned District Judge in his view that it was not open to the judgment-debtor to raise this point by way of cross-objections in the appeal of the decree-holder from the order of the Executing Court refusing to set aside the prohibitory order.

It is strongly contended on behalf of the respondent that once the payment order was given to the decree-holder by the Executing Court the money had been paid to him so far as the Court was concerned, and the Court could not thereafter go back and prohibit the payment of the money. It was also contended that the money was received by the Lahore Branch of the Bank from the Kasauli Branch as the agent of the decree-holder and that the money when received by the Bank in Lahore belonged to the decree-holder and it was no longer within the jurisdction of the Court to deal with it in any way. The learned District Judge gave expression to a similar opinion in the last paragraph of the order passed by him in review on the 8th of January 1923. I agree with the Counsel for the respondent that the Lahore Branch held the money on behalf of the decree-holder as his agent and that the Court could not interfere with the actual delivery of the money to the decree-holder.

I, therefore, uphold the order of the lower Appellate Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 57 OF 1921.

March 20, 1923.

Present:—Mr. Justic C. C. Ghose and Mr. Justice Panton.

KRISHNA CHANDRA DEY—PLAINTIFF—APPELLANT

versus

W. GRAHAM—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), ss. 14, 15, 16—Agreement to sell—Vendor unable to convey good title to whole property—Purchaser, whether can enforce specific performance of remainder—Abatement.

It is of the essence of specific performance that part only of an agreement should not be performed. The exceptions to this general rule are contained in sections 14, 15 and 16 of the Specific Relief Act. [p. 425, col. 1.]

Under section 14 of the Specific Relief Act, specific performance of a contract may be enforced by either the promisor or promisee, provided the part which cannot be performed is inconsiderable and may be compensated for in money and provided that such compensation is made. [p. 425, col. 1.]

Under section 15 of the Specific Relief Act, the party in default may claim specific performance without compensation, where the part left unperformed is small in value and admits of compensation, but he cannot have specific performance where such part is considerable and does not admit of compensation. [p. 425, col. 1.]

Under section 16 of the Act where a contract consists of several parts, which are separate from, and independent of, one another, and some of which cannot and ought not to be performed, such part or parts, as can and ought to be performed, may alone be specifically enforced, with a proportionate abatement in the price. This is on the principle that such a contract though nominally one, is actually divisible and where the Court enforces what is apparently a part of the contract, it really enforces an entire and complete contract. [p. 425, col. 1.]

The question whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract. [p. 425, cols. 1 & 2.]

Though the difference between the property contracted to be sold and that which the vendor can actually convey may be great, the Court will generally, notwithstanding this circumstance, enforce the contract where the vendee is willing to take whatever interest the vendor has. [p. 426, col. 1.]

Jones v. *Evans*, (1848) 17 L. J. Ch. 469; 12 Jur. 664; 80 R. R. 192, *Barnes* v. *Wood*, (1869) 8 Eq. 424; 38 L. J. Ch. 683; 17 W. R. 1080, *Hooper* v. *Smart*, [*Bailey* v. *Piper*], (1874) 18 Eq. 683; 43 L. J. Ch. 704; 31 L. T. 86; 22 W. R. 943 relied on.

But if the vendee is, from the first, aware of the defendant's incapacity to convey the whole of what he has contracted for, he cannot, generally insist on having at an abated price what the vendor can convey. [p. 426, col. 1.]

KRISHNA CHANDRA DEY *v.* GRAHAM.

Even in cases where the ascertainment of the amount of abatement cannot be certain or exact the Court proceeds to grant abatement, if it can reasonably estimate the amount of abatement from the evidence of competent persons. [p. 426, col. 2.]

Defendant agreed to sell two distinct and independent plots of land, neither of which was important for the enjoyment of the other, to plaintiff, and failed to disclose to the latter that one of the plots was owned by his wife. In a suit for specific performance:

***Held*, (1) that the contract was divisible and the case fell within the purview of section 16 of the Specific Relief Act; [p. 426, col. 1.]**

(2) that the plaintiff was entitled to specific performance of the contract with respect to the plot owned by the defendant with a proportionate abatement in the price agreed upon. [p. 426, col. 2; p. 427, col. 1.]

Rutherford v. *Acton-Adams*, (1915) A. C. 866; 84 L. J. P. C. 238, *Mortlock* v. *Buller*, (1804) 10 Ves. Jun. 292 at p. 315; 32 E.R. 857; 7 R.R. 417, **relied on.**

Appeal against a decree of the Subordinate Judge of 24-Perganahs, dated the 27th November 1920.

Dr. *Dwarkanath Mitter*, (with him Babus *Satendra Nath Mukherjee* and *Asiranjan Chatterji*), for the Appellant.

Mr. *S.R. Das*, Advocate-General, (with him Babus *Charu Chandra Biswas* and *Manindra Kumar Bose*), for the Respondent.

JUDGMENT.—The plaintiff is the appellant before us and the facts which have given rise to the suit, out of which this appeal has arisen, are, briefly stated, as follows:—By an agreement in writing made on the 15th day of September 1919, the defendant agreed to sell and the plaintiff agreed to purchase certain lands, measuring about 24½ *bighas*, in Tollygunge, in the suburbs of Calcutta, particularly described as plots A and B in the schedule annexed to the said agreement, free from encumbrances, for a sum of Rs. 1,53,000. The vendor agreed to deliver to the purchaser's Solicitor the title-deeds relating to the said plots A and B within two days from the said date and the purchaser agreed to send in his requisitions in respect of the title within five days from the date of the delivery of the title-deeds. The requisitions were to be answered within five days thereafter. The vendor agreed to make out a marketable title to the said properties and in case of failure, to refund to the purchaser the latter's deposit of Rs. 501 without interest. It was also agreed, *inter alia*, that on the vendor making out a marketable title, he should execute a proper conveyance in favour of the purchaser, causing all unnecessary parties to join therein, and that, in the event of the purchaser failing to complete the purchase within fourteen days from the date of the delivery of the title-deeds, the vendor should be entitled to cancel the said agreement and to forfeit the amount of the vendor's deposit. On the 16th September the title-deeds in respect of the properties were handed by Messrs. Leslie & Hinds, the vendor's Solicitors, to the plaintiff's Solicitor, Mr. Rajendranath De. On the 19th September, the requisitions on title were sent to the vendor's Solicitors. It was pointed out therein by the plaintiff's Solicitor that it appeared from a certain conveyance bearing date the 12th July 1904, that Mrs. Kate Graham, the wife of the vendor, was the owner of one of the properties comprised in the schedule to the said agreement and an enquiry was addressed as to how the vendor proposed to sell the said property. The answer to this requisition, which was given on the 24th of September, was in these words, "Mrs. Graham will concur in the same." Another requisition, being Requisition No. 16, was in these terms "is the vendor alone competent to convey an absolute title to the properties free from all encumbrances," and the answer was, "Yes, with the concurrence of Mrs. Graham." The answers to the requisitions were not received by the plaintiff's Solicitor till the 25th September and on that date he asked that the title-deeds might be returned to him to enable him to consider the sufficiency of the answers (see Exhibit 8). On the 27th September the vendor's Solicitors drew the attention of the plaintiff's Solicitor to the fact that the completion of the transaction under the agreement must take place on or before the 30th September and asked for the draft conveyance for the approval of the vendor. On the same day, the plaintiff's Solicitor again wrote to the vendor's Solicitors asking for the title deeds, without which, it was pointed out, the sufficiency of the answers could not be considered. On

the 29th September the plaintiff's Solicitor wrote a further letter to the vendor's Solicitors asking for the title-deeds and protesting against the unreasonableness of the attitude taken up by the vendor's Solicitors and he pointed out that some of the answers to the requisitions were unsatisfactory. However, on the 29t September the vendor's Solicitors wrote to the plaintiff's Solicitor purporting to retur the title-deeds to the plaintiff's Solicitor and on the 30th September they wrote the following letter to the plaintiff's Solicitor :—"According to the terms of the agreement, the conveyance of the above premises should have been executed to-day. As your clie it failed to do this, we have been instructed by our clie it to give you notice that the agreement is cancelled and the deposit money forfeited to the vendor." It appears that on the 29th September the plaintiff's Solicitor closed his office for the Long Vacation, without receiving the title-deeds in question, and on the 30th September he left town. What happened subsequently was this,—the title-deeds in question were brought to the clerk of the plaintiff's Solicitor, after the latter had left town, and he, the clerk, at first refused to receive the same but on the vendor's Solicitor's clerk refusing to take back the title-deeds, the plaintiff's Solicitor's clerk kept the same with him, without the knowledg of the plaintiff's Solicitor. Meanwhile, on the 6th and 7th October, the vendor's solicitors kept on asking for the return of the title-deeds. These letters, however, were returned by the plaintiff's Solicitor's *durwan* on the ground that the office was closed. On the 8th October, the plaintiff's Solicitor, having returned to town, asked for the title-deeds to enable him to deal with the sufficiency of the answers. Thereafter, a controversy arose as to whether the title-deeds had not been returned to the plaintiff's Solicitor and whether the contract had not already been cancelled. The question about the title-deeds was not settled until the 4th November, when it was discovered that the title-deeds had been left with the clerk of the plaintiff's Solicitor. On that date, further requisitions on title were sent by the plaintiff's Solicitor. On the 5th November, the vendor's Solicitors returned these further requisitions and declined to answer them on the ground that the contract had already been cancelled by reason of breach of contract on the part of the plaintiff. The plaintiff, thereupon, on the 10th November, having regard to the attitude of the vendor, instituted the present suit against the vendor, claiming specific performance of the said contract or, in the alternative, damage, which he assessed at Rs. 1,00,000. The defendant in his written statement contended that time was of the essence of the contract, and that the transaction had to be completed under the terms of the agreement between the parties, within fourteen days from the date of the delivery of the title-deeds to the plaintiff's Solicitor and that as the plaintiff had failed and neglected to complete the transaction within the time limited as above, the defendant was within his rights in cancelling the agreement. The defendant maintained that he had performed his part of the contract and although it was the plaintiff who was not ready and willing to perfrom his part of the said agreement, the defendant was willing to return to the plaintiff the amount of the said deposit. The learned Subordinate Judge, who tried the suit, held by his judgment dated the 27th November 1920 that time was not of the essence of the contract but that, inasmuch as it appeared that one of the two properties mentioned in the schedule to the said agreement belonged to the wife of the defendant, who was not a party to the said agreement, and as the defendant had no authority to enter into any agreement in respect of the said property on her behalf, the plaintiff could not get any decree for specific performance of the contract so far as that property was concerned. As regards the question as to whether the plaintiff could enforce partial performance of the contract in respect of the property which belonged to the defendant, it was held that, although under section 15 of the Specific Relief Act, the plaintiff could claim such a right, provided the plaintiff was willing to pay the price agreed upon and take the property which belonged to the defendant, waiving all right to compensation either for the de-

ficiency or for loss sustained by him through the defendant's neglect or default, yet no such case was made by the plaintiff and, therefore, the learned Subordinate Judge dismissed the entire suit.

On behalf of the plaintiff-appellant it had been contended by Dr. Dwarkanath Mitter before us that, although the Court will not specifically enforce part of a contract, except where that part can be separately enforced without any possible injustice to the defendant, where property is sold in distinct lots there is a separate contract for each lot and, secondly, that the principle that the Court will not perform part of a contract if it cannot perform all, did not apply to cases where the impossibility of carrying a part into execution was due to the default of the defendant who set up this defence, for to permit it to prevail would be opposed to the maxim that no man shall take advantage of his own wrong. The learned Advocate-General, on behalf of the defendant-respondent maintained, however, that the plaintiff's case came within the four corners of section 15 of the Specific Relief Act and that, inasmuch as the plaintiff had not complied with the provisions of that section, the entire suit had been rightly dismissed. To this the plaintiff-appellant replied that this case was governed by section 16 of the Specific Relief Act and that section 15 on which the defendant relied, had no application whatsoever to the facts of this case.

The learned Advocate-General admitted before us that time was not of the essence of the contract in this case, nor had time been subsequently made of the essence of the contract by notice on the part of the defendant. It was also admitted on behalf of the defendant that at the time of the agreement between the parties he had not disclosed that one of the lots comprised in the schedule to the agreement belonged to his wife. The defendant stated, in his evidence that, without consulting his wife, he had entered into the agreement, as he was sure that his wife would join with him in executing a conveyance in favour of the plaintiff. Thus, it was that he had said in the replies to the requisitions that his wife would concur in the sale. He had no power, however, over his wife and if she refused, he could not make her join with him in the conveyance. Asked about whether the replies to some of the requisitions might not have been more satisfactory, the defendant seemed to imply that they might have been.

According to the learned Advocate-General, the mere fact that there were two plots specified in the schedule to the agreement did not show that the contract could be treated as divisible into two separate and independent parts. He further contended that the parties contemplated one and indivisible agreement, one lump sum price being fixed for two plots and, in the circumstances, it was impossible to assess the prices of the two plots separately. He suggested that section 16 of the Specific Relief Act applied only where the part sought to be enforced was a separate independent and self-contained contract.

Now, plot A in the schedule to the agreement relates to an area containing by estimation 11 *bighas* 13 *cottas* bounded on the north by the garden land of Sahebjada Mahamed Haidar Sultan, on the west partly by the vendor's land purchased from Nayantara Dassi and Khayrennessa Begam, on the south by a public road and on the east by a dwelling house and garden of Babu Mulla. Plot B relates to an area containing by estimation 11 *bighas* 4 *cottas* and 2 *chataks* and bounded on the north partly by the purchased land of Amirannessa Begam, now the dwelling house of Shahajada Naymat Saheb, partly by the garden land of the late Panchacowri Doctor and partly by the land of the Tramway Depôt, on the east by the garden of Shahajada Moujaddin Saheb, now the tank and land belonging to Panchacowari Doctor, on the south by a public road, on the west by a land and *jhil* belonging to the daughter of Shahjada Mahammed Anwar Shaha, now the land and tank belonging to the Tramway Company. Plot B is the property which is the subject-matter of the conveyance dated the 12th July 1904 referred to in requisition No. 9 and is alleged to belong to the wife of the defendant.

From the description of the two plots, there seems to be little doubt that they are two distinct and independent lots and it is impossible to come to the conclusion

that one is important for the enjoyment of the other. In other words, it cannot be predicated that plot B is important for the enjoyment of plot A, or that the transaction relating to plot A is dependent on the transaction relating to plot B. It would, therefore, appear that the performance of the contract, so far as it relates to plot A, which belongs to the defendant, is both practicable and proper, whereas the performance of the contract so far as it relates to plot B, which belongs to the wife of the defendant, who was not a party to the agreement, is at once impracticable and improper. No doubt, it is of the essence of specific performance that part only of an agreement should not be performed: this is the general rule and the exceptions to this general rule are embodied in sections 14, 15 and 16 of the Specific Relief Act. In our opinion the present case does not come within the purview of sections 14 and 15 of the Specific Relief Act but it does within the purview of section 16. Under section 14 performance of a contract may be enforced by either the promisor or promisee, provided (*i*) the part which cannot be performed (*a*) is inconsiderable and (*b*) may be compensated for in money, and (*ii*) provided that such compensation is made. Under section 15, the party in default may claim specific performance without compensation, where the part left unperformed is small in value and it admits of compensation, but he cannot have specific performance where such part is considerable and does not admit of compensation; the party not in default, however, may have specific performance with compensaton in the first case, but specific performance without compensation in the second case. Under section 16, where a contract consists of several parts, which are separate from, and independent of, one another, and some of which cannot and ought not to be performed, such part or parts as can and ought to be performed, may alone be specifically enforced. This is on the principle that such a contract, though nominally one, is actually divisible, and when the Court enforces what is apparently a part of the contract, it really enforces an entire and complete contract. The question, therefore, whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract.

In the case of *Rutherford* v. *Acton-Adams* (1), the principles on which the Court will act in a suit for specific performance are thus stated by their Lordships of the Judicial Committee of the Privy Council —"In exercising its jurisdiction over specific performance, Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the verdor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship, he may elect to take all he can get, and to have a proportionate abatement from the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract."

The principle is well settled and it was held as early as in *Mortlock* v. *Buller* (2), that, "If a man, having partial interests in an estate chooses to enter into a contract representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and, therefore, the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contract-

(1) (1915) A. C. 866; 84 L. J. P. C. 238.
(2) (1804) 10 Ves. Jun. 292 at p. 315; 32 E. R. 857; 7 R. R. 417.

ing under these circumstances, is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole."

It has even been held that, though the difference between the property contracted to be sold and that which the vendor can actually convey may be great, the Court will generally, notwithstanding this circumstance, enforce the contract where the vendee is willing to take whatever interest the vendor has, [See *Jones* v. *Evans* (3), *Barnes* v. *Wood* (4), *Hooper* v. *Smart* (*Batley* v. *Piper*) (5)]. No doubt if the vendee is, from the first, aware of the vendor's incapacity to convey the whole of what he has contracted for, he cannot, generally, insist on having, at an abated price, what the vendor can convey. In this case, however, it is not suggested that the vendee was aware of the defendant's incapacity to convey the whole of what was contracted for; indeed, we have, as has already been pointed out, the defendant's own statement that he did not disclose that one of the properties belonged to his wife. The representation, such as it was, therefore, by the defendant was that the entirety of the properties mentioned in the schedule to the agreement belonged to him. The learned Advocate-General, however, argues that there can be no abatement of the price in a case under section 16 of the Specific Relief Act and that if the vendee wishes to take plot A, then he must pay the entire sum mentioned in the contract. We are unable to take such a restricted view of the scope of section 16 of the Specific Relief Act as has been suggested to us by the learned Advocate General. The inability on the part of the defendant to make a good title as regards plot B of the schedule to the agreement is a legal and not a physical, inability to perform the contract; it would, therefore, follow that it does not lie in the mouth of the defendant to urge that he is unable to do all the physical acts necessary for the performance for the contract, as far as it related to plot A. There is nothing of which the defendant can complain. It is his own fault if he has assumed an obligation which he cannot fulfil; and, in our opinion, it cannot be inequitable to require him to perform, as far as it is in his power, so much of the contract as relates to plot A. In no just sense can it be said that in requiring the defendant to perform the contract with reference to plot A, a new contract is being made by the Court for the parties. The defendant is not compelled to convey anything which he did not agree to convey and the vendee pays for what he gets according to the rate established by the agreement between the parties. The conclusion, therefore, to which we have come on the facts of this case is that the defendant ought to be compelled to convey to the plaintiff plot A of the schedule to the agreement with an abatement in the price agreed upon.

It has been said that, in circumstances like the present, the principle on which the abatement in price is calculated is *prima facie* acreage. Having regard to the view which the learned Subordinate Judge took in this case, he felt that it was not necessary for him to go into any question of abatement in the price and consequently there are no data in the evidence on record from which the amount of compensation, *i.e.*, abatement in the price, can be ascertained. Even in cases where the ascertainment of the amount of abatement cannot be certain or exact, the Court proceeds to grant abatement, if it can reasonably estimate the amount of abatement from the evidence of competent persons. We have on the present record no materials, and we are, therefore, constrained to direct a remand in this case to the lower Court for the purpose of assessing the abatement in the price which should be allowed to the plaintiff on such evidence as may be adduced by the parties.

The order, therefore, will be that it is declared that the plaintiff is entitled to specific performance of the agreement, dated the 15th September 1919, in the pleadings in this suit mentioned to the extent of all the interest of the defendant in the property particularly described as plot A in the schedule to the said agree-

(3) (1848) 17 L. J. Ch. 469; 12 Jur. 664; 80 R. R. 192.
(4) (1869) 8 Eq. 424; 38 L. J. Ch. 683; 17 W. R. 1080.
(5) (1874) 18 Eq. 683; 43 L. J. Ch. 704; 31 L. T. 86; 22 W. R. 943.

ment with a proportionate abatement of the purchase-money in respect of the property particularly described as plot B in the said schedule and alleged to belong to the wife of the defendant; and it is ordered that the case be remanded to the lower Court for determining the amount to be paid by the plaintiff for the purchase-money of the said property plot A mentioned in the said schedule, having regard to the declaration aforesaid and it is further ordered that the defendant do execute and register a proper conveyance of the said property, being plot A mentioned in the said schedule, in favour of the plaintiff or such person as he may direct in terms of the said agreement on making out a good title to the said plot A, and to deliver up to him possession of the said property within a time to be fixed by the lower Court, the plaintiff paying to the defendant the amount of the purchase money as may be determined by the lower Court and also all costs and expenses necessary to complete and obtain the conveyance of the said property.

The result, therefore, is that the judgment and decree of the lower Court are set aside and this appeal is allowed with costs.

Let the records be sent down to the lower Court without delay.

Appeal allowed;
Z. K. *Case remanded.*

PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEAL FROM APPELLATE DECREE NO. 35 OF 1921.

December 2, 1921.

Present:—Mr. Justice Das and Mr. Justice Adami.

RAGHUNATH MISRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM BEHERA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 103 B—Record of Rights—Presumption of correctness—Prior documentary and oral evidence, value of—Provincial Settlement Record, value of—Occupancy tenant, status of, whether can be acquired by custom.

Evidence of facts, documentary and oral, of a date prior to that of the publication of the Record of Rights is admissible and should be taken into consideration in determining whether the presumption under section 103 B of the Bengal Tenancy Act has been rebutted or not. [p. 427, col. 2.]

Sheonandan Persad Sukul v. *Bacha Raut*, 4 Ind. Cas. 54; 9 C. L. J. 284, followed.

In determining the status of a tenant the Provincial Settlement Records are of high value, and are sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement Records, where it appears that there was a procedure by which the status of the tenant could have been changed to what it is recorded in the Revisional Settlement Records. [p. 428, col. 1.]

A person cannot by custom acquire the status of an occupancy tenant, notwithstanding that he is so recorded in the Record of Rights. If he relies on any custom, it is for him to allege and prove that custom. [p. 428, col. 2.]

Appeal from a decision of the District Judge, Cuttack, dated the 9th May 1921, confirming that of the Deputy Collector, Khurda, dated the 23rd January 1921.

Messrs. *J. N. Bose* and *Satindra Narayan Roy*, for the Appellants.

Messrs. *A. Manan* and *Bichitranand Das*, for the Respondents.

JUDGMENT.

Das, J.—This appeal arises out of a suit instituted by the plaintiffs for ejectment of the defendants from 4.582 acres of land in Khurda. The plaintiffs describe themselves as *rafa-tankidars* and it is their case that the defendants are *shikmi raiyats*, that is to say, under-*raiyats*. The Provincial Settlement Records describes the plaintiffs as *rafa-tankidars* but the Revisional Settlement describes them as *tankidars* and the defendants as having rights of occupancy in the land in dispute.

The learned Judge has come to the conclusion that the entry in the Revisional Settlement Record must be presumed to be correct until it is shown to be incorrect, and his view is that the Provincial Settlement is by itself insufficient to rebut the presumption that the Revisional Settlement Record is correct. Now, in my opinion, this is not a very correct way of stating the position. As was held in the case of *Sheonandan Persad Sukul* v. *Bacha Raut* (1), evidence of facts, documentary and oral, of a date prior to that of the publication of the Record of Rights is admissible and should be taken into consideration in determining whether the presumption under section 103 B of the Bengal Tenancy Act, as amended, has been rebutted or not.

(1) 4 Ind. Cas. 54; 9 C. L. J. 284.

Now, as I understand the position, in the year 1839 the Government agreed to a compromise with *tankidars* or holders of land on quit rent to the effect that on condition of their agreeing to pay rent at certain rates fixed by Government no enquiries would be made into the liability of their holding on resumption. I understand that the quit rates so fixed were termed *rafa-tanki* or terms at fixed rates and the holders of the land were known as *rafa-tankidars*. If in fact the plaintiffs were *rafa-tankidars* at the time of the Provincial Settlement there is no procedure by which they became *tankidars* at the time of the Revisional Settlement. The Provincial Settlement Records must be considered of very high value in determining the status of tenants and in my opinion the Provincial Settlement Record is sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement Records in this case because it is conceded that there is no oral evidence in the case on the point.

The next question is, if the position of the plaintiffs be that of *rafa-tankidars* are they entitled to eject the defendants? The learned Judge in the Court below says that Mr. Taylor's opinion on the point is not entitled to much weight. There is, however, a decision of this Court in the case of *Harayan Patnaik* v. *Raghunath Patnaik* (2), which concludes the matter. That decision is in favour of the appellants. It decides that *rafa-tankidars* are occupancy *raiyats* and not tenure-holders. If that be so, they are entitled to eject the defendants unless it be that the defendants have acquired certain rights by custom. The learned Judge says that, under section 237 of the Orissa Tenancy Act, "under-*raiyats* can acquire occupancy rights by custom." With all respect, I am unable to agree with this view. Section 237 provides:—

"Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by its provisions."

I can quite understand an under-*raiyat* acquiring by custom certain privileges which are possessed by occupancy tenants but it is one thing to say that a person may by custom acquire certain rights which are incident to rights of occupancy in land but it is quite another thing to say that by custom an under-*raiyat* may become a *raiyat*. There would, in my opinion, be a contradiction in terms if the view of the learned Judge in the Court below be accepted. It may, of course, be that the defendants by custom may acquire certain privileges of occupancy tenants and it may be that one of these privileges is that he is not entitled to be ejected merely on notice under section 57 of the Orissa Tenancy Act. But no custom has been alleged in the written statement and none could have been investigated by the learned Judge in the Court below. His view is that as they are recorded in the Record of Rights as occupancy tenants it must be held that they have acquired those rights by custom; but I hold that the defendants could not by custom acquire the status of occupancy tenants. That being so, if they did rely upon any custom as a bar to the plaintiffs suit, it was for them to allege and prove that custom.

I must allow the appeal, set aside the judgment and decree of the Court below and give the appellants a decree for possession. The plaintiffs are entitled to their costs of this appeal.

Adami, J.—I agree.

N. H. *Appeal allowed.*

(2) 57 Ind. Cas. 225; 5 P. L. J. 373.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 2189 OF 1922.

March 13, 1923.

Present:—Mr. Justice Moti Sagar.

RAMESHWAR DAS—DEFENDANT—APPELLANT

versus

YAKIN-UD-DIN KHAN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Temporary injunction, when

RAMESHWAR DAS *v.* YAKIN-UD-DIN KHAN.

to be granted—Election, Municipal, suit to contest, validity of—Injunction restraining defendant from exercising functions of Municipal Commissioner, whether can be granted.

A person asking the Court to exercise its discretionary jurisdiction by granting a temporary injunction must make out a strong *prima facie* case in support of the title which he asserts, and must satisfy the Court that its interference is necessary to protect him from irreparable or, at least, serious injury before the legal right can be established at the trial. Being an exceptional remedy, an injunction will be refused in the first instance except upon a clear *prima facie* case and upon positive averments of the equities on which the application for relief is based. [p. 429, col. 2.]

In a suit contesting the validity of a Municipal election, the plaintiff applied for a temporary injunction restraining the defendant from exercising the functions of a Municipal Commissioner during the pendency of the suit:

Held, that the plaintiff could in no way be injured by the defendant continuing to act as a Municipal Commissioner during the pendency of the suit and a temporary injunction could not, therefore, be granted. [p. 430, col. 1.]

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Hissar, dated the 22nd August 1922.

Bakhshi *Tek Chand*, for the Appellant.

Messrs. *C. Bevan Petman* and *Indar Sain*, for the Respondents.

JUDGMENT.—The plaintiff and the defendant were rival candidates at a Municipal election held at Sirsa on the 14th of November 1921. The defendant secured 150 votes as against 138 votes obtained by the plaintiff, and was declared successful. On the 3rd of February 1922 a Notification was published in the *Government Gazette* declaring the defendant to have been duly elected and on the same date the plaintiff was nominated a Municipal Commissioner by the orders of the Government. On the 2nd of May 1922, three months after the result of the election had been published in the *Government Gazette*, the plaintiff brought this suit for a declaration that the election was void and that the defendant was consequently not entitled to sit as a Commissioner on the Municipal Committee. He also made an application for the grant of a temporary injunction that the defendant be restrained from attending the meetings of the Municipal Committee and from otherwise exercising the powers of a Municipal Commissioner pending the decision of the suit. The learned Senior Subordinate Judge allowed this application, and it is against this order passed on the 22nd of August 1922 that the present appeal is directed.

The case has been argued at some length by the learned Counsel on both sides, but the point involved for decision is very simple and can shortly be disposed of.

It is contended on behalf of the defendant that the suit for setting aside the election does not lie under section 42 of the Specific Relief Act and that the learned Senior Subordinate Judge was consequently not justified in granting the temporary injunction prayed for by the plaintiff. I do not propose to enter into a discussion of the question relating to the maintainability or otherwise of the suit as the sole question for determination before me at this stage is whether, in the circumstances narrated above, an *interim* injunction restraining the defendant from acting as a Municipal Commissioner pending the decision of the suit should or should not have been granted.

The principle of law is firmly established that a person asking the Court to exercise its discretionary jurisdiction must make out a strong *prima facie* case in support of the title which he asserts, and must satisfy the Court that its interference is necessary to protect him from irreparable or at least, serious injury before the legal right could be established at the trial. Being an exceptional remedy, an injunction will be refused in the first instance except upon a clear *prima facie* case and "upon positive averments of the equities on which the application for relief is based." I am unable to see what equities there are in favour of the plaintiff entitling him to the temporary injunction granted by the Court below, nor am I satisfied that the plaintiff is likely to suffer any injury while his alleged rights are being investigated. The rule of law is that the Court should, before disturbing any man's legal right or stripping him of any rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimate-

ly failing in the final issue of the suit. This, in my opinion, the plaintiff has not been able to establish, and I do not, therefore, think that a temporary injunction should have been granted in this case.

As to plaintiff's sustaining irreparable injury by the defendant's continuing to act as a Municipal Commissioner pending the determination of the suit, the apprehension appears to be more imaginary than real. If the suit is decided in favour of the plaintiff the result would be that the election would be set aside and a fresh election ordered, but I am wholly at a loss to understand how the plaintiff would be injured by the defendants continuing to discharge the functions of a Municipal Commissioner during this time. It appears to me that there is no substance in the application made by the plaintiff for the issue of a temporary injunction and that he is obviously prompted by a desire to cause injury to the defendant.

I accordingly accept the appeal and, setting aside the order of the Court below, dismiss the petition for the temporary injunction with costs throughout.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

CIVIL REVISION NO. 86 OF 1923.

June 15, 1923.

Present:—Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

Musammat BIBI ZAINAB AND ANOTHER—JUDGMENT-DEBTORS—PETITIONERS

versus

PARAS NATH AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115; O. XXI, rr. 89, 92 (2)—Application to set aside sale—Notice to parties affected—Judgment-debtor, whether necessary party—Notice, issue of—Limitation—Revision—Court acting under erroneous view of law—High Court, whether will interfere—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Negligence of judgment-debtor to take out notice, effect of.

A Court is not competent to make any order upon an application made by a judgment-debtor under O. XXI, r. 89 until notice of such application has been given under r. 92 to all the persons affected thereby. [p. 431, col. 2.]

Although an application under O. XXI, r. 89, to deposit must be made within 30 days of the date of the sale, no limitation is prescribed for the issue of a notice under r. 92. [p. 431, col. 2.]

Ganesh Bab Naik v. *Vithal Vaman Mahalya*, 19 Ind. Cas. 475; 37 B. 387; 15 Bom. L. R. 244, relied on.

Sumitra Kuer v. *Damri Lal*, 62 Ind. Cas. 61; 2 P. L. T. 336, and *Ajiuddin Ahamed* v. *Khoda Bux Khondkar*, 50 Ind. Cas. 5, dissented from.

Where in the body of his application for deposit a judgment-debtor states the name and address of the auction-purchaser and asks that the sale be set aside on his depositing the decretal amount, that is a sufficient application to make the auction-purchaser a party, and as soon as the notice is issued upon him he becomes a party to the proceedings. [p. 432, col. 1.]

Where an Appellate Court confirms an execution sale upon an erroneous view of the law its decision is final and cannot be interfered with under section 115, Civil Procedure Code. [p. 432, col. 1.]

Fazal Rab v. *Manzur Ahmed*, 45 Ind. Cas. 773; 40 A. 425; 16 A. L. J. 433, relied on.

The powers of superintendence vested in a High Court by section 107 of the Government of India Act, will not be exercised lightly, and certainly not where a petitioner is guilty of negligence. [p. 432, col. 2.]

Application against an order of the Officiating Additional District Judge, Patna, dated the 31st January 1923, reversing that of the Subordinate Judge, Second Court, Patna, dated the 10th May 1922.

Messrs. *Muhammad Hasan Jan*, Syed *Ali Khan* and *Ahmad Raza*, for the Petitioner.

Mr. *Shiveshwar Dayal*, for the Opposite Party.

JUDGMENT.

Mullick, J.—This application has been made against an order passed by the Officiating Additional District Judge of Patna on the 31st January 1923 reversing the order of the Subordinate Judge of Patna dated the 10th May 1922. It appears that on the 18th April the Subordinate Judge of Patna sold certain immoveable properties belonging to the two petitioners and their co-judgment-debtors in execution of a money-decree. On the 5th May the petitioners applied for permission to deposit the money under O. XXI, r. 89, Civil Procedure Code and to have the sale set aside. On the same date the decree-holder made an application stating that he had received the full amount of his decretal claim from the judgment-debtors and asking that the payment should be certified. On the 6th May the petitioners deposited in Court the compensation due to the auction-purchaser. On the same date the auction-purchaser paid into Court the balance of the auction purchase-money. Thereupon the Subordinate Judge adjourned the case till the 10th May in order that the petitioners might produce a Treasury Chalan showing that the necessary sums had been paid into the Treasury. On the 10th May the case was duly put up and the sale was set aside. Against this order the auction-purchaser appealed to the Additional District Judge who held that, as the auction-purchaser had not been made a party to the proceedings within one month of the date of the sale, the deposit could not be accepted. He accordingly set aside the order of the Subordinate Judge and directed that the sale should be confirmed. The present application is made against the Additional District Judge's order.

It is urged by the petitioners that the learned Additional District Judge declined to exercise jurisdiction in refusing to accept the deposit. Now, O. XXI, r. 92, Civil Procedure Code, nowhere speaks of the auction-purchaser being made a party, it provides that no sale can be confirmed or set aside unless notice of the application has been given to all persons affected thereby and, in my opinion the rule means that the Court is incompetent to make any order at all till such notice has been given. The duty of moving the Court to issue notice lies, of course, upon the applicant and all that the Court has to do is to give him a reasonable opportunity for doing so. On default, the Court may dismiss the application, and there is no obligation upon the Court to issue a notice of its own motion and without the assistance of the applicant. The law requires that the application to deposit should be made within 30 days of the sale, but it does not impose any period of limitation for the issue of notice and so it has been held in *Ganesh Bab Naik* v. *Vithal Vaman Mahalya* (1). It is not clear whether the learned Additional District Judge was of opinion that the period of limitation for the issue of notice was 30 days or whether he was of opinion that there must be an express prayer to make the auction purchaser a party to the proceedings within that period. In either event, his view of the law is wrong. The learned Additional District Judge, however, relies on the decision of a Single Judge of this Court in *Sumitra Kuer* v. *Damri Lall* (2) which follows a decision of the Calcutta High Court in *Ajudaan Ahamed* v. *Khoda Bux Khondkar* (3). It seems to have been held in these cases that the applicant must make the auction-purchaser a party to the proceedings within one month.

If the view of the learned Judge was that notice must be issued upon the auction-purchaser within one month, then I must respectfully differ. All that the law requires is, that the deposit shall be made within one month of the sale.

With regard to the contention that the auction-purchaser must be made a party, the law does not in terms require him to do so, but assuming that it does, I have not been able to obtain from the learned

(1) 19 Ind. Cas. 475; 37 B. 387; 15 Bom. L. R. 244.
(2) 62 Ind. Cas. 61; 2 P. L. T. 336.
(3) 50 Ind. Cas. 5.

Vakil for the opposite party any precise exposition of the applicant's duty in this matter. In the present case the applicants stated in the body of their petition the name and address of the auction-purchaser and asked that the sale should be set aside after payment of Rs. 175 as compensation to the auction-purchaser. I fail to see why this was not an application to make the auction-purchaser a party. The fact is that, as soon as the notice is issued upon him, the auction-purchaser becomes a party to the proceedings and it is, therefore, unnecessary to make a special prayer for adding him as a party. There is no prescribed form of application and, in my opinion, in the present case there was a sufficient application for the service of notice upon the auction-purchaser.

The Subordinate Judge, therefore, acted without jurisdiction in setting aside the sale without fixing a date for hearing the auction-purchaser.

The learned Additional District Judge, therefore, had jurisdiction to set aside the learned Subordinate Judge's order and to remand the case for the issue of notice upon the auction-purchaser or to dispose of the matter finally himself. It appears that as all parties affected by the sale were before him he chose the latter alternative and he held that the applicants were not entitled to get the sale set aside because they had failed to serve the auction-purchaser with a notice within one month of the sale.

Now, it is true that this was a wholly erroneous view of the Law of Limitation, but, all the same, it was a decision arrived at with jurisdiction and it cannot, therefore, be revised under section 115, Civil Procedure Code. The principle is now too well-settled, but we have been invited by the learned Vakil for the opposite party to refer to *Fazal Rab* v. *Manzur Ahmad* (4) because the facts of that case are somewhat similar to the facts before us. There the sale was held by the Collector on behalf of the Civil Court and the deposit was made in the Court of the Collector because the Civil Court was closed. The Civil Court of first instance set aside the sale, but the Appellate Court confirmed it and upon an aplication for revision being made to the High Court it was held that parties could not by a resort to the revisional jurisdiction secure the benefits of an appeal and that a Court of competent jurisdiction having held that the deposit had not been made within the specified time the decision could not be interfered with under section 115, Civil Procedure Code.

In my opinion the order of the Additional District Judge, though erroneous, was final and it cannot be revised in the exercise of our revisional jurisdiction.

It has, however, been urged that we should interfere in the exercise of our powers of superintendence, but those powers are not to be lightly exercised. The petitioners were asking for what was really an indulgence and it was their duty to see that the Statute was complied with. If they had put in the process-fee for the issue of the notice at the time of the deposit the Subordinate Judge would probably not have disposed of the case till notice had been served.

In my opinion the petitioners were guilty of negligence and we should not exercise our powers under section 107 of the Government of India Act in their favour.

The application will, therefore, be dismissed with costs, hearing fee two gold *mohurs*.

Bucknill, J.—I agree.

W. C. A. *Application dismissed.*

(4) 45 Ind. Cas. 778; 40 A. 425; 16 A. L. J. 433.

CHANDRIKA PRASAD *v.* HIRA LAL.

PATNA HIGH COURT.

CIVIL REVISION NO. 345 OF 1923.

August 16, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

Babu CHANDRIKA PRASAD AND OTHERS —APPELLANTS

versus

Babu HIRA LAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, rr. 3, 4, 5, 6, O. VI, rr. 16, 17—Amendment of plaint—Joinder of several causes of action—Alternative claim, whether necessarily prejudices trial—Procedural law, object of.

It cannot be laid down as a general principle in all cases that an alternative claim necessarily prejudices, embarrasses or delays the fair trial of a case. [p. 434, col. 1.]

The whole object of the procedural law is to prevent multiplicity of suits and a plaintiff should not be compelled to institute a second suit if he can obtain appropriate relief in the first suit without in any way embarrassing the defendant. [p. 434, col. 2.]

Owen v. *Morgan*, (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 705, relied on.

Plaintiffs sued for rescission of an agreement for sale and for an order upon the defendants to refund the sum of money paid by them to the defendants towards the performance of the agreement. Subsequently, the plaintiffs applied for amendment of the plaint asking for a decree for specific performance of the agreement in the event of the Court finding it impossible to give them a decree for its rescission

Held, that the causes of action could be conveniently tried or disposed of together if the application for amendment of the plaint was allowed and the alternative relief would not prejudice, embarras or delay the fair trial of the case. [p. 435, col. 1.]

Revision from an order of the Subordinate Judge, Arrah, dated the 9th May 1922.

Messrs. *P. K Sen, S M. Mullick, S. Dayal* and *J. L. Mitra*, for the Appellants.

Messrs. *S. Ahmed, S. A. Sami* and *Jafar Imam*, for the Respondents.

JUDGMENT.

Das, J.—I think this application must succeed. The plaintiffs allege in their plaint that, on the 8th of August 1921 they entered into a contract with the defendants for the purchase of property, fully described in the plaint, for the sum of Rs. 1,54,000 and that they actually paid Rs. 1,32,847-7-2 to the defendants towards the performance of the contract. They go on to assert that the defendants made material misrepresentations to them as to the value of the property, and they ask for a decree for the rescission of the agreement for sale, dated the 8th August 1921, and for an order upon the defendants to refund the sum of money paid by them to the defendants with interest thereon at 12 per cent. per annum. The plaint was filed on the 6th February 1922 on the allegation that the cause of action arose on the 12th August 1921 when the plaintiffs became aware of all the facts entitling them to the reliefs claimed.

On the 17th July 1923, the plaintiffs applied for amendment of the plaint, and it is this application which has given rise to the present proceedings. The whole object of the application was to enable the Court to give the plaintiffs a decree for specific performance of the agreement of the 8th August 1921 in the event of the Court finding it impossible to give them a decree for rescission of the contract. The learned Subordinate Judge, relying upon certain passages to be found in Fry on Specific Performance and Banerji on Specific Relief Act, has refused the application. He also thought that the plaint, even if amended in the manner suggested by the plaintiffs, would not entitle the plaintiffs to a decree for specific performance.

It may be conceded that the opinion of the distinguished author of Fry on Specific Performance entirely supports the conclusion of the learned Subordinate Judge; and, but for the contrary opinion expressed in some of the cases of high authority to which I shall presently refer, it would be impossible for me to differ from the learned Subordinate Judge The passage to which the learned Subordinate Judge refers is as follows: "But, for the reason already stated, a suit to set aside a transaction for fraud, or, in the alternative, for specific performance of a compromise, could not be sustained in the Court of Chancery" If the passage stopped here, it would not assist the defendants to any great extent, for the Court of Chancery in the passage means the Court which existed prior to the Judicature Act. Under the practice which prevailed in the Court of Chancery before the Judicature Act a bill was demurrable on the ground that inconsistent and alternative reliefs were

claimed, *Rawlings* v. *Lambert* (1), *Cawley* v. *Poole* (2); but, as is well-known, the Judicature Acts and Orders swept away the old forms and practice of pleading, leaving it open to a plaintiff to claim inconsistent and alternative reliefs, but at the same time giving a power to the Court to order to be struck out or amended any matter in the pleadings which may be scandalous, or which may tend to prejudice, embarass, or delay the fair trial of the action. That the Judicature Acts and the Orders have profoundly affected the practice in this respect is undoubted; and the only question under the present practice is, whether the inconsistent and alternative reliefs claimed do not prejudice, embarass or delay the fair trial of the action. That this is the true position is not denied by the learned author; but, in his view, "notwithstanding the provisions of the Rules of the Supreme Court as to alternative claims for relief, it seems probable that the same conclusion would still be arrived at, on the ground that the claims were inconsistent and embarrassing."

In my opinion, it is a question of fact in each case whether the alternative relief claimed prejudices, embarrasses, or delays the fair trial of the case and that it cannot be laid down as a general principle applicable to all cases that an alternative claim necessarily prejudices, embarrasses, or delays the fair trial of the case. The case of *Bagot* v. *Easton* (3), I think, materially affects the value of the opinion of the learned author of Fry on Specific Performance. The plaintiff, in that case, claimed to have an agreement for a partnership with the defendant in a land speculation cancelled on the ground that he had been induced to enter into it by the misrepresentation of the defendant, and in ignorance of its real effect; or, in the alternative, that the partnership created by the agreement be dissolved and the accounts taken, and the defendant restrained from interfering with the management of the works in violation o the agreement. The defendant moved for an order for the plaintiff to amend his statement of claim by confining it to one of the alternative claims. The Court of Appeal came to the conclusion that the plaintiff was entitled to claim alternative relief In my opinion, the case of *Bagot* v. *Easton* (3) is directly in point. It was contended by Mr. Sultan Ahmed that a claim for dissolution of partnership is really a claim to put an end to the partnership and is in no way analogous to the alternative relief which the plaintiffs propose to claim in this suit, which is that the contract should be specifically enforced. I am unable to agree with this contention. A claim for dissolution of partnership is, in my opinion, a claim to enforce the rights of one of the partners under the partnership and constitutes an offer by the plaintiff to pay what may be due from him on the taking of partnership accounts. If it be open to a plaintiff to claim a rescission of an agreement for partnership on the ground of fraud, and, in the alternative, for dissolution of partnership and for partnership accounts, it is, in my opinion, equally open to a plaintiff to claim a rescission of an agreement for purchase of a property and in the alternative for specific performance of the agreement. The whole object of the procedural law, both in Engalnd and India, is to prevent multiplicity of proceedings, and I can see no justification whatever for compelling the plaintiffs to institute a second suit, if he can obtain the appropriate relief in the first suit without in any way embarrassing the defendant. This position is also supported by the case of *Owen* v. *Morgan* (4).

I have dealt with the position in England because great reliance was placed upon the passage from the well-known work to which I have referred. But it is not difficult to show that the position in India is exactly the same as in England. O. II, r. 3 gives liberty to the plaintiff, "save as otherwise provided," to "unite in the same suit several causes of action against the same defendant, or the same defendants jointly." Rules 4 and 5 restrict the power of the plaintiff as to joinder of causes of action in certain specified cases, and they

(1) (1866) 1 J. & H. 458; 70 E. R. 826; 128 R. R. 468.
(2) (1853) 1 H. & M. 50; 71 E. R. 23; 136 R. R. 27.
(3) (1878) 7 Ch. D. 1; 47 L. J. Ch. 225; 37 L. T. 369; 26 W. R. 66.
(4) (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 705.

do not in any way touch the present question. Rule 6 gives power to the Court to order separate trials if, in the opinion of the Court, the causes of action joined in one suit cannot be conveniently tried. Order VI, r. 16 gives power to the Court at any stage of the proceedings to order "to be struck out or amended any matter in the pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the suit." The result of all these different provisions in the Code is to allow the plaintiff to unite in the same suit several causes of action against the same defendant or the same defendants jointly, subject to the provisions of O. II, rr. 4 and 5, and subject to the supervision given to the Court in O. II, r. 6 and O. VI, r. 16. In my opinion, the causes of action may be conveniently tried or disposed of together, if we allow the application for amendment of the plaint, and the alternative relief now claimed will not prejudice, embarrass or delay the fair trial of the case.

The other point is wholly without substance. If the amendment be allowed, there would be sufficient allegations to enable the plaintiffs to claim a decree for specific performance. They allege, that it was agreed that the conveyance would be executed within seven days from the date of agreement, and that the defendants failed to carry out the agreement. They give the date of the cause of action on the footing that the suit is a suit for specific performance of the contract, and they aver their readiness and willingness to pay into Court the balance of the consideration money.

I would allow the application, set aside the order of the Court below, and direct that the plaint be amended in terms of the plaintiff's application of the 17th July 1923. Costs both of the Court below and of this Court will be costs in the suit. Hearing fee in this Court, five gold *mohurs*.

Macpherson, J.—I agree to the order proposed.

K. S. D. *Application allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 45 OF 1922.

December 18, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.,

MATHURA NATH MUKHERJEE—PLAINTIFF—APPELLANT

versus

LAKHI NARAIN GANGULY—DEFENDANT—RESPONDENT.

Hindu Law — Will—Property dedicated to religious usage—Appointment of testator's widow as shebait*—Power to appoint successor—Person born after testator's death, whether can be appointed.*

Property cannot be made inheritable otherwise than as the law allows but there may be exceptional cases in which Hindu Law sanctions a departure from the rule that the donee must be in existence. [p. 438, col. 2.]

Sreemutty Soorjeemoney Dossee v. *Denobundoo Mullick*, 6 M. I. A. 526 at p. 555; 1 Ind. Jur. (N. S.) 37; 4 W. R. P. C. 114; 1 Boul. Rep. 228; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 19 E. R. 198 and *Jotendromohun Tagore* v. *Ganendromohun Tagore*, I. A. Sup. Vol. 47; 18 W. R. 359; 9 B. L. R. 377; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.), followed.

A trusteeship with power to appoint a successor is well known to and recognised by Hindu Law. [p. 438, col. 2.]

A Hindu made a Will according to which after leaving certain properties to his daughter he made provision for the performance of his *sradh* and dedicated certain properties to religious uses. He appointed his wife his executrix and *shebait* and gave her power to appoint her successor. The widow of the testator left a Will by which she appointed a great-nephew of her deceased husband, born after his death, as *shebait*. The heirs of the testator brought a suit for the construction of his Will:

Held, that the power given to the widow was not badly exercised and the appointment by the widow of a successor to herself was not inconsistent with Hindu Law the fact that the successor so appointed was not alive at the time of the death of the testator would not make the appointment invalid. [p. 439, col. 1.]

Appeal from the judgment of Buckland, J.

Mr. *S. R. Das*, Advocate-General, (with him Mr. *M. N. Basu*), for the Appellant.

Mr. *N. N. Sircar* (with him Sir *B. C. Mitter* and Mr. *M. N. Mitter*), for Defendant No. 1-Respondent.

JUDGMENT.

Richardson, J.—This is an appeal from the judgment of Mr. Justice Buckland in a suit brought for the construction of

the Will of Sreeman Chandra Mukherji who died in the year 1878.

The plaintiff, as the learned Judge states, is one of the heirs of the testator and the defendants Nos. 2 to 12 are also heirs. The first defendant, Lakhi Narain Ganguly is a great nephew of the testator. He was not alive at the death of the testator, as he was born in the year 1886, and he is interested in this Will as having been appointed by the Will of Bama Sundari Devi, the widow of the testator, who died in 1918—the *shebait* of the property to which the former Will referred and the dedication and management of which are in question.

By the first clause of his Will the testator gave his interest in a *taluq* called Dehee Ulasee to his only daughter and her husband

The second clause calls for no mention

By the third clause the testator made provisions for the performance of his *sradh* and for the monthly expenses of his widow. By that clause he also provided annuities for certain persons and directed his widow to perform his annual *sradh*, and also to perform prilgrimages to Ishur Gyadham and other shrines and other religious ceremonies." The money necessary for these purposes was to come out of a Taluq Fatabad. The clause ends with these words:—"After deducting all these expenses whatever surplus shall remain from the profits of the said *taluq* to my share shall be devoted to the under-mentioned *Debseva* and *Atithiseva* (entertainment of strangers)."

The fourth clause calls for no comment.

The fifth clause is in these terms: "I do hereby dedicate to the *Ishur Debseva* the whole of my immoveable property and all the residue of the profits save and except the said share in Dehee Ulasee and the aforesaid profits of the said Taluq Fatiabad, My hereinafter-named executrix shall for my salvation consecrate a *Shivaloy* and a *Shiva* and shall perform *seva*, etc., of the said *Shiva* from the profits of the whole of my property, that is to say, she will out of the profits of all the said immoveable properties cause to be performed the daily and periodical *seva* of the said *Shiva*, the feeding of Brahmins and entertainment of strangers, My hereinafter-named executrix will be able, if she shall so desire, to consecrate a *Shivaloy* and *Shiva* out of my estate for her own salvation. It is my heartfelt desire that the said *Debseva*, the feeding of Brahmins and the entertainment of strangers shall be performed daily out of profits of my said immoveable properties."

In the sixth clause the testator referred to certain provisions which he had already made for his widow during his lifetime.

The seventh clause is important. It runs: "I do hereby appoint my wife, *Srimati* Bama Sundari Debi, my executrix and the *shebait*, she will perform all the acts according to my aforesaid instructions and the person whom she shall appoint to the duties of executrix and *shebait* shall be vested with the power to perform all the said acts after her death."

The first point raised before the learned Judge turned upon the meaning of the word "surplus" in the concluding sentence of the third clause which I have quoted, The question, as stated by the learned Judge, was, what was to be done with the amounts of the annuities formerly payable under the Will to persons who are now dead. The learned Judge said: "In my opinion the amounts of such annuities will fall into the surplus and should be devoted to the *sevas* to be performed under the fifth paragraph of the Will."

In my opinion, that is the natural meaning of the language used and I see no reason to differ from the learned Judge.

Then, as to the fifth paragraph of the Will, it seems to have been suggested that a dedication of property "to the *Ishur Debseva*" was not a sufficient dedication to a particular Hindu deity. But, as the learned Judge indicates, the clause must be read as a whole, and if the objection may be regarded as having even a superficial plausibility, the subsequent direction to consecrate a *Shivaloy* and *Shiva* deprive it of all force. Indeed, if the point has been referred to in the argument before us, it has not been pressed and, in my opinion, the clause contains a valid dedication of property to religious uses.

A further point taken in connection with this clause may perhaps be regarded as having more substance. It is contended

that, according to the true construction of the clause, the testator did not dedicate the absolute interest in the property but merely created a charge on the property for the stated purposes. It was argued that the direction to the testatrix was to consecrate a *Shiva* and *Shivaloy* and to perform the other duties imposed "out of" or "from the profits of all the said immov able properties." It was also argued that the feeding of Brahmins and the entertainment of *Atithis* or strangers coming to the house has no necessary relation to the worship of *Shiva* and that the amount required for those purposes must necessarily rest in the discretion of the testator's representative. The contention was sought to be reinforced by reference to the power given to the testatrix in the following sentence—"if she shall so desire to consecrate a *Shivaloy* and *Shiva* "out of my estate for her own salvation." Stress was laid upon the words "out of my estate" and the question was put, how could the executrix consecrate a separate *Shivaloy* and *Shiva* for her own salvation unless she had herself an interest in the property from which the necessary funds were to come.

As to these arguments, if the concluding sentence of the third clause and the fifth clause be read together and if regard be had to the express saving in the fifth clause of the share in Dehee Ulasee dealt with in the first clause and the profits in Taluq Fatiabad required for the purposes of the third clause, and if regard be also had to the express mention in the sixth clause of the provision which the testator had already made for his wife during his lifetime, then, it seems clear that the testator intended to dedicate the whole of his estate, both corpus and income, less the excepted items, to religious charity. The language used is sufficient, *prima facie* at any rate, to express that intention. The direction to feed Brahmins and strangers is a common form of charity in connection with Hindu endowments and affords no reason for putting other than its natural meaning on the language used by the testator. And when the testator gave his widow power to consecrate a *Shivaloy* and *Shiva* for her own salvation out of his estate, he was merely authorising her to use a sufficient portion of the trust fund for that purpose. By the words "out of my estate," he meant out of that portion of his estate which he was devoting to charity.

Before us, the decision of their Lordships in *Har Narayan* v. *Surja Kunwari* (1) has been cited, and it has been suggested that the expenditure which the testator contemplated would not, by any means, exhaust the whole of the profits of an estate so large as that which the testator is said to have left. Unfortunately, this point does not appear to have been raised in the plaint or at the trial; no issue on the subject was framed and there is no evidence on the record either as to the value of the property left by the testator or as to the amount required for the charities ordained.

My conclusion, therefore, on this part of the case is in accord with that of the learned Judge and the contention, with which I have been dealing fails.

A question of some difficulty remains in regard to the seventh clause of the Will. In pursuance of that clause the testator's widow, Bama Sundari Debi, as executrix, carried out his instructions and during her lifetime acted as the first *shebait* of the endowment. By her Will she appointed the testator's great-nephew, the first defendant, to be her successor. As I have said, the first defendant was not in existence at the testator's death. It is accordingly contended that this appointment contravenes the well-known rule in the *Tagore case*, [*Jotendromohun Tagore* v. *Ganendromohun Tagore* (2)] and is a bad appointment. There can be no question that in a case to which that rule applies, a gift which cannot be made directly cannot be made indirectly by means of a power conferred by the testator on his executor. Authority for that proposition is to be found in the case to which reference was made on behalf of the appellant: *Bai Mativahu* v. *Bai Mamubai* (3). In that

(1) 63 Ind. Cas. 34; 48 I. A. 143; 43 A. 291; 25 C. W. N. 961; 14 L. W. 633 (P. C.).
(2) I. A. Sup. Vol. 47; 18 W. R. 359; 9 B. L. R. 377; 2 Suth.P.C.J. 692; 3 Sar. P.C.J. 82 (P.C.).
(3) 24 I. A. 93; 21 B. 709; 1 C. W. N. 566; 7 Sar. P. C. J. 140; 11 Ind. Dec. (N. S.) 477 (P. C.).

case a Hindu testator by his Will gave his daughter, in the event of her having no children, power to direct by Will to whom his immoveable property should go after her death. As the head-note states, their Lordships held upon the construction of the Will that the gift of the absolute estate was not to the daughter in the event which happened of her having no children but to such persons as she should appoint by Will. As to the power of appointment it was further held that it could be validly exercised only in favour of persons who were actually or in contemplation of law in existence at the death of the testator. In other words, their Lordships followed the rule in the *Tagore case* (2). But both in the *Tagore case* (2) and in the case of *Bai Mativahu* v. *Bai Mamubai* (3) the property in question was ordinary private property, the beneficial interest in which was to pass to the recipient. It may be conceded that the managership of such an endowment as the testator here created is 'property.' But it is property of a special kind; the manager has in theory no beneficial interest in the endowment. The question, therefore, arises whether such an appointment as that made by the widow is within the rule in the *Tagore case* (2).

The reasons on which the rule is based will be found at pages 64 and 65* of the report. Their Lordships said this:—"Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by gift or Will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (4): 'A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.'"

Their Lordships went on to illustrate this general principle and to deal with the Hindu Law of Gifts. The conclusion is stated at page 70* of the Report, where the rule is enunciated that, according to Hindu Law, "a person capable of taking under a Will must be such a person as could take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law, be in existence at the death of the testator." But this express reservation is added: "Their Lordships adopting and acting upon the clear general principle of Hindu Law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provisions for which authority may be found in Hindu Law or usage."

It appears, therefore, that the rule in the *Tagore case* (2) is a general rule to which there may be exceptions. Property cannot be made inheritable otherwise than the law allows, but there may be exceptional cases in which Hindu Law sanctions a departure from the rule that the donee must be in existence.

Now, if the Hindu Law allows, the founder of a religious trust or institution—it may be within limits which it is not now necessary to determine—to lay down a general rule of succession to the managership, it seems difficult to say that the power given to the widow in the present case was badly exercised when she appointed the testator's grand-nephew to succeed her as *shebait*, though he was not in existence at the testator's death. The testator has not said that the office of manager is to be heritable and to descend in his family according to some new rule of succession. His direction was that the office should be held first by his widow and afterwards by such person as she might appoint. He might have said that the first and every succeeding manager should be appointed by a Civil Court. Again, as the learned Judge has observed, a trusteeship with power to appoint a successor is well-known to and recognized by Hindu Law. The testator, therefore, might have created

(4) 6 M. I. A. 526 at p. 555; 1 Ind. Jur. (N. S.) 371; 4 W. R. P. C. 114; 1 Boul. Rep. 228; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 19 E. R. 198.

such an office, in which case no one would have suggested that the rule in the *Tagore case* (2) was applicable. The testator did not go so far but he did give his widow power to appoint her successor and it seems inconsistent with the larger direction which the testator might have given, that every succeeding holder should have power to appoint a successor, to say that the widow's choice—she did not die till 1918—was limited to some person who was in existence at the testator's death in 1878. It might be far from advantageous to the testator's descendants or to the interest of the endowment that her choice should be so limited. In my opinion, the appointment made by the widow may be supported by way of exception to the rule in the *Tagore case* (2) or it may be said that the power given to her is outside the scope of that rule. The appointment does not appear to be inconsistent with the Hindu Law and usage.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram* (5) was much relied on for the appellant but there their Lordships were dealing with an hereditary endowment or office, descendible according to the ordinary rules of inheritance. In connection with the question of limitation, which was before them, their Lordships observed that the successive holders of the office could not be treated as having successive life-estates in the endowment because Hindu Law did not permit the creation of such estates. The observation has little or no bearing on the question with which we have to deal. We are not dealing with the nature of the estate which a *shebait* takes in his office but with the question whether the widow could lawfully appoint the first defendant to be her successor.

The result is that, on this part of the case also, I agree with the learned Judge, and the appeal fails. I may add that it is not necessary for us now to determine who will succeed the first defendant upon his death or in the event of his vacating the *shebaitship*.

As to costs, the learned Judge has made the usual order that they should be paid by the losing party, namely, the plaintiff. In view, however, of the nature of the case and the difficulty of at least one of the questions which arise upon the Will, we are of opinion that there is reasonable ground for modifying the learned Judge's decree in respect of costs. We direct that the costs both of the Trial Court and of this appeal do come out of the estate. The executor's costs should be as between attorney and client. Apart from this modification the appeal will be dismissed.

Sanderson, C. J.—I agree. I desire to add a few words as regards the contention of the appellant, which was based upon the 7th paragraph of the Will, namely, that, inasmuch as the first defendant, Lakhi Narain Ganguly, was not born at the time of the testator's death his appointment by the testator's widow was invalid. In my judgment, the two cases which were relied upon, namely *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5) and *Gopal Chunder Bose* v. *Kartick Chunder Bose* (6), are not decisive of the present case. It was, no doubt, decided that the ruling in *Jotendromohun Tagore* v. *Ganendromohun Tagore* (2) is applicable to an hereditary office and endowment as well as to other immoveable property. In this case, however, in my judgment, having regard to its terms, the Will did not create an hereditary office or endowment. Consequently, in my judgment, the fact that the first defendant was not alive at the time of the death of the testator does not make the appointment of the first defendant as *shebait* invalid.

K. S. D. & W. C. A. *Appeal dismissed.*

(5) 27 I. A. 69; 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

(6) 29 C. 716 (P. C.).

KAMAL NARAYAN *v.* BANI RAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 255-B OF 1922.
July 23, 1923.

Present:—Mr. Prideaux, A. J. C.

KAMAL NARAYAN—PLAINTIFF—APPELLANT

versus

BANI RAM SHOP OWNER SHEONARAYAN—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 25 (2), 62—Limitation Act (IX of 1908), ss. 19, 20—Contract, breach of—Settlement of damages—Suit to recover damages—Cause of action—Limitation—Extension of time.

An oral settlement between the parties to a contract providing in case of a breach of the contract, for the payment of compensation by the defaulter is not a new contract within section 62 of the Contract Act and the cause of action would accrue on the date of the breach of the contract. Such a settlement does not extend the period of limitation under section 19 or section 20 of the Limitation Act, where the cause of action had already accrued.

Neither section 25 (2) of the Contract Act nor section 92 (4) of the Evidence Act applies to the settlement as there is neither a new contract nor a modification of the original contract.

Appal from a decree of the District Judge, Akola, dated the 6th January 1922, in Civil Appeal No. 81 of 1921.

Mr. *M. B. Niyogi*, for the Appellant.

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

JUDGMENT.—The plaintiff's case is that on 16th October 1917 defendant contracted to sell 200 *khandis* of cotton seed at Rs. 13-8-0 per *khandi*, the date of delivery being 27th January 1918. When delivery was demanded on that date the defendant did not deliver as the price of cotton seed had risen to double. On 1st February 1918 there was an agreement between the parties that defendant should pay at Rs. 21-8-0 per *khandi*, *i. e.*, compensation at the rate of Rs. 8 per *khandi*. He has not paid and hence the present suit for recovery of Rs. 1,600 with interest, in all Rs. 2,000.

The defendant admitted the *sauda* but denied that there was any settlement. He said there was another *sauda* of 200 *khandis* dated 11th September 1917 by which plaintiff had sold to him 200 *khandis* of cotton seed at Rs. 12-8-0 per *khandi*. Plaintiff lost heavily over that *sauda*. Defenant asked that both *saudas* be settled at once but nothing was done and that, as the claim of the plaintiff was time-barred, he has made the false allegations as regards the settlement. Interest was said to be penal.

Plaintiff denied the *sauda* of 11th September 1917, and stated that the suit was within time as it has been filed within three years from the date of settlement. It was further contended that the settlement can be orally proved and that he could claim interest.

The case went to trial on the following issues :—

"1. Was there any settlement as pleaded by the plaintiff?

"2. Is oral evidence to prove such settlement inadmissble?

"3. Is the claim time-barred?

"4. Is the plaintiff entitled to claim interest? If so, at what rate?

"5. Is the interest claimed penal?

"6. To what relief is the plaintiff entitled?"

The Trial Court held the settlement was proved, an entry of the settlement being made in the plaintiff's account books on 1st February 1918. It was also found that the *sauda* pleaded by the defendant had been entered into and had been settled at Rs. 162-8-0 and a further *sauda* of 50 *khandis* in which defendant lost was also found to have been entered into and this had been settled by the defendant's *sauda* of 11th September 1917. Oral evidence was held to be admissible to prove the settlement. The suit was found to be within time. Defendant was found to be liable to pay interest at 1 per cent. per mensem by way of damages and the full claim was decreed.

On appeal the District Judge, Akola, finds that the plaintiff's right of action accrued on 27th January 1918, the date on which the defendant broke the contract by not delivering the cotton seed agreed to be sold and that the period of limitation could not be extended by any subsequent settlement alleged by the plaintiff. The alleged oral settlement does not fall within sections 19 and 20 of the Limitation Act. The appeal was decided on this point alone and the claim was held to be barred by limitation on the ground that the suit was instituted more than three years after the breach took place.

It is here argued that the settlement could be proved and further that

there has been a novation of contract. I am referred to section 62 of the Contract Act. That section runs :—

"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

But I do not think that the settlement comes within this section. The contract subsisted and had failed and the cause of action would be the failure of the contract. The settlement that a certain amount of money was payable for the failure is not a new contract in my opinion.

Section 25 (2) of the same Act is also relied upon. But I do not think that this again can apply, nor does section 92 (4) of the Evidence Act apply for the contract itself is not modified. *Ranglal* v. *Chunilal* (1) is depended on and it is argued that the settlement was an adjustment of the dispute. It seems to me that the case is that there was a *sauda* and a date fixed for delivery. Defendant failed to deliver. Thereafter, he said he would pay damages at Rs. 8 per *khandi*. The mere fact that at a later date he said he would pay the damages cannot extend the time were the cause of action already accrued. Take the case of a bond payable on a particular date and suppose that the defendant said he would pay after that date ; unless that promise was in writing it would not save limitation and in the present case the settlement does not amount to a promise giving a fresh cause of action. The cause of action was on the contract of delivery. There is no novation of contract and I think the view taken by the lower Appellate Court is correct assuming there was a settlement which question has not been decided by that Court. The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondent's costs.

G. R. D. & W. C. A. *Appeal dismissed.*

(1) 60 Ind. Cas. 316; 16 N. L. R. 204.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 1413 OF 1921.

March 17, 1923.

Present:—Mr. Justice Abdul Raoof.

PURAN CHAND—APPELLANT

versus

PURAN CHAND AND OTHERS—RESPONDENTS.

In the matter of the insolvency of

UMR O S NGH.

Provincial Insolvency Act (III of 1907), s. 37—Fraudulent transfer—Transfer under pressure—Charge—Note on hundi, *whether operates to create charge—Registration Act (XVI of 1908), ss. 17 (1) (b), 49.*

Where the dominant motive of a debtor in making a transfer in favour of a creditor is to save himself from exposure or from proceedings in Court, the transfer cannot be held to be fraudulent within the meaning of section 37 of the Provincial Insolvency Act. [p. 443, col. 1.]

Puran Chand v. *Punjab National Bank, Limited,* 59 Ind. Cas. 578; 3 L. L. J. 44; 3 U. P. L. R. (L) 6 and *Ex parte Taylor, In re Goldsmid,* (1887) 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148, relied on.

At the foot of an unregistered *hundi* for over Rs. 100, a note was added in the following words: "Our property at Delhi and Ludhiana shall be liable for this debt:"

Held, (1) that the note did not operate to create a charge on the property ; [p. 443, col. 1.]

(2) that, in any case, the *hundi* being unregistered it was inadmissible in evidence under section 49 of the Registration Act to establish a charge on the property. [p. 443, cols. 1 & 2.]

Miscellaneous first appeal from an order of the District Judge, Ludhiana, dated the 14th March 1921.

Lala *Har Gopal,* for Bakhshi *Tek Chand,* for the Appellant.

Lala *Jagan Nath* and Lala *Badri Das,* R. B., for the Respondents.

JUDGMENT.—This appeal has arisen out of insolvency proceedings. The following facts will disclose the nature of the question which is to be decided in this appeal:—On the 17th of January 1917 Murlidhar, one of the creditors of Umrao Singh, applied under the Provincial Insolvency Act to have him adjudicated an insolvent. Accordingly, Umrao Singh was adjudicated an insolvent by an order dated the 28th of May 1917. On the 3rd of January 1917, *i.e.*, within three months of the application for adjudication, Umrao Singh had created an equitable charge on his house property in Delhi in favour of his creditors, Ludhiana

Mills Co., represented by Dr. Chandar Bhan, for the sum of Rs. 35,684. The wife of Thakur Puran Chand held a *hundi* executed by Umrao Singh on the 28th of December 1915 for Rs. 5,500. At the foot of this *hundi* a note is added in the following words:—

"Hamari Delhi wa Ludhiana ki jaiiad is qarze ki zimmewar hogi."

The house at Delhi was sold by the Official Receiver for Rs. 14,500. The Company put in a claim under the lien created by the equitable mortgage of the 3rd of January 1917 which was registered by the Receiver. Thakur Puran Chand then put in an application on the 25th of July 1917 on behalf of his wife claiming a prior charge and objecting to the charge created in favour of the Ludhiana Mills Company on the grounds, namely, (1) that no charge as a matter of fact had been created, and (2) that if a charge was created it was void with reference to the provisions of section 37 of the Provincial Insolvency Act III of 1907. Mr. Jwala Sahai, District Judge, by on order dated the 14th of March 1921, overruled the objection of Thakur Puran Chand and held that the sale of the house must be taken to be subject to the lien in favour of the Ludhiana Mills Company. The claim of Thakur Puran Chand for a prior right was disallowed.

Two appeals have accordingly been preferred by Thakur Puran Chand. Civil Appeal No. 1413 of 1921 relates to the order recognising the equitable mortgage in favour of the Ludhiana Mills Company, and Civil Appeal No. 1788 of 1922 relates to the disallowance of Thakur Puran Chand's claim to a prior charge. Argument has been addressed in respect of both the appeals in Civil Appeal No. 1413 of 1921.

It has been contended by Mr. Har Gopal on behalf of Thakur Puran Chand that the evidence of Dr. Chandar Bhan, Lahori Mal and Simru Ram on the basis of which the learned District Judge has decided that an equitable mortgage was created in favour of the Ludhiana Mills Company by the deposit of title-deeds relating to the house in Delhi is not reliable and must be rejected. The only ground urged for this contention is that these witnesses are partisans of the Ludhiana Mills Company and their evidence is interested. The title-deeds were produced before the District Judge and this fact supports the evidence given by the witnesses and I see no reason for holding that they have not told the truth. An alternative contention was put forward that the evidence of Chandar Bhan we t to show that the title-deeds were handed over not with the object of creating an equitable mortgage for the property but with a view to a contemplated sale in respect of the property. The evidence of the witness has been read out and I am not prepared to hold that it bears the construction put upon it by the learned Vakil.

The second contention put forward by the learned Vakil on the basis of section 37 of the Provincial Insolvency Act, III of 1907, was that the mortgage should be held to be fraudulent and void. Section 37 of the Act provides that, "Every transfer of property or of any interest therein, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof be deemed fraudulent and void as against the Receiver and shall be annulled by the Court." The question, therefore, which I have to decide is whether the equitable mortgage was created with a view of giving the Ludhiana Mills Company a preference over the o her creditors of Umrao Singh. The facts proved by the evidence in the case are that Umaro Singh being threatened and pressed by Dr. Chandar Bhan escaped from Ludhiana but he was followed and was threatened with proceedings in Court and in order to escape from the threatened proceedings in Court he deposited the title-deeds with Dr, Chandar Bhan which had been produced by this witne s in the Court below.

Umrao Singh, under pressure from the Punjab National Bank, had created an equitable charge in favour of the Bank over his Ludhiana house. According to the witness Chandar Bhan he had done this stealthily and had not disclosed the secret to him. Having come to know of this fact he began to press Umrao Singh for the payment of the debt to the Ludhiana

Mills Company. This is what he states in his evidence:—

"We were constantly pressing Umrao Singh for settlement. On 2nd January 1917 he escaped quietly. I heard he was at Gobindgarh and I went there. I had other men with me. We searched him out. He said he was helpless. Again we threatened him with litigation. He offered the mortgage of the Delhi house. He handed over title-deeds to us and mortgaged the house to the Mills for the money due from him."

Umrao Singh, in order to save himself from exposure and from proceedings in Court and in order to appease the Ludhiana Mills Company, made this equitable mortgage in favour of the Company. Can it be said under these circumstances that the mortgage was created with a view of giving preference to the Company over the other creditors? I think not. In a similar case in respect of an equitable charge created in favour of the Punjab National Bank a similar question arose and Mr. Justice Wilberforce held, "that the dominant motive of the debtor in making the transfer was to save himself from exposure or from a criminal prosecution, and, in such a case, as the law regards only the motive of the debtor, it cannot be held that the transfer was voluntary or amounted to a fraudulent preference," vide. *Puran Chand* v. *Punjab National Bank, Limited* (1). This decision of the learned Judge is based on the rule laid down in *Ex parte Taylor, In re Goldsmid* (2). I cannot do better in this case than to follow the decision of Mr. Justice Wilberforce as the facts of the case decided by him were almost similar to the facts of the present case. I accordingly hold that the equitable mortgage in favour of the Ludhiana Mills Company was not fraudulent and is not void.

The next question which I have to decide is whether a charge was created in favour of the wife of Thakur Puran Chand by the note appended to the *hundi* to which I have already referred, I am clearly of opinion that the words quoted do not create a charge but even if they do the document filed to prove this, being unregistered, is inadmissible in evidence under section 49 of the Registration Act to establish the charge claimed by Thakur Puran Chand. It follows that Thakur Puran Chand cannot claim a preference over the debt of the Ludhiana Mills Company. This appeal therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 59 Ind. Cas. 578; 3 L. L. J. 441; 3 U. P. L. R. (L) 6.
(2) (1887) 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2256 OF 1920.

January 19, 1923.

Present :—Mr. Justice Rankin and Mr. Justice Panton.

PRAMATHA NATH SEN GUPTA—
PLAINTIFF—APPELLANT
versus
Sheikh ABDUL AZIZ MEAH—
DEFENDANT—RESPONDENT.

Commissions—Commissioner, duty of—Fees, recovery of, mode of—Mortgage-bond obtained in lieu of fees, whether enforceable.

It is entirely contrary to the duty of a Commissioner to approach an individual party and get him to pay sums of money in discharge of an untaxed bill of costs upon the footing that, unless this is done, the report will not be filed. A Commissioner's duty is to keep all parties at arm's length, to receive no favour from any one, to look to one no more than to another. [p. 445, col. 1.]

The work done by a Commissioner is not work done for any of the parties; it is work done for the Court. If the Commissioner wants the payment of his fees he must look to the Authority that appointed him and whose duty it is to put proper pressure on the right party and to provide for an adequate remuneration for the Commissioner in a reasonable and proper way. For the Commissioner himself to put any sort of pressure on one party so as to make the immediate payment of an untaxed bill a condition without which the Commissioner's duty would not be done or would be done at another time is not merely ill-advised conduct; it is improper and illegal conduct. [p. 445, col. 1.]

A mortgage-bond obtained by a Commissioner from one of the parties in lieu of payment of an untaxed bill of costs is an improper advantage obtained by an Officer of Court by abuse of his position as such Officer and is not enforceable. [p. 445, col. 1.]

Gopalaratnamayyar v. *Bupala Narasimma Nayudu*, 4 M. 399; 1 Ind. Dec. (N. S.) 1113, distinguished.

PRAMATHA NATH SEN GUPTA v. ABDUL AZIZ MEAH.

Appeal against decree of the Officiating Subordinate Judge, Noakhali, dated the 12th July 1920, reversing that of the Munsif, Third Court, at Sudharam, dated the 2nd December, 1918.

Babus *Gunada Charan Sen*, (with him Babu *Jitendra Kumar Sen Gupta*), for the Appellant.

Babu *Krishna Kamal Maitra*, (for Babus *Jotindra Mohan Chowdauri* and *Subodh Chandra Roy Chowdhury*), for the Respondent.

JUDGMENT.

Rankin, J.—This is a second appeal brought by the plaintiff who acted as a Commissioner in a partition suit which was referred to arbitration under the Second Schedule of the Code. It appears that an arbitrator having been appointed certain petitions were made to the arbitrator including one by the plaintiff in the suit asking that, in respect of a certain property, there should be a local enquiry. On the 8th March 1915 the Court having appointed the arbitrator to determine all the matters in difference between the parties in the suit empowered him to dispose of all the petitions filed before him including the plaintiff's petition for the appointment of a Pleader Commissioner. The order gave the arbitrator power to appoint "whomsoever he likes" and directed the plaintiff to deposit Rs. 100 at present as Commissioner's fees etc., within seven days. The plaintiff deposited Rs. 100 in terms of that order and the plaintiff in the present suit was appointed Commissioner under that order. His actual appointment was made by the arbitrator under the power given to him by that order of the Court. The present defendant who was then plaintiff was applied to from time to time by the Commissioner to put in certain additional sums as further fees and in the end the Commissioner got ready his report and approached the plaintiff in the suit on the footing that, unless a couple of hundred rupees more were paid, he could not be expected to file his report. Thereupon a mortgage-bond was given to the Commissioner by the then plaintiff promising to pay Rs. 200. On that bond the Commissioner has now sued.

The first Court has decreed the suit and the lower Appellate Court has dismissed the suit on the ground that the mortgage-bond taken by the Commissioner in that way is taken contrary to law and cannot be sued upon. I shall, for the present purpose, put on one side altogether any question except this, whether the taking of that mortgage-bond by the Commissioner was such a breach of his duty towards the parties, to the arbitrator and to the Court that it cannot be sued upon as being an illegal contract. In my opinion that proposition ought to be affirmed, and, nonetheless so, that it is good law that when one party at the instance of another has done work or come under an obligation, there may be an implied contract by the party at whose instance the work has been done to indemnify the other. The Commissioner, if sufficient fees were not forthcoming, was quite entitled to go to the arbitrator and object to do the work without remuneration. It was quite proper for the arbitrator, if he though fit, to require the plaintiff to pay further sums of money into the arbitrator's hands. It was quite open to the arbitrator to enquire as to the amount due, to fix the terms of the Commissioner's remuneration and to deal with the matter as justice should require. It appears that no actual rate was fixed by contract with anybody. It is said that the rate usually allowed under the Rules of the High Court was taken as a guide in assessing what was due to the Commissioner. But the plaintiff was not in so good a position as the arbitrator to dictate the Commissioner any terms, to tax his bills, to query entries in the diary or to see that he did his duty properly. It is quite true that, in all probability, the arbitrator would feel obliged to make the plaintiff and no other party deposit the amount necessary to meet the Commissioner's claim. What happened was that, at a time when the Commissioner was assisting the arbitrator to discharge judicial duties as between one party to a partition suit and another, he was approaching the plaintiff from time to time and getting sums of money on account, and finally as a condition of rendering his report, he took from the plaintiff this mortgage-bond for a fixed sum of money, viz., Rs. 200

which the plaintiff promised to pay. In my judgment, this is entirely contrary to the duty of a Commissioner whether he be regarded as appointed by an arbitrator or whether he be regarded as appointed by the Court, the arbitrator having power to nominate the individual. It is quite incredible that the duties of a Commissioner should be thought consistent with approaching an individual party and getting him to pay sums of money in discharge of an untaxed bill of costs upon the footing that, unless this is done, the report will not be filed. In my judgment, there is no doubt about the principle. The Commissioner's duty was to keep all parties at arm's length, to receive no favour from any one, to look to one no more than to another. If he wanted his money he had the arbitrator as the person whose duty it was to put proper pressure on the right party and to provide for an adequate remuneration in a reasonable and proper way. For the Commissioner himself to put any sort of pressure upon one party so as to make the immediate payment of an untaxed bill a condition without which the Commissioner's duty would not be done, or would be done at another time is not merely ill-advised conduct, it is improper and illegal conduct. No such bargain so procured can stand. It is an improper advantage obtained by an officer of Court by abuse of his position as such officer. The case of *Gopalaratnamayyar* v. *Bupala Narasimma Nayudu* (1) is a case with reference to a suit for fees by a Commissioner after the litigation in question has come to an end. That is another matter altogether. It is not the case that the Commissioner is the servant of the party at whose instance the Court or the arbitrator makes the appointment. The work done is not work done for that party. It is work done for the Court and the right to sue a party at whose instance the Court appoints a Commissioner is not the right to sue a party for whom the plaintiff has worked. It must be based upon a different principle of law, namely, that where one party does work, or incurs an obligation at the instance of another there is, in certain circumstances, an implied provision of indemnity. It seems to me necessary that there should be no doubt cast on the broad rule that a Commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees. I think the conclusions at which the learned Subordinate Judge has arrived are correct and that his decision should be upheld.

The appeal is accordingly dismissed with costs.

Panton, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 4 M. 399; 1 Ind Dec. (N. S.) 1113.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 102 OF 1922.

March, 19, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.

KRISHNA IYER—RESPONDENT —APPELLANT

versus

THE OFFICIAL RECEIVER OF TRICHINOPOLY—PETITIONER—RESPONDENT.

Procedure—Insolvency—Evidence recorded by Official Receiver—Consent of parties.

Where a matter has to be decided on trial by a Court, the Court should hold the trial itself and retain advantage of seeing the witnesses give evidence following the course of proceedings. It is undesirable that it should delegate its duty to a person whose interest and duty may conflict in the conduct of the proceedings. [p. 446, col. 1.]

In proceedings arising out of an application made by an Official Receiver for the setting aside of an alienation by the insolvent the parties agreed that the statements of the witnesses should be recorded by the Official Receiver and they were so recorded:

Held, that the procedure adopted was extremely undesirable but was validated by the consent of the parties. [p. 446, col. 1.]

Jainab Bibi Saheba v. *Hyderally Saheb*, 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, followed.

Appeal against an order of the District Court, Trichinopoly, dated the 5th December 1921, in C. M. P. No. 17 of 192 , in I. P. No. 10 of 1919, (I. P. No. 50 of 1919, on the file of the Official Receiver of Trichinopoly).

Messrs. *K. Krishna Menon* and *N. R. Lakshmana Iyer*, for the Appellant.

Mr. *S. T. Srinivasagopalachary*, for the Respondent.

JUDGMENT.—The fist objection taken to the lower Court's order is that it was passed after an irregular trial, in that the witnesses did not depose before it. The facts are that the proceedings began with a report from the Official Receiver in which he applied for the setting aside of an alienation, Exhibit A, by the insolvent. The parties then, it is on the record and it is not disputed, agreed that in the enquiry into this application, the statements of the witnesses should be recorded by the Official Receiver. The objection here is that statements of the witnesses so recorded were not evidence and that the ower Court was not entitled to pass a judicial decision on them. We desire to express the strongest disapproval of the lower Court's procedure. It is clearly undesirable that, where a matter has to be decided on trial the Court should not hold the trial itself and retain the advantage of seeing the witnesses give evidence following the course of the proceedings; and it is further undesirable that it should delegate its duty to a person, such as the Official Receiver in the present case, whose interest and duty may conflict in the conduct of the proceedings. But, at the same time, we must hold that *Jainab Bibi Saheba* v. *Hyderally Saheb* (1) applies and that the consent of the parties was sufficient to validate the procedure employed. We can, therefore, only express the hope that the lower Court will not take a similar course in future proceedings of this nature.

This objection failing, we turn to the merits. The lower Court dealt with them in very general language; but we think that its decision is right. Exhibit A was executed within five months of the insolvent's petition. It is a usufructuary mortgage; but possession of the property has not passed, the insolvent's family continuing to occupy it under a rent deed, Exhibit G. The alienee, here appellant, admits that he has never received any rent. In fact, the amount of rent secured by Exhibit G is identical with the total income of the insolvent's family, that which they receive for looking after the timber business said to have been started by the alienee on the premises. The alienee does not know how much the Municipal tax of the house is; and he has even never entered the portion of the building occupied by the insolvents; and, although he says that his accounts are being kept in the upstair of the premises, he could not say whether they were actually there at the time of the enquiry. The insolvents had no property except the house dealt with in Exhibit A.

The consideration for Exhibit A is evidenced mainly by accounts, and, although the accounts may have been kept in the course of business, there is no security of any value for their having been. In fact, one material entry of Rs. 910 is, in our opinion, open to distinct suspicion. It is said that a large portion of the consideration for Exhibit A, Rs. 2,000, alleged to have been paid to Palaniappa Chetty must be regarded as genuine, because Palaniappa Chetty was undoubtedly a creditor for that amount under Exhibit K and, if he had not actually been paid, he would have proved in the insolvency. There is no doubt that Palaniappa Chetty was a creditor; and there is some reason for holding that he has been paid in accordance with the endorsement on Exhibit A. But it does not follow that he was paid with the money raised by means of Exhibit A. Palaniappa Chetty is not examined. The endorsement referring to the payment is paid by one Gnanikkam Pillai on behalf of the alienee; but Gnanikkam Pillai is not examined. In these circumstances, we do not think that the payment under Exhibit K is on any better footing than the others enumerated in Exhibit A.

It is said further that the alienee is a timber merchant of Palghat and that he is not shown to have had any previous connection with the insolvent. He, however, was, as the accounts show, legally indebted to one Appavu Pillai, father of Gnanikkam, already referred to, and connected in business with the insolvents. There is, therefore, nothing in the alienee's

(1) 46 Ind. Cas. 957; 43 M. 609; 38 M. L. J. 532; 28 M. L. T. 231 (1920) M. W. N. 360; 12 L. W. 164.

favour on this part of the case and there is, in any event, the absence of evidence that the alienee made any reasonable inquiry as to the insolvent's position.

We confirm the lower Court's decision and dismiss the appeal with costs.

V. N. V.

Appeal dismissed

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 685 OF 1921.

March 28, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

ROSHAN ALI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

CHANDRA MOHAN DAS—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 22 (2) 49—Landlord and tenant—Occupancy holding purchased by co-sharer landlord, effect of—Sub-lessee, position of—Ejectment by notice.

A co-sharer landlord who purchases an occupancy holding is not in the position of a *raiyat* with regard to the holding, but holds it in his right as a co-proprietor; and a person to whom he lets out the land is not an under-*raiyat*, but a *raiyat* or a tenure-holder who is not liable to be ejected by service of notice under section 49 of the Bengal Tenancy Act. [p. 448, col. 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Tipperah, dated the 15th December 1920, reversing a decree of the Munsif, First Court, at Comilla, dated the 27th May 1920.

Babu *Jatindra Mohan Ghose*, for the Appellants.

Babu *Upendra Kumar Rai*, for the Respondent.

JUDGMENT.

Ghose, J.—This appeal arises out of a suit for recovery of *khas* possession on declaration of the *raiyati* right of the plaintiff after evicting the defendants who are under-*raiyats* under the plaintiff and who hold under a *kabuliyat*, the term of which has expired. This is how the plaintiff frames his suit. It was dismissed by the Munsif who held that the defendants were under-*raiyats* but that no notice had been served under section 49 of the Bengal Tenancy Act on them and, therefore, the plaintiff was not entitled to a decree for ejectment. On appeal by the plaintiffs the learned Subordinate Judge holds that the defendants are not in possession of the land as tenants but as labourers. This view, I think, it was not open to the Subordinate Judge to take because the plaintiff comes to Court on the allegation that the defendants are under-*raiyats*. The facts, shortly stated, are these:—The plaintiff was a co-sharer landlord with regard to a certain occupancy holding which has been found to be non-transferable. He purchased the occupancy holding and then let it out to the defendants under a *kabuliyat* dated 2nd *Pous* 1317 B.S. for a term of one year only which expired in *Pous* 1318 B. S. With regard to the meaning of this *kabuliyat*, there is some dispute which I shall state later on. The defendants continued in possession, after the expiry of the term of that *kabuliyat* and the present suit was brought in May 1919 which correspond, with sometime in Jaith 1326 B. S. The question is, what is the status of the defendants. The learned Subordinate Judge, as I have said, holds that, under the *kabuliyat*, the defendants are mere labourers. Whatever may, be the true construction of the document the defendants did not hold the land at the time of the suit under the terms of the *kabuliyat*. The plaintiff mentions in his plaint that the defendants have been "holding over" and that they are *korfa raiyats* under the plaintiff. There cannot be any question, therefore, that the defendants hold the land as tenants under the plaintiff whatever their status may be. The learned Subordinate Judge next says that the occupancy right of a *raiyat* prior to the purchase of the plaintiff not being transferable, section 22, sub-section (2), of the Bengal Tenancy Act has no application, and he seems to have held that the right of occupancy subsisted in the

plaintiff and there could not be any merger. This, evidently is a misconstruction of the effect of section 22, sub-section (2), of the Bengal Tenancy Act. The question of transferability or non-transferability of occupancy right is only relevant with regard to the position of the co-sharer landlords when one of them purchases the occupancy right, that is, whether the other co-sharers would be entitled to joint possession with the purchaser or would be entitled only to receive rent from the purchaser according to their shares in the property. In this case, that question does not arise, because the other co-sharers did not ask for joint possession and they have accepted the position that the plaintiff is entitled to possession by payment of their share of the rent to them. The question then is, what is the position of the plaintiff with regard to this land? The learned Vakil for the respondent does not contend that the occupancy right purchased by the plaintiff subsists as has been observed by the Subordinate Judge; but he contends that the plaintiff would be a non-occupancy *raiyat* with regard to the land. That position cannot be supported and it would lead to anomalies. Why should the plaintiff be considered to be only a non-occupancy *raiyat*? If the plaintiff is a settled *raiyat* of the village and if the contention of the plaintiff be accepted, then by the purchase he acquired a right of occupancy and he would be an occupancy *raiyat* under himself as well as under his co-sharers. Therefore, although section 22, sub-section (2), of the Bengal Tenancy Act (before the amendment in 1907 as that applies to this case) lays down that the occupancy right will cease to exist by such purchase, a new occupancy right would accrue to the plaintiff. Then, supposing that he would be a non-occupancy *raiyat*, would he be an occupancy *raiyat* by twelve years' possession of the land? It seems to me that it cannot be so. This question was discussed in one of the many cases which have clustered round section 22 of the Bengal Tenancy Act. In the case of *Ram Lal Sukul* v. *Bhela Gazi* (1) it was observed that a purchaser in the position of the plaintiff could not acquire a new occupancy-right under himself and his co-sharers. Mr. Justice Woodroffe, in delivering the judgment of the Court, says:—"To hold this" that is, that the purchaser acquires a new occupancy right "would, I think, defeat the policy of the section and further the owner of the holding could not acquire a right adversely to himself in his other character as co-proprietor." It seems to me, therefore, that the plaintiff was not a *raiyat* with regard to the land after his purchase of the occupancy right but was holding it in his right as a co-proprietor. The next question is what the position of the person to whom he lets out the land would be? He would, in my judgment, be a *raiyat* or a tenure-holder as has now been made clear by the provisions of section 22, sub-section (2), of the Bengal Tenancy Act, after the amendment in 1907, which says "if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a *raiyat*, as the case may be, in respect of the land." The defendants, therefore, would be *raiyats* and not under-*raiyats* as is contended for by the learned Vakil for the respondent If that is so, they are not liable to be ejected by service of notice under section 49 of the Tenancy Act. The appeal is, therefore, allowed and the suit dismissed with costs in all the Courts.

Walmsley, J.—I agree.

Z. E. *Appeal allowed.*

(1) 6 Ind. Cas. 870; 37 C. 799; 14 C. W. N. 814.

PHULLI *v.* DEBI PARSHAD.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 972 OF 1918.

March 8, 1923.

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

PHULLI—PLAINTIFF—APPELLANT

versus

DEBI PARSHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 3 (4)—Minor defendant—Guardian ad litem, appointment of—Notice to minor, absence of, effect of—Hindu Law—Property inherited through maternal grandfather, nature of.

Where a Court by its action has given its sanction to the appearance of a person as guardian *ad litem* to a minor defendant, the absence of a formal order of appointment is not necessarily fatal to the proceedings. [p. 452, col. 1.]

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), followed.

The failure of the Court to issue the notice required by r. 3 (4) of O. XXXII of the Civil Procedure Code to a minor defendant is a mere irregularity and does not invalidate the appointment of the guardian *ad litem*.

Rambrichh Ram v. *Tarak Tewari*, 33 Ind. Cas. 805; 14 A. L. J. 589, *Enuga Sundarama Reddi* v. *Bezwada Pattabhiramireddi*, 42 Ind. Cas. 421; (1917) M. W.N. 495; 6 L. W. 272, relied on.

Rajendra Prasad v. *Probodh Chandra Mitra*, 59 Ind. Cas. 936; 2 P. L. T. 116; 6 P. L. J. 82; (1921) Pat. 156, *Syed Ali Sarkar* v. *Manikjan Bibi*, 43 Ind. Cas. 728, *Ghanshyam Das* v. *Hardei*, 32 Ind. Cas. 380; 2 O. L. J. 562, distinguished.

Sheo Shankar Ram v. *Jaddo Kunwar*, 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.), *Sai Deo* v. *Jai Nath*, 67 Ind. Cas. 808; 9 O. L. J. 141; 4 U. P. L. R. (O.) 43; (1922) A. I. R. (O.) 75, referred to.

What the Court has to look to is the substance of what occurred and not the shadow, and to interfere with the former proceedings only if it appears that the minor's interests were neglected by the person who undertook and was permitted by the Court to represent them. [p. 453, col. 1.]

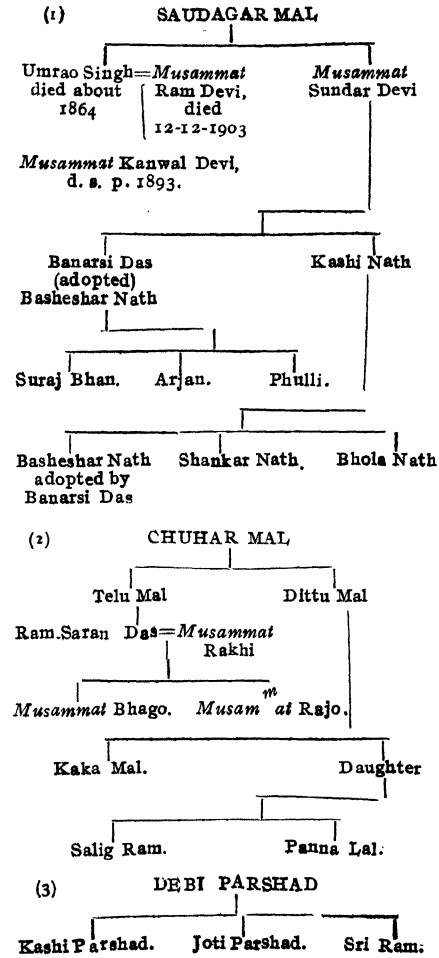
Property inherited by a Hindu through his maternal grandfather is obstructed heritage and is his self-acquired property, and his male issue do not take any interest in it by birth. [p. 453, col. 2.]

First appeal from a decree of the Senior Sub-Judge, Delhi, dated the 31st December 1917.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *Manohar Lal* and Lalas *Jagan Nath*, *Sardha Ram* and *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—The following three pedigree-tables are necessary for the understanding of the matter in controversy in this appeal:—



Umrao Singh (pedigree No. 1) was the owner of considerable property which was held by his widow, *Musammat* Ram Devi, until her death in December 1903. Three sets of claimants to the succession then appeared, (1) the descendants of Umrao Singh's sister *Musammat* Uttam Devi, (2)

Ram Saran Das and Kaka Mal who alleged that Saudagar Mal's great-grandfather and Telu Mal's great-great-grandfather had been brothers, and (3) Debi Parshad and his sons who also claimed to be descended from a brother of Saudagar Mal's great-great-grandfather. On the 19th January 1904 these rivals entered into an agreement which was signed (1) by Basheshar Nath for himself and as the guardian of his three sons and by Shankar Nath for himself and as guardian of Bhola Nath; (2) by Ram Saran Das and Kaka Mal; (3) by Debi Parshad for himself and as guardian of Sri Ram, and by Kashi Parshad and Joti Parshad. The parties agreed that each set of claimants should be owner of one-third of Umrao Singh's property; that a Succession Certificate or Letters of Administration should be taken out jointly or by one of the three parties, and that all should combine to resist any other claimant.

Four years of litigation about Letters of Administration ensued, and Letters of Administration eventually were granted to Basheshar Nath alone on the 11th January 1908, the order being upheld by the Chief Court on 12th February 1909.

On the 8th March 1909, Debi Parshad and his sons sued for possession of one-third of the property by partition on the basis of the agreement of 19th January 1904. Among the defendants named in the plaint were Basheshar Nath and his sons Suraj Bhan, Arjan and Phulli who were described as minors under the guardianship of their father Basheshar Nath. The body of the plaint contained no mention of the minority of the sons of Basheshar Nath nor was it prayed that Basheshar Nath should be appointed their guardian *ad litem*. There was no separate application for such appointment and no order of appointment was passed by the Court. No notice under O. XXXII, r. 3 (4) was issued to the minors. They were never served personally with summons in the suit.

Basheshar Nath was served with a summons on 1st May 1909 in which he was designated guardian for his minor sons. On the 4th May 1909 he gave a power-of-attorney to B. Wazir Singh, Pleader, to defend the suit and described himself as guardian of his minor sons.

B. Wazir Singh appeared in Court on 13th May 1909, as Pleader for defendants Nos. 3 to 8, *i.e.*, Basheshar Nath and his sons, Shankar Nath and Bhola Nath. He had previously filed written pleas on behalf of Shankar Nath and Bhola Nath. On the 14th May 1909, he is recorded as stating certain verbal pleas on behalf of "the defendants." Preliminary issues were struck on that day and were decided on 19th July 1909. On 7th October 1909, Suraj Bhan and Arjan were declared to be of age and on 13th October, all the defendants Nos. 3 to 8 were declared to have been served with notice. Issues were struck as follows on 18th October 1909:—

(1) Was the execution of the mutual settlement, dated 19th January 1904, obtained by false representations alleged?

2. Is the deed of settlement (*i.e.*, the agreement of 19th January 1904) otherwise invalid for reasons stated in the pleas or not?

3. Did defendants Nos. 3 to 8 subsequently ratify by their conduct the settlement?

4. Is the suit within time?

5. Are the defendants barred from raising the plea of invalidity of the agreement because they have failed to get it set aside within time?

On that day Mr. Kirkpatrick, Advocate, appeared for defendants Nos. 3 to 8 and the suit was ordered to proceed *ex parte* against the other defendants. Counsel for the plaintiff commenced an explanation of the pleas of defendants Nos. 3 to 8 with reference to issue (2) and an explanation by Mr. Kirkpatrick was recorded that the words "otherwise invalid for reasons given in the pleas," included, "except matters covered by issue (1) " (*a*) without consideration, (*b*) contrary to law, *i.e.*, against public policy, (*c*) that it was never acted upon, (*d*) that the plaintiffs themselves acted contrary to it."

On the next day of hearing, 4th January 1910, B. Wazir Singh appeared for defendants Nos. 3 to 8. Two witnesses were examined for the plaintiffs and their case was closed. The case for the defendants

was also closed "Except previous file for historical purposes." On the subsequent date fixed for arguments both Mr. Kirkpatrick and B. Wazir Singh appeared for defendants Nos. 3 to 8 and Mr Kirkpatrick argued on their behalf. The Court delivered judgment on 21st March 1910, and acknowledged in the judgment the help given to it, "by the able arguments of Mr. Kirkpatrick, Counsel for defendants Nos 3 to 8, and Lala Piara Lal, Counsel for plaintiffs." The plaintiffs were given a preliminary decree for possession by partition of a one-third share in the property. It was remarked in the judgment that the question of minority had not been taken in the pleas; that during the pendency of the suit defendants Nos. 4 and 5 (Suraj Bhan and Arjan) had become major and had not pleaded that the agreement was not binding on them because they were minors at the time; that no such plea had been taken on behalf of the sole remaining minor defendant (*i.e.*, Phulli) by his father, and that the Court did not propose to discuss the point.

The defendants Nos. 3 to 8 appealed to the Chief Court and specifically pleaded in their memorandum of appeal that the Trial Court was not right in not discussing the question of the effect of minority on the compromise. The appeal was presented by two Advocates, Mr. Shadi Lal (now Sir Shadi Lal, Chief Justice of this Court) and the late Mr. Sukh Dial. It was argued by Sir Shadi Lal. The decree of the Trial Court was affirmed on 6th June 1912 by a Division Bench, which held on the point of minority that the District Judge should not have taken it up on his own motion and proceeded:—

" * * * * * in any case the contention is *prima facie* untenable, as the defendants-appellants, who are alleged to have been minors at the time of the agreement were members of a joint Hindu family with the other defendants who were adults, and the latter acted as *de facto* guardians on their behalf and for their benefit in entering into the agreement in question. The agreement must, therefore, be treated as binding upon them equally with the other members of the family."

Then followed a final decree by the Trial Court which is dated 6th January 1915 and against which appeal has again been made to this Court. We are not concerned in this judgment with that appeal but with a fresh suit instituted on 2nd May 1914 by Phulli, minor son of Basheshar Nath, through another next friend, Deoki Mal, against Devi Parshad and his sons, the successful plaintiffs in the partition suit, and all the other defendants in that suit including Basheshar Nath.

In its amended form the plaint asked for a declaration that the preliminary decree in the partition suit is null and void, and inoperative against the plaintiff and the property mentioned in the said decree for the reasons:—

(*a*) that Basheshar Nath was not appointed guard an *ad litem* of the plaintiff in the manner required by law;

(*b*) Basheshar Nath was not a fit and proper person to represent the plaintiff as he was a signatory of the agreement of 19th January 1904, which agreement was collusive and to the prejudice of the plaintiff;

(*c*) Basheshar Nath did not conduct the case properly on behalf of the plaintiff, he did not defend it on the basis of the plaintiff's minority and he did not produce any evidence to refuse the agreement for the plaintiff's benefit.

The claim was resisted by the defendants other than Phulli's own father and brothers. The Court framed a single issue as follows:—

Whether the decree, dated 21st March 1910, is not binding on the plaintiff for all or any of the following reasons:—

(*a*) the invalidity of the appointment of defendant No. 7 (*i.e.*, Basehshar Nath) as his guardian *ad litem*;

(*b*) the unfitness, incompetency and negligence of defendant No. 7 as guardian *ad litem*.

Thereafter, the Court held that the plaintiff was of age and permitted him to continue the suit in his own person.

The oral evidence consisted of the statements of Basheshar Nath as witness for the plaintiff and of Debi Parshad as witness for the defendants.

The Court dismissed the suit and Phulli's appeal against that order is before us.

PHULLI v. BEBI PARSHAD.

The main arguments on his behalf are, firstly, that in the previous suit there was no order appointing Basheshar Nath guardian; that no notice was issued to the plaintiff under O. XXXII, r. 3 (4), and that consequently he was not in law represented properly; and, secondly, that if Basheshar Nath is to be regarded as guardian *ad litem*, he showed his unfitnes and incompetency by his neglect to raise the plea that he (Basheshar Nath) had not acted in the interest of the plaintiff by entering into the agreement of January 1904 and surrendering gratuitously valuable rights belonging to the plaintiff.

On the first point it is argued that the well-known Privy Council ruling *Wallan* v. *Banke Behari Pershad Singh* (1) is out of date since the enactment of the 1908 Code of Civil Procedure, and that under the present law notice to the minor is essential before any person can be recognised as acting on his behalf in a suit.

In *Wallan* v. *Banke Behari Pershad Singh* (1) it was held that, where a Court by its action has given its sanction to the appearance of a person as guardian to a minor in a suit, the absence of a formal order of appointment is not necessarily fatal to the proceedings, and that, in that particular case, the absence of a formal order appointing a mother as guardian *ad litem* she having appeared throughout the proceedings in that capacity, and the fact that no attempt was made to serve either the minors (who were members of a joint Hindu family) or their motherp ersonally with summons before serving it on the only adult male member and manager of the family constituted mere irregularities under section 578 of the then Code of Civil Procedure, there being nothing to suggest that the interests of the minors were not duly protected and the defects in procedure not having prejudiced them.

Three cases are cited by the learned Counsel for the appellant.

The first is *Rajendra Prasad* v. *Probodh Chandra Mitra* (2), and is not in point, because the question dealt with was not the effect upon a decree of the irregular appointment of a guardian *ad litem*. The Trial Court had appointed a certain person guardian without notice to the minor concerned and had refused to listen to subsequent objections by the minors, and the actual order of appointment was taken to the High Court on revision and was set aside.

The second is *Syed Ali Sarkar* v. *Manikjan Bibi* (3). Here two Judges disagreed on the question of the imperative necessity of notice to the minors and the appeal was decided on other grounds. The opinion of one learned Judge that notice was imperative was thus an *obiter dictum*.

The third is *Ghanshyam Das* v. *Hardei* (4) in which the learned Judicial Commissioner delivered himself of a *dictum*, which supports the present appellant on this particular point, but which also was *obiter*, since the minor in question was held not to have been a minor at all.

On the other hand, here are several decisions passed after the present Code came into force in which absence of formal orders of appointment and of notice to the minors were regarded as errors or irregularities not affecting the merits of the case.

In another and recent Oudh case reported as *Sat Deo* v. *Jai Nath* (5), there had been no formal order appointing the major defendant guardian *ad litem* of the minor defendants, members of a joint family of which the major defendant was manager. It was held, on the authority of *Sheo Shankar Ram* v. *Jaddo Kunwar* (6), that the minor defendants could not escape their liability under the decree for this reason and that the major defendant as manager had sufficiently represented their interests.

In *Rambrichh Ram* v. *Tarak Tewari* (7) in a suit by a minor to avoid a decree passed against him, it was held that his

(1) 30 C. 1021; 30 I. A. 182; 7 C W. N. 774 & Bom. L R. 822; 8 Sar. P. C. J. 512 (P. C.).
(2) 59 Ind. Cas. 936; 2 P L. T. 116; 6 P. L. J. 821 (1921) Pat. 156.
(3) 43 Ind. Cas. 728.
(4) 32 Ind. Cas. 380; 2 O. L. J. 562.
(5) 67 Ind. Cas. 808; 9 O. L. J. 141; 4 U. P. L. R. (O.) 43; (1922) A. I. R. (O.) 75.
(6) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).
(7) 33 Ind Cas 805; 14 A. L. J. 589.

interests had been properly defended by the manager of the joint family of which he was a member in spite of the facts that the manager had refused to act as his guardian, that a stranger had been appointed guardian without notice either to the minor or to the manager of the family, and that the stranger guardian had done nothing and had not even appeared. It was remarked by Mr. Justice Walsh that, where there has been an irregularity in the appointment of a guardian *ad litem* in suit, the moment it is shown that there has been no fraud and that the minor's interests have not been prejudiced by the irregularity the minor's right to set aside the proceedings must be denied.

This decision was approved by the Madras High Court in *Enuga Sundararama Reddi* v. *Bezwada Pattabhiramireddi* (8), and we have no doubt that the view taken of the law in these two latter cases is correct, and that the principles laid down in *Walian* v. *Banke Behari Pershad Singh* (1) are still the broad principles which should be applied. Too much may easily be made of the new provision in O. XXXII, r. 3 (4) for the issue of notice to the minor, since the minor may be an infant in arms. In the case with which we are dealing it has not been shown affirmatively that the appellant was capable of reading and understanding the notice which the Court might have sent to him in the 1909 suit. His own brothers were parties to the suit and were of age before issues were framed and it is impossible to surmise that the issue of notice would have resulted in some other relative receiving information of the suit for the first time and coming forward to protest against the appellant being represented by his father. What we have to look to is the substance of what occurred and not the shadow and to interfere with the former proceedings only if it appears that the minor's interests were neglected by the person who understook and was permitted by the Court to represent them, and who, moreover, is the plaintiff's father while the family is Hindu and presumably joint.

(8) 42 Ind. Cas. 421; (1917) M. W. N. 495 6 L. W. 272.

This brings us to the second point urged for the appellant that there was neglect on the part of Basheshar Nath. We regard the deposition of Basheshar Nath in the present case that he was negligent merely as confirmation of the Trial Court's view that the suit was collusive. The history of the proceedings in the partition suit given above makes it clear that the appellant was substantially represented by his father as guardian *ad litem*, that in both Courts eminent Advocates appeared for him, that the case of his family was pleaded exhaustively in the First Court by Mr. Kirkpatrick, and that in the Chief Court the special plea of minority at the time of the agreement was also raised and argued on his behalf. It is contended that this plea should have been taken in the Trial Court but the judgment of the Chief Court to the effect that the plea was without force does not support this complaint, and actually the decree which the appellant must succeed in getting set aside is the decree of the Chief Court in which the decree of 21st March 1910 specifically attacked in his plaint was merged.

The agreement that Basheshar Nath surrendered valuable rights belonging to his sons when he entered into the agreement is one which does not stand the test of examination. Actually, the sole rights in Umrao Singh's estate which the sons could claim were those conferred on them by the action of their father in making them parties to this same agreement about which the appellant complains. Anything inherited by Basheshar Nath through his maternal grandfather would be obstructed heritage, his male issue would not take any interest in it by birth, and it would be his self-acquired property (Mulla's Principles of Hindu Law, 3rd Edition, pages 197 and 205). The appellant's learned Counsel objects that the Court below refused explicitly to go into the question of the appellant's status as an heir in the presence of his father, and says that the appellant might have been able to prove either that the family was governed by custom in this particular or that Basheshar Nath had amalgamated the separate acquisition with the co-parcenary property. It is true that the learned Subordinate

Judge excluded from consideration certain matters raised in the pleadings with which he might well have dealt and we do not understand what he meant by saying "All these matters may and can be urged in such further proceedings which plaintiff may be advised to take if successful in the present suit," espe ially when he proceeded to dismiss the suit. But what did the appellant plead upon the point. All the contesting defendants specially pleaded that the plainti f had no right to Umrao Singh's property in the lifetime of his father. The appellant filed a replication as follows:—

"The plaintiff's father, Basheshar Nath, paid no regard to the plaintiff's rights, and he having colluded with the defendants executed the agreement against the facts and law which is not in any way binding upon the plaintiff. The plaintiff can be held entitled to get the property left by Umrao Singh in the presence of his father, especially when his father "is in collusion with the opposite p rty, and does not safeguard the plaintiff's rights." Not a word about custom and not a word about a voluntary thr wing of self-acquired property into the common stock. The plainti f's pleadings merely reiterated questions which had been dealt with on his behalf in the partition suit and, as we have held, adequately dealt with. In that suit, his interests were identical with those of his father and brothers and were properly protected.

We find no reasons for interfering with the order of the lower Court and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1096 OF 1920.
April 21, 1922.
Present:—Mr. Justice Ryves and
Mr. Justice Stuart.
BISHESHAR NATH—PLAINTIFF—APPELLANT
versus
KUNDAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908). Sch. I, Art. 139—Lessor and lessee—Lessee holding over after expiry of lease—Adverse possession—Suit for ejectment—Limitation terminus a quo.

Where after the expiry of the term of a lease the lessee holds over and pays no rent, his possession is adverse to the lessor, and a suit for his ejectment must be instituted within the period prescribed by Art. 139 of Sch. I to the Limitation Act, the said period commencing to run from the date on which the lease expired.

Bilas Kunwar v. *Desraj Ranjit Singh*, 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 235; 2 L. W. 830; 18 M. L. J. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.), followed.

Pusa Mal v. *Mahdum Bakhsh*, 3 Ind. Cas. 566 31 A. 514; 6 A. L. J. 584, distinguished.

Second appeal from a decree of the Additional Judge, Moradabad, date the 7th June, 1920, reversing a decree of the Munsif, Nagina, dated the 22nd January 1920.

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

The Hon'ble *Syed Raza Ali*, for the Respondents.

JUDGMENT.

Ryves, J.—This appeal came on originally for hearing before a Single Judge of this Court. He was of opinion that, in view of the decision of their Lordships of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh* (1) and of the decision in *Pusa Mal* v. *Mahdum Bakhsh* (2), it was advisable that this case should be heard by a Bench of two Judges. It has consequently come before us for hearing.

After full argument it seems to me that the question referred to this Divisional Bench is really irrelevant, and I think the appeal can be disposed of on a short point.

(1) 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. J. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1918) M. W. N. 757; 42 I. A. 202 (P. C.).
(2) 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584.

The facts of the case are as follows:—The plaintiff was the lessor. He, by a lease dated the 19th of July 1892, leased some premises to the father or predecessor of the defendants for a term of three years. At the expiry of the term, the lessees (or their representatives) remained on in possession until the date of suit which was brought on the 18th of June 1919. The plaintiff asserted that the rent fixed by the lease had been regularly paid by the defendants until within three years of the date of suit.

The main defence to the suit was that the defendants had been in adverse possession for more than twelve years, that they never paid rent, and that the suit was barred by limitation.

The first Court decreed the suit.

On appeal, however, the learned District Judge of Moradabad has dismissed the suit. He has found that, since the expiry of the lease, no rent whatever has been paid by the defendants. He has also found that no new tenancy was created otherwise than by the lease, and he, therefore, dismissed the suit as barred by limitation. On appeal before us it has been argued very strenuously that, having regard to the decision of their Lordships of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh* (1), it must be held that the defendants continued to be tenants of the plaintiff after the expiry of the lease until notice was served on them by the lessor under section 106 of the Transfer of Property Act. It seems to me that the decision of their Lordships of the Privy Council does not apply at all to the question of limitation and has no application to Art. 139 of the First Schedule to the Limitation Act, which, in my opinion, governs this case. That Article runs as follows:—"A suit by a landlord to recover possession from a tenant.....twelve years.....when the tenancy is determined." It seems to me, on the facts of this case, that the tenancy was determined on the 19th of July 1895 It has not been proved that any new tenancy was created. By holding over without paying rent, it seems to me that the defendants became what is known as tenants by sufferance. Their position in English law has been summed up in Addison's Law of Contract, 10th Edition, page 618 in the following words:—"The difference, therefore, between a tenancy-at-will and what is called a tenancy by sufferance is that in the one case the tenant holds by right and has an estate or term in the land, precarious though it may be, and the relationship of lessor and lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord and has no estate at all in the occupied premises. When the tenancy at sufferance has existed for twenty (now twelve) years, the landlord's right of entry is barred by Statute, and the tenant becomes the absolute and complete owner of the property." So far as the question of limitation is concerned, the law in India is not different, in my opinion, although it may not be good law to hold that a tenant holding over is in adverse possession to his landlord. In my opinion this view is supported by *Chandri* v. *Daji Bhau* (3), where the facts were similar, and which case was followed in *Madan Mohan Gossain* v. *Kumar Rameswar Malia* (4). In my opinion the suit was clearly barred under Art. 139 of the Limitation Act. I would, therefore, dismiss this appeal with costs.

Stuart, J.—I would like to add a few words to the decision of my learned brother. It was I who referred this case to a Bench and I did so in view mainly of the position created by the decision of their Lordships of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh* (1). The law governing this case appears to have been laid down in *Chandri* v. *Daji Bhau* (3). There, as here, it appears that there was a tenancy by instrument, which had expired more than twelve years before the date of the suit. There, as here, after the expiration of the tenancy, a tenancy at sufferance had come into existence. There had been no payment of rent. The same was the case here. There had been no explicit recognition of the authority of the landlord. The same was the case here. It would be difficult to find two

(3) 24 B. 504; 2 Bom. L. R. 491; 12 Ind. Dec. (N. s.) 867.
(4) 7 C. L. J. 615.

cases in which the facts were so similar as in the present case and in the Bombay case. It was held by Jenkins, C. J., that Art. 139 must govern the case and that the period from which the period of limitation began to run was the period from which the tenancy by instrument had expired. In the absence of any other authority, I should consider the Bombay decision conclusive in the matter, and it only remains to be seen whether there is anything in the Privy Council decision to which I have already referred which can be invoked to overrule the decision of Jenkins, C. J. Their Lordships of the Privy Council say: "A tenant who has been let into possession cannot deny h s landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord." That clearly is the law, but does it in any way affect the present case? I think it does not. The defendants cannot be permitted to deny the plaintiff's title. They have foolishly denied it but they cannot be permitted to do so. The plaintiff is undoubtedly the landholder and the defendants are tenants by sufferance, but once having recognised that the tenants are so estopped, the fact still remains that the suit has been instituted beyond the period of limitation allowed by the law. In these circumstances, I accept the view of my learned brother and would dismiss this appeal.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 374 OF 1920.

February 17, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Fforde.

KARORI MAL,—PLAINTIFF—APPELLANT

versus

THE E. T. AND LIGHTING COY. LTD., DELHI—DEFENDANT—RESPONDENT.

Electricity Act (IX of 1910), Sch. cl. VI, Pro. (2) (c)—Defective cut-out causing loss of energy—Electric Company, whether justified in discontinue supply.

Where the seals on the cut-outs on a consumer's premises are not in good order and condition, as a result of which there has been a leakage of energy, the Electric Company is entitled to discontinue the supply of energy to the consumer, as such a state of things must be deemed to be, "likely to affect injuriously the use of energy by the licensee or by any other person," within the meaning of clause VI (1), proviso (2) (c) of the Schedule to the Electricity Act. [p. 457, col. 1.]

Lahore Electric Supply Company v. *Durga Das*, 45 Ind. Cas. 171; 85 P. R. 1918; 79 P. W. R. 1918; 77 P. L. R. 1918, followed.

Second appeal from a decree of the District Judge, Delhi, dated the 10th November 1919, affirming that of the Sub-Judge, Second Class, Delhi, dated the 12th March 1919.

Mr. *Shamir Chand*, for Mr. *Moti Sagar*, R.S., for the Appellant.

Messrs. *Dalip Singh* and *Sarda Ram*, for the Respondent.

JUDGMENT.—The appellant sued the respondent Company for damages alleged to have arisen by reason of the latter having disconnected the supply of electricity to the former's Mills. The respondents in defence contended that they were justified in the course they had adopted in view of the fact that the seals on the cut-outs on the appellant's premises were not in good order and condition, with the result that the supply of electric energy was injuriously affected.

The justification relied upon is alleged to be contained in the statutory provisions which govern the Company's contractual rights and liabilities. The particular provision relied upon is to be found in clause VI, (1) proviso (2) (c) of the Schedule to the Indian Electricity Act of 1910, which provides that the licensee (*i.e.*, the Electric Company) shall be entitled to discontinue the supply of electricity to the consumer—"if the electric wires, fittings, works and apparatus in such property are not in good order and condition, and are consequently likely to affect injuriously the use of energy by the licensee, or by other persons."

The Court of first instance held that this clause did not apply to the facts of the present case; but further held that the appellant had not proved that he had suffered any loss from the act of disconnection and dismissed the suit on that ground. The learned District Judge agreed with this finding on the question of damages, and held, for that reason, that it was unnecessary to give a decision on the other issue, but suggested that, assuming the

defective condition of the cut-out was due to its having been tampered with by the appellant, sub-clause (1), proviso (2) (*d*) of clause VI might be applicable.

We find ourselves unable to agree with the views of the lower Courts as to the proper construction of the enactment.

It has been found as a fact that a part of the electric apparatus on the appellant's premises, namely, the seals of the cut-out were not in good order and condition. As a result of this defect there had been a leakage of energy whether by theft of the current or otherwise it is unnecessary to decide. Such a state of things must certainly be deemed to be "likely to affect injuriously the use of energy by the licensee or by other persons," and, accordingly, the respondents were entitled, upon discovering this condition of things, to discontinue the electric supply.

The attention of the Courts below does not appear to have been called to a decision on this very point in *Lahore Electric Supply Company* v. *Durga Das* (1). The powers of an Elecrtic Supply Company under the Indian Electricity Act, IX of 1910, were, there, very fully considered by Scott-Smith, J., and amongst other questions the effect of clause VI (1), proviso (2) (*c*) was a subject of decision. It was held in that case that, where a main fuse was burnt out—in other words, where the cut-out became defective—the Company was entitled to discontinue the supply of energy to the consumer. Precisely the same facts appear here the only difference being that in the reported case the cause of the defect in the cut-out was apparent whereas in the present case the cause is only to be conjectured.

As we hold—following the reasoning in the relevant passages of the judgment above referred to—that the respondent Company was fully justified in the steps they took, it is unnecessary to consider whether or not the lower Courts were justified in their finding as to the failure of the appellant to prove damage.

For the reasons we have given the appeal is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 43 Ind. Cas. 171; 85 P. R. 1918; 79 P. W. R. 1918; 77 P. L. R. 1918.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1513 OF 1920.

May 4, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Stuart.

SHAMBHU—DEFENDANT—APPELLANT

versus

KANHAYA—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Guardian and minor—Guardian ad litem, *appointment of—Period for which appointment enures—Appeal on behalf of minor.*

Where a guardian *ad litem* for a minor is appointed, his appointment enures for the whole of the *lis* in the course of which it was made, unless and until it is revoked by the Court, and such guardian only has the right to prefer an appeal on behalf of the minor.

Jwala Dei v. *Pirbhu*, 14 A. 35; A. W. N. (1891) 192; 7 Ind. Dec. (N. S.) 394, followed.

Venkata Chanarasekhara Raz v. *Alakarajamba Maharani*, 22 M. 187; 8 Ind. Dec. (N. S.) 133. *Bawan Das* v. *Bishnath*, A. W. N. (1899) 203. *In the matter of the application of Sukhdeo Rai*, 2 A. L. J. 489, relied on.

Appeal from a decree of the District Judge, Agra, dated the 27th of May 1920, confirming that of the Subordinate Judge, Muttra, dated the 13th of January 1919.

Mr. *A. P. Dube*, for the Appellant.

Mr. *Narain Prasad Ashthana*, for the Respondent.

JUDGMENT.—The point that arises in this appeal is fully covered by authority. The suit was brought by a mortgagee on the foot of a mortgage to recover the loan. It was instituted against the mortgagor who executed the mortgage and his minor son. After attempts had been made by the plaintiff to get various persons appointed guardian *ad litem* to the minor, the Nazir of the Court was ultimately appointed. The suit was heard, evidence was given and it was ultimately decreed in favour of the plaintiff against both the father and the son. Thereafter an appeal was presented to the District Judge by one Bhagwanji on behalf of the minor. He was not the guardian *ad litem* and had never applied to be made guardian. On the appeal coming before him, the learned District Judge refused to hear it on the ground that there was no valid appeal before him. He held that the *Nazir* having been appointed guardian *ad litem* his authority must be held to continue as long as the

RASUL KHAN *v.* HAWASI.

lis continued and that until he had been removed from the guardianship by the Court, he and he only was competent to file an appeal. He, therefore, dismissed the appeal. It is from this decree dismissing the appeal that this second appeal was brought, and it is urged that the authority of the *Nazir* ended with the decree of the First Court and that thereafter it was open to the minor defendant to appeal through his next friend. In *Jwala Dei* v. *Pirbhu* (1), a Bench of this Court decided that where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it was made, unless and until it was revoked by the Court. In *Venkata Chandrasekhara Raz* v. *Alakarajamba Maharani* (2), the same proposition was laid down. That case was followed by a Divisional Bench of this Court in *Bawan Das* v. *Bishnath* (3). These three cases were referred to and followed by a Single Judge of this Court in *In the matter of the application of Sukhdeo Rai* (4). We see no reason to differ from this consistent authority. Our attention has been called to *Bhagwan Dayal* v. *Param Sukh Das* (5). In that case, however, this point did not arise and was not considered. The result is that the appeal fails and is dismissed with costs.

W. C. A. *Appeal dismissed.*

(1) 14 A. 35; A. W. N. (1891) 192; 7 Ind. Dec. (N. S.) 394.
(2) 22 M. 187; 8 Ind. Dec. (N.S.) 133.
(3) A. W. N. (1899) 203.
(4) 2 A. L. J. 489
(5) 36 Ind. Cas. 366; 39 A. 8; 14 A. L. J. 818.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 124 OF 1922.

July 19, 1922.

Present:—Mr. Justice Martineau.

RASUL KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat HAWASI AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 41 (3)—Custom—Inheritance—Finding that Muhammadan Law applies—Second appeal—Certificate, necessity of.

Where on the question of the right of inheritance the lower Appellate Court finds that the parties are governed by Muhammadan Law and not by custom, that finding cannot be challenged in second appeal without a certificate. [p. 459, col. 1.]

Second appeal from the decree of the District Judge at Campbellpur, dated the 24th October 1921, reversing that of the Subordinate Judge, Attock, dated the 24th February 1921.

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

Mr. *Moti Sagar*, for the Respondents.

JUDGMENT.—One Zedullah, a *Pathan* of a village in the Attock District, died in 1903 leaving 45 *kanals* 11 *marlas* of land, which was his self-acquired property. Half of the land went to his widow and half to his mother, *Musammat* Hawasi. The latter sold her share in 1920 for Rs. 3,500, and the present suit was brought by Zedullah's collaterals in the third degree for a declaration that the sale should not affect their reversionary rights. The defendants pleaded that the parties followed Muhammadan Law; that *Musammat* Hawasi's possession had been adverse; that there was a sister of Zedullah named *Musammat* Said Jan alive, and that even if the parties were governed by custom the plaintiffs had no right to sue.

The First Court passed a decree in the plaintiffs' favour allowing a sum of Rs. 3,050, out of Rs. 3,500 as a charge on the land.

On the defendants' appeal the District Judge has held, relying on *Fatima Bibi* v. *Shah Nawaz* (1), that the question of the right of inheritance to Zedullah's self acquired property must be decided in accordance with the Muhammadan Law. He holds that under that law Zedullah's sister is the heir and not the collaterals and from this he has concluded that the plaintiffs cannot control *Musammat* Hawasi's alienation of the property, and he has, therefore, dismissed the suit. The plaintiffs have filed a second appeal in this Court.

On behalf of the respondent a preliminary objection is taken that as the lower Appellate Court has decided that the plaint-

(1) 60 Ind. Cas. 509; 2 L. 98 at p. 102; 3 L. L. J. 152.

tiffs are governed by Muhammadan Law and not by custom a second appeal is not maintainable without a certificate from the District Judge under section 41 (3) of the Punjab Courts Act, and *Aso* v. *Harnami* (2) and *Tulsi Ram* v. *Amar Singh* (3) are cited in support of this contention. To this Mr. Bhagat, on behalf of the appellants, replies that as there was no issue regarding the question of *Musammat* Said Jan's right of succession, the lower Appellate Court was not competent to give a decision on the point, and that, therefore, no certificate is necessary and he relies on *Nur Ali* v. *Bahawal* (4), in which it was held that as the lower Appellate Court had decided the question on a point not properly before it a certificate was not required.

It is true that in the present case no specific issue was framed on the question whether *Musammat* Said Jan was entitled to succeed but this question appears to be included in the first issue, which was whether the plaintiffs have a *locus standi* to sue.

That issue was framed in consequence of the plea taken by the defendants that Zedullah's sister was alive, by which they evidently implied that she was an heir and that in her presence the plaintiffs could not sue and if it had been found that she was not an heir the first issue would necessarily have been decided in the plaintiffs' favour.

I hold, therefore, that the question as to the respective rights of inheritance of *Musammat* Said Jan and the plaintiffs was a matter of fact in issue, and that the learned District Judge's finding that the parties are governed by Muhammadan Law and not by custom on this point cannot be challenged in the absence of a certificate.

But this does not conclude the case, and the other issues have yet to be determined. In the first place, even though *Musammat* Said Jan is an heir her presence does not necessarily debar the plaintiffs from contesting the alienation. In the second place, the learned District Judge is wrong in thinking that under the Muhammadan Law the plaintiffs would not be heirs, for *Musammat* Said Jan would get only a share in the property and the plaintiffs would also succeed to a portion as residuaries. Thirdly it is not right to assume that, because the Muhammadan Law is to be applied in deciding the question of inheritance as between *Musammat* Said Jan and the plaintiffs, it necessarily follows that *Musammat* Hawasi's powers of alienation are not subject to control by the collaterals. It is possible that while the former question has to be decided according to the Muhammadan Law, Hawasi's powers of alienation may be restricted in accordance with the customs prevailing among agriculturists. The learned District Judge has given no finding on this point although he has found that the members of Zedullah's family have lived entirely by agriculture.

I must, therefore, accept the appeal, reverse the decree of the lower Appellate Court, and remand the case to that Court under O. XLI, r. 23, Civil Procedure Code for a fresh decision in accordance with law. The Court-fee on the Memorandum of Appeal will be refunded and other costs will be costs in the case.

W. C. A. *Appeal accepted.*

(2) 36 Ind. Cas. 944; 1 L. L. J. 60; 2 U. P. L. R. (L.) 114.
(3) 42 Ind. Cas. 115; 141 P. W. R. 1917.
(4) 31 Ind. Cas. 386; 34 P. R. 1916; 54 P. W. R. 1916.

PANNA LAL *v.* HUSAIN BEG.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 306 OF 1922.

April 11, 1923.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Gokul Prasad.

PANNA LAL—PLAINTIFF—APPELLANT

versus

HUSAIN BEG—DEFENDANT—RESPONDENT.

Vendor and purchaser—Contract to sell—Specific performance—Damages.

Defendant told a friend that he wanted to sell a house and communicated to him the terms on which he was willing to sell it. The latter arranged for the sale of the house and wrote to the former that plaintiff had agreed to purchase the house on the terms proposed and was sending a certain sum as earnest-money. Defendant received the sum, and promised to send a formal receipt by registered post. This he failed to do, and ultimately refused to sell the house on the ground that it belonged to his wife who was not willing to sell it. Plaintiff, thereupon, brought a suit for specific performance and in the alternative for damages:

Held, (1) that there was a completed contract for the sale of the house between the parties; [p. 460, col. 2.]

(2) that specific performance could not, under the circumstances, be decreed; [p. 460, col. 2.]

(3) that the plaintiff was entitled to damages for breach of the contract, the measure of damages being the difference between the market-value of the house and the contractual price. [p. 461, col. 1.]

Second appeal from a decree of the District Judge, Agra, reversing that of the Subordinate Judge, Agra.

Mr. *Kailas Nath Katju*, for the Appellant.

Mr. *Narain Prasad Asthana*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for specific performance of a contract for sale of a house and in the alternative for damages. It appears that the defendant wanted to sell a house, and for this purpose Abdul Aziz, a common friend of the parties to the suit, was negotiating with prospective purchasers. Abdul Aziz wrote to the defendant saying that a certain person was offering Rs. 3,600 for the house and was enquiring if the defendant would agree to sell the house. On the 13th of December 1918 the defendant wrote back to Abdul Aziz saying that if the purchaser was willing to pay Rs. 4,000 for the house and the costs of transfer, he would sell the house. Abdul Aziz, thereupon, on the 21st of December 1918 wrote to the defendant saying that one Panna Lal had accepted the terms proposed by the defendant and was sending a money-order for Rs. 200 as earnest-money and the defendant was to send a formal receipt. It appears that the defendant received a money-order for Rs. 200 on Saturday and wrote back saying that as the next day was a Sunday, he would send the receipt on the Monday following by registered post or under a bearing cover as desired by Abdul Aziz. Matters stopped here for some days. On the 5th of January 1919 the defendant wrote to Abdul Aziz saying that he had received a telegram asking him for the return of Rs. 200 sent as earnest-money and he wanted to know if Panna Lal was going back out of the agreement. Later on he also said that the house really belonged to his wife and she refused to sell it. Ultimately, the defendant refused to execute a sale-deed and then the plaintiff brought the present suit for specific performance of the contract to sell, and, in the alternative for damages.

Several pleas were taken in defence and the main plea was that Abdul Aziz had by misrepresentation induced the defendant to agree to the sale of the house in December 1918, and that it was owing to this misrepresentation that the defendant acted as he did, but that the defendant did not contract with the plaintiff to sell the property. The Trial Court, the learned Subordinate Judge of Agra, came to the conclusion that the defendant had contracted to sell the house but he could not give a decree for specific performance of the contract, because the defendant was not competent to sell the house which belonged to his wife. He, however, gave a decree for damages and the refund of Rs. 200, the earnest-money already advanced. The defendant went up in appeal and the learned District Judge has confirmed the finding of the Trial Court as to the amount of damages, but has allowed the appeal and dismissed the suit on the ground that there was no completed contract for sale. It is not very easy to understand how the learned District Judge came to this conclusion. Having regard to the correspondence to which we have referred above, there can be no question that there was

a proposal by Abdul Aziz that the defendant made an offer to sell the house for Rs. 4,000 and the said offer was accepted by Panna Lal who sent Rs. 200 by money-order as earnest-money. The learned Judge seems to be under the misapprehension that a receipt registered under the Registration Act was required for the Rs. 200 sent by Panna Lal as a condition precedent to the completion of the contract. This was clearly the result of a mis-reading of the correspondence between Abdul Aziz and the defendant. In the letter which Abdul Aziz wrote to the defendant, he asked the defendant to send a receipt by post under registered cover or bearing and the defendant wrote back in reply saying that he would send it on Monday following by registered post or bearing. The learned Judge seems to think that this last letter meant that the receipt was to be registered under the Registration Act and then sent to Abdul Aziz. This was no body's case and the learned Judge seems to have misunderstood the defence and erred in deciding the case on a point not raised by the parties. In our opinion the judgment of the Trial Court was correct and should not have been disturbed. We are of opinion that the plaintiff is entitled to recover damages for a breach of the contract entered into with him by the defendant and that the measure of such damages is the difference between the market value of the property and the contractual price. The learned Judge accepts the amount assessed by the Court below as correct. We, therefore, allow the appeal set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in this Court and in the Court below.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1112 OF 1919.

March 15, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justce Fforde.

GHULAM MUSTAFA KHAN AND OTHERS —DEFENDANTS—APPELLANTS

versus

GHULAM NABI AND OTHERS—PLAINTIFFS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Registration Act (XVI of 1908), s. 17 (1) (b), (2) (vi)—Compromise relating to properties not subject of suit, recording of—Procedure—Registration, whether necessary.

Where a suit is compromised, but the compromise relates to properties some of which are not the subject of the suit, the proper procedure for the Court recording the compromise is to record the whole of the agreement, and then to pass a decree in accordance with so much of it as relates to the subject-matter of the suit. [p. 463, col. 2.]

Hemanta Kumari Debi v. *Midnapore Zemindari Co., Limited*, 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. 301; 31 C. L. J. 298; 22 Bom. L. R. 488; 47 C. 485 (P. C.), followed.

Where a suit has been adjusted in the manner contemplated by O. XXIII, r. 3 of the Civil Procedure Code, and the terms and conditions of the adjustment have been reduced to writing by the parties and the Court has duly recorded those terms and conditions and passed a decree in accordance with such of them as are the subject of the then existing litigation, then the writing of the parties may be produced in evidence in any subsequent suit without being registered. [p. 463, col. 2.]

Pranal Anni v. *Lakshmi Anni*, 26 I. A. 101 at p. 106; 1 Bom. L. R. 394; 22 M. 508; 3 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.), followed.

A suit relating to immoveable property of the value of more than Rs. 100 was compromised and the parties agreed to divide the property in dispute and some other property in certain proportions. The agreement was reduced to writing and was presented to the Court. The Court made an order thereon to the effect that as the compromise related to property outside the scope of the suit a decree could not be passed upon it, and the suit was dismissed "in accordance with the compromise." In a subsequent suit to enforce the compromise:

Held, (1) that the procedure adopted by the Court in recording the compromise in the previous suit was erroneous and that it should have recorded the whole compromise and then passed a decree in accordance with so much of it as related on the property in dispute; [p. 462, col. 2; p. 463, col. 1.]

(2) that the compromise not having been incorporated in the decree or order of the Court, was not admissible in evidence for want of registration. [p. 464, col. 2.]

GHULAM MUSTAFA KHAN v. GHULAM NABI.

Hari Chand v. *Maghi Mal*, 40 Ind. Cas. 675; 78 P. R. 1917; 95 P. W. R. 1917; 112 P. L. R. 1917 and *Khair-ul-nisa* v. *Bahadur Ali*, 27 P. R. 1906; 11 P. L. R. 1906; 17 P. W. R. 1906, distinguished.

Second ppeal from a decree of the District Judge, Sialkot, dated the 4th March 1919, affirming that of the Subordinate Judge, Second Class, Sialkot, dated the 17th December 1917.

Messrs. *Aziz Ahmad* and *Muhammad Rafi*, for the Appellants.

Mr. *Zafrulla Khan*, for the Respondents.

JUDGMENT.—The main question in this appeal is whether a certain document, dated the 9th February 1910 is admissible in evidence in a suit brought to enforce its terms, in spite of the fact that it has not been registered in accordance with the provisions of section 77 (1) (*b*) of the Indian Registration Act of 1908.

The facts out of which the appeal has arisen are shortly as follows:—

In 1909 the respondents brought a suit for possession of certain lands. In the course of the proceedings the parties came to an agreement and the suit was compromised upon terms which were reduced to writing and signed by all the parties to the suit except one for whom one of the signatories appears to have acted. The material facts of this document are as follows :—

"In the case noted above the plaintiff adult for himself and as guardian (*wali sarprast*) of the minors, Ghulam Jilani, Muhamnad Shafi and Muzaffar Khan on one side, and the defendants on the other have, entered into a mutual compromise to the following effect":—

"According to the conditions laid down in the deed of partition dated the 12th January 1898 we have agreed to partition the lands, situate in the villages of Cha an Nagar, Ainowali. Raya Goraya, Mirak Pur, and Bhoja Dhandsa (as noted in the said deed) in the following shares."

"Rahim Bakhsh, son of Ghulam Muhammad, and Jalal-ud-Din, son of Rahim Bakhsh	1/3rd share.
"Ghulam Nabi, adult, and Ghulam Jilani, Muhammad Shafi and Muzaffar Khan, minors, sons of Inayat Ullah, plaintiffs	1/3rd share.
"Ilahi Bakhsh, son of Ghulam Muhammad, defendant	1/3rd share.

"Thus each of us shall be owner of one third share in all the villages above mentioned. From to-day we have made a settlement in respect of the mortgage-money paid by any co-sharer on behalf of the others for redemption of land or in respect of the payment of debt made by any of them. Nothing now remains due by any party to the other. We have entered into this compromise with the above mentioned conditions.

"We have produced this deed of compromise for being accepted. Jalal-ud-Din, defendant, is not present. Defendant No. 1 is responsible for him."

"Dated the 9th February 1910."

This document was tendered to the Court for the purpose of being recorded under the provisions of O. XXIII, r. 3 of the Code of Civil Procedure. The Court, however, seemed to think that it could not record the agreement embodied in this document as it included some parcels of land which were not the subject-matter of the suit, and the Court thereupon dismissed the suit and at the same time made the following order:—

"The parties have entered into a compromise. As this general compromise is in respect of all the lands and the suit is in respect of one village only, a decree cannot be passed according to the compromise."

"It is, therefore, ordered that the record of the case be consigned to the record-room according to the compromise.

"Dated the 9th February 1910."

The effect of this order is that the suit was dismissed upon the terms of the compromise but the agreement itself was not recorded; nor was a decree passed in accordance therewith.

In adopting this course the Court was clearly wrong. What it should have done was to record the whole agreement, even though it included matters outside the scope of the present suit, and then pass a decree in accordance with so much of the agreement as related to the suit. In *Hemanta Kumari Debi* v. *Midnapore Zemindari Company Limited* (1) the proce-

(1) 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. 301; 31 C. L. J. 298; 22 Bom. L. R. 488; 47 C. 485 (P. C.).

CHULAM MUSTAFA KHAN *v.* GHULAM NABI.

dure to be adopted under section 375 of the Code of Civil Procedure, 1882, which corresponds to O. XXIII, r. 3 of the present Code, was suggested in the judgment of the Privy Council. The view expressed by Lord Buckmaster at page 246 is as follows:—

"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 e ectau method of carrying out the terms of this 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."

Had this procedure been adopted in the present case the respondents could have put the document of compromise in evidence in the present suit without having it registered. Such of its terms as were embodied in the decree would have been binding upon the parties as *res judicata* and the order of the Court incorporating the terms not contained in the decree itself, would have been "judicial evidence available to the appellants," that the respondents had agreed in those terms to the partition of the lands which were outside the scope of the former suit [*Pranal Anni* v. *Lakshmi Anni* (2)].

The present suit has been brought to enforce the terms of the compromise in respect of part of the land thereby agreed to be allocated to the plaintiff-respondent. The appellant's contention now is that this document cannot be received in evidence as it has not been registered. This contention is founded on the judgment of the Privy Council already referred to, and on an earlier case reported in *Hemanta Kumari Debi* v. *Midnapore Zemindari Company, Limited* (1), which definitely decides that a written document embodying the terms of a mutual agreement compromising a suit, can only be received in evidence without being registered if its provisions have been recorded by the Court in the form of a decree. This exception is extended to agreements incorporated in a decree even in cases where the operative part of the decree does not contain all the stipulations and provisions contained in the agreement. In other words, if a suit has been adjusted in the manner contemplated by O. XXIII, r. 3, of the Code of Civil Procedure, and the terms and conditions of the adjustment have been reduced to writing by the parties, and if the Court has duly recorded those terms and conditions and passed a decree in accordance with such of them as are the subject of the then existing litigation, then the writing of the parties may be produced in evidence in any subsequent suit without being registered. In the present case the document evidencing the terms upon which the previous suit had been adjusted between the parties, has not been incorporated in a decree of the Court nor has it been embodied in the order of the 9th February 1910. The exception provided in sub-section 2 (*vi*) of section 17, which declares that nothing in clauses (*b*) and (*c*) of sub-section applies to "among other things" any decree or order of a Court does not, therefore, cover this case as the order of the 9th February 1910 connot, in view of the authorities cited above, be regarded as a decree or order within the meaning of that exception. It follows, therefore, that the document is subject to the provisions of section 17 (1) (*b*) and being unregistered is prohibited by section 49 of the Act from being received as evidence of the compromise arrangement.

The lower Appellate Court thought that *Hari Chand* v. *Maghi Mal* (3) was a clear authority for holding that the document did not require registration, but we are unable to understand how

(2) 26 I. A. 101 at p. 106; 1 Bom. L. R. 394; 22 M. 508; 3 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.).

(3) 40 Ind. Cas. 675; 78 P. R. 1917; 95 P. W. R. 1917; 112 P. L. R. 1917.

the learned District Judge came to that conclusion. In that case the parties in a pending suit settled the matters in dispute by mutual consent. The document embodying the terms of the settlement was presented to the Court in which the suit was pending, for the purpose of having the mutual agreement recorded under the provisions of O. XXIII, r. 3 of the Code of Civil Procedure. The Court refused to act on the compromise on the ground that the document could not be accepted as it had not been registered, and on a further ground not material to the present question. The document was not tendered as evidence of a contract sued upon in that litigation, but was merely a memorandum of the terms upon which the parties had agreed to put an end to the litigation, and which the Court was requested to accept and record in accordance with O. XXIII, r. 3. It, therefore, could not possibly be held to come within the provisions of section 17 (*b*) of the Registration Act. The Court was bound, under the Civil Procedure Code, to record the terms of the arrangement arrived at by the parties if it was satisfied that the arrangement was a lawful one and that it adjusted the suit either wholly or in part and the appeal was brought against the order of the Subordinate Judge solely on account of his refusal to comply with the provisions of the Code.

That is an entirely different case to the present one. Here the document embodying the terms of the compromise is sought to be given in evidence in a fresh suit brought to enforce those terms, the previous suit which was compromised having been dismissed. The document is here tendered as evidence of the terms of the compromise which is sought to be enforced in the present litigation.

A number of other cases have been cited by Counsel for the respondents, but in all those cases it appears that the document containing the terms of the compromise was in fact incorporated with, and given effect to by, the order of the Court which tried the suit. In one case only amongst those referred to there appears to be some doubt as to the extent to which the compromise was in fact incorporated in the order of the Court of first instance. This is a case reported as *Khair-ul-nisa* v. *Bahadur Ali* (4). The judgment in that case discussed at some length the question as to what was the exact nature of the document of compromise, and certain *dicta* in the judgment of Rattigan, J., have been seized upon by Counsel for the respondents as authority for the somewhat remarkable proposition that a document can be tendered as evidence in a suit without being registered, provided it is merely the record reduced to writing of an antecedent verbal arrangement. We confess we cannot follow this line of reasoning. Most contracts in writing are merely the formal documentary expression of an antecedant verbal arrangement, but it is an elementary principle of law that the antecedent agreement cannot be proved by parol evidence if the parties have reduced the agreement to writing. Where that has been done the writing itself must be tendered in evidence, and such writing by section 49 of the Indian Registration Act cannot be received by the Court as evidence of the verbal agreement unless it is registered. This is subject to the proviso contained in sub-section (2) exempting *inter alia* any decree or order of a Court.

If *Khair-ul-nisa* v. *Bahadur Ali* (4) does, as Counsel for the respondents contend, in fact decide that a compromise which is merely referred to by the Court, but the terms of which are not incorporated in an order or decree, can be tendered as evidence in subsequent litigation, all we can say is that that decision can no longer be a binding authority in view of the judgments of the Privy Council already referred to. We do not, however, agree that those were the facts in that particular case. It appears in the judgment of the Court that "The plaintiff and defendant were both examined by the Court with reference to the document and repeated in full detail all that was set forth in that document, the plaintiff concluding by expressly requesting the Court to dismiss her suit in accordance with the terms of the compromise. The Court accordingly wrote an

(4) 27 P. R. 1906; 11 P. L. R. 1906; 17 P. W. R. 1906.

order reciting the said terms and dismissed the suit as prayed." That case, therefore, cannot be said to conflict with the long series of authorities terminating in the decision of the Privy Council reported in *Hemanta Kumari Debi* v. *Midnapore Zemindari Co., Limited* (1). Holding as we do that the documentary evidence upon which the respondents rely is not admissible by reason of its not having been registered, we must accept the appeal, the appellants to have their costs throughout.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 649 OF 1921.

March 29, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

TOTA VARAHALIAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sree Rajah VATSAVAYA VENKATA SURYANARAYANA JAGAPATHIRAJU BAHADUR GARU AND OTHERS—PLAINTIFFS—RESPONDENTS.

***Madras Estates Land Act** (I of 1908), s. 3—Inam granted prior to 1802, whether estate—Presumption.*

The fact that certain lands were granted as an *inam* prior to 1802 affords strong evidence that the lands so granted were excluded from the Permanent Settlement and do not form part of an "estate" within the meaning of section 3 of the Madras Estates Land Act. [p. 465, col. 2.]

***Kuppu Reddi Nookayya* v. *Mandaluka Bheemanna*, 73 Ind. Cas. 733; (1923) M. W. N. 176; 17 L. W. 712; (1923) A. I. R. (M.) 454; 44 M. L. J. 91, followed.**

Second appeal against a decree of the Court of the Subordinate Judge, Cocanada, in A. S. No. 40 of 1920, preferred against a decree of the Court of the Additional District Munsif, Cocanada in O. S. No. 569 of 1919.

Messrs. *D. Appa Rao*, *P. Narayanhmoorthy* and *A. Krishnaswamy Iyer*, for the Appellant.

Messrs. *V. Ramadoss* and *K. Venkata Rama Raju*, for the Respondents.

JUDGMENT.—The only question for our disposal in this appeal is whether the suit lands formed part of an 'estate' within the meaning of section 3 of the Madras Estates Land Act, so as to oust the jurisdiction of the Civil Court. Both the lower Courts have found that it did not, and after a long argument on both sides we see no reason for interfering with that decision. We must take it as a fact that the suit lands were granted as an *inam* in the year 1798, at any rate, before 1802. This was not disputed before the lower Appellate Court; and the case proceeded on the assumption that it was so. The argument there adduced by the defendants, the appellants before us, was that, in spite of this fact, the lands should be treated as part of the estate, because it was not shown that the rentals on them had been deducted from the assets of the *zemindari* for the purpose of assessing *peishcush*. The lower Appellate Court has considered this aspect of the case and has come to the conclusion that, although the Circuit Committee's accounts prepared with a view to the assessment of *peishcush*, would only extend to two years before 1798, the date of the grant, yet, nevertheless, it must be found as a fact that the lands were excluded from the assets of the *zamindari* in calculating *peishcush*. This we take to be the conclusion arrived at, at the end of paragraph 7 of the lower Appellate Court's judgment.

Mr. Ramadoss for the respondents has drawn our attention to a recent decision of this Court reported in *Kuppu Reddi Nookayya* v. *Mandaluka Bheemanna* (1), from which it would appear that the lower Appellate Court might have approached the consideration of the evidence from a point of view much more favourable to the respondents than he did. The learned Judge in that case held that the fact of grant prior to 1802 afforded, at any rate, strong evidence that the lands so granted were excluded from the Permanent Settlement. It may be that this is a rebuttable presumption. But we think it is quite clear that the lower Appellate Court has not found the presumption to be rebutted in the present case. In fact, it has arrived at the conclusion it has, while practically throwing burden of proof on the appellants. We

(1) 73 Ind. Cas. 733; (1923) M. W. N. 176; 17 L. W. 712; (1923) A. I. R. (M.) 454; 44 M. L. J. 91.

can see no reason for questioning this finding.

The learned Vakil for the appellants has laid great stress on an entry in the 'Remark' column in Exhibit II, the B Register of the village, to the effect that the enfranchisement of these properties was cancelled in 1920. The learned Subordinate Judge referred to the enfranchisement but has not referred to the cancellation. The reason appears to be this: When Exhibit II was originally filed in the First Court there was no such entry in the 'Remark' column. The register, being a public document, appears to have been returned to the party producing it after the disposal of the case by the First Court and, in the interval, before it was produced again on the hearing in the lower Appellate Court, this entry appears to have been made in the 'Remark' column. Strictly speaking, therefore, the entry in the 'Remark' column is not a part of the record in the case, and, if the present appellants wished the lower Appellate Court to treat it as part of the record, a special application should have been made to that effect. Nothing of the kind appears to have been done, and, although we are told that the learned Subordinate Judge's attention was drawn to this 'Remark' column, he makes no reference to it, and it may quite well be that he declined to consider it in the absence of such a special application. We can see no reason for interfering with the lower Appellate Court' finding of fact as to exclusion of the suit lands from the *zemindari* and we must dismiss this second appeal with costs.

We see no reason to interfere with the lower Appellate Court's order as to costs.

The Memorandum of Objections is dismissed with costs.

V. N. V. *Appeal dismissed.*

CALCUTTA HIGH COURT.

REFERENCE UNDER SECTION 5 OF THE COURT-FEES ACT, 1870.

February 20, 1923.

Present:—Mr. Justice Greaves.

In the goods of G. T. WILLIAMS—DECEASED.

Government of India Act, 1919, (9 & 10 *Geo. V, c.* 101), *s.* 80 (*A*) - *Court-Fees Act* (*VII of* 1870), *Sch. I, Art.* 11—*Bengal Court-Fees* (*Amendment*) *Act* (*IV of* 1922), *whether* ultra vires—*Fee payable on Letters of Administration, whether tax.*

Under the provisions of section 80 *A* of the Government of India Act, a local Legislature may, subject to the limitations mentioned in sub-section (3) of the section, repeal or alter as to that Province any law made before or after the commencement of the Act by any authority in British India. [p. 468, col. 1.]

The limitations imposed by sub-section (3) of section 80 A of the Government of India Act relate under clause (*a*) to the imposition of new taxes other than those set out in Schedule I of the Scheduled Taxes Rules and under clause (*b*) to the Acts set out in the Schedule to the Previous Sanction Rules. [p. 468, col. 1.]

The Court-Fees Act is not set out in the Schedule to the Previous Sanction Rules, and a Court-fee not being a stamp duty within the meaning of Schedule I of the Scheduled Taxes Rules, the amendment of the Court-Fees Act by a local Legislature does not require the previous sanction of the Governor-General in Council. The Bengal Court-Fees (Amendment) Act of 1922 was not, therefore, *ultra vires* the Bengal Legislature for want of such sanction. [p. 468, col. 1.]

The sum charged under the provisions of the Court-Fees Act upon a grant of Probate or Letters of Administration is not a tax or duty levied upon the property upon which the Probate or Administration operates but is merely a fee levied by the Court issuing the Probate or Letters of Administration for the work done in this connection, and must be paid according to the scale prescribed in the Province in which the grant is made, irrespective of the fact whether the whole of the property in respect of which the grant is made is or is not situate within that Province. [p. 468, col. 2.]

Mr. *R. Westmacott*, for the Administrator-General of Bengal.

Mr. *S. R. Das*, Advocate-General.

JUDGMENT.—This is a reference under section 5 of the Courts-Fees Act, 1870, for the purpose of determining the amount of the fees to be paid in respect of the grant of Letters of Administration in the above estate. Two questions are raised. The first is whether the Bengal Court-Fees Amendment Act of 1922 (Act IV of 1922) is *ultra vires*. The second question is whether, assuming the Act is not *ultra vires*, the fees to be levied at the enhance-

ed rate prescribed by the Bengal Court-Fees Amendment Act of 1922 (Act IV of 1922) on the whole estate, or whether the enhanced fee is payable only on that portion thereof which is situate in Bengal, the fee in respect of the assets outside Bengal being leviable at the lower rate prescribed by the Court-Fees Act of 1870, as amended by subsequent Acts of the Imperial Legislative Council.

On behalf of the Administrator-General of Bengal to whom a grant has been issued, and who has paid under protest the fee at the enhanced rate prescribed by Bengal Act IV of 1922 in respect of all the assets, it is contended, first, that the Bengal Court-Fees Act of 1922 is *ultra vires*; second, that if it is *intra vires* it was not competent to the Bengal Legislature to enhance the fees on assets outside Bengal.

I will deal first with the first point. Section 80 (*A*) of the Government of India Act provides, sub-section 1 (*2*), that the local Legislature of any Province may, subject to the provisions of the sub-section next following, repeal or alter as to that Province any law made either before or after the commencement of this Act by any authority in British India other than that local Legislature. And sub-section (3) provides that the local Legislature of any Province may not without the previous sanction of the Governor-General make or take into consideration any law (*a*) imposing or authorising the imposition of any new tax unless the tax is a tax scheduled as exempted from this provision by rules made under this Act or (*b*) altering or repealing the provisions of any law which, having been made before the commencement of the Government of India Act, 1919, by any authority in British India other than that local Legislature, is declared by rules under this Act to be a law which cannot be repealed or altered by the local Legislature without previous sanction.

By the rules framed in respect of section 80 A (3) (*a*) of the Act it is provided (1) that the Legislative Council of a Province may, without the previous sanction of the Governor-General, make and take into consideration any law imposing, for the purposes of local Government, any tax included in Schedule I to these rules. Schedule I (2) includes a tax on succession and Schedule I (8) includes a stamp duty other than duties of which the amount is fixed by Indian Legislation. By the rules framed in respect of section 80A 3 (*h*) it is provided (*2*) that a local Legislature may not repeal or alter without the previous sanction of the Governor-General (1) any law made by any authority in British India before the commencement of the Indian Councils Act, 1861, (2) any law specified in the Schedule to these rules or any law made by the Governor-General in Council amending a law so specified.

Now the Court-Fees Act, 1870 (Act VII of 1870), under which the fee payable on a grant o Letters of Administration is levied, which is an Act of the Governor-General of India in Council, is not one of the Acts specified in the Schedule to the rules framed in respect of section 80 A (3) (*h*).

It will be convenient at this stage to consider the material provisions of that Act. Section 3 provides (*inter alia*) that the fees chargeable in the different High Courts under No. 11 of the First Schedule (which prescribes the fee payable in respect of Letters of Administration) are to be levied in manner thereinafter appearing; that it is to say, by stamps under section 25.

Now, as I understand the argument for the Administrator-General on this first point, it is this that the fee is a stamp-duty because it is collected by stamps under the provisions of section 25 of the Court-Fees Act, 1870, and inasmuch as that Act is an Act of the Governor-General in Council, it is a duty, of which the amount is fixed by Indian Legislation and that it cannot, therefore, be altered without the previous sanction of the Governor-General, which admittedly has not been obtained in this case.

The Advocate-General contends that the provisions of section 80A (3) relate only to new taxes and not to the enhancement of existing taxes and that the taxes referred to in Schedule I of the Scheduled Taxes Rules, which can be imposed without leave, all relate to new taxes and that sanction is only required for the imposition of a new tax which does not fall with-

in the provisions of Schedule I and not to the enhancement of an existing tax. And he contends that, under the provisions of section 80 A (3) (*h*), the local Legislature can amend any Act of the Imperial Legislature except those mentioned in the Previous Sanction Rules.

I think that these contentions are correct. Under the provisions of section 80A (1) the local Legislature has power to make laws for the peace and good Government of the territories of the Province, and under section 80 A (2) the local Legislature may, subject as therein mentioned, that is to say, subject to the limitation mentioned in (3), repeal or alter as to that Province any law made before or after the commencement of the Act by any authority in British India.

The limitations imposed by (3) relate (*a*) to the imposition of new taxes other than those set out in Schedule I of the Scheduled Taxes Rules. Now it is quite true that duties which are collected by means of stamps are, in a sense, stamp duties, for instances, in England, Estate Duty, Probate Duty and Succession Duty are stamp-duties because they are so collected, but I feel very great doubt whether a Court-fee becomes a stamp-duty within the meaning of the Scheduled Taxes Rules, Schedule I, because it is collected by means of stamps. I think that the stamp-duties referred to in Schedule I mean some such duties as are imposed by the Indian Stamp Act, see section 3 of that Act, and do not comprise Court-fees comprised in the Court-Fees Act, even although in a sense they are stamp-duties as being paid by stamps. As to 3 (*h*) the limitations extend only to those Acts set out in the Schedule to the Previous Sanction Rules, which does not, as already stated, contain the Court-Fees Act. For these reasons, in my opinion, the first point fails and Bengal Act IV of 1922 is not *ultra vires* of the local Legislature, as no previous sanction was necessary.

I now come to the second point. On behalf of the Administrator General it is contended that the Bengal Court-Fees (Amendment) Act, 1922, extends only to Bengal and that the Bengal Legislature cannot impose a tax on property in another Province. The real question is whether the enhancement of the Court-fees payable on a grant of Administration is a tax or merely a Court-fee. It is said that it is a tax or duty because this has to be paid before the Court exercises any jurisdiction in the matter and because, under the provisions of section 19 *H* (2) of the Court-Fees Act, notice of the application has to be given by the High Court to the Revenue authority of the Province and because of the provisions for valuation in section 19 A, E and F and the provisions for deducting debts in 19 B. The Advocate-General, however, contends that it is merely a Court-fee and that if a man chooses to take out Probate or Administration in Bengal he must submit to the laws of the local Legislature, and that if the imposition is viewed as a Court-fee and not as a duty or tax it is quite immaterial where the property is situate. I think that this contention is correct, the sum charged upon a grant of Probate or of Letters of Administration is not a tax or duty levied upon the property upon which the Probate or Administration operates, and it is not charged thereon as is Estate Duty in England, but it is merely a fee levied by the Court issuing the Probate or Letters of Administration for the work done in this connection. And I do not think that this is any less the case because the fee is levied upon the value of the property.

In my opinion, therefore, the Court-fee was rightly levied at the enhanced rate on the value of all the assets, whether in this Province or outside.

Z.K. & N. H. *Order accordingly.*

PATNA HIGH COURT.

CIVIL REVISION PETITION NO. 208 OF 1923.

August 13, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

THE BENARES BANK, LIMITED—PETITIONER

versus

SURENDRA NARAIN SINGH AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 16, 20—Decree improperly passed—Proper remedy—Suit for declaration that decree not binding on plaintiff, nature of—Cause of action—Jurisdiction.

Where a decree has been improperly passed, the proper and convenient course is for the party aggrieved to go to the Court that granted the decree and get it set aside by that Court. [p. 470, col. 2.]

Before a Court can entertain a suit for a declaration that a decree granted by another Court is not binding on the plaintiff it must be shown that there is a cause of action within the jurisdiction of the Court. [p. 470, col. 1.]

A mortgage decree in respect of properties situate within the jurisdiction of the Patna Court was passed by the Court at Benares. The judgment-debtor instituted a suit in the Court of the Subordinate Judge of Patna for a declaration that the decree was inoperative against him:

Held, (1) that the suit was not a suit for land and section 16 of the Civil Procedure Code did not apply; [p. 470 col. 1.]

(2) that the cause of action did not arise within the jurisdiction of the Patna Court; [p 470 col. 2.]

(3) that the plaint should, therefore be returned for the purpose of being filed in the proper Court. [p. 470 col 2.]

Ramsumran Prasad v. *Gobind Das*, 68 Ind. Cas. 700; 2 Pat. 125; (1922) Pat. 291; 4 U. P. L. R. (Pat.) 75; 3 P. L. T. 704; (1922) A. I. R. (Pat.) 615; 1 P. L. R. 1, referred to.

Revision from a decision of Subordinate Judge, Third Court, Patna, dated the 16th May 1923.

Mr. *Sultan Ahmad*, for the Petitioners.

Messrs. *Gangadhar Das* and *Ram Prasad*, for the Opposite Party.

JUDGMENT.

Das, J.—I think this application must succeed. The petitioner Bank was the plaintiff in a mortgage action at Benares. The suit was filed against the opposite party and various other persons whose names it is unnecessary to mention. The Benares Bank Limited, obtained the usual mortgage decree on the 17th December 1917. The decree, as I have said, was against the opposite party and others by compromise.

The opposite party, sometime in 1922, instituted a suit in the Third Court of the Subordinate Judge of Patna for a declaration that the consent decree passed in Benares was wholly inoperative as against them. One of the questions which the learned Subordinate Judge had to try was, whether the Court at Patna had jurisdiction to entertain the suit.

I am clearly of opinion that the suit is not a suit for land and that section 16 of the Code has no application to the facts of the case. Mr. Gangadhar Das has insisted that the suit is for the determination of a right to or interest in immoveable property. His argument is based upon the view that it is impossible for him to succeed in the action unless he establishes his title to the properties which were mortgaged by defendants Nos. 5 and 6 in favour of the Benares Bank, Limited, and that, in so far as he is inviting the Court to adjudicate the title of his clients to the mortgaged properties which are situated within the jurisdiction of the Patna Court, he is in effect asking the Court to determine the right to or interest of the petitioners in immoveable property. In my opinion the argument is unsustainable in point of law. The only question which the learned Subordinate Judge has to decide is, whether the plaintiffs are entitled to a decree declaring that the decree passed by the learned Subordinate Judge of Benares in 1917 is inoperative and void as against the plaintiffs in the present action. The plaintiffs in their action, no doubt, have asked the Court to adjudicate their title to the properties in dispute and also to hold that the defendants Nos. 5 and 6 were not entitled to mortgage the properties which belonged to them to the Benares Bank, Limited. But as the learned Chief Justice has pointed out in the case of *Ramsumran Prasad* v. *Gobind Das* (1), "the Court is in all cases bound to adjudicate upon the matters in issue between the parties and it is unnecessary for the plaintiff to pray that this should be done. The real relief which the plaintiff seeks is the delivery of possession of the property by dispossession of the defendant, and if he

(1) 68 Ind. Cas. 700; 2 Pat. 125; (1922) Pat. 291; 4 U. P. L. R. (Pat.) 75; 3 P. L. T. 704; (1922) A. I. R. (Pat.) 615; 1 P. L. R. 1.

asks for a decree in those terms when he is not bound first to ask for a declaration before such relief can be granted, I do not think that, merely because he asks the Court to adjudicate upon the matters in issue, the suit should be treated as a suit to obtain declaratory decree with consequential relief."

The question which the learned Chief Justice had to decide in the case to which I have referred was a question of Court-fees payable on a certain plaint which had been filed by the plaintiff, but in my opinion we are entitled to refer to that decision in order to determine the question whether the suit should be regarded as a suit for land because in giving the appropriate relief to the plaintiffs the Court may have to determine some question as to the right to the property as between the plaintiffs and the *pro forma* defendants. I do not say that the Court may necessarily have to determine those points; but it may have to do so. In my opinion the suit which has been filed by the plaintiffs in this case cannot be regarded as a suit for land, having regard to the relief which they prayed in this action.

The next question is, whether part of the cause of action may be said to have arisen within the jurisdiction of the Patna Court. If section 16 does not apply, the only other section to which we may refer is section 20 of the Code of Civil Procedure. That section provides as follows:—"Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction,—

"(*a*) the defendant, or each of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business or personally works for gain or,

"(*b*) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

"(*c*) the cause of action wholly or in part arises."

It is conceded that the terms of clauses (*a*) and (*b*) have not been complied with. The only other question is, have the terms of clause (*c*) been complied with? That leads us to consider the meaning of the term "cause of action." All that I need do is to refer to the decision of the late Chief Justice of the Allahabad High Court in the case of *Dan Dial* v. *Munna Lal* (2). That was a case where a decree had been obtained by the respondents as against the appellant in Calcutta. The appellant instituted a suit in Mainpuri for a declaration that the decree passed by the Calcutta High Court had been obtained by fraud. No application for execution had been made as against the appellant and the Subordinate Judge held, and the High Court confirmed the decision of the learned Subordinate Judge, that the Mainpuri Court had no jurisdiction whatever to entertain the suit. No doubt, if an application for execution had been presented as against the opposite party in Patna, that itself would have given rise to a cause of action on of which the respondents might have taken advantage; but it is conceded that the petitioner Bank has not presented any application for execution of the decree which it has obtained as against the opposite party and it does not seem to us right that this suit should have been instituted in the Patna Court. As was pointed out by the late Chief Justice of the Allahabad High Court, where a decree has been improperly obtained the proper and most convenient course is for the party aggrieved to go to the Court that granted the decree and get it set aside by that Court. I do not for a moment suggest that under no circumstances would another Court have jurisdiction to entertain a suit for a declaration that a decree granted by another Court is not binding upon it, but it must be established that there is cause of action within the jurisdiction of the Court. In my opinion

(2) 24 Ind. Cas. 978; 36 A. 564; 12 A.L.J. 955.

the learned Judge had no jurisdiction to entertain the suit.

I must accordingly allow the application, set aside the order passed by the Court below and direct that the plaint be taken off the file and returned to the opposite party for the purpose of being filed in the proper Court. The petitioners are entitled to their costs throughout and we assess the costs in this Court at five gold *mohurs*.

Macpherson, J.—I agree.

K. S. D. & N. H.

Application allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2050 OF 1920.

April 18, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Coleridge.

VARADARAJAN (MINOR) BY NEXT FRIEND S. RANGANATHA RAO—PLAINTIFF—APPELLANT

versus

SRINIVASA RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Insolvency of manager—Shares of other members, whether vest in Official Receiver. [p. 471, col. 2.]

On the insolvency of the managing member of a joint Hindu family, the Official Assignee succeeds to the undivided interest of the insolvent in the joint property and his rights as managing member so far as they can be exercised for his own benefit, but he is not entitled to have vested in him the shares of the other members though he is entitled to deal with them as the insolvent would lawfully have done if there had been no insolvency. [p. 471, col. 2.]

Official Assignee of Madras v. *Ramachandra Aiyar*, 68 Ind. Cas 898; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; (1923) A. I. R. (M) 55; 46 M. 54, followed.

Bihari Lal v. *Sai Narain*, 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L.) 1 (F. B.), referred to and not followed.

Second appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Appeal Suit No. 2 of 1920, preferred against that of the Court of the Additional District Munsif, Kulitalai, in Original Suit No. 288 of 1916.

Mr. *T. Narasimha Aiyangar*, for the Appellant.

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

JUDGMENT.

Schwabe, C. J.—This is a second appeal from the judgment of the Subordinate Judge, Trichinopoly, in a partition suit. The plaintiff was the son of the first defendant and they were puisne members of a joint Hindu family. At one time before the suit the first defendant became insolvent. The plaintiff joined in the partition suit certain alienees of the joint family property alleging that the consideration was such that the transactions were not binding on him. The case came up before the District Munsif and then on to the District Judge who remanded the matter to the District Munsif again for finding on the question whether the consideration for these assignments was of a nature to bind the son. The findings were given and the case came up again and was heard on the findings by the Subordinate Judge. The Subordinate Judge took no notice of the finding and did not enquire at all into any of the matters considered by the District Judge as relevant, but accepted the contention that, as the first defendant had become an insolvent, the whole joint family property vested in the Official Receiver, and, therefore, the son had no claim to partition and could not take any steps to recover this alienated property from the alienees. In my judgment, that is not the law. The matter has recently been before this Court in the *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) when I expressed my views to be that, on the insolvency of the managing member of a joint Hindu family, the Official Assignee succeeded to the undivided interest of the insolvent in the joint property and his rights as managing member so far as they can be exercised for his own benefit, but he is not entitled to have vested in him the shares of the other members though he is entitled to deal with them as the insolvent would lawfully have done if there be no insolvency.

(1) 68 Ind. Cas. 898; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; (1923) A. I. R. (M.) 55; 46 M. 54.

RAM SARUP v. RAM LAL.

There has since been a decision of the Full Bench in Lahore, *Bihari Lal* v. *Sat Narain* (2) in which the Court, though expressing preference for the view of this Court which was not before it, held itself bound by authority to decide that the whole joint family property vests in the Official Assignee. I think we must follow the decision of the Bench of this Court. It follows from that that the decision of the Subordinate Judge in this case is wrong and the matter must be remanded to the Subordinate Judge, Trichinopoly, to be heard from the stage at which it had arrived on return of the findings called for by the District Judge. It seems to me necessary that the Official Receiver of the second defendant should be a party. The point was raised early in the case, and notice must be given to him so that he may come before the Court, if so advised.

The plaintiff is entitled to his costs o this appeal.

Coleridge, J.—I concur.

V. N. V. *Order accordingly.*

(2) 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L) 1 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1451 OF 1920.

May 9, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

RAM SARUP—PLAINTIFF—APPELLANT

versus

RAM LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 77, 101—Mortgage—Prior and subsequent mortgagee—Prior mortgagee acquiring rights of mortgagor, status of.

The shield of a subsequent mortgagee, who acquires the rights of a prior mortgagee, is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of a mortgagor or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation; for he cannot b required to sue for the recovery of the money due on his mortgage from his own property. [p. 474, col. 1]

Gokaldas Gopaldas v. *Puranmal Premsukhdas*, 10 C. 1035 at p. 1046; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), relied on.

Athan Kutti v. *Matavil Illoth Sutarjanam*, 37 Ind. Cas. 756; (1917) M. W. N. 9; 5 L. W. 461; 32 M. L. J. 317, distinguished.

Second appeal from a decree of the Subordinate Judge, Meerut, dated the 9th of September 1920, modifying that of the Munsif, Meerut, dated the 29th of April 1920.

Dr. *Surendra Nath Sen* and Munshi *Kailas Chandra Mital*, for the Appellant.

Babu *Harendra Krishna Mukerji*, for the Respondents.

JUDGMENT.—These appeals arsise out of two suits brought by a subsequent mortgagee for the recovery of the money due on two simple mortgages The claims were resisted by a person who had purchased the mortgaged property in execution of a simple money-decree due by the mortgagor. That person also held certain prior mortgagees on the same property. He asserted that the plaintiff was not entitled to sue for the recovery of the money due on the subsequent incumbrance until he had paid the money due on the prior mortgages. The First Court decreed the claim without requiring the plaintiff to pay the money due on the prior mortgages. The view taken by it was, that the prior mortgages had ceased to subsist and that the defendant could not set up those mortgages as a shield against the claim brought by the subsequent mortgagee. The lower Appellate Court, however, held otherwise and granted a decree to the plaintiff subject to his redeeming the prior mortgages set up by the defendant-respondent.

It is urged on behalf of the plaintiff-appellant that the prior mortgages had ceased to be subsisting, becauee no step had been taken to enforce them within the period allowed by law. The mortgagee, however, had purchased the mortgaged property in execution of a simple money-decree due by the mortgagor, and it was not open to him to sue for the recovery of the money due on his prior mortgagees after the rights of the mortgagor had merged in him. Section 101 of the Transfer of Property Act lays down that where the

owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished unless he declares by express words or necessary implication that it shall continue to subsist, or such continuance would be for his benefit.

The ordinary rule, as laid down by their Lordships of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), is that, if a man is entitled to act in either of two ways, he shall be assumed to have acted according to his interest, and the presumption, therefore, is that the mortgagee intended to keep his prior incumbrances subsisting, in order that he might be able to use them to protect himself against any subsequent incumbrancer. That being so, the defendant respondent could set up these prior mortgages as a shield against the claims brought by the subsequent mortgagee.

The learned Counsel for the plaintiff-appellant contends that no such shield is available to a person who has purchased the mortgaged property otherwise than in execution of a decree on the prior mortgage; but he has not been able to cite authority in support of that proposition. He relies on the decision in *Athan Kutti* v. *Matavil Illoth Sutarjanam* (2), but that was a case in which a suit was brought to redeem a usufructuary mortgage against a person who also held a simple mortgage of a subsequent date on the same property. The latter was barred by time. There were certain conditions in the simple mortgage which imposed fetters on the right of the mortgagor to redeem the former, and all that was laid down in that case was that the plaintiff was entitled to redeem the usufructuary mortgage irrespective of those fetters, and that, as the liability of the mortgagor under the simple mortgage was quite independent of his liability under the usufructuary mortgage, the simple mortgage could not, in any case, be set up as a shield against the claim of the mortgagor to redeem the usufructuary mortgage. There was no covenant therein for tacking or consolidation and no shield was available. He has also relied on the decision in *Mutiullah Khan* v. *Bawari Lal* (3), but that was not a case in which the mortgagee had purchased the equity of redemption in the mortgaged property. There was a certain person who had mortagaged the property in succession with two different persons and subsequently sold it to a third party. The third party made a mortgage in favour of a person who, thereafter, redeemed the first mortgage out of the money left with him for the purpose by his mortgagor. He subsequently filed a suit for the recovery of the money due on his mortgage and obtained a decree in satisfaction whereof the rights of the mortgagor were sold by auction and purchased by a person against whom an attempt was afterwards made by the intermediate mortgagee to enforce his mortgage. One of the defences taken by the auction-purchaser was that the mortgagee, in satisfaction of whose decree he had purchased, had acquired the rights of the prior mortgagee by payment of his money, and it was held by this Court that he was entitled to use that mortgage as a shield against the claim of the intermediate mortgagee if the right to enforce that mortgage was subsisting.

There is, however, a considerable difference between cases where a subsequent mortgagee has acquired the rights of a prior mortgagee by payment of the money due to him under section 74 of the Transfer of Property Act and cases where the rights of the mortgagors have merged in the mortgagee within the meaning of section 101 of the Transfer of Property Act. There is no question of merger in the former as there is in the latter. Under the latter section, if at any time the purchaser is sought to be deprived of the mortgaged property, it is open to him to set up his original rights as a prior mortgagee as a shield against any rights which might be claimed under a subsequent incumbrance. Having purchased the mortgaged property, he can redeem any subsequent incumbrance but he is under no obligation to do so. He can retain possession of the mortgaged

(1) 10 C. 1035 at p. 1046; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

(2) 37 Ind. Cas. 756; (1917) M. W. N. 9; 5 L. W. 461; 32 M. L. J. 317.

(3) 5 Ind. Cas. 132; 32 A. 138; 7 A. L. J. 61.

property until an attempt is made by a puisne mortgagee to oust him by redemption or sale.

The shield of a subsequent mortgagee, who acquires the rights of a prior mortgagee, is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a morgtgagee merge in those of the mortgagor or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation, for, as pointed out in *Laxman Ganesh* v *Mathurabai* (4), he cannot be required to sue for the recovery of the money due on his mortgage from his own property. Indeed, being both the mortgagee and the mortgagor, he cannot have any cause of action against himself.

It makes no difference how the rights of the mortgagor are acquired by the mortgagee. In *Baldeo Parshad* v. *Uman Shankar* (5), a mortgagee, who had, in the exercise of a right of pre-emption, purchased the property mortgaged to him, was held to have a right to be re-paid the money due in respect of his mortgage before a subsequent mortgagee could bring such property to sale in execution of a decree on a mortgage held by the latter.

The other pleas taken in the memoranda of appeals have not been pressed. A question was raised as to the right of the defendant-respondent to claim interest beyond the date on which he got possession of the mortgaged property, but the lower Appellate Court has not awarded interest beyond the date on which possession was so obtained by the defendant-respondent. The appeals, therefore, fail and we dismiss them with costs.

W. C. A. *Appeals dismissed.*

(4) 23 Ind. Cas. 121; 38 B. 369 at p. 372; 16 Bom. L. R. 26.
(5) 4 Ind. Cas. 810; 32 A. 1 6 A. L. J. 987.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 598 OF 1920.

February 21, 1923.

Present :—Mr. Justice C. C. Ghose and Mr. Justice Panton.

KARALI CHARAN PAL AND OTHERS—DEFENDANTS NOS. 1 & 4—APPELLANTS

versus

ASHUTOSH NANDI—PLAINTIFF—RESPONDENT.

Hindu Law—Inheritance—Exclusion—Burden of proof—Leprosy.

The presumption of Hindu Law is against disqualification of an heir and the burden of proof of disqualification lies on a person who seeks to exclude another who would be an heir, should no cause of exclusion be established. [p. 476, col. 1.]

Where it is contended that a person is excluded from inheritance by reason of disease, the strictest proof of the disease as will disqualify him at the time the succession opens will be required. [p. 476, col. 1.]

Under the Hindu Law leprosy, to be a ground of exclusion from inheritance, must be of the sanious or ulcerous and not of the anaesthetic type. [p. 476, col. 1.]

Janardhan Pandurang v. *Gopal Pandurang*, 5 B. H. C. R. (A. C. J.) 145, *Anania* v. *Ramabai*, 1 B. 554; 1 Ind. Dec. (N. S.) 367, *Rangayya Chetti* v. *Thanikachala Mudali*, 19 M. 74; 6 Ind. Dec. (N. S.) 757, *Helan Dasi* v. *Durga Das Mundal*, 4 C. L. J. 323, *Bhagaban Ramanuj Das* v. *Ram Praparna Ramanuj Das*, 22 C. 843; 22 I. A. 94; 6 Sar. P. C. J. 536; 11 Ind Dec. (N. S.) 558 (P. C.) and *Kayarohana Pathan* v. *Subbaraya Thevan*, 19 Ind. Cas. 690; 38 M. 250; 13 M. L. T. 460; (1913 M. W. N. 642; 25 M. L. J. 251, relied on.

Appeal against a decree of the District Judge, Bankura, dated the 8th December 1919, affirming that of the Subordinate Judge of that District, dated the 31st July 1918.

Dr. *Dwarkanath Mitter* (with him Babu *Manindranath Banerji*), for the Appellants.

Babu *Heramba Chandra Guha*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal have been set out at length in the judgments of the Courts below, and it is, therefore, unnecessary for us to repeat them here. The plaintiff prayed for declaration of title to and separate possession of the lands in schedule 2, for declaration of title to one-fourth share of the lands in schedule 1 and for recovery of that share on partition, and for declaration of title to one-fourth share of the lands in schedules 6 and 7 and for recovery of joint possession of the same and for other reliefs mentioned in the

plaint. The defendant No. 1 contended that the plaintiff being a leper did not inherit the properties left by his maternal grandfather, one Jagannath, and that, in any event, the plaintiff's claim was barred by limitation. The defendants Nos. 2 and 3 pleaded that the plaintiff had no cause of action as against them. The defendant No.4 supported the defendant No. 1. The Court of first instance found that the plaintiff was not disqualified to inherit the properties which belonged to Jagannath on account of his leprosy and that the suit was not barred by limitation. The lower Appellate Court on appeal found, according to the medicel evidence which had been adduced in the case, that the plaintiff had anæsthetic leprosy of the mildest kind and that it was not of a bad type and was not ulcerous and accordingly held that at the time when the succession opened, he had no leprosy of such a kind as could disqualify him from inheriting the properties which belonged to his maternal grandfather. On the question of limitation, the lower Appellate Court found that, inasmuch as Jagannath's widow, Sreemati Bhagbati, was in possession of the joint properties till 1321 B. S. when she died, time began to run as against the plaintiff only from the death of Bhagbati when the succession opened, and, therefore, the plaintiff's suit was not barred by limitation. The lower Appellate Court accordingly affirmed the decree of the First Court. Against this judgment and decree of the lower Appellate Court the present apppeal has been preferred by the defendants Nos. 1 and 4 and on their behalf it has been contended before us that, on the findings of the two Courts below, it should have been held that the plaintiff was excluded from inheritance, and, secondly, that it had not been shown what the condition of the plaintiff was at the time when the succession opened.

Now, under the Hindu Law, the grounds of exclusion from inheritance fall under the follwing six heads: (*i*) physical and mental defects, (*ii*) incurable or agonizing diseases, (*iii*) degradation from caste by reason of crime or otherwise, (*iv*) vicious, criminal or irreligious conduct, (*v*) becoming *naisthika brahmachari* (perpetual student), *vanaprasthasrami* (hermit) or *sanyasi* (ascetic.) The physical and mental defects expressly mentioned in the text are impotence, dumbness, deafness, lunacy, lameness, blindness and idiocy. Manu has a further vague ground of exclusion *nirindriyatwa, i.e.*, absence of limb or sense which includes according to Saraswati Vilasa females as a class. Among the diseases, lunacy has already been referred to. Other deseases expressly mentioned are leprosy (Vishnu) and elephantiasis (Devala). Yajnavalkya has a general ground *acjikitsya roga* (incurable disease) of which consumption is given as an illustration by the Mitakshara, and Narada has a similar general ground *deerghteeraroga* obstinate or agonizing disease. There is some difference of opinion as to some of these defects, whether they should be congenital. Sir Thomas Strange distinguishes between infirmities, such as blindness, deafness, dumbness, etc., which to disqualify must be coeval with birth, and disqualifying diseases such as leprosy, etc., which the Hindu religion regards as visitations not only for sins committed in a preceding state, but also for sins committed in this life; and, therefore, such visitations are not necessarily congenital in order to disqualify.

Of the *smriti* writers, the only one who expressly excludes a leper is Devala, whose text runs as follows:—"When the father is dead, an impotent man, a leper, a madman, an idiot, a blind man, an outcaste, the offspring of an outcaste, and person wearing the token (of religious mendicity) are not competent to share the heritage." Manu excludes one who is a *nirindriya*, that is, devoid of an organ, after expressly mentioning eunuchs and outcastes, one born blind or deaf, an insane, an idiot and a dumb man, but a leper is not referred to by him. See Buhler, Ch. IX, *sloka* 201. Apostamba and Vasistha do not exclude him. Narada excludes persons afflicted with a chronic or acute disease (see Sacred Books of the East, Volume 33, page 194), or, as otherwise translated, an acute or agonizing distemper. Atrophy or pulmonary consumption is instanced as a chronic, and leprosy as an acute, disease in the Ratnakara. Yajnavalkya and Vishnu exclude

persons sufferi g from an incurable disease. So far as leprosy is concerned, the later Hindu Law books generally lay down that to be a ground of exclusion it must be of the sanious or ulcerous and not of the anæsthetic type: see *Janardhan Pandurang* v. *Gopal Pandurang*(1), *Ananta* v. *Ramabai* '2), *Rangayya Chetti* v. *Thamkachalla Mudali* '3), *Helan Dasi* v. *Durga Das Mundal* '4), *Bhagaban Ramanuj Das* v. *Ram Praparna Ramanuj Das* (5), and *Kayarohana Pathan* v. *Subbaraya Thevan* (6).

The presumption of Hindu Law is against disqualification and the burden of proof of disqualification lies on a person who seeks to exclude another who would be an heir, should no cause of exclusion be established. It is also settled that where it is contended that a person is excluded from inheritance by reason of disease, the strictest proof of the disease as will disqualify him at the time the succession opened will be required. On the findings arrived at by the two Courts below and on the authorities referred to, with which we are in agreement, we must hold that the plaintiff was not disqualified from inheriting the properties which belonged to his grandfather after the death of Sreemati Bhagabati Dasi. In this view of the matter the two contentions advanced on behalf of the appellants fail, and this appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 5 B. H. C. R. (A. C. J.) 145.
(2) 1 B. 554; 1 Ind. Dec. (N. S.) 367.
(3) 19 M. 74; 6 Ind. Dec. (N. S.) 757.
(4) 4 C. L. J. 323.
(5) 22 C. 843; 22 I. A. 94; 6 Sar. P. C. J. 536; 11 Ind. Dec. (N. S.) 558 (P. C.).
(6) 19 Ind. Cas. 690; 38 M. 250; 13 M. L. T. 460; 1913) M. W. N. 642; 25 M. L. J. 251.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 213 OF 1920.
February 28, 1923.
Present:—Mr. Justice Phillips and Mr. Justice Devadoss.

KENATH PUTHEN VEETIL KOPPASSA MENON KENATH ACHAN AVERGAL —PLAINTIFF—APPELLANT
versus
KARUMATHIL KALLIANI AMMA AND OTHERS—DEFENDANTS NOS. 1 TO 9—RESPONDENTS.

Malabar Law—Tarwad—Karnavan—*Renewal of* kanom *before date of expiry*—Bona fide *dispute as to validity of prior renewal—Compromise, whether binding on* Tarwad—*Powers of Karnavan—Costs when payable by successful party.*

The *karnavan* of a Malabar *tarwad* executed a *kanom* demise for consideration in renewal of an existing tenure, before the date of its expiry in settlement of a *bona fide* dispute with the *kanomdar* relating to the validity and binding character of a still earlier renewal by which the existing tenure was created by a prior *karnavan*. In a suit by the senior *anandravan* of the *tarwad* to set aside the demise as not binding on the *tarwad*;

Held, that the *kanom* having been executed in settlement of a *bona fide* dispute between the parties and for the benefit of the estate so as to avoid litigation was valid and binding on the members of the *tarwad* and it was immaterial that the sum received by the *karnavan* was spent for the benefit of the estate or misappropriated by him for his own purposes, provided there was no collusion between him and the defendant. [p. 479, col. 1.]

Ramsumran Prasad v. *Shyam Kumari*, 69 Ind. Cas. 71; 49 I. A. 344; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.), followed.

If a person compromising with a *karnavan* is satisfied that the compromise is a *bona fide* one and that, in the ordinary course, a benefit will accrue to the estate, it is not necessary for him to prove that it actually did so as against the allegation that the benefit which should have accured was fraudulently misappropriated by the *karnavan* unless the person compromising is a party to the fraud and acts in collusion with the *karnavan*. [p. 479, cols. 1 & 2.]

A renewal of a *kanom* by the *karnavan* of a Malabar *tarwad* before the expiry of its period when such renewal is to take effect from the date of its expiry is not valid unless it is shown to be for necessity, for it is impossible to predicate some years in advance what the state of affairs will be when the original *kanom* expires and what incidents should be imposed, in order to make the demise beneficial. Where, however, the *karnavan* obtains the consent of the *kanomdar* to a premature renewal to take effect at once, it does not

necessarily follow that it is an act of bad management even if necessity be not proved, for the *karnavan* has full powers of management and is in a position to decide whether the transaction is a prudent one or not. [p. 477, col. 1; p. 478, col. 1.]

Vatavatia Raman Nair v. *Kenath Puthen Vittal Kuppassan Menon*, 51 Ind. Cas. 740; 36 M. L. J. 630, referred to.

The position of the *karnavan* of a *tarwad* is higher than that of a Hindu widow and he has in some respects greater powers than a manager of a joint Hindu family. He has full power of management of the family property and is entitled to make alienations by way of *kanoms* of the *tarwad* property without necessity. [p. 478, col. 1.]

Ponambilath Parapravan Kunhamod Hajee v. *Ponambilath Parapravan Kuttiath Hajee*, 3 M. 169; 1 Ind. Dec. (N. S.) 675, relied on.

A successful party should not be made to pay the loser's costs save in exceptional cases, such as, when his false contentions have been the cause of unduly swelling his opponent's costs. [p. 479, col. 2].

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in Original Suit No. 47 of 1917.

Messrs. *A. S. Venku Ayyar*, *T. R. Ramachandra Ayyar* and *P. Govinda Menon*, for the Appellant.

The Advocate-General and Mr. *P. S. Narayanaswami Ayyar*, for the Respondents.

JUDGMENT.

Phillips, J.—The facts of this case are as follow: A previous *karnavan* of the plaintiff's *tarwad* granted a *kanom* of Rs. 12,000 and odd to one Thappan Nair on the 11th of May 1896 and subsequently on the 30th of June 1902 executed a *puramkanom* deed for Rs. 1,350, under which the original term of 12 years granted in 1896 was extended for another 12 years from 1908. Thappan Nair was, accordingly, entitled to hold the property until 1920. Subsequently Thappan Nair transferred Rs. 6,000 of the *kanom* to defendants Nos. 1 to 3, the first defendant being the wife of Raman Nair and the daughter of Thappan Nair. The remainder of the *kanom* passed to Raman Nair, the husband of the first defendant. In 1914 the 10th defendant, who had then become the *karnavan*, executed two demises one in favour of Raman Nair and one in favour of defendants Nos. 1 to 3. These demises renewed the existing tenure for a period of 12 years from their date, namely, until 1926. The plaintiff, the senior *anandravan* of the *tarwad*, has now brought suits to set aside these demises as not being binding on the *tarwad*. The case against Raman Nair has already been disposed of and we are now only concerned with the demise in favour of defendants Nos. 1 to 3. In the lower Court the plaintiff's suit has been dismissed and he appeals.

It has been consistently held in this Court that renewal of a *kanom* by a *karnavan* before the expiry of its period, when such renewal is to take effect from the date of expiry, is not valid, unless it is shown to be for necessity, and it is the appellant's contention that the plaint demise, is, in effect, a renewal of the *puramkadam* deed granted in 1914 for a period of six years from 1920, and that, therefore, unless the necessity for the transaction is proved, it is not valid and binding on the *tarwad*. The case is not, however, quite so clear as that; for in all cases of renewal a fee is payable by the tenant to the *tarwad* varying in amount according to circumstances. Ordinarily, therefore, the renewal fee is payable every 12 years and in this case the *tarwad* would not have been entitled to a renewal fee until 1920, whereas a fee of Rs. 500 for this document was received by the *karnavan* in 1914, although the prior demise, for which also a fee had been paid did not expire until 1920. The practical effect of the demise, therefore, is that the tenant has a right to hold the property for an additional six years but has, in fact, paid a renewal fee for 12 years. The *tarwad* loses the right to redeem for a period of six years but gains, what is, in effect, the renewal fee payable for six years.

The demise has been justified by the defendants on three grounds: (1) that it was executed for necessity; (2) that, as the *puramkadam* deed was an invalid deed and it was a renewal before the date of the expiry of the *kanom*, the *kanom* was the only valid demise in existence in 1914, and (3) that the demise was executed in settlement of a *bona fide* dispute between the parties. I do not think it necessary to discuss the first two grounds in this judgment, for I am satisfied that on the third ground the defendant must succeed. Defendants Nos. 1 to 3 were holding the property under the *puramakdam* demise of 1902, but the succeeding *karnavan*, the present 10th defendant, sent a notice in 1914 demanding surrender

on the payment of the *kanom* amount and value of improvements. A reply was sent by the first defendant's husband, a High Court Vakil of some standing, to the effect that the *kanom* of 1896 had been renewed by the *puramkadam* deed of 1902 and that the 10th defendant had no right to evict until the expiry of the term under the latter. In the first place, it is contended for the appellant that there was no real dispute between the parties and that, therefore, this demise cannot be treated as in the nature of a compromise and, consequently, that, if there was a dispute, the compromise not being entered into for the benefit of the *tarwad* is invalid. A large number of cases have been cited as to the circumstances in which a compromise entered into by disqualified owner should be recognised as binding on the estate, but most of these refer to the case of compromises entered into by widows. A *karnavan's* position is, however, somewhat higher than that of a Hindu widow and, in fact, a *karnavan* of a Malabar *tarwad* has, in some respects, greater powers than a manager of a joint Hindu family, as pointed out in *Ponambilath Parapravan Kunhamod Hajee* v. *Pon mbilath Parapravan Kuttiath Hajee* (1). He has full powers of management of the family property and is even allowed to give *kanoms* of the *tarwad* property without necessity, although a *kanom* amounts to an alienation of immoveable property. This power is, therefore, one which is not possessed either by a widow or by a manager of a Hindu family except in cases of necessity. The chief reason for holding that necessity must be proved in order to validate a renewal executed before the expiry of the subsisting *kanom* is, that it is impossible to predicate some years in advance what the state of affairs will be when the original *kanom* expires, and what incidents should be imposed in order to make the demise beneficial. In this case, however, the plaint demise is to take effect at once and, therefore, the above consideration does not come into play. If, therefore, a *karnavan* can obtain the consent of a *karnomdar* to a premature renewal to take effect from that date, in my opinion, it does not necessarily follow that it is an act of bad management even if necessity be not proved, for the *karnavan* has full powers of management and is in a position to decide whether the transaction is a prudent one or not. A somewhat different view has been taken in *Vatavatla Raman Nair* v. *Kenath Puthen Vittal Kuppassan Menon* (2) but in the present case I think the validity of the demise can be supported on other grounds, without deciding this question here. I think that, even if we take it that the *karnavan's* powers in this instance are not higher than those of a Hindu widow the transaction can be justified on the ground that it was entered into *bona fide* for the benefit of the *tarwad* (*vide Ramsumran Prasad* v. *Shyam Kumari* (3). The *puramkadam* demise of 1902 was outstanding and, as it had been granted before the expiry of the prior demise, it would be invalid unless it were granted for necessity.

It was, of course, alleged that it was granted for necessity, but that was a fact which the defendants would have to prove. On the other hand, if they did prove it, the defendants would be entitled to hold without payment of any further renewal fee till 1920. By compromising the claim, therefore, the 10th defendant, allowed the defendants to remain in possession for a further period of 12 years on payment of a renewal fee which would not become due until six years later. There is evidence that there were other disputes also. The first defendant's husband who, as I said before, is a High Court Vakil of some standing, says, "The 2nd defendant repudiated the demise under Exhibit XXI and threatened to recover the property on the strength of Exhibit XX. Therefore, I consented to give up the unexpired period secured by Exhibit XXI and to accept a fresh demise from him." "..I was induced by my friends Mr. P. Kannan Nair and Mr. M. Narayana Menon to give up my term

(1) 3 M. 169; 1 Ind. Dec. (N. S.) 675.

(2) 51 Ind. Cas. 740; 36 M. L. J. 630.

(3) 69 Ind. Cas. 1; 49 I. A. 344; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.).

and take a renewal." These two friends are a High Court Vakil and a First Grade Pleader respectively, the former being the Vakil for Raman Nair, the first defendant's husband, and the latter the 10th defendant's Vakil. They were both examined and they both said that there was a dispute about this demise and also disputes with regard to their property and that, in settlement of these disputes, the plaint demise as well as the demise in favour of Raman Nair, was executed.

The next question is, whether that compromise was entered into for the benefit of the estate, the allegation being that the *karnavan* entered into the compromise in order to secure the renewal fee for his own purposes, and that, as there was no present necessity for the money, it was an improvident action, that it alienated the property for an additional six years. No doubt, it is technically an alienation, but, if the circumstances of the case are thoroughly examined, it is only an alienation in the technical sense. The property was outstanding on mortgage for nearly Rs. 14,000, which apparently the *karnavan* was not in a position to pay, and the only effect of the renewal was to put it out of the power of the *tarwad* to redeem the property for a further period of six years and it was very unlikely that they would be in a position to redeem at an earlier date, nor is it apparent that an earlier redemption would be beneficial to the *tarwad*. No additional money was borrowed and, consequently, no fresh burden imposed on the *tarwad*, but, on the contrary, a sum of money was received for the benefit of the *tarwad*. Taking this circumstance into consideration and the fact that litigation was avoided by the compromise, it appears to me that the transaction was certainly entered into *bona fide* and for the benefit of the estate. I am not prepared to accept the contention that it is necessary for a contracting party to prove that the estate did, in fact, actually benefit and, therefore, the suggestion that the money paid to the *karnavan* was appropriated by him for his own purposes and that the estate did not benefit at all need not be taken into consideration. If the contracting party is satisfied that the compromise is a *bona fide* one and that, in the ordinary course, a benefit will accrue to the estate, it is not necessary for him to prove that it actually did so as against the allegation that the benefit which should have accrued was fraudulently misappropriated by the *karnavan*. A contracting party cannot presume that there will be a fraudulent misappropriation and, unless he is a party to that fraud and acts in collusion with the *karnavan*, he is entitled to protection. Whether, therefore, the 10th defendant did or did not spend the money received by him for the benefit of his *tarwad* is in this case immaterial, as it is not alleged that there was any collusion between defendants Nos. 1 to 3, and the 10th defendant in this respect. The money was paid to the *karnavan* for the benefit of the *tarwad*, and, consequently, the transaction was one beneficial to the *tarwad*, although, subsequently, that benefit was misappropriated by the *karnavan*.

On these grounds I think that the Subordinate Judge's decision is correct and dismiss this appeal with costs.

Devadoss, J.—I agree.

As regards the memorandum of objections we do not think that a successful party should be made to bear the loser's costs, save in exceptional cases, such as when his false contentions have been the cause of unduly swelling his opponent's costs. That is not the case here. We accordingly direct, in modification of the Subordinate Judge's order, that each party do bear his own costs in the lower Court and also of the memorandum of objections.

Appeal dismissed.

V. N. V.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 199 OF 1922.
August 31, 1923.
Present:—Mr. Pipon, J. C.
Musammat BABO AND ANOTHER —DEFENDANTS—PETITIONERS
versus
JEHANGIR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Procedure — Two cases decided simultaneously

BABO *v.* JEHANGIR.

—*Two appeals—One appeal dismissed as time-barred—Decision, whether* res judicata qua *other appeal—Refusal of Appellate Court to entertain other appeal—Miscarriage of justice—Irregularity —Revision.*

The right of a party to appeal in one out of two cases simultaneously decided must be recognised especially where it does not involve the setting aside of any decree held by the opposite party which has become final by reason of non-appeal. [p. 484, col. 1.]

A porprietor left a Will bequeathing the whole of his property to his two daughters. On the strength of this Will the daughters alienated some land to one person and a house to another. The brother of the deceased proprietor brought two suits for possession alleging that the testator had no power to make a Will and that no title was conferred by it on the alienors. The issue in both the suits was the same. They were heard and decided together by a single judgment which was recorded in the case relating to the land. In the case relating to the house a formal order referring to this judgment was made. The alienors appealed against the decree given in the suit relating to the land. The appeal against the decree given in the suit relating to the house was filed out of time. The Divisional Judge dismissed this latter appeal as time-barred and then held with regard to the appeal regarding the land suit that no appeal could lie because by reason of the dismissal of the other appeal, the only issue had been finally decided and constituted *res judicata*, and dismissed this appeal also. The alienors preferred an application for revision:

Held, (1) that the refusal of the Divisional Judge to entertain the appeal on the ground that his jurisdiction to hear it had been ousted by reason of the operation of the law of *res judicata* was wrong and amounted to a miscarriage of justice; [p. 481, col. 1.]

(2) that the miscarriage amounted to an irregularity within the meaning of the law governing revisions; [p. 481, col. 1.]

(3) that the fact that no application for revision had been lodged against the dismissal as time-barred, of the appeal respecting the house, did not debar the Court from entertaining this revision; [p. 484, col. 2.]

Akhi v. *Hazratgul*, 71 Ind. Cas. 1009, *Rahim Bakhsh* v. *Fakhar-un-nisa*, 31 P. R. 1898 and *Jogal Kishore* v. *Chammo*, 85 P. R. 1905; 151 P. L. R. 1905; 105 P. W. R. 1905 (F. B.), distinguished.

Abdul Majid v. *Jew Narain Mahto*, 16 C. 233; 8 Ind. Dec. (N. S.) 154, *Mariamnissa Bibi* v. *Joynab Bibi*, 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149, *Nur Muhammad* v. *Jamun*, 153 P. R. 1890, referred to.

(4) that the defendants had the right to appeal to the Divisional Court and to obtain an adjudication in the land suit without necessarily appealing in the case of the house suit; [p. 483, col. 2.]

(5) that the order of the Appellate Court dismissing an appeal as time-barred could not be said to amount to an adjudication upon the issues in suit. [p. 483, col. 2; p. 484, col. 1.]

Petition for revision of an order of the Additional Divisional Judge, Peshawar, dated the 17th June 1922, affirming that of Munsif, First Class, Peshawar, dated the 28th February 1922.

Mr. *Diwan Chand*, R. B., for the Petitioners.

Mr. *Gokal Chand Dhawan*, for the Respondents.

JUDGMENT.—The material facts of this case are these. A deceased proprietor left a Will bequeathing the whole of his property to his two married daughters. The daughters, on the strength of the title conferred by the Will, alienated some land to one person and a house to another. Against these alienations the brother of the deceased proprietor lodged two suits for possession on the ground that the testator had no power to make a Will, and that no title was conferred by it upon the alienors. The issue in the suit related to the alienation of land, and the other to the house. The issue in the two suits was the same, namely, as to whether or not the Will was operative. They were heard together and decided on the 28th of February 1922 by a single judgment. The judgment was given in full in the case relating to the land, and in the case relating to the house a formal order referring to the other judgment was recorded. On the 11th of April 1922 the alienors lodged an appeal in the Divisional Court against the decree given in the suit relating to the land. On the 22nd May 1922 they lodged another appeal against the decree relating to the house. This latter appeal was not instituted within time, but it was urged before the Additional Divisional Judge that condonation should be allowed on the ground that the appellants' Counsel was under a *bona fide* misapprehension that there was only one judgment to be appealed against. On the 17th of June 1922 the Additional Divisional Judge passed orders on both appeals. He took up the appeal regarding the house first and, overruling the contention that there was a ground for an extension of time, dismissed the appeal as time-barred. He then passed orders upon the appeal regarding the land suit. He held that no appeal could lie because, by reason of his dismissal of the other appeal, the only issue between the parties

had been finally decided and constituted *res judicata* as between the parties to the appeal then before him. He, therefore, dismissed also the appeal in the suit regarding the land.

The appellants have now preferred in this Court an application for revision against the dismissal of the appeal in the land suit. A preliminary objection is taken by the plaintiff-respondent that this is not a case in which revisional jurisdiction can be exercised. He quotes my own ruling in a recent case published as *Akhi* v. *Hazratgul* (1) to the effect that a wrong decision on the question of *res judicata* is not a valid ground for interference on revision, unless the decision is so manifestly illegal and inequitable as to amount to a miscarriage of justice. The nature of that case, however, was not the same as that now before me. The question of *res judicata* had been fought out between the parties in the original suit, and the question related to the decision of the suit itself. The point was one which had been fully adjudicated upon, and in which there was no question of the case as a whole not having been fully tried. In the present case, however, the finding of the Additional Divisional Judge amounts to a refusal to entertain the appeal at all on the ground that his jurisdiction to hear it has been ousted by reason of the operation of the law of *res judicata*. It appears to me that, if the decision of the Divisional Court can be shown to be wrong, there has been a miscarriage of justice which ultimately amounts to an irregularity within the meaning of the law governing revisions in this Province. To deprive a party of his right to be heard at all upon an appeal by reason of a wrong decision upon a technical point must necessarily amount to a miscarriage of justice. I consider, therefore, that it is incumbent upon me to decide the question as to whether or not the Divisional Court was right in dismissing the appeal on the ground that it was *res judicata* by reason of its own order dismissing the other appeal as time-barred.

Two separate positions which may be taken up by the petitioners are to be distinguished. The first is based upon the assumption that, as the appeal in the house suit was time-barred, the existence of that appeal must be ignored altogether, and that we must regard the case as one in which there had been two simultaneous decrees passed upon a decision on the same issue, and in which one has been appealed and the other has not. The question for decision is, whether a person against whom two simultaneous decrees of this kind have been passed is obliged to appeal against both. There has been, on this subject, a certain conflict of authority which appears still to exist. The rulings of the Allahabad High Court, *Zaharia* v. *Debi* (2), *Dakhni Din* v. *Ali Asghar* (3) and *Anant Das* v. *Udaibhan* (4), are all quoted as authorities for the view that, unless an appeal is lodged in both suits, the decree which has not been appealed against remains in operation, and that its existence *ipso facto* bars any fresh adjudication by the Appellate Court upon the same issue. This view appears to be partly based upon the interpretation of the wording of section 11, Civil Procedure Code, and partly upon the practical results which would ensue from an adoption of the contrary view. Explanation I to section 11 recites that "the expression 'former suit' shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto." It is argued that, if a suit is decided and not appealed against, the decree in that suit is final from the date on which the decree was passed. The decree in the other suit ceases *ipso facto* to be a final decree once the appeal was lodged. The issue, then, so far as regards the appeal only amounts to *lis pendens* and not *res judicata*. When, however, the appeal comes before the Appellate Court, it is confronted by the fact that there is already in existence a decree of a date prior

(1) 71 Ind. Cas. 1009.

(2) 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861.
(3) 7 Ind. Cas. 902; 33 A. 251; 7 A. L. J. 995.
(4) 19 Ind. Cas. 76; 35 A. 187; 11 A. L. J. 214.

to th t upon which the appeal is now to be decided. This may be said to be a purely technical view of the strict wording of the law. The High Court of Allahabad, however, was governed by other considerations. It was represented that, if the Appellate Court accepted the appeal and reversed the decree appealed against, there would be two conflicting decrees in operation at the same moment, and execution would arrive at an *impasse*, and that it is impossible that two equally binding orders of a Judicail Court of a contrary nature should exist side by side. A contrary view, however, has been taken by other High Courts notably by the High Court of Calcutta in *Abdul Majid* v. *Jew Narain Mahto* (5) and *Mariamnissa Bibi* v. *Joynab Bibi* (6), and by the Punjab Chief Court in *Rahim Bakhsh* v. *Fakhar-un-nisa* (7), and *Jogal Kishore* v. *Chammo* (8). This view also was followed by my predecessor in the present Court in an unpublished judgment *Amir Khan* v. *Shamdas* (Civil Appeal No. 21 of 1916). In some of the suits to which these rulings refer, the facts were quite parallel to those of the present case. One related to suits by rival pre-emptors in which the unsuccessful pre-emptor had appealed against the dismissal of his own suit but had failed to appeal against the decree granted to his rival. In other cases also simultaneous suits related to a single property. The learned Counsel for the respondent has quoted *Nur Muhammad* v. *Jan-un* (9) as being on all fours with the present case, but I cannot see that it is. In that case there were two suits respecting the same property, one for a declaration and one for possession. No appeal was lodged in the suit for declaration but an appeal was lodged in that for possession. It was held that, by reason of the decision in the declaratory suit, there was *res judicata* which barred the hearing of the appeal in the suit for possession. Here, again, the subject-matter of the two suits was the same. Now, it appears to me that the test is really a very simple one. It is obviously impossible that two distinct and conflicting orders by Judicial Courts, which are both fully operative, can co-exist. I quite agree that in such a case execution would be impossible. I can also understand that, even if there were not a question of execution, two contradictory orders could not co-exist, governing a title in the same property. But I fail to see that in a case, such as the present, the acceptance of the appeal by the Additional Divisional Judge in the case of the land would have produced this anomalous result. There seems to me to have been a distinct confusion between the decision on an issue and the decree which embodies the order of the Court. If the Divisional Court had accepted the appeal, it might have reversed the finding on the issue as to the validity of the Will, and this finding would have prevailed against the finding of the Trial Court so far as regards the question of custom which governed the validity of the Will. On the other hand, it would not have annulled the decree which was passed for actual possession of the house. The decree-holder would have been perfectly entitled to execute his decree for possession, because the operative order of the Court was simply one for possession. It seems to me perfectly reasonable that, if a person is sued for possession of a number of properties, and if a decree is granted against him in respect of them all, he may elect to abandon his claims to some of these properties and face the existence of a decree against him. The operation of these decrees might be regarded as a penalty for his neglect or apathy in not challenging more than one of the decrees. His right to challenge one decree may, however, subsist and, so far as regards the mere question of anomaly or inconvenience, it cannot be said that he is not entitled to save one portion of the property if he can.

The above, however, only disposes of one aspect of the case, namely, the argument which is based upon the anomalous results which would follow if the

(5) 16 C. 233; 8 Ind. Dec. (N. S.) 154.
(6) 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149.
(7) 31 P. R. 1898.
(8) 5 P. R. 1905; 151 P. L. R. 1905; 105 P. W. R. 1905 (F. B.).
(9) 153 P. R. 1890.

right of appeal in one out of two simultaneously decided cases is conceded. There is also the argument that there has been a decision by a competent Court of the material issue upon which alone the decision is based in a former suit between the same parties litigating under the same title. If we regard alone the decision of the two suits by the First Court, it is difficult to see how a simultaneous decision can be regarded as a former decision. As regards the position of the Appellate Court, I must agree with the view taken by the Calcutta High Court in *Abdul Majid* v. *Jew Narain Mubto* (5) and *Mariamnissa Bibi* v. *Joynab Bibi* (6). The existence of two separate findings upon a single issue is really, as has been pointed out, a legal fiction. There has been, in actual fact, a single decision. It cannot really be said that, once an appeal has been lodged against this single decision, it remains operative and unchallenged merely because it is formally repeated in a suit simultaneously decided between the same parties. *Rahim Bakhsh* v. *Fakhar-un-nisa* (7) and *Jogal Kishore* v. *Chammo* (8) deal with cross suits. It appears to me that the case for a single appeal is even stronger where we are dealing not with cross-suits, but with suits lodged by the same person in respect of different properties proceeding on the same contentions. In a cross-suit it might at least be argued that the decree passed in favour of the opposite party cannot be affected because a plaintiff appeals only against the dismissal of his own suit. He is obliged in his appeal to attack not only the finding on the issue between the parties but also the decree held by the opposite side. Where, however, a defendant has been unsuccessful in resisting two suits brought against him in respect of two different properties, he does not, when he challenges the finding on the issue, in any way attempt to annul the decree which has been passed against him in the suit in which he has not appealed. If we follow the principle adopted by the Punjab Chief Court and by the Calcutta High Court, that a party to simultaneously decided cross-suits may legally appeal in only one of them, it follows *a fortiori* that the defendant must be able to appeal in one out of two simultaneously decided suits when he has suffered decrees upon the same facts in respect of two separate properties. I hold, therefore, that the defendants in this case had the right to appeal to the Divisional Court and to obtain an adjudication in the land suit without necessarily appealing in the case of the house suit.

A second line, however, is taken up by the learned Counsel for the respondent. He argues that we cannot ignore the appeal preferred after time to the Divisional Court against the decree passed in the house suit, and that, even if the right to appeal in one out of two simultaneous suits be conceded, we are here dealing with appeals which have been instituted in both the suits. He contends that the appeal in the house suit had also the effect of removing finality from the order of the Trial Court, and that it reduced the dispute between the parties, as in the case of the other appeal, from *res judicata* to *lis pendens*. He urges that when the Additional Divisional Judge dismissed the appeal against the decree for possession of the house as being time barred, he must be held to have adjudicated upon the appeal and to have confirmed the decree of the First Court, and that, having once done this, his own order constituted *res judicata* which debarred him from adjudicating upon the same facts on the other appeal. I must, of course, accept the argument of the learned Counsel for the respondent in one respect, namely, that Explanation I of section 11 applies to appeals equally with suits, and that it is quite immaterial that the appeal in the land suit was presented first. At the same time, the argument is, in other respects, open to two objections. In the first place, the Additional Divisional Judge in dismissing the appeal as time-barred, cannot be said to have adjudicated upon the appeal at all. It is true that the decision of a suit *ex parte* or under O. XVII, r. 3, has been held to be equally operative to create *res judicata* as any other decision, but I am unable to see how it can be said that the order of an Appellate Court dismissing an appeal as time-barred, which amounts to a refusal to enter-

tain it by reason of a defect in procedure only, can be said to amount to an adjudication upon the issues. It is perfectly true that the dismissal of an appeal *ex parte* does confirm the order of the Firt Court, but it cannot be held to do more than this. It is not in itself any confirmation of the correctness of the finding by which the order was arrived at. It appears to me that there is only one way in which the dismissal of an appeal as time-barred can be regarded, and that is that it puts the parties into exactly the same position as if no appeal had been lodged at all. We are, therefore, thrown back upon that aspect of the case with which I have already dealt, namely, the right of a party to appeal in one out of two cases simultaneously decided. I have already held that this right must be recognized, especially in cases where it does not involve the setting aside of any decree held by the opposite party which has become final by reason of non-appeal. There is a second and even more serious objection to the view that the Appellate Court, by dismissing one appeal as time-barred, deprives itself of the power of adjudicating in another appeal upon an issue involved in the dismissed appeal. On the respondent's own argument the presentation of a time-barred appeal has the same effect as an appeal within time. It also, he contends, reduces the finding of the First Court from *res judicata* to *lis pendens*. The Appellate Court, therefore, has before it two pending appeals. Now, it was perfectly open to the Appellate Court to hear first the appeal which was within time. It might have accepted this appeal upon the merits, and it might have set aside finally the finding by the lower Court on the issue which was appealed against. In that case it could not possibly be said that the finding of the Appellate Court was not a final one. It would then have to take up the question of the time-barred appeal. It would have been open to it either to extend the time and entertain the appeal, or to refuse to do so. Its refusal to entertain that appeal could not possibly be said to have the effect of annulling the orders which it had already passed upon the appeal which was within time. To assume, therefore, that the rejection of the time-barred appeal operates to prevent the Appellate Court from hearing the appeal which was within time is to assume that a party can be deprived of his rights by a wholly fortuitous contingency over which he has no control. Such a view of the law can only be described as impossible. In other words, the dismissal of a time-barred appeal must operate in the same way as if no appeal had been lodged.

It remains to consider a third argument which has been adduced. It is urged for the respondents that the present Court is itself debarred in entertaining this revision by reason of the fact that no application for revision has been lodged against the dismissal, as time-barred, of the appeal respecting the house. I am unable to follow this argument. It can only rest on the assumption that there is *res judicata* which debars this Court from re-opening a particular issue. The issue before this Court in the revisional proceedings is simply the correctness or otherwise of the finding of the Divisional Court that it could not entertain the appeal which is the subject of this revision because it had dismissed another appeal as time-barred. The fact that no application has been lodged against the dismissal of the appeal as time-barred, does not operate to confirm or give finality to any question which is now before this Court. I must, therefore, overrule this objection.

The learned Counsel for the respondent also opposes the application on the grounds of equity and convenience. He urges that, even if the appeal is remanded to the Divisional Court for disposal on its merits, the result will be the same as the petitioners have no serious case. I can hardly enter here into the question of merits. The point is that the appeal has never been heard on the merits at all. Further, when considerations of convenience or equity are invoked, Courts must necessarily be in favour of the adjudication of any dispute upon its merits as against any purely technical defect. Again, so far as I can judge, the petitioner, in failing to appeal within time against the other decree, was clearly not actuated by any *mala fides*. The mistake appears

to have been one on the part of his Counsel who had failed to notice that, although there was a single judgment, there were really two decrees. The mistake may imply even gross carelessness, but it was clearly a perfectly honest mistake. It is one no doubt for which the petitioners must be made to suffer but they do actually suffer, for they have lost their entire right to challenge on appeal the decree passed against them in respect of the house. The anomaly of depriving a person of his right to appeal in respect of one property, because he has carelessly failed to do so in respect of another property simultaneously adjudicated upon, might indeed be illustrated by a hypothetical case. It is possible to conceive that a large number of suits might be simultaneously decided, the questions at issue in all being precisely the same, some of which related to extremely valuable property and one to a property of comparatively small value. The judgment-debtor might omit by inadvertance to lodge an appeal in respect of this one small property. He would, of course, by this omission suffer the loss of that property, but it could hardly be consistent that he should not only be punished for his mistake by that loss, but that he should *ipso jacto* lose his entire right to appeal in respect of property which might be of extreme value. The penalty which he would incur would be so out of all proportion to the mistake which had been made, that it is hardly conceivable that it could be recognized as inevitable by Courts of Justice.

On the above findings I hold that the Divisional Court was entitled to hear and to adjudicate upon Appeal No. 200, and that it has wrongly refused to entertain it upon its merits. I, therefore, set aside the order dismissing that appeal and direct that it be decided upon its merits by the Divisional Court. Stamp on revision will be refunded. The costs of this proceeding will be borne by the respondent.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 99 OF 1921.
May 10, 1922.
Present:—Mr. Justice Gokul Prasad and Mr. Justice Strart.

SITAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
BAIJNATH PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Mortgage—Proceedings to obtain decree absolute, nature of—Preliminary decree obtained on compromise—Application for decree absolute—Satisfaction of preliminary decree out of Court, whether can be proved.

Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree, but are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. [p. 486, col. 2.]

Ramjilal v. *Karan Singh*, 40 Ind. Cas. 424; 39 A. 532; 15 A. L. J. 448, relied on.

A preliminary decree based on a compromise arrived at between the parties and in which the terms of the compromise are embodied, is not a decree to which the terms of r. 5 of O. XXXIV of the Civil Procedure Code would apply, and where, in such a case, an application is made for a decree absolute for sale, it is open to the judgment-debtor to prove adjustment and satisfaction of the preliminary decree out of Court. [p. 486, col. 2.]

Mangar Sahu v. *Bhatu Singh*, 57 Ind. Cas. 473; 1 P. L. T. 416; 5 P. L. J. 672, relied on.

Second appeal from a decree of the District Judge, Allahabad, dated the 27th July 1920, reversing that of the Subordinate Judge, Mirzapur, dated the 2nd February 1920.

Dr. *S. M. Sulaiman*, Mr. *Abu Ali*, Babu *Piari Lal Banerji* and Munshi *Sheo Dehal Sinha*, for the Appellants.

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

JUDGMENT.—This is an execution second appeal arising under the following circumstances:—

A compromise decree was passed on the 14th of August 1917 in favour of Purnanand and Bhagwan Ram against Sital Singh and others, judgment-debtors, under which Rs. 2,950 were to be realized by sale of certain hypothecated property, but in case the judgment-debtors paid Rs. 2,500 to the decree-holders within three months of the date of the decree, the judgment-debtors and their property would be released from all liability under the decree

or, in other words, the decree for sale would cease to exist.

On the 30th November 1918 the present application was put in by Baijnath, a transferee of the decree from the original decree-holders, for a decree absolute for Rs. 850, the balance alleged to be due under the decree on the allegation that the judgment-debtors had already paid Rs. 2,100. The judgment-debtors preferred an objection to the preparation of the decree absolute on the ground that they had paid the whole amount of the decree in the following manner:—They had paid Rs. 25 to the original decree-holders on the 6th of November 1917, that is, within the three months allowed by the decree and obtained an extension of time up to the 2nd of December 1917 to pay the balance and that on the 29th of November 1917, that is, within the extended time allowed by the decree-holders, they paid Rs. 2,500 to them, and thus the whole decree was satisfied in the manner agreed upon between the parties. This objection was allowed by the learned Subordinate Judge and the respondent's application for preparation of a decree absolute was dismissed.

On appeal by the decree-holders the learned District Judge has agreed with the First Court in holding that the arrangement set up by the judgment-debtors had been proved, but he disallowed the objection of the judgment-debtors on the ground that the preparation of the final decree was a step-in-execution of the preliminary decree and as the settlement pleaded by the judgment-debtors had not been certified to the Court, it could not be recognized in the execution department. He accordingly allowed the appeal and directed the preparation of the decree absolute for sale as prayed by the decree-holders. The judgment-debtors come here in second appeal and their contention is that the learned Judge of the lower Appellate Court has erred in holding that the proceedings for obtaining a decree absolute for sale are proceedings in execution. This contention seems to have force, and, having regard to the repeal of sections 88 and 89 of the Transfer of Property Act and the enactment of O. XXXIV of the Code of Civil Procdedure (Act V of 1908), the proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree. Such proceedings are not to obtain any order absolute for sale, as used to be the case under section 89 of the Transfer of Property Act, but they are prodceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. This view of ours finds support from the case of *Ramji Lal* v. *Karan Singh* (1), where this matter has been fully discussed.

It is, however, urged by Dr. Katju on behalf of the respondents that, having regard to O. XXXIV, r. 5, of the Code of Civil Procedure, a payment like the one alleged by the judgment-debtors to have been made out of Court would not be valid and could not be recognized. In our opinion this contention must fail because the decree originally prepared was not prepared in strict accordance with the provisions of O. XXXIV, r 4, and hence O. XXXIV, r. 5, would not apply to this decree. It was a decree based on a compromise arrived at between the parties and the terms of the compromise were embodied in the decree Strictly speaking, O. XXXIV, r. 5, has no application to such a decree. This view of ours finds support from the well-considered judgment of Mr. Justice Jwala Prasad in the case of *Mangar Sahu* v. *Bhatoo Singh* (2). There is nothing against public policy in the compromise arrived at between the parties in the present case on which the decree was based and we can find no provision of law which prohibits the payment of a compromise decree out of Court. There is, therefore, no bar to the judgment-debtors setting up and proving the adjustment set up here. Before a Court can pass a decree absolute for sale, it has to find out the amount which is due to the decree-holder for which a decree absolute can be passed. On the findings arrived at concurrently by the two lower Courts in this case, nothing is due to the decree-holders and the whole amount of the decree has been paid up according to the arrangement arrived at between the decree-holders and the judgment-debtors

(1) 40 Ind. Cas. 424; 39 A. 532; 15 A. L. J. 448.

(2) 57 Ind. Cas. 473; 1 P. L. T. 416; 5 P. L. J. 672.

We, therefore, allow the appeal, set aside the decree of the lower Appellate Court, and restore that of the Court of first instance with costs in all Courts.

W. C. A. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 830 OF 1922.

March 17, 1923.

Present:—Mr. Justice Moti Sagar.

THE PUNJAB BANKING COMPANY, LIMITED—DECREE-HOLDER—APPELLANT

versus

Dewan DHANPAT RAI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Inherent power, refusal to exercise—Discretion—Revision, when competent.

The revisional powers of a High Court are exercisable only in those cases in which the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity. [p. 488, col. 1.]

Section 115 of the Civil Procedure Code applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it, and is not directed against conclusions of law or fact which do not involve the question of jurisdiction. [p. 488, col. 2.]

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. 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 will not, in revision, interfere with an order passed under section 151 of the Civil Procedure Code which, on the face of it, is not perverse or illegal. [p. 489, col. 1.]

Sham Parshad v. *Ram Chand*, 20 Ind. Cas. 203; 10 P. R. 1914; 273 P. L. R. 1913; 217 P. W. R. 1913; 25 P. W. R. 1914, followed.

Bholu v. *Ram Lal*, 60 Ind. Cas. 720; 2 L. 66; U. P. L. R. (L.) 29, distinguished.

Petition, under section 44 of Act VI of 1918, for revision of the order of the Senior Subordinate Judge, Gujranwala, dated the 14th July 1922.

Lala *Jai Lal*, R. B., for the Petitioner.

Dr. *Gokul Chand Narang*, for the Respondent.

JUDGMENT.—Civil Revisions Nos. 830, 831 and 832 of 1922 are connected and shall be disposed of by one judgment. The Punjab Banking Company, Limited, Lahore, held three decrees against one Lachman Das, deceased. One was a decree for Rs. 5,434 and was obtained on the 17th of November 1898, the second was a decree for Rs. 1,494, and passed on the 22nd of February 1899, and the third was a decree for Rs. 1,909 dated the 9th of February 1900. Applications for the execution of these decrees were made from time to time but nothing was realised. Lachman Das having died, his son Shib Nath was brought on the record as his legal representative. He also raised a number of objections to the execution of the decrees but they were all decided against him. Shib Nath having also died on some date prior to 1910, Dhanpat Rai, the present respondent, was brought on the record as his legal representative. In 1910 the decrees were transferred to Gujranwala and on the 22nd of November 1910 applications were made for the execution of the decrees by the sale of some immoveable properties belonging to the judgment-debtor in that district. On the 30th of May 1916 the judgment-debtor filed certain objections which were disallowed on the 21st of January 1917 and it was ordered that the properties attached should be put to auction. On the 4th of February 1918, however, the sale which had already taken place was set aside as irregular, and a re-sale was ordered. On the 16th June 1920 Dhanpat Rai again raised certain objections with regard to the execution of the decrees which were set down for a hearing for the 19th of July 1920. On that date neither the decree-holder nor his Counsel was present at the time the case was called on for hearing, and the applications for execution were accordingly dismissed for default. It appears that before the date fixed for the hearing of the cases negotiations were going on between the parties for an amicable settlement the terms of which had practically been settled. On the 20th of July 1920, however, the judgment-debtor

backed out of the compromise on finding that the applications for execution had been dismissed for default, and that the decrees had become barred by limitation. On the 15th of October 1920 applications for reveiw were made by the decree-holder, and it was prayed that the orders dismissing the execution proceedings for default be set aside. On the 10th of August 1921 these applications for review were converted into applications under section 151, Civil Procedure Code, and it was prayed that, even if the applications for reveiw were not maintainable, the Court should proceed to take action under the inherent powers possessed by it under the Code. These applications were dismissed by the learned Senior Subordinate Judge on the 15th of July 1922, and it is against these orders of dismissal that the present applications for revision are directed.

A preliminary objection has been raised by Dr. Gokul Chand Narang on behalf of the respondent that there is no question of jurisdiction involved in these cases and that revisions are consequently not competent. He also points out that the excercise of powers under section 151, Civil Procedure Code, is purely discretionary with a Court and that if the learned Subordinate Judge refused to excercise these powers their non-excercise is not a good ground for revision. In my opinion this contention is well founded and must prevail. There is ample authority for holding that the revisional powers of a High Court can be exercised only in cases in which the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity. It will be observed, as pointed out in the Privy Council ruling reported as *Balakrishna Udayar* v. *Vasudeva Aiyar* (1), that section 115, Civil Procedure Code, which corresponds in its wordings to section 44 of the Punjab Courts Act, applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it, and that it is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. It is not disputed that in the present case the Senior Subordinate Judge had jurisdiction to deal with the matter before him and that his decision is not liable to attack on the ground of the irregular exercise or non-exercise of jurisdiction or the illegal assumption of it. I must, therefore, confirm the orders passed by the Court below and hold that these revisions are not competent.

Mr. Jai Lal for the petitioner, however, relies on *Bholu* v. *Ram Lal* (2) and contends, upon the authority of that decision, that this Court ought to interfere on the revision side when the Court below has refused to exercise its powers under section 151 of the Code of Civil Procedure which, it is pointed out, is the only section applicable to a case of this kind. In my opinion that decision is no authority for holding that a revision is competent in such a case. What was held in that case was, that section 141 of the Code of Civil Procedure was not applicable to execution proceedings, and that an application for execution dismissed for default could be restored only under the provisions of section 151 of the Code. The lower Court in that case refused to exercise jurisdiction under section 151, Civil Procedure Code, and held that that section was entirely inapplicable. The High Court set aside the order of the Court below in revision and held that section 151 was applicable. It is clear that the present case stands on an entirely different footing. In the present case the Senior Subordinate Judge has held that section 151 was applicable and that he had jurisdiction to proceed under it, but that no grounds had been made out for the exercise of those powers on the facts disclosed in these particular cases. It is

(1) 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.).

(2) 60 Ind. Cas. 720; 2 L. 66; 3 U. P. L. R. (L.) 29.

clear, therefore, that the decision relied on which was a case of the refusal to exercise jurisdiction under section 151 which lay vested in the Court below can possibly have no hearing on the present case where no question of jurisdiction arises and in which the only question is one of the exercise or the non-exercise of discretion by a certain Court. In the case of *Sham Parshad* v. *Ram Chand* (3) it was held that when the order passed by the lower Court was not, on the face of it, perverse or illegal the Chief Court would not on revision interfere with this order under section 151 of the Code of Civil Procedure. I am unable to hold in the present case that the orders passed by the learned Senior Subordinate Judge are perverse or illegal, and I decline to interfere with them on the revision side.

The petitions are accordingly dismissed but, under the peculiar circumstances of the case, I think that the parties should bear their own costs throughout, and I direct accordingly.

Z. K. & W. C. A. *Petitions dismissed.*

(3) 20 Ind. Cas. 203; 10 P. R. 1914; 273 P. L. R. 1913; 217 P. W. R. 1913; 25 P. W. R. 1914.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 130 OF 1921.

January 31, 1923.

Present:—Justice Sir Francis Oldfield, KT.,

PARTHASARATHI CHETTI—(DEAD) AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

ABDUL RAHIM SAHIB—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Order by Court—Application for time—Step-in-aid of execution.

An order by an Execution Court fixing a date cannot be relied upon as a step-in-aid of execution within the meaning of Art. 182 (5) of Schedule I to the Limitation Act, inasmuch as the step is not taken by the decree-holder; nor can an application by the decree-holder for further time be regarded as an application to the Court to take a step-in-aid of execution, so as to give a fresh start of limitation.

Kedarnath Dutt v. *Hara Chand Dutt*, 8 C. 420; 4 Ind. Dec. (N. S.) 268, *Chalavadi Kottiah* v. *Poloori Alimelammah*, 31 M. 72; 18 M. L. J. 46; 3 M. L. T. 329, distinguished.

Petition, under section 25 of Act IX of 1887 and section 107 of the Government of India Act, praying the High Court to revise an order, dated 22nd September 1920, of the Court of the District Munsif, Tirupathur, in R. E. P. No. 300 (a) of 1920 (S. C. S. No. 11636 of 1900 on the file of the Court of Small Causes, Madras).

Mr. *C. Narasimhachariar*, for the Petitioner.

JUDGMENT.—The question is, whether the execution application is in time; that is, when the last step-in-aid of execution was taken by the petitioner.

The facts are, that on 3rd May 1917, a warrant of arrest, issued at his instance, had been returned, the judgment-debtor not having been found. What is relied on by the petitioner as a step-in-aid of execution is that the Court passed an order in the following terms:—"Fresh steps, if any, by 10th May 1917." This order or the application, which I am asked to presume must have been made in connection with it, is relied on as a step-in-aid of execution. I agree with the lower Court that neither can be relied on in that way. The order itself is clearly not a step taken by the petitioner (decree-holder). It is impossible to say whether it was based on any application made or what the nature of that application was. On the assumption that there was an application for further time, that would not be a step-in-aid.

The petition is then argued on the ground that time really ran from 10th May 1917, on which date the execution petition then pending was dismissed. This is not in accordance with the wording of Art. 182 of Sch. I of the Limitation Act; and the only authority shown me for it is *Chalavadi Kotiah* v. *Poloori Alimelammah* (1) and *Kedarnath Dutt* v. *Harrachand Dutt* (2) followed therein. In *Chalavadi Kotiah* v. *Poloori Alimelammah* (1) the question was of an execution, which had been suspended owing to a bar to its proceeding and in which a strike off order of the well-known type was passed. The reasoning of the learned Judges is not fully stated. In fact, they give two alternative grounds

(1) 31 M. 72; 18 M. L. J. 46; 3 M. L. T. 329.
(2) 8 C. 420; 4 Ind. Dec. (N. S.) 268.

for their conclusion and it is not clear to me that they meant to lay down a general principle which would involve a wide departure from the language of the Act. *Kedarnath Dutt* v. *Harrachand Dutt* (2) is a decision of a Single Judge. His reason for holding that the right to apply was still subsisting apparently was that the application was one in a pending suit. If so, that reason is not available to the petitioner in the present case, for the present application is not made in any pending suit or other pending proceedings.

The result is that the revision petition fails and is dismissed.

V. N. V. *Petition dismissed.*

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2818 OF 1921.

February 10, 1920.

Present:—Mr. Justice Scott-Smith.

SAHIB DAYAL—DEFENDANT—APPELLANT

versus

DHANPAT RAI—PLAINTIFF—RESPONDENT.

Lessor and lessee—Holding over—Damages.

A lessee who holds over contrary to the terms of his lease, is liable to the lessor for damages for the full term during which he has held over.

Second appeal from a decree of the District Judge, Amritsar, dated the 22nd October 1921, varying that of the Sub-Judge, Amritsar, dated the 28th February 1921.

Mr. *Des Raj Sawhney*, for the Appellant,

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—This is an appeal from the appellate order of the District Judge of Amritsar giving the plaintiff a decree for the ejectment of his tenant, the defendant, and for Rs. 200 on account of rent. The appeal to this Court is only for a reduction of the decree for rent by Rs. 165. The defendnant was a tenant on a five years' lease at a rent of Rs. 35 a month, and the term of the lease expired on the 10th January 1920. On the 23rd of January the plaintiff sent the defendant a notice that he should quit the premises by the 27th of March, corresponding to the 10th of February 1920, and saying that if he did not do so he would be liable to pay rent at the enhanced rate of Rs. 200 a month. The defendant did not vacate the premises in accordance with the terms of this notice and hence the plaintiff claimed a sum of Rs. 200 on account of rent for one month from 10th January to 10th February 1920. The appellant's Counsel contends that he was not bound to quit unless and until he recieved a notice of fifteen days ending with a month of the tenancy. He has referred to section 106 of the Transfer of Property Act, and to *Pirbhu Dial* v. *Ram Chand* (1) in which it was held that should it be found that the tenant has held over wilfully and contumaciously, double the original rent would be a fair amount to fix for the term for which the tenant held over. For the other side Mr. Tek Chand has also referred to various authorities, but, in my opinion, none of these are in point. In the present case the parties are bound by the conditions laid down in the original lease dated the 10th of January 1915. In that it was clearly stated that after the expiry of the term of lease the lessor, if he wanted the lessee to quit, was to give him one week's notice, and if the lessee quitted the premises in accordance with the notice well and good, otherwise he would be liable to pay rent at the enhanced rate entered in the notice. In accordance with the terms entered in this lease the plaintiff sent the defendant a notice on the 23rd of January, which he admitted to have received on the 25th of January 1920. This notice gave the defendant time up to the 10th of February, *i.e.*, a period of ten days within which to vacate; in other words, it gave him ten days instead of the seven days agreed upon the original lease. As the defendant did not vacate by the 10th of February he was liable to pay rent for that month at the enhanced rate It is really a matter of penalty, and the only question which appears to me to arise is this, is the sum of Rs. 200 demanded by the plaintiff reasonable under all the circumstances of the case? In my opinion the plaintiff is entitled to the full sum of Rs. 200. The extra Rs. 165 above the original rent may

(1) 5 P. R. 1904; 42 P. L. R. 1904.

be considered as damages, the defendant having failed to quit the premises. I have come to this conclusion, after considering the fact that defendant not only did not vacate the premises but raised a false defence in the suit. I do not say that the plaintiff will be entitled hereafter to rent of Rs. 200 per mensem for the full term during which the defendant has held over. I merely hold that the plaintiff is entitled to the sum of Rs. 200 for the period from the 10th of January to the 10th of February 1920

The appeal is dismissed with costs.

W. C. A. *Appeal dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2127 AND 2128 OF 1920.

March 23, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Devadoss.

VENKITESWARAYYAN AND ANOTHER—PLAINTIFFS Nos. 2, 3—APPELLANTS

versus

ASWATHA NARAYAN AND OTHERS—DEFENDANTS RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXI, r. 57—Execution of decree—"Default of decree-holder," meaning of—Dismissal of execution application on account of absence of bidders—Attachment, whether continues—Application, fresh, for attachment and sale—Order for production of schedules—Default—Dismissal of application—Alienation by judgment-debtor—Auction-sale under fresh application, position of.

In execution of a money-decree certain properties of the judgment-debtor were attached and their sale was ordered, but the execution petition was dismissed as there were no bidders at the sale. A second execution petition was then filed with a prayer for attachment. The decree-holder was ordered to produce schedules. This was not done and the petition was dismissed. A day before the date of this dismissal the judgment-debtor granted two mortgages on the properties which were the subject of attachment. A third execution was thereafter filed, the properties were attached and sold and the sale was confirmed. In a suit by the mortgagee to enforce the mortgage as against the auction-purchaser:

Held, that neither the first nor the second order of dismissal of the execution petitions was on account of 'default' of the decree-holder within the meaning of O. XXI, r. 57 of the Civil Procedure Code, and, therefore, on the date of the mortgage, the original attachment on the first petition was subsisting in favour of the plaintiff and, this being so, the alienation was void as against the auction-purchaser.

The default of the decree-holder under O. XXI, r. 57 of the Civil Procedure Code cannot be constituted either by his absence from the sale or his failure to bid at the sale, but must be a default in the discharge of some obligation laid on him by the Code or the rules framed under it, and the order in respect of which the default is contemplated must, further, clearly be one which could be made after attachment and not one which is appropriate only before attachment. [p 491, col. 2; p. 494, col. 2.]

Order XXI, r. 57 of the Civil Procedure Code is applicable only to cases in which the stage of attachment has been passed and in which the Court is conscious that the next stage is intended and is not applicable to an abnormal case where no one concerned, neither the party nor the Court, is conscious of the true facts and where, if there is in fact an attachment, the party and Court are not aware of it and are proceeding as though there were none. [p. 494, col. 1.]

Second appeals against the decrees of the District Court, South Malabar, in Appeal Suits Nos. 17 and 5 of 1920; preferred respectively against the decrees of the Court of the Additional District Munsif, Palghat, in Original Suits Nos. 280 and 395 of 1919.

Messrs. *C. V. Ananta Krishna Aiyar* and *C. S. Swaminathan*, for the Appellants.

The Advocate-General and Mr. *K. R. Narayana Aiyar*, for the Respondent.

Second appeal coming on for hearing on the 27th of October 1922, the Court delivered the following

JUDGMENT.—Second and third plaintiffs-appellants, are here to contend that the lower Appellate Court erred in holding that Exhibit C was executed during the pendency of an attachment, effected by a decree-holder now represented by the sixth defendant. The lower Appellate Court, no doubt, was right in holding that the attachment under Exhibit I was not terminated by the dismissal, with which the proceedings closed. It is only necessary to say with regard to that conclusion that it might have been reached more shortly, because the default of the decree-holder referred to in O. XXI, r. 57, cannot, in our opinion, be constituted either by his absence from the sale or his failure to bid at the sale, but must be a default in the discharge of

some obligation laid on him by the Code or the rules framed under it.

Having reached that conclusion, however, the lower Appellate Court did not go on to consider the result of the subsequent proceedings in Exhibit II. Exhibit II was another application for attachment, which was dismissed on 20th July 1914, because the decree-holder failed to produce the schedules called for. A day before that dismissal Exhibit C had been executed, it is urged, during the pendency of an attachment. The plaintiffs' contention is that the attachment under Exhibit I was terminated by the order of dismissal of 20th July 1914 and that Exhibit C executed the day before that dismissal would become effective, when the attachment came to an end. In this connection reliance has been placed on the reference in section 64, Civil Procedure Code, to a transfer made pending an attachment, as void, as against all claims enforceable under the attachment, the argument being that, when the attachment ceases and there are no longer any claims enforceable under it, there is no reason why the transfer should not be regarded as valid. On the question raised in connection with the proceedings evidenced by Exhibit II the lower Appellate Court has expressed no opinion.

We must accordingly call on it for a revised finding on the question whether Exhibit C is void because of the order of dismissal included in Exhibit II. The lower Appellate Court's finding must be returned within six weeks and seven days for objection. It will on the return of the finding be open to the respondents to argue the question raised by Issue No. 7 at the trial.

Second Appeal No. 2128 of 1920 will stand adjourned pending returns of the finding in Second Appeal No. 2127 of 1920.

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

FINDING:—The facts which are admitted are as follow:—Fifth defendant obtained a small cause decree against one Kunhi Krishna Menon, and attached his rights in the suit property on 19th January 1914. (Execution Petition No. 113 of 1914, Exhibit I.) The property was attached by 9th February 1914 and sale was ordered; the execution petition was dismissed on 22nd April 1914 as there were no bidders at the sale. Again, on 10th July 1914 an execution petition was filed (Execution Petition No. 1011 of 1914, Exhibit 2. Petitioner was ordered to produce schedules; he did not do so, and the petition was dismissed on 20th July 1914. On 19th July 1914 the day before this petition was dismissed, Kunhi Krishna Menon granted a *melcharth* (Exhibit C) to plaintiff. A third execution petition was filed on 14th August 1914 (Execution Petition No. 1227 of 1914, Exhibit 3). The property was attached by 5th September 1914 and was sold on 13th November 1914 and the sale was confirmed. The question is whether the *melcharth* (Exhibit C) is void under section 64, Civil Procedure Code. Their Lordships have held that the attachment made under the first execution-petition (Exhibit I) was not terminated by the dismissal of the petition for the reason that O. XXI, r. 57 did not apply to that dismissal and have called for a finding whether the *melcharth*, Exhibit C, is void by reason of the dismissal of the second petition (Exhibit 2).

2. As the attachment made in the course of the first execution-petition subsisted after the dismissal of the petition the prayer for attachment in the second execution-petition was a surplusage. The petitioner was ordered to produce schedules presumably for sale proclamation, he failed to do so, and the petition was dismissed. If this had been the first petition it would be clear that the petition was dismissed by reason of his default. But here I think that there was no default. The attachment made on the first execution-petition subsisted. The fact that in the second petition the petitioner asked again for an attachment does not mean that he abandoned the first attachment. It means merely that he made a prayer which was in fact unnecessary. The first petition, it has been held, was wrongly dismissed. It was in fact not dismissed at all, within the meaning of O. XXI r. 57. As it was not dismissed, the call for schedules was unnecessary, for it

seen from Exhibit I the first petition that all the papers necessary for sale had been produced. Therefore, in failing to produce schedules, the petitioner did not default (in the words of their Lordships) in the discharge of an obligation laid on him by the Code or the rules, and consequently O. XXI, r. 57 does not apply to the dismissal of the second petition and upon its dismissal the attachment made under Exhibit I did not cease.

3. Under section 64, Civil Procedure Code, where an attachment has been made any private transfer of the attached property contrary to the attachment is void as against claims enforceable under the attachment. Here, attachment in Execution Petition No. 113 of 1914 had been made on or before 9th February 1914, it was subsisting on 19th July 1914, when the property was transferred under Exhibit C and it did not cease on the dismissal of the petition on 20th July 1914. The attachment under Exhibit I cannot be held to have been abandoned by reason of the third application for attachment made in Exhibit III for that application was again mere surplusage. Accordingly my finding is that Exhibit C is void.

These second appeals came on for final hearing on the 22nd of March 1923 after the return of the finding from the lower Appellate Court upon the issue referred by this Court for trial in Second Appeal No. 2127 of 1920, and the cases having stood over for consideration till this day the Court delivered the following

JUDGMENT.—The appellants, second and third plaintiffs, sued for redemption on two documents, Exhibits C and D. The defence at present material was that Exhibits C and D were taken during the currency of an attachment of the property by the fifth defendant contesting respondent here, who has since become the owner of that property by purchase from the purchaser at the Court-sale, which subsequently took place. Before the remand we decided that the fifth defendant's attachment was subsisting notwithstanding the dismissal of the fifth defendant's execution-petition on the 22nd April 1914. We have now to deal with the lower Appellate Court's finding on remand, that the attachment was not terminated by the order of dismissal on a subsequent execution-petition, passed on 20th July 1914. The importance of that is that, if there was such a termination of the attachment Exhibits C and D (it is not disputed) would, so soon as there was no attachment and no obstacle to their doing so, become binding on the property.

We agree with the lower Appellate Court's conclusion but not for the reasons it has given. For it held that there was no default by the decree-holder, fifth defendant, such as O. XXI, r. 57 contemplates, on the assumption that the failure to produce schedules, on account of which the execution-petition was dismissed, was a failure to produce schedules for the purpose of framing the sale proclamation and that it therefore was not a failure to comply with any order, which the Executing Court was entitled or bound to make. That assumption was untenable. For it is clear from the record that every one, the decree-holder and the Court, mistakenly thought that the previous attachment had been raised and that the stage at which schedules were necessary for framing the proclamation had not been reached. That is clear from the order on execution-petition, Exhibit II. There is first the order after its receipt, being that of 11th July 1914, "Pray *batta* for attachment," and next that of 14th July 1914 "*Batta* paid, produce schedules." There is no reference to any return of the warrant of attachment; and there is no doubt that attachment was thought necessary and so process had been filed and that no attachment had been completed. There was so far no question of the further stage of framing proclamation. Whether, if that stage had been reached, non-compliance with the Court's order to produce schedule would have been a default within the meaning of r. 57 need not be decided. It is clear that the lower Appellate Court has neglected the material evidence on this matter and that we must proceed on the footing that the schedules were required for the making of an attachment, such schedules being required for the affixture

in various places and for the making of the proclamation by beat of tom-tom under r. 54 (2). An attempt has been made on behalf of the fifth defendant to contend that failure to produce them was not a default within the meaning of r. 57 and that the order of dismissal was, therefore, not passed under that rule. As we are deciding the case on another and wider ground, we need not pursue that. For we cannot accept the contention, because we think that either under the Code or in the exercise of its inherent power to make orders necessary for the prosecution of the petition before it the Court had power to require such schedules to be produced.

The wider ground on which we decide the petition is that, even so, the order cannot in the circumstances be regarded as having been made under r. 57. It is true that the conditions specified in r. 57 are at first sight satisfied. The Court was unable to proceed further with the application for execution. There was default by the decree-holder. The property had been attached in execution of a decree. But that does not entail that the section has in substance been complied with. No doubt the first six words of the section "where any property has been attached" are literally satisfied in the present case. But, we are not prepared to hold that such literal satisfaction is sufficient. It seems to us that the section as a whole is applicable only to cases in which the stage of attachment has been passed and in which the Court is conscious that the next stage is intended and is not applicable to an abnormal case, such as that before us, where no one concerned neither the party nor the Court was conscious of the true facts and where, if there was in fact an attachment the party and the Court were not aware of it and were proceeding as though there were none. That is clear from the nature of the procedure enjoined on the Court. Two courses are open to it, either to dismiss the application with the implication that the attachment ceased to exist, in which case what may be described as a *quasi* penal consequence shall be assumed, or for any sufficient reason to adjourn the proceedings to a future date. It would be contrary to all principle that the Court should be supposed to be making its choice between the two alternatives, one of which results in the imposition of a penalty when it is not aware of the true facts. The order in respect of which default is contemplated, must clearly be one, which could be made after attachment, not one, as here, appropriate only before it. Taking this view, we hold that O. XXI, r. 57 was not applicable to the present case or to the order of dismissal now under consideration at all.

Reliance is then placed on behalf of the plaintiffs on the fact that the order of dismissal was never set aside on appeal or, in the alternative, that the decree-holder by applying again for attachment must be taken to have abandoned or waived the attachment already made and still subsisting. As regards the absence of appeal we observe that the question whether an order was really passed under r. 57 and whether it has the implication referred to in the last sentence of that rule is in our experience always a difficult one, and it is perhaps to be desired that the rule should impose an obligation on the Court to express that implication clearly, so as to include in its disposal a clear expression of that implication, when it intends it. The difficulty is that the character of the order, which is made in many cases in the absence of the judgment-debtor, is not in controversy until after time has elapsed and it is necessary in some future proceedings to determine its effect. The argument before us, however, can be dealt with shortly. For, after our conclusion that the order of dismissal was not passed under r. 57 at all, it is immaterial that there was no appeal; for an appeal could have secured no purpose, when the order in question had not any effect on the previous attachment, which it was necessary to displace. As regards waiver, the answer is equally simple. For it is a general principle that there can be no waiver in ignorance of the existence of the rights alleged to have been waived.

Taking this view, we accept the finding

and hold that the first attachment was never determined and that, therefore, Exhibits C and D, made during the attachment which never ceased have never, become effective.

This failing the appeal has been argued on another ground that Exhibit O, the order on a claim petition by these plaintiffs, sustained Exhibit D to the extent of Rs. 630 actually secured by it and that, therefore, the plaintiffs should have had a decree to obtain possession on payment of Rs. 630. This argument was taken very obscurely, if at all, in the grounds of appeal in this Court. It can be dealt with very shortly. First, the right to obtain possession was conferred by the *melkanom*, Exhibit C and not by the *panayam* deed, Exhibit D, which entitled the plaintiffs only to retain possession of the property as security for their money after possession had been obtained under Exhibit C. Next, Exhibit O did not sustain Exhibit D, as a mortgage with possession, which could be redeemed, but only directed the plaintiffs that the property should be sold subject to a charge under that document for Rs. 630. The plaintiffs cannot claim any different or further relief on Exhibit D, than Exhibit O allowed them.

The result is that Second Appeal No. 2127 of 1920 fails and is dismissed with costs of fifth respondent (sixth defendant). Second Appeal No. 2128 of 1914 must be decided on the same grounds and it is also dismissed with costs of first respondent-plaintiff.

Appeals dismissed.

V. N. V.
Z. K. & W. C. A.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 255 OF 1921.
May 12, 1922.
Present:—Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

MAHARAJA OF JAIPUR AND ANOTHER—DEFENDANTS—APPELLANTS
versus
SURJAN SINGH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 116—Estoppel—Third persons not claiming under tenant, whether estopped from claiming possession by escheat.

Third persons who do not claim possession of land under the tenant thereof, are not estopped from claiming possession by escheat.

Tadman v. *Henman*, (1893) 2 Q. B. 168; 5 R. 479; 57 J. P. 664, relied on.

Second appeal from a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Allahabad, dated the 5th of April 1921, reversing that of the Additional Munsif, Allahabad, dated the 20th December 1918.

Dr. *S. M. Sulaiman* (with him Pandit *Jagjiwan Nath Takru* and Munshi *Sheo Prasad Sinha*), for the Appellants.

Munshi *Haribans Sahai*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises can be stated very shortly as follows:—There is a small house in Katra, Allahabad City, standing within an area of 35 acres. This area is owned by His Highness the Maharaja of Jaipur. This small house was previously occupied by a woman called *Musammat* Sukharaji. She died about 1907. Before her death she had let the house to a man named Ramji Sahai. He continued to occupy it after her death. There was a man called Sukhu Nut with whom Sukharaji had been living as his mistress. On her death, Ramji Sahai continued to pay rent to Sukhu Nut. Then Sukhu Nut died. After his death Ramji Sahai paid rent to *Musammat* Raghunathi, who was a subsequent mistress of Sukhu Nut. When *Musammat* Raghunathi died she made a Will in favour of a man called Surjan Singh, the plaintiff-respondent in this appeal, by which she bequeathed him the house in question. We have it that Ramji Sahai vacated the premises on the 6th of October 1916. Three days after he had vacated the premises, Pandit Amar Nath took possession

of them under the permission of the Maharaja of Jaipur, who claimed the house as having escheated to him after the death of Sukharaji. Surjan Singh instituted the suit out of which this appeal arises for the ejectment of Ramji Sahai and Pandit Amar Nath. The suit was instituted on the 14th of March 1918 about eighteen months after Ramji Sahai had left the premises. The object, apparently, including Ramji Sahai as a defendant when he palpably could not be ejected, was to raise a plea which has been decided in the plaintiff's favour by the lower Appellate Court. Pandit Amar Nath naturally put up the defence that he was holding with the permission of the Maharaja and, in consequence, the Maharaja was joined as a defendant. Ramji Sahai took no interest in the decision of the suit. He would not take any interest in it as he had left the premises. He contested the suit, but not seriously. The Maharaja of Jaipur and Pandit Amar Nath took as their defence the obvious defence as to the title of Surjan Singh. The Maharaja claimed by escheat but he was content to put the plaintiff to proof of his title. Then a plea was put forward that the Maharaja and Amar Nath could not question Surjan Singh's title under section 116 of the Indian Evidence Act. This plea of estoppel has found favour with the lower Appellate Court but it does not find favour with us. It is perfectly clear that neither the Maharaja nor Amar Nath was a tenant of the house in question, nor did they claim through Ramji Sahai who was the tenant, and, further, there was then no tenancy. There can be no estoppel against them. The learned Subordinate Judge has found collusion between Ramji Sahai and Amar Nath. On the facts, as he has found, there was no collusion at all. In any circumstances, the ordinary doctrine which was laid down in *Tadman* v. *Hanman* (1), that third persons not claiming possession of land under the tenant are not estopped, has application. The Maharaja and Amar Nath, who are the sole appellants in this case, have every right to put Surjan Singh to proof of his title. They put him to proof of his title in the Court below and there can be no doubt as to the fact that he has been unable to establish any title. The question of the estoppel of Ramji Sahai is of no importance in the decision of this appeal, for he has not appealed. We, therefore, decree this appeal and direct that Surjan Singh's suit against His Highness the Maharaja of Jaipur, and Pandit Amar Nath stand dismissed and we direct that Surjan Singh pay his own costs in this appeal and the costs of the Maharaja of Jaipur and Pandit Amar Nath in all Courts.

W. C. A. *Appeal decreed.*

(1) (1893) 2 Q. B. 168; 5 R. 470; 57 J. P. 664.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 107 OF 1922.

August 1, 1922.

Present:—Mr. Justice Campbell.

Musammat MUKABAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KARIM BAKSH—PLAINTIFF—RESPONDENT

Guardians and Wards Act (VIII of 1890), s. 17—Father, when ought not to be appointed guardian of his son.

Where a father neglects to maintain a son, and it appears that the welfare of the son would not be promoted by his being placed under the guardianship of his father, the latter ought not to be appointed guardian.

First appeal from an order of the Senior Subordinate Judge, Ludhiana, dated the 22nd November 1921.

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

Messrs. *Beni Parshad Khosla* and *Ghulam Rasul*, for the Respondent.

JUDGMENT.—This is an appeal against an order by the Senior Subordinate Judge, Ludhiana, under the Guardians and Wards Act appointing Karim Baksh the guardian of the person of his own son, Wazir Alam, aged 14 years. The appellant is the boy's maternal grandmother. It is argued that on account of the applicant's previous conduct towards his son the order should

not have been made. For the respondent it has been contended that the application was one under section 25 of the Act and that what was done was to order the return of the minor to his father who is his natural guardian. A decision of the Madras High Court, reported as *Mohideen Ibrahim* v. *Mahomed Ibrahim* (1), is quoted as showing that such an application is competent and should be granted in cases like the present. It is not clearly stated in *Mohideen Ibrahim* v. *Mahomed Ibrahim* (1) whether the father in that case had been appointed guardian under the Act. In any case, the learned Senior Subordinate Judge is specific in saying at the end of the order under appeal: "I, therefore, appoint the applicant as guardian of the person of the minor," and there is no express direction under section 25 to the ward to place himself in the custody of the guardian

The boy stated that he wished to remain with his maternal grandmother, but the Court thought that he did not seem to be old enough to form an intelligent opinion. The Court also held that the fact of the father having re-married and the order of maintenance having been passed against him had no effect in depriving him of his right to be guardian of his own son. It was further remarked that the minor had not been sent to any school; that he did not appear to be making much progress at his trade of tailoring since he had been an unpaid apprentice for six years, and that from his appearance he did not look to be well cared for.

The main point in appeal is in respect of the maintenance order, the full significance of which the Court below has not perhaps appreciated. It is admitted that an order was passed under section 488, Criminal Procedure Code, on the 6th July 1910, directing the applicant to pay Rs. 3 per mensum for the support of this boy. The record of this case has been burnt, but it is admitted that out of Rs. 126 due as maintenance for the period 6th March 1918 to 6th March 1922 the applicant had failed altogether to pay some Rs. 30 and only paid Rs. 97-8-0 after four years' delay. This evidences very serious neglect by the applicant of his son. He appears to have divorced the mother.

The boy wants to go on being a tailor and does not wish to live with his father and if he is fourteen years of age he is old enough to know something about his own mind. He is learning a trade and if his father takes him away and sends him to school, as is suggested he might do, the boy's prospects in life would not necessarily be improved. The father is said to be a Ticket Collector on Rs. 50 per mensem and there is a step-mother and a second family.

It does not seem that the welfare of the minor will be promoted by his being placed under the guardianship of his father in view of the latter's past neglect, and there appears to me to be something in the contention that the application was filed by the father merely in order to escape payment of arrears of maintenance for which steps were being taken against him.

I accept the appeal and set aside the order of the lower Court with costs.

W. C. A.

Appeal accepted.

(1) 39 Ind. Cas. 941; 39 M. 608; 30 M. L. J. 21.

SIND JUDICIAL COMMISSIONER'S COURT.

SUIT No. 211 OF 1921.

March 28, 1922.

Present:—Mr. Raymond, A. J. C.

CHELARAM AND OTHERS—PLAINTIFFS

versus

OFFICIAL RECEIVER AND OTHERS, —DEFENDANTS.

Hindu Law—Debt—Pious duty of son—Provincial Insolvency Act (V of 1920), s. 3 (8)—Hindu father adjudged insolvent, right of, to dispose of son's interest in ancestral property—"Property," meaning of.

It is the pious duty of a Hindu son to pay his father's debts even in the father's lifetime. [p. 501, col. 1.]

Case-law considered.

CHELARAM *v.* OFFICIAL RECEIVER.

Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immoveable property for the payment of his own debts not contracted for immoral purposes, and such interest is, therefore, "property" within the meaning of section 3 (*a*) of the Provincial Insolvency Act, and, on the father being adjudged insolvent, vests in the Receiver. [p. 501, col. 2; p. 502, col. 1.]

Fakirchand Motichand v. *Motichand Hurruchchand*, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294, *Jagabhai Lalubhai* v. *Vijbhukhandas Jagjivandas*, 11 B. 37; 6 Ind. Dec. (N. S.) 24, *Rangayya Chetti* v. *Thanikachalla Mudali*, 19 M. 74; 6 Ind. Dec. (N. S.) 757 and *Harmukh Rai-Munna Lal* v. *Radha Mohan*, 54 Ind. Cas. 931; 158 P. R. 1919; 109 P. W. R. 1919, relied on.

Mr. *Srikrishandas Lulla*, for the Plaintiffs.

Messrs. *Kimatrai Bhojraj, Nathumal Asanand* and *Isardas Odhoram*, for the Defendants.

JUDGMENT.—This is a suit by the minor sons of one Motumal Dalumal by their next freind Ghanshamdas Dalumal for a declaration that a dwelling house situated on plot No. 57, Survey Sheet A, 23 Napier Quarter, Karachi, is their joint ancestral property and that of their father Motumal, and that the shares of the plaintiffs in it are not liable for the debts of the latter, and for the partition of the same. Defendant No. 1 is the Official Receiver in whom the estate of Motumal on his being adjudicated insolvent has been vested; defendant No. 2 is the wife of Motumal, and defendants Nos. 3 A, and 3 B and 3 C are according to the plaint joined as co-defendants as they claim to be mortgagees of the said property. Plaintiffs contend that their share in the aforesaid property is not liable for the alleged debts due to defendant No. 3 or for any debts at all due by their father, on the ground that the business done by the father was neither ancestral nor for the benefit of the joint family, that the property sought to be partitioned was not asset of the business and that the debts, if any incurred, do not justify the father during his lifetime to mortgage the property.

The main contention of defendant No. 1 is that, even if Motumal and the plaintiffs constitute a joint Hindu family, the said Motumal being the manager of the family and the father of the plaintiffs, the whole joint family property including the interest of the plaintiffs vest in him. Written statements have also been filed by the other defendants except defendant No 2 but it is unnecessary to refer to them at this stage.

After some evidence had been recorded on behalf of the plaintiffs, Mr. Kimatrai, representing defendant No. 1, invited me to dispose of the following issue in the first instance, for, in his view, if I came to the conclusion that the property of which partition is sought was vested in the Official Receiver on Motumal being adjudicated an insolvent, it would conclude the whole suit and obviate the necessity of any further evidence. Mr. Lulla, for the plaintiffs, acceded to the suggestion as he agreed that if the property in suit has vested in the Official Receiver, his suit is unmaintainable, and the Pleaders for the other defendants concurring. I am confining my decision to this issue only.

This issue is as follows:—

Did the co-parcenary property vest in this Official Receiver on Motumal being adjudicated insolvent?

In addressing arguments on the legal aspect of the case, Mr Kimatrai has proceeded on the assumption that the property in suit is ancestral, and that the business carried on by Motumal was his separate business, and that the debts contracted by him are his private debts. His arguments may be formulated as follows: The Hindu Law imposes on the son the duty of paying the debts of his father to the extent of the former's interest in the co-parcenary property, provided the debts are not of an illegal or immoral character, and the creditor of a father, though he may obtain a decree against the father alone, can enforce such decree by attachment and sale of the whole co-parcenary property including the son's interest therein. The father, therefore, to satisfy an antecedent debt not incurred for an unlawful or immoral purpose may mortgage or sell the whole co-parcenary property including the son's interest therein without the consent of the son, and such mortgage or sale binds the son's interest in the property, though the son was not a party to it. It is not alleged that the debts contracted by Motumal were tainted with immorality or were of an illegal character. Therefore, argues Mr. Kimatrai, when Motumal was adjudicated insolvent the whole

of the co-parcenary property under section 28 of the Provincial Insolvency Act vested in the Official Receiver, and property is defined in section 2, clause (*d*), of the same Act as including any property over which a person has a disposing power which he may exercise for his own benefit, and as Motumal had the power of disposal over the property in suit for debts not of an immoral or illegal character, this property became vested in the Official Receiver by virtue of the adjudication order.

Mr. Lulla's answer to this argument is the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) decided by the Privy Council. He strongly relies on the following passage in the judgment at page 444*: "While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own,.. .....must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely on pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive, and that there is a concurrent finding by both the Courts below to the effect that the plaintiffs have failed to prove that the debt of Rs. 200 for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate." Relying on this decision Mr. Lulla has contended that as Motumal is alive, plaintiffs' interest in the co-parcenary estate remains intact and cannot be affected by Motumal's liabilities, during the latter's lifetime. In other words, payment of the father's debts cannot be enforced by suit against the sons during the father's lifetime.

The judgment of the Privy Council has evidently given rise to much anxious thought in some of the High Courts in India which had to consider it. For if the logical result of this judgment is to declare the non-liability of the son to pay his father's debts during his father's lifetime, it involves a departure from several rulings of the Privy Council itself and of High Courts in India.

The case of *Nanomi Babuasin* v. *Modhun Mohun* (2) held that the sons could not 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. The father was alive in this case and it was held that the purchaser bought the entirety of the estate which could lawfully be sold to him. In the cases of *Girdharee Lall* v. *Kantoo Lall* (3) and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4) the creditor's right is held to be co-extensive with the father's power to satisfy his antecedent debts not tainted with illegality or immorality and the right exists equally in the lifetime of the judgment-debtor as well as after his death. It was said by Lord Justice Knight Bruce in the former* case:

"The freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." As late as 1916, in the case of *Sripat Singh* v. *Prodyot Kumar* (5), it was laid down by the Privy Council that, "By the Mitakshara Law a judgment against

(1) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 19 Bom. L. R. 498; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 26 C. L. J. 1; 33 M. L. J. 1; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

* Page of 39 A.—[Ed.]

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

(3) 1 I. A. 321; 14 B. L. R. (P. C.) 187; 22 W. R. 56; 3 Sar P. C. J. 380 (P. C.)

(4) 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(5) 39 Ind. Cas. 252; 44 C. 524; 44 I. A. 1; 19 Bom. L. R. 290; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222 (P. C.).

*See *Huneoman Persad Panday* v. *Mussammat Babooee Munraj Koonwaree*, 6 M. I. A. 393 at p. 421.—[Ed.].

the father of the family cannot be executed against the whole of the joint family property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." The father against whom the decree was obtained was still alive at the date of execution proceedings in this case. Now, it is very significant to observe that there is no explicit pronouncement of dissent in *Sahu Ram's case* (1) from the earlier judgments of the Privy Council if it was intended to lay down the law for future guidance that the liability of the sons does not arise during the lifetime of the father and their shares in the ancestral property cannot be proceeded against so long as the father is alive.

The Privy Council case of *Sahu Ram Chandra* v. *Bhup Singh* (1) has been considered in the case of *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (6) and it was there held that this case does not overrule the long line of decisions as to the right of the creditor to a Hindu father to sue the father and the sons for an antecedent debt incurred by the father for purposes neither illegal nor immoral and to attach and to bring to sale the interest of the sons as well as of the father in the execution of the decree in such a suit, and Kumaraswami Sastry, J., said: "The decision in *Sahu Ram's case* (1) makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son, assuming that it arises at all during the lifetime of the father, arises only if his father's share or his self-acquisitions are insufficient to meet the debts." *Sahu Ram's case* (1) has again been discussed in *Hanmant Kashinath Joshi* v. *Ganesh Annaji Pujari* (7). It was held in this case that the shares of the sons in the ancestral property could be attached and sold during the lifetime of the father for the satisfaction of his personal debt not tainted with illegality or immorality. Justice Shah at page 628* of his jugment, observed, "That the main point in *Sahu Ram's case* (1) related to the antecedency of the mortgage-debt, the debt not having been incurred prior to or independently of the mortgage. Undoubtedly, this point is decided and the conflict of decisions on that point is settled. But there was no question in that case if the remedy of a decree-holder during the lifetime of the father and the judgment cannot be taken as deciding this point." There is a natural reluctance to hold that the effect of the judgment in *Sahu Ram's case* (1) is to override in effect the law that has prevailed for over 40 years, the more so as there is no express indication in the jugment to that effect and if the judgment is to be taken as overriding the current of decisions hitherto in force, it must result in a serious shock to the right of creditors who have been acting on the faith of these decisions ever since 1874 when the case of *Girdharee Lall* v. *Kantoo Lall* (3) was decided. No doubt, previous to the judgment in this last case by the Privy Council, it was considered as pointed out in the case of *Lalji Sahai* v. *Fakir Chand* (8): "That the pious duty of paying the father's debts did not arise until after his decease, and that by the judgment of the Privy Council it had been established that it was the pious duty of the son to pay his father's debts out of the ancestral estate even in the father's lifetime," and in the view of some of the Judges the law as it stood anterior to the judgment of the Privy Council in *Girdharee Lall's case* (3) was more in accord with the law as propounded by the Smriti writers and their commentators.

Now, as far as the case before me is concerned, it appears to me unnecessary to discuss the question whether the judgment of the Privy Council in *Sahu Ram's case* (1) was mainly confined to reconciling the divergence of opinion in the various High Courts as to the

(6) 43 Ind. Cas. 225; 41 M. 136; 33 M. L. J. 919; 22 M. L. T. 334; 6 L. W. 649; (1918) M. W. N. 55.

(7) 51 Ind. Cas. 612; 43 B. 612; 21 Bom. L. R. 435.

(8) 6 C. 135; 7 C. L. R. 571; 3 Ind. Dec. (N. S.) 89.

* Page of 43 B.—[Ed.

true meaning and scope of "antecedent debt" in the Hindu Law or whether it was intended to lay down the law for our guidance as to the exemption of the son's liability for his father's debts in the latter's lifetime, for the Privy Council appears to have restricted this exemption to cases where there is a possibility of the father paying of his debts before his death or where after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged, and it may be argued that this possibility discharges a Mitakshara son from the pious obligation to pay the debt of his father whether it has been incurred for a family necessity or not. But in the present case the father has been adjudicated an insolvent and this normally excludes the possibility of his discharging his liabilities or of the possession of personal estate sufficient to discharge them. Therefore, as the debts were not incurred for illegal or immoral purposes, and the father is unable to discharge them out of his personal estate, the pious obligation rests on the sons to discharge their father's debts even in the latter's lifetime.

The question now arises, did the property in suit vest in the Official Receiver on Motumal being adjudicated insolvent and, if so, what is its effect on this suit? But before answering this question it is necessary to consider whether the father's power of disposal of ancestral property for his antecedent private debts not being of an immoral character falls within the purview of the definition of the word "property" as explained in section 2 clause (*d*) of the Provincial Insolvency Act. The word "property" has not been defined but is said to include any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit, thus certainly rendering the meaning of the word very comprehensive. Equally, the term "property" is not defined in the Transfer of Property Act but in the Full Bench case of *Ram Shankar* v. *Ganesh Prasad* (9) it was described as a word of very comprehensive meaning and reference was made to Lord Langdale's description of it as being "the most comprehensive of all terms which can be used, as it is indicative and descriptive of every possible interest which a party can have." Now, by section 28 of Provincial Insolvency Act of 1920, corresponding with section 16 of the Provincial Insolvency Act of 1907, clause (2) states that: "On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver" and the only restriction that is introduced is by clause (5) of section 28 that the property of the insolvent shall not include any property which is exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree. Mr. Lulla contended that the power of the father to dispose of the ancestral property could not be transferred to the Official Receiver but in the case if *Fakirchand Motichand* v. *Motichand Hurruckchand* (10) it was held that, "Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes; and a vesting order, made under section 7 of the Indian Insolvency Act, vests that right in the Official Assignee who can, therefore, give a good and complete title to such ancestral immoveable estate to a puchaser. A substantially similar conclusion was arrived at in the case of *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (11) and the principle of both these cases was approved and followed in the case of *Rangayya Chetti* v. *Thankachalla Mudali* (12). No doubt, these cases were decided under the Indian Insolvency Act, but I can conceive no distinction in principle as to the applicability of the rule; and in the case of *Harmukh Rai-Munna Lal* v. *Radha Mohan* (13) a Divisional Bench of the Lahore High Court held in a case to which the Provincial Insolvency Act applied that under the Mitakshara Law father has the right to dispose of his son's interest in ancestral immoveable estate for the payment of

(9) 29 A. 385; 4 A. L. J. 273; A. W. N. (1907) 271 2 M. L. T. 248 (F. B.).

((10) 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294.

(11) 11 B. 37; 6 Ind. Dec. (N. S.) 24.

(12) 19 M. 74; 6 Ind. Dec. (N. S.) 757.

(13) 54 Ind. Cas. 931; 158 P. R. 1919; 109 P. W. R. 1919.

his own debts not contracted for immoral purposes and such interest, therefore, is "property" within the meaning of section 3 clause (*a*) of the Provincial Insolvency Act and on the father being adjudged insolvent vests in the Receiver. This latter case is on all fours with the case with which I am concerned. In my opinion, therefore, the shares of the plaintiffs in the property in suit are effected by the vesting order consequent on the adjudication of their father Motumal as insolvent and the property in suit has wholly vested in the Official Receiver. The result, therefore, is that the plaintiff's suit is unmaintainable and must be dismissed but the parties are to bear their own costs in the circumstances of this case.

W. C. A. *Suit dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

March 6, 1923.

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

Mirza ABID HUSAIN KHAN AND ANOTHER—APPELLANTS

versus

AHMAD HUSAIN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110, applicability of—Suit for recovery of annuity—Value for purpose of appeal, how calculated.

The value of the subject-matter in dispute for the purposes of an appeal to His Majesty in Council in a suit to recover an annuity is, under section 110 of the Civil Procedure Code, the annuity which is sought to be recovered, not the value of the property upon which that annuity is charged.

Radhakrishna Ayyar v. *Sundaraswamier*, 74 Ind. Cas. 584; 49 I. A. 211; 45 M. 475; 16 L. W. 18; 31 M. L. T. 31; 43 M L. J. 323; 27 C. W. N. 1; (1922) A. I. R. (P. C.) 257; 20 A. L. J. 937; 36 C. L. J. 450 (P. C.), referred to.

Appeal from the judgment of the Oudh Judicial Commissioner's Court.

Messrs. *De Gruyther, K. C.*, and *E. B. Raikes*, for the Appellant.

Mr. *W. Wallach*, for the Respondents.

JUDGMENT.

Lord Atkinson.—In this case the annuity which is sought to be enforced is only Rs. 125 per annum. By no reasonable method of valuation can an annuity of Rs. 125 per annum be worth Rs. 10,000. The 110th section of the Code of Civil the annuity which is sought to be recovered, not to the value of the property upon which that annuity of Rs. 125 is charged. Their Lordships think it right to call attention to the fact that the decision in the case which has been referred to, *Radha Krishna Ayyar* v. *Sundaraswamier* (1), apparently proceeded upon a supposed admission, which admission it now appears was really not made. In that case, too, the rent was Rs. 1,500 odd per annum, and there was nothing inconsistent or irrational in holding that the value of that rent was over Rs. 10,000. It was not seven years' purchase; whereas it is impossible that the annuity about which the controversy in this case has arisen can be worth Rs. 10,000. Their Lordships are, therefore, of opinion that the appeal is incompetent and they will so humbly advise His Majesty. The appellants will pay the costs of the appeal.

W. C. A. *Appeal dismissed.*

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

Solicitors for the Respondents:—Messrs. *T. L. Wilson* and *Co.*

(1) 74 Ind. Cas. 584; 49 I. A. 211; 45 M. 475; 16 L. W. 18; 31 M. L. T. 31; 43 M. L. J. 323; 27 C. W. N. 1; (1922) A I. R. (P. C.) 257; 20 A. L. J. 937; 36 C. L. J. 450 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 611 OF 1922.

July 10, 1923.

Present:—Mr. Justice Kanhaiya Lal.

Musammat ALTAFAN—PLAINTIFF—APPELLANT

versus

IBRAHIM—DEFENDANT—RESPONDENT.

Muhammadan Law—Marriage — Impotent person, definition of—Suit for cancellation of marriage —Wife, what must establish—Procedure—Expert evidence, value of—Finding based on opinion of experts, whether conclusive—Second appeal.

According to Muhammadan Law, a person is said to be 'impotent' if he is unable to have connection with a woman, though he has the natural organ; or if he is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others. Whether the disability be by reason of disease, or weakness, or original constitution, or advanced age or enchantment, he is still to be accounted impotent with respect to her with whom he cannot have connection. [p. 505, col 1.]

Baillie's Muhammadan Law, Vol. I, p. 347, referred to.

The right of a wife to claim a judicial divorce

ALTAFAN *v.* IBRAHIM.

contingent on her succeeding to establish that she did not know of his impotency at the time of her marriage, and that it has not since then been removed; but the divorce must remain suspended for a year after the decree in order that it might be ascertained whether the defect is removeable. [p. 505, col. 2.]

Wilson's Muhammadan Law, 5th Edition, p. 145.

A. v. *B.*, 21 B. 77; 11 Ind. Dec. (N. S.) 54, relied upon.

A finding based on the opinion of experts is not necessarily a finding based on facts proved or directly demonstrated and may be interfered with in second appeal. [p. 505, col. 1.]

The opinions of experts are relevant but not conclusive as to matters to which they relate and where they materially differ, their value and ufficiency may legitimately form the subject of consideration and scrutiny despite the acceptance of any one of them by one Court or another. [p. 505, col. 1.]

Plaintiff sued for the annulment of her marriage with the defendant alleging that he was impotent and that she came to know of this fact after her marriage. It appeared that she had lived with him for about six years but that her hymen was intact and there were also other signs of virginity. On the other hand, the medical evidence showed that the defendant was potent and quite fit for sexual intercourse:

Held, (1) that as the hymen was intact and there was nothing to show that the physical conditions of the hymen were of an abnormal character, very strong evidence was needed to rebut the presumption which arose from that state of things against the consummation of the marriage by the husband in spite of the wife having lived with him for about six years; [p. 504, col. 1]

(2) that a *prima facie* case having been made out the plaintiff was entitled to a decree *nisi* for the annulment of her marriage with the defendant, but that the decree would not be made absolute till a year hence during which period the plaintiff would allow full access to the defendant to exercise his marital rights; [p. 505, col. 2.]

(3) that if after the expiry of the above period she satisfied the Court that her husband continued to be impotent, the decree would be confirmed. [p. 506, col. 1.]

Second appeal from a decree of the District Judge, Aligarh, dated the 15th February 1922.

Mr. *M. A. Aziz*, for the Appellant.

Messrs. *Iqbal Ahmad* and *Panna Lal*, for the Respondent.

JUDGMENT.—This and the connected appeal arise out of a suit brought by the husband for the restitution of conjugal rights and another brought by his wife for the annullment of her marriage with him. They were married on the 15th May 1914 when the woman was 13 years old and the husband about three or four years older. The woman lived in the house of her husband for about six years; but owing to subsequent differences she came away from his house and has been living with her parents since. Her allegation is, that her husband was impotent and that she came to know of that fact after her marriage. A certain amount of medical evidence was examined on either side. On a consideration of that evidence the Court of first instance came to the conclusion that the husband was impotent and that that fact was not known to the wife when she was married. The lower Appellate Court, however, thought that the medical evidence produced by the husband was entitled to a greater weight and it decreed the claim brought by the husband for conjugal rights and dismissed that brought by the wife for the annulment of the marriage.

The medical evidence adduced by the woman consisted of two Lady Doctors, one of whom Miss Massey, is an Assistant Surgeon in charge of the Dufferin Hospital at Aligarh. Her statement was that she examined the girl on the 13th July 192 and she thought that she was a virgin, as her hymen was intact. She admitted that the presence of the hymen was not a conclusive proof of virginity in every case, but she explained that the hymen of this woman was complete and not torn in any way and that there were no symptoms, such as exist in rare cases, where, in spite of cohabitation, the hymen remains unaffected. The other Lady Doctor, who was examined, was Miss Bakhsh in charge of the Singhara Hospital at Hathras. She stated that she examined the woman on the 8th August 1921 and that in her opinion she was a virgin and has had no sexual intercourse with any man. She examined other parts of her body and found that the other symptoms noticeable were consistent with that opinion. On behalf of the plaintiff, Major Barber, at one time Civil Surgeon of Aligarh, was examined. He testified to his having examined the husband on the 15th June 1921 and deposed that he found no physical or mental defects in him, his genital organs perfectly formed, and his general health good; and he thought that he was capable of sexual intercourse. Lieut. Mathews, who succeeded as Civil Surgeon of Aligarh, examined the husband on the

18th July 1921 and stated that he was not incapacitated by any mental or physical disease from having sexual intercourse, that he found no malformation in his male organ, and that in his opinion he was normally capable of performing the sexual act. He further said that the husband had a partial erection before him. Lieut. Col. Ilias,, another Civil Surgeon of Aligarh, stated that he examined the husband on the 8th September 1921 and found that he was potent and quite fit for sexual intercourse. He further said that no disease or deformity was found in his male organ that could incapacitate him from sexual intercourse and that the man had an erection before him quite full.

Where there is so much conflict in medical opinion it is not always easy to find which opinion is to be accepted in preference to the other. A man may, however, be nominally or temporarily potent, due for instance to the use of certain medicinal drugs or other cause, or he may be potent as regards some women and not potent as regards his wife. The latter fact was acknowledged by the medical witnesses, and is also recognised by the Muhammadan Law. It is material in any circumstance to note that, according to the evidence of the Lady Doctors, the hymen of *Musummat* Altafan, the wife in question, was intact and there were no conditions such as exist in exceptionally rare cases where continual cohabitation might exist and the hymen may yet remain unaffected. If the hymen was intact and there was nothing to show that the physical conditions of the hymen were of an abnormal character very strong evidence is needed to rebut the presumption which arises from that state of things against the consummation of the marriage by the husband in spite of the wife having lived with him for about six years.

In *Lewis* v. *Hayward* (1) where, after a cohabitation of fourteen years, a woman presented a petition for a decree of nullity of marriage on the ground of the man's impotence and the report of the Inspectors and the medical evidence showed that the woman was *virgo intacta et apta viro* and there was no apparent defect or malformation in the man and the Trial Court was satisfied that the marriage had never been completely consummated but was not satisfied that the non-consummation arose from the incapacity of the man, it was held by the House of Lords that the woman was entitled to a decree that the marriage was null and void on the ground that the cohabitation had been for a much more lengthened period than was required to raise the presumption against a husband and that the onus was thrown upon the husband either of disproving the facts or of showing by clear and satisfactory evidence that the result was attributable to other causes than his own impotency.

If the hymen is intact (not even lacerated) the probabilities, except in the case of females below the age of puberty are, according to Lyons, very strongly in favour of virginity; and the inference of virginity becomes almost certain, if the membrane is normal in position and structure and its apperture is of small size and undilateable and if, accompanying this condition of the hymen, the other signs of virginity are present (Lyon's Medical Jurisprudence Sixth Edition, page 264). One of the Lady Doctors examined has referred in her evidence to these signs of virginity, including the condition of the breasts, the vagina and the fourchette.

There was no allegation that the husband has had no access to the woman. On the other hand, the husband stated that he has had sexual intercourse with her on numerous occasions. The condition of the hymen, however, renders his story wholly improbable.

It is urged on behalf of the husband that the finding of the lower Appellate Court is a finding of fact and, however erroneous, it ought not to be disturbed; but a finding based on the opinions of experts is not necessarily a finding based on facts proved or directly demonstrated. It is a finding based on an examination and balancing of the opinions and views of experts or of the impressions produced on their minds by what they may have seen, heard, or observed, and as in the case of some species of evidence, about custom, the sufficiency of the facts

(1) (1866) 35 L. J. P. & M. 105.

observed or of the inferences or opinions, formed can always be examined to ascertain and determine their intrinsic value. The opinion of experts are relevant, but not conclusive as to the matters to which they relate; and where they materially differ, as in this instance, their value and sufficiency may legitimately form the subject of consideration and scrutiny despite the acceptance of any of them by one Court or another.

An impotent person is defined by the Muhammadan Law as one who is unable to have connection with a woman, though he has the natural organs and a person who is able to have connection with an enjoyed woman but not with a virgin, or with some woman but not with others, whether the disability be by reason of disease, or weakness or original constitution, or advanced age or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection, (Baillie's Muhammadan Law, Vol. 1, p. 347). The Muhammadan Law provides that where such is the case and a woman brings her husband before a Judge and sues him, demanding a separation on the ground of impotency, and the fact whether the woman is an enjoyed woman or a virgin is disputed, the case is to be adjourned for a year, and if, after the expiry of that year, the woman should allege that she is still a virgin an inspection by women is to be ordered, and if they should declare her to be an enjoyed woman, the word of her husband is to be taken with his oath; but if they should declare her to be a virgin her word as to non-intercourse is to be received without oath. The intention obviously is that, if such a claim is brought by a wife and is contested, an opportunity should be given to the husband to show that the charge against him is unfounded or that the alleged incpacity is removeable; and the woman should be required to appear again after a year before the Judge in order to establish her claim to the relief she asks for (*Ibid* p. 348). If the husband should consummate the marriage in the interval the petition of the wife requires to be dismissed after the lapse of the period fixed by the Judge. If he, however, fail in his marital obligation, the wife is entitled to a divorce (Ameer Ali's Muhammadan Law, Vol. 1, page 598, and Tayabji's Muhmmadan Law, p. 251).

It is contended on behalf of the appellant that the procedure enjoined by the Muhammadan Law in regard to the disposal of such a claim is not obligatory on the British Courts; but the provision aforesaid is intended to operate as a safeguard against error or a hasty or precipitate, annulment of the marriage where a removal of the complaint or a disproof thereof is possible and like the provisions relating to the preliminary demand requisite to validate a claim for the enforcement of the pre-emptive right, it must be treated as an essential part of the Muhammadan Law, regulating the annulment of marriages. In a similar case in which the parties were governed by the Muhammadan Law, *A.* v. *B.* (2), an interlocutory order was passed, postponing the annulment of the marriage for a year in order that the parties might be allowed an opportunity of resuming cohabitation during that period if that was possible.

The right of a wife to claim a judicial divorce on the ground of the impotency of her husband is contingent on her succeeding to establish that she did not know of his impotency at the time of her marriage, and that it has not since then been removed, but, as pointed out by Wilson, the divorce must remain suspended for a year after a decree in order that it might be ascertained whether the defect is removeable (Wilson's Muhammadan Law, 5th Edition, p. 145).

A *prima facie* case having been made out, the wife can be granted a decree *nisi* which can be confirmed after a year, in case the husband, if found to be physically unable to perform the marital obligation during the interval; but she must allow full access to her husband at all reasonable times whether she is living in the house of her parents or elsewhere but not outside Aligarh. In view of the present litigation, it would be risky and undesirable to compel her to leave the protection of her parents and live in the house of the plaintiff or his relations. An adjournment of the appeal really can serve

(2) 21 B. 771 at Ind. Dec. (N. S.) 54.

no purpose, as the final enquiry has to be made by the Court of first instance.

The appeal is, therefore, allowed and a decree *nisi* passed in favour of the paintiff, *Musammat* Altafan, for the annulment of her marriage with the defendant, Ibrahim, but this decree will not be made absolute till a year from this date, during which period, whether she lives in the house of her parents or elsewhere but not outside Aligarh, she should allow full access to the defendant at all reasonable times to exercise his marital rights as her husband. If after the expiry of the said period she satisfies the Court that the husband continues to be impotent and physically unable to perform his marital obligation she will be entitled to have this decree made absolute. But if she fails to do so the decree *nisi* will be discharged and the suit will be dismissed. An application for the above purpose will have to be made to the Court of first instance, to which the suit will be remanded for disposal in accordance with the directions above given. The costs here and hitherto will abide the result.

M. A. A. & E. S. D. *Appeal allowed.*
Decree nisi passed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1173 OF 1920.

May 31, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

AKSHAY KUMAR CHAND—DEFENDANT—APPELLANT

versus

THE COMMISSIONERS OF BOGRA MUNICIPALITY—PLAINTIFF—RESPONDENT.

Bengal Municipal Act (III of 1884), ss. 34, 43, 44—Evidence Act (I of 1872), s. 78 (5)—Lease granted by Chairman of Municipal Corporation not sanctioned by Commissioners at meeting—Legality—Burden of proof—Admissibility of proceedings of Municipal Corporation—Presumption as to nature and extent of powers of Municipal Corporation—Ultra vires transaction—Receipts of rent, whether validate transaction.

Under the Bengal Municipal Act (III of 1884), a lease of land belonging to a Municipal Corporation granted by the Chairman of the Corporation is void unless the lease has been sanctioned by the Commissioners of the Corporation at a meeting, and the burden of proving that a particular lease fulfilled the requirements of the Statute lies upon the person who asserts its legality. [p. 507, col. 1.]

Jagannath Saha v. *Chairman of Berhampur Municipality*, 4 Ind. Cas. 55; 9 C. L. J. 286, followed.

Under sub-section (5) of section 78 of the Evidence Act, proceedings of a Municipal body in British India may be proved by a copy of such proceedings certified by the keeper thereof. [p. 507, col 2.]

Where a Corporation is constituted by a Statute, all persons and Corporations are presumed to know the nature and extent of its powers. [p. 507, col. 2.]

Macgregor v. *Dover & Deal Railway Company*, (1852) 18 Q. B. 618 at p. 631; 7 Railw. Cas. 227; 22 L. J. Q. B. 69; 17 Jur. 21; 19 L. T. (o. s.) 316; 88 R. R. 715; 118 E. R. 233, followed.

Where a transaction of lease entered into by the Chairman of a Corporation is *ultra vires* under the law, it cannot be validated by ratification by reason of the Corporation having received rent for any length of time under it. [p. 507 col 2.]

Appeal against decree of the Subordinate Judge, Bogra, dated the 8th March 1920, affirming that of the Munsif, Bogra, dated the 23rd July 1919.

Babus *Sarat Chandra Roy Chowdhury* and *Indu Bhusan Roy*, for the Appellant.

Babu *Atul Chandra Gupta*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in an action in ejectment. The disputed land was the subject-matter of a lease granted by the Chairman of the Municipal Corporation at Bogra to the appellant on the 28th April 1909. The document was registered on the 18th August 1909. The defendant went into occupation of the land and paid rent to the Municipality for a period of six years. On the expiry of the term of the lease the Municipality requested the defendant to vacate the land, but he insisted that the lease included a covenant for renewal which entitled him to continue in occupation. Thereupon the present suit was instituted on the 19th December 1918. The Courts below have decreed the suit on the ground that the lease granted by the Chairman was void, as such lease could have been granted only by the Commissioners at a meeting.

One of the questions in controversy in the Trial Court was, whether there was in fact a Resolution of the Commissioners at a meeting for the grant of this lease. The book which contains the minutes of the meetings of the Commissioners was produced and no Resolution could be traced therein. In these circumstances, the Courts below have inferred that there was in fact no Resolution to grant the lease adopted by the Commissioners at a meeting. The concurrent decisions of the Courts below have been challenged before us on two grounds, namely, first, that the Court of Appeal below should have held that the burden lay upon the Municipality to establish that the lease had been granted in contravention of the Statute and that the Municipality had failed to discharge this burden; and, secondly, that as rent has been received by the Corporation on the basis of the lease for a term of six years, the lease has been ratified by the Commissioners. In our opinion, there is no foundation for either of these contentions.

Section 34 of the Bengal Municipal Act, 1884, provides that the Commissioners at a meeting may sell, let, exchange or otherwise dispose of any land not required for their purposes. Section 44 then provides that the Chairman shall, for the transaction of business connected with the Act, or for the purpose of making any order authorised thereby, exercise all the powers vested by the Act in the Commissioners. If this stood by itself it might have been interpreted to cover a case within the scope of section 34. But the proviso to section 44 ordains that the Chairman shall not act in opposition to or in contravention of any order of the Commissioners at a meeting or exercise any power which is directed to be exercised by the Commissioners at a meeting. The grant in this case by the Chairman would be void, unless the lease had been sanctioned by the Commissioners at a meeting. The burden clearly lies upon the defendant to establish that the requirements of the Statute were fulfilled. He has failed to discharge that burden. In the normal course of events the Resolution adopted at a meeting of the Commissioners must be recorded; and section 43 provides that minutes of the proceedings of a meeting of the Commissioners shall be entered in a book to be kept for the purpose and shall be signed by the President of the meeting, and such book shall be open to the inspection of the tax-payers. Under sub-section (5) of section 78 of the Indian Evidence Act, proceedings of a Municipal body in British India may be proved by a copy of such proceeding certified by the keeper thereof. The minute book has been produced and there is no trace of a Resolution on the subject. Consequently, the position is that there is no valid lease as was held in the case of *Jagannath Saha* v. *Chairman of Berhampur Municipality* (1).

On behalf of the appellant, a greivance was made that a stranger in his position could not be expected to be acquainted with the nature and extent of the powers of Municipal Corporations. There is clearly no force in this contention. As was explained by Alderson, B, in *Macgregor* v. *Dover & Deal Railway Company* (2) where a Corporation is constituted by a Statute, all persons and Corporations are presumed to know the nature and extent of its powers. It was open to the defendant at the time when he took the lease, to make his position safe by insisting upon a copy of the Resolution of the Commissioners at a meeting, if such Resolution was ever adopted. It has finally been contended that as a rent was paid by the defendant to the Corporation for a period of six years, there was ratification by the Commissioners. There is no foundation for this contention. The transaction was *ultra vires* and could not be validated by ratification in the manner suggested.

We are consequently of opinion that the decree made by the Subordinate Judge is correct and this appeal must be dismissed with costs.

M. D. J. & W. C. A. *Appeal dismissed.*

(1) 4 Ind. Cas. 55; 9 C. L. J. 286.
(2) (1852) 18 Q. B. 618 at p. 631; 7 Railw. Cas. 227; 22 L. J. Q. B. 69; 17 Jur. 21; 19 L. T. (o. s.) 316; 88 R. R. 715; 118 R. R. 233.

NENA OJHA *v.* PARBHU DUTT OJHA.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 192 OF 1920.

June 7, 1923.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Ross.

NENA OJHA AND OTHERS—DEFENDANTS—APPELLANTS

VERSUS

PARBHU DUTT OJHA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Presumption—Separation, proof of—Receiver, necessary conditions for—Effect of re-union—Members, whether bound by act of manager—Property acquired during separation, whether becomes joint after re-union.

The natural presumption of the Hindu Law is in favour of a family being joint and the burden of proving separation lies on the party alleging it. [p. 510, col. 2.]

For a re-union two things are essential; firstly, that one can re-unite with his father, brother or paternal uncle; and, secondly, that the re-union must take place after separation, so that the parties seeking to re-unite must have separated before the re-union. [p. 515, col. 2.]

Basanta Kumar Singha v. *Jogendra Nath Singha*, 33 C. 371; 3 C. L. J. 98; 10 C. W. N. 236, followed.

To constitute a valid re-union the parties should not only live in one mess and in one place and like one family, but they should again join each other's share of the property and remain in possession. [p. 517, col. 1.]

The effect of a re-union is to place the united co-parceners in the same position as they would have been in, had no partition taken place and the property of the united members stands on exactly the same footing as that of members who have always been undivided so that, upon the death of any one of the re-united members, his share will pass by survivorship to the remaining members and will not get into the hands of any undivided member so long as there are undivided members in existence. [p. 515 col. 2; p. 516, col. 1.]

All members of a joint Hindu family, whether minor or adult, are bound by the act of the manager or *karta* of the family unless they prove that the *karta* entered into transactions which were prejudicial to their interests and not for their benefit. [p. 519, col. 2.]

A property acquired during the separation by a member of the family will be presumed, after the re-union, to have been acquired out of the funds of the joint estate and the re-united members will be entitled to a share in it. [p. 519, col. 2.]

Pranhishen Paul Chowdry v. *Mothooramohun Paul Chowdry*, 10 M. I. A. 403; 5 W. R. P. C. 11; 1 Suth. P. C. J. 609; 2 Sar. P. C. J. 164; 19 E. R. 1025, followed.

In a suit for partition it appeared that there had been a separation but subsequently the plaintiff and defendant, two brothers, had entered into an agreement whereby they had agreed to live together and to hold the property in certain specified shares:

Held, that there was no re-union in the sense that the two brothers became co-parceners of a joint Mitakshara family. [p. 517, col. 2.]

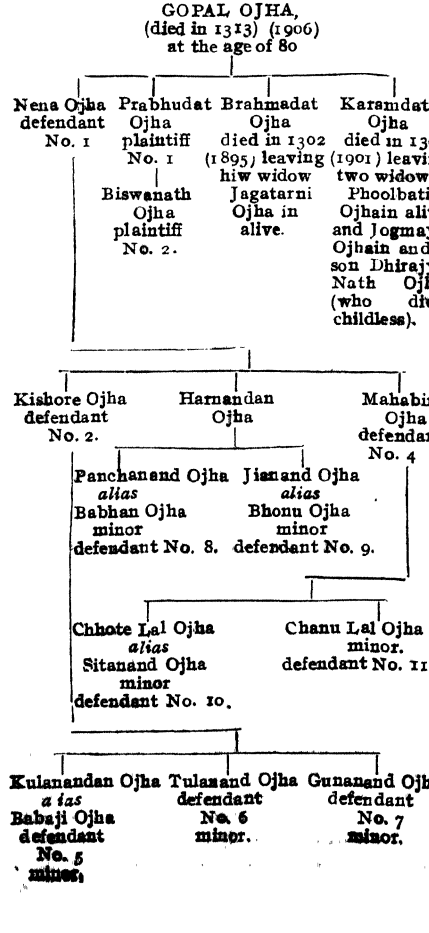
Appeal from a decision of the Subordinate Judge, Second Court, Muzaffarpur, dated the 29th March 1920.

Messrs. *S. K. Mitra* and *S. C. Mitra*, for the Appellants.

Messrs. *L. N. Singh* and *Parmeshwar Dayal*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of a suit for partition between the members of the same family. The following geneology will show the relationship of the parties:—



NENA OJHA *v.* PARBHU DUTT OJHA.

Prabhu Datt Ojha (plaintiff No. 1) and Nena Ojha (defendant No. 1) are brothers. Plaintiff No. 1 is the father of plaintiff No. 2. Defendants Nos. 2 to 4 are the sons and defendants Nos. 5 to 11 are the grandsons of defendant No. 1. These defendants Nos. 1 to 11 are the principal defendants first party in the case.

Shorn of the details the plaintiff's case as laid in the plaint is that Gopal Ojha, the common ancestor of the family, had four sons: Nena Ojha, defendant No. 1, Prabhu Dutt, plaintiff No. 1 and Brahmadatt Ojha and Karamdat Ojha. They were all members of a joint Mitakshara family of which Gopal Ojha was the *karta*. Brahmadat Ojha died while he was a member of the joint family, in 1302 (1895); similarly, Karamdat Ojha died in 1308 (1901). The former left a widow Jagatarini Ojhain who is alive, and the latter two widows Phoolbati Ojhain (alive) and Jogmaya Ojhain and a son Dhairajya Nath Ojha who died childless. The surviving members of the family continued to be joint. Gopal Ojha died in 1313 (1906) and on his death the plaintiff and the defendants first party came into possession of the entire joint family property by survivorship. Nena Ojha from the lifetime of his father (Gopal Ojha) being the eldest son acted as the *karta* of the joint family of the plaintiffs and the defendants first party and from time to time acquired properties with the joint family fund. The plaintiffs have got half share in the properties described in Schedules I to VI. On 21st November 1914, the defendant No. 1 being a shrewd and cunning man and taking advantage of the simplicity of plaintiff No. 1 got an *ekrarnama* (Exhibit 2) executed by plaintiff No. 1 stating that it was a *Mukhtearnama* and that it would be necessary to enable defendant No. 1 to look after the interest of the family during the Survey and Settlement Operations, and the plaintiff No. 1 having confidence in defendant No. 1 did not acquaint himself with the contents of the document and signed and executed the same believing it to be a *Mukhtearnama*; that recently taking advantage of his management, defendant No. 1 began to sell the joint family properties without any family necessity and to appropriate the income therefrom, that the plaintiff then thought it wise to become separate from the defendant first party and asked defendant No. 1 to partition his half share and to render an account of the receipts and disbursements during the period of his management, that the defendants refused to partition stating that the plaintiff's share amounted to 1-4th of the family properties and referred to the said *ekrarnama* of the 21st November 1914 as having been executed by the plaintiff; that the plaintiff then took a copy of the document from the Registration Office and came to know of the fraudulent recitals therein, and hence the plaintiff instituted the suit for partition by filing his plaint on 1st February 1919, claiming partition of the properties by metes and bounds and to have *khas* possession thereof to the extent of 8-annas as his share in the properties.

Defendants Nos. 12 and 13 are defendants second party and have been impleaded on the allegation that defendant No. 1 has executed two *kobalas* in their favour without any legal necessity with regard to the properties in Schedule VII and property No. 7 in Schedule II, respectively. These defendants have not entered appearance in the case. The defendants Nos. 14 and 15 are alleged to be the *farmdars* of some of the properties in suit. Defendant No. 14 has filed a separate written statement admitting that he is the *farmdar* of defendant No. 1 with respect to one property and of defendant No. 4 with respect to another, the former belonging to the family of the defendants first party and the latter exclusively to defendant No. 4. Defendant No. 15 has not entered appearance. Defendants Nos. 3 and 4 have filed a joint written statement to the same effect as the written statement of their father, defendant No. 1. The guardian *ad litem* of the minor defendants Nos. 4 to 11 has filed a separate written statement on the same lines. Thus, the written statement of defendant No. 1 is the chief defence in the case. He pleads limitation and want of cause of action. His material allegations are *inter alia* that plaintiff No. 1 became separate in 1305 (1898) from his father Gopal Ojha and his brothers Nena Ojha, defendant No. 1, and Karamdat Ojha, Brahmadatt Ojha having died in 1302 (1895) and out of the family properties took the pro-

erties in village Pota and some *brit* lands representing his 4-annas share and began to live with his family at Pota where he used to live even from before his separation and partition; that he had no concern with other properties of the family, which fell to the share of defendant No. 1 and his brother Karamdatt Ojha; that the sons of defendant No. 1 acquired properties with their own private funds which are in their separate possession as their *kosal* (self-acquired) properties; that the properties which defendant No. 1 sold to the defendants Nos. 12 and 13 were his own private properties with which the plaintiffs have no concern whatever. In his written statement the defendant further relied upon the *ekrarnama* (Exhibit 2) in support of the separation of plaintiff No. 1 and the allotment of the aforesaid properties in village Pota and the *brit* lands as his share, stating that it was executed by plaintiff No. 1 of his own free will and choice with a view to become united with defendant No. 1.

Upon the pleas taken by the defendants, nine issues were framed in the Court below. Issues Nos. 1 to 3 and 7 were decided in favour of the plaintiffs and they no longer arise in this appeal. The remaining issues are as follows :—

"4. Whether plaintiffs form members of a joint Hindu family with the defendants first party alleged by the plaintiffs? Are the plaintiffs entitled to the partition prayed for?

"5. Whether there are any properties joint amongst the plaintiffs and defendants first party, what are the properties liable to be partitioned and what is the share of the plaintiffs in the same?

"6. Whether the *ekrarnama* dated 21st November 1914 is fraudulent and void as alleged by the plaintiffs?

"8. Whether defendant No. 1 is liable to render account to the plaintiffs?

"9. To what relief, if any, are the plaintiffs entitled?"

All these issues were decided by the Court below in favour of the plaintiffs. The Court below held that the plaintiffs and the defendants were joint in family and properties and that the *ekrarnama* (Exhibit 2) dated the 21st November 1914, is fraudulent and null and void. Accordingly, the Subordinate Judge decreed the paintiffs' suit directing partition of the properties, allotting to the plaintiffs 8-annas share therein. He also directed the appointment of a Commissioner to effect partition and to take accounts from each party with regard to the properties and the *karbar* in their charge from 1313. Aggrieved by this decision the defendants have appealed to this Court.

The first question for determination in this appeal is as to whether there was any separation among the members of the family as alleged by the defendants. The *onus* to prove separation lies upon the defendants, the natural presumption of the Hindu Law being in favour of the family being joint. The parties have adduced both oral and documentary evidence. We have considered carefully the evidence in the case and the arguments advanced on both sides. The witnesses on behalf of the defendants prove that Prbhudat Ojha had been living in Pota for the last several years and that he was exclusively in possession of that property, has built a house there where his wife and children were residing, and that he seldom came to Rupaulia, the ancestral home of the parties, and that he ceased to have any connection with Rupaulia and other properties of the family, and he did not receive any income of these properties from 1300 to 1304 as the Court below found (D. W. No. 1). The lower Court further found that after the death of Gopal Ojha in 1313 (1906) the name of the plaintiff No. 1 was mutated with respect to the Pota properties alone and that of defendant No. 1 with respect to Rupaulia and other properties. The evidence in the case further shows that there was a separation in food and mess and in the dwelling houses and that the plaintiffs and the defendants have been carrying on separate transactions, acquiring properties in their names and disposing of the properties in their separate possession *vide* the *sarpeshgi* deeds, Exhibit F, dated 15th May 1906, Exhibit C, dated 20th February 1911, Exhibit D, dated 27th August 1913, Exhibit A, dated 29th May 1906 and Exhibit K dated 3rd August 1918, All these documents show that Prabhudat was separate in property and had no co-sharer. The learned Subordinate Judge, has dealt with them in detail so I need not

refer to them further. He, however, says that they are not in themselves inconsistent with the jointness of the family and may have been due to the convenience of the parties. The learned Subordinate Judge relies upon Exhibit K (1), a mortgage-bond dated 19th January 1917, which describes the plaintiff No. 2 as a "co-sharer *malik* of Rupaulia" and the endorsement of the receipt of the principal and interest thereon by Prabhudat through the pen of Mahabir Ojha, his nephew. This was long after the *ekrarnama* (Exhibit 2) of 1914 when the re-union took place. The previous document showing separation and this document showing jointness, rather support the recital in the *ekrarnama* which will be discussed hereafter. The endorsement in Exhibit 1 dated 25th April 1914 relied upon by the learned Subordinate Judge has been satisfactorily explained. The entries in the Revisional Settlement of 27th February 1914, Exhibits 6 and 6 (*a*), with respect to some lands in Padamkher, showing the name of Prabhudat, may also be due to the *maliks* still retaining the name of Prabhudat. Exhibit 7 (*a*), judgment in a case under section 145 of the Criminal Procedure Code, dated 25th August 1919, goes against the plaintiffs' case as the learned Subordinate Judge says, of jointness, but as observed by him much weight cannot be attached to it as the criminal case happened during the pendency of the present case. Taking the evidence as a whole, it inclines considerably in favour of separation and subsequent re-union. The oral evidence also points to the same direction. I need not refer to all the witnesses. I would, however, refer to only a few of them. The manner in which the separation took place has been stated by the following witnesses on behalf of the defendants Jagdhar Pandey (D. W. No. 14), Rijhan Singh (D. W. No. 19) and Gajadhar Ojha (D. W. No. 20). Jagdhar Pandey was the *purohit* of the family before partition. Now he is the *purohit* of the defendant's family since Prabhudat left the village and was residing at Pota. Gajadhar Ojha is an agnate of the family and Rijhan Singh is a resident of Siswa which is on the border of Rupaulia. These are all competent witnesses and are reliable. Nena Ojha, Mahabir Ojha, Harnandan Ojha and Kishore Ojha, the defendants in the case, have also given evidence in proof of the separation of Prabhudat from the rest of the family. Nena Ojha says: "Prabhu at is separate from me from 1305. He began to live at Pota since 1300. He went there alone at first and his wife went to live with him later on." He gives the reason why Prabhudat separated from the rest of the family, thus: "He (Prabhudat) wanted to become separate from us in 1301 and 1302 as he had no son then. I executed a bond in favour of Dhanukdhari, my brother-in-law, because he wanted to give his properties to his daughters. When he was apprised of the execution of the *benami* deed he demanded partition in 1305." Continuing, Nena Ojha states, "Prabhudat wanted Pota properties for himself and wanted us to take other properties. We had 15 *bighas* of *malkiat*, two-half *bighas* of *kashtkari* and 7 to 8 *bighas* of land in *zarpeshgi* for Rs. 1,000 at Pota. The *khatian* and *khewat* and *zarpeshgi* deeds of these lands were with us at Rupaulia and we made them over to Prabhudat." The reason given for Prabhudat's separation seems to be plausable for he had no son then and had only daughters to whom he wanted to give his properties which he could not do so long as the properties were joint, for, till then, he had no specific or defined share in the family properties. It is significant that the talk of partition commenced in 1300-1301 and Prabhudat since then began living in Pota. Whereas the actual partition is said to have taken place in 1305. This is important because much is sought to be made out of the partition having been stated in the *ekrarnama* to have taken place in 1300, whereas in the defendant's evidence it is said to have taken place in 1305. At the time of partition, Gopal Ojha, the common ancestor of the parties, was alive. Prabhudat asked Gopal Ojha to give him the properties in Pota in lieu of his share and Gopal Ojha told Nena Ojha to give Prabhudat the said properties in Pota to which Nena is said to have agreed and thus the partition was effected. No reason has been assigned for disbelieving the evidence of the defendant and his witnesses. On behalf of the plaintiff three witnesses came from Rupaulia. They hardly seem to be entitled to any credence. Witness No. 1 Baideo Misir admits that defend-

ant No. 1 brought a suit against him for the demolition of his house and that there were two more cases brought against him. Witness No. 2, Srikant Ojha, has a greivance against the defendant inasmuch as his uncle sold some properties to the defendant in which he was interested 10 or 12 years ago, and Berkhi Kurmi (P. W. No. 20), a labourer of Mahabir Ojha, brought a criminal case against him on behalf of Mahabir in connection with which the Sub-Inspector of Police had come to investigate. Witness No. 3, Ramdhari, lives in the Patti of Baijnath, father-in-law of Biswa Nath Ojha, plaintiff No. 2. Even these witnesses admit that the family of Prabhudat do not live at Raupulia and that Prabhudat mostly lives in Pota and manages the property there. He is, according to the evidence of plaintiff's witness No. 4, President of the *Chaukidar Panches* in Pota. Most of the witnesses on behalf of the plaintiffs have come from Pota where Prabhudat had great influence and, as observed above, occupied the office of *Chaukidari Panch* or President. Other witnesses from the Patti of Baijnath Thakur have given evidence on behalf of the plaintiffs. We have carefully gone through the evidence of these witnesses and find that they are either interested or do not seem to know much about the family affairs of the parties. Prabhudat examined himself in the case. He admits that he remained mostly at Pota for the last 10 or 12 years and before that also he looked after the affairs of Pota for the most part. While he denies that he has a residential house in Pota he admits that he has a *dera* at Pota and that the *Chaukidari* tax is now paid in his name, although he adds that he bears of it. He being a *Panch* of the *Chaukidari* Committee, there is no reason why he did not positively know one way or the other as to the payment of the *Chaukidari* tax with respect to the house in question. He admits in his evidence that he and the defendants have separate transactions and *kaobar* for a long time. The fact that the Pota property was in his exclusive possession is corroborated by the production of *khewat* from his own possession relating to Pota village. This corroborates the statement of defendant Nena Ojha quoted above that the *khatian*, the *khewat* and the *zarpeshgi* deeds of the Pota property and *brit* lands were made over to Prabhudat at the time of partition. He is also corroborated by Rijhan Singh who, when asked in cross-examination, stated: "I did not see the *Panches* do anything in connection with the partition. They were talking about papers, such as *khatian* and *parchas*. They said that *khatian* and *parchas* might be divided among the parties. In my presence the *Panches* divided the *khatians*, *parchas*, deeds, bonds, etc., among the parties." Therefore, the production of these papers from the custody of the plaintiffs proves the mode in which the partition is said to have taken place, by the witnesses on behalf of the defendants. Much has been made by Mr. Lakshmi Narayan Singh of the fact that *khewat* (Exhibit 7) which was finally published in 1897 (corresponding to 1304) shows the names of the plaintiffs as well as the defendants with respect to the family properties Rupaulia and that of Gopal Ojha with respect to Pota. It is said that, had the partition taken place in 1300, the names of the parties should have appeared in these papers according to the allotments, that is, Prabhudat's name should have appeared in place of Gopal Ojha in the *khewat* of village Pota and his (Prabhudat's) name should have been omitted with respect to Rupaulia. It is said that in the *ekrarnama* the partition is stated to have taken place in 1300 and, in order to explain the entries in the aforesaid *khewat* of Rupaulia and Pota, the defendants have now changed the alleged time of partition by stating that it took place in 1305. I do not see how the aforesaid entries in any way embarrass the defendants. Gopal Ojha's name was in the Collector's Register D and, according to the rules laid down in the Survey and Settlement Manual for the preparation of the *khewat*, his name must have been copied in the *khewat* from Register D. The argument loses much of its force when we find that the year 1897 (1304) stated in the *khewat* and *khatian* is the year of its final publication, whereas the *khewats* are prepared at the *khanapuri* stage which takes place at an earlier stage of the Survey operations. From the *khanapuri* stage up to the preparation of the

Record of Rights and its final publication several years generally elapse. Therefore, in the absence of any evidence as to when the *khewat* was actually prepared, it is not possible to draw any inference against the defendants from the year given in these papers. On the other hand, it is significant that, after the death of Gopal Ojha in the year 1313 (1907), the name of Prabhudat Ojha was mutated in place of Gopal Ojha in Register D (Exhibit W2) of the Collectorate with respect to the Pota property on the ground of inheritance. Now, if Pota was not assigned upon partition or separation to Prabhudat, his name alone would not have been entered with respect to that village in the Collectorate Register and the defendants would not have allowed their own names to be omitted thereform. The mutation, as stated above, took place in 1907-08 seven years before the *ekrarnama* in question was executed, and certainly at a time when there was no difference or dispute between the parties. Again, the ground for mutation being stated there to be inheritance (*vide* column 7 of Register D, Exhibit W2) shows that the joint estate of the family had ceased to exist for no succession by inheritance takes place in a joint Hindu family; the properties pass to the possession of the remaining members of the family by survivorship.

I do not think much can be made out of the inconsistency in the statement of the defendant as to the time of separation as alleged in the *ekrarnama* and in the written statement. It may be, as is suggested, that the time of the partition is now changed to 1305 in order to meet any inference that may be drawn from the date 1897 of the final publication of the Survey *khewats* and the *khatians*. The attempt of the defendants to improve their case by peculiar notions or whims of their own will not affect the value of the inference drawn from the mutation of the name of Prabhudat in Register B of the Collectorate in 1907-08 "by right of inheritance," nor will it affect the value of the evidence afforded by the recital as to the date of partition in the registered *ekrarnama* (Exhibit 2).

The recital in the *ekrarnama* to which Prabhudat was a party leaves no manner of doubt that separation had taken place in 1300. Prabhudat now wants to make out that this was a fraudulent document, and that he executed it on account of the fraud practised upon him by Nena Ojha telling him that the document was a *Mukhtearnama* executed for looking after the Survey cases, and that he did not know the contents thereof when he signed the documents. The learned Subordinate Judge has accepted the suggestion of the plaintiffs and has held that the document was a fraudulent one. We have carefully considerd the evidence in the case and are satisfied that the Subordinate Judge has taken a mistaken view of the evidence. The marginal witnesses of the deed have been examined. Taki Singh has been examined on behalf of the plaintiffs and Shiekh Janab, Jaleswar Missir and Kunj Behari Pandey on behalf of the defendants. They have also examined the scribe of the document Sarjug Prasad, Mukhtar. All these witnesses clearly state that they knew fully that the document they were attesting was an *ekrarnama* and not a *Mukhtearnama*. Taki Singh (P. W. No. 9) went so far as to say that Mahabir Ojha, one of the defendants, had told him that it was an *ekrarnama* which was being executed between his (Mahabir's) father (Nena Ojha) and his uncle (Prabhudat Ojha), the plaintiff in the case. He also knew that under the *ekrarnama* Nena Ojha was to get 12 annas and Prabhudat 4 annas.

This witness further says that he was aware for a long time that Prabhudat was living at Pota. Sheikh Janab says that the *ekrarnama* was read over to him before he signed it in the presence of Nena Ojha and Prabhudat Ojha. Jaleswar Missir (D. W. No. 10) is a close neighbour of Nena Ojha and is a nephew of the family. He says that Prabhudat lived at Pota for the last 20 or 24 years with his family. He proves that the *ekrarnama* was written in the presence of Nena Ojha and Prabhudat Ojha and that the scribe read out the document after it had been drawn up, and that Nena Ojha signed it first and Prabhudat next.

Kunj Behari Pandey (D. W. No. 11) says that Nena Ojha and Prabhudat Ojha told him that they had executed an *ekrar-*

nama and asked him to sign it and that he got it read over and then signed it. The evidence of Sarjug Prasad (D.W. No. 21), the scribe, is conclusive as to the *ekrarnama* being a genuine document as having been drawn up in accordance with the instructions given by Prabhudat. He distinctly says: "I drew up the deed from a draft according to the instructions of both" (Prabhudat and Nena Ojha) "and it was read over to them and that they understood the contents and then signed the deed." He repels the suggestion made that Prabhudat asked him to draw up a *Mukhtearnama* and not an *ekrarnama*. Prabhudat purchased the stamp, he signed all the pages of the document stating therein that the *ekrarnama* with the stipulations contained in the body thereof, executed is correct. There is, therefore, no room for any doubt as to the *bona fide* execution of the document in question by Prabhudat. The plaintiffs have failed to show that there was any occasion for Prabhudat executing a *Mukhtearnama* at the time. The story is unfounded that the *Mukhtearnama* was required in order to look after Survey cases, as no trace of any Survey case is found in the record. The parties had not many properties and there does not appear to have been any dispute before the Survey Authorities which necessitated the execution of a *Mukhtearnama* by Prabhudat. He could not, therefore, be misled into a belief that a *Mukhtearnama* was required to safeguard his interest before the Survey Authorities.

The learned Subordinate Judge does not seem to have realised the importance of the absence of any Survey dispute or case nor does he seem to have weighed properly the evidence of the marginal witnesses, and, above all, the following careful and solemn words in the document in the handwriting of Prabhudat himself: "The *ekrarnama* with the stipulations contained in the body thereof executed is correct." The finding of the Subordinate Judge is against the weight of evidence. It seems to be based upon surmise and conjecture. The learned Vakil on behalf of the plaintiffs has not been able to support the finding of the Subordinate Judge. In fact, whenever challenged with the astounding evidence in the case as to the genuineness of the document in question, the learned Vakil felt that he had no answer to make. In these circumstances, I disagree with the view of the *ekrarnama* in question taken by the Subordinate Judge and hold that it was a *bona fide* and genuine document executed by the parties, and that Prabhudat knew fully the contents thereof.

The circumstances in the case support the defendant's version that Prabhudut having in his advanced age got an only son who was somewhat stupid was anxious to go back to his native village and to give his boy the benefit of the company of Nena Ojha's family consisting of a large number of young boys. It was with a view to make the boy happy and prosperous and develop in intelligence which was somewhat low that Prabhudat Ojha thought of coming back to the family. The internal evidence indicates that Nena Ojha was not anxious for an agreement of that kind, for the document does not restore the family to the status of a fully re-united Hindu family. It is a sort of arrangement whereby the members were united for the purpose of living together and for enjoying jointly the properties of the family without in any way disturbing their shares which stood prior to the agreement in question. This document supports the defendant's case that there was separation in 1300 whereby Prabhudat disconnected himself with the rest of the members of the family and took one-fourth of the joint family properties. Prabhudat and his son are, therefore, bound by the settlement made therein as to the separation of Prabhudat, and this settlement is supported by the evidence in the case indicated above. If the learned Subordinate Judge had accepted this document as true and *bona fide*, he would have certainly changed his view that the separate mess, residence and transactions of the members of the family were not sufficient to prove separation and that they were consistent with the family continuing to be still joint. It is true that these circumstances, taken separately, may not be inconsistent with jointness, but taking them together the presumption of jointness is weakened and the admission of

separation contained in the *ekrarnama* wholly rebuts the presumption and, to my mind, conclusively proves a contrary state of affairs, namely, that the family had ceased to be a joint family and that Prabhudat had separated.

There was, no doubt, no need of partition, nor a regular *Panchayat* or solemn proceedings to work out the shares of the parties and to divide the properties accordingly, but they are not essential for effecting a partition or separation of a joint Hindu family. Prabhudat had himself calculated his own share and found that the Pota property represented his share of one-fourth in the entire family properties. He approached his father Gopal Ojha, who was then the head member of the family. He said that he did not like to live there and wanted to have the Pota property in lieu of his own share. Gopal Ojha as *karta* of the family directed his elder son, Nena Ojha, to give Pota to Prabhudat. Nena consented and there was an end of the matter. In these circumstances, there was no necessity of an elaborate proceeding of a *Panchayat*, though some freinds of the family, whom the witnesses call *Panches*, seem to have been present at the time. The subsequent conduct of the parties and the exercise of sole possession by Prabhudat over the Pota property prove the partition. Therefore, I come to the conclusion that in 1300 Prabhudat had separated himself from the family and had taken Pota as his share of the family properties. At that time his son Biswanath Ojha, plaintiff No. 2, was not in existence. According to the statement of Prabhudat he was born sometime in 1309 or 1310. According to the statement of Nena he was born in 1306 or 1307. In any case, he was not in existence at the time of the partition whether it took place in 1300 or 1305. Prabhudat died during the pendency of this appeal, and his son Biswanath Ojha has been substituted in his place as the sole respondent. He is bound by the statement contained in the *ekrarnama* under section 21 of the Evidence Act as a statement of his predecessor-in-interest in the properties in question. The *ekrarnama* is, therefore, a binding document. This was executed by Prabhudat and Nena, the *karta* of the family of the other defendants, who were his descendants. It is admitted that Nena is still the *karta* of the family. The *ekranama* is not impugned by the defendants as being in any way fraudulent or in excess of the authority of Nena. On the other hand, the plaintiff states that the document was executed *bona fide*. Nothing has been shown in this case why this document, executed by Nena Ojha as the *karta* of the family, should not bind his descendants.

Now, what is the effect of this document? Mr. L. N. Singh on behalf of the plaintiffs contends that the document purports to effect a re-union of the the two brothers Nena and Prabhudat, so as to restore them to the original state of jointness and that there was a fusion of all the properties which were originally ancestral, and those which were acquired before, during and after the separation and re-union. For a re-union two things are essential; firstly, that one can re-unite with his father; brother or paternal uncle, in other words, the re-union is restricted to these three classes of cases only. The text of Brahspatti "He who being once separated dwells again through affection with his father, brother or paternal uncle is termed re-united" has been so interpreted by the Calcutta High Court in *Basanta Kumar Singha* v. *Jogendra Nath Singha* (1), as the Law of Mitakshara as administered in this Province; secondly, the re-union must take place after separation so that the parties seeking to re-unite must have separated before the re-union. Nena and Prabhudat were brothers and, as held above, Prabhudat had separated in 1300 *Fasli* and, therefore, there could be a valid re-union between them in 1914, when the *ekranama* in question was executed. The effect of a re-union is to place the united coparceners in the same position as they would have been in, had no partition taken place and the property of the united members stands on exactly the same footing as that of members who have always been undivided so that upon the death of any one of the re-united members his share will pass by survivorship to the remaining members and will no get into the hands

(1) 33 C. 371; 3 C. L. J. 98; 10 C. W. N. 236.

of any divided member so long as there are undivided members in existence; for instance, when two brothers re-unite on the death of one of them without male issue, his estate passes by survivorship to the united members instead of devolving upon his widow or daughter, which would have been the case had he not re-united. The Madras High Court had taken a contrary view at one time; it was of opinion that before partition the members of a joint Hindu Mitakshara family are joint tenants and after partition they are sole tenants with respect to the properties allotted to their shares and after re-union they become tenants-in-common, holding their shares in severalty so that after the death of any one of them his share passes by descent, and not by survivorship. This view was based upon the idea that after partition the shares of the members become ascertained and consequently after re-union their shares remained so ascertained, the re-union only destroying the exclusive right which by separation the member had acquired in the property which had fallen to his share. This view has now been abandoned in the Madras High Court, and in the case of *Ramasami* v. *Venkatesam* (2) it was ruled that in the case of re-united co-parceners property passes by survivorship.

As regards the effect on re-union the *ekrarnama* states as follows:—

"Now it is the wish of us, the declarants to become again joint in family and property and come and remain jointly in possession and use of the entire family properties. But the share of me, Nena Ojha and my sons shall be 12 annas and that of me, Prabhudat Ojha and my son Biswanath Ojha 4-annas in the joint family properties. We have become joint again under the above stipulations. The said three widows shall get maintenance out of the 12-annas share of me Nena Ojha and my sons. We, Nena Ojha and Prabhudat Ojha, shall remain joint in family during our lifetime or during the lifetime of any one of us and we shall never effect partition. After the death of us, the declarants Nena Ojha and Prabhudat Ojha, when our sons will partition their shares among themselves Keswar Ojha, Harnandan Ojha, Mahabir Ojha, sons of me declarant No. 1, shall get each four-annas share, to Biswanath Ojha, son of me, declarant No. 2, the remaining 4-annas share. All the brothers (cousins) shall get an equal share of four-annas each. Though some of the family properties stand in the name of one declarant and other properties in the name of the other declarant and though in future also properties may be acquired in the name of any of the declarants or of his issue all these properties shall be joint and at the time of the aforesaid partition each heir, *i. e.*, Keshwar Ojha, Harnandan Ojha and Mahabir Ojha sons of me declarant No. 1, and Biswanath Ojha, son of me declarant No. 2, shall get 4-annas share in all the family properties."

Mr. Mitter on behalf of the defendants-appellants contends that the aforesaid terms of the *ekrarnama* do not effect a valid re-union in the estate of the two brothers and they do not, therefore, become co-parceners of a joint Mitakshara family. He says that the *ekrarnama* only purports to enable the two brothers to live jointly and to be in joint possession of the properties, but it does not make them joint tenants or co-parceners with respect to their properties. On the other hand, it keeps their shares in the properties, of 12-annas and 4-annas as was ascertained at the time of the separation and their joint enjoyment of the properties is restricted in the proportion of the shares aforesaid. He says that, in order to constitute a re-union after partition, there must be, to use the expression of Seton-Karr, J., in *Gopal Chunder Daghoria* v. *Kenaram Doghoria* (3), "a junction of estate" which subsequently adopted in the case of *Rishi (Rusi) Mendli* v. *Sundar Mendli* (4) where their Lordships of the Calcutta High Court say: "In order to constitute a re-union there must be a junction of estate with an intention to re-unite." Seton-Karr, J., in the aforesaid case of *Gopal Chunder*

(2) 16 M. 440; 3 M. L. J. 107; 5 Ind. Dec. (N. S.) 1013.

(3) 7 W. R. 35.
(4) 6 Ind. Cas. 441; 37 C. 703.

Deghoria v. *Kenaram Deghoria* (3) refers to the text of Brahspati "the re-union must be a re-union of property: "The property which is mine is thine, and that which is thine is mine'" According to the text, therefore, the parties should not only live in one mess (*ekenne*) and in one place (*ektre*) and like one family (*ek paribar nyaye*) but they should again join each other's share of the property and remain in possession. It depends upon the evidence in each case as to whether the parties have re-united as stated above. The *ekrarnama* in question set forth above, no doubt, declares that Nena Ojha and Prabhudat Ojha would become joint in family and property and would jointly be in possession and use of the family properties but it does not obliterate the shares of the two brothers of 12-annas and 4-annas respectively which had existed before the re-union. It, therefore, does not amalgamate the two shares but keeps them separate so that they are not able to say to each other, as is required by the text of Brahspati, "The property which is mine is thine, and that which is thine is mine." Again, in an ordinary case of re-union, the widows of the two brothers Brahmadat and Karmadat would have been entitled to maintenance out of the joint property, the share formed by amalgamating the shares of both the brothers. The agreement, however, was that these widows would get their maintenance out of the 12-annas share of Nena Ojha and his sons. On partition, after the death of Nena Ojha and Prabhudat Ojha, among their respective sons, the division of the property would not be according to the shares they would have in a joint Mitakshara family, but would be according to the share which their respective fathers had in the property before the re-union. Now, the re-union was by a written agreement and hence the rights of the parties will be determined in accordance with the terms thereof. In the case of *Raja Setrucherla Ramabhadra* v. *Raja Setrucherla Virabhadra Suryanarayana* (5) three members of a joint Hindu family agreed by a deed that their estate would remain joint and that the eldest of the three should manage the family estate for 12 years and after an account being rendered by him of the profit and loss a division among them should be made. Their lordship of the Privy Council held that in a suit for partition commenced by one of the brothers and carried on by his representatives, the eldest brother was liable on the footing of an ordinary agent accountable for receipts and expenditure, and that he was not in the position of the managing member of a joint family liable only to account as to the then existing state of the property. In other words according to their Lordships the effect of the agreement was not to give the eldest brother the status of a *karta* of the joint family but to render the eldest brother accountable for receipts and expenditure as if he was a mere agent. Their Lordships observed: "It is not a simple agreement to postpone the partition and so to leave the family status of the brothers untouched. They are put upon a new footing. The defendant has the management secured to him for an absolute term of 12 years and though, during that term the others would not be precluded from, demanding division, they could only do so on condition of giving up profits and bearing any loss occasioned by their premature withdrawal. Moreover, the division when it comes is to be effected after settling the profit and loss accruing to that date. That is hardly the language which would have been used if the parties had meant nothing except that they should divide the corpus of the estate as it stood at the end of the term whether it had increased or decreased.',

Therefore, I agree with the view urged by Mr. Mitter that there was no re-union in the sense that the two brothers, Nena Ojha and Prabhudat, became co-parceners of a joint Mitakshara family. Prabhudat wants partition of the properties and he is entitled to the share in the properties as mentioned in the *ekrarnama* whether he was a co-parcener or was only a tenant-in-common. That share is 4-annas of the family properties. That was his share at the time of separation in 1300

(5) 22 M. 470; 1 Bom. L. R. 388; 3 C. W. N. 533; 26 I. A. 167; 7 Sar. P. C. J. 510; 8 Ind. Dec. (N. S.) 337 (P. C.).

which his son, the sole surviving respondent now before us, is bound to take. He cannot, therefore, get more than 4-annas and his claim for 8-annas in the family properties as if he was a co-parcener with defendant No. 1 Nena Ojha, must, therefore, be dismissed.

The question then arises as to the properties in which he is entitled to have his share. Mr. Mitter says that he is entitled to get only 4-annas in the properties which were allotted to him at the separation in 1300, that is, the properties set forth at the beginning of the *ekrarnama*, namely, the entire properties lying in village Pota consisting of *kasht* land of 10 *bighas* held in *zar rehn brit bandobasti* measuring 2-*bighas* 10 *cottahs* and *Milkiyat* property comprising 15 *bighas* of land. Mr. Mitter says that he is entitled to his own acquisitions subsequent to the separation in 1300, but that he is not entitled to the properties which were held by Nena Ojha and his branch after partition and the properties which were acquired by that branch during separation and after reunion up to the date of the suit. So far as Nena is concerned, undoubtedly he agreed to give 4-annas share to the plaintiff in all the family properties and in all the properties which might have been acquired in his own name or in the name of any of his issues, the defendants Nos. 2 to 11 in the case. He is a party to the *ekrarnama* and is bound by the terms thereof. Mr. Mitter, however, says that the terms of the *ekrarnama* are not binding upon the descendants of Nena, the other defendants in the case, inasmuch as they were not parties to the *ekrarnama* and that Nena had no right to agree to give away shares in the properties which by separation were allotted to them and those which were subsequently acquired by that branch. Mr. Mitter says that the other defendants have been all along joint with Nena as members of a joint Mitakshara family and they had a vested interest therein which Nena had no right to destroy by the agreement in question or to transfer in any way. Now, the Court below has held, and its finding is supported by evidence, that all the properties which stand either in the name of Nena or his descendants, were acquired out of the income of the joint family and that they appertained to the joint family properties of Nena's branch. An attempt has been made in this case to show that some of the properties standing in the name of Kishore Ojha, Harnandan Ojha and Mahabir Ojha were acquired out of their *kosal* (self-acquired) properties alleged to have been carved out of the joint family properties and given by their father, defendant No. 1 the *karta*, of the family to his sons for their private and personal or pocket expenses. Further, it was attempted to show that Kishore and Harnandan had means of their own out of which they acquired properties in their own names without the help of the joint family properties. It is said that Kishore and Harnandan earned some money by service in Nepal and Bettia Raj respectively. There is some evidence to show that Kishore and Harnandan were out on service as alleged, but how long they were in service and what their pay was and what they actually earned has not been disclosed. At one place it is simply said that Harnandan used to get Rs. 40 to Rs. 65. It has also not been shown that any of the properties were acquired out of their income from service, nor that any of the properties standing in the names of these sons were acquired out of the *kosal* (self-acquired) properties, assuming that such properties could be treated as private and personal properties of these sons. Mr. Mitter admits that there is no such evidence connecting the acquisition with the separate income of the members of this family. The onus of proving the acquisitions by their self-exertion and out of their separate means was upon them and they failed to discharge that onus. Therefore, the finding of the Court below must be accepted that these properties standing in the names of the sons of Nena Ojha must be deemed to be the joint family properties of the branch of defendant No. 1 in which according to the terms of the *ekrarnama*, Prabhudat was declared to have 4-annas share.

The question then is whether the descendants of Nena Ojha are bound by the terms of the agreement executed by Nena to which they were not parties. They were members of a joint Mitakshara family and admittedly Nena was and is their *karta*. He had a

right to deal with the family properties and to enter into any agreement with respect thereto unless the act is impugned as not being for the benefit of the family or without consideration. It must be stated at the outset that no such case has been made out in the written statement nor in the evidence. It is not the case of the defendants that the agreement in question was tainted with fraud, undue influence, coercion, mistake or misunderstanding. On the other hand, the agreement has been set up by the defendants as a *bona fide* transaction. The agreement is a mutual one between Nena and Prabhudat. Nena by this agreement obtains for himself and his sons 12-annas in the properties acquired by Prabhudat, for in these properties also the agreement states that Prabhudat will have only 4-annas, whereas 16-annas belonged to him exclusively. Therefore, as a return for the 4-annas share given to Prabhudat in the acquisitions made by Nena and the members of his branch Nena Ojha has secured by this document 12-annas share in the properties acquired by Prabhudat. There was a consideration and a good consideration. It may be, but there is no evidence to show, that now Nena Ojha and his branch may not get an equal return and that the transaction has not turned out to be a good bargain. But these are not the considerations which will affect the terms of the agreement. There was, as observed above, a good consideration and on account of mutual benefit the parties came to the agreement as to how their acquisitions will be dealt with. Therefore, the document was executed for consideration for the benefit of the family. Nena Ojha as *karta* of the family had a right to enter into this agreement with respect to the properties, and his descendants, the defendants Nos. 2 to 11 in the case, are bound by that agreement. This agreement although executed with the full knowledge of defendant Mahabir and after discussion with him, as he admits in his evidence has not yet been challenged in any Court of Justice although five years had elapsed since the execution of the *ekrarnama* in 1914 when the plaintiff brought the present suit in 1919 and the right to have the deed set aside is barred by limitation.

It is then said that the *ekrarnama* was not acted upon. The defendant states that as his son did not agree, effect was not given to it. Defendant Mahabir says that when he came to know of the *ekrarnama* he objected to it, but as his father insisted on the execution of the document he left him to do whatever he liked. This implies that ultimately he tacitly consented to abide by what Nena would decide, that is, the terms of the *ekrarnama*, and Nena Ojha agreed to the terms thereof. Therefore, the defendant Mahabir also agreed to the said terms. The defendants want to abide by the *ekrarnama* so far as it contains admissions and statements in their favour, and to resile from the terms which give a share to the plaintiff in the acquired properties. This they cannot be permitted to do. In the circumstances, I accept the evidence that the parties acted upon the *ekrarnama* after its execution and became joint in the properties.

In the case of *Balkishen Das* v. *Ram Narain Sahu* (6) it was held that *ekrarnama* executed by the members of a joint family some of whom were minors, was binding on the minors. If it was unfair or prejudicial to their interests, it was for the minors on attaining majority to have it set aside so far as it concerned them. This upholds the principle that all the members of the family, minor or adult, are bound by the act of the manager or *karta* of the family unless they prove that the *karta* entered into transactions which were prejudicial to their interests and not for their benefit. This they have failed to establish in this case.

In the case of *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry* (7) it was held that a property acquired during the separation by a member of the family will be presumed, after the re-union, to have been acquired out of the funds of the joint estate and that re-united members will be entitled to a share in it.

(6) 30 C. 738; 30 I. A. 139; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489 (P. C.).

(7) 10 M. I. A. 403; 5 W. R. P. C. 11; 1 Suth. P. C. J. 609; 2 Sar. P. C. J. 164; 19 W. R. 1025 (P. C.).

As to the properties acquired after re-union, there is nothing to show that they were not acquired out of the joint properties belonging to the two brothers and the presumption will be that they were acquired with the income of such properties. Therefore, in those properties Prabhudat obviously has a right to claim his share as mentioned in the *ekrarnama*. I, therefore, hold that Prabhudat is entitled to 4-annas share in all the properties standing in the name of Nena himself or his descendants whether those properties were acquired before, during or after the separation and re-union, and that his share in those properties is 4-annas and that of Nena and his branch 12-annas. All these properties were thrown into a joint stock of the re-united members, that is Nena Ojha and Prabhudat Ohja and their sons.

The decree of the Court below must, therefore, be vacated and in lieu thereof a decree for partition should be made declaring the share of Biswanath to be 4-annas and that of Nena and his descendants 12-annas. The parties are not entitled to render any accounts to each other with respect to the dealings with the properties which they were in possession of after separation in 1300 (1893) up to the date of the *ekrarnama* of the 1st November 1914. The *ekrarnama* is silent upon the question of accounting, but as the properties were in joint possession of the parties they must render to each other accounts of the properties which were dealt with by them from 1914. The date of the *ekrarnama* up to the date of the possession being delivered in the course of partition proceedings. The partition will be effected by a Commissioner appointed by the Court below. The assests found after accounting will be divided in the proportion of 4-annas and 12-annas as stated above. The plaintiff had claimed 8-annas share in the properties, whereas he has got 4-annas only. This is a partition case and the costs ultimately will be determined after the final decree for partition will be made. The costs incurred by the parties in this litigation up to the date the possession is delivered according to the shares aforesaid, should be borne by the estate in the proportion of 4-annas payable by the plaintiff and 12-annas payable by the defendants, and the amount thus ascertained will be dealt with in the accounts that the Commissioner will be directed to take.

Ross, J.—I agree.

K. S. D. *Order accordingly.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 554 OF 1922.

February 17, 1923.

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

NAWAZ ALI AND OTHERS—DEFENDANTS—PETITIONERS

versus

ALLU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Decree modified on review—Application for leave to appeal to His Majesty in Council—Limitation, terminus a quo—*Subject-matter of suit land assessed to revenue—Value, how calculated.*

Where the High Court reviews and modifies a decree passed by itself the period of limitation for an application for leave to appeal to His Majesty in Council begins to run from the date of the decree passed in review.

Joykishen v. *Ataoor Rohoman*, 6 C. 22; 5 Ind. Jur. 522; 6 C. L. R. 575; 3 Shome L. R. 197; 3 Ind. Dec. (N. S.) 15 (P. C.) and *Vadilal* v. *Fulchand*, 30 B. 56; 7 Bom. L. R. 664, relied on.

In determining whether the value of land in dispute is Rs. 10,000 or upwards, for the purpose of section 110, Civil Procedure Code, the rules under the Suits Valuation Act in accordance with which land is valued for the purpose of jurisdiction in the Trial Court, do not apply. It is the market-value of the land which has to be ascertained for the purpose of that section.

Civil miscellaneous petition for leave to appeal to His Majesty's Privy Council against the decree and the judgment of the Lahore High Court, dated the 29th November 1921 and 19th May 1922.

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

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

ORDER.—This is an application for leave to appeal from a decree of this Court which reversed the decree of the Court of first instance. The decree of this Court was first passed on the 29th November

SALEH ABRAHAM v. MANEKJI COWASJI.

1921, but on an application for review it was modified on the 19th May 1922. It is clear that the period of limitation for the present application is to be reckoned from the latter date, on which a new decree was passed in substitution for the first one and *Joykishen* v. *Ataoor Rohoman* (1) and *Vadilal* v. *Fulchand* (2) are authorities in support of this view. The rulings to which Counsel for the respondents has referred us are not in point. We hold, therefore, that the application which was made on the 8th August 1922, is within time.

It remains to determine whether the value of the land in dispute is Rs. 10,000 or upwards. The rules under the Suits Valuation Act, in accordance with which the land was valued for the purposes of jurisdiction in the lower Court, do not apply in determining the value for the purpose of section 110 of the Civil Procedure Code, but it is the market-value which has to be ascertained.

We accordingly direct the Subordinate Judge to make inquiry and report to this Court whether the value of the land in dispute is Rs. 10,000 or upwards.

M. D. J. *Order accordingly.*

(1) 6 C. 22; 5 Ind. Jur. 522; 6 C. L. R. 575; 3 Shome L. R. 197; 3 Ind. Dec. (N. S.) 15 (P. C.).
(2) 30 B. 56; 7 Bom. L. R. 664.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL, NO. 67 OF 1922, IN SUIT NO. 2234 OF 1921.

January 31, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.,

SALEH ABRAHAM—PLAINTIFF—APPELLANT

versus

MANEKJI COWASJI—DEFENDANT—RESPONDENT.

Calcutta Rent Act (III of 1920), ss. 4, 11—Statutory tenant—Agreement to pay more than the standard rent—Lease in terms of agreement—Object of lease, legality of—Lease, whether enforceable—Contract Act (IX of 1872), s. 23.

Where the immediate object of a lease is to secure a rate of rent in excess of that allowed by the Calcutta Rent Act, thus tending to defeat the provisions of the Act, which disables a landlord from recovering more than the standard rent, the object is unlawful, and consequently the lease is void and cannot be enforced. [p. 526, col. 2.]

Appeal from the judgment of Mr. Justice Greaves.

Mr. *F. R. Surita*, for the Appellant.

Mr. *S. N. Banerjea* (with him Mr. *B. N. Ghose*), for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiff from the judgment of my learned brother Mr. Justice Greaves.

The learned Judge dismissed the suit.

The suit was to recover vacant possession of the upper flat in No. 11, Bow Street, in the town of Calcutta, for mesne profits and for costs.

The defence set out several allegations on which the defendant relied. The one which is material for the purposes of my judgment in effect was, that the defendant was a tenant from May 1917 of the upper flat, that the standard rent had been fixed by the Controller of Rents, Calcutta, on the 30th of May 1921; that the defendant was continuing as tenant of the flat at the rent fixed by the Controller of Rents; that the defendant denied that the plaintiff required the premises for his own use and occupation as the residence of himself or his family; that he had paid rent regularly and was entitled to continue in occupation as such tenant. The standard rent referred to in the defence has been fixed at the sum of Rs. 85 per month.

The facts may be taken from the learned Judge's judgment as follows:—"The property belonged to Mr. Emmanuel Jacob Cohen who was still the owner of the premises; the defendant was a tenant under him paying, prior to this suit, a sum of about Rs. 65 a month. Mr. Cohen negotiated with the defendant for renewal of

his tenancy which had expired, at a higher rent and Mr. Cohen stated that the rent of the ground floor flat was Rs. 100, that the rent of the middle flat was Rs. 150, and that he was entitled to ask, as he did, Rs. 100 for the rent of the flat in suit. The defendant demurred to paying Mr. Cohen the sum which he asked although it appeared that he was willing to pay as much as Rs. 104if a godown were included where in he could garage his motor car. However, the negotiations broke down and Mr. Cohen leased or purported to lease this upper flat to the present plaintiff at Rs. 100 a month, and this suit was brought by the plaintiff who claimed to be the landlord within the definition in the Rent Act to recover possession of the upper flat."

The learned Judge proceeded to say: "I should say that the plaintiff at present lives in No. 4, Harin Bari Lane, where he has premises as convenient and commodious as the flat in suit but he states that he is desirous to move to the premises in suit because he says he has young daughters and that there is a brothel in the near neighbourhood of the premises No. 4, Harin Bari Lane, and that it is undesirable that his daughters should remain in close proximity to the brothel. No question arises as to the payment of rent, for it is admitted that rent has been deposited at the standard rent of Rs. 85 with the Rent Controller."

The learned Judge dismissed the suit, holding that the lease which was executed by Mr. Cohen was really against the spirit of the Rent Act, and upon that the learned Judge based his decision.

There is no doubt, in my mind, that the execution of the lease was against the spirit of the Rent Act. But, with due respect to the learned Judge, I do not think that the conclusion, as stated by the learned Judge, provides a sufficient basis for the judgment. It must be shown that the lease defeated the intention which the Legislature expressed in the Rent Act or which is necessarily implied from the express terms of the Act.

The lease was executed on the 26th of October 1920, and the term was two years from the 29th of October 1920. It appears, therefore, that the term has expired by this time; and in any event, in my judgment, it would not be right for this Court now to make a decree for vacant possession in favour of the plaintiff. The rights of the parties, however, must be considered as they existed at the date of the suit inasmuch as, at any rate, the question of mesne profits and costs would depend upon the result of our decision in that respect. The rights of the parties, therefore, have to be determined by this Court.

Several points were urged in the course of the arguments by the one party and the other. In my judgment, it is not necessary to deal with them all as, in my opinion, the appeal may be disposed of on one ground.

It was said in the first place that the plaintiff was a "landlord" as defined by section 2, clause (*c*), of the Calcutta Rent Act, 1920, and reliance was placed upon the words "any person for the time being entitled to receive rent in respect of any premises, whether on his own account, or on account, or on behalf, or for the benefit of any other person" and upon the words "every person from time to time deriving title under a landlord." Having regard to the facts of this case, I consider that to be an arguable point, and I desire to make it clear that I do not decide it in this appeal. I assume, however, for the purpose of my judgment, that the plaintiff may be considered as a "landlord" within the meaning of section 2, clause (*c*), of the Rent Act.

In the next place, it was contended on behalf of the plaintiff that he came within the proviso to section 11 (1), and that the premises were *bona fide* required by the plaintiff, the landlord, for his own occupation.

The learned Judge on this point found that the plaintiff genuinely "desired" in the circumstances to move from No. 4, Harin Bari Lane, and to occupy the upper flat of No. 11, Bow Street. But, as I have pointed out, he came to the further conclusion that the premises in which the plaintiff was living in No. 4, Harin Bari Lane, were as convenient and as commodious as the premises which are the subject-matter of this suit.

In the case of *Rekhab Chand Doogar* v. *D'Cruz* (1), my learned brother Mr.

(1) 69 Ind. Cas. 963; 26 C. W. N. 499; (1923) A. I. R. (C.) 223.

Justice Buckland, in his judgment at page 502* held as follows: "I do not think it is enough that a plaintiff in order to defeat a plea under the Calcutta Rent Act should merely say that he desires the premises *bona fide* for his own occupation. The word in the Act is not 'desire' but 'require.' This, in my opinion, involves something more than a mere wish and it involves an element of need, to some extent at least." In my judgment, it is not necessary for this Court in this case to decide that question, and I desire to make it clear that I do not decide it. I assume, however, for the purpose of my judgment, that the plaintiff on the facts of this case may be said to have *bona fide* required the premises for his own occupation.

I am, however, in agreement with the learned Judge's finding at page 43 of the Paper Book, which runs as follows:—"I am bound to hold that Mr. Cohen's object in leasing the premises as he did to the plaintiff was to avoid the provisions of the Rent Act and that, inasmuch as he could not obtain possession himself of the flat, he put some other person in a position in which he thought that person would be able to get possession of the premises and pay him the higher rent which he was unable in the circumstances to extract from the defendant."

The plaintiff also, in my judgment, must have known that the result of his taking the lease from Mr. Cohen would be to eject the defendant from the premises, if effect could be given to his lease. He must have known, further, that the rent which he agreed to pay was in excess of that which Mr. Cohen could lawfully demand from the defendant by reason of the provisions of the Rent Act. The question is whether, under these circumstances, the lease granted by Mr. Cohen to the plaintiff could be enforced.

The object of the Rent Act, as stated in the preamble, was to restrict temporarily the increase of rents in Calcutta. The Act provided for the fixing of a standard rent. In this case it was fixed at Rs. 85 which the defendant was all along willing to pay and which in fact he deposited with the Controller of Rents under the Act.

*Page of 26 C. W. N.—[Ed.

Section 4 (1) of the Act provides, "Subject to the provisions of this Act, where the rent of any premises has been or is hereafter, during the continuance of this Act, increased so as to exceed the standard rent, the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable." So that, having regard to the provisions of that section, Mr. Cohen could not recover from the defendant, his tenant, a rent in excess of the standard rent, Rs. 85. Nor could he obtain a decree for recovery of possession of the premises against the defendant so long as the defendant paid the rent to the full extent allowable by the Act, and performed the conditions of the tenancy: for he, Mr. Cohen, was not able to bring himself within any of the conditions contained in the proviso to section 11 (1) of the Act. Section 11 (1) provides: "Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or in the Indian Contract Act, 1872, no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays rent to the full extent allowable by this Act, and performs the conditions of the tenancy." That section is applicable to the case of Mr. Cohen and the defendant, inasmuch as, Mr. Cohen was not able to bring himself within any of the provisions of the proviso to section 11 (1).

I have no doubt that the object of the parties to the lease was to defeat the provisions of the Rent Act. Mr. Cohen wanted a rent higher than that which he could obtain from the defendant by reason of the Rent Act. He could not obtain possession of the premises himself. So he granted the lease to the plaintiff who, it was thought, might be able to obtain possession of the premises, inasmuch as he wanted to occupy them and who would pay Mr. Cohen the higher rent. The plaintiff was a party to this arrangement and was willing to pay a rent higher than that which could be lawfully recovered by Mr. Cohen, by reason of the Rent Act.

Section 10 of the Contract Act provides: "All agreements are contracts if they

are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

Section 23 deals with the questions of *consideration* and *object* and runs as follows: "The consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

"In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." In my judgment, the object of the lease was of such a nature that, if permitted, it would defeat the provisions of the Rent Act; and, consequently, the object was unlawful.

The result is, that the object being unlawful, the lease was void,

In my judgment, therefore, this appeal must be dismissed with costs.

Richardson, J.—This appeal raises a question under the Calcutta Rent Act (Bengal Act III of 1920) which was passed, as the preamble states, with the object of restricting temporarily the increase of rents in Calcutta. The Act came into force on the 5th May 1920, with a life limited to a period of three years from that date (section 1, clause (4)).

The respondent, Manekji Cowasji, the defendant in the suit, was a tenant of the upper flat No. 11, Bow Street, at a rent of Rs. 65 a month, under the owner of the premises, Emmanuel Jacob Cohen. The defendant tendered no evidence at the trial and I will assume in favour of Saleh Abraham, the plaintiff-appellant, that when the Rent Act came into force the defendant was holding as a monthly tenant under Cohen as landlord. The position then was that, while the Act remained in force, the defendant was the statutory tenant of the flat liable to pay the standard rent defined in section 2, clause (*j*). So long as he paid such rent he was protected from eviction at Cohen's hands otherwise than under the proviso to section 11, sub-section (1). Cohen, however, treated the Act with scant respect. He tried, without reference to the standard rent, to increase the rent to Rs. 100 a month. The defendant appointed out that that was an increase of more than 50 per cent. Probably in view of proviso (1) to section 15 (3) (*e*) he offered to pay a 25 per cent increase. The offer was not accepted On the 11th June 1920 Cohen wrote to the defendant refusing the defendant's tender of rent at the old rate and suggesting that the defendant should move the Rent Controller to fix the standard rent. As to that it must be observed that, if Cohen was anxious to keep within the Act, he was himself free to move the Rent Controller. In August Cohen gave the defendant notice to quit by the end of September on the ground suggested by section 11, clause (5), that he had not paid within three months of the 5th May all arrears of rent due from him. The defendant replied that he had deposited the rent for May and June with the Controller. In October the defendant offered a rent of Rs. 104 a month for the flat and in addition a godown which he wanted for use as a motor garage. Nothing came of the offer and in this state of things, the defendant, not having submitted to his terms, Cohen took the following step. By an indenture, dated the 26th October 1920, he granted to the plaintiff a lease of the flat for a term of two years from the 29th October 1920, at a monthly rent of Rs. 100 for the first year and Rs. 110 for the second year, Cohen gave the defendant notice of the lease, requested him to attorn to the plaintiff as landlord till the end of October and thereafter, in pursuance of a notice to quit, already served upon him, to give vacant possession to the plaintiff. The defendant replied claiming the protection of the Rent Act and refusing to vacate. Subsequently, however, as it appears, he did attorn to the plaintiff to the extent of depositing with the Controller rent at the old rate for payment to the plaintiff and of applying to the Controller to fix the standard rent as between the plaintiff and himself. The application was made in March 1921, and by an order, dated the 30th May 1921, the Controller fixed the standard rent at Rs. 85;

The Controller held, no doubt, under proviso (1) to section 15 (3) (*e*) that the fair rent in November 1918 was Rs. 75 to which he added 10 per cent. *plus* Rs. 3 for the wages of a coolie to pump water.

The plaintiff had in vain given the defendant more than one notice to quit before this order was made. After the order on the 31st May the plaintiff's Solicitors wrote to the defendant giving him a fresh notice to quit by the end of June 1921. It was asserted that the plaintiff required the premises for his own occupation [proviso to sub-section (1), section 11], This notice was as ineffectual as the others, and in July 1921, the plaintiff filed his suit, claiming vacant possession of the flat and mesne profits at the rate of Rs. 100 per mensem from the 1st July till the flat was vacated. The suit was dismissed by Greaves, J., by a judgment, dated the 25th April 1922, and the plaintiff filed this appeal on the 16th May 1922.

The plaintiff's lease ran out in October 1922, before the appeal came on for hearing. It is suggested, but not proved, that the plaintiff has obtained an extension of the lease from Cohen and it is further said that the duration of the Rent Act may be extended. But in any case a decision of the appeal on the merits is necessary with reference to the claim for mesne profits and the costs of the litigation.

In my opinion the only substantial question which arises is whether or not the lease is void on the ground of illegality. This is the first of the issues framed at the trial. "Is the lease void?" As to the other questions which have been discussed, no final opinion need be expressed.

In the first place, on the question whether the plaintiff was the defendant's landlord within the meaning of the Rent Act, the argument on his behalf proceeded as follows:—On the facts and in view of the terms of the lease, a formal instrument in writing, it was argued that Cohen intended that the lease should operate as an assignment—though a temporary assignment—of the reversion on the termination of the defendant's monthly tenancy. In India, it was said, such an assignment would be good and valid under the general provisions contained in sections 6, 7 and 8 of the Transfer of Property Act and the particular provisions of sections 109. Under those provisions the assignment would entitle the assignee or transferee during the continuance of his interest to the rent payable by the previous lessee. It was unnecessary to consider the doctrine of English Law on the subject of concurrent leases or the bearing on that doctrine of the Statute of Anne which is referred to in Platt on Leases (Vol. II, p. 57) and in such cases as *Wordsley Brewery Co.* v. *Halford* (2), and *Horn* v. *Beard* (3). It was the more unnecessary to discuss such topics because in the present case, there was, apart from the Transfer of Property Act, a sufficient attornment by the defendant to make him the plaintiff's tenant. Therefore, the plaintiff became entitled either under the Transfer of Property Act, or by reason of the defendant attorning, to receive the rent payable by him, and, if so, the plaintiff became the defendant's landlord both under the ordinary law and as the term is defined in section 2, clause (*c*) of the Rent Act. It followed that the plaintiff became entitled to exercise the rights of a landlord under the Rent Act, including the right to evict the tenant on any ground sanctioned by section 11. If Cohen had transferred the premises absolutely to the plaintiff no one would have doubted that he had this right and the fact that the transfer was a partial transfer was immaterial.

If it were necessary to decide the question, I should be disposed to accept this argument. The Act interferes with some of the rights of landlords, but it does not expressly restrict their right to transfer their property, wholly or partially, and it cannot be extended on considerations of mere policy. I do not mean that the object and scope of the Act may not be taken into account in construing any of its provisions, which is capable of more than one construction. But the Act was passed to meet an emergency, and in hasty and improvised legislation of this kind

(2) (1904) 90 L. T. 89.
(3) (1912) 3 K. B. 181; 81 L. J. K. B. 935 107 L. T. 87.

there may be loopholes and there may be omitted cases. It is not the duty of the Courts to add to, or subtract from, the fair sense of the language of the Act. When a landlord transfers his rights, wholly or partially, the Act must be applied, as it stands, to the new rights and the new relations thus created.

There is, next, the suggestion that the plaintiff did not *bona fide* require the flat for his own occupation within the meaning of section 11 of the Act. It is true that at all material times the plaintiff was and he still is in occupation of premises in Harin Bari Lane which admittedly are as convenient and commodious for himself and his family as the flat in suit. But, he says, near those premises is a brothel and it is not desirable for his daughters, one of whom, we are told, is of marriageable age, to live close to a brothel. The learned Judge held on the evidence that the plaintiff genuinely desired to move from Harin Bari Lane to the flat. We were referred to the observations of Buckland, J., in *Rekhab Chand Dougar* v. *D'Cruz* (1). In that case also a landlord already in occupation of a house purported to require the house of a tenant. The learned Judge said: "The word in the Act is not 'desire' but require.' This, in my opinion, involves something more than a mere wish and it involves an element of need, to some extent at least." I agree that a landlord is not acting *bona fide* under the Act, unless he reasonably requires the house for his own occupation. Much, therefore, must depend on the facts of the particular case. The present case differs from the case which came before the learned Judge, and if the plaintiff here were in a position to require the flat I should be disposed to hold that he reasonably or *bona fide* required it for his own occupation.

It is, however, unnecessary to decide either of these questions, the defendant being, in my opinion, entitled to succeed on the issue as to the legality of the transaction on which the plaintiff founds.

Under clause (*h*) of section 6 of the Transfer of Property Act, "no transfer can be made . . . . . for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872." By section 23 of the Contract Act, the consideration or object of an agreement is said to be unlawful, among other cases, when "it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law," and "every agreement of which the object or consideration is unlawful, is void."

Cohen's immediate object was clearly to secure a higher rent than the Act allowed. That this object was illegal is, I think, shown not only by the preamble or by section 4 which makes any excess above the standard rent irrecoverable, but also by section 19 which makes it an offence on the part of a landlord if he "knowingly receives whether directly or indirectly on account of the rent of any premises any sum in excess of the standard rent." There can, I think, be little doubt that the plaintiff was a party to or connived at this illegality. He was apparently aware that the defendant was in possession of the flat as Cohen's tenant, because his first notice to quit was given on the 30th October 1920. He accepted the lease, nevertheless, without stopping to enquire whether the rent which he agreed to pay was or was not in excess of the standard rent.

In any case, the transfer is unlawful because the consideration which Cohen demanded and accepted and which the plaintiff agreed to give for the grant of the lease was a rent in excess of that allowed by the Rent Act. If it be said that the consideration was not unlawful at date of the lease because the Controller had not then determined the standard rent, both Cohen and the plaintiff took the risk of the rent turning out to be more than the standard rent. The lease, if not unlawful in its inception, became unlawful and void when the Controller fixed the standard rent at Rs. 85 a month. Then, if not before, it became unlawful for Cohen to receive or the plaintiff to pay the rent reserved. The agreement was inconsistent with the express policy of the Act and tended to defeat its provisions, which disable a landlord from recovering more than the standard rent. The plaintiff, therefore, acquired no rights thereunder which he could enforce against the defendant.

The defendant, it is true, was quite willing to pay the standard rent either to Cohen or the plaintiff. He merely treated the plaintiff as standing in Cohen's shoes—his attornment does not validate the lease and it is in virtue of the lease that the plaintiff seeks to evict him.

It was said that, even under the lease, Cohen could not lawfully recover from the plaintiff more than the standard rent, but the remark does not meet the objection that either the object or the consideration of the agreement or both were unlawful. In the language of the Contract Act, if the agreement were permitted, it would defeat the provisions of the Rent Act.

I agree with my Lord that the appeal should be dismissed.

W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 66 OF 1920.

July 11, 1922,

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

JAINI LAL—PLAINTIFF—APPELLANT

versus

FIRM MESSRS. DURGA PRASAD-DAU DAYAL—DEFENDANTS—RESPONDENTS.

Appeal—Objection to costs taken for first time, whether entertainable.

An objection to an award of costs against a party cannot be entertained if taken in appeal for the first time. Such an objection should be taken in the lower Court at the time when either the judgment is delivered or the decree published.

First appeal against a decree of the Subordinate Judge, Agra, dated the 11th Decebmber 1919.

Messrs *M. L. Agarwala* and *P. L. Banerji*, for the Appellant,

Messrs. *B. E. O'Coner*, *G. W. Dillon* and *N. P. Asthana*, for the Respondents.

JUDGMENT.—For the reasons stated in our judgment in First Appeal No. 28 of 1920, this appeal is dismissed. We ought, however, to take notice of one matter not discussed in that judgment. The appellant has taken the objection that the fees awarded to defendant No. 2 in the lower Court were not certified by the Pleader, nor were they certified by an affidavit of the defendant filed in accordance with Chapter XXI, rule 1 of the General Rules for Civil Courts subordinate to the High Court. Looking at the matter very technically and narrowly, it does appear that there is no certificate by the Pleader and there is no affidavit by the defendant, but there is an affidavit by the Solicitors duly instructed by the defendant which sets out, what we have no doubt is the truth, that certain sums of money were duly paid by the Solicitors to the gentlemen named in the affidavit for and on behalf of the defendant. Therefore, in substance, though not in strict form, there is the certainty at which Chapter XXI, rule 1 was aiming, namely, that the Court should be satisfied that fees were paid. If the matter had rested merely there, we are of opinion, that Dr. Agarwala's point, technical though it is, would have to be allowed; but a reference to the judgment shows that the concluding words of it were "the defendants will get their costs from the plaintiff." That was a perfectly clear intimation to the plaintiff and to the plaintiff's advisors that they would be called upon to pay the costs in the Court below incurred by the Titaghur Paper Mills. They did not raise any objection to that order at any time in the Subordinate Court, The first objection taken has been made in the Memorandum of Appeal filed in this Court. We are of opinion that these objections ought to be taken in the lower Court and should be taken at the time when either the judgment is delivered or the decree published so that the lower Court may consider whether there are circumstances which would justify it in allowing costs even though the rules have not been strictly complied with. In the lower Court all those matters are ascertainable and we consider it bad practice to allow the appellant who has taken no objection to an award of costs against him in the lower Court, to come up here in appeal and argue that which he should have put before the learned Subordinate Judge making the order. For these reasons we overrule this objection. There will be no order as to costs except that the appellant do pay the costs of the Titaghur Papers Mill in this Court including fees on the higher

scale. As the Titaghur Paper Mills stood in one event to bear the whole of the liability of Rs. 25,000, their costs should be taxed upon that scale.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 381 OF 1920.

February 22, 1923.

Present:—Mr. Justice LeRossignol and Mr. Justice Martineau.

JAIMAL AND OTHERS — PLAINTIFFS—APPELLANTS

versus

GANESHI MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit for recovery of possession from mortgagees—Subsequent suit for redemption, whether barred—Cause of action.

Where a suit against mortgagees for possession on the ground that the mortgagees were trespassers and the mortgage was not binding on the plaintiff by reason of absence of consideration and legal necessity is dismissed, a subsequent suit to redeem the property mortgaged is not barred by O. , r. 2, Civil Procedure ode, as the cause of action in the two suits is different.

Dhanpat Mal v. *Jhaggar Singh*, 93 P. R. 1908 (F. B.); 164 P. L. R. 1908; 133 P. W. R. 1908, referred to.

Barkhurdar v. *Chhatta Mal*, 48 Ind. Cas. 798; 119 P. R. 1918, distinguished.

Second appeal from a decree of the District Judge, Ludhiana, dated the 9th December 1919, affirming that of the Junior Subordinate Judge, Ludhiana, dated the 30th May 1919.

Mr. *Jagan Nath*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The plaintiffs in this case prayed to redeem the land in suit which had been mortgaged by their father for Rs. 1,525 in the year 1897 and 1898. The Courts below have dismissed the suit on the ground that it is barred by O. II, r. 2 of the Civil Procedure Code, inasmuch as in 1904 the appellants brought a suit against the mortgagees for possession on the ground that they were trespassers and that the mortgage by their father was not binding upon them by reason of absence of consideration and legal necessity.

In our opinion this appeal must succeed. O. II, r. 2 of the Code, provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs but shall not afterwards sue for any relief omitted, and the first question for consideration is whether the cause of action in both suits is the same. It was laid down in *Dhanpat Mal* v. *Jhaggar Singh* (1) that where mortgagors have obtained a decree for redemption and have failed to excute it, another suit to redeem will lie for the reason that the cause of action is not the same. The allegation against the present appellants is that in 1904, they did not ask to redeem, and may, therefore, not do so now. They are thus placed in a worse position than if they had secured a decree for redemption in 1904 and failed to execute it. But we are quite clear that the cause of action now is not the same cause of action as in 1904. In 1904 the cause of action was a mortgage to which the plaintiffs objected *ab initio*. They were attempting to avoid it and had they prayed for redemption they would have *ipso facto* admitted their liability to redeem the mortgage; in other words, such a prayer would have cut at the roots of their claim. On the cause of action recited in the 1904 case no redemption was possible. The cause of action in the present suit is the mortgage now admitted as binding on the plaintiffs *plus* a refusal of the mortgagees to accept redemption on the terms offered by the plaintiffs, *Barkhurdar* v. *Chhatta Mal* (2) is cited by the learned District Judge as being on all fours with the present case, a proposition which we cannot admit. This case is very easily distinguishable so that it is not necessary for us to express any opinion whether we are prepared to follow the decision above cited

In short, our finding is that the present cause of action and that of 1904 are quite different, and we accept the appeal and remand the case to the First Court for decision on the merits. Costs to be costs in the cause.

W. C. A. *Appeal accepted.*

(1) 93 P. R. 1908 (F. B.); 164 P. L. R. 1908; 133 P. W. R. 1908.

(2) 48 Ind. Cas. 798; 119 P. R. 1918.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 38 OF 1922.

May 9, 1922.

Present:—Justice Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

PARUL BALA DEBI—COMPLAINANT

versus

SATISH CHANDRA BHATTACHARJEE—DEFENDANT.

Criminal Procedure Code (Act V of 1898), s. 488 (5)—Maintenance, order for—Subsequent temporary stay of wife with husband, effect of.

The return of a wife to her husband temporarily after obtaining an order for maintenance may have the effect of suspending the operation of the order, it has not the effect of cancelling the order in the way in which it can be cancelled under section 488 (5) of the Code of Criminal Procedure. [p. 530, col. 1.]

Criminal Reference, under section 438 of the Criminal Procedure Code, made by the Sessions Judge of Burdwan.

Babus *Dasarathi Sanyal, Manmatha Nath Mukerjee* and *Panna Lal Chatterjee*, for the Complainant.

Babus *Amarendra Nath Bose* and *Lalit Mohan Sanyal*, for the Defendant.

JUDGMENT.—This is a Reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Burdwan. It relates to proceedings under section 488 of the Code of Criminal Procedure instituted by one Parul Bala Debi against her husband, Satish Chandra Bhattacharjee. It appears that there were some proceedings of this nature which were infructuous and were struck off by the Sub-Divisional Magistrate on the 2nd April 1915; but the lady after that made another application on the 8th July 1915 which resulted in the Sub-Divisional Magistrate's making, on the 14th September 1915, an order in her favour directing the husband to pay her maintenance at the rate of Rs. 10 per month. The husband, it appears, is employed by the East Indian Railway Company. He was, at the time when the proceedings were instituted, in receipt of a monthly salary of Rs. 45 which has now risen to Rs. 76 a month. The lady was at the time residing elsewhere, but towards the end of the year 1918, she returned to her husband and lived with him for a few months. While she was staying with him, a petition was filed in the Court of the Magistrate on the 24th January 1918 in which the lady purports to relinquish her claim for maintenance. The order made upon this petition by the Magistrate was that it should be filed with the record. It further appears that the lady left her husband soon after this, and on the 24th March 1919, she made a further application to the Magistrate for the payment of arrears of maintenance for one year. On the 12th April 1919, both parties put in a petition in which they agreed that the present petitioner should pay his wife Rs. 10 a month as long as she remained at the house of the petitioner's father. The petition ends thus: "We beg to ask the Hon'ble Court to pass a decree according to the above-mentioned term for Rs. 10 a month for maintenance." On this petition also the order of the Court was that it should be filed. Then, again, on the 7th January 1921, the lady made a further application to the Magistrate for payment of arrears of maintenance to the amount of Rs. 346 and on the 8th February 1921 an order under section 438 of the Code was made for the levy of the sum. Thereupon the Sessions Judge of Burdwan was invited by the present petitioner to make a reference to this Court with the result that this Court remanded the case to the Sub-Deputy Magistrate with certain directions, namely, that proper enquiries should be made on the four points set out, and that the case should be disposed of on that footing. The four points were, first, whether by the return of the wife to the husband's house towards the close of the year 1918, the order of the 14th September 1915, became inoperative; secondly, whether by reason of the arrangement made in the beginning of the year 1919, the order of the 14th September 1915 was superseded; thirdly, whether if the order of the 14th September 1915 is still in force, it should now be cancelled under the provisions of section 488, sub-section (5); and, fourthly, what amount is due to the wife if the order of the 14th September 1915 is not inoperative and has not been superseded or cancelled.

On receipt of these directions the Sub-

PARUL BALA DEBI v. SATISH CHANDRA BHATTACHARJEE.

Deputy Magistrate proceeded to take evidence and arrived at a finding, on the 17th August 1921, to the effect that a sum of Rs. 346-13 was due by the husband to the wife. Thereupon the present petitioner again moved the Sessions Judge of Burdwan to make a reference to this Court. The learned Sessions Judge, before otherwise dealing with the matter, remanded the case to the Sub-Deputy Magistrate in order that he might come to more explicit findings on the four points set out in the judgment of this Court. The Sub-Deputy Magistrate recorded such findings on the 20th December, but their effect was not to modify in any way the order which he had already made. Thereupon the Sessions Judge of Burdwan has referred the whole case to us with the recommendation that the order of the Sub-Deputy Magistrate should be set aside.

The matter for decision in this reference is, it appears to me, whether the decisions of the Magistrate on the four points are or are not correct. As regards the first point, namely, whether the order of the 14th September 1915, became inoperative by reason of the woman's having returned to live with her husband towards the end of the year 1918, it appears to me that the view taken by the Sub-Deputy Magistrate is correct. A mere temporary stay of this kind, though it may have suspended the operation of the order, had not the effect of cancelling it in the way in which it could be cancelled under section 488 (5) of the Code. Moreover, the Magistrate found that the petition to which I have referred and which was filed by the lady on the 24th January 1919, was obtained by fraud. It is obvious that such a petition could not have the effect of cancelling the order dated the 14th September 1918.

The second point is of greater importance, namely, whether by reason of agreement made in the beginning of the year 1919, the order of the 14th September 1915, was superseded. It appears to me that when the petition of compromise was filed in the Court of the Sub-Deputy Magistrate, the parties had the intention of effecting a complete settlement of all questions outstanding between them, and it further seems to me that if there had been any intention of excluding the arrears of maintenance from the operation of the petition of compromise this would have been expressly mentioned therein. In my view, the decision of the learned Magistrate on the second point is correct and the intention of the parties, when they filed their petition, was, that the lady should abandon her claim to any arrears of maintenance which may have accrued due up to that date.

I think that the Sub-Deputy Magistrate has rightly decided the third point. It has been urged that the petitioner had not proper opportunity to place his case before the Court. But I am satisfied that he wilfully abstained from appearing when he had notice of the proceedings, and that this is not a just ground for disturbing the Magistrate's finding. It is certainly not proved that Parul Bala has been guilty of any irregular conduct and, having regard to the treatment she has had in the past, she has ample reason, as things at present are, for refusing to live in her husband's house. There is no ground, therefore, for cancellation under section 488 (5) of the order of the 14th September 1915.

In this view of the case, it becomes unnecessary for this Court, to consider the fourth point which was referred to the Magistrate.

In the result, the reference of the learned Sessions Judge should be accepted only so far as it relates to the arrears of maintenance anterior to the 12th April 1919; as regards the arrears of maintenance subsequent to that date, the order of the learned Sub-Deputy Magistrate should be affirmed. It will be necessary in this view to return the case to the Sub-Deputy Magistrate in order that he may calculate, on this footing, the amount of arrears of maintenance due by the petitioner to his wife.

The order of the Sub-Deputy Magistrate as regards costs, will stand. We make no further order as to costs.

W. C. A. *Reference partly accepted.*

PATNA HIGH COURT.

CRIMINAL REVISION NO. 452 OF 1923.

August 13, 1923.

Present:—Mr. Justice Kulwant Sahay.

AKAL MAHTON AND OTHERS—PETITIONERS

versus

MAHABIR MAHTO—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145, applicability of—Magistrate, duty of—Jurisdiction—Revision direct to High Court, maintainability of—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107.

Section 144 of the Criminal Procedure Code is applicable only to temporary orders in urgent cases of nuisance or apprehended danger; its provisions do not apply to cases where there is a dispute as to land for the settlement of which section 145 provides the proper remedy. [p. 533, col. 1.]

Lachmin Ran v. *Diiru Dusadh*, 48 Ind. Cas. 342; 19 Cr. L. J. 1002, followed.

In a proceeding under section 144 of the Criminal Procedure Code the Magistrate, without taking any evidence and without considering the documents produced or which might have been produced by the parties, found in favour of the second party and made an order absolute as regards possession. On revision:

Held, that the order was without jurisdiction, and could not be sustained, inasmuch as action under section 144 of the Code of Criminal Procedure, can only be taken after the Magistrate is satisfied that immediate prevention or speedy remedy is necessary and when he is so satisfied that it is so, he must state the material facts in the order. [p. 532, col. 2.]

Karoolal Sajwal v. *Shyam Lal*, 32 C. 935; 9 C. W. N. 864; 1 C. L. J. 216; 2 Cr. L. J. 215, followed.

Where an order made by a Magistrate is outside the scope of cl. (1) of section 144 of the Criminal Procedure Code it cannot be treated as an order made under that section, but is an unauthorised order made without jurisdiction and the High Court can, in exercise of its power of superintendence under section 107 of the Government of India Act, set it aside, even though no application was in the first instance made to the District Magistrate as required by sub-section (4) of section 144 of the Criminal Procedure Code. [p. 533, col. 2.]

Sheobalak Singh v. *Kamaruddin Mandal*, 68 Ind. Cas. 149; 2 Pat. 94; 3 P. L. T. 573; (1922) Pat. 241; 4 U. P. L. R. (Pat.) 57; 23 Cr. L. J. 549; (1922) A. I. R. (Pat.) 435; 1 P. L. R. 2 Cr. (F. B.), referred to.

Appeal from an order of the Sub-Divisional Magistrate of Dinapore, dated the 13th July 1923.

Mr. *Bhagwan Prashad*, for the Petitioners.

Mr. S. *Dayal*, for the Opposite Party.

JUDGMENT.—The petitioners were the first party in a proceeding under section 144 of the Code of Criminal Procedure.

The facts set out in the application for revision filed in this Court are shortly these. One Lachman Lohar and Sahdeo Lohar had a holding of one acre, thirteen decimals. On the 14th April 1920 these two persons sold their holding to Doma Gope and Ramkeshwar who purchased the holding half and half and it is alleged that they paid off an incumbrance upon this property created by their vendors. On the 3rd June 1920, Doma sold his half share to Akal Mahto who is the petitioner No. 1 in this case. It is alleged that the mortgage-bond paid off by Doma and Ramkeshwar was handed over to Akal and the original deed dated the 14th April 1920, remained with Ramkeshwar. Ramkeshwar is alleged to have lost the original deed and on the 18th May 1922, he lodged an information before the Police stating the fact of the loss and asking the Police to enquire into the matter. On the 14th December 1922, Ramkeshwar sold his half share in the holding to two persons, Bhusa Mahto and Bhadai Saha, who are the petitioners Nos. 2 and 3 in the present application. On the 26th May 1923, the opposite party Mahabir Mahto served a notice on Doma stating that he had come to know that he was going to transfer the property and forbade him from doing so on the allegation that Doma was really the *farzidar* of Mahabir Mahto. As a matter of fact, Doma had already sold his share to Akal Mahto on the 3rd June 1920 and the notice was given by Mahabir to Doma about three years after Doma had already sold his share. On the 15th June 1923, the Police submitted a report before the Sub-Divisional Magistrate of Dinapore stating that there was a likelihood of a breach of the peace relating to the possession of the land in dispute and recommending proceedings under section 145 of the Code of Criminal Procedure. On the 2nd July 1923, the petitioners filed what is stated in the order-sheet a "protest petition," whereupon, on the same date, the learned Sub-Divisional Magistrate made an order for issue of notice under section 144 of the Code of Criminal Procedure on both parties not to create a breach of the peace in respect of the land and fixed the 13th July for showing cause. On the 13th

July without taking any evidence, the learned Sub-Divisional Magistrate made the order absolute as against the first party who are the petitioners in this case. Against this order the petitioners come up in revision to this Court.

Now, the learned Sub-Divisional Magistrate states that he was absolutely convinced that the first party's claim was really frivolous and was based simply on the fact that their names are entered as *furzidars* in the sale-deed dated the 14th April 1920. The learned Sub-Divisional Magistrate seems to be under a complete misapprehension on this point. The deed of sale of the 14th April 1920 stands in the name of Doma and Ramkeshwar. The names of the first party are not to be found in this deed and it is stated that there is no mention in this deed about the purchasers being *furzidars* for anybody else. Then, the learned Sub-Divisional Magistrate says: "There have been two sale-deeds of later dates purporting to re-transfer the property and one of those is by the first party dated December 1922." Here, again, the learned Magistrate appears to be under some misapprehension. The deed of December 1922 is the one by which Ramkeshwar sold his half share to Bhusa and Bhadai who were the first party in the present proceeding. There was no sale-deed by the first party, it was in favour of the first party, and it was not a re-transfer, but a conveyance by Ramkeshwar and Doma to the present petitioners. The learned Magistrate then proceeds and observes that the claim of the first party is that he lost the deed of sale of April 1920 and that the second party is falsely claiming on the strength of it. Here, again, the learned Sub-Divisional Magistrate is in error. The first party never alleged that he had lost the deed of sale. The deed of sale was alleged to have been lost by Ramkeshwar, the vendor of the petitioners Nos. 2 and 3, and he is alleged to have lodged an information of the loss before the Police in May 1922.

The learned Magistrate then says that he cannot believe that a party would steal a document which did not contain his name and claim on the strength of it, and he says that the converse is much more probable. Instances are not infrequent when documents of title have been lost and have been found to be in possession of persons who have really no title to the property covered by them, and this matter can only be finally determined after taking evidence adduced by the parties.

Now, this is the whole of the judgment of the learned Magistrate, and upon these facts he held that possession was undoubtedly with the second party and he made the notice absolute for two months as against the first party.

It has been contended by the learned Vakil for the petitioners that the order made by the learned Sub-Divisional Magistrate is without jurisdiction. He says that under section 144 of the Criminal Procedure Code, the Magistrate had no jurisdiction to make any order unless and until he was satisfied that there was apprehension of a breach of the peace and that immediate prevention or speedy remedy was desirable. There is no indication in the judgment that such circumstances existed in the present case. On the other hand, the learned Vakil relies upon the Police report which recommended proceedings under section 145 of the Code of Criminal Procedure and not under section 144. He relies on the case of *Karoolal Sajawal* v. *Shyam Lal* (1) for the proposition that, before a Magistrate can take action under section 144 of the Code of Criminal Procedure, he must be of opinion that immediate prevention or speedy remedy is necessary, and when he has made up his mind that it is so, he must state the material facts in the order; and where a Magistrate passed an order directing the second party not to interfere with the first party in the cultivation of his *khas* land or the collection of rents from his under-tenants, and it did not appear from the proceedings that he was of opinion that immediate prevention or speedy remedy was necessary and the order made did not state the material facts of the case, it was held that the order was bad and it was set aside. He further relies on the case of *Lachman Ram* v. *Dhiru Dusadh* (2), where Mr. Justice Mullick lays it down as a proposition of law that

(1) 32 C. 935 = 9 C. W. N. 864 = 1 C. L. J. 216 = 2 Cr. L. J. 213.
(2) 48 Ind. Cas. 342 = 9 Cr. L. J. 1002.

section 144 of the Code of Criminal Procedure is applicable only to temporary orders in urgent cases of nuisance or apprehended danger; it is not applicable in cases where there is a dispute as to land for the settlement of which section 145 provides the proper remedy. In my opinion the learned Vakil is right in his contention and the authorities cited by him support his contention.

From the order of the learned Magistrate it is not at all clear that the case was of such an urgency as to require action under section 144 of the Code of Criminal Procedure. Moreover, the learned Magistrate really makes an order as regards possession and he holds that the second party is undoubtedly in possession without taking any evidence on the point and without considering the documents produced or which might have been produced by the parties if a proceeding under section 145 had been initiated. I am, therefore, of opinion that the order of the learned Sub-Divisional Magistrate cannot stand and it must be set aside. If there is any apprehension of a breach of the peace it will be open to him to initiate proceedings under section 145 of the Code.

A preliminary objection is taken by Mr. Shiveswar Dayal, who appears for the opposite party, that the application to this Court is not maintainable as, under clause (4) of section 144, Criminal Procedure Code, it was incumbent on the petitioners to go in the first instance before the District Magistrate before coming up in revision to this Court. No doubt the District Magistrate had full power to rescind or alter the order made by the Sub-Divisional Magistrate, and the ordinary practice in this Court is that in cases of orders made under section 144, Criminal Procedure Code, the parties against whom the order is made should in the first instance approach the District Magistrate before coming up to this Court. Here, however, the learned Vakil for the petitioners argues that the order of the learned Sub-Divisional Magistrate is wholly without jurisdiction.

In the Full Bench case of *Sheobalak Singh* v. *Kamaruddin Mandal* (3) it was argued that the order complained of in that case, as originally made by the Deputy Magistrate, was one which was outside the scope of section 144, clause (1), and was made without jurisdiction and that in such circumstances it should not be treated as an order made under that section at all, but as an unauthorised order made without jurisdiction and that this Court should exercise its power of superintendence under section 107 of the Government of India Act and set aside the order; and in considering this argument his Lordship the Chief Justice observed as follows: "No doubt this Court has interfered and exercised its jurisdiction in such cases and if it could be shown that the order in the present case did not come within the powers conferred by the first clause of section 144, we should be entitled to interfere and set it aside." Similar observations were made by the other learned Judges who composed the Full Bench; and as, in the present case, it has been found that the order made was without jurisdiction the preliminary objection cannot prevail. The result is that the order of the learned Sub-Divisional Magistrate is set aside.

W. C. A. *Order set aside.*

(3) 68 Ind. Cas. 149; 2 Pat. 94; 3 P. L. T. 573; (1922) Pat. 241; 4 U. P. L. R. (Pat.) 57; 23 Cr. L. J. 549; (1922) A. I. R. (Pat.) 435; 1 P. L. R. 2 Cr. (F. B.).

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 431 OF 1922.

January 10, 1923.

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

KALI SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (4)—Sanction to prosecute—Application giving full particulars—Order of sanction omitting to give particulars—Sanction, whether valid.

An application for sanction to prosecute should be read with the order granting such application, and if the necessary particulars required by sub-section (4) of section 195 of the Criminal Procedure Code are given in the application, the fact that the order omits to give these particulars would not render the sanction a bad sanction.

KALI SINGH *v.* EMPEROR.

***Dulloo Singh* v. *Deputy Inspector General of Police, C. I. D., Bengal*, 65 Ind. Cas. 570; 49 C. 551; 23 Cr. L. J. 138; (1922) A. I. R. (C.) 412, followed.**

***Baperam Surma* v. *Gouri Nath Dutt*, 20 C. 474; 10 Ind. Dec. (N. S.) 320 and *Thaddeus* v. *Janaki Nath Saha*, 21 Ind. Cas. 172; 40 C. 423; 14 Cr. L. J. 572, referred to.**

Criminal appeal against an order of the Sessions Judge, Birbhum, dated the 1st July 1922.

Babu *Dasarathi Sanyal*, with him Babus *Lalit Mohan Sanyal* and *Promode Kumar Ghose*, for the Appellants.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is an appeal by two persons who have been convicted of various offences in connection with a fraudulent suit brought in the Munsif's Court. The main facts found are that the appellant, Kali Singh, filed a suit against one Pasindh Roy of Kanaila, in the United Provinces, in the Court of the Munsif of Kampurhat, in the District of Birbhum, in this Province. This suit was based on a hand-note which has been found to have been a forgery, and to have been forged by the second accused, Deb Nath Roy. Kali Singh was charged with having fraudulently used as genuine a forged document purporting to be a valuable security, punishable under section 471 of the Penal Code, and also with having been a member of a criminal conspiracy for the purpose of fraudulently and dishonestly making a false claim punishable under section 209, read with section 120 B, of the Penal Code. Deb Nath was charged with forging a valuable security punishable under section 467 of the Penal Code, with abetment of the offence of fraudulently using a forged document punishable under section 471, read with section 109, and also with joining in the conspiracy punishable under section 120 B with section 209 of the Penal Code. The appellants were convicted on all these charges. Each of these accused is sentenced to three years' rigorous imprisonment on the principal charge, under section 471 of the Penal Code in the case of Kali Singh, and under section 467 of the Penal Code in the case of Deb Nath. Each of the accused was further sentenced to one year's rigorous imprisonment on the conspiracy charge, and Deb Nath was also sentenced to the additional period of one year's rigorous imprisonment on the conviction of abetment of using a forged document.

The first point urged on behalf of the appellants is that the trial is bad for want of proper sanction. Under the proviso of section 196-A of the Code of Criminal Procedure a sanction under that section for prosecution for criminal conspiracy to commit a non-cognizable offence is not necessary in the present case, since the provisions of sub-section (3) of section 195 are applicable. But it is contended that there has been no proper sanction under section 195. It is said that the sanction is contrary to the provisions of sub-section (4) of that section as the order of sanction does not give the necessary particulars. The order of sanction was passed on a petition (Exhibit 3) presented by the Deputy Inspector-General of Police, and the effective part of the order is that the application be allowed. If this order be read with the application all the details required by sub-section (4) have been supplied. We think that the petition and the order should be read together. This was the view taken in the case of *Dulloo Singh* v. *Deputy Inspector General of Police, C. I. D., Bengal* (1), and we think it is the right view. It is contended that this decision is opposed to earlier decisions on this point. But we cannot find in any of those that have been cited anything which contradicts the view that the order of sanction and the petition asking for sanction should be read together. All the rulings to which our attention was directed were to the effect that the omission to give the particulars required by sub-section (4) of section 195 renders the sanction a bad sanction. But they did not deal with the point which arises in this case. It would appear in an earlier case, *Baperam Surma* v. *Gouri Nath Dutt* (2) that the learned Judges in discharging the Rule referred to the record of the case, and it would seem that their order was based on a consideration of the petition with the order, though this is not clearly stated

(1) 65 Ind. Cas. 570; 49 C. 551; 23 Cr. L. J. 138; (1922) A. I. R. (C.) 412.

(2) 20 C. 474; 10 Ind. Dec. (N. S.) 320.

in the report. In another case on the Original Side of this Court reference was certainly made to the application in order to interpret the order granting sanction since the words used by the learned Judge, when passing the order, were only "very well." This case is *Thaddeus* v. *Janaki Nath Saha* (3). We, therefore, have no hesitation in following the recent ruling referred to above, and in holding that there is no flaw in the sanction under section 195 of the Criminal Procedure Code.

The learned Sessions Judge appears to have put the facts clearly before the Jury. The only misdirection in that charge, which is suggested, is as to the legality of the conviction of Deb Nath under section 471, read with 109, of the Penal Code, and we find it hard to see what act of abetment of using the forged document was done by him other than the acts which are covered by his conviction under the other sections. We have also some doubt as to the legality of separate sentences for all the offences of which the accused were convicted. The learned Deputy Legal Remembrancer, however, states that he does not press for upholding that part of the order which directs that the separate sentences passed should run consecutively. We, therefore, do not think it necessary to deal at length with these points as regards the sentence.

In the result, we uphold the convictions o the appellants, and modify the sentences to this extent that, while upholding the terms of each sentence passed under the respective sections against each of the appellants, we direct that these sentences do run concurrently and not consecutively.

W. C. A. *Convictions upheld; Sentences modified.*

(3) 21 Ind. Cas. 172] 40 C. 423] 14 Cr. L. J. 572.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 427 OF 1923.

August 3, 1923.

Present:—Mr. Justice Kulwant Sahay.

BHULAN RAUT—SECOND PARTY—PETITIONER

versus

KUMAR RAI AND ANOTHER—FIRST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Decision as to possession by Civil or Criminal Court, whether binding on Magistrate—Written statement—Statement supported by evidence of deponent—Discretion—Further evidence, when necessary.

It is not always incumbent upon a Magi trate tryin a case under section 145 of the Criminal Procedure Code to give effect to the decision of a Civil or Criminal Court, and no hard and fast rule can be laid down in this respect. [p. 537, col. 1.]

Parmessar Singh v. *Kailaspati*, 35 Ind. Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1, referred to.

Where, in a proceeding under section 145 of the Criminal Procedure Code, one of the parties files a written statement, and that statement is supported by his own evidence in Court, the Magistrate, in relying upon the written statement, does not act without jurisdiction; nor does he do so in not accepting a decision in a previous case of rioting as to possession. [p. 537, col. 1.]

It is in the discretion of the Magistrate in a proceeding under section 145 of the Criminal Procedure Code to take further evidence, if he thinks it is necessary to do so. If he is satisfied on the evidence produced as to the party in actual possession, it is not necessary for him to take further evidence. [p. 537, col. 1.]

Appeal from a decision of the Sub-Divisional Magistrate, Gopalgunj.

Mr. *G. C. Pal*, for the Petitioner.

JUDGMENT.—The petitioner was one of the second party in a proceeding under section 145, Criminal Procedure Code. The dispute related to the possession of 8 *bighas* 19 *kathas* 4 *dhurs* of land in village Pakri Sham. This piece of land originally formed the holding of one Moti Koeri who died leaving a widow *Musammat* Parbatia and two daughters *Musammat* Baudhi and *Musammat* Domini. *Musammat* Domini died leaving a son Jadu. After the death of Moti Koeri and his widow the holding came into the possession of

Musammat Baudhi. It is alleged that *Musammat* Baudhi made a gift of this holding to her sister's son Jadu and to her own minor daughter *Musammat* Marachia by a deed of gift dated the 12th March 1920. The first party claim possession under a usufructuary mortgage, dated the 10th November 1921, executed in their favour by Jadu and the second party claim possession under a usufructuary mortgage executed in their favour in respect of the same land by *Musammat* Baudhi in December 1921 which deed was registered on 3rd January 1922. The proceeding was initiated on a report submitted by the Sub-Inspector of Police to the effect that there was an apprehension of immediate breach of the peace relating to the possession of the holding in dispute. On the 27th October 1922, the Magistrate made an order for drawing up proceedings under section 145 and for attachment of the land in dispute. After the proceeding had been started a Criminal case of rioting cropped up in which some of the second party were accused by the first party of carrying away certain crops grown on a portion of the land in dispute by the first party. This case was disposed of sometime in March 1923 and resulted in an acquittal of the accused persons. The proceeding under section 145 was kept in abeyance till the decision of the rioting case and was taken up again after the disposal of that rioting case. The learned Sub-Divisional Magistrate of Gopalganj who tried the case under section 145 has held that the first party are in possession and he has declared that their possession will be maintained until they are evicted therefrom in due course of law. The second party has come up to this Court in revision against this order and the points taken by their learned Vakil are,—first, that the learned Sub-Divisional Magistrate has not considered the evidence adduced by the second party; secondly, that the written statement filed by *Musammat* Baudhi could not be used as evidence in the case, and thirdly, that if the evidence adduced by the parties before the learned Magistrate was not satisfactory, he ought to have taken further evidence in order to come to a satisfactory finding on the question of possession.

It appears that the first party examined two witnesses and the second party examined one witness and both parties filed some documents. The learned Magistrate refers to the documents produced by the second party and he refers to the judgment of the rioting case referred to above and that of another rioting case which was disposed of sometime in the year 1922 and he says that the position taken up by the parties in these rioting cases has an important bearing in the case. He considers the fact that in the rioting case of 1923 the second party had filed a written statement to the effect that the land in dispute had all along been in the possession of *Musammat* Baudhi, and she used to give them half the crop of the land in lieu of interest for the money advanced by them. On the 15th May 1923 the second party filed a petition in the Court below wherein they stated that, having regard to the result of the two rioting cases referred to above, the present proceedings ought to be dropped, and they further stated that *Musammat* Baudhi was a necessary party to the present proceedings. *Musammat* Baudhi was thereupon made a party and on the 31st May 1923 she filed a petition saying that she was not in possession and the first party were in possession. She was thereupon examined by the learned Magistrate and she reiterated the statement made by her in the petition and stated that the statement was made by her voluntarily. The learned Magistrate has considereed all these facts and has come to the finding that the first party are in possession of the land in dispute. No doubt, he does not refer to the findings arrived at in the previous rioting cases but it cannot be said that the learned Magistrate has not taken the whole of the evidence into his consideration and that he has not taken the judgment in the two rioting cases into consideration. Besides the judgments in the two rioting cases and he usufructuary mortgage-bond executed by *Musammat* Baudhi, there was no other document produced by the second party. It is admitted that the one witness examined by the second party was merely a formal witness who was called to prove certain documents. Mr. Gour Chandra Pal for the petitioner further contends that the question of possession had been already

decided in the rioting cases and the learned Magistrate was bound to respect the said decisions and that he has acted without jurisdiction in not doing so. He relies on the decision of the Special Bench in the case of *Parmessar Singh* v. *Katlaspati* (1). It is pointed out by Mr. Abani Bhusan Mukherji for the opposite party that the question of possession was gone into incidentally in those cases and the finding was that *Musammat* Baudhi was in possession. When *Musammat* Baudhi comes and stated that she is not in possession, the learned Magistrate was not bound to follow the decisions in the rioting cases. As has been laid down in the same Special Bench case, it is not always incumbent upon the Magistrate to give effect to decision of a Civil or Criminal Court and no hard and fast rule can be laid down in this respect. Having regard to the circumstances of the present case, it cannot be said that the Magistrate acted without jurisdiction in not accepting the decision as to possession in the rioting cases. The first contention of the learned Vakil for petitioner must, therefore, be overruled.

As regards the second contention, the learned Magistrate was entitled to consider the written statement filed by *Musammat* Baudhi. Her written statement was, moreover, supported by her own evidence in Court and there is no ground for the contention that the learned Magistrate has acted without jurisdiction in relying upon the statement of *Musammat* Baudhi.

As regards the third contention, it is to be noted that it was in the discretion of the Magistrate to take further evidence, if he thought it necessary to do so. If he was satisfied upon the evidence produced in the case that the first party were in actual possession of the land it was not necessary for him to take further evidence. On the whole, although the judgment of the learned Magistrate is not as satisfactory as it ought to have been, yet I cannot say that the final order made by him is without jurisdiction. This application must, therefore, be dismissed.

W. C. A.

Application dismissed.

(1) 35 Ind. Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 951 (1917) F.B.

CALCUTTA HIGH COURT.

CRIMINAL MISCELLANEOUS REVISION PETITION NO. 60 OF 1923.

May 23, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

AHMED ALI SARDAR AND OTHERS—ACCUSED—PETITIONERS (IN JAIL)

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 123, 498—Sessions Judge, if competent to grant bail pending hearing of reference under section 123, Criminal Procedure Code.

Pending the hearing of a reference made to a Sessions Judge under section 123 (2) of the Criminal Procedure Code in respect of an order made under section 118 of that Code, the Sessions Judge has jurisdiction, under section 498, to admit the person adversely affected by that order to bail.

Criminal Reference, under section 123, clause (2) of the Code of Criminal Procedure, made by the Sessions Judge, Tipperah.

Mr. *Mohamed Nurul Haq Choudhuri*, for the Petitioners.

Mr. *Orr*, for the Crown.

JUDGMENT.—The present Rule was issued calling upon the District Magistrate of Tipperah to show cause why, pending the hearing of a Reference by the Sessions Judge of Tipperah under section 123, clause (2), of the Code of Criminal Procedure, bail should not be granted to the petitioners to the satisfaction of the District Magistrate.

It appears that certain proceedings were taken against the petitioners under section 110 of the Code and an order against the petitioners was made under section 118,

as the petitioners were unable to furnish the securities demanded. The proceedings were then laid before the Sessions Judge of Tippreah for orders under section 123. The petitioners urge that, pending the hearing of the Reference under section 123, sub-section (2), they should be admitted to bail. The Sessions Judge was of opinion that, having regard to the provisions of section 123, sub-section (2), he had no power to admit the petitioners to bail.

Now, the provisions of section 498, Criminal Procedure Code, regarding admission to bail are particularly wide and it is pointed out in the section itself that a Court of Session may in any case direct any person to be admitted to bail. There are no words in section 123, sub-section (2), controlling the very wide provisions of section 498. If a person has been convicted and has appealed, he can apply for bail to the Sessions Judge. In the present case as an order has been made under section 118 against the petitioners, such an order is liable, in the circumstances stated, to be revised by the Sessions Judge under the provisions of section 123, sub-section (2). In other words, the Sessions Judge may or may not confirm the order passed by the Magistrate under section 118 and it stands to reason that if in the case of a person who is convicted and who has preferred an appeal, bail is allowable, bail can similarly be allowed in the case of a person against whom an order has been made under section 118 and which order is liable to be revised by a Sessions Judge under the provisions of section 123, sub-section (2). At any rate, in our opinion, there is no reason why any restriction should be placed upon the wide provisions of section 498. In this view of the matter, we think the Sessions Judge had power to admit the petitioners to bail and we accordingly send the matter back to the learned Sessions Judge in order that he may deal with the matter of the application for bail in the light of the remarks made above.

W. C. A. *Case sent back.*

PATNA HIGH COURT.

CRIMINAL REVISION PETITION NO. 450 OF 1923.

August 10, 1923.

Present:—Mr. Justice Kulwant Sahay.

Musammat WAHIDUNNISSA AND OTHERS —PETITIONERS

versus

PICHIT LAL MISSIR AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898) s. 145—Examination of witnesses—Magistrate, discretion of—Document admitted without being proved —Jurisdiction, whether affected.

In a proceeding under section 145 of the Criminal Procedure Code, it is in the discretion of the Magistrate to refuse to examine all the witnesses produced by any party, but the discretion is one which must be exercised with due care and caution and with careful regard to the circumstances of each particular case [p. 540, col. 1]

Samir Sheikh v. *Jahed Sheikh*, 3 C. L. J. 478; 3 Cr. L. J. 423, referred to.

Biswanath Mahapatra v. *Shwanand Saraswati*, 61 Ind. Cas. 718, 2 P. L. T. 330; 22 Cr. L. J. 430, distinguished.

The admission of a document without being duly proved and without any objection may be an illegality, it does not affect the jurisdiction of the Magistrate to pass the final order in the case. [p. 541, col. 1.]

Criminal Revision from an order of the Deputy Magistrate, Monghyr, dated the 21st May 1923.

Mr. *S. M. Naimutullah*, for the Petitioners.

Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT.—The petitioners were the first party in a proceeding under section 145 of the Code of Criminal Procedure. The dispute relates to the possession of 250 *bighas* of land in *Mauza* Bira in the District of Monghyr. On the 22nd November 1922, *Musammat* Wahidunnissa of the first party filed a petition before the Sub-Divisional Magistrate to the effect that there was imminent likelihood of a breach of the peace in respect of the possession of the 250 *bighas* of land in dispute. An order under section 144 of the Code of Criminal Procedure was passed and the Sub-Inspector of Police was directed to enquire into the matter and submit a report. The Sub-Inspector submitted his report whereupon proceedings under section 145 were ordered to be drawn up on the 5th December 1922; and by an order of the same date it was directed that the first party should produce her witnesses on the 20th December 1922,

In the proceeding as originally drawn up the petitioner No. 1, Wahidunnissa, was the only member of the first party. On the 20th December 1922, the second party appeared and filed a petition stating that certain other persons who were interested in the land in dispute should also be made parties, and upon this application. Azizur Rahman and Kamaluddin were added as first party in the proceeding. The three persons of the first party jointly own a 10-annas share in the village and the second party own a 6-annas share. Several adjournments were taken by the parties in order to settle their disputes out of Court; and on the 17th March 1923, the learned Magistrate, while postponing the case to the 3rd April, directed that the parties must either settle all matters in the meantime amicably or must come ready with evidence on that date. He stated: "I must not allow further adjournments on any account." On the 3rd April 1923, a petition was again filed by both parties for a week's adjournment in order to enable them to come to terms. This application was rejected, and the first party were called upon to produce their evidence. They thereupon examined six witnesses and the order on the 3rd April 1923 was that the case was adjourned to the 12th April 1923 for the evidence of the second party. On the 11th April 1923 a petition was filed on behalf of the first party wherein it was stated that as there was a talk of compromise going on between the parties the first party were not ready with their evidence on the 3rd April 1923 and they examined only such witnesses on that date as were present in Court. They prayed for issue of summonses on a number of other witnesses whom they wanted to examine on the next day. The petition was put up before the Magistrate with an office note to the effect that the case was a section 145 case, that the petition filed by the first party was for having summonses served upon witnesses and that written summonses were attached therewith. This application with the office note being put up before the learned Magistrate, he made an order to the effect "Let it be served." On the 12th April 1923 the case was again adjourned as the learned Magistrate had no time to take up the case, and the next date fixed for the hearing was the 24th April 1923. On the 24th April 1923, the first party wanted to examine the witnesses named in their petition of the 11th April. The learned Magistrate examined two of those witnesses and refused to examine the rest. The order passed upon this petition runs thus: "These are fresh witnesses, not named in the first list of witnesses; can't examine them; file." After rejecting the petition of the first party and after examining two more witnesses for the first party, the learned Magistrate postponed the case to the 27th April 1923 for taking the evidence of the second party. The evidence of the second party was only taken, and ultimately the learned Magistrate passed his final order declaring the second party to be in possession. The first party thereupon filed the present application for revision to this Court, and one of the main grounds urged before the Bench before whom the application was filed was that the first party, Azizur Rahman, had his witnesses ready but that those witnesses were not examined and that the statement in the order of the learned Deputy Magistrate to the effect that Azizur Rahman did not contest the proceedings was incorrect.

This Court thereupon made an order calling upon the Deputy Magistrate to report on the petition particularly as regards the allegation that the first party, Azizur Rahman, did contest the proceedings and had his witnesses ready but that those witnesses were not examined. The learned Deputy Magistrate has submitted an explanation, and he says that, as a matter of fact, Azizur Rahman filed a written statement and thereafter never appeared to contest the proceedings.

It has been pointed out by learned Counsel for the petitioners that the petition of the 24th April 1923 was, as a matter of fact, signed by the *Mukhtar* for Azizur Rahman, although the petition purported to be on behalf of *Bibi* Wahidunnissa only. He also points out that certain other petitions were also filed which bear the signature of the *Mukhtar* for Azizur Rahman alone and he contends that, as a matter of fact, Azizur Rahman did contest the proceedings.

Mr. G. C. Pal on behalf of the opposite party contends that, assuming that Azizur Rahman did contest the proceedings and that the application of the 24th April 1923 was really an application on behalf of Azizur Rahman, that fact does not alter the position. He contends that it was in the discretion of the learned Magistrate to refuse to examine the witnesses who were produced on the 24th April 1923 and he relies on the case of *Samir Sheikh* v. *Jahed Sheikh* (1). In that case it was held by a Division Bench of the Calcutta High Court that a Magistrate acting under section 145, Criminal Procedure Code, has a discretion in the matter of examination of witnesses. He is not bound to examine all the witnesses adduced by the parties, but may limit the number for good and sufficient reason. It was further laid down that the discretion is one which must be exercised with due care and caution and with careful regard to the circumstances of each particular case. That case clearly lays down the proposition that, in a proper case, it will be in the discretion of the Magistrate to refuse to examine all the witnesses produced by any party. It appears in the present case that, although Azizur Rahman was not a party in the proceedings as originally drawn up, yet the proceedings were amended on the 20th December 1922 and Azizur Rahman filed his written statement on the 10th January 1923; and, although the first list of witnesses was filed before Azizur Rahman had filed his written statement, still it was open to him to come ready with his witnesses on the 3rd April 1923 when the witnesses of the first party were examined. Moreover, it appears that when the Magistrate recorded his order on the 3rd April 1923 that the case was adjourned to the 12th April 1923 for the purpose of taking the evidence of the second party, no objection was raised by the first party alleging that they had other witnesses to examine or other evidence to produce. On the 24th April the learned Magistrate exercised his discretion: he examined two more witnesses for the first party, although the first party had closed their case and the case was adjourned in order to take the evidence of the second party, and after examining two more witnesses he refused to examine the fresh witnesses produced on that date. Now, if that is a matter of discretion, I am unable to say that the learned Deputy Magistrate acted without jurisdiction in refusing to examine the witnesses produced on the 24th April 1923.

Learned Counsel for the petitioners relies upon the case of *Biswanath Mahapatra* v. *Shivanand Saraswati* (2). The facts of that case are different from those of the present case. In that case the question related to the right to collect rent from certain tenants; both parties claimed the right to collect rent from tenants of the lands in dispute. The learned Deputy Magistrate examined some of the tenants, and as regards those tenants he held that the party in whose favour those tenants had deposed was in possession by collecting rent from those tenants. There were altogether fifty-eight tenants on the land, and one of the parties wanted to examine all those tenants and it was argued on his side that all his witnesses who were the tenants of the land were present in Court but that the learned Deputy Magistrate refused to examine all of them and, therefore, there was a denial of justice. It was held that, although it was discretionary for the Magistrate to refuse to examine all the witnesses, yet, having regard to the circumstances of that particular case, there was a denial of justice, inasmuch as the learned Magistrate had proceeded to declare possession in favour of the party in whose favour the tenants had given evidence, and if the other tenants had also been examined it was likely that the learned Magistrate would have made an order in favour of that party as regards the other tenants also. The witnesses whom the Deputy Magistrate refused to examine in that case were the witnesses named in the first list and they were not fresh witnesses; and, in remanding the case, Mr. Justice Jwala Prasad observed: "It must, however, be mentioned that the second party is not entitled to examine

(1) 3 C. L. J. 478; 3 Cr. L. J. 423.

(2) 61 Ind. Cas. 718; 2 P. L. T. 300; 22 Cr. L. J. 430.

any witness not mentioned in the list of persons (*hazri*) filed on the 3rd December 1920." Therefore, in that case also the party was limited only to those witnesses whom he had named in the first list. In the present case, the witnesses who were not examined were witnesses who were not named in the first list but who were witnesses named in a fresh list, and I am unable to hold that the learned Deputy Magistrate acted without jurisdiction in not examining those witnesses. This was the chief point taken on behalf of the petitioners.

Another point taken on their behalf was that the learned Deputy Magistrate was wrong in admitting into evidence a written statement which had not been properly proved. It appears that a copy of the written statement was filed by the second party but the original was not produced and the copy was admitted and marked as an exhibit after examining the copyist and the comparing clerk who had prepared the copy. This was, no doubt, an irregular procedure. But it appears that no objection was taken to the document being taken in evidence and it was marked as an exhibit without any objection. The fact of the document being marked as an exhibit without being duly proved may be an illegality, but it does not affect the jurisdiction of the Magistrate to pass the final order in this case.

The last objection taken on behalf of the petitioner is, that the learned Deputy Magistrate has not considered a document marked 'X' which is a report of the Sub-Inspector in a previous proceeding. The learned Deputy Magistrate expressly refers to this document and comments upon it; and there is no reason to hold that he did not consider this piece of evidence on behalf of the first party.

None of the grounds taken by learned Counsel for the petitioners can, therefore, be entertained; and this application must, therefore, be rejected.

K. S. D. & W. C. A. *Application accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 908 OF 1922.

December 21, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Chotzner.

NATABAR GHOSE—PETITIONER

versus

ADYA NATH BISWAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 540—Examination of witnesses after close of case—Illegality—Discretion of Magistrate, exercise of.

After both sides to a case had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined by the Magistrate under section 540 of the Criminal Procedure Code;

Held, that the procedure adopted by the Magistrate was entirely unjustifiable and the trial must be set aside.

The power conferred by section 540 of the Criminal Procedure Code on Magistrates is very wide, but the wider the power, the more cautious should be the exercise of discretion on the part of the Magistrate.

Criminal revision against an order of the Deputy Magistrate, Krishnagar, dated the 28th August 1922, affirming that of the Sub-Deputy Magistrate, Second Class, Kushtia, dated the 8th August 1922.

Babus *Dasarathi Sanyal* and *Dwijendra Krishna Dutt*, for the Petitioner.

Babus *Manmatha Nath Mukherjee* and *Panna Lal Chatterjee*, for the Opposite Party.

JUDGMENT.—In this case a complaint was lodged against the accused Natabar Ghose on the 27th October 1921, under section 408, Indian Penal Code. From the order-sheet which has been placed before us by Mr. Sanyal who appeared on behalf of the accused, it is clear that there was a protracted hearing of the case before the Sub-Deputy Magistrate of Kushtia; the case for the prosecution was not closed till the 9th June 1922, and the case for the defence was not closed till the 14th July 1922. Arguments on behalf of the prosecution were heard on the 18th July and the 25th July 1922 was fixed as the date for delivery of judgment. It appears that on the 28th July 1922, after both sides had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judg-

ment, two witnesses who were named by the prosecution were examined before the Magistrate, the Magistrate having exercised his powers under section 540, Criminal Procedure Code. The accused rightly complains before us that the procedure which was adopted by the Magistrate was one which was entirely unjustifiable. It is pointed out on behalf of the accused that, although the terms of section 540 are very wide, the wider the power, the more cautious should be the exercise of discretion on the part of the Magistrate. There is a great deal of force in this argument and we think that the action of the Magistrate in summoning the two witnesses on the 28th July 1922, cannot be justified on any view of the matter.

The conviction of the petitioner under section 408 and the sentence imposed on him must, therefore, be set aside and the case against the accused must be re-tried. Such re-trial is to be held before a Magistrate other than the Sub-Deputy Magistrate who originally tried this case or by such Magistrate as may be nominated by the District Magistrate.

The accused will remain on the same bail till the disposal of the case by the new Magistrate.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1761 OF 1922.
February 16, 1923.
Present:—Mr. Justice Scott-Smith.
NIZAM DIN—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 383—Nikah khawan, whether bound to perform Nikah—Demand of heavy fee, whether an offence.

A nikah khawan is not bound to read a *nikah* for a person unless he chooses to do so, and it is no offence for him to demand any fee he likes for doing so.

Case reported by the Sessions Judge, Multan, with his No. 218-J, of 1922.

FACTS.—Nizam Din, the accused petitioner, is a *nikah khawan*. Allah Rakhiya, the complainant, engaged the petitioner to read the *nikah* for the complainant's younger brother. When the people were collected, the petitioner refused to perform the ceremony and enter the marriage in his register unless he was first paid Rs. 5. A great deal of dispute ensued and eventually the complainant paid Rs. 5 and the marriage was performed. The petitioner said that he had received only Rs. 2, of which he himself had to get Re. 1, the remainder being spent on payment to the *girdawar* of the *nikah khawans*, the *chaukidar* and for postage expenses. The petitioner was prosecuted by the complainant for extortion. The Honorary Magistrate came to a finding that Rs. 5 had actually been paid by the complainant to the petitioner and, convicting the petitioner under section 384, Indian Penal Code, sentenced him to pay a fine of Rs. 15, in default of payment to undergo two weeks' rigorous imprisonment. The evidence for the prosecution is, in my opinion, credible. Several respectable persons deposed that Rs. 5 had actually been paid after protest to the petitioner, and I consider that the Magistrate came to a correct finding on facts.

GROUNDS.—The definition of extortion in section 383, Indian Penal Code, runs:—

"Whoever intentionally puts any person in fear of any injury to that person or to any other, and thereby dishonestly induces the person so put in fear, etc."

In cases under this section the threat must be of an injury, which means a harm illegally caused. Now, in the present case, doubtless harm was caused to the complainant and the persons attending the marriage, but it cannot be said that the harm was caused illegally. The District Board of Muzaffargarh has laid down certain rules, a copy of which is on the record, regarding the registration of marriages.

Rule 9 reads:—"At the time of performing a marriage the *nikah khawan* in addition to his customary dues, will get 6 annas more for every marriage, which will be distributed as follows:—

MAHADU *v.* EMPEROR.

"*Girdawar Qazi*, 4 annas, District Board fee, 1½ an as, postage stamps, ½ anna."

Now, it is nowhere laid down what the customary dues are, and, theoretically, a *nikah khawan* might demand any fee that he likes. There is no law forbidding him to do so. His demand for Rs. 5 was not illegal, because his due is not prescribed by law. The petitioner's action did not put any one in fear of such an injury as is contemplated in section 383, Indian Penal Code, and I, therefore, forward the record to the High Court and recommend that the conviction be set aside and the fine, which has been paid, be refunded.

JUDGMENT.—A *nikah khawan* is not bound to read a *nikah* for a person unless he chooses to do so, and it is certainly no offence for him to demand any fee he likes for doing so. I agree with the learned Sessions Judge and, setting aside the conviction and sentence, acquit Nizam Din. Fine if paid will be refunded

K. S. D. *Revision accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 127-B OF 1923.

July 19, 1923,

Present:—Mr. Kotwal, A. J. C.

MAHADU—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 195—Penal Code (Act XLV of 1860), s. 211—Application to Deputy Commissioner, for enquiry, whether complaint—Sanction to prosecute —False complaint—Procedure.

M. addressed an application to a Deputy Commissioner, saying that his application to the Police was not enquired into and praying that the Deputy Commissioner should order an enquiry or start himself an enquiry. *M.* did not ask for the trial and punishment of the accused :

Held, that the application was not a "complaint" for the purposes of section 211 of the Act.

As a matter of judicial prudence, sanction to prosecute for making a false complaint ought not to be granted unless the complaint has been properly dealt with and dismissed.

Revision against an order of the District Magistrate, Yeotmal, dated the 20th March 1923, in Criminal Case No. 907 of 1923.

Mr. *Atmaram Bhagwant*, for the Applicant.

Mr. *G. P. Dick*, for the Non-Applicant.

ORDER.—The applicant's petition was addressed to the Deputy Commissioner, and not to a Magistrate or the District Magistrate. It is stated therein that his applications to the Police had not been enquired into, and that he wished the Deputy Commissioner to order the Police to make an enquiry early or to make it himself on the spot. He did not ask for the trial and punishment of the accused. The application was referred to the Police for enquiry and report by Mr. Khan, Deputy Commissioner. On receipt of the Police report Mr. Tucker, as District Magistrate, passed the order sought to be revised. Mr. Tucker states that the applicant's petition was a complaint before the District Magistrate accusing five Banjaras of having committed dacoity and that the accusation was false. He granted sanction to prosecute the applicant under section 211 of the Indian Penal Code for filing the false complaint. It is clear that the petition was not a complaint at all and the order passed by Mr. Tucker as Magistrate sanctioning prosecution cannot be upheld. Even assuming that the petition was a complaint, as a matter of judicial prudence at least, no sanction ought to have been granted until the complaint was properly dealt with and dismissed. This has not been done. The complainant has not been examined at all nor is there a specific order of dismissal. Whether it was open to Mr. Tucker to pass an order under section 211, Criminal Procedure Code, as Deputy Commissioner, it is unnecessary to discuss. I cannot allow the order sanctioning prosecution to stand on the ground that it could have been passed by Mr. Tucker as Deputy Commissioner. I set aside the order sanctioning prosecution.

W. C. A. *Order set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 60-B OF 1923.
August 3, 1923.
Present:—Mr. Prideaux, A. J. C.
YASINKHAN — PLAINTIFF—APPELLANT
versus
EMPEROR — DEFENDANT —RESPONDENT.

Penal Code (Act XLV of 1860), ss. 411, 414—Receiving stolen property—No evidence about property being stolen—Conviction, whether justifiable—Offence under s. 411, prosecution, duty of.

Although there may be cases in which it may not be necessary in a case under sections 411 or 414, Penal Code, to prove that the property was stolen from a particular individual. Yet, as a rule a person cannot be called upon to account for the possession of property where there is no evidence whatever that the property has been stolen.

Emperor v. *Budhankhan*, 17 Ind. Cas. 537; 14 Bom. L. R. 893; 13 Cr. L. J. 792, referred to.

A mere suspicion against the accused that the property was not his own would not justify a conviction under section 411 in the absence of direct or circumstantial evidence, establishing beyond a reasonable doubt that the property was stolen.

In order to justify a conviction under section 411, Penal Code, it is the duty of the prosecution to establish that the accused dishonestly retained the property and had knowledge at the time of the receipt that the property was obtained in one of the ways specified in section 410 of the Indian Penal Code.

Appeal against the finding of the Sub-Divisional Magistrate, Basim, dated 5th June 1923, in Criminal Case No. 21 of 1923.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—This judgment also disposes of Criminal Appeal No. 61-B of 1923. The appellants are Yasinkhan and Molamad Hashim. The facts stated for the prosecution are mainly these. On the 18th of February last the two appellants were found in the Basim bazar trying to sell a black bullock. On being questioned Mohamad Hashim admitted having sold a red bullock at Dhanora to one Gyanu for Rs. 25. It can be held as proved that the two accused did sell the red bullock and were trying to sell the black one.

The charge against each accused runs as follows:—

"Did dishonestly retain stolen property, to wit, two bullocks belonging to persons unknown knowing them to be stolen property." Thus appellants have been convicted of dishonestly retaining stolen property, though it has not been established to whom that property belonged or that possession of the bullocks had in fact been transferred by theft, extortion, or robbery, or that the animals were property which had been criminally misappropriated or in respect of which criminal breach of trust had been committed.

To prove the case against the two appellants it was necessary for the prosecution to establish dishonest retention of the bullocks and that the accused had knowledge at the time of receipt that the property was obtained in one of the ways specified in section 410 of the Indian Penal Code. Though there may be cases in which it may not be necessary in a case under section 411 or 414, Indian Penal Code, to prove that the property was stolen from a particular individual, see the case of *Emperor* v. *Budhankhan* (1), yet, as a rule, it may be taken as settled law that a person cannot be called upon to account for the possession of property when there is no evidence whatever that the property has been stolen.

As it has not been proved in the present case that the bullocks found with the two appellants were stolen property, in my opinion, a conviction under section 411 of the Indian Penal Code cannot be sustained. There may be strong suspicion against the accused that the animals they were trying to dispose of were not their own but in the absence of direct or circumstantial evidence establishing beyond a reasonable doubt that the animals were stolen property the appellants must be acquitted.

I set aside their convictions and direct that appellants be set at liberty.

G. R. D. & W. C. A.

Conviction set aside.

(1) 17 Ind. Cas. 537; 14 Bom. L. R. 893; 13 Cr. L. J. 792.

SANTA SINGH *v.* VIR SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 805 OF 1920.
February 27, 1923
Present:—Mr. Justice LeRossignol and Mr. Justice Martineau.
SANTA SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
VIR SINGH AND OTHERS—PLAINTIFFS AND SADHU SINGH—DEFENDANT—RESPONDENTS.

Jurisdiction, civil or revenue—Suit for share in occupancy tenure, nature of—Civil Court, whether can take cognizance.

A suit to establish the plaintiff's right to a share in an occupancy tenure is cognizable by a Civil Court.

Second appeal from a decree of the District Judge, Amritsar, dated the 17th March 1920, affirming that of the Munsif, First Class, Amritsar, dated the 21st July 1919.

Mr. *Faqir Chand*, for the Appellants.

Messrs. *Sheo Narain* and *Badri Das*, for the Respondents.

JUDGMENT.—A reference to the pedigree table, which will be found in the body of the lower Appellate Court's judgment, will explain the relationship between the parties. The main question in the case is whether the plaintiffs are entitled to share in the occupancy tenancy which in 1852 was entered in the name of Lehna Singh alone. The contention for the plaintiffs has been that the acquisition of the tenancy was effected by the whole family, and that Lehna Singh's name alone was entered in the Revenue Records as the representative of the whole family.

The Courts below have decided that Lehna Singh was acting on behalf of the whole family and this decision, right or wrong, being one of fact, cannot be challenged in second appeal. The question which has been hotly debated in this Court is whether this is a suit entertainable by a Civil Court and, even if it is such, whether the issue regarding the claim to occupancy rights was not such as should have been transferred for decision to a Revenue Court under the proviso to section 77 of the Tenancy Act.

Had the plaintiffs not been recorded as tenants-at-will under the defendants the matter would have been easier of decision. The suit would then have been one for a declaration that the plaintiffs were entitled to a share in the occupancy rights already established by the defendants and for joint possession. The complication in the case, however, arises from the fact that since 1862 the plaintiffs have been recorded as tenants-at-will in respect of a portion of the land, holding under the defendants. In 1916 the plaintiffs claimed occupancy rights and were served by the defendants with a notice of ejectment whereupon the plaintiffs contested their liability to ejectment by suits in the Revenue Courts. The Collector held that the plaintiffs were not occupancy tenants but tenants-at-will, and the plaintiffs were accordingly, ejected from the land to recover which they have brought this suit.

If the issue whether the plaintiffs are occupancy tenants must be referred to the Revenue Courts under the proviso to section 77 of the Tenancy Act, it is obvious that the matter will be *res judicata* between them in those Courts, and it is admitted on behalf of the respondents that, if the matter is one determinable by the Revenue Courts, the case should not be remitted to the Revenue Courts but should be finally settled in this Court. There can be no doubt that, strictly speaking, the landlords, who have not been made parties to this suit, should have been impleaded for, clearly, they will be affected by the result. Instead of having in prospect the extinction of the occupancy on the failure of the defendants' line, the prospects of such extinction will become far more remote and problematic, if it be held, that plaintiffs' line also must disappear before the occupancy becomes extinct. We have to envisage the fact, however, that the landlords are not parties to this suit, and to bear in mind that they will not be bound by any decision in this case.

The position then is as follows:—The defendants are the admitted owners of an occupancy right, and the question for decision is, whether the plaintiffs are entitled to a share in that right. It will be observed that this is not a suit between a tenant and a landlord to establish occupancy rights. It is a suit in which the plaintiffs seek to

establish their right to a share in an already esatablished occupancy tenure. The plaintiffs deny that they were ever tenants holding under the defendants and claim an interest in the tenancy equal to that of the defendants. Though the result will be anomalous in that the landlords, who are not parties to this suit may refuse to recognize the plaintiffs' title, we are unable to hold that the matter is one which, under the Statute, can be heard and determined only by a Revenue Court, and we conclude that the Civil Courts have jurisdiction.

On this finding, we dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE COURT OF APPEAL OF DEPUTY COMMISSIONER, WARDHA, CENTRAL PROVINCES.

April 17, 1923.

Present:—Lord Buckmaster, Lord Dunedin, Lord Carson, Sir John Edge and Lord Salvesen.

BALIRAM SINGH AND ANOTHER—APPELLANTS

versus

Rai Bahadur Seth NARSINGDAS PRAYAG DAS MOHTA AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 90—Sale proclamation—Statement as to revenue essential—Omission, effect of—Material loss—Burden of proof.

Under O. XXI, r. 66, of the Civil Procedure Code a proclamation of sale should contain a statement as to the revenue assessed upon the estate to be sold. It is a material matter and its omission is the omission of a matter which would enable the judgment-debtor to base an application for setting aside the sale if he could comply with the other condition that the Code provides.

Macnaghten v. *Mahabir Pershad Singh*, 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.), **followed.**

Where a judgment-debtor applies to have a sale in execution of a decree set aside it is for him to establish before the Court that he has suffered damage and if he fails to produce evidence on the point and does not ask for any opportunity to do so, it is too late in an appeal to the Privy Council for him to ask for such an opportunity on the ground that had he had such an opportunity he might have been able to satisfy the Court that he had suffered material damage.

Appeal from a decree of the Court of Appeal of the Deputy Commissioner, Wardha, Central Provinces, confirming that of the Sub-Divisional Officer, Wardha.

Messrs. *De Gruyther*, *K. C.*, and *Skinner*, for the Appellants.

Sir *George Lowndes*, *K. C.*, and *A. Majid*, for the Respondent.

JUDGMENT.

LORD BUCKMASTER.—Their Lordships see no need to reserve further consideration of this case. The question that it raises is a question which is more of procedure than of law, and arises under the execution, by way of sale, of a decree made by the Subordinate Judge of Wardha at a date which is not exactly defined, but which was clearly before the 6th April 1918. On this latter date that decree was sent down to the Deputy Commissioner of the District for execution, and on the 16th July 1918, the sale under that decree was proclaimed.

It is alleged by the appellants who were the judgment-debtors under the decree, that that proclamation was imperfect, and the first appellant, on the 20th August 1918, made an application to the proper Court for the purpose of having the proclamation amended and the sale adjourned. The ground upon which he based that application was that, first, the revenue had not been properly defined in the proclamation, and, further, that there was no adequate descrip-

establish their right to a share in an already esatablished occupancy tenure. The plaintiffs deny that they were ever tenants holding under the defendants and claim an interest in the tenancy eqral to that of the defendants. Though the result will be anomalous in that the landlords, who are not parties to this suit may refuse to recognize the plaintiffs' title, we are unable to hold that the matter is one which, under the Statute, can be heard and determined only by a Revenue Court, and we conclude that the Civil Courts have jurisdiction.

On this finding, we dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

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JUDGMENT.

LORD BUCKMASTER.—Their Lordships see no need to reserve further consideration of this case. The question that it raises is a question which is more of procedure than of law, and arises under the execution, by way of sale, of a decree made by the Subordinate Judge of Wardha at a date which is not exactly defined, but which was clearly before the 6th April 1918. On this latter date that decree was sent down to the Deputy Commissioner of the District for execution, and on the 16th July 1918, the sale under that decree was proclaimed.

It is alleged by the appellants who were the judgment-debtors under the decree, that that proclamation was imperfect, and the first appellant, on the 20th August 1918, made an application to the proper Court for the purpose of having the proclamation amended and the sale adjourned. The ground upon which he based that application was that, first, the revenue had not been properly defined in the proclamation, and, further, that there was no adequate descrip-

tion of the property that was about to be sold.

The rules which govern the sale in that District are the same as those established by the Code of Civil Procedure. Under section 66* of that Code, it is plain that the proclamation should contain the statement as to the revenue assessed upon the estate, and this Board, in a case reported in *Macnaghten* v. *Mahabir Pershad Singh* (1), have held that that is a material matter and that its omission is the omission of a matter which would enable the judgment debtor to base an application for setting aside the sale if he could comply with the other condition that the Code provides.

The sale had been fixed for the 23rd August 1918 and consequetly this application was only three days before the sale was to take place. The Sub-Divisional Officer, before whom the matter was heard, did not think that it was desirable that the sale should be postponed; for this purpose it would have been necessary to have had a further month's advertisement, and accordingly he adjourned the application until after the sale had taken place. The sale did duly take place on the 23rd August and on the 27th August the application was heard. What took place upon that hearing is a matter of some dispute, but it is clear that the present appellants did not appear. Of course, it is plain that if the hearing were regarded as merely the hearing of an adjourned application to postpone the sale, the fact that the sale had already taken place would have itself defeated the application; it would then have become too late. But it appears to have been regarded in a more liberal sense and the learned Judge before whom it came regarded it as an application under r. 90 of O. XXI of the Code of Civil Procedure, which entitles a person who has been injured by an imperfect proclamation to apply to the Court to set it aside on the ground of material irregularity, provided that he proves to the satisfaction of the Court that the material irregularity has caused him substantial injury.

It is not easy to see exactly what occurred on the hearing because we have no short hand note of the judgment, and the only reference to it is contained in a summary of the proceedings in the order-sheet. That recites the fact of the sale and refers to the omission of the land revenue as one of the grounds upon which the application for amendment of the proclamation had originally been based, and contains the statement: "I believe the irregularity is immaterial, and such shrewd purchasers as" the two purchasers of the property "would not bid till they knew the land revenue. I, therefore, again reject the objection." If by that was meant that the omission of the land revenue was immaterial for the purposes of r. 90 *(supra,)* which entitles the person injured to apply on the ground of a material irregularity, the learned Judge was wrong. If, on the other hand, he meant by it that it was immaterial because, having regard to all the circumstances of the case, there was nothing to lead him to believe that there had been any damage whatever suffered, his observation would be less open to question.

From that judgment an appeal was brought before the Deputy Commissioner himself, one of the grounds of it being that the irregularities complained of had resulted in an inadequate price being realised. It is by no means plain to their Lordships that on that hearing the appellants did, in fact, insist upon the omission of the land revenue as one of the grounds of complaint. If introduced at all in the notice of appeal it was only introduced by implication, where it was said that the lower Court had admitted that the proclamation was defective. The specific grounds on which it is alleged that the imperative provisions of law relating to proclamations were not followed do not include this matter; but, at any rate, it was very definitely asserted that the irregularities had resulted in an inadequate price.

Upon the hearing of that appeal, the appellants appear to have made no application whatever to be permitted to call evidence to prove that they had, in fact,

(1) 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. ur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.).

* O. XXI, r. 66 (?) [*Ed.*]

suffered material damage by what had taken place. They did not ask that the matter should be sent back for hearing upon that head by the Sub-Divisional Officer, nor, indeed, that the Deputy Commissioner himself should hear evidence upon it. It appears to have been argued on the facts as they stood, and the result was that the Deputy Commissioner decided that the omission was one which was not likely to have had any effect on the bidding in the auction.

In these circumstances, remembering that it lay upon the appellants to establish before the Court that they had suffered damage before they could start their application for setting aside the sale; that they never did bring forward any evidence whatever upon the point, and they never appear to have asked for liberty to do it, it appears to the Board too late now to come and say that had they had such an opportunity they might have been able to satisfy the Court that they had suffered such damage and that the opportunity should be afforded them now.

For these reasons their Lordships will humbly advise His Majesty that the appeal should fail and should be dismissed with costs accordingly.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. *Valpy, Peckham* and *Chaplin*.

Solicitor for the Respondents.—Mr. *E. Dalgado*.

W. C. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 33 OF 1923.

September 3, 1923.

Present:—Mr. Baker, A. J. C.

TOPAN HARJI & COMPANY—DEFENDANT No. 2—APPLICANT

versus

SINGHAI DALCHAND—PLAINTIFF—AND ANOTHER—DEFENDANT No. 1—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 24—Transfer of suit—High Court, powers of—Procedure.

No Court can direct any transfer from one Court to another unless both Courts are subordinate to it.

A High Court will not, save upon most exceptional grounds, direct a Court subordinate to it to return a plaint, duly instituted, for presentation to a Court outside the jurisdiction of such High Court.

Abu Bakar Abdul Rahiman & Co. v. *Rambux*, 40 Ind. Cas. 393; 13 N. L. R. 81, followed.

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

Messrs. *N. G. Bose*, R. B, and *P. Lobo*, for the Non-Applicants.

ORDER.—The facts of this case are that the plaintiff, Singhai Dalchand, despatched 4 wagon loads of grain to Bombay through the defendant No. 1 (G. I. P. Railway Company). This grain was sold by the plaintiff to a firm called Gangji Takarsi of Bombay but as the *hundis* given by that firm were dishonoured, the plaintiff wanted to stop the goods in transit. He wired to the Goods Superintendent, G. I. P. Railway Company at Bombay, to withhold delivery, but 2 wagon loads had already been delivered and the remaining two were delivered by the Railway Company to the defendant No. 2, Topan Harji, to whom the goods have been sold or transferred by the firm of Gangji Takarsi. The plaintiff, therefore, brought a suit in the Court of the District Judge at Sargor to recover the price of the goods from the defendants.

The Railway Company pleaded that the Sargor Court had no jurisdiction as both the defendants reside in Bombay, and the cause of action arose there. The defendant No. 2 moved the Court for a stay in order to enable him to apply for a transfer and he now prays in the present application asking this Court to withdraw the suit or return the plaint to the plaintiff for presentation to the proper Court on the ground that the Sargor Court has no jurisdiction.

The contention of the applicant is that, as the cause of action arose solely in Bombay, the case is exclusively triable there. I do not propose to go into the merits of the case at all, because it is obvious that the present application cannot lie. The case is on all fours with *Abu Bakar Abdul Rahiman & Co.* v. *Rambux* (1). This

(1) 40 Ind. Cas. 393; 13 N. L. R. 81.

Court has no jurisdiction to direct transfer from the Saugor Court to any Court in Bombay which is outside its jurisdiction. No Court can direct any transfer from one Court to another unless both Courts are subordinate to it. The same case lays down that, even if a High Court is of opinion that a suit, which has been duly instituted in a Court subordinate to it, should proceed in another Court beyond the territorial limits of the jurisdiction of such High Court, it is doubtful whether it is competent to direct the former Court to return the plaint for presentation to the latter. Assuming that it is so competent, the High Court should not adopt such a course save upon most exceptional grounds.

It is admitted by the learned Pleader for the applicant that he cannot ask for withdrawal of the suit since under section 24 of the Civil Procedure Code the withdrawal must be followed either by trial by itself of the case by the Court withdrawing it or by transfer to some Court subordinate to it, and if the Saugor Court has no jurisdiction then neither this Court nor any other Court in the Province can have any.

As regards the making of an order for the return of the plaint I adopt the reasoning of Stanyon, A. J. C., in the case quoted above, in *Abu Bakar Abdul Rahiman & Co.* v. *Rambux* (1). Even supposing that it was competent to this Court to decide that the plaint in this case should be returned for presentation to the Court having jurisdiction in Bombay, the exceptional grounds referred to in that case do not exist here. The jurisdiction of the Saugor Court has already been challenged by the defendant No. 1 and will naturally be challenged by the defendant No. 2. An issue will certainly be framed, and if the Court holds that it has no jurisdiction the plaint will be returned to the plaintiff for presentation to the proper Court. If the Court holds that it has jurisdiction, that is a matter which will be considered in appeal. The defendant, therefore, has an opportunity of challenging the jurisdiction of the Court.

The present application is clearly unsustainable and must be dismissed. The applicant will pay the costs of the 1 on-applicant No. 1 (plaintiff). The non-applicant No. 2, the Railway Company, who support the application will bear their own costs.

G. R. D. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 32 OF 1920.
December 1, 1922.
Present:—Mr. Kincaid, J. C., and Mr. Raymond, A. J. C.

MANOHERDAS AND OTHERS—APPELLANTS
versus
RAMDAS AND OTHERS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42, proviso, object of—Suit, when barred—Injunction, nature of—Injunction, when can be claimed—Amendment of plaint—Appellate Court, power of—Amendment, when not allowable.

The object of the proviso to section 42 of the Specific Relief Act is to prevent a multiplicity of suits, and to prevent a plaintiff, who has obtained a declaration, from filing a fresh suit for possession. In order that a suit can be held as not maintainable by reason of this proviso, it must be shown that the defendant was in possession, and that, as against him, the plaintiff could have obtained an order for delivery of possession. [p. 551, col. 1.]

Malijya Pillai v. *Tirumalaperumal Pillai*, 12 Ind. Cas. 170; 36 M. 62; 21 M. L. J. 1022; 10 M. L. T. 277; (1912) M. W. N. 161, relied on.

An injunction is a discretionary relief and cannot be obtained by a plaintiff out of possession, when he does not ask for possession against defendants who are actually in possession. [p. 551, col. 1.]

Mir Husain Bux v. *Kando*, 32 Ind. Cas. 689; 9 S. L. R. 174 and *Rathnasabapathi Pillai* v. *Ramasami Aiyar*, 5 Ind. Cas. 630; 33 M. 452; 20 M. L. J. 301; (1910) M. W. N. 112; 7 M. L. T. 311, relied on.

Although an Appellate Court has very wide powers in the matter of permitting an amendment of the plaint in a suit, yet that Court will not grant such permission if the plaintiff has already had an opportunity of amending his plaint, and has not availed himself of it, and the amendment is likely to operate prejudicially to the defendant. [p. 552, col. 2.]

JUDGMENT.—The facts of the case out of which this appeal arises have been exhaustively set out in the judgment of the Trial Court and it is unnecessary to re-capitulate them. On the pleadings, the learned Judge of the Trial Court framed

five issues amongst which Issue No. 4 was as follows :—

"Whether the plaintiff has possession of the Jacobabad Tikana and its properties; if not, whether the present suit is maintainable".

Upon the first part of the issue the learned Judge came to the conclusion that the plaintiff had not possession of the Jacobabad Tikana or its properties, and on the second part that the suit was not maintainable as framed and he, therefore, dismissed it.

On a careful consideration of the evidence in the case and the judgment of the lower Court, I see no reason whatever to differ from the finding of the learned Judge that the plaintiff has not been shown to have had either the possession of the temple or the other properties appurtenant to it. This finding of the lower Court is borne out by the plaint itself in the case, as in paragraph 11 of the plaint the allegation of the plaintiff is that during his absence defendants-respondents Nos. 2 and 3 trespassed on the *tikana* and began to interfere with the collection of the *tikana* dues and recovery of rents of the shops attached thereto. And in paragraph 2 of the plaint it was stated that the defendants declined to give up possession of the *tikana* in spite of the repeated demands of the plaintiff. The position, therefore, appears to be perfectly clear that at the time the suit was filed the plaintiff-appellant was out of possession of the Jacobabad Tikana and what he substantially prayed for was that the *tikana* should be restored to his possession and the defendants evicted therefrom.

Now, it is the common ground that attached to the Jacobabad Tikana there are four shops situate at Jacobabad and a share of 8 pies out of 16 annas in a factory situated at Sukkur and known by the name of Dwarkadas Isardas Factory. Plaintiff's prayer in his plaint was that he be declared the rightful successor to Pahilajrai's *Gaddi* and in that capacity entitled to receive the share of profits from the Dwarkadas Isardas Factory at Sukkur and that he should also be declared the owner of the Jacobabad Tikana and for the issue of an injunction restraining defendants-respondents Nos. 1 to 5 from interfering with the plaintiff's lawful possession of the Jacobabad Tikana and also from interfering with the enjoyment of the profits receivable by way of rents from the four shops attached to the *tikana*. In their written statement the defendants took up the plea that the suit was not properly framed as the appropriate consequential relief which the plaintiff should have sought was one for possession and not for an injunction and, therefore, the suit was barred by section 42 of the Specific Relief Act. It was apparently in consequence of this plea that the issue was raised whether the suit as framed was maintainable.

The plaintiff-appellant who has appealed against the finding of the learned Judge as to the maintainability of the suit has contended on appeal by his learned Counsel Mr. Isardas that the suit was correctly framed and even if the frame of the suit was not what it should have been, the case is a fit one wherein the lower Court should have allowed an amendment of the plaint and the lower Court has erred in not doing so. The issue before this Court which has been argued both by the Counsel for the appellant and the Pleader for the respondents has been, first, whether the suit as framed was not correct. In the consideration of this question it would be necessary to consider the plaintiff's suit with regard to the various properties mentioned in the plaint separately, and I propose, therefore, in the first instance, to discuss the question as to whether the suit can be deemed to have been correctly framed for a declaration and injunction in respect of the *tikana* and, I have remarked above, that the paragraphs in the plaint to which I have referred, clearly show that defendants Nos. 1, 2 and 3 had entered into possession of the *tikana* and plaintiffs object by the suit was to have them evicted and possession restored to him. And it is important to bear in mind that the plaintiff's prayer was not only for a declaration of his right to the *gaddi* but also for a declaration of his right of ownership to the Jacobabad Tikana. He asks for an order from the Court to be placed in possession of this *tikana* and as a natural consequence to evict from it those who had trespassed upon it. In my opinion, therefore, under these circumstances, the prayer for a bare declaration was infructuous and it

was necessary to apply for a consequential relief not in the shape of an injunction merely, as I shall presently show, but for possession of the property in dispute. The proviso to section 42, Specific Relief Act, provides: "that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so."

This is a clear case where there is right to consequential relief and the object of the proviso is to prevent multiplicity of suits and a plaintiff, after obtaining a declaration, from filing a fresh suit for possession of the property. It is further to be borne in mind that under section 42 of the Specific Relief Act declaration is a matter which is within the discretion of the Court whether to grant or not. It was argued that the injunction that was sought for was by way of consequential relief and no further relief need be asked. To this argument the answer is to be found in the case of *Mir Hussein Bux* v. *Kando* (1) where it was held, "An injunction is an equitable relief which cannot be granted unless Common Law remedies fail," and to the same effect is the ruling in the case of *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (2) which says very clearly that: "An injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against defendants who are actually in possession." It appears to me that injunction that is sought in this case is not the appropriate relief that the plaintiff is entitled to claim possession as against the defendants who are, on the plaintiffs own showing, at present in actual possession of the Jacobabad Tikana. As further authority for this proposition I may refer to the case of *Mallijya Pillai* v. *Tirumalaperumal Pillai* (3) where it was held: "In order that a suit can be held not maintainable by reason of the proviso to section 42 of the Specific Relief Act (I of 1877) it must be shown that the defendant was in possession, and that as against him the plaintiff could have obtained an order for delivery of possession." In the present case, we have the undoubted fact that the defendants were in actual possession against the plaintiff and the plaintiff could have obtained an order for delivery of possession and in this view the injunction sought is not the appropriate relief for which plaintiff should have sued for but he should have actually sought for possession and framed and stamped the suit accordingly, and, not having done so, his suit, so far as the *tikana* is concerned, is barred by the proviso to section 42 of the Specific Relief Act.

As I have already said, we are not merely concerned with the *tikana* but with two other items of property which the plaintiff claims from the defendants and to which I have already adverted. The first with respect to the four shops that are attached to the *tikana*, it is common ground that the owner of the Jacobabad Tikana would also have the proprietary rights over the shops. As so far as the shops are concerned, it appears to us that it has been established that the defendants Nos. 2 and 3 have been realising the rents and not the plaintiff. The shops are, no doubt, in physical possession of tenants but, as held again in the case of *Mir Hussein Bux* v. *Kando* (1), "the right to recover rent is it itself capable of possession" and again in the case of *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (2) where it was held "that notwithstanding that lands belonging to the temple were in the physical possession of tenants, yet the plaintiff's right to receive rents was capable of possession which if disturbed entitled him to bring a suit for possession under section 9, Specific Relief Act." Mr. Isardas referred to the judgment in *Ramdas* v. *Ajudhiadas* (4) in support of his contention that when the property is in physical possession of the tenants then it is unnecessary to file a suit for possession. But the *ratio decidendi* of that case has to be considered and the point that was decided is in confirmity with the judgment in the case of *Rama Das* v. *Hanumantha Row* (5) for in both

(1) 32 Ind. Cas. 689; 9 S. L. R. 174.
(2) 5 Ind. Cas. 630; 33 M. 452; 20 M. L. J. 301; (1910) M. W. N. 112; 7 M. L. T. 311.
(3) 12 Ind. Cas. 170; 36 M. 62; 21 M. L. J. 1022; 10 M. L. T. 277; (1912) M. W. N. 161.
(4) 63 Ind. Cas. 685; 14 S. L. R. 137.
(5) 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 9; 10 M. L. T. 356; (1911) 2 M. W. N. 387.

these cases it was clearly established that the tenants who were in possession of the land belonging to the temple were willing to pay the rent to whomsoever was a trustee and, therefore, it stated in both these cases that, under such circumstances, the suit for a bare declaration may suffice though still it would be within the discretion of the Court either to grant or refuse the relief sought. But there is no such contention put forward in the present case. The tenants have all along been paying the rent to defendants Nos. 1, 2 and 3 and it is not suggested that they have expressed their willingness to pay the rent to any one that the Court orders them to pay and consequently the principle of that ruling does not apply. Mr. Isardas relied upon the case of *Rama Das* v. *Hanumantha Row* (5) where a suit for a declaration and injunction was held to be correctly framed. But the distinction between that suit and the present one is that in the Madras case the suit was for the recovery of the office of the trustee, whereas the present suit is for the recovery of the *tikana* which is in the defendant's possession. Further, it is to be remembered, as I have remarked, that the rents due can be enjoyed only by the owners of the *tikana* and, therefore, as the suit as to the *tikana* is badly framed that as to the rents is equally so.

The remaining item of property is in regard to the 8 pies share in the Factory situated in Sukkur. Now, it is asserted and not denied that this share in the Factory must necessarily be vested in the proprietors of the *tikana* building. And apart from the question whether an injunction may not be an appropriate relief in the case of the share in the Factory we have these two important points before us that both, with regard to the *tikana* building and with regard to the shops attached to it, the injunction is not the appropriate relief which the plaintiff should have sought and the relief should have been one for possession, and the learned Judge, I think, came to the correct conclusion that the suit is not maintainable.

The second point raised in the appeal and very strongly pressed is that the learned Judge was in error in not allowing the amendments. No doubt our powers are very wide and an application for amendment should receive a liberal construction and it has been well-established that amendments have been allowed sometimes in first appeals sometimes in second appeals and even in the appeals to the Privy Council. Though, therefore, I am always willing to accede to a prayer for amendment, however late the stage at which it may be made, the circumstances of every case must be considered before the amendment is granted. In the present case we have it that, already, in the written statement, the defendants raised a plea that the suit was badly framed inasmuch as possession had not been asked for and an issue was raised on this contention of the defendants yet the plaintiff never thought of applying for the necessary amendment of the plaint.

Further, which is very important indeed, the learned Judge states in his judgment that he allowed the plaintiff an opportunity of amending his plaint and yet the plaintiff refused to amend. And it was only after the whole case was concluded and the plaintiff probably had suspicions as to the bent of the learned Judge's mind he then put in an application for amendment which the Judge refused to grant. It appears to me the learned Judge of the Court below acted quite rightly in refusing the amendment. A similar order was made in the case of *Mir Hussein Bux* v. *Kando* (1) where the Judges refused an amendment because, they said, "the lower Court gave him an opportunity to amend the plaint and to pray for further relief but he did not avail himself of that opportunity." There is a similar decision in the case of *Raj Narain Das* v. *Sham Nando Das Chowdhry* (6) where it is said "the Appellate Court will not grant in a case of this nature an opportunity to amend the plaint if the plaintiffs had already such an opportunity and did not avail themselves of it." It appears to us that the plaint which was filed on a stamp of Rs. 25 was intentionally filed in order to evade the payment of Court-fee and when this fact was brought to the notice of the plaintiff and an opportunity was

(6) 26 C. 845; 4 C. W. N. 162; 13 Ind. Dec. (N. S.) 1141.

given to him he did not choose to avail himself of it. This case is one in which we should not allow him to amend the plaint. Further, I am not prepared to say that no hardship will accrue to the defendants by the amendment of the plaint because if the plaintiff were permitted to amend his plaint and include a relief for possession, the defendant must amend his written statement and as the defendants' Pleader pointed out, and I think quite rightly, a good deal of evidence with regard to possession was excluded at the original hearing for the very simple reason that on the plaint as it stood the evidence was led on the basis of the pleadings and issues and no evidence as to possession was necessary. The suit was filed on the 13th November 1918; over four years have now elapsed, and it is difficult to say what the position now may be with regard to the evidence on the question of possession and, therefore, also on the ground that an order for amendment would operate prejudicially to the defendants so far as their evidence of possession is concerned, it appears to me that this is an additional circumstance which ought to weigh with us in confirming the order of the Trial Judge refusing the plaintiff's prayer for the amendment of the plaint.

Under these circumstances, we must dismiss this appeal with costs.

Appeal dismissed.

W. C. A.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1596 OF 1920.

June 27, 1922.

Present:—Mr. Justice Sulaiman.

Musammat HIRIA—PLAINTIFF—APPELLANT

versus

RAM ADHIN SINGH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 164—Suit by co-sharer for share of profits—Burden of proof—Second appeal—Negligence — Mixed question of law and fact.

When in a suit against a *lambardar* for a share of the profits a co-sharer has given general evidence to show that rents are greatly in arrear; that the tenants are solvent, and that there are no special circumstances why the rents should not have been collected, the onus is on the *lambardar* to show that, for some reason not connected with his own negligence or misconduct, he was unable to collect the rents. [p. 554, col. 1.]

Mithan Lal v. *Mizaji Lal*, 17 Ind. Cas. 914; 10 A. L. J. 529 and *Shiva Chander Singh* v. *Ram Chander Singh*, 30 Ind. Cas. 550; 37 A. 595; 13 A. L. J. 851, followed.

The question of negligence is a mixed question of fact and law, and, although a finding on the facts cannot be disturbed in second appeal, yet the proper inference from those facts as to the negligence is a question of law and can be gone into in second appeal. [p. 554, col. 1.]

Chhabraji Kuar v. *Ganga Singh*, 60 Ind. Cas. 643; 43 A. 29; 18 A. L. J. 863; 2 U. P. L. R. (A.) 272, relied on.

Second appeal against a decree of the District Judge, Cawnpore, dated the 29th July 1920.

Mr. *Mangal Prosad Bhargava*, for the Appellant.

Mr. *Baleshwari Prosad*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of the plaintiff's share of profits against a *lambardar*, under section 164 of the Agra Tenancy Act. The plaintiff claimed her share on the basis of the total demand. The defendant pleaded that there was no negligence or carelessness on his part and that the decree should be on the basis of actual collections.

The Court of first instance, being of opinion that very little care was taken by the defendant in the collections and that large arrears were allowed to remain uncollected, which indicated a negligence on his part justifying a presumption that what remained uncollected was due to his carelessness, and that there was no explanation or excuse offered by him for the short collections, passed a decree on the basis of the gross rental. On appeal the learned District Judge has modified that decree and reduced the amount decreed.

The three years in dispute were 1323, 1324 and 1325 *Faslis*. The collections by the *lambardar* in these years amount roughly to 61, 56 and 53 per cent. respectively. Obviously these collections were grossly inadequate and very low and at once call for some explanation by the *lambardar*. The learned District Judge

has agreed with the Court of first instance that the rents in the present case have been considerably in arrears, that during the years in suit the crops were good and the tenants were generally solvent. This was the statement of the *patwari* which has been assumed to be correct by the lower Appellate Court. These facts in themselves were sufficient to shift the burden at once on to the defendant and call upon him to explain why the realisations were so low. It was laid down in the case of *Mithan Lal* v. *Mizaji Lal* (1) that, where it was proved by a co-sharer that a very large percentage of the rent had remained uncollected and the *lambardar* had not produced his account-books, it was, under the circumstances, for the *lambardar* to explain why such a large sum had remained uncollected. This case was followed by a Division Bench in the case of *Shiva Chander Singh* v. *Ram Chander Singh* (2) where it was pointed out that when a co-sharer has given general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on to the *lambardar* of showing that, for some reason not connected with his own negligence or misconduct, he was unable to collect the rents. This view has not been correctly appreciated by the lower Appellate Court. If the onus was actually shifted on to the *lambardar* defendant it would have to be seen how he has tried to explain it. All that has been shown on his behalf is that the plaintiff also made very poor collections in his own *patti*. Even if that shows that the plaintiff himself was grossly careless and negligent in his own *patti* that would not justify the defendant in his negligence. The learned Vakil for the respondent has not been able to bring to my notice anything which could be put forward as an explanation showing why the collections have been so poor. The question of negligence is a mixed question of fact and law. The facts found by the lower Appellate Court are binding on me, but the question of the proper inference from those facts as to the negligence on the part of the *lambardar* is a question of law which can be gone into in second appeal. This was pointed out in the case of *Chhabraji Kuar* v. *Ganga Singh* (3). In my opinion the lower Appellate Court has thrown the burden wrongly and erred in thinking that even under the admitted circumstances of this case there was on the plaintiff the burden of proving not only the defendant's negligence but the amount which remained uncollected owing to his negligence. The learned Judge has not dissented from the findings of fact recorded by the First Court and has only differed as to the inference to be drawn from the admitted circumstances. In my opinion the burden, having been shifted on to the defendant to explain the low collections, has not been discharged by him. It is noteworthy that the defendant *lambardar* has not produced any accounts showing the actual amount which he has collected. The result is that the decree of the Court of first instance based on the gross rental was correct.

The learned Vakil for the respondent, however, has supported the decree of the learned District Judge on grounds other than those decided by him in his favour. He has urged (1) that the nominal rents fixed for the *sir* and *khudkashi* lands which were in the possession of the *lambardar* were wrongly taken into account, and (2) that in any case some amount should have been awarded as collection charges. The respondent is certainly entitled to support the decree on this new ground under the provision of O. XLI, r. 22 of the Code of Civil Procedure.

As to the first point raised, in my opinion, in the absence of any accounts produced by the *lambardar* showing the actual profits he had made from the *sir* and *khudkasht* land, the lower Appellate Court was justified in treating the amount of rent which was recorded in the revenue papers as the correct amount of the profits. The amount so entered is ovbviously nominal in the sense that such an amount has not in fact to be paid to any one, the *lambardar* himself being in cultivation of *sir* and *khudkasht* land. The rent entered in the revenue papers can only represent the

(1) 17 Ind. Cas. 914; 10 A. L. J. 529.
(2) 30 Ind. Cas. 550; 37 A. 595; 13 A. L. J. 831.
(3) 60 Ind. Cas. 043; 43 A. 29; 18 A. L. J. 863; 2 U. P. L. R. (A.) 272.

amount of rent roughly, and cannot be the exact amount of rent which has to be paid. But in the absence of actual accounts it can properly be made the basis of the calculation.

As to the collection charges, however, in my opinion, the Courts below should have given the defendant credit for a sum fixed at a reasonable percentage. The plaintiff had only given the defendant credit for Rs. 22-8-0 as *lambardari* dues. It is the amount which the *lambardar* is entitled to get under the Land Revenue Act on the amount of Government revenue paid by him. No credit was given to him for collection charges. It is true that the lower Appellate Court has found that the *lambardar* has failed to prove that he kept any special *karinda* or peon or that he incurred any special damages. All that the *lambardar* seemed to have done was that he himself took the trouble of going from tenant to tenant and making collections and, in my opinion, there is no reason why he should not be given credit for meeting collection charges. The plaintiff's share in the total demand inclusive of interest as found by the Court of first instance came to Rs. 262-7-6 only. In my opinion the sum of Rs. 12-7-6 should be deducted as a rough approximate amount to which the defendant *lambardar* is entitled on account of the trouble taken by him in making collections. When the decree on the basis of gross rental is to be passed against him, it is fair that he should be given credit for such an amount.

I accordingly modify the decree of the lower Appellate Court and decree the plaintiff's claim for a sum of Rs. 250 with interest at 6 per cent. That is to say, I give him credit for Rs. 12-7-6 representing collection charges which amounts to less than 5 per cent. The parties will receive and pay costs in proportion to their success and failure

W. C. A. *Decree modified.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 618 OF 1920.

March 1, 1923.

Present:—Mr. Justice LeRossignol and Mr. Justice Broadway.

NATHU RAM AND ANOTHER—DEFENDANTS —APPELLANTS

versus

DOGAR MAL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Cause of action—Hundis *taken in liquidation of original transactions, suit on*—Hundis *found to be inadmissible in evidence—Plaintiff, whether can fall back on original cause of action.*

Plaintiff sued for Rs. 1,500 principal and Rs. 84-5-0 interest on two *hundis* reciting that there had been dealings between the parties ending in the striking of a balance of account for Rs. 2,500 which the defendants paid, as to Rs. 1,000 in cash and as to the balance of Rs. 1,500 by the *hundis;* inasmuch as the *hundis* were improperly stamped they were held to be inadmissible, and the question arose whether the debt could be proved *aliunde*:

Held, that a cause of action existed to the plaintiff independently of the two *hundis* and as the *hundis* were a mere sequal and consequence of the earlier transactions the plaintiff was not precluded from falling back on his original cause of action.

Parsotam Narain v. *Taley Singh*, 26 A. 178; A. W. N. (1903) 217, distinguished.

Miscellaneous appeal from an order of the District Judge, Hoshiarpur, dated the 9th January 1920, reversing that of the Subordinate Judge, First Class, Hoshiarpur, dated the 9th July 1919.

Messrs. *Fakir Chand* and *Amar Nath Chona*, for the Appellants.

JUDGMENT.—Plaintiff sued in this case for Rs. 1,500 principal and Rs. 85-4-0 interest on two *hundis*, reciting that there had been dealings between the parties ending in the striking of a balance of account for Rs. 2,500 which the defendants paid, as to Rs. 1,000 in cash and as to the balance of Rs. 1,500 by the *hundis* on which this suit was based. Inasmuch as the *hundis* were improperly stamped they were held to be inadmissible and the question arose whether the debt could be proved *aliunde*. The First Court held that, inasmuch as the original transactions were liquidated and a complete discharge was effected by the payment of Rs. 1,000 cash and the delivery of the two *hundis* for an aggregate of Rs. 1,500, the plaintiff could

KUMAR PRASANNA DEB RAIKAT *v.* UDDHAB CHANDRA SHAHA.

not have recourse to his original cause of action.

The learned District Judge on appeal held that a cause of action existed to the plaintiff independently of the promissory-notes and that, consequently, the plaintiff was entitled to prove that original cause of action and the failure of consideration represented by the defective promissory-notes, and, in our opinion, his view is correct. Had the defendant borrowed Rs. 1,500 and the contract been embodied in the *hundis* the plaintiffs would have had no remedy other than of a suit on the *hundis*. Since, however, the contract embodied in the *hundis* was a mere sequel and consequence of the earlier transactions, we see no reason why the principles set forth in *Parsotam Narain* v. *Taley Singh* (1) preclude the plaintiff from falling back on his original cause of action. In this case the plaintiff had a complete cause of action for money for goods sold. That transaction was liquidated in part by the delivery of the *hundis*, and as the *hundis* are found to be inadmissible in evidence and that, through the default of the debtor, the plaintiff is at liberty to sue for the original consideration.

We accordingly dismiss the appeal with costs and maintain the order of the lower Court remanding the case for re-decision.

K. S. D. *Appeal dismissed.*

(1) 26 A; 178; A. W. N. (1903) 217.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

April 23, 1923.

Present:—Lord Buckmaster, Lord Dunedin, Lord Carson, Sir John Edge and Lord Salvesen.

KUMAR PRASANNA DEB RAIKAT—APPELLANT

versus

UDDHAB CHANDRA SHAHA AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 50 (2)—Presumption as to rental—Claim for enhanced rent—Plaintiff, what must prove.

Where a landlord claims increased rent, he must, in order to succeed, rebut the presumption arising under section 50 (2) of the Bengal Tenancy Act, 1885, in favour of a tenant that if he held the tenure at a fixed rent for 20 years, he held it from the time of the Permanent Settlement.

Appeal from a judgment and decree of the Calcutta High Court, confirming that of the lower Court.

Messrs *DeGruyther, K. C.*, and *Dube*, for the Appellants.

JUDGMENT.

Lord Buckmaster.—Their Lordships see no reason for the further consideration of this case. The whole question for determination is whether or no there has been proved in the suits which have ended in these appeals anything which will rebut the presumption established by section 50, sub-section (2), of the Bengal Tenancy Act, 1885. That presumption is stated to follow from these conditions, that,—

"If it is proved in any suit or other proceeding 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 twenty 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."

The presumption upon which the appellant relies is to be found in the form of the *kabuliyat* under which the respondent held their title. This has been the subject of consideration by the High Court and by many Judges in the various suits. The real question, upon the face of that *kabuliyat*, is whether it shows that there has been a new tenancy then created or whether it is executed in reliance upon a pre-existing tenure.

Their Lordships have considered the document carefully, and they see no reason whatever to differ from the views expressed in the Courts through which this case has proceeded that the *kabuliyat* undoubtedly proceeds upon the basis that there were pre-existing rights, and consequently it cannot be relied upon for the purpose of showing that there has

been a change in the rent since the date of the Permanent Settlement.

For this reason their Lordships will humbly advise His Majesty that these appeals should be dismissed. As the respondents have not appeared, there will be no order as to costs.

W. C. A. *Appeals dismissed.*

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

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2430 OF 1920.

July 13, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

ANNADA CHARAN SIL AND ANOTHER —DEFENDANTS—APPELLANTS

versus

HARGOBINDA SIL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Evidence varying amount of consideration in sale-deed—Admissibility—Pleading, evidence, finding—Governing principle—Parties to be kept to their pleadings—Fraud.

Evidence to vary the amount of consideration in a registered sale-deed is inadmissible, though want or failure or difference in kind of the consideration may be proved. [p. 558, col. 2.]

Eshenchunder Singh v. *Shamachurn Bhutto*, 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar P. C. J. 209; 20 E. R. 3, followed.

Mylapore Iyasawmy Vyapoory Mudaliar v. *Yeo Ray*, 14 I. A. 168; 14 C. 801; 11 Ind. Jur. 397; 5 Sar. P. C. J. 50; 7 Ind. Dec. (N. S.) 531 (P. C.), *Malaraju Lakshmi Venkayyamma Row* v. *Venkatadri Appa Row*, 59 Ind. Cas. 767; 33 C. L. J. 171; 25 C. W. N. 654; 19 A. L. J. 97; 40 M. L. J. 144; 13 L. W. 256; (1921) M. W. N. 77; 29 M. L. T. 164; 23 Bom. L. R. 713 (P. C.) and *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal*, 16 Ind. Cas. 741; 18 C. W. N. 473, referred to.

The allegations in a plaint, the evidence and the finding should correspond in legal intent, and parties ought not to be permitted to depart from their deeds and to establish a case not set up in their pleadings. [p. 559, col. 1.]

Rees v. *John Young*, 66 Ind. Cas. 745; 34 C. L. J. 178; 25 C. W. N. 519, referred to.

A party cannot come into Court with fraud on his lips and ask for relief: as to such the Courts of Justice are not open. [p. 559, col. 1.

Appeal against a decree of the District Judge, Chittagong, dated the 8th September 1920, reversing that of the Munsif, Chittagong, dated the 29th November 1919.

Babus *Dwarkanath Chakarbutty, Chandra Sekhar Sen* and *Promatha Nath Bandopadhya*, for the Appellants.

Babus *Sarat Chandra Roy Chawdhury* and *Nripendra Chandra Das*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit to enforce a mortgage executed by them on the 22nd December 1916 in favour of the plaintiffs to secure a loan of Rs. 800. The plaintiffs alleged that nothing had been paid on the mortgage and according to the terms thereof they claimed Rs. 1,071. The defendants pleaded that the debt had been satisfied and the claim was unfounded. The Court of first instance dismissed the suit. Upon appeal the District Judge reversed that decision and decreed the claim in full with interest from the date of suit to the date of judgment. In their plaint the plaintiffs allege that the mortgage-bond was part of a transaction which took place between the parties on the 22nd December 1916. The plaintiffs and the defendants were partners in a paddy business at Akyab. The defendants, it is alleged, fixed the price of the share of the plaintiff in the business at Rs. 3,000 and purchased that share for the sum. The defendants paid Rs. 1,500 in cash, Rs. 400 by a boat and for the balance of Rs. 1,100 executed two bonds for Rs. 300 and Rs. 800 respectively. According to the plaintiffs, the bond for Rs. 300 has been satisfied; but nothing has been paid on the bond for Rs. 800. The defendants alleged that the sale had been effected not for Rs. 3,000 but for Rs. 2,000 that Rs. 500 had been paid in cash and that for the balance two bonds had been executed for Rs. 300 and Rs. 800 respectively. They further pleaded that both the bonds had been satisfied. The conveyance, when produced, showed that the consideration for the sale was Rs. 2,000 as alleged by the defendants and not Rs. 3,000 as alleged by the plaintiffs. This placed the plaintiffs in a situation of considerable embarrassment and they asked for leave to amend the plaint. This application was

refused. There was, consequently, an obvious variance between the pleadings and the proof. If in these circumstances the plaintiffs proceeded with their case on the basis mentioned in their plaint, they would contravene a well-known rule of law repeatedly affirmed by the Judicial Committee, by Lord Westbury in *Eshenchunder Singh* v. *Shamachurn Bhutto* (1), by Sir Barnes Peacock in *Mylapore Iyasawmy Vyapoory Mudaliar* v. *Yeo Ray* (2) and by Sir Lawrence Jenkins in *Malaraju Lakshmi Venkayyamma Row* v. *Venkatadri Appa Row* (3). This principle is well-established, namely, that the determination in a case should be founded upon a case either to be found in the pleadings or involved in and consistent with the case thereby made; and it has been applied recently in this Court in the case of *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal* (4), *Rees* v. *John Young* (5), *Gopal Krishna Sil* v. *Abdul Samad Chaudhuri* (6) and *Satis Chandra Ghosh* v. *Kalidasi Dasi* (7). No doubt, as explained by Viscount Haldane in *Umar Abdul Rahiman* v. *Gustadji Muncherji Cooper* (8), and by Lord Dunedin in *Motabhoy Mulla* v. *Mulji Haridas* (9), the rule should not be applied in an abstract way regardless of the circumstances of the case. But, when the plaintiffs had failed to obtain an amendment of the plaint so as to bring their case into harmony with the statement in the conveyance the only course open to them was to make an attempt to adduce evidence in contradiction to the statement in the conveyance, namely, to show by oral evidence that, although the conveyance recited the consideration as Rs. 2,000, the actual consideration was Rs. 3,000. This they did, notwithstanding the protest of the defendants. Consequently, two questions arise, namely, first whether it was permissible to the plaintiffs, in view of the provisions of section 92 of the Evidence Act, to contradict the terms of the conveyance: and, secondly, whether it was competent to them to prove that they had committed a fraud upon the revenues of the country.

As regards the first point it has been pointed out by the Madras High Court in *Adityam Iyer* v. *Ramakrishna Iyer* (10), that while want or failure or difference in kind of the consideration may be proved evidence to vary the amount of consideration in a registered sale-deed is inadmissible. This position is not inconsistent with the decisions of the Judicial Committee in *Achal Ram* v. *Kazim Husain Khan* (11) and *Hanif-un-nisa* v. *Faizunnisa* (12) which affirmed the proposition that it was open to the parties to prove by oral evidence that the actual consideration was different from what was mentioned in the deed, or that there was no consideration for the deed. This view was approved by this Court in the case of *Gopal Singh* v. *Laloo Lall* (13). There can be little doubt that the view taken by the Madras High Court in *Adityam Iyer* v. *Ramakrishna Iyer* (10) is well-founded on principle. To take an illsutration, suppose a mortgage-bond had been executed for Rs. 1,000. Would it be competent to the mortgagee who instituted a suit to enforce the security for Rs. 1,000 to prove by oral evidence that the real consideration was not Rs. 1,000 as stated

(1) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3.
(2) 14 I. A. 168; 14 C. 801; 11 Ind. Jur. 397; 5 Sar. P. C. J. 50; 7 Ind. Dec. (N. S.) 531 (P. C.).
(3) 59 Ind. Cas. 767; 33 C. L. J. 171; 25 C. W. N. 654; 19 A. L. J. 97; 40 M. L. J. 144; 13 L. W. 256; (1921) M. W. N. 77; 29 M. L. T. 164; 23 Bom. L. R. 713 (P. C.).
(4) 16 Ind. Cas. 741; 18 C. W. N. 473.
(5) 66 Ind. Cas. 745; 34 C. L. J. 178; 25 C. W. N. 519.
(6) 66 Ind. Cas. 640; 34 C. L. J. 319.
(7) 68 Ind. Cas. 577; 34 C. L. J. 529; 26 C. W. N. 177; (1922) A. I. R. (C.) 203.
(8) 34 Ind. Cas. 268; 20 C. W. N. 297; 3 L. W. 308; (1916) 1 M. W. N. 137; 30 M. L. J. 444 (P. C.).
(9) 29 Ind. Cas. 223; 42 I. A. 103; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 39 B. 399 (P. C.).
(10) 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602.
(11) 32 I. A. 113; 27 A. 271; 9 C. W. N. 477; 15 M. L. J. 197; 8 Sar. P. C. J. 772; 8 O. C. 155 (P. C.).
(12) 11 Ind. Cas. 398; 33 A. 340; 15 C. W. N. 521; 8 A. L. J. 373; 13 C. L. J. 510; 13 Bom. L. R. 391; 10 M. L. T. 23; (1911) 2 M. W. N. 370; 21 M. L. J. 1126; 38 I. A. 85 (P. C.).
(13) 2 Ind. Cas. 953; 10 C. L. J. 27.

in the bond but Rs. 5,000. If such a course were permissible, the protection intended by the Legislature to be afforded by the adoption of the rule embodied in section 92 of the Evidence Act would be completely nullified.

As regards the second point, there can be no doubt that if the plaintiffs are permitted to prove their allegation that the conveyance was not for Rs. 2,000 but for Rs. 3,000 they will have to establish that they have committed a fraud upon the revenues of the country. If the conveyance had been for Rs. 3,000 the stamp duty payable would have been Rs. 30. Their allegation is that, although the consideration was Rs. 3,000 it was deliberately stated to be Rs. 2,000 because they were unable to procure a stamp-paper of the proper value. This story has been disbelieved by both the Courts below. In such circumstances, if they are now permitted to contradict the statement in the conveyances, they would only be permitted to allege that they have violated the law. Under these circumstances, the principle applies, that a party cannot come into the Court with fraud on his lips and ask for a relief; as to such the Courts of Justice are not open; see the observations of Sanderson, C. J., in *Gregory* v. *Hawoth* (14) where a similar attempt was made. In the same case it was pointed out that the parties should not be permitted to depart from the deeds and to establish a case which is contrary to their pleadings. This cannot be allowed without a gross violation of the rule which requires that the allegations of the complaint, the evidence and the findings should correspond in legal intent. The averment, the proof and the finding should harmonise and proceed upon the same theory, each pointing with logical distinctness to the same result. A recovery, if had, must be *secundum allegata* and must be grounded upon facts which are averred in the complaint and not upon those which are denied.

We are consequently of opinion that the case has not been approached from the right point of view by the District Judge. The rights of the parties must be determined on the assumption that the statements in the conveyance are true. The result is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him for re-consideration. The costs of this appeal will abide the result.

M. D. J. *Appeal allowed.*

W. C. A.

(14) 25 California 622 at p. 657.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 61 OF 1922.

August 15, 1923.

Present:—Mr. Kotwal, A. J. C.

GUMAN SINGH—PLAINTIFF —APPELLANT

versus

UMRAO SINGH—DEFENDANT —RESPONDENT.

Easement rights—Trees standing in adjoining fields—Loss by shade—Suit for damages, whether lies—Enjoyment of natural rights—Limits.

A suit does not lie for compensation for damages caused to crops in a field by the shade of trees standing in an adjoining field falling in it.

The use and enjoyment of land in respect of rights of light, sun's heat and air is restricted by the claim of similar rights in respect of adjoining lands by their owners.

Bryant v. *Lefever*, (1879) 4 C. P. D. 172; 48 L. J. C. P. 380; 40 L. T. 579; 27 W. R. 592, cited.

Appeal against a decree of the District Judge, Chhindwara, in Civil Appeal No. 92 of 1921, dated the 3rd November 1920.

Mr. *A. C. Roy*, for the Appellant.

Mr. *T. Gupta*, for the Respondent.

JUDGMENT.—The plaintiff, who is the appellant here, sued for compensation for damage caused to his crops by the shade of five trees standing in the defendant's field falling in his field. The Trial Court dismissed the suit and an appeal from its decision has also failed.

In the plaint the plaintiff has stated that all the five trees stood on the defendant's land but later alleged that two of them stood on the plaintiff's portion of the *mend* between the two fields. The plaintiff complains that the Court was wrong in not giving him an opportunity of examining the *Patwari* who had been

summoned to prove this fact. The *Patwari* was once summoned but was absent and a second summons was ordered to be issued. The plaintiff, however, paid the process-fee late and the summons was not returned at the next hearing; and as no other witnesses remained to be examined no further service was ordered and the case was closed. It is said that the Court, when it found that the *Patwari* was absent after service, should have ordered a warrant of arrest to be issued against him. No warrant would ordinarily be issued against a public servant who was cited as a witness and remained absent and knowing this the plaintiff appears to have accepted the order for a fresh summons. He did not ask for the issue of a warrant and it is very probable that he would not have liked one to be issued. In any case, in his grounds of appeal to the lower Appellate Court the plaintiff did not urge that the *Patwari* should be examined. All that he desired was a reference to a remark in a map prepared by the *Patwari* which, as the lower Appellate Court observes, has no evidentiary value. The finding of the lower Appellate Court that all the five trees stand on the defendant's land must, therefore, be accepted.

In this Court the plaintiff relies on a custom as to his right to claim damages on account of the shade caused by the trees. But no custom was alleged or has been proved.

Unless and until it can be said that every owner of a field has the right to have the sun's rays fall on it from every possible direction the plaintiff cannot succeed. There cannot be such a right, for if it were allowed the use and enjoyment of the adjoining fields by their owners would be very largely restricted. The use and enjoyment of the very land in respect of which such a right is claimed might be restricted by the claim of a similar right in respect of adjoining lands by their owners. In this connection the following passage from the judgment of Bramwell, L. J., in *Bryant* v. *Lefever* (1) may be cited with advantage :—

"What then is the right of land and its owner or occupier? It is to have all natural incidents and advantages as nature would produce them. There is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow—a right that the rain, which would pass over the land, should not be stopped and made to fall on it, a right that the heat from the sun should not be stopped and re-flected on it; a right that the wind should not be checked, but should be able to escape freely; and, if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the rights of adjoining owners, who, for the benefit of the community, have and must have, rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours, rights to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other: but nobody could doubt that in such case no action would lie".

It must be held tht no suit for compensation for damages caused to the crops in a field by the shade of trees standing in an adjoining field falling in it lies. The appeal fails and is dismissed with costs.

G. R. D. & W. C. A. *Appeal dismissed.*

(1) (1879) 4 C. P. D. 172; 48 L. J. C. P. 380; 40 L. T. 579; 27 W. R. 592.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 777 OF 1921.

August 22, 1922.

Present:—Justice Sir Lallubhai Shah, KT., and Mr. Justice Crump.

RAOJI THAKARAM PATEL NIHARKAR AND OTHERS—DEFENDANTS —APPELLANTS

versus

HEMRAJ SADARAM MARWADI—PLAINTIFF—RESPONDENT.

Minor—Alienation by guardian—Test for determining whether alienation binds minor—Alienee, duty of.

The test for determining whether an alienation by the guardian of a minor is binding on the minor is, whether the alienation was for necessity or for the benefit of the minor. It is for the alienee to establish that he made all proper and necessary inquiries, and that he had acted in good faith in advancing monies to the natural guardian of the minor.

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393 at pp. 423, 424; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.), followed.

Second appeal against the decision of the District Judge, Nasik, in Appeal No. 2 of 1921.

Mr. *D. R. Patwardhan*, for the Appellants.

Mr. *A. G. Desai*, for the Respondent.

INTERLOCUTORY JUDGMENT.—The plaintiff in this case sued to recover possession of certain Survey Numbers on the strength of a sale-deed passed in his favour by Laxman and his wife Jai who purported to act on behalf of Bhavdya, the minor son of Jai, by her first husband. It appears that the property originally belonged to Laxman but before his marriage with Jai he conveyed the property to the minor Bhavdya in 1905. After the sale deed in favour of the plaintiff, Bhavdya apparently mortgaged the property in suit to the defendants in 1916 and sold the same to them in 1918. Bhavdya's whereabouts at the date of the suit were not definitely known. The suit was filed on the 18th December 1919 and the question between the parties was really as to the merits of their respective titles.

The Trial Court disallowed the plaintiff's claim on the ground that the sale-deed in favour of the plaintiff was not proved.

The plaintiff appealed to the District Court, and that Court directed further evidence to be taken on the 1st June 1921. After the further evidence was received the learned Judge came to the conclusion that the sale-deed was proved. But the question as to whether the sale-deed was binding upon the minor Bhavdya does not appear to have been considered in the Trial Court, nor in the lower Appellate Court. It appears that in the Trial Court on the 9th September 1920 the defendants made an application requesting the Court to raise an issue as to whether the conveyance in favour of the plaintiff was for the benefit of the minor Bhavdya. They wanted to raise the question as to whether the sale-deed was really for the benefit of the minor but the Trial Court rejected the application and did not raise the issue on the ground that it was inconsistent with the defendant's contention.

In the lower Appellate Court it appears that the objection was taken in a different form. It was urged that the minor had repudiated the sale-deed. With reference to that point the learned Judge observed that the objection had been taken on that ground in the lower Court but it was belated and was disallowed. The point as to the repudiation of the sale deed by the minor was dealt with by the learned Judge and decided against the defendants.

It seems to us, however, that both the lower Courts have missed the real point at issue in connection with this sale-deed. It was a sale of the property belonging to a minor by two persons Laxman and Jai. Laxman had no right whatever to deal with the property of the minor. It is not suggested that he was his legal guardian. Jai was his mother and she might be able to deal with the property as the natural guardian of her minor son for his benefit. But the test with regard to the binding nature of such an alienation upon the minor has been laid down in *Hunoomanpersuad Panday* v. *Musammat Babooee Munraj Koonweree* (1). It must be shown before the plaintiff can succeed that the power was exercised rightly for necessity or for the benefit of the infant. It would be open to the plaintiff to establish, as pointed out in that case, that he had made all proper and necessary inquiries and that he had

(1) 6 M. I. A. 393 at pp. 423, 424; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.).

KANSHI RAM *v.* JAIMAL SINGH.

acted in good faith in advancing the moneys to the natural guardian of the minor.

It has been suggested before us that Jai was not in the position of a natural guardian at all after her re-marriage and that, therefore, she would not have even the limited power which the natural guardian of a Hindu infant would have, to deal with the property of the infant. We must, however, disallow this contention having regard to the fact that she was the natural mother of the minor who lived with her at the time; under the circumstances she was the natural guardian of the minor.

Before we can dispose of this appeal, it is necessary to have a distinct finding on the question as to whether this sale-deed has been shown to be binding upon the minor Bhavdya. We accordingly send down the following issue to the lower Appellate Court:—

Is the sale-deed of 1912 binding upon Bhavdya?

Parties to be at liberty to adduce further evidence on this point. Finding to be certified in three months.

W. C. A. *Issue sent down.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 220 OF 1920.

March 19, 1923.

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

KANSHI RAM—PLAINTIFF—APPELLANT

versus

JAIMAL SINGH—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55 (2)—Sale—Guarantee of title—Caveat emptor, *applicability of—Pleading—Cause of action arising during pendency of suit—Procedure.*

Though the Transfer of Property Act does not extend to the Punjab, the fundamental principles laid down therein have generally been adopted by the Courts of the Province as affording proper rules of decision. [p. 563, col. 1.]

The rule of *caveat emptor* has become obsolete by reason of the provision contained in section 55 (2) of the Transfer of Property Act, and where the consideration for a sale fails, the vendor is bound to return the purchase-money to the purchaser, even where there is no covenant in the deed of sale guaranteeing his title. There is always an implied covenant of title under section 55 (2) of the Transfer of Property Act. [p. 563, cols. 1 & 2]

Vellayappa Rowthen v. *Bava Rowthen*, 29 Ind. Cas. 747, *Subbaraya Reddiar* v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T. 240; (1914) M. W. N. 376, *Chidambaram Pillai* v. *Swathasamy Thevar*, 15 M. L. J. 396, *Shaligram Sadasheo Pande* v. *Narain*, 45 Ind. Cas. 669, *Lachhman Das* v. *Jowahir Singh*, 70 Ind. Cas. 250; 44 P. L. R. 1922, *Bhattu Ram* v. *Ganga Prasad Gope*, 47 Ind. Cas. 37; 3 P. L. J. 358, *Vatakka Chathillngath Tavazhi* v. *Ramaswami Patter*, 27 Ind Cas. 889; 2 L. W. 155 *Rajagopalan* v *Tirupananthal Tambiran*, 17 M. L. J. 149, relied on.

Where a suit is found to have been premature at the time when it was filed but a valid cause of action arises during the time it is pending, and the plaintiff is otherwise entitled to succeed, the Court should pass a decree in his favour and not compel him to institute another suit for the purpose. [p 563, col. 2.]

Sita Ram v. *Ram Chandra*, 44 Ind. Cas. 863; 26 P. R. 1918; 51 P. W. R. 1918; 114 P. L. R. 1918, *Ghulam Fatima* v. *Rahman*, 50 Ind. Cas. 270; 127 P. R. 1919, followed.

Second appeal from a decree of the District Judge, Ambala, dated the 20th February 1920, modifying that of the Senior Subordinate Judge, Ambala, dated the 22nd November 1919.

Mr. *Dev Raj Sawhney*, for the Appellant.

Mr. *M. Obedullah*, for the Respondent.

JUDGMENT.—This was a suit by the purchaser of agricultural land to recover from the seller the purchase-money by way of damages as the latters' title to the land was declared to be defective. The land originally belonged to one Dewa Singh, who gifted it to Jaimal Singh, defendant, and the latter sold it to plaintiff. The reversioners of Dewa Singh sued for and obtained a declaration that the gift and subsequent sale of the land shall both be inoperative as against them after the death of the donor. The purchaser then brought the present suit while he was still in possession of the land and the donor was alive, and, therefore, the seller's defence was that the suit was premature and was also barred by the rule of *caveat emptor*, and he further pleaded that the vendee was precluded by the terms of the sale from claiming a refund of the price paid by him. The First Court found in favour of the defendant on both these points and dismissed the suit. On appeal the learned District Judge came to the conclusion that the suit was not premature, but confirmed the First Court's decree on the ground that there was no covenant

by the defendant-vendor to refund any of the purchase-money.

The plaintiff comes to this Court in second appeal, and it is urged on his behalf (1) that the rule of *caveat emptor* became nugatory by virtue of section 55 (2) of the Transfer of Property Act; (2) that the suit was not premature; and (3) that even if it was at the time of its institution it is not so now, as the donor has died and his reversioners have taken possession of the land.

As stated in the Courts below and repeated before us, the ruleof *caveat emptor* was applied by the Chief Court in cases reported as *Hira Nand* v. *Mahia* (1) and *Kashmira Singh* v. *Hanwanta* (2). But Counsel for the plaintiff-appellant points out that the judgment in the former case was given long before the enactment of the Transfer of Property Act of 1882, that section 55 (2) of that Act was not referred to in the case of 1893, and that the principle of section 55 (2) was accepted and applied in *Jai Kishen Das* v. *Arya Priti Nidhi Sabha* (3).

Though the Transfer of Property Act does not extend to this Province, the fundamental principles laid down therein have generally been adopted by this Court as affording proper rules of decision. The rule of *caveat emptor* has now become obsolete and we are, therefore, of opinion that consideration for the sale having failed the defendant is bound to return the price to the plaintiff though there was no covenant in the deed of sale guaranteeing his title. As held by several High Courts in the cases cited by the Counsel for the appellant, (which are noted on the margin*) there is an implied guarantee of title because, according to clause (2) of section 55, "the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same." Counsel for the defendant-respondent argued that clause (2) of section 55 was not applicable because there was a contract to the contrary in the deed itself. That contract was, that "the heirs and reversioners of the seller would have no objection to the sale and that if any of them should claim the land he would have to pay all the price and costs and damages to the vendee and then take the land sold from him." This covenant cannot be said to be in any way contrary to clause (2) of section 55, and, therefore, was not sufficient to avoid that clause.

The purchaser had no knowledge of the defect in title and, therefore, he is not debarred from claiming a refund of the money.

The plea that the suit was premature is technically correct, but it will serve no useful purpose to compel the plaintiff to start the case *de novo*. In *Sita Ram* v. *Ram Chandra* (4) it was held in a suit for money, where the money became payable to the plaintiff after the institution of the suit, that the Court should pass a decree and not compel the plaintiff to institute another suit for the purpose. This ruling was followed in *Ghulam Fatima* v. *Rahman* (5).

We accept the appeal and, reversing the judgments and decrees of the Courts below, decree the plaintiff's suit with costs throughout.

Z. K. *Appeal accepted.*

(1) 90 P. R. 1876.
(2) 62 P. R. 1893.
(3) 58 Ind. Cas. 757; 1 L. 380; 80 P. W. R. 1920.
(4) 44 Ind. Cas. 863; 26 P. R. 1918; 51 P. W. R. 1918; 114 P. L. R. 1918.
(5) 50 Ind. Cas. 270; 127 P. R. 1919.

* *Vellayappa Rowthen* v. *Bava Rowthen*, 29 Ind. Cas. 747, *Subbaraya Reddiar* v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T. 240 (1914) M. W. N. 376, *Chidambaram Pillai* v. *Sivathasamy Thever*, 15 M. L. J. 396, *Shaligram Sadasheo Pande* v. *Narain*, 45 Ind. Cas. 669, *Lachhman Das* v. *Jowahir Singh*, 70 Ind. Cas. 250; 44 P. L. R. 1922, *Bhatiu Ram* v. *Ganga Prasad Gope*, 47 Ind. Cas. 371 3 P. L. J. 358, *Vatakka Chathilingath Tavazhi* v. *Ramaswami Patter*, 27 Ind. Cas. 889; 2 L. W. 135, *Rajagopalan* v. *Tirupananthal Tambiran*, 17 M. L. J. 149.

SUMITRI BAI *v.* SUBHADRA BAI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 24 OF 1922.

July 26, 1923.

Present:—Mr. Baker, Offg. J. C., and Mr. Halifax, A. J. C.

SUMITRI BAI—NON-APPLICANT—APPELLANT

versus

Musammat SUBHADRA BAI—APPLICANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 19 (b)—Guardianship—Mother, position of—Unfitness of mother not proved—Application by other relatives, whether can be considered.

The principle underlying clause (*b*) of section 19 of the Guardians and Wards Act applies to a mother as well as to a father though with less force, and it must be shown that a mother is unfit to be the guardian of the person and property of her minor child before the relative fitness of other relatives can be considered. [p 565, col. 1.]

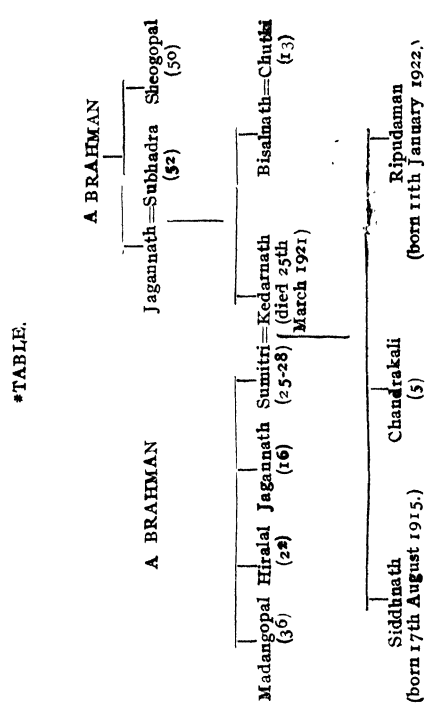
Appeal against an order of the Additional District Judge, Bilaspur, dated the 31st August 1922 in Civil Miscellaneous Case No. 47 of 1921.

Mr. *P. C. Dutt*, for the Appellant.

Mr. *J. C. Ghose*, for the Respondent.

JUDGMENT.—The proceedings for the appointment of the guardian for the property of a minor originated in an application made by the respondent Subhadra Bai. She also has appealed against the final order in the case, and her appeal (Miscellaneous Appeal No. 41 of 1922) will also be governed by this judgment. The following table* shows the relationship between most of the parties with whom we have to deal. The figures in brackets under each name except in the case of Kedarnath give the ages in 1921 of the persons mentioned :—

*TABLE.



We are concerned also with one Har prasad aged about 50, who is a second cousin to Kedarnath, and with Kapil Singh, the young *Mulguzar* of Akaltari a village quite close to Prasada, who was Kedarnath's *Mukhtiyar* and is still the *Mukhtiyar* of his widow Sumitri. He does not belong to either of the families mentioned in the table above and may not be of the same caste, though we have been unable to ascertain his caste from the record of the proceedings in the lower Court. It is alleged by Subhadra Bai that there is reason to believe that immoral relations subsist between Kapil Singh and Sumitri Bai, but the only support for the allegation appears to lie in the facts that they are both young and that such relations between a young and wealthy widow and her *Mukhtiyar* are by no means uncommon.

(2) The original application by Subhadra Bai was for the appointment of herself as the gaurdian of both the person and the property of her grandson Siddhnath. There is no mention of his younger brother Ripudaman in the application as he was born after it was made. The learned Judge of the lower Court has refused to remove Sumitri Bai from the guardianship of the person of her son Siddhnath, and this part of his order has been accepted by Subhadra Bai. This fact and her failure to apply for the removal of Sumitri Bai from the guardianship of the person of Siddhnath's younger sister, throw some doubt on her allegations of immorality against her daughter-in-law and her own motives

in asking to be made the guardian of Siddhnath's property.

(3). The order of the learned Additional District Judge, against which both Subhadra Bai and Sumitri Bai have appealed, is far from satisfactory. He has stated a finding, for which no real basis seems to exist, that both of them are incapable of managing the property, of which the annual income is between four and seven thousand rupees, " and of preserving the honour of this respectable family which consists of one infant owner or two; a daughter yet to be married and three widows to be maintained." For this reason, on the 5th of August 1922, he appointed the Collector a guardian, but cancelled the order on the same day on realising that he had not consulted the Collector. Then, on the 31st of August 1922, he again appointed the Collector as guardian without having consulted him in the interval except to the extent of having asked him to report the annual income of the property. When notice of the two appeals was served on the Collector he wrote to ask for a copy of the lower Court's order, and on receipt of it he wrote again to say that he did not accept the appointment, That is a sufficient commentary on the order,

(4). The case then requires examination from the beginning, but before any necessity can arise for a consideration of the relative fitness of Subhadra Bai and Sumitri Bai and her brother Madan Gopal, it has to be shown that Sumitri Bai is unfit for the position of guardian of the property as well as the persons of her own children, which she would otherwise occupy as a matter of course. The principle underlying clause (*b*) of section 19 of the Guardians and Wards Act applies to a mother as well as to a father, though with less force. No evidence has been given, and in this Court there was no suggestion made, that either party desired to give any. For a decision of the case we have, therefore, nothing but the allegations of Subhadra Bai and Sumitri and ordinarily no allegation made by the former could be accepted as true unless it had been admitted by the latter. But it has to be remembered that this is not a matter of the rights of rival claimants to the possession and management of certain property, though that is the light in which cases of this nature are frequently regarded by the Courts and almost invariably by the rival claimants themselves. The Court has to find out for itself what is for the interest of the minor and what is against that interest, and must itself call for evidence on any matter on which it is doubtful and thinks that evidence is available.

(5). In this light, therefore, we proceed to examine the allegations in regard to the unfitness of Sumitri Bai to be the guardian of the property left by her late husband Kedarnath. As I as already been pointed out, the allegation of her unfitness is based mainly on what is more a suggestion than an allegation of her immoral relations and close association with Kapil Singh and of the probability of mismanagement and misappropriation by him, not by her. It is discounted to some extent by the acquiescence of Subhadra in the continued residence of Siddhnath and his sister with their mother; if she is concerned with the interests of Siddhnath in any way, it is only with his material interests as an owner of property.

(6). In the original application the only allegations made against Sumitri Bai are that " she spends most of her time with this young man" Kapil Singh and "her relations with him are suspicious" and in any case unbefitting a lady in her position, and she "is said to have given away all her ornaments worth about Rs. 4,000 to Kapil Singh." The rest of the application is taken up with vague suggestions of what an undesirable person Kapil Singh is and of what, in the applicant's opinion, he is likely to do. That he is in debt and that he was once committed to the Court of Session on a charge of murder "in connection with some female" (but apparently acquitted, though mention of this is carefully omitted) and that some unspecified persons also had suspicions against him in connection with another murder, are matters which can hardly be called relevant in the present case.

(7) We have, however, two statements of facts which might be relevant. There is the assertion of the probability of a person

so deeply in debt as he is said to be trying to fill his own pockets at the expense of the minor, and the statement that "in fact this process has already commenced," and the statement of fact already mentioned that Sumitri Bai "is said" to have given him all her ornaments, and that "he is taking away *dan*, etc.," The manner in which these statements are made suggests that there is little truth in them and that no object would be served by calling for evidence on them. This impression is confirmed by the second very voluminous written statement put in by Subhadra Bai, in which she has certainly said everything that could possibly be said about the relations between Sumitri Bai and Kapil Singh and the character of the latter.

(8) It has not been made out, nor is there any prospect if we were to call for further evidence of its being made out, that Kapil Singh possesses any undue influence over Sumitri Bai in the management of her late husband's property, or that, if he has any such influence, there is any danger of his using it to the detriment of that estate. Taking this view of the case we have to decide on the fitness of Subhadra Bai or Hariprasad, whom she now puts forward instead of herself, to be appointed guardian of the property, but it may be added that both of them are very evidently unfit. The order of the lower Court is set aside and in its place an order will issue appointing Sumitri Bai to be the guardian of the property as well as the persons of all her minor children. The costs incurred by her in both Courts will be paid by Subhadra Bai. The Pleader's fee in this Court will be Rs. 50.

G. R. D. *Order set aside.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 114 FO 1921.

July 26, 1923.

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

AMBI *alias* SUBRAMANIAM PATTAR—PETITIONER—DEFENDANT No. 1—APPELLANT

versus

PUTHIA KOVILAKATH VIATHAN SRIDEVI, STYLED VALIA THAMBURATTI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 34 (2), O. XXI, r. 2, O. XXXIV, r. 8—Notice of payment, applicability to mortgage suits—Position of kanomdar without notice—Failure to award interest—Presumption that interest refused.

Order XXI, r. 1, clause (2) of the Civil Procedure Code which requires notice to be given to the decree-holder of any payment made into Court under a decree is inapplicable to a redemption decree where the decree-holder has to make the payment. Order XXXIV, r. 8, governing redemption suits, does not require any notice to be given to a defendant after the decree has been passed before the plaintiff obtains possession, and a *kanomdar* who does not receive notice is not also prejudiced by such failure since he is not entitled to have delivery stayed pending a re-valuation of improvements [p. 567, col 1.]

Sankaran Nambudripad v *Sankaran Nair*, 66 Ind. Cas. 129, 44 M. 960; (1921) M. W. N. 470, (1922) A. I. R. (M.) 347, referred to.

Under section 34 (2) of the Civil Procedure Code where a decree is silent with respect to interest the Court should be deemed to have refused such interest. [p. 567, col. 2.]

Appeal against an order of the Court of the Subordinate Judge, South Malabar at Palghat, in A. S. No. 152 of 1920, preferred against an order of the Court of the District Munsif, Alatur, in E. A. No. 696 of 1920, in O. S. No. 431 of 1916.

Mr. *C. V. Anantha Krishna Ayyar*, for the Appellant.

Mr. *K. P. Ramakrishna Ayyar*, for the Respondent.

JUDGMENT.—The respondent in this case obtained a decree for redemption of a *kanom* after the expiry of the *kanom* period. There was an appeal and the Appellate Court modified the District Munsif's decree on certain points. It confirmed it as regards the main right of the plaintiff to redeem the suit property. In this second appeal two points have been pressed. First, it is argued that before the decree-holder

obtained possession, notice ought to have been given to the first defendant, and that the failure to give him notice prejudiced this defendant in respect of his right to remove the improvements made by him, if it appeared to him advantageous that he should do so, and in respect of his right to demand increased compensation for the period during which he had been in possession after the passing of the decree. The second point argued is that the decrees which have been executed have been misconstrued as regards the interest awarded by the First Court on costs. In support of the first point Mr. Ananta Krishna Ayyar has referred us to O. XXI, r. 1, clause (2), of the Code of Civil Procedure which requires that notice should be given of any payment made into Court under a decree. This Order and rule evidently refer to a money decree. The rule says that notice of such payment should be given to the decree-holder. In a redemption decree it is the decree-holder who makes the payment and the defendant who is to receive it. This rule is evidently not applicable to cases of mortgage-decrees, which are governed by O. XXXIV. Order XXXIV, r. 8, which governs decrees in redemption suits, does not specifically require any notice to be given to a defendant after the decree has been passed before the plaintiff obtains possession. Moreover, the *kanomdar* was not prejudiced by the want of notice seeing that he was not entitled to have delivery stayed pending a revaluation of improvements. This has been established by *Sankaran Nambudripad* v. *Sankaran Nair* (1). As regards interest on costs, the First Court in its judgment awarded to the defendants their costs with interest at the usual rate. This was taken to be 6 per cent. when the decree was drawn up. The plaintiff and the first defendant appealed and the Appellate Court directed the plaintiff to pay the first defendant Rs. 203-8-0 as costs instead of Rs. 343-8-0 and the first defendant to pay the plaintiff Rs. 146-8-0 as costs, and directed that in other respects the decree of the lower Court should be confirmed. As the lower Appellate Court reduced the amount of costs to be paid to the first defendant and increased the amount due to the plaintiff, it is reasonable to suppose that the Appellate Court considered it unnecessary to award interest on costs, altough it did not expressly say so. If it had thought it necessary to award interest to the first defendant, it might have also awarded interest to the plaintiff on his costs. While leaving the order awarding interest on the costs of the defendant untouched in the judgment, the lower Appellate Court simply directed that the decree of the District Munsif should be modified in accordance with the findings recorded. The words. "The decree of the lower Court is in other respects confirmed" appear in the decree only. The difficulty that has arisen in the present case is only as to the interpretation of the Appellate Court's decree. Under section 34 (2) of the Code of Civil Procedure where a decree is silent with respect to interest, the Court shall be deemed to have refused such interest. The lower Court, therefore, appears to be right in holding that the result of the Appellate Court's decree was to abrogate the order of the First Court as regards interest on costs, and, therefore, the amount paid into Court must be treated as the correct amount, and the appellant is not entitled to have it increased or to have the property re-delivered to him.

The second appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

(1) 66 Ind. Cas. 129; 44 M. 960; (1921) M. W. N. 470; (1922) A. I. R. (M.) 347.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 139 OF 1916.

December 18, 1917.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Walmsley.

RUP CHAND GHOSE—PLAINTIFF—APPELLANT

versus

Srimati KHIRODAMAYI DASI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7, cl. 10

(c)—Suit for declaration of plaintiffs' right and consequential relief— Valuation of the relief sought —Court-fee payable.

Plaintiff purchased certain property inherited by defendant under a Will, and brought the present suit for a declaration of his right; for the administration of the estate of the testator, if any portion remained unadministered, and for the appointment of a Receiver, and valued the relief sought at Rs. 1,500 in respect of each claim. The question was as to the amount of Court-fee payable on the plaint:

Held, that the suit was one for a declaratory decree where consequential relief is prayed, and that, an *ad valorem* Court-fee was payable under section 7, clause (iv) of the Court-Fees Act, according to the amount at which the relief sought was valued in the plaint. [p. 569, col. 1.]

Appeal against a decree of the Subordinate Judge, Second Court, 24-Pergannas, dated the 26th and 29th April 1916.

Messrs. *Langford James, Arabinda Roy*, and Babu *Satish Chandra Mukherji*, for the Appellant.

Babu *Ram Charan Mitra*, for the Respondents.

JUDGMENT.

Chatterjea, J.—The only point for consideration in this appeal relates to the question of Court-fee payable on the plaint in the suit out of which this apeal arises.

The prayers in the plaint are as follows:—

(ka) That the Court may be pleased to declare that the plaintiff's purchase of the paternal right inherited by defendant No. 2 in the properties described in schedule *(ka)* and *(kha)* below is valid and binding on the defendants under the circumstances stated above.

(Kha) That the Court may be pleased to declare after a true construction of the Will of the deceased Puran Chandra Malata, that the estate left by him was fully administered at the time the Probate was taken and that the executrixes to his estate were not competent to retain possession of his estate as executrixes and that the said Probate is now only an inoperative instrument.

(Ga) That the Court may be pleased to declare, that the defendants by their conduct and acts and deeds are estopped from claiming any sort of title against the plaintiff to the properties mentioned below which have been purchased by the plaintiff.

(Gha) That if in the judgment of the Court any portion of the said estate is yet unadministered, it may be ordered that the same may be administered by the Court, that arrangements may be made for keeping the plaintiff's purchased right therein unaffected, and that a Receiver may be appointed by the Court for that purpose.

(Una) That a decree may be passed against the defendants for all the costs of the present suit.

(Cha) That the Court may be pleased to grant any other relief to the plaintiff, to which he may be found entitled in the judgment of the Court".

The first prayer is for declaration of plaintiff's right, but in the fourth prayer the plaintiff prays for administration of the estate (if in the judgment of the Court any portion of it is yet unadministered) and for the appointment of a Receiver. The suit is, therefore, one for a declaratory decree where consequential releif is prayed and the Court below is right in holding that it is such a suit. The learned Subordinate Judge, however, fixed the value of the properties purchased by the plaintiff at Rs. 30,000 and held that the plaintiff must pay *ad velorem* Court-fee on that sum, *viz*,, Rs, 975 minus Rs. 30 already paid by him.

But the market value of the property cannot be taken to be the value of the relief sought as the plaintiff does not seek possession of the property. The plaintiff says that he is in possession, and there is nothing in the plaint to show that he is suing for possession. That being so, the case does not come under section 7 clause v. A suit for a declaratory decree where consequential relief is prayed falls under section 7, clause iv *(c)* of the Court-Fees Act. Clause iv provides that in suits to obtain a declaratory decree or order where consequential relief is prayed or in a suit for accounts the amount of fee shall be computed, "according to the amount at which the relief is valued in the plaint or Memorandum of Appeal" and that in all such suits the plaintiff shall state the amount at which he values the relief sought". The valuation of the relief sought in cases coming under section 7, clause iv; therefore,

rests with the plaintiff and not the Court. The plaintiff valued the claim in the present case as follows :—Rs. 1,500 for declaration Rs. 1,500 for construction, and Rs. 1,500 for administration. The learned Counsel for the appellant contended that if *ad valorem* Court-fee is to be paid at all, it should be paid only on the amount at which the relief sought for in the fourth prayer of the plaint (*i.e.*, for administration) was valued as a suit for "account" under section 7, clause IV (*f*), and that the first three prayers are merely for declaration and, therefore, a Court-fee of ten rupees only is payable. It is unnecessary to consider whether the 2nd and 3rd prayers are merely for declaration as contended for the plaintiff, or involve consequential reliefs, though in form for mere declaration as contended by the learned Senior Government Pleader (who was asked to appear in this case) because a Court-fee of ten rupees is payable (under Schedule II, clause 17) on a plaint in a suit to obtain a declaratory decree only where no consequential relief is prayed. In the present case consequential relief having been paid in the 4th prayer Schedule II, clause 17, cannot apply, and *ad valorem* Court-fee is payable as laid down in section 7, clause IV. In the cases cited before us, the only relief which was valued was that relating to administration. In the present case the plaintiff himself, as stated above, valued the suit at Rs. 1,500 for administration, Rs. 1,500 for construction and Rs. 1,500 for declaration, and paid Court-fee of Rs. 30 at Rs. 10 for "each claim". The fee, however, under clause IV, must be computed according to the amount at which the relief sought is valued in the plaint. That being so, the plaintiff must pay *ad valorem* Court-fee on "each claim" of Rs. 1,500. The Court-fee payable is Rs. 300 out of which only Rs. 30 has been paid. The plaintiff must, therefore, pay the balance *viz.*, Rs. 270 on the plaint. He must also pay a similar sum on the Memorandum of Appeal.

We accordingly direct that on the plaintiff paying the balance of the Court-fee, namely, Rs. 270 on the plaint and Rs. 270 on the Memorandum of Appeal on or before the 15th January 1918, the order of the Court below rejecting the plaint and the decree passed upon the said order, will be set aside and the case will be remanded to the Court below to be tried according to law.

We make no order as to costs of this appeal.

Walmsley, J.— I agree.

W. C. A. *Order accordingly.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 119 OF 1921.

November 29, 1922.

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

SHANKAR GANPAT LELE AND ANOTHER —APPELLANTS

versus

DAMODAR BHUKANDAS—RESPONDENT.

Will—Administration—Appointment of Panchas—Panchas, *powers of.*

Where by a Will certain persons are appointed *Panchas*, of whom one was to supervise the work of administration, and the *Panchas* were given power to appoint other *Panchas*, the power of appointment can only be exercised by the whole body of *Panchas*. An appointment, therefore, by one of the *Panchas* of a successor to himself by his Will is invalid.

Appeal against the decision of the Joint Judge, Poona, in Miscellaneous Application No. 34 of 1920.

Mr. *H. C. Coyajee* (with him Mr. *A. G. Desai*), for the Appellants.

Messrs. *G. S. Rao* and *B. G. Rao*, for the Respondent.

JUDGMENT.—The petitioners applied for Letters of Administration *de bonis non* with a copy of the Will annexed of one Bandoba Vithoba who died on the 11th March 1896. The petition was opposed by Damodhar Bhukandas, the son of one of the persons appointed *Panchas* by the Will. The Will directed six persons to be *Panchas* of whom one was to supervise the work of administration. The *Panchas* were given power to appoint other *Panchas*. That power could only be exercised by the whole body of *Panchas* and when Bhukandas asserted his right to appoint his son to succeed him by his Will

he was attempting to do what was not authorised by the terms of the Will of Bandoba. Evidently the testator had never intended that *Panchas* should have the power to appoint other *Panchas* by Will because it was intended by the testator that they should exercise that power as a body. That would exclude any power to appoint by Will. It follows then that Damodhar Bhukandas has no inherent right to be considered as executor of the Will. At the most he would be a person who might apply for Letters of Administration *de bonis non*. Whether the petitioners are proper persons to be appointed administrators has not been decided by the Court below. Therefore, we allow the appeal and the case must go back to the lower Court for the decision of the question whether the petitioners or any other person should be appointed adminsitrators *de bonis non* with the Will annexed.

The petition of Damodhar Bhukandas for Probate which was granted by the lower Court has no foundation in law. The petition ought to have been dismissed. First Appeal No. 122 of 1921 will be allowed and the petition dismissed.

Costs in both appeals to be costs in the cause.

W. C. A. *Petition dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1404 OF 1921.

August 9, 1923.

Present:—Mr. Justice Kulwant Sahay.

DHANI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sri CHANDRA CHOOR DEO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Two suits against same defendants for recovery of rent for different holdings—Decree in one at consolidated rental for all lands—Dismissal of other suit—Appeal, whether competent—Plaintiff accepting decree, whether can challenge decision against them.*

Two suits were instituted against the same defendants for recovery of arrears of rent for different holdings at different rentals. The suits were heard together; the issues framed were common to both suits, and they were disposed of by one judgment, in which the Trial Court found that the defendants had only one holding, and not two holdings, and that the lands covered by the two suits formed one holding at one consolidated rent, for which a decree was passed in favour of the plaintiff in one suit only conditional on his paying additional Court-fees. Plaintiff paid the deficit Court fees and agreed to take a decree for the amount the rentals for the lands covered by both suits; a final decree was accordingly drawn up for this amount the decree in the other suit was one of dismissal of suit. The plaintiff preferred an appeal against the latter decree, but preferred no appeal against the former decree; the Appellate Court reversed the decree dismissing the suit, and decreed that suit also. The defendants preferred a second appeal to the High Court.

Held, (1) that the decree in the first suit having become final operated as *res judicata* and it was not open to the plaintiffs to raise the same question again in appeal in the other suit; [p. 571, col. 2.]

(2) that the plaintiff having accepted the decree of the Munsif and having agreed to take a decree for an amount as representing the consolidated rent for the lands covered by both the suits it was no longer open to him to challenge the correctness of the decree. [p. 572, col. 1.]

Zaharia v. *Debia*, 7 Ind. Cas. 156; 33 A. 511; 7 A.L.J. 861 and *Midnapore Zemindary Company Limited* v. *Nitya Kali Dasi*, 24 Ind. Cas 243, followed.

Mariamnissa Bibi v. *Joynab Bibee*, 33 C. 1101; 4 C. L. J. 149; 10 C. W. N. 934, dissented from.

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 20th May 1921, reversing that of the Munsif, Begusarai, dated the 26th July 1920.

Messrs *Ram Prasad* and *D. C. Varma* for the Appellants.

JUDGMENT.—This is an appeal by the defendants against the decree of the Subordinate Judge of Monghyr reversing the decree of the Munsif of Beguserai and decreeng the plaintiff's suit with costs.

Four suits were heard together and disposed of by the Munsif by one judgment. The suits were for recovery of arrears of rent for certain holdings alleged to have been held by the defendants in these suits. Out of those four suits, Suits Nos. 1452 and 1453 of 1919 were against the same defendants, except that in suit No. 1452 one Dwarka Singh was added as defendant, but he was not made a party in Suit No. 1453. The plaintiff's allegation was that the defendants in these two Suits Nos. 1452 and 1454 held two different holdings at different rentals. They alleged that the defendants in Suit No. 1452 had a holding of 16 *bighas* 17 *kathas* 3 *dhurs* at a rental of Rs. 38-1-9 with cesses and they claimed

arrears of rent for the year 1918 and three-quarters of the year 1919. In Suit No. 1453 the allegation was that the defendants had a holding of 19 *bighas* 8 *kathas* 19 *dhurs* at a rental of Rs. 24-7-0 and the suit was for recovery of arrears of rent for the same period. The defence in these two suits was that the lands in both the suits formed one holding and that the entire holding consisted of 32 *bighas* and odd at a rental of Rs. 40-0-9 besides cesses. The defendants further alleged that they were occupancy tenants of the lands in suit and that their rent could not be enhanced in contravention of the provisions of section 29 of the Bengal Tenancy Act. The learned Munsif held that the holding in the possession of the defendants in these two suits was one holding at one rental of Rs. 40-0-9 as alleged by the defendants. He further held that the defendants were occupancy *raiyats* and that their rents could not be enhanced in contravention of section 29 of the Bengal Tenancy Act. He accordingly ordered that the plaintiffs will get a decree at the admitted *jama* of Rs. 40-0-9 in one suit only, if the plaintiffs paid additional Court-fee, while the other suit will stand dismissed. As Suit No. 1452 was brought first, he decreed that suit and he dismissed Suit No. 1453. The order made by him runs thus: "Suit No. 1452 be decreed in full with costs and interest at 3 per cent. per annum at a *jama* of Rs. 40-0-9, besides cesses, at one half-anna per rupee, if the plaintiffs pay the deficit Court-fee within three days hence, otherwise only for the amount claimed with costs and interest at 3 per cent. per annum and that Suit No. 1453 be dismissed with costs". It appears that the plaintiffs paid the deficit Court-fee in Suit No. 1452 and a final decree was drawn up by the Munsif in Suit No. 1452 as directed by him and the decree in Suit No. 1453 was a decree of dismissal of the suit. Against the decree in Suit No. 1453 of 1919 the plaintiffs preferred an appeal before the Subordinate Judge. No appeal was preferred by them in Suit No. 1452. The learned Subordinate Judge has reversed the decree of the Munsif in Suit No. 1453 and has decreed the suit with costs as claimed by the plaintiffs. Against this decree of the learned Subordinate Judge, passed in Suit No. 1453 of 1919, the defendants prefer this second appeal to this Court and the first point taken by their learned Vakil is that no appeal having been filed against the decree in Suit No. 1452, that decree has become final and operates as *res judicata* to the hearing of the present appeal. In my opinion this contention is sound. The suits were heard together. The issus framed in the suit were common. They were disposed of by one judgment. The result was that it was found by the Munsif that the defendants had only one holding and not two holdings and that the lands covered by the two suits formed one holding at one consolidated rent as alleged by the defendants. The decree in Suits No. 1452, which decided the very point which was ought to be agitated before the learned Subordinate Judge in appeal in Suit No. 1453, having become final, it was not open to the plaintiffs to raise the same question again in appeal in Suit No. 1453. Moreover, the plaintiff having accepted the decision of the Munsif in Suit No. 1452 and paid the deficit Court-fee and agreed to take a decree for the entire amount as alleged by the defendant as representing the rental for the lands covered by both the suits, he was precluded from raising the question in appeal before the Subordinate Judge that he was entitled to additional rent for the land covered by Suit No. 1453. That the principle of *res judicata* applied to the hearing of the appeal before the learned Subordinate Judge is supported by authority. In the Full Bench case of *Zaharia* v. *Debia* (1) two persons filed two separate suits for pre-emption in respect of the same sale, each claiming a right of pre-emption preferential to that of the other. Each plaintiff was made a party defendant to the suit brought by the other. A judgment was delivered in the suit of one of the plaintiffs and a copy thereof was placed on the record as the judgment in the suit of the other plaintiff; but separate decrees were prepared in each suit, one of the suits being decreed and the other dismissed. The plaintiff, whose suit had been dismissed, preferred an appeal from the decree in his own suit but not from the decree in the other suit which

(1) 7 Ind. Cas. 156; 33 A. 511; 7 A. L. J. 861.

decree became final before the appeal was decided. It was held that the doctrine of *res judicata* applied and the appeal was barred. In the same Volume of the Allahbad Series of the Law Reports at page 151* there is a decision in the case of *Dakhni Din* v. *Syed Ali Asghar* (2) which follows the decision in the case of *Zaharia* v. *Debia* (1). The same view was taken by the Calcutta High Court in the case of *Midnapore Zemindary Company Limited* v. *Nitya Kali Dasi* (3). A different view was taken by two learned Judges of the Calcutta High Court in the case of *Mariamnissa Bibi* v. *Joynab Bibi* (4); but Mr. Justice Rampini dissented from the view taken by the other two Judges and the view taken by Mr. Justice Rampini was adopted in the Full Bench case of *Zakaria* v. *Debia* (1). Moreover, having regard to the fact that the plaintiff accepted the decree of the Munsif in Suit No. 1452 and agreed to take a decree for a consolidated rent for the lands covered by both the suits, it is no longer open to him to challenge the correctness of the decree in Suit No. 1453 and to obtain a decree for rent for a portion of the same holding twice over.

I am, therefore, clearly of opinion that the hearing of the appeal before the learned Subordinate Judge was barred by *res judicata*. In this view of the case it is not necessary to discuss the other points raised by the learned Vakil for the apppellant. I would allow the appeal, set aside the decreee of the learned Subordinate Judge and restore the decree of the Munsif. The appellant will be entitled to his costs in the lower Appellate Court. There will be no order for costs in this Court as the respondents did not appear.

K. S. D & W. C. A. *Appeal allowed.*

(2) 7 Ind. Cas. 909; 33 A. 151; 7 A. L. J. 995.
(3) 24 Ind. Cas. 243.
(4) 33 C. 1101; 4 C. L. J. 149; 10 C. W. N. 934.

* Page of 33 A.—[*Ed.*].

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 106 OF 1920.
March 6, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Venkatasubba Rao.

SIVASUBRAMANIA PILLAI—RESPONDENT—APPELLANT

versus

THEETHIAPPA PILLAI AND OTHERS—PETITIONERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 24 (3), 28, 39 (4), 146—Proof of debt after discharge of insolvent and declaration of dividend, admissibility of—Debt enforceable at date of adjudication but subsequently barred whether can be proved—Insolvent, whether person aggrieved by order admitting creditor to proof of debt—Appeal—Civil Procedure Code (Act V of 1908), s. 48, applicability of, to proof of decree-debt in insolvency.

An insolvent is a "person aggrieved" within the meaning of section 46 (2) of the Provincial Insolvency Act of 1907 by an order admitting a creditor to proof of his debt and is, therefore, entitled to appeal against it. [p. 575, col. 1]

Under sections 24 (3) and 39 (4) of the Provincial Insolvency Act of 1907, a creditor is not bound to tender proof of his debt before the discharge of the insolvent or before the declaration of the final dividend, but is entitled to tender proof of his debts at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties. [p. 576, col. 1.]

Ex parte Boddam, In re Taylor, (1860) 45 E. R. 763 at p. 765; 2 De G. F. & J. 625; 29 L. J. Bk. 20; Jur. (N. S.) 570; 2 L. T. 343; 8 W. R. 457; 129 R. B. 224 *In re McMurdo, Penfield* v. *McMurdo*, (1902) 2 Ch. 684 at pp. 699, 706; 71 L. J. Ch. 691; 86 L. T. 814; 50 W. R. 644, *Lakshmanan* v. *Muttia*, 11 M. I. 4 Ind. Dec. (N. S.) 1, followed.

A debt not barred at the commencement of the Insolvency does not, in and for the purpose of the insolvency, become barred by lapse of time and, therefore, under section 28 (1) of the Provincial Insolvency Act, any debt of the insolvent subsisting on the date of adjudication is provable in insolvency even though on the date of presentation of proof the debt had become barred. [p. 577, col. 1.]

Ex parte Ross, (1827) 2 Gl., & J. 46 and 330, *In re Benzon, Bower* v. *Chetwynd*, (1914) 2 Ch. 68; 83 L. J. Ch. 658; 110 L. T. 926; 21 Manson 8; 58 S. J. 430; 30 T. L. R. 435, *In re McMurdo, Penfield* v. *McMurdo*, (1902) 2 Ch. 684 at pp. 699, 706, 71 L. J. Ch. 691; 86 L. T. 814; 50 W. R. 644, *Ex parte Lancaster Banking Corporation, In re Westby*, (1878) 10 Ch. D. 776; 48 L. J. Bk. 89; 39 L. T. 673; 27 W. R. 292, relied on.

Subbarayan v. *Natarajan*, 70 Ind. Cas. 396; 45 M. 785; 16 L. W. 68; (1922) M. W. N. 424; 43 M. L. J. 168; 31 M. L. T. 140; (1922) A. I. R. (M.) 268, (F. B.) distinguished.

Per *Oldfield, J.*—When a decree-holder can prove his decree-debt in insolvency no question of his right to execute the decree, within the meaning of section 48 of the Civil Procedure Code, is raised. [p. 577, col. 1.]

SIVASUBBARAMANIA PILLAI *v.* THEETHIAPPA PILLAI.

Per *Venkatasubba Rao, J.*—The object underlying section 24 of the Provincial Insolvency Act is to enjoin upon creditors to tender proof as early as possible, a course tending to convenience in the administration of the insolvent's estate and the provision does not enact a rule of limitation. [p. 578, col. 2.]

Section 48 of the Civil Procedure Code deals only with the execution of a decree and has no applicability to the proof of a decree-debt in insolvency proceedings. [p. 578, col. 2.]

Appeal against an order of the District Court, Tinnevelly, in I. A. No. 488 of 1919, in I. P. No 6 of 1909, dated the 3rd of January 1920.

Mr. *S. T. Srinivasagopalachariar* (with him Mr. *T. Nalla Sivan Pillai* and Messrs. *Chidambaram* and *Marthandam*), for the Respondents :—There is a preliminary objection to the maintainability of the appeal. Although an application lies under section 46 (2) against an order of the District Court under section 24 admitting proof of a debt, the appellant is not a "person aggrieved" within the meaning of section 46 (2) because he is an insolvent who has no interest as to the persons among whom the money is distributed. This is specially so in the case where by the order of discharge the insolvent, subject to a personal allowance, has to place all his properties whatever present and future at the disposal of the Court.

Further, the Official Receiver has not been a party to the proceedings here. The practice in this Court is not to hear the insolvency appeal without his being on record. The appeal is incompetent on this ground also.

Mr. *K. V. Krishnaswamy Iyer*, (with him Messrs. *T. L. Venkatarama Ayyar* and *T. A. Ananta Ayyar*), for the Appellant.—The insolvent is clearly entitled to the surplus after distribution to creditors. This contingent interest is sufficient to bring him within the scope of the section and he is a "person aggrieved" by a wrong admission of a debt.

All parties interested are before the Court. The Official Receiver's presence is hence not essential. In any case, non-joinder though an irregularity is not fatal.

On the merits.—The order allowing tender of proof of debts is bad.

Firstly. The statutory limit of time under secton 24 (3) for tendering proof of a debt is any time before discharge. The discharge here on 20th September 1918 is long before the date of proof.

A discharge under section 24 (3) read with section 44, clause 2 (*c*), may be conditional as well as absolute and under section 45, clause (2), an order of discharge releases the insolvent from all debts entered in the schedule so that the case of debts not so entered is even stronger. The creditor is hence not entitled to tender proof at that stage.

Secondly. A creditor tendering proof must on the date of tender be capable of enforcing his right or claim in the ordinary course. The decree obtained by the respondent here was barred on the date of proof both under Art. 182 of the Limitation Act and section 48 of the Civil Procedure Code since more than 12 years had elapsed, without any execution application from the date of decree to date of proof. The period of 12 years fixed under section 48 of the Civil Procedure Code can in no case be extended [see *Subbarayan* v. *Natarajan* (1) as to what a period of limitation means]. The only circumstances when there can be suspense of a right to sue is set out in the order of reference of Oldfield, J., in *Muthu Korakki Chetty* v. *Mahamad Madar Ammal* (2). The case in *Rokhia Bi* v. *Official Assignee, Madras* (3) makes it clear beyond doubt that limitation does continue to run even after debtor's insolvency has intervened. So it has been held that subsequent annulment of adjudication does not attract the provisions of section 15 of the Limitation Act.

See observations of Seshagiri Aiyer, J., in *Ramaswami Pillai* v. *Govindasami Naicker* (4) explaining *In re General Rolling Stock Company, Joint Stock Discount Company's Claim* (5) which may be apparently against me. There is nothing in law to prevent a creditor from keeping the debt alive against or suing the

(1) 70 Ind. Cas. 396; 45 M. 785; 16 L. W. 68; (1922) M. W. N. 424; 43 M. L. J. 168; 31 M. L. T. 140; (1922) A. I. R. (M.) 268 (F. B.).

(2) 54 Ind. Cas. 66; 43 M. 185; 38 M. L. J. 1; 26 M. L. T. 459; 11 L. W. 487; (1920) M. W. N. 42.

(3) 37 Ind. Cas. 505; (1916) 2 M. W. N. 254; 4 L. W. 364.

(4) 49 Ind. Cas. 625; 42 M. 319; 36 M. L. J. 104; 25 M. L. T. 247; (1919) M. W. N. 698.

(5) (1872) 7 Ch. App. 646; 41 L. J. Ch. 732; 27 L. T. 88; 20 W. R. 76.

insolvent. Indeed section 16 of the Provincial Insolvency Act does not effect an absolute stay of suits at all; only leave of Court has to be procured. The general principle of law embodied in section 9 of the Limitation Act that when once limitation has begun to run, subsequent disability of any sort does not stop it, has been clearly affirmed in *In re Benzon, Bower* v. *Chetwynd* (6). The decree-debt here being clearly time-barred on the date of tender cannot be admitted to proof.

Mr. *S. T. Srinivasagopalachariar* :—On the first point, the discharge in this case is not with reference to any particular enumerated debts; it is not absolute but is only conditional and until the conditions are fulfilled, there is no discharge at all within the meaning of section 24 (3) since a conditional order of discharge is liable to being rescinded by Court for non-fulfilment of conditions. [See English Bankruptcy, Rules 238 and *In re Summers, Ex parte Official Receiver* (7).] Again section 24 only provides that proof of debts may be made at any time before discharge. This does not impose a prohibition against tender after discharge and under section 39 until all properties of the insolvent are realised and final dividend is declared, there is no bar at all to proof of debt. The only disability for late proof after declaration of a dividend is that the creditor cannot disturb dividends already declared and the well-established principle of limitation of right to proof is only not to disturb existing rights and declared dividends. The English Law is very clear and well-settled.

See *In re McMurdo, Penfield* v. *Mc Murdo* (8), *Ex parte Boddam, In re Taylor* (9), Per L. J. Turner. 2 Halsbury's Laws of England, S. 380, Note P., S. 394, Note D. Re Fentor Montague's Reports in Bankruptcy page 212.

The order of discharge is thus irrelevant. The Act even permits such an order the next day after adjudication even before schedule is framed subject only to the fulfilment of formalities, such as publication of the application for discharge.

On the second point, there is no bar of limitation at all for proof of debts. Section 24 (3) does not enact a rule of limitation. The Provincial Insolvency Act is a self-contained Statute and reference to the Civil Procedure Code or the Limitation Act is irrelevant. Neither Art. 182 of the Limitation Act nor section 48 of the Civil Procedure Code has any application to an insolvency proceeding. The English Law on the point is entirely in my favour and definitely negatives any notion of a period of limitation for proof of debt (see Williams on Bankruptcy, 12th Edition, page 147; Sugden on Bankruptcy, 13th Edition, page 139 citing *Ex parte Ross* (10), also see *In re Crosley, Muns* v. *Burn* (11) and *Ex parte Lancaster Banking Corporation, In re Westby* (12) observations of Bacon, C. J.

This is not an application for execution at all and the case in *Subbarayan* v. *Nataraian* (1) cannot be against me. *Muthu Korakki Chetty* v. *Mahamad Madar Ammal* (2) proceeded on a construction of sections 3 9, 14 of the Limitation Act and no question of insolvency arose there. *Rokhia Bi* v. *Official Assignee, Madras* (3) a decision of Abdur Rahim and Seshagiri Aiyer, JJ., is a case on the special facts of that case and is no authority for any general or limited proposition material to the present case. The case in *In re General Rolling Stock Company, Joint Stock Discount Company's Claim* (5) states the general rule to be that after intervention of insolvency, no leave to sue should as a rule be granted, and even where such a leave is granted, the fruits of such decrees enure not only to the decree-holder plaintiff but for all creditors in general (see section 34 of the Act).

In re Benzon, Bower v. *Chetwynd* (6) is not an insolvency case but arose in an administration suit and the general principle as to insolvency cases is also recognised at pages 75 and 76.

Further, in the present case I may contend that no proof of debt is necessary since the decree was included in the insolvent's schedule.

(6) (1914) 2 Ch. 68; 83 L. J. Ch. 658; 110 L. T. 926; 21 Manson 8; 58 S. J. 430; 30 T. L. R. 435.
(7) (1907) 2 K. B. 166; 76 L. J. K. B. 707; 96 L. T. 791; 14 Manson 101; 23 T. L. R. 465.
(8) (1902) 2 Ch. 684 at pp. 699, 706; 71 L. J. Ch. 691; 86 L. T. 814; 50 W. R. 644.
(9) (1860) 45 E. R. 763 at p. 765; 2 De G. F. & J. 625; 29 L. J. Bk. 20; 6 Jur. (N. S.) 570; 2 L. T. 343; 8 W. R. 457; 129 R. R. 224.
(10) (1827) 2 Gl. & J. 46 and 330.
(11) (1887) 35 Ch. D. 266 at p. 270; 57 L. T. 298; 35 W. R. 790.
(12) (1878) 10 Ch. 776; 48 L. J. Bk. 89; 39 L. T. 673; 27 W. R. 892.

The judgment of the lower Court is correct.

JUDGMENT.

Oldfield, J.—This insolvency originated in the arrest by first respondent of the insolvent, here appellant. On the latter's adjudication, however, only two creditors, now represented by other respondents, proved debts, the appellant refraining from proving his, until after a dividend of less than half an-anna had been distributed and about nine years had elapsed. Evidently what has led him now to tender proof of his debt under section 24 (3) of the Provincial Insolvency Act, III of 1907, is that on the 20th September 1918 the lower Court granted the insolvent what is described as a conditional discharge the condition being that he should, subject to his right to an allowance of Rs. 25 per month for maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire. This discharge was granted on the application of the insolvent based on the expectation that in case of his discharge his mother would relinquish a life-estate to which he was entitled in reversion, in his favour, and the appellant evidently thought it worth while to prove in order to obtain a share in these new assets. The lower Court held that he was entitled to do so, notwithstanding the two points urged before it and here that his claim was made after the order of discharge of 20th September 1918 and that recovery of his debt would in proceedings other than insolvency be barred by limitation.

A preliminary objection has been taken to this appeal by the insolvent on the ground that he is not a "person aggrieved" within the meaning of section 46 (2) of the Act, because he has no interest in the distribution of assets, which have vested in the Official Receiver for his creditors, whoever they may be. But that is unsustainable for, under section 41, he will eventually be entitled to any surplus remaining, after the creditors, who have proved, have been satisfied and will be deprived of such surplus if the proof of another creditor whose claim may diminish or exhaust it, is wrongly admitted. Another formal objection to the proceedings is that the Official Receiver has not, so far as appears, been a party to them at any stage. But, as all the creditors concerned have had notice of them we simply note this irregularity and proceed.

First, as regards the order of 20th September 1918, it is, we may observe, defective, because it contains no definite provision for or directions to the Official Receiver regarding the manner, in which it is to be given effect; and it should probably have been framed with reference to section 44 (5), explicitly, as imposing a condition and also suspending the discharge until that condition had been fulfilled by the execution of the anticipated release in favour of the Official Receiver or otherwise for the benefit of the creditors. But its terms have already been stated and its meaning is clear. First, a point referred to by the lower Court, although in doubtful language, this order is consistent with the future declaration of a final dividend since it contemplates the realization of further assets for distribution in one and, it may be added, it is clear from the text of the order, by which the insignificant dividend already distributed was declared, that it was not final. Next, the order of 20th September 1918 was not one of absolute discharge. For it was in terms conditional and expressly contemplated the continuance of the insolvent's disability to acquire property except for the benefit of his creditors and subject only to the reservation of a monthly income for himself and his family. Those terms are, as already stated, anomalous and it is doubtful what exact change in the insolvent's position they were intended to effect and whether they were intended to do or did more than release him from liability for his scheduled debts, those debts being made payable only from the property, which he was expected to acquire. Certainly, however, and this is the material point, there is nothing to indicate an intention on the part of the Court or other parties to the order to release such property from provable debts or to make any change in respect of them except as regarded the liability of the insolvent himself. It is then impossible to accept the first argument for the insolvent (appellant), that this order constituted such a discharge, as is referred to in section 24 (3) as fixing the stage in the insolvency, afte

which no more proofs, such as the respondents', could be received.

That argument is, moreover, open to objection on the further ground that the reference to discharge in that section does not fix that stage. No doubt the section is at first sight explicit—"Any creditor may, at any time before the discharge of the insolvent, tender proof of his debt." But those words must be read in the light of section 39 (4) under which debts, if notified, as was the respondents' in the present case, can be proved until a final dividend is declared and the fact that it will in many cases be harsh and useless to postpone the grant of discharge until its declaration. For, although it may be impossible for the purpose of section 44 (3) *(a)* to ascertain the proportion between assets and liabilities at an early stage in the insolvency, it may be clear that the insufficiency of the former has arisen from causes, for which the insolvent is not responsible; and there will then be no reason for postponing his discharge, if he asks for it, as he can do under section 44 (1) at any time after the order of adjudication. We have not, it is worth observing, been shown that this reference to the right to prove before discharge corresponds with anything in the Presidency Towns Insolvency Act or English Law; and it is possible that it was worded with reference to the description of debts provable under the Act in section 28 (1) as including those, to which the debtor becomes subject before his discharge by reason of obligations incurred before his adjudication. See section 46 (3), Presidency Towns Insolvency Act III of 1909 and section 30 (4) and (5), George V, C. 59. In any case the general law of insolvency contemplates proof of debts at any time, so long as there are assets to be distributed and no injustice is done to other parties. *Ex parte Boddam, In re Taylor* (9) and *In re McMurdo, Penfield* v. *Mc Murdo* (8). We accordingly hold, as a fair construction and one which will reconcile the policy of the Act and section 39 (4) with section 24 (3), that the words we are concerned with in the latter are not restrictive, but, as Vaughan Williams, J., said in the second of those decisions of similar words "as soon as may be after the making of a receiving order" in the Bankruptcy Act of 1883, Schedule II, r. 1, are merely directory and that "non-compliance with them does not in any way deprive any creditor of his right or limit his right."

That contention failing, it is argued next that the respondents' debt is not provable because it would be time-barred in other proceedings, or, more definitely, because the decree, in which it is merged, would be unexecutable after the twelve years which have elapsed since its date, under section 48, Civil Procedure Code. That twelve years elapsed between the respondents' decree and the presentation of his proof is no doubt true. But we are still of opinion that his debt is provable under section 28 (1) of the Act. The definition in that section of a provable debt contains no reference to the date at which the proof is presented or to any date except that of the adjudication, when respondents' debt embodied in the decree which he had lately been executing, was certainly recoverable, and the view that the existence of the debt at the date of adjudication alone is material is in accordance with English Authority on the similar provision of the English Law. The matter is dealt with generally in *Ex parte Ross* (10), that decision, it may be observed, being unaffected by the facts that (1) the debts in question had not, like respondents' debt, been merged in a decree and that they represented obligations which became enforceable only after the date of the adjudication, but before that of the discharge, the Indian and English definitions of provable debts alike including such liabilities. On the other side reliance has been placed on *In re Benzon, Bower* v. *Chetwynd* (6) and no doubt there reference was made to the principle that, if the Statute begins to run, it continues, whatever happens, to do so; and that principle would be applicable in the case before us, because the twelve years' period available to respondent for execution of his decree had opened before appellant's petition was filed. But the principle was applied in the case then under disposal, only because that case was, what the case before us is not, one of an administration suit and not of insolvency. If the question had been of insolvency, *Ex parte Ross* (10) would, as the earlier part of the judgment

shows have been followed and it would have been held that a debt not barred at the commencement of the insolvency does not, in and for the purpose of the insolvency, become barred by lapse of time. Respondent has then relied on the decision in *Subbarayan* v. *Natarayan* (1) that section 48 contains an unqualified prohibition of execution of decrees over twelve years old. But the answer is that, when (as we hold) the respondent can prove for his decree-debt in the insolvency, no question of his right to execute is raised. In these circumstances, we must, following *Ex parte Ross* (10), hold that his debt is provable within the meaning of section 28 (1).

The result is that the appeal fails and is dismissed with costs of legal representatives of first respondent.

Venkatasubba Rao, J.—I agree and would like to state my reasons for the conclusion at which we have arrived.

It was first contended by Mr. K. V Krishnaswami Aiyar for the insolvent-appellant that, under section 24 (3) of the Provincial Insolvency Act, 1907, a creditor would be bound to tender proof of his debt before the discharge of the insolvent and that, as in the present case, proof was submitted after the insolvent's discharge the creditor's application should not have been entertained. In the view I am taking, it is immaterial that the discharge in the present case was conditional The relevant portion of section 24 (3) is as follows: "Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under this Act and not entered in the schedule." I am unable to interpret this provision as rendering it obligatory upon a creditor to submit proof before the discharge of the insolvent. Under section 44 a debtor may, at any time after the order of adjudication apply for an order of discharge. There is nothing in the Act to prevent an order of discharge being passed at a very early date after the order of adjudication, and it seems to be inconsistent with the scheme of the Act to hold that a creditor, who does not prove his debt before an order of discharge, is deprived altogether of his remedy. I only refer to section 39. Clauses (3) and (4) of that section set forth the disabilities of the creditor guilty of laches in the matter of proving his debt. Clause (3), while giving him a certain right, provides that he shall not be entitled to disturb any dividend declared previous to the proof of his debts. Clause (4) refers to a declaration of a final dividend. It must be first observed that no inflexible rule is laid down as regards the point of time when a final dividend is to be declared. The clause only provides that when the Receiver has realised all the property of the insolvent or so much thereof as can be realised without needlessly protracting a Receivership he shall declare a final dividend. The matter is largely one of discretion to be exercised by the Court. When a final dividend is to be declared in a particular case, will depend upon the circumstances of that case. It is next material to observe that the penalty described for neglect, or omission to prove a debt before making a final dividend is, that that dividend shall be declared without regard to the claim of the creditor who has failed to prove the debt. These are the provisions which limit or affect the right of a creditor who fails to tender proof of his debt before a specified point of time.

Mr. K. V. Krishnaswamy Aiyar's second contention was that, if a creditor omits to prove his debt before the declaration of a final dividend he is barred from doing so. There is no warrant for this position in the sections to which I have referred. It is unnecessary to deal with this contention further than to say that this argument is entirely destructive of the first argument to which I have referred. According to the first contention based on section 24 (3) the discharge of the insolvent is the furthest point of time beyond which no debt can be proved, whereas the second contention fixes the declaration of the final dividend under section 39 (4) as an event subsequent to which a proof of a debt can not be tendered. In my opinion, neither of these arguments is sound. No limitation is fixed for the creditors to come in and prove their claims. This is the English rule, and we have been shown nothing to induce us to hold that under the Provincial Insolvency Act a different rule is intended.

SIVASUBRAMANIA PILLAI v. THEETHIAPPA PILLAI.

Rule 1 of the Second Schedule to the English Bankruptcy Act, 1883, runs thus: "Every creditor shall prove his debt as soon as may be after making of a receiving order." It will be noted that the word used is 'shall'. But *In re Mc Murdo, Penfield* v. *McMurdo* (8) Vaughan Williams, L. J., held that the rule was "merely a directory clause, a clause non-compliance with which does not in any way deprive any creditor of his right or limit his right." He observed that in his experience of Bankruptcy practice there never was any doubt as to the right of a creditor to come in and prove at any time during the administration. This rule was stated to be subject to certain conditions which are not material for the present purpose. See also Halsbury, Volume II, paragraphs 380 and 394.

No Indian cases were cited to us. But I find that in *La shmanan* v. *Muttla* (13) a Bench of this Court observed that it is open to a creditor at any time while the assets are undistributed to prove his debt and added "this is the course in all Bankruptcy and Insolvency proceedings." I am not quite clear how the statement in the judgment that even if a schedule had been framed it was still open to the creditor so long as assets were available to apply to be admitted on the schedule, under section 352 of the Civil Procedure Code of 1882 is reconcilable with Art. 174 of the Limitation Act of 1877 which prescribed for an application under section 353 of the said Code a period of 90 days from the date of the publication of the schedule. But I am referring to the case only for the purpose of showing that it was regarded as a settled doctrine that, apart from any particular Statute in Bankruptcy proceedings, no limitation was fixed for creditors to prove their debts. I may state that the Provincial Insolvency Act, III of 1907, repeals not only the provisions of the Civil Procedure Code relating to insolvency, but also Art. 174 of the Limitation Act of 1877.

I also find that in *Parshadi Lal* v. *Chunni Lal* (14) a distinction was drawn between applications under section 353 of the Civil Procedure Code of 1882 governed in regard to limitation by Art. 174 prescribing a period of 90 days and applications under section 353 to which Art. 178 prescribing a period of three years was held applicable An argument based upon *Parshadi Lal* v. *Chunni Lal* (14) that an application by a creditor to prove his debt is governed by Art. 181 of the present Limitation Act was not advanced before us, and possibly the omission to advance this argument was due to the fact that Art. 181 is held applicable only to applications under the Civil Procedure Code and that as at present the Insolvency Law is contained in the Insolvency Act and not in the Civil Procedure Code, Art. 181 can have no application.

The object underlying section 24 of the Provincial Insolvency Act is the same as that which underlies rule 1 of the Second Schedule to the English Bankruptcy Act, 1883, namely, to enjoin upon creditors to tender proof as early as possible, a course tending to convenience in the administration of the insolvent's estate, and the provision clearly does not enact a rule of limitation.

I, therefore, hold, as my learned brother has done, that the creditor's application to prove his debt was not made beyond the time allowed by the law, and this ground of appeal consequently fails.

The next argument of Mr. K. V. Krishnaswamy Iyer was that the debt itself was barred, and as there was no subsisting debt there could be no proof of debt. In my opinion, this argument is also untenable. The creditor's debt was merged in a decree and it was argued that under section 48, Civil Procedure Code, the decree became extinguished. This argument cannot be accepted because section 48 deals only with execution and lays down that no order for the execution of the decree shall be made upon an application presented after the expiration of twelve years from certain dates which, however, it is immaterial to specify for the present purpose.

Then, the general argument remains that a barred-debt cannot be proved in insolvency. I shall say nothing in regard to the question as to whether the pendency of insolvency proceedings does or does not

(13) 11 M. 1; 4 Ind. Dec. (N. S.) 1.
(14) 6 A. 142; A. W. N. (1883) 264; 3 Ind. Dec. (N. S.) 749.

save a debt from the bar of limitation. In the present case the debt is sought to be proved in the insolvency itself and no claim is based upon the debt in a separate proceeding. *Ex parte Ross* (10), to which Mr. Srinivasagopalachariar referred us, clearly held that in bankruptcy a debt did not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. The same view was taken in *Ex parte Lancaster Banking Corporation, In re Westby* (12) which was also relied on by the learned Counsel. A very clear statement of the principle is contained in the following passage in the judgment of Bacon, C. J. in that case "When a bankruptcy ensues, there is an end to the operation of that Statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy and the Statut of Limitations has no application at all to such a case, or to the principles by which it is governed." The authority of these decisions have not, in the slightest degree, been shaken by *In re Benzon, Bower* v. *Chetwynd* (6). On the contrary the judgment in it while holding that the pendency of bankruptcy proceedings did not save a claim made in the course of an administration suit from being barred by the Statute of Limitations, carefully distingusihed the *Exparte Ross* (10) and other cases similar to it as being cases where the proof was *in the bankruptcy itself*. I cannot do better than quote the following passage from the judgment: "As to the second point, cases were quoted beginning with *Ex parte Ross* (10) which show that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy and of this there can be doubt, but this is only *in the bankruptcy*."

The rule contained in section 28 (1) as regards debts provable under the Act is consistent with the rule deducible from the English cases. All debts to which the debtor is subject when he is adjudged an insolvent (quoting only the material portions) are debts provable under the Act. Under the section, therefore, it must be a debt to which the debtor was subject on the date of adjudication. If the debt was then subsisting, it is provable in insolvency.

On these grounds the second contention of the appellant also fails.

I, therefore, agree that the appeal should be dismissed with costs of the legal representatives of the first respondent.

V. N. V. *Appeal dismissed.*

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 24 OF 1922.

August 7, 1923.

Present:—Mr. Cunning, A. J. C., and Mr. Wazir Hasan, A. J. C.

MOHAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

P. SEWA RAM—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 5, 6, 43, 95—Feeding grant by estoppel, principle of—Assignment by person with defective title—Subsequent acquisition of interest, effect of—Contract void ab initio, whether validated—Mortgage of charge, whether valid—Sub-mortgage—Notice to original mortgagor, necessity of—Charge, creation of—Acquisition of possession.

The principle of section 43 of the Transfer of Property Act is a principle of law generally known as feeding the grant by estoppel and is well established in England and there is nothing to prevent its being given effect to by Courts in India. [p 584 cols. 1 & 2.]

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101; 47 I. A. 239 (P. C.), relied on.

If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title

MOHAN SINGH *v.* SEWA RAM.

is apparent on the face of the assignment. [p. 584, col. 2.]

Cuthbertson v. *Irving*, (1859) 4 H. & N. 742; 28 L. J. Ex. 306; 5 Jur. (N. S.) 740; 157 E. R. 1034; 33 L. T. (O. S.) 328; 118 R. R. 726 and *Patridge* v. *Ward*, (1910) 2 Ch. D. 342; 79 L. J. Ch. 740; 103 L. T. 421, followed.

A contract which is void *ab initio* cannot be validated by the provisions of section 43 of the Transfer of Property Act. If a contract, therefore, purports to transfer property which the law makes inalienable, that contract cannot be given effect to with reference to another property which the transferor may subsequently acquire. [p. 587, col. 1.]

Gangabai v. *Basvant*, 5 Ind. Cas. 866; 34 B. 175; 12 Bom. L. R. 143 and *Pandiri Bangaram* v. *Karamoory Subbaraju*, 8 Ind. Cas. 388; 34 M. 139; 8 M. L. T. 259, distinguished.

The doctrine of constructive notice is no part of the law of estoppel. It is enough that the person estopped has made the representation to the other party of an existing fact and the other party has believed in the truth of the representation and acted on it. [p. 585, col. 2.]

Bloomenthal v. *Ford*, (1897) A. C. 156 at p. 162; 66 L. J. Ch. 253; 76 L. T. 205; 45 W. R. 449; 4 Manson, 156 relied on.

In equity the benefit of a lien or a charge may be assigned with the debt in respect of which it is claimed. [p. 586, col. 1.]

Bull v. *Faulkner*, (1848) 2 De G. & Sm. 772; 13 Jur. 93; 79 R. R. 367; 64 E. R. 346, followed.

The right to hold immoveable property as a security for the re-payment of a loan and the further rights corresponding with the rights of a mortgagee are "property" within the meaning of sections 5 and 6 of the Transfer of Property Act. [p. 586, col. 2.]

A mortgage of a chargee's rights, if made, would be valid in law. [p. 586, col. 2.]

Lawlinson v. *Hall*, (1884) 12 Q. B. D. 347; 53 L. J. Q. B. 222; 50 L. T. 723; 32 W. R. 492; 48 J. P. 216, *Bull* v. *Faulkner*, (1848) 2 De G. & Sm. 772; 13 Jur. 93; 79 R. R. 307; 64 E. R. 346 and *Tunered* v. *Delagoa Bay Ry.*, (1889) 23 Q. B. D. 239; 58 L. J. Q. B. 459; 61 L. T. 229; 38 W. R. 15, referred to.

Where a person acquires not only the incorporeal right of a charge-holder but also enters into possession of the property, the charge becomes a possessory lien and is capable of being transferred, devised and inherited. [p. 587, col. 1.]

Asher v. *Whitlock*, (1866) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 25; 13 L. T. 254; 14 W. R. 26; 148 R. R. 598 and *Wajid Khan* v. *Dargahi Khan*, 9 O. C. 161, relied on.

It is a well-settled principle of law that if a sub-mortgagee gives no notice to the original mortgagor of an assignment of the mortgagee's rights in his favour, the original mortgagor would be justified in paying the debt wholly or in part to the assignor, thereby extinguishing the original mortgage altogether, and on such an extinction taking place, the sub-mortgagee has no remedy left against the property. [p. 587, col. 2.]

In re Lord Southampton's Estate, Allen v. *Lord Southampton, Banfather's Claim*, (1881) 16 Ch. D. 178 at p. 187; 50 L. J. Ch. 816; 43 L. T. 687; 29 W. R. 231 and *Dixon* v. *Winch*, (1900) 1 Ch. 736; 69 L. J. Ch. 465; 48 W. R. 612; 82 L. T. 437; 16 T. L. R. 276, relied on.

The acquisition of possession, constructive or actual, is a condition precedent to the creation of a charge under section 95 of the Transfer of Property Act. [p. 588, col. 2.]

Ahmad Wali Khan v. *Shamsh-ul-jahan Begam*, 28 A. 482; 10 C. W. N. 626; 3 A. L. J. 360; 3 C. L. J. 481; 1 M. L. T. 143; 8 Bom. L. R. 397; 16 M. L. J. 269; 8 Sar. P. C. J. 918; 33 I. A. 81 (P. C.), referred to.

As a general rule, there is no lien at law without possession and this rule of Common Law seems to have been adopted by the Legislature for the purpose of section 95 of the Transfer of Property Act. [p. 588, col. 2.]

Appeal against a decree of the Subordinate Judge, Hardoi, dated the 7th February 1922.

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

Messrs. *G. N. Misra* and *M. H. Qidwa* for Respondents Nos. 1, 3 to 6.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Hardoi, dated the 7th February 1922, by which the suit of the plaintiff-respondent was decreed against the defendants, who are the appellants in this Court.

The facts of the case are complicated; and the best way of solving the tangle will be to state them in chronological order.

A 2-*biswas* 17-*biswansis* and 5-*kachwansis* share in village Antaura, Pargana Sarra Sumali, Tahsil Shahabad, District Hardoi, was owned by the ancestors of the defendants Nos. 10 to 13 and by the ancestor of one Mohan Singh; 4/5ths of the share being held by the former, and 1/5th by the latter. On the 16th August 1887, all the owners of this share mortgaged it by way of conditional sale to the predecessors of the defendants Nos. 3 to 9, who are the appellants before us. On the 20th August 1892 a deed of further charge in respect of a fresh loan was executed by the mortgagors in favour of the mortgagees. This was followed by the execution of a second deed of further charge on the 5th September 1895. The mortgagees entered into possession of the property which was the subject-matter of the mortgages mentioned above; that is to say, the whole of the share of 2 *biswas* 17 *biswansis* and 5 *kachwansis*.

MOHAN SINGH v. SEWA RAM.

On the 2nd September 1905, Raghunandan Prasad, defendant, purchased the 1/5th share which belonged to Mohan Singh, under a sale-deed executed by *Musammat* Parbati, acting as the guardian of her minor son, Mohan Singh. In 1906 the mortgagees brought a suit for the recovery of Rs. 3,036-10-0, the mortgage-money, due to them under the deeds of the 16th August 1887, 20th August 1892 and the 5th September 1895. Besides the representatives of the original mortgagors, Raghunandan Prasad was made a defendant to that suit. On the 24th August 1906 the Court granted a foreclosure decree. This decree provided for the payment of the sum of Rs. 3,439-10-0, by the judgment-debtors on the 24th February 1907; and further that, "if such payment be not made on or before the aforesaid 24th day of February 1907, then it is ordered that the defendants shall be absolutely debarred of all rights to redeem the mortgaged property." (Exhibit 2).

On the 21st February 1907 Raghunandan Prasad and one Fauji Singh, defendant No. 2, (who died during the pendency of the suit in the Court below and is represented by defendants Nos. 14 to 16) executed a deed of mortgage (Exhibit 1) to secure a loan of Rs. 3,600 in favour of Sewa Ram, the plaintiff to the suit, out of which this appeal has arisen. Raghunandan Prasad mortgaged the 2 *biswas* 17-*biswansis* and 5-*kachwansis* share in village Antaura, which was the subject of the foreclosure decree of the 24th August 1906, to which reference has just been made. Fauji Singh mortgaged his share of 4 *biswansis* in the same village. This was a simple mortgage and is the basis of this suit. The deed expressly stated that the object of raising the loan was to satisfy the foreclosure decree of the 24th August 1906. It may be noted here that the decree under appeal directs the sale of the 4-*biswansis* share of Fauji Singh also. His representatives have neither appealed from that decree, nor have appeared before us at the hearing of the appeal. The appellants have also not attacked the propriety of that part of the decree. We are, therefore, not concerned with that part of the decree of the Court below which directs the sale of the 4-*biswansis* share belonging to Fauji Singh.

We have seen that out of the 2-*biswas* 17-*biswansis* and 5-*kachwansis* share 1/5th belonged to Mohan Singh, which was purchased in 1905 by Raghunandan Prasad. In view of the events which happened later, to which reference will be made in its proper place, this 1/5th share has also dropped out of the present litigation. The suit in the Court below related to the remaining 4/5ths share owned by the defendants Nos. 10 to 13 and the present appeal is solely confined to that share.

On the 2nd March 1907, Raghunandan Prasad paid the entire amount due under the foreclosure decree by depositing that sum in Court (Exhibit 4), the 24th February to the 1st March being holidays. On the 8th March 1907, he applied to the Court to be put in possession of the 2-*biswas* 17 *biswansis* and 5 *kachwansis* share in virtue of his having entirely satisfied the foreclosure decree. In this application he alleged that the other judgment-debtors, that is, the ancestors of the defendants Nos. 10 to 13, not having paid a 'single shell' in satisfaction of the foreclosure decree, had "lost their right of getting possession" of any portion of the share then in suit (Exhibit 5). The Court accepted his prayer, and on the 16th March 1907, issued a warrant for delivery of possession of the mortgaged property (Exhibit 8). In this warrant Raghunandan Prasad was described as a plaintiff-decree-holder. The warrant was addressed to the Bailiff of the Court and stated that, "whereas the decree-holder has been awarded possession over 2-*biswas* 17-*biswansis* and 5-*kachwansis* share of village Antaura ..... by the decree dated the 24th August 1906 you are directed to get the possession of the same given to the said decree-holder."

On the 23rd March 1907 the defendants Nos. 10 to 13 executed a deed of possessory mortgage in favour of the defendants Nos. 3 to 9, in whose favour, of course, the foreclosure decree of the 24th August 1906, had been passed, in respect of the 4/5ths of the 2 *biswas* 17 *biswansis* and 5 *kachwansis* share in dispute before us for Rs. 2,807 (Exhibit 12). The purpose of

the execution of this deed was to raise money to pay Raghunandan Prasad the sum of Rs. 2,571-7-3 due to him in respect of the 4/5th share of the mortgagor's liability under the foreclosure decree, which, as we have seen, Raghunandan Prasad had paid off in its entirety. This amount was left with the mortgagees for payment to Raghunandan Prasad.

On the 1st April 1907 Raghunandan Prasad was put in actual possession of the entire share under the warrant of the 16th March, to which reference has already been made.

On the 9th April 1907 the mortgagees under the deed of the 23rd March 1907, that is, the present appellants, defendants Nos. 3 to 9, deposited in Court the sum of Rs. 2,751-7-3 for payment to Raghunandan Prasad the payment being described as on account of "redemption money" (Exhibit 13). This deposit was made under the old section 83 of the Transfer of Property Act (IV of 1882). On the 20th April 1907 Raghunandan Prasad refused to accept the tender. On the 27th April 1907 the Court rejected the application accompanying the tender. On the 22nd May 1907 the mortgagees brought a suit, which they described as one for redemption of the share in dispute against Raghunandan Prasad and the mortgagors (Exhibit 110). On the 2nd July 1907, Raghunandan Prasad by a petition of that date admitted their claim, and agreed to take the sum of Rs. 2,751-7-3 previously deposited by them. In this application he said: "I have redeemed the mortgage property." (Exhibit 111). A consent decree was accordingly passed the same day. The property, of which possession was given under this decree, was described therein to be 2 *biswas* 5 *biswansis* 6 *kachwansis* and 8 *nanwansis*, which practically represents 4/5ths of the entire share of 2 *biswas* 17 *biswansis* and 5 *kachwansis* (Exhibit 16). It is common ground that these mortgagees under the deed of the 23rd March 1907, in other words, the defendants Nos. 3 to 9, that is, the appellants before us, have since then been and are still in possession of the property in suit.

We said that further reference would be made to the share of Mohan Singh. In the year 1913 Mohan Singh, in conjunction with a transferee of his, named Drigbije Singh, brought a suit against Raghunandan Prasad and the present plaintiff for cancellation of the sale-deed of the 2nd September 1905, and for possession of his share conveyed thereby in favour of Raghunandan Prasad by his mother, *Musammat* Parbati. This suit was decreed on the 14th July 1914. The plaintiffs, Mohan Singh and Drigbije Singh, were, however, ordered to pay Rs. 700 to Sewa Ram, the plaintiff-respondent before us, in discharge of the proportionate liability of Mohan Singh's 1/5th share under the foreclosure decree paid off by Raghunandan Prasad with the aid of the money borrowed from the respondent under the deed of mortgage of the 21st February 1907 referred to.

Now, on the date of the mortgage of the 21st February 1907 which, as we have said before, is the basis of the suit out of which this appeal has arisen, Raghunandan Prasad owned, by virtue of the sale by Mohan Singh's mother of the 2nd September 1905, only 1/5th of the entire *Zemindari* share which he purported to mortgage by that deed in favour of the plaintiff-respondent. We have further seen that by the decree of the 14th July 1914, which Mohan Singh obtained against Raghunandan Prasad, the latter eventually lost even that 1/5th share. The result is that no portion of the mortgage share of 2 *biswas* 17 *biswansis* and 5 *kachwansis* was, on the date of this suit, either in the ownership or in the possession of Raghunandan Prasad. In the plaint of the present suit the property mortgaged, apart from the share of Fauji Singh, is described as follows:—"2 *biswas* 17 *biswansis* 5 *kachwansis zemindari* property situate in village Autaura, ... out of this 1/5th property was owned by the defendant No. 1 (Ragunandan Prasad) which he, under a sale-deed dated the 2nd September 1905, has purchased from *Musammat* Parbati, mother and guardian of Mohan Singh." The defendant No. 1 was mortgagee or charge-holder of the remaining 4/5ths portion of the *Zemindari* property

because, having paid off the prior charge due to the defendants Nos. 3 to 9 from the defendants Nos. 10 to 13 had got redemption effected and obtained possession." No claim is made in respect of Mohan Singh's 1/5th share now. The main relief for which the plaintiff prayed is given in the plaint as follows:—

"(a) That a decree for recovery of Rs. 11,233-3-0, as per details given in Lists A and B besides interest and compound interest accruing during the pendency of suit, and in future up to the date of realization, with costs of the suit, be passed in his favour against the defendants in the following terms that they be ordered to pay up the total amount due to him in Court within a date fixed by the Court, else the amount may be realized by sale of the *zemindari* property to the extent of 4/5ths out of 2 *biswas* 17 *biswansis* 5 *kachwansis*, situate in the said village Antaura owned by the defendants Nos. 10 to 13 and the said 4 *biswas*, situate in the said village Antaura owned by the defendant No. 2, and that in case the sale-proceeds be not sufficient he may be allowed to obtain a simple money decree." The nature of the plaintiff's claim is stated in paragraph 1 of the plaint, which is as follows:—

"That the plaintiff is the mortgagee of *zemindari* property owned by the defendants Nos. 1 and 2 and sub-mortgagee of *zemindari* property owned by the defendants Nos. 10 to 13, the charge-holder of which is the defendant No. 1 and the subsequent mortgagees of which are the defendants Nos. 3 to 9."

It is common ground that when Raghunandan Prasad paid the foreclosure decree and obtained possession in virtue of that payment he acquired a charge in respect of the 4/5 ths share of the 2 *biswas* 17 *biswansis* and 5 *kachwansis* under the provisions of section 95 of the Transfer of Property Act (IV of 1882) In the circumstances, the plaintiff claims that Raghunandan Prasad be treated as a mortgagee of the 4/5ths share and he, the plaintiff, as a sub-mortgagee of the same under the deed of the 21st February 1907. He consequently asks for sale of the 4/5ths share of the property mortgaged under the deed of the 21st February 1907 by enforcing the charge which Raghunandan Prasad subsequently acquired under the provisions of the section just cited. This then is the substance of the suit now brought by the plaintiff. The decree against which this appeal is preferred describes the property liable to be sold in satisfaction of the plaintiff's claim as follows:—

"4/5ths, out of 2 *biswas* 17 *biswansis* and 5 *kachwansis* *haqiat zemindari*, situate in *Mauza* Antaure, Pargana Sarra Shumali, Tahsil Shahbad, District Hardoi, which is in possession of the defendants Nos. 10, 11, 12 and 13." No other defendants except the defendants Nos. 3 to 9 have appealed against this decree; the others being arrayed in the group of the respondents.

The basis of the decision of the Subordinate Judge is that, in virtue of the principle of section 43 of the Transfer of Property Act, the plaintiff is entitled to sell the share in suit in enforcement of the charge which Raghunandan Prasad acquired under the provisions of section 95 of that Act in satisfaction of the debt due under the deed of the 21st February 1907. The claim of the plaintiff was resisted by the defendants on various grounds. These will appear from the following lines of attack adopted in this Court against the decision of the Court below:—

1. That neither the principle nor the provisions of section 43 of the Transfer of Property Act (IV of 1882) apply.

2. That neither the defendants Nos. 10 to 13, the owners of the property in suit, nor their transferees, the defendants Nos. 3 to 9, that is, the present appellants, had any notice of the plaintiff's option to enforce the charge in favour of Raghunandan Prasad and that consequently the said charge having been redeemed by payment to Raghunandan Prasad of the amount for which he held that charge and his having surrendered possession early in July 1907, the plaintiff is no longer entitled to enforce that charge by sale of the property in suit.

3. That the plaintiff's claim is barred by limitation.

4. That, in any event, the plaintiff cannot get a decree for more than the amount for which Raghunandan Prasad

acquired a charge as against the shares of the defendants Nos. 10 to 13 under the provisions of section 95 of the Transfer of Property Act (IV of 1882).

5. That, in any event, the mortgage of the 23rd March 1907 in favour of the appellants is entitled to priority over the charge which Raghunandan Prasad had, the latter not having come into existence before the 1st April 1907, the date on which Raghunandan Prasad was put in actual possession of the share in suit.

As to (1), the principle of section 43 of the Transfer of Property Act (IV of 1882) is a principle of law generally known as feeding the grant by estoppel, and, as was pointed out by Lord Buckmaster in the case of *Tilakdhari Lal* v. *Khedan Lal* (1), is well established in England. His Lordship stated the principle in the following words:—"If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes." On this principle, therefore, the interest which Raghunandan Prasad acquired by virtue of the provisions of section 95 of the Transfer of Property Act (IV of 1882) would pass to the plaintiff by way of mortgage under the deed of the 21st February 1907, the basis of the suit. What he purported to mortgage by that deed was his "*zemindari*" interest in the 2 *biswas* 17 *biswansis* and 5 *kachwansis* share in village Antaura. This interest he never possessed; but subsequently he acquired a lesser interest; that is, a charge merely upon 4/5ths of the share. It is also clear that the covenants of the deed of mortgage of the 21st February 1907 will also attach to this acquired interest of the mortgagee, that is, the plaintiff will be entitled to the benefits of those covenants as against that interest of Raghunandan Prasad. Raghunandan Prasad and his assignee are in the same position as if the estate had been *ab initio* an estate in interest —*Cuthbertson* v. *Irving* (2). In the case of *Partridge* v. *Ward* (3), Swinfen Eady, J., laid down the following propositions:—"If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment."

The learned Counsel for the appellants argued that the principle of equitable estoppel as stated above is not applicable to cases arising in this country and the law which would govern all cases must be found within the limitation of section 43 of the Transfer of Property Act (IV of 1882). The decision of their Lordships of the Privy Council in the case of *Tilakdhari Lal* v. *Khedan Lal* (1), already referred to, is instructive on this point. Their Lordships thought that "there may be statutory provisions or provisions of native law which would prevent the operation of the doctrine." Consequently, they remitted "that part of the case and that part only for further consideration." No such provisions have been brought to our notice. We have considered our own judgment in the light of the observations of their Lordships of the Privy Council and have come to the conclusion that there is nothing in the provisions of section 43 or of any law in force in India or in this Province which would preclude us from giving effect to the principle of feeding the grant by estoppel. We are of opinion, therefore, that the plaintiff-respondent is entitled to rely on that principle.

Coming to the terms of section 43 of the Transfer of Property Act (IV of 1882) the first thing we have to consider is whether there was or was not an erroneous representation on the part of Raghunandan Prasad as to his *zemindari* title in respect of the 2 *biswas* 17 *biswansis* and 5 *kachwansis* share which he purported to mortgage to the plaintiff-respondent by the deed

(1) 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 24; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 40; 28 M. L. T. 224; 3 C. L. J. 479; 13 L. W. 61; 2 P. L. T. 101; 47 I. A. 239 (P. C).

(2) (1859) 4 H. & N. 742; 28 L. J. Ex. 306; 5 Jur. (N. S.) 740; 157 E. R. 1034; 33 L. . (o. s.) 328; 118 R. R. 726.

(3) (1910) . Ch. D. 342; 79 L. . Ch. 746; 103 L. T. 421;

of the 21st February 1907. The recitals in the deed of mortgage, the circumstances surrounding its execution and the subsequent conduct of Raghunandan Prasad, leave no room for doubt in our minds that he represented himself as the owner of the whole of the share which he professed to mortgage to the plaintiff-respondent; and it is agreed on all hands that if he did make such a representation, it was erroneous. It will be remembered that the deed of mortgage was executed both by Raghunandan Prasad and Lauji Singh, each mortgaging different property; and, therefore, we find the use of the words "we" and "our" in the questions which we give below from the deed in question:—"For the satisfaction of the said creditor we have mortgaged and hypothecated in lieu of the principal ..... due under this deed our *zemindari* property of 2 *biswas* 17 *biswansis* and 5 *kachwansis*." (Exhibit 1). This makes it perfectly clear that Raghunandan Prasad represented that he was the *zemindar*, that is, the owner, of the said share. It should be borne in mind that the money which Raghunandan Prasad borrowed under this deed of mortgage was borrowed for the purpose of satisfying the foreclosure decree already mentioned. In fact, both the purpose and the decree are mentioned in the deed. The last date fixed by the foreclosure decree for the payment of the mortgage-money was the 24th February 1907 and the deed in question was executed only three days before that date. It is, therefore, highly probable that, with a view to carry through the bargain successfully, Raghunandan Prasad represented to the creditor that he was authorised to make a mortgage of the whole of the share mentioned in the document. He seems to have believed that by paying the foreclosure decree in its entirety he would acquire the rights of the decree-holder. In other words, that he would become the full owner of the property by virtue of the foreclosure as against the interests of the defendants Nos. 10 to 13 to the extent of their 4/5ths share in the property mortgaged. In the tender which he made on the 2nd March 1907 (Exhibit 4) Raghunandan Prasad described himself as the decree-holder. Similarly, he arrogated that position to himself in his application of the 8th March 1907 (Exhibit 5) asking for delivery of possession and, curiously enough, the Court in granting the application accepted the position of Raghunandan Prasad as that of the decree-holder. This conduct of his leads to the inference that he thought that as soon as he made the payment in satisfaction of the foreclosure decree and acquired possession in consequence, he would be the owner of the 4/5ths share. In the deed of mortgage he merely anticipated the situation in which he believed he would eventually be. There is no evidence whatsoever which would make us doubt the accuracy of the inference which we have drawn. We, therefore, hold that there was erroneous representation on the part of Raghunandan Prasad in respect of his authority to mortgage this 4/5ths share.

It was also argued by the learned Counsel for the appellants that the recital of the foreclosure decree with reference to its date and the number of the suit in which it was passed was enough to put the plaintiff to inquire into the title of Raghunandan Prasad, and if he had made that inquiry he would have reached the result that he had no title except in respect of the 1/5th share. We are of opinion that the argument is unsound. The doctrine of constructive notice is no part of the law of estoppel. It is enough that the person estopped has made the representation to the other party of an existing fact and the other party has believed in the truth of the representation and acted on it. It would obviously be unfair to allow the first party to turn round and say to the other party: "You should not have believed me but made inquiries as to whether I was speaking the truth or not." In case of *Bloomenthal* v. *Ford* (4), the Lord Halsbury, L. C., made the following observation:—"But once the conclusion is arrived at that the belief was induced, and intentionally induced, by a mis-statement of fact intended to operate upon the mind of another, upon which the man has acted, then I do not think any case can be found in the books

(4) (1897) A. C. 156 at p. 162; 66 L. J. Ch. 233; 76 L. T. 201; 45 W. R. 449; 4 Manson 156.

in which it has been suggested that the legal consequence does not follow, namely, that there is estoppel, and that it is open to the person who has made the representation to say, 'I told you so-and-so; but you ought not to have believed me. You were too great a fool. I had a right to mislead you because you were too great a fool.' I do not believe that any such case can be brought forward, or that there is any authority for such a proposition."

The second line of attack in this connection taken by the learned Counsel for the appellants was, that the charge which was subsequently acquired by Raghunandan Prasad could not be validly mortgaged by him and consequently the plaintiff's mortgage could not operate on that interest of Raghunandan Prasad. To begin with, the following argument was put to us:

A mortgage is the transfer of title (or of an interest) in specific immoveable property (section 58 of the Transfer of Property Act, IV of 1882).

A charge is not a 'transfer of title' in any property [*Burlinson* v. *Hall* (5)].

Ergo, there can be no mortgage of a charge.

In our judgment the premises are correct, but the conclusion is not rightly drawn. The true and the only conclusion following from the premises is that a mortgage is not a charge and *vice versa*. It was admitted by the learned Counsel for the appellants that a charge could be sold. It is difficult to escape the conclusion flowing from this admission that it can also be hypothecated or given as a security for the performance of an obligation. We think it is well established that in equity the benefit of a lien or a charge may be assigned with the debt in respect of which it is claimed. *Bull* v. *Faulkner* (6). It may be that, where the assignment of a debt is in the form of a hypothecation with the consequent right of redemption on re-payment, the assignment would for all practical purposes work out as an absolute assignment. It will expressly be so under section 25, sub-section (6), of the Judicature Act, 1873, (36 and 37 Vic. c. 66)–*Tancred* v. *Delagoa Bay Ry.* (7). Independently of the Act, however, the assignee will have authority to sue in his own name in a Court of Equity and recover the debt from the original debtor (Fisher's Law of Mortgage, 6th Edition, page 126, paragraph 231). It would follow from this that if the amount of the debt recovered is equal to the claim of the assignee he will appropriate the whole amount. If, however, the amount recovered exceeds the debt due to the assignee, the original debtor will be entitled to the surplus. The proposition of such an assignee is exactly the same as that of a sub-mortgagee. The plaintiff was, therefore, not much to blame when he treated himself as a sub-mortgagee in the circumstances of this case. A charge is defined in section 100 of the Transfer of Property Act (IV of 1882). It will be noticed that the definition is partly of a positive and partly of a negative character. Immoveable property is made security for the payment of money both in the case of a mortgage and in the case of a charge. That section clearly gives the charge-holder rights and remedies of a mortgagee. The right to hold immoveable property as a security for the re-payment of a loan and the further rights corresponding with the rights of a mortgagee in a similar position are, according to our judgment, substantial rights. Such rights would certainly be classified under incorporeal hereditaments in English Law; and we have no hesitation in holding that they are "property" within the meaning of sections 5 and 6 of the Transfer of Property Act (IV of 1882). The latter section enacts: "Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force." It is not contended that the rights mentioned above are either within the exceptions provided by Act IV of 1882 or by any other law for the time being in force. We, therefore, hold that a mortgage of a chargee's rights, if made, would be valid in law. This conclusion is further supported in this particular case by the fact that Raghunandan

(5) (1884) 12 Q. B. D. 347; 53 L. J. Q. B. 222; 50 L. T. 723; 32 W. R. 492; 48 J. P. 216.

(6) (1848) 2 De G. & Sm. 772; 13 Jur. 93; 79 R. R. 367; 64 E. R. 346.

(7) (1889) 23 Q. B. D. 239; 58 L. J. Q. B. 459; 61 L. T. 229; 38 W. R. 15.

Prasad not only acquired the incorporeal right of a charge-holder, but that he also acquired and entered into the possession of the property. The charge was, therefore, a possessory lien. A possessory title by itself is capable of being transferred, devised and inherited: *Asher* v. *Whitlock* (8) and *Wajid Khan* v. *Dargahi Khan* (9). We think, however, that the argument just considered and disposed of is irrelevant. Raghunandan Prasad made no mortgage of his charge-holder's interests. What he mortgaged was a 2 *biswas* 17 *biswansis* and 5 *kachwansis zemindari* share. It is only by the operation of law that those interests of his can be availed of by the plaintiff in enforcement of his claim under the deed of mortgage. Before we part with this point we may observe that a contract which is void *ab initio* cannot be validated by the provisions of section 43 of the Transfer of Property Act. If a contract, therefore, purports to transfer property which the law makes inalienable that contract cannot be given effect to with reference to another property by which the transferor may subsequently acquire. On this ground the decisions in the cases of *Gangabai* v. *Basvant* (10) and *Pandiri Bangaram* v. *Karumoory Subbaraju* (11) as well as the other cases cited by the learned Counsel in support of his argument on this point are clearly distinguishable. We, therefore, overrule the first point of argument.

As to the second point, that is, the question of notice, it is agreed that if the owner of the property, that is, the defendants Nos. 10 to 13 or their transferees, the appellants, paid up the charge which Raghunandan Prasad had in respect of the 4/5ths share owned by the defendants Nos. 10 to 13 in ignorance of the assignment in favour of the plaintiff, the plaintiff is not entitled to enforce the said charge. It is also agreed on all hands that the plaintiff may be assigned the position of a sub-mortgagee by analogy. We are also of opinion that this may be conveniently done. The substance of the plaintiff's claim, as we have shown above, is the enforcement of the charge which came into existence in favour of Raghunandan Prasad on the 2nd March 1907. It is, therefore, incumbent on the plaintiff to show that the original debtors or their transferees had notice of his sub-mortgage. The plaintiff must prove such notice. The finding of the Court below is that the appellants had notice of the mortgage of the 21st February 1907 executed by Raghunandan Prasad in favour of the plaintiff. The evidence in support of this finding is, in our judgment, not convincing; but, in view of what we are going to state just now, it is not necessary to record any formal disagreement with it. Assuming, therefore, that the appellants had notice of the mortgage of the 21st February 1907, the question which arises is, is the notice of the contents of the deed of the 21st February 1907 notice of the transfer of the charge now sought to be enforced? Our answer to this question must be in the negative. The charge was not in existence on the date of the mortgage. We must, therefore, hold that neither the appellants nor the defendants Nos. 10 to 13 had any notice of the assignment of the charge in favour of the plaintiff.

It is a well settled principle of law that if the sub-mortgagee gives no notice to the original mortgagor of the assignment of the mortgagee's rights in his favour the original mortgagor would be justified in paying the debt wholly or in part to the assignor, thereby extinguishing the original mortgage altogether. It follows that on such extinction taking place the sub-mortgagee has no remedy left against the property—*In re Lord Southampton's Estate, Allen* v. *Lord Southampton Banfather's Claim* (12) and *Dixon* v. *Winch* (13).

The proviso attached to section 43 of the Transfer of Property Act (IV of 1882) is as follows:—"Nothing in this section shall impair the rights of the transferee in good faith for consideration without

(8) (1866) 1 Q. B. 115; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 126; 148 R. R. 598.

(9) 9 O. C. 161.

(10) 5 Ind. Cas. 866; 34 B. 175; 12 Bom. L. R. 143.

(11) 8 Ind. Cas. 388; 34 M. 159; 8 M. L. T. 285.

(12) (1881) 16 Ch. D. 178 at p. 187; 50 L. J. Ch. 218; 43 L. T. 687; 29 W. R. 231.

(13) (1900) 1 Ch. 736; 69 L. J. Ch. 405; 48 W. R. 613; 82 L. T. 437; 16 T. L. R. 276.

notice of the existence of the said option." The appellants will be protected by the proviso if they had no notice of the plaintiff's option to enforce Raghunandan Prasad's interests of a charge-holder in the property originally mortgaged to him. It may be that the appellants had notice of the original mortgage in favour of the plaintiff but that is immaterial. What is material is that they should have notice of the plaintiff's option to proceed against Raghunandan Prasad's interests as a charge-holder in enforcement of his claim under the deed of the 21st February 1907. It is difficult to fix the precise point of time at which the plaintiff became aware of the defect of Raghunandan Prasad's title as an owner in the share mortgaged by him to the plaintiff. At the earliest, he might have known this when Raghunandan Prasad surrendered his possession of the 4/5ths share in favour of the appellants in July 1907 and, at the latest, when he instituted the present suit. There is no evidence on the record that the plaintiff gave notice of his option to the appellants at any time. The transfer in favour of the appellants had come into existence on the 23rd March 1907.

We have seen that Raghunandan Prasad surrendered possession to the appellants in July 1907. In view of the possessory nature of the mortgage on which the foreclosure decree was founded it is obvious that the charge in favour of Raghunandan Prasad could arise under the provisions of section 95 of the Transfer of Property Act (IV of 1882) only in the event of his obtaining possession of the property which he redeemed by satisfying the foreclosure decree. See in this connection the decision of their Lordships of the Privy Council in the case of *Ahmad Wali Khan* v. *Shamshul-Jahan Begam* (14). It is common ground that he did obtain possession. The learned Counsel for the appellants argues that the charge came into existence only at the moment when Raghunandan Prasad was put into physical possession of the property, that is, on the 1st April 1907. On the other hand, the learned Counsel for the plaintiff-respondent contends that it is enough that Raghunandan Prasad was in a position to enter into the possession of the property and that this position he acquired when he deposited money on the 2nd March 1907. In the view which we are taking of the case, it is not necessary to decide between these two contentions. We will assume that constructive possession is sufficient for the acquisition of the charge contemplated by section 95 of the Transfer of Property Act (IV of 1882). We are, however, clearly of opinion that the acquisition of possession, constructive or actual, is in the present instance a condition precedent for the creation of a charge under that section. It follows that the continuance of the charge depends upon the continuance of possession. That this is the intention of the Legislature is clear from the terms of section 95 of the Act. As a general rule, there is no lien at law without possession and this rule of Common Law seems to have been adopted by the Legislature for the purpose of section 95. In equity, possession in certain cases will not be necessary but in the present case we must be guided by the provisions of section 95. On this view of the case the charge now sought to be enforced had come to an end when Raghunandan Prasad parted with possession in favour of the appellants early in July 1907. The appeal, therefore, succeeds.

In view of our findings on the point of notice the appeal succeeds in so far as the decree for sale of 4/5ths of *2-biswas 17-biswansis* and *5-kachwansis* share in *Mauza* Antaura is concerned. The other points raised in the arguments at the hearing of the appeal are all points of law, and, in view of our opinion just expressed, it is not necessary to decide them.

We, therefore, allow the appeal, reverse the decree of the Court below and dismiss the plaintiff's suit in respect of the relief for the sale of that share. In other respects, the decree of the lower Court will stand. The appellants will get their costs from the plaintiff-respondent in both the Courts.

Appeal allowed.

G. H. & K. S. D.

(14) 28 A. 482; 10 C. W. N. 626; 3 A. L. J. 360; 3 C. L. J. 481; 1 M. L. T. 143; 8 Bom. L. R. 397; 16 M. L. J. 299; 8 Sar. P. C. J. 918; 33 I. A. 81 (P. C.).

KALICHARAN *v.* RATANSINGH.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 100 OF 1922.

March 8, 1923.

Present:—Mr. Hallifax, A. J. C.

KALICHARAN—PLAINTIFF—APPLICANT

versus

RATANSINGH AND OTHERS—DEFENDANTS —NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, rr. 8, 9, O. XLIII, r. 1 (c)—Suit dismissed in default—Application for restoration—Dismissal in default—Appeal—Procedure.

The procedure provided in the Civil Procedure Code in regard to suits must be followed so far as it can be made applicable, in all proceedings arising out of an application for the restoration of a suit dismissed in default of the plaintiff. [p. 590, col. 1.]

Manakji v. *Surajmal*, 10 Ind. Cas. 705; 7 N. L. R. 32, followed.

An appeal lies from an order dismissing an application for restoring to file an application for the restoration of a suit dismissed in default of the plaintiff. [p. 590, col. 1.]

Revision of an order of the Subordinate Judge, Bhandara, dated the 22nd December 1921, in Miscellaneous Judicial Case No. 72 of 1920.

Mr. *G. R. Pradhan*, for the Applicant.

JUDGMENT.—A suit filed by the applicant, Kalicharan, in the Court of the Subordinate Judge, Bhandra, against the three non-applicants was dismissed on the 23rd of June 1920, on account of his absence, the first two defendants being present, that is to say, under r. 8 of O. IX of the Civil Procedure Code. On the 25th of June 1920, he put in an application under r. 9 of the same Order for restoration of the suit and this application also was dismissed in his default and in the presence of the first defendant on the 24th of September 1920. He then applied again on the 30th of September 1920 for the restoration of his application to restore his suit, and succeeded in satisfying the Court that there was sufficient cause for his non-appearance on both the 23rd of June and the 24th of September, the dates on which his suit and the application for restoration of it were dismissed. The learned Subordinate Judge, however, appears to have regarded the second application as one for restoration of the suit itself and not as one for restoration of the first application, and accordingly dismissed it as barred by time.

2. In appeal against this dismissal the finding that good cause has been shown for non-appearance on both occasions was accepted and it was held that the Subordinate Judge ought to have restored the second application and thereafter the suit, section 141 of the Civil Procedure Code being applicable to the proceedings, as was laid down in *Manakji* v. *Surajmal* (1). The learned District Judge was, however, of opinion, based apparently on the use of the word "suit" in clause (*c*) of r. 1 of O. XLIII, that though an appeal lies against an order under r. 9 of O. IX refusing to restore a suit, there can be none against an order passed under the same rule read with section 141 refusing to restore an applicaton. The plaintiff has now applied for revision of the Subordinate Judge's order dismissing his second application, admitting the correctness of the view taken in the Court of the District Judge that he has no right of appeal against that order.

3. In *Harlal* v. *Narayan* (2) I distinguished the case of *Manakji* v. *Surajmal* (1) as not being concerned with execution proceedings. I went out of my way, however, to suggest a doubt as to its correctness in regard to proceedings of the nature of those with which we are concerned now in view of the rulings of the Privy Council in *Thakur Prasad* v. *Fakir-Ullah* (3) and the Calcutta High Court in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (4). That doubt I find on examination to be without basis. Both the cases mentioned dealt with an application in execution, and it was held that section 647 of the old Code in the earlier case and section 141 of the present Code in the later case did not make the procedure laid down for suits the procedure to be followed in such cases, but only for the reason that the Code itself lays down a full procedure for them. That reason does not apply to applications

(1) 10 Ind. Cas. 705; 7 N. L. R. 32.
(2) 64 Ind. Cas. 420; 18 N. L. R. 152; 4 N. L. J. 118; (1922) A. I. R. (N.) 267.
(3) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 3 (P. C.).
(4) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

of the nature of that with which we are now dealing. I hold, therefore, following the ruling in *Manakji* v. *Surajmal* (1), that the procedure provided in the Civil Procedure Code in regard to suits must be followed so far as it can be made applicable in all proceedings arising out of the present application.

4. But the view taken by the learned District Judge is in effect that section 141 makes O. IX applicable to the present case but does not make clause (*c*) of r. 1 of O. XLIII similarly applicable. The words of the section, however, make the whole of the Procedure Code applicable, as far as that is possible. The distinction seems to be based on the use of the word "suit" in the latter rule, but that is the word used all through r. 9 of O. IX and also in section 141. It appears in clause (*c*) of r. 1 of O. XLIII merely as a repetition of the exact terms of the rule against which an appeal is allowed that repetition being necessary merely becasue the appeal is allowed only against the rejection of an application, that is to say, only one of the orders that can be passed under r. 9 of O. IX; otherwise it would have been sufficient to mention no more than an order under that rule. The right of appeal is no more and no less a matter of procedure than the right to apply for the setting aside of a dismissal in default, and the ruling of Skinner, A. J. C., which the learned District Judge followed comes to this, that after the word "suit," wherever it occurs in r. 9 of O. IX, we must read the words: "or other proceeding to which this rule applies by virtue of section 141." It follows that the same words must be added after the word "suit" in clause (*c*) of r. 1 of O. XLIII. In that view, an appeal did lie to the Court of the District Judge, and that Court ought to have restored the application, leaving the Subordinate Judge to make the necessary consequential restoration of the suit.

5. In strictness, therefore, the order of the Subordinate Judge being appealable cannot be revised, and the correct course for this Court would be to set aside the appellate decree, against which no second appeal lay, and to remand the case to the Appellate Court. That Court could pass no order but that the application for restoration should be restored, and thereon the first Court could only order that the suit should be restored. No object can possibly be served by going through these formalities, which can only mean at least two unnecessary appearances in Court for the parties. I, therefore, order that, the suit itself shall be restored to the file and tried out according to law. The costs of these proceedings, in which the Pleader's fee will be Rs. 15, will be costs in the suit.

G. R. D. *Application allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2490 OF 1921.

March 5, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Zafar Ali.

KIDRI PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

K. R. KHOSALA—PLAINTIFF—RESPONDENT.

Jurisdiction of Courts—Exclusion of jurisdiction—Consent of parties.

An agreement between the litigants to have the suit tried in a particular Court to the exclusion of other Courts which may also lawfully entertain the same, is unenforceable.

Prosunno Chunder Bose v. *Prosunno Chunder Roy*, 15 W. R. 343, and *Barkat-un-nissa Begam* v. *Mahboob Ali Mian*, 52 Ind. Cas. 684 at p. 685; 17 A. L. J. 1068; 1 U. P. L. R. (A.) 187; 42 A. 70, **distinguished.**

Litigants can no more by agreement *inter se* divest a Court of its inherent jurisdiction over the subject-matter of a suit than they can confer jurisdiction upon it by consent where it has none.

First appeal against a decree of the Senior Sub-Judge, Simla, dated the 12th October 1921.

Mr. *Badri Das*, for the Appellants.

Mr. *Sagar Chand*, for the Respondent.

JUDGMENT.—The suit for accounts out of which this first appeal arises was based on a written agreement according to which the plaintiff, who is a Barrister of Simla, undertook to obtain contracts for the defendants, who are Bankers and contractors of Ferozepore Cantonment, on the condition, *inter alia* that, the latter would pay him 10 per cent. of the net profits on the contracts. The agreement was executed at Ambala on the 22nd October 1920, and by the end of that month the

KIDRI PRASAD v. K. R. KHOSALA.

defendants, through the instrumentality of the plaintiff, were given at Simla three contracts to supply to Government 300 tons of *Ghee*, 1,140 tons *Gur* and 375 tons Sugar. In February 1921 they paid to plaintiff Rs. 2,000 in part satisfaction of his claim to a share in the profits and in April he began to urge for payment of the balance. At first, on the 2nd April 1921, he sent them a letter demanding settlement of accounts but not receiving a reply thereto till the 15th April he sent them notice in a registered cover intimating that they should refer the matter to arbitration in accordance with clause 14 of the agreement and nominate their arbitrator within a week and that if they failed to do so he would file a suit against them. In reply to this letter of 2nd and the notice of the 15th April the defendants wrote back on the 20th April to say that they never denied his claim but could not calculate the net profits as the accounts were not ready; that in case he should insist upon immediate payment they were ready to make a rough calculation of the profits; that no controversy or dispute had arisen between them which could be referred to arbitration, and that he might come to Ferozepore and examine the account-books to satisfy himself but should not rush to Court. But the plaintiff did not wait much longer and on the 17th May 1921, instituted the present suit for accounts in the Court of the Subordinate Judge, Simla. The defendants pleaded *inter alia* that the Court had no jurisdiction to try the suit because, according to clause 15 of the agreement, the Courts at Ferozepore alone were given jurisdiction to try cases between the parties; that according to section 18 of Schedule II to the Code of Civil Procedure the suit should be stayed and the parties directed to refer it to arbitration, in compliance with clause 14 of the agreement, and that the suit was premature as no cause of action had accrued to the plaintiff. Upon these pleadings the Court below framed the following issues:—

(1) Has this Court no jurisdiction? (2) Does clause 14 of the agreement bar this suit? (3) Can the suit be stayed, if so, should it be stayed? (4) Is the suit premature? (5) Is the plaintiff not entitled to rendition of accounts? The lower Court recorded a finding on issue No. 3 only stating in its judgment that defendants' Counsel gave up his case on all the issues except No. 3 and decided that issue against the defendants and granted the plaintiff a decree with costs for rendition of accounts. Counsel for the defendants-appellants contends before us (1) that the lower Court ought to have given findings on all the law points specially on the question of jurisdiction because the admission of Counsel on a law point does not bind his client and, further, because jurisdiction could not be conferred by consent of parties, and (2) that the suit should have been stayed and that the parties should have been directed to refer the matter to arbitration according to clause 14 of the agreement.

As regards the plea of want of jurisdiction it is clear that the litigants can, by agreement *inter se*, divest a Court of its inherent jurisdiction over the subject-matter of a suit no more than they can confer jurisdiction on it by consent where it has none. The learned Counsel for the defendants-appellants could cite no authority in support of his proposition that the agreement to have the suit decided by the Ferozepore Courts to the exclusion of other Courts which could lawfully, entertain the same, was enforceable *Prosunno Chunder Bose* v. *Prosunno Chunder Roy* (1) and *Barkat-un-nissa Begam* v. *Mahboob Ali Mian* (2) cited by him are not in point. We are, therefore, of opinion that the jurisdiction of the Court below could not be ousted by the agreement between the parties.

As regards the finding of Issue No. 3, the reasons given by the Court below in support of it are untenable. The defendants' plea that the accounts were not ready is on the face of it true. To purchase and supply hundreds of tons of *Ghee*, *Gur* and Sugar, they must have made numerous transactions with a large number of persons at different places, and must have expended *lacs* of Rupees thereon, and, therefore, it was not possible for them to complete accounts of all these transactions and calculate net profits within the time

(1) 15 W. R. 343.
(2) 52 Ind. Cas. 684 at p. 685; 17 A. L. J. 106 & 1 U. P. L. R. (A.) 187; 42 A. 70.

at their disposal before the institution of the suit. The lower Court says in its judgment that the point in dispute between the parties was whether the accounts were ready or not and that the defendants refused to refer this point to arbitration. But they asked the plaintiff to inspect their account-books and see for himself whether what they stated was true or not. There is nothing to show that in reply to the defendants' letter of 20th April the plaintiff wrote back to say that he wanted to refer to arbitration the question whether the accounts were ready or not. The plaintiff made no allegation which the defendants denied and, therefore, the latter were justified in telling him that there was no point in dispute between them which could be referred to arbitration.

The next question is whether the suit should be stayed and the parties directed to have recourse to arbitration according to clause 14 of their agreement. As more than 21 months have now elapsed since the institution of the suit the accounts must have been completed during this period and the defendants must now be in a position to tell what has been the amount of their net profits, if any. We are, therefore, of opinion that the suit must be stayed and the parties directed to appoint arbitrators to examine the accounts and find out therefrom the amount of net profits if any, and award to the plaintiff the amount due to him. Accordingly we accept the appeal, set aside the judgment and decree of the Court below and remand the case to be dealt with as stated above. The Court-fee stamp on the memorandum of appeal to be refunded. Other costs in this Court to be borne by the parties.

N. H. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 8-B OF 1923.
August 15, 1923.
Present:—Mr. Prideaux, A. J. C.
Musammat TULSAI—APPLICANT—APPELLANT
versus
Musammat TULSAI—NON-APPLICANT—RESPONDENT.

Guardians and Wards Act *(VIII of* 1890), *ss.* 47, 48—*Order fixing maintenance and education allowance of ward—Appeal, whether lies.*

No appeal lies from an order on a guardianship application fixing the amount to be paid by the guardian of the property for the maintenance and education of the ward.

Gopammal v. *Srinivasa Iyengar*, 27 Ind. Cas. 921; 28 M. L. J. 96, followed.

Appeal from an order of the District Judge, Akola, dated the 24th February 1923, in Miscellaneous Case No. 16 of 1922.

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

Mr. *A. V. Khare*, for the Respondent.

JUDGMENT.—The guardian who has been appointed by the District Court should have been made a party to this appeal, but the point is really immaterial for I intend to dismiss the appeal. It is clear from the record that the present appellant is an unfit person to be appointed the guardian of her minor sons' property. She has in the past been immoral and has spent the minor's money in wandering about the country to get away from her village for her delivery for an illegitimate child. It is also clearly established that she has been mismanaging and wasting the minor's estate. Under these circumstances, the District Judge was clearly right in not entrusting the further custody of her minor son's property to her.

It is here argued that the maintenance ordered by the District Judge, namely, Rs. 25 a month, for the maintenance of herself and her two children is insufficient, but no appeal lies from an order on a guardianship application fixing the amount to be paid by the guardian of the property for the maintenance and education of the ward: See *Gopammal* v. *Srinivasa Iyengar* (1). There is nothing to prevent the guardian or the present appellant applying to the District Judge to increase the monthly allowance should circumstances exist to make this desirable. This appeal fails and is dismissed with costs. The appellant to bear the respondent's costs. I fix Pleader's fee at Rs. 20.

G. R. D. *Appeal dismissed.*

(1) 27 Ind. Cas. 921; 28 M. L. J. 96.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 89 OF 1921.

July 5, 1922.

Present :—Mr. J stice Sulaiman.

CHHAJJ U AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOKUL—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Document affecting property worth over Rs. 100—Family settlement—Compromise—Property affected exceeding Rs. 100 in value—Registration compulsory—Res judicata—*Representative suit, decision in, whether operates as res judicata.*

A document which purports or operates to create or extinguish a y right or interest in moveable property worth Rs. 100, even though it records a family settlement or compromise, is compulsorily registrable, and, unless registered, has no binding effect.

Jagrani v. *Bisheshar Dube*, 35 Ind. Cas 701; 38 A. 356; 14 A. L. J. 449 (F B), relied on.

A suit instituted in the interests of n estate and for the benefit o not only the pla ntiffs, but all persons who come to succeed after t em, is a representative suit and the decision arrived at therein, in the absence of any fraud or collusion, is binding on subsequent reversioners and operates as *res judicata* [p. 595, col. 1]

Risal Singh v. *Balwant Singh*, 48 Ind. Cas. 553; 40 A 573; 45 I. A. 168; 28 C L J. 519, 24 M. L. T. 361; 9 L W. 52; 23 C W. N. 32 ; (1919) M. W. N. 155; 36 M. L J. 597; 21 Bom. L. R. 511 (P. C) and *Kesho Prasad Singh* v. *Sheopargish Ojha*, 64 Ind. Cas. 248; 19 A L J. 749; 3 U. P L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A) 301, relied on.

Narain Singh v. *Rao Kunar Singh*, 66 Ind. Cas. 62; (1922) A I. R. (A) 217, 44 A. 428; 20 A. L. J 251, distinguished.

Second appeal against the decree of the District Judge, Meerut, dated the 2nd September 1920.

Mr. *K. N. Katju*, for the Appellants.

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

JUDGMENT.—This is a defen ant's appeal arising out of a suit for recovery of possession of a one-third share of 49 *bighas* and o d land. The plaintiff claimed to be entitled to the property on the death of his mother an a nt, Bhurya and Kirpya, daughters of Pirthi, the last male owner.

On behalf of the defendants it was plea ed that the plaintiff was bound by a family settlement arrived at between the defendants and the ladies and that the claim was also barred by the principle of *res judicata* in consequence of a previous litigation.

Pirthi, the last male owner, died some 22 years ago and his widow, *Musammat* Shibya, succeeded to the estate. She died in 1910. On her death an application for mutation of names was made in the Revenue Court by *Musammat* Bhurya and Kirpya, the two daughters of *Musammat* Shibya, which was opposed by Chajju, defendant, on the allegation that he was the adopted son of *Musammat* Shibya. The matter remained pending in the Revenue Court for a long time and, ultimately, on the 11th October 1911, a compromise was filed in that Court, under which two-thirds of the properties went to the two daughters in equal shares and the remaining one-third to Chhajju and other collaterals. Mutation of names followed accordingly. Very soon after this compromise, namely, on the 18th of June 1912, *Musammat* Bhurya and *Musamma* Kirpya instituted a suit in the Civil Court to recover possession of the one-third share of the properties which had gone to Chhajju and others, on the allegation that the previous compromise was not binding on them. In the plaint, as originally filed, there was no relief asked for as to the cancellation of that compromise. The Court of first instance threw out the suit on the technical ground that the plaint was defective. On appeal the plaint was ordered to be amended, and a relief for the cancellation was added, and the case remanded for disposal on the merits. On the 24th of March 1914 the Court of first instance dismissed the suit, holding that the ladies could not avoid the previous compromise. This decree was affirmed in appeal by the District Judge and by the High Court on the 13th of April 1916. The result was, that Chhajju and others remained in possession of the one-third share of the estate of Pirthi, and a suit brought to recover possession of it by Pirthi's daughters stood dismissed. Both the daughters have since died. Gokul, the present plaintiff, who is the son of *Musammat* Bhurya has instituted the present suit to recover possession of the one-third share which had passed out of the estate. This suit has been decreed by both the Courts below.

In appeal two points have been raised before me: (1) that the present claim is barred by the principle of *res judicata* and

(2) that, in any case, the previous compromise was a family settlement and was binding on the plaintiff.

It would be convenient to dispose of the second point first. If the question of *res judicata* does not arise then, in my view, on the findings recorded by the learned District Judge, the compromise cannot be held to be binding on the plaintiff. In the first place, there is a finding by the lower Appellate Court that this really did not amount to "a genuine family settlement." In the next place, he has held that this compromise could not bind the ladies nor the plaintiff for want or registration. This latter view is supported by the Full Bench ruling in the case of *Jagrani* v. *Bisheshar Dube* (1) in which it was held that a document which purports or operates to create or extinguish any right or interest in immoveable property worth Rs. 100, even though it records a family settlement, was compulsorily registrable. I am, therefore, of opinion that, if the present claim is not barred by the principle of *res judicata* then, on the findings, the compromise cannot bind the plaintiff. The principal point for determination, therefore, is the plea of *res judicata*. The former suit was instituted by the ladies to recover possession of a part of the estate which was in the wrongful possession of Chhajju and others who were claiming a paramount title in themselves. The suit obviously must be deemed to have been instituted in the interest of the estate and for the benefit of all the persons who might come to inherit it thereafter. The two ladies represented the estate for the time being and it was their duty to raise all the ground of attack which would entitle them to recover possession of the estate. If they failed to raise any such ground, or if they raised it and it was not accepted by the Court, the decree nevertheless would be final. It is not suggested anywhere that the former decree had been obtained by collusion or fraud. The suit being, in my opinion, a representative one the decree would bind not only the ladies who were the plaintiffs in the suit but all subsequent successors to the estate. It has, however, been strongly contended by the learned Vakil for the respondent that the former suit was brought in the personal capacity of the ladies and for their own benefit, inasmuch as their main object was to get the compromise cancelled in which they had entered into, and that such a suit was really not a representative suit. It is further contended that the defendants at that time were in the position of transferees from these ladies and a decision arrived at between the ladies and their transferees could not bind the present plaintiff who was not claiming title through them but claiming in his own right. But, as was observed by their Lordships of the Privy Council in the case of *Khunni Lal* v. *Gobind Krishna Narain* (2), the property which is acquired by persons under a compromise based on the assumption that there was an antecedent title of some kind in themselves which was acknowledged and defined by an agreement, is not the same thing as an alienation by limited owners in their favour. Chhajju and others did not acquire any title from the two ladies, but, on the other hand, they in compromise of an independent claim acquired a portion of the property. They cannot, therefore, be treated as mere transferees from those ladies. The learned Munsif in the former case had dismissed the suit for possession on the ground that the compromise had not been obtained under any undue influence, mistake of law or fact, and was in fact valid. The mere fact that the ladies at that time did not raise the plea that the compromise was not binding on them for want of registration cannot nullify the effect of that decree. Even if that suit had been dismissed on the ground of personal estoppel against the ladies, it seems to me that the adjudication would still be final. In the case of *Risal Singh* v. *Balwant Singh* (3), their Lordships of the Privy Council held a decree dismissing a widow's suit on the ground of personal estoppel as binding on subsequent reversioners. If the previous suit

(1) 35 Ind. Cas. 701; 38 A. 306; 14 A. L. J. 449 (F. B.).

(2) 10 Ind. Cas. 477; 33 A. 356; 38 I. A. 87; 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) 1 M. W. N. 432; 21 M. L. J. 645 (P. C.).

(3) 48 Ind. Cas. 55; 40 A. 593; 45 I. A. 168; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 16 M. L. J. 597; 21 Bom. L. R. 511 (P. C.).

was a suit instituted in the interest of the estate and for the benefit of not only the ladies but all the persons who may come to succeed after them, then it must be deemed to have been a representative suit, and if it was such a suit then the decision arrived at in that litigation, in the absence of any fraud or collusion, would operate as *res judicata*. This was the view accepted in the Full Bench case of *Kesho Prasad Singh* v. *Sheopargash Ojha* (4). The learned Vakil for the respondent has strongly relied on the case of *Narain Singh* v. *Raj Kumar Singh* (5), in which it was held that a previous compromise decree between an adopted son on the one hand and certain other claimants on the other was no bar to a subsequent claim raised by the adopted son. That case, however, is clearly distinguishable because in that case a compromise decree did not stand on any higher footing than the compromise itself. There was really no adjudication by the Court and a question of *res judicata* in that case did not arise. The learned Judges were of opinion that, under the circumstances of that case, the compromise was not a settlement of any *bona fide* family dispute and as such was not binding on the plaintiff. In the present case I have already said that if it were not for the decree in the previous suit which was obtained after a fair fight, the compromise would not have been binding on the plaintiff.

The result, therefore, is that I allow the appeal, set aside the decree of the lower Appellate Court and dismiss the suit with costs in all Courts.

Appeal allowed.

W. C. A.

(4) 64 Ind. Cas. 248; 19 A. L. J. 740; 3 U. P. L. R. (A) 117; 44 A. 19; (1922) A. I. R. (A) 301.
(5) 66 Ind. Cas. 62; (1922) A. I. R. (A.) 217; 44 A. 428; 20 A. L. J. 251.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 13 OF 1923.

July 7, 1923.

Present:—Mr. Prideaux, A. J. C.

Musammat AHILYABAI—NON-APPLICANT—APPELLANT

versus

Musammat VITHABAI AND ANOTHER—APPLICANTS—RESPONDENTS.

Guardians and Wards Act (*VIII of* 1890), *s.* 39 (*h*)—*Guardian, appointment of—Person residing outside jurisdiction of Court, whether eligible for appointment.*

There is nothing in the Guardians and Wards Act to prevent a Court from appointing as guardian a person who ordinarily resides outside the limits of its jurisdiction.

Asghar Ali v. *Amina Begam*, 24 Ind. Cas. 59; 36 A. 280; 12 A. L. J. 392, dissented from.

Application for stay of the execution of an order of the District Judge, Wardha, dated the 16th April 1923.

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

ORDER.—This is an application to stay execution of the District Judge, Wardha's order dated the 16th April 1923 regarding the guardianship of two minors, Vital aged eleven and his sister Kamala aged six. The first applicant in the case, *Musammat* Vitha Bai, is a real sister of the minor's father. The second applicant is the son of the first. These, who are residents of Bombay, have been appointed joint guardians of the persons of the minors with permission to take them to their home near Bombay. The case is now under appeal in this Court. It being fixed for the 19th September for hearing applicant with the records. One application to stay execution of the order having failed, this is the second. The ground urged is that it is against the provisions of the Guardians and Wards Act to appoint guardians residing outside the Court's jurisdiction. I am referred to section 39 (*h*) which lays down that a Court may remove a guardian who ceases to reside within the local limits of the jurisdiction of the Court. The Act does not say *must* remove such guardian, and nothing in the Act itself has been shown me preventing the appointment of a person ordinarily residing outside the limits of the Court's jurisdiction. It is conceivable that in many

cases no proper objection could be raised to such a course. I am also referred to *Asghar Ali* v. *Amina Begam* (1) which lays down that the Guardians and Wards Act, 1890 contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he mace the application. With due respect, I doubt the correctness of the dictum above referred to. Under the peculiar circumstances of the present case, namely, that the present applicant apparently is no relation of the minors and that she is a prostitute by profession, I see no reason to stay execution of the District Court's order. I decline again to stay it.

G. R. D. *Order accordingly.*

(1) 24 Ind. Cas. 59; 36 A. 280; 12 A. L. J. 392.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 868 1921.
December 5, 1922.
Present:—Mr. Justice Stuart.
Musammat DURGA AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BABU RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Licensor and licensee—Licensee in possession—Denial of title of grantor, effect of.

A licensee in possession does not, like a tenant, by denying the title of the grantor of the license, forfeit the license and become liable to ejectment.

Dharam Kunwar v. *Fakira*, A. W. N. (1901) 157 and *Akbar Ali Khan* v. *Shah Muhammad*, 40 Ind. Cas. 443, 39 A. 621; 15 A. L. J. 592, followed.

Second appeal from a decree of the District Judge of Farrukhabad, dated the 12th July 1921.

Mr. *Durga Prasad*, for the Appellants.

Messrs. *G. Agarwala* and *Gulzarilal*, for the Respondents.

JUDGMENT—On the findings of both the Courts below, *Musammat* Durga and Sia Ram are the licensees of a certain piece of land in Farrukhabad town upon which a *kacha puckka* house has been constructed, and the plaintiffs are the licensors of that land. In a previous suit; Durga denied the plaintiff's title Sia Ram did not. Durga also executed a usufructuary mortgage, under which, however, possession was not given. The plaintiffs then sued for a declaration that the usufructuary mortgage was inoperative against their title to the land and for the ejectment of the defendants. The Trial Court granted them a declaration that the usufructuary mortgage was inoperative and that Durga had lost her right to residence but refused ejectment.

The lower Appellate Court granted both reliefs. The defendants appeal here.

It is quite clear that the defendants, Durga and Sia Ram, are licensees. Apart from the fact that Sia Ram never denied the plaintiff's title, it is settled law in this Court that a licensee in possession does not, like a tenant, by denying title of the grantor of the license, forfeit the license and become liable to ejectment [*Dharam Kunwar* v. *Fakira* (1) and *Akbar Ali Khan* v. *Shah Muhammad* (2)] So there is no case for ejectment. I do not agree with the appellants that *Musammat* Durga did not deny the title of the plaintiffs. I think she did. It is to be noted that the plaintiffs did not sue for ejectment by revocation of license. Had they done so, the defence raised under section 60 of the Easements Act would have been material.

As a result, I set aside the decree of the lower Appellate Court and uphold the decree of the learned Munsif only so far as it awards a declaration that the mortgage cannot operate against the interests of the plaintiffs. The suit for dispossession of Durga and Sia Ram is dismissed. The plaintiffs will pay their own costs and those of Durga and Sia Ram in this Court and the Courts below. These costs will include in this Court fees on the higher scale.

W. C. A. *Appeal allowed.*

(1) A. W. N. (1901) 157.
(2) 40 Ind. Cas. 443; 39 A. 621; 15 A. L. J. 592.

SHAMBHU DYAL SINGH *v.* ISWAR SARAN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 427 OF 1921.

December 11, 1922.

Present:—Mr. Justice Stuart.

SHAMBHU DYAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ISWAR SARAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Decree against father—Execution against joint family estate, whether allowable—Partition subsequent to decree—Creditor, rights of, whether affected.

Where a simple money-decree is passed against the father and manager of a joint Hindu family, it can be executed against the whole of the estate and operates against the interests of the sons. Any partition of the property subsequent to the date of the decree would not affect the creditor's rights against the joint family property, which rights would be the same as on the date on which the decree was passed, and would not be affected by subsequent actions of the members of the family. [p. 599 cols. 1 & 2.]

Sripat Singh Dugar v. *Prodyot Kumar Tagore*, 39 Ind. Cas. 252; 44 I. A. 1; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290, 44 C. 524 (P. C.), followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280, 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 430; 22 M. L. T. 22; 6 L. W. 213; 15 A. L. J. 437 (P. C.), distinguished.

Second appeal from the decision of the Additional District Judge, Gorakhpur, dated the 20th November 1920.

Mr. *A. Haider*, for the Appellants.

Messrs. *K. N. Katju, Jang Bahadur Lal* and *S. P. Sinha*, for the Respondents.

JUDGMENT.—The facts of the litigation out of which this appeal arises afford some indication of the hardness of the way of the decree-holder in India. Ram Richpal Singh is the father of two sons, Shambhu Dayal Singh and Girja Dayal Singh. They were members of a joint Hindu family governed by the Mirakshara Law. Shambhu Dayal Singh was born about 1908, Girja Dayal Singh was born about 1910. Before they were born, the father, Ramrichpal Singh, commenced borrowing money from the Kayasth Trading Company, Gorakhpur. He continued borrowing money and in 1913, when Shambhu Dayal Singh was five and Girja Dayal Singh was three, he executed a promissory-note for Rs. 2,028, and in 1914 executed a second promissory-note for Rs. 350 in favour of the same Company. In 1916 the Company obtained a decree on the first promissory-note and sold the decree-holder's rights under that decree together with the second promissory note to Munshi Chhotu Lal. Munshi Chhotu Lal subsequently obtained a decree on the second promissory-note later. Both decrees were against Ramrichpal Singh alone, he being the executant of the promissory-note in question. In execution of the first decree Munshi Chhotu Lal attached certain property in 1918. Shambhu Dayal Singh, aged ten, and Girja Dayal Singh, aged eight objected in execution proceedings that two-thirds of the property so attached was not liable to attachment under the decree for the following reason:—

Their allegation was that they and their father were members of a joint Hindu family, and that in the year 1916 after both the decrees had been passed against their father they, the elder then being eight and the younger then being aged six, had separated from their father by means of a partition decree which had been obtained not in the Gorakhpur District where they resided and where the property under attachment is situated, but in the Fyzabad District under the jurisdiction of the Judicial Commissioner of Oudh. Their plea was accepted in 1918 by the Court executing the first decree and a two-thirds share of the property in question was exempted from attachment accordingly. Within a year of the success of the plea of Shambhu Dayal Singh, and Girja Dayal Singh, Munshi Chhotu Lal instituted a suit in the Court of the Subordinate Judge of Gorakhpur for a relief which must be examined rather closely. The relief which he sought was for a declaration that the decree of the 20th December 1916 passed by the Fyzabad Court was invalid; secondly, for a reversal of the order passed in execution on the 27th July 1918 declaring two-thirds of the property not liable to attachment, and, thirdly, for a declaration that the whole of certain family property was liable to attachment and sale in execution not only of the first decree but of the second decree, and, as far as I can gather, he also desired that the two-thirds share of the property already

exempted should be liable for the satisfaction of both decrees. Upon the facts before me it does not appear that he has as yet put the second decree into execution. In the meanwhile, the situation has become further complicated by the fact that Ramrichpal Singh has become an insolvent. The Receiver was added as a party to the suit.

The learned Counsel who represents the plaintiff in this appeal has said that all that the plaintiff wishes is for a declaration that both these decrees bind as much joint family property as is at present in the hands of Shambhu Dayal Singh and Girja Dayal Singh and that he wants nothing more. The plaint might have been drafted more artistically. It, however, in my opinion, suggests that that is the actual relief which the plaintiff desired from the beginning. In respect of the father's property, such as it is, he can of course only obtain such satisfaction as the Receiver can give him and what he clearly now desires is that he shall be at liberty to execute both his decrees against the joint family property which has come to the sons, and which is not in the hands of the Receiver. The Trial Court decided that the promissory-note of 1913 was executed in satisfaction of antecedent debts and that the whole of the joint family property was thus liable under the decree passed upon it. It held that the second promissory-note had not been executed in lieu of antecedent debts or for legal necessity and that, therefore, the joint family property was not liable under the decree passed upon it. It gave relief accordingly. The learned Second Additional District Judge in a careful and reasoned judgment on an appeal by the defendants and a cross-objection by the plaintiff decreed the whole relief for which the plaintiff had prayed. The present appeal is preferred by the two minor children, Shambhu Dayal Singh and Girja Dayal Singh. Before I discuss the grounds taken in the Memorandum of Appeal it is necessary to go back to the original pleadings, and it is to be noted, that not only are the reliefs sought completely separate but that in two instances they depend upon separate causes of action. The first relief is for a declaration that the decree partitioning the property between the father and the two sons which was passed by the Court of Fyzabad is invalid as against the plaintiff. The second relief for a reversal of the order in execution exempting the sons' property, is clearly based on O XXI, r. 63 and the cause of action there arose upon the order exempting that property which was passed on the 27th July 1918. The third relief, however, for a declaration that other property held by the present appellants is liable in execution of the first decree and that that other property and the property already exempted are liable in execution of the second decree, is based not upon the order of the 27th July 1918 but upon the denial of the plaintiff's rights to execute against such property which was implied in the objection filed in 1918, upon which the order of the 27th July 1918 was passed. There were, thus, three declaration sought and a Court-fee of Rs. 30 should have been paid and only Rs. 20 were paid but that error can be corrected now.

I shall now take the grounds of appeal in order:

The first ground is, that the suit is barred by limitation. The suit is certainly not barred by limitation in respect to any of the three reliefs. It was instituted in March 1919. The partition decree of the Fyzabad Court was passed on the 23rd October 1916. The plea that Shambu Dayal Singh and Girja Dayal Singh were in no way liable was not put forward till 1918 and the order in the Execution Department was not passed till the 27th July 1918. The period of limitation in respect of the third cause of action was one year, and the period of limitation in respect of the other two causes of action was not less than three years.

The next point taken is, that the suit is barred by the provisions of section 16 (2) of Act III of 1907. It certainly is not so barred for two reasons. In the first place, the relief sought, as I read it, in respect to property was against Shambhu Dayal Singh and Girja Dayal Singh only. Their father was joined as a necessary party, but no relief was actually sought against him, except in respect of the declaration that the decree of 1916 was not

binding upon the plaintiff. The plaintiff did not seek relief against any of the property which had come into the hands of the Receiver under the insolvency proceedings. Further, the joining of the Receiver as a party would have been sufficient to cure any irregularity.

I now come to the next point. It is, that the two-thirds share of the sons in the family property is not liable to attachment and sale in execution of simple money-decrees obtained against the father We here have to differentiate the two promissory-notes. The promissory-note for the large amount, Rs. 2,028, has been found by both the Courts to have been executed by Ramrichpal Singh to discharge antecedent debts incurred by him. The finding of the lower Appellate Court on this point is as follows :—"There is abundant evidence to show that the promissory-note dated the 22nd January 1913 was executed in consideration of several promissory-notes. Besides the oral evidence on the point, there is the certified copy of the ledger of the Kayasth Trading and Banking Corporation, Limited, Gorakhpur, the original creditors, from whom Munshi Chhotu Lal purchased the decree. I find the issue in favour of the respondents." The issue (which he elsewhere calls the point) was whether the lower Court was right in holding that the promissory-note dated the 22nd January 1913 on which the earlier decree was passed was supported by antecedent debts. This finding is a conclusive finding which connot be contested in second appeal. The first promissory-note was executed in lieu of antecedent debts due from the manager of a joint Hindu family. So the appeal must fail upon that point.

But in the case of the second promissory-note which was executed only for Rs. 350, on the facts, there were no antecedent debts and no legal necessity is established. The lower Appellate Court has here found that the decree was passed upon the basis of that note before any partition had taken place in the family. I agree with the learned Additional District Judge that, as both decrees were passed against the father at the time that the family was joint, no subsequent partition could affect the creditor's rights what ever they might be against the joint family property. His rights would be against the joint family property, as it was on the dates on which the decrees were passed in his favour and could not be affected by subsequent actions of the members of the family. But we have it that here there was no legal necessity and no antecedent debt. Nevertheless, the property in the hands of the sons is liable in execution of the decree upon the second promissory-note. This is clear from the decision of their Lordships of the Privy Council in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1). The words used by their Lordships which govern this particular matter are these :—

"The property in question was joint property governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. *In every other event* it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against *the father alone.*" These words could not be clearer and they are absolutely comprehensive. There are no limitations, qualifications or reservations to the effect that the debt must be incurred by the father as representing the estate or purporting to be for the benefit of the estate or in some capacity other than his personal capacity. The words are : "*In every other event* it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against *the father alone*"—and there is nothing to qualify the words "the father alone". It has been argued by the learned Counsel for the appellants that, in view of a subsequent judgment of their Lordships of the Privy Council, it must be taken that the share of the sons in such circumstances can only be attached and brought to sale, if at that time their father is dead and they are made liable under the doctrine

(1) 39 Ind. Cas. 252; 44 I. A. 1; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 584 (P. C.).

of pious duty. On the facts, here, the debts were not incurred for illegal or immoral purposes, and the qualification which the learned Counsel would apply cannot, as I read the decision which I have quoted, be attached. It is true that in *Sahu Ram Chandra* v. *Bhup Singh* (2) their Lordships of the Privy Council, less than three months after they had pronounced judgment in *Sripat Singh Dugar* v. *Parodyat Kumar Tagore* (1), laid down that, under the Mitakshara Law joint family property could not be the subject of gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners, and that the father in his capacity of manager and head had no power of sale or mortgage in absence of such consent or of family necessity or in payment of antecedent debts, and that the obligation of religion and piety which is placed upon sons and grandsons under the Mitakshara Law to discharge their progenitor's debts does not attach while the said progenitor is alive. It would have been most surprising if their Lordships of the Privy Council had in less than three months after they had passed the first decision arrived at a second decision which in effect overruled their former views. This is what the learned Counsel for the appellants is arguing for. Unless the second decision overruled the first decision, the words of the first decision which I have read hold good. But as I read them, the second decision not only does not overrule the first decision but in no way covers the same ground. The first decision is to the effect that, once a simple money-decree is passed against the father and manager of a joint Hindu family, that simple money-decree can be executed by the execution creditor against the whole of the estate, and will operate against the interests of the sons, unless the debt has been incurred for illegal or immoral purposes. The second decision lays down an absolutely different proposition that joint family property cannot be transferred by an act of volition on the part of the manager, except with the consent of other co-parceners or for legal necessity or in payment of antecedent debts, and that the doctrine of the pious duty of a Hindu son to satisfy his father's debts can have no operation to validate such a transfer, so long at any rate as the father is alive. But in order to apply the principle of the second decision there must be a transfer by the volition of the manager. In the previous case and in the case before me there was no transfer at all. There was a decree for debt against the manager. He had transferred nothing. I am concerned with the execution of a decree and not with a transfer of joint family property. I am unable to see that any difficulty arises. The two matters are complete and separate, one is in no way included in the other. There is no advantage, in view of the fact that the law is laid down plainly by their Lordships of the Privy Council, in proceeding to discuss decisions of Benches of High Courts upon the point. The Privy Council decision states the law. Therefore, I agree with the learned Additional District Judge that the property in the hands of the sons is liable in execution of the decree upon the second promissory-note.

The fourth point taken was that some of the property against which it is sought to execute the decrees are buildings belonging to agriculturists and occupied by them. The Court below has found that the buildings in question are not buildings belonging to agriculturists and occupied by them. This point has not been pressed in appeal.

The fifth point was also not pressed in appeal.

The sixth point argued, which is not in the grounds of appeal, was that the two reliefs for setting aside the order of the Execution Court and for a declaration that property could be attached in execution of the second decree could not be joined in the same suit. I was inclined to think that there might be some force in this objection, but in any circumstances as it is not in the grounds of appeal it could not prevail. However, I do not think that the appellant has in any way been prejudiced by omitting to place it in the grounds of appeal for, on considera-

(2) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 221; 6 L. W. 213; 15 A. L. J. 437 (P. C.).

tion I am satisfied that the parties being the same, it was open to the plaintiff to join all three reliefs together.

It now remains to consider the question of Court-fees. There has been some slight mistake here. The suit should have been instituted on a Court-fee of Rs. 30. As the lower Court granted only two reliefs out of three, the fee in appeal should have been Rs. 20 and the cross-objections should have been on a stamp of Rs. 42-12-0. Only Rs. 10 were paid in respect of the cross-objections. The Court-fee in this Court on the appeal should have been Rs. 30. Now, there has been a deficiency in the First Court of Rs. 10 by the plaintiff; there has been a deficiency of Rs. 32-12-0 in the second Court by the plaintiff; and there has been a deficiency of Rs. 20 in this Court by the appellants. I dismiss this appeal with costs. The result is that the plaintiff can put his decree into execution, but before he can put his decree into execution he must make up a deficiency of Rs. 52-12-0. The decree will not issue from this office until he has made up this deficiency.

W. C. A. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1068 OF 1921.

April 17, 1923.

Present :—Justice Sir John Bucknill, KT.

BARIO SANTHAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAKIR SANTHAL—DEFENDANT—RESPONDENT

Chota Nagpur Tenancy Act (VI of 1908), s. 46—Surrender of holding by tenant for consideration, validity of.

It is open to a tenant to surrender his holding which is amenable to the provisions of the Chota Nagpur Tenancy Act, to his landlord for a pecuniary consideration, and such a transaction does not amount to a transfer in contravention of the provisions of section 46 of that Act. [p. 602, col. 2.]

Trilochan Panda v. *Dinabandhu Panda*, 44 Ind. Cas. 317; 3 P. L. J. 88 at p. 90, *Jairam* v. *Gopikisar*, 47 Ind. Cas. 32, 14 N. L. R. 125, ***Abdul Majid* v *Haricharan Halder*, 53 Ind. Cas.** [illegible]

Appeal from a decision of the District Judge, Manbhum, dated the 14th April 1921, reversing a decision of the Munsif, Chaibasa, dated the 13th November 1920.

Mr. *A. B. Mukherji*, for the Appellants.
Mr. *N. N. Sen*, for the Respondent.

JUDGMENT.—This was a second appeal from a judgment of the District Judge of Manbhum, dated the 14th April 1921 by which he reversed a decision of the Munsif of Chaibasa, dated the 13th November of the preceding year. The point which is now brought up before me is a very simple one, and, so far as I can see, appears to be substantially covered by authority. The first three plaintiffs (who are the appellants) were three sons of one Jujhar Santhal and the fourth plaintiff was the son of another but deceased son of the same man. They, according to their plaint, had two cousins, one named Gopal and the other Singar Santhal. Some years ago there was a partition between them of their family property and the land in respect of which this litigation has been instituted fell within the portion which was allotted on the partition to these cousins of the plaintiffs. Now, it is alleged that both these cousins of the plaintiffs, (Gopal and Singar Santhal), have died without heirs, and the plaintiffs now claim that that being so, they are in some way or another entitled to inherit the property of their deceased relatives. They state in their plaint that the defendant, who, it should be mentioned, is the landlord of the property which the plaintiffs' deceased cousins used to hold as *raiyats*, had dispossessed or rather has unjustly cultivated the properties in dispute. The defendant, however, himself in his written statement points out that, as a matter of fact, there had been a surrender by the plaintiffs' cousins to him of their holding, which, it may be added, was a holding which is amenable to the provisions of the Chota Nagpur Tenancy Act, 1908. The plaintiffs in answer to this have endeavoured to point out that, as a matter of fact, there was no real surrender but that what had happened had been that their cousins had or purported to have given back their holding to the landlord (the defendant) on account of partially

a very small amount of rent which was due to the defendant from them, but largely on account of money which had, so it was stated, been lent by the defendant to their cousins. Now, the Munsif came to the conclusion that the defendant, having admitted that the two cousins of the plaintiffs had surrendered the lands in suit in liquidation not only of arrears of rent but also of certain debts due to him which were alleged to have been covered by a handnote, could not defend the transaction in its main elements because it took place in contravention of the provisions of section 46 of the Chota Nagpur Tenancy Act. He says: "It has been admitted by the defendant in his deposition that Gopal and Singar surrendered the suit lands in liquidation of their debts alleged to have been covered by a handnote and for the decretal amount for arrears of rent. But the arrears of rent amounted to only Rs. 47 and odd annas and this amount was also subsequently deposited in Court by the plaintiffs. The evidence available goes to show that had this been the only debt, it would not have been necessary at all for the plaintiffs to relinquish the lands. It is obvious, therefore, that the relinquishment was tendered to the defendant not as *pradhan* but as money-lender and the entire transaction is a sale only covered by a camouflage of relinquishment. In accordance with the provisions of section 46 of the Chota Nagpur Tenancy Act sale of a *raiyati* holding is strictly prohibited. The suit lands are admittedly *raiyati* lands of Gopal and Singar. Accordingly the *istifanama* must be regarded as invalid in law". He, therefore, decreed the suit in favour of the plaintiffs.

The learned District Judge, however, basing his view upon certain decisions which have been given both in this and in other Courts, comes to the conclusion that the view which the Munsif has taken is not in law justified. He says: "The defendant's case is that Gopal and Singar had mortgaged their holding to him as they had incurred debts to the defendant amounting to Rs. 510 to defray the expenses of the partition suit and that afterwards they relinquished the schedule (*kha*) to liquidate this debt as well as a decree for arrears of rent obtained by the defendant. The Munsif held that this so-called relinquishment was really sale and was, therefore, void according to section 46 of the Chota Nagpur Tenancy Act. The lower Court holds this view as the consideration for the surrender was liquidation of the handnote as well as the arrears of rent. But section 46 does not apply to the present case which was a surrender in favour of the landlord, *vide Trilochan Panda* v. *Dinabandhu Panda* (1), *Abdul Majid* v. *Hari Charan Halder* (2). Section 46 of the Chota Nagpur Tenancy Act puts no bar on surrender to the landlord. The transaction was not a sale in my opinion. The lower Court is drawing a distinction which does not exist in the law between surrender to the *pradhan qua pradhan* and *qua* money-lender. The plaintiffs cannot, therefore, succeed on this point, so the suit must fail."

This is not the first occasion within the last few weeks that this point has, in a somewhat slightly different form, been brought to my attention. In a previous case, in which I held that in my view I must follow the decisions to which the District Judge has referred and that in another case, *Jairam* v. *Gopikisan* (3). I have already expressed the opinion that it is possible that this may conceivably result in some form of evasion being effected against the intention of the Chota Nagpur Tenancy Act. The decisions, however, seem to be clear that it *is* open to a tenant to give back his holding to or to let his landlord take his holding (*i. e.*, surrender it) for a pecuniary consideration. In the case of *Trilochan Panda* v. *Dinabandhu Panda* (1) decided in this Court, Mullick and Atkinson, JJ., state that a surrender is not a transfer within the meaning of section 46 of the Central Provinces Tenancies Act, 1898. In that Act the language of the section is very much the same as that utilized in the Chota Nagpur Tenancy Act. In the case of *Abdul Majid* v. *Hari Charan Halder* (2) Walmsley and Huda, JJ., held that a surrender, though for consideration, by a tenant is operative and that the provisions of the Transfer of Property Act do not require any registered instrument to

(1) 44 Ind. Cas. 317; 3 P. L. J. 88 at p. 90.
(2) 53 Ind. Cas. 17.
(3) 47 Ind. Cas. 321; 14 N. L. R. 125.

evidence the surrender. The most important case, however, (and which is more important than these others) is that of *Jairam* v. *Gopikisan* (3). It was there held that a surrender of an occupancy holding for a consideration is not a transfer in contravention of the provisions of section 46 of the Chota Nagpur Tenancy Act, 1908.

I think that, in view of these findings, it would be extremely difficult for me to contemplate coming to any other view than that which has been held by those learned Judges. Indeed, in the case which I had to decide the other day, *Nagru Kumhar* v. *Chhugu Nath Mandal* [Second Appeal No. 1030 of 1921], the position went in my opinion somewhat further than that which obtains in this case; for in that case in which a similar decision was arrived at by the lower Appellate Court to that which has been arrived at in this case, the facts were that a third party had paid a consideration to a tenant as a result of which the tenant had agreed with the landlord to surrender his holding whilst the landlord had agreed to re-settle the property with the person who had given the consideration to the outgoing tenant. It was, however, very difficult to see how this circuitous arrangement could in law be regarded as definitely illegal.

In my opinion, therefore, this appeal must be dismissed with costs and the judgment of the District Judge upheld.

Z. K. & W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 765 OF 1921.
December 5, 1922.

Present:—Mr. Justice Gokul Prasad.

GHASI RAM—DEFENDANT—APPELLANT
versus
MALONY CLUB, *through* CHIRANJI LAL—PLAINTIFF—RESPONDENT.

Registration—Lease for thirty years determinable at will of lessor—Registration, whether necessary—Right of lessee.

A lease of land purported to be for thirty years and reserved a yearly rent, and stated that the lessee would vacate the land in case he failed to pay the rent reserved or whenever the lessor required him to do so. The question was whether the lease was admissible in evidence without being registered:

Held, that the lease was not for a term exceeding one year, nor had the lessee the right to remain in possession for thirty years, as the lessor could on the day succeeding the grant of the lease have required the lessee to vacate, and that, consequently, the lease did not require registration to render it admissible in evidence against the lessee.

Second appeal against a decree of the Sub-Judge, Aligarh, dated the 10th March 1921,

Mr. *Saila Nath Mukerjee*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for ejectment and recovery of Rs. 6-12 arrears of rent. The defence taken was that the defendant took a lease of the land from the Municipal Board on the 24th November 1898, and had built a *pucca* house on the land leased worth about Rs. 2,000 and had been in possession for 22 years. It was further contended that the notice given was one not in accordance with law. The facts of the case are briefly as follows: The land originally belonged to Government. It was handed over to the Municipal Board later on and the Municipal Board leased the disputed land to the defendant. The Board then transferred the ownership to the plaintiff, the Malony Club, and the defendant was informed of this fact and continued paying rent to the Club. The so-called lease was for a period of thirty years at Rs. 4-8 a year, determinable on the failure of the defendant to pay rent or to give it up to the Municipality when required to do so. The plaintiff came into Court on the allegation that the tenancy was a monthly tenancy ending with the end of a month of the English calendar; that the defendant was a bad paymaster, and the plaintiff Club had given him a notice terminating with the end of a month of the tenancy and the plaintiff wanted to dispossess him. The defendant pleaded in reply that the term of his lease had not expired and he had built a house worth Rs. 2,000 and was not liable to ejectment.

The First Court came to the conclusion

that the so-called lease did not require registration and was admissible in evidence and that, in any event, it amounted to a license coupled with a grant and was as such irrevocable. It dismissed the suit.

The plaintiff went up in appeal and the learned Subordinate Judge has come to the conclusion that the document was an agreement, pure and simple, and was as such admissible in evidence. He further came to the conclusion that rent had not been paid and under the terms of the lease the defendant was liable to ejectment. He allowed the appeal, set aside the decree of the First Court, and decreed the plaintiff's claim with costs. The defendant comes here in second appeal. Various points have been urged before me at great length, namely, that the document did not require registration and that if it was inadmissible for want of registration it amounted to a license coupled with a grant. The decision of this case has given me anxious consideration. In my opinion, however, it is not necessary to discuss those points at length for the purpose of this appeal. On the very words of the agreement, dated the 24th of November 1918, the suit was bound to succeed. This document which purposts to be one for thirty years and reserves an yearly rent of Rs. 48 says that the defendant will vacate the land in case he fails to pay the rent reserved or whenever the Board, the lessor, requires him to do so. It is clear from this condition that the lease could not be said to be for a term exceeding one year as the Board could on the very day succeeding the grant of the lease ask him to vacate the land. The lease, therefore, did not require registration. Having regard to the express terms of the lease the defendant had no right to remain in possession for thirty years. It may be a hard case for the defendant but he has himself to blame by acting on such a lease and erecting a costly building on the land. He was liable to ejectment at the will of the Municipal Board and the plaintiff, its successor, has the same right. I, therefore, dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NO. 1594 OF 1923.

August 1, 1923.

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

Sri Rajah BOMMADEVARA SATYANARAYANA VARAPRASADA RAO BAHADUR, ZEMINDAR GARU —PETITIONER

versus

Sri Rajah BOMMADEVARA VENKATA BHASYAKARLU RAO BAHADUR, ZEMINDAR GARU, MINOR BY MOTHER AND GUARDIAN VENKATALAKSHMI NARASIMHAYAMMA BAHADUR, ZEMINDARINI GARU.—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 111, 115—Madras High Court—Letters Patent (Mad.), cls. 39, 44—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Single Judge, order of, in revision, whether appealable to Privy Council.

Under section 111 (*a*) of the Code of Civil Procedure, read with clause 44 of the Letters Patent of the Madras High Court, no appeal lies to the Privy Council against an order of a Single Judge of the High Court passed in revision under section 115 of the Civil Procedure Code and section 107 of the Government of India Act notwithstanding that such an order is a "final order" within the meaning of clause 39 of the Letters Patent.

Petition, under clause 39 of the Letters Patent, praying that, in the circumstances stated therein, the High Court will be pleased to grant a certificate to enable the petitioner herein to appeal to His Majesty in Council against an order of the High Court in C. R. P. No. 361 of 1922, presented against an order of the Court of the Subordinate Judge, Masulipatam, in E. A. No. 438 of 1922, (O. S. No. 18 of 1920 on the file of the District Court, Kistna).

Messrs. *C. V. Ananta Krishna Iyar*, for the Petitioner.

Messrs *V. Ramadoss* and *V. Krishna Mohan*, for the Respondents.

ORDER—This is an application for leave to appeal to the Privy Council against an order passed by one of us sitting as a Single Judge, under section 115 of the Civil Procedure Code and section 107 of the Government of India Act. That order confirmed the order of the lower Court and dismiss-

ed the civil revision petition filed in this Court. The present petitioner who was the petitioner in the revision petition has applied to us to grant him leave to appeal to the Privy Council.

A preliminary objection is taken to this application on the ground that section 111, Civil Procedure Code, bars any such application. Section 111 says, notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council, among other things, (*a*) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861. This is manifestly an application for an appeal from such an order. It is difficult to see how the petitioner can escape the obstacle placed in his way by this section. His learned Vakil says, however, that under section 39 of the Letters Patent a right of appeal is given in all cases of final orders or decrees of this High Court to the Privy Council and since the amendment of the Letters Patent whereby the right of appeal to two Judges from the judgment of a Single Judge sitting in Revision has been taken away, this order which was passed in such proceedings has become final and, therefore, he contends that he is entitled to ask for leave. Section 44 of the Letters Patent expressly provides that any provision in the Letters Patent can be altered or controlled by the legislation of the Governor-General in Legislative Council; and such an Act is the Civil Procedure Code and when there is express provision in that Code, we must hold that that provision must be given effect to even if it is possible to bring the case under the general wording of section 39 of the Letters Patent. In these circumstances, we have no other alternative but to dismiss the application with costs.

V. N. V. *Application dismissed.*
W. C. A.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 784 OF 1921.
December 5, 1922.
Present:—Mr. Justice Ryves.
GIRJA NAND—PLAINTIFF—APPELLANT
versus
HIS HIGHNESS THE MAHARAJA PARBHU NARAIN SINGH, KASHI NARESH AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 96, applicability of—Thekadar, *status of—Suit by* thekadar *under section, whether maintainable.*

The provisions of section 96 of the Agra Tenancy Act are meant to apply only to a non-occupancy tenant of *an agricultural holding*, and not to a *thekadar* who is not such a tenant. A suit, therefore, by a *thekadar* under that section is not maintainable. [p. 606, col. 1.]

Second appeal from a decree of the District Judge, Benares, dated the 18th March 1921.

Mr. *Harnandan Prasad*, for the Appellant.
Messrs. *K. N. Katju* and *Kumuda Prasad*, for the Respondents.

JUDGMENT.—This appeal raises a point which, so far as I know, is a novel one. The suit was brought in the Court of the Assistant Collector of Benares under section 96 of the Agra Tenancy Act. It was alleged in the plaint that the plaintiff had been a *thekadar* of Mouza Udaychandpur under H. H. the Maharaja of Benares; that his *theka* was about to expire and negotiations were entered into between him and State officials for the purchase of a permanent lease of this *mauza*. It was agreed on behalf of the Maharaja that a permanent lease should be granted and certain sums of money were paid into the Treasury by the plaintiff in accordance with the contract. There is some dispute apparently as to the nature of this payment which is described as *amanat*, or deposit. It is then alleged that the village was sold to defendants Nos. 2 and 3 and that the plaintiff had previously given notice to defendants Nos. 2 and 3 of the contract entered into between the Maharaja and himself for the permanent lease. It was mentioned in the plaint that the plaintiff had applied to the Local Govern-

GIRJA NAND v. PURBU NARAIN SINGH KASHI NARESH.

ment for sanction to bring a suit against the Maharaja for specific performance of the contract, and, on this application being refused, the present suit was filed under section 96 of the Agra Tenancy Act. Among other pleas taken in defence, it was urged (1) that no contract had been completed between the parties, and (2) that in any case the suit as brought was not maintainable.

The Court of first instance upheld both these pleas and dismissed the suit. The plaintiff appealed and the learned District Judge of Benares has disposed of the matter in a short judgment. It held that section 96 did not apply to the facts of this case. The plaintiff is not in possession without a lease. He had been in possession under his *theka* and when the *theka* came to an end he was ejected and never retained possession with the consent of the *zemindar* after the expiry of his *theka*. He, therefore, dismissed the appeal on this short point.

In second appeal before me it is urged (1) that this view of section 96 is erroneous, and (2) that in any case, under the provisions of section 197 (1), as all the materials were on the record, the lower Appellate Court ought to have decided the matters in issue between the parties as if the suit had been properly brought in a Civil Court. On the first point it seems to me that the Court below is right not only on the ground that it has taken but also because I think that, although the *thekedar* is a non-occupancy tenant within the meaning of the general definition in section 19, that nevertheless section 96 can apply only to a non-occupancy tenant *of an agricultural holding*, which a *thekadar* is not. Reading the whole section and looking at the form of the lease in the Third Schedule, it seems to me to be clear that the section is meant to apply only to a non-occupancy tenant of an agricultural holding but even if it does apply to a *thekadar*, I think for the reason given by the learned District Judge it is not applicable in this case. The section runs:—

"A non-occupancy tenant is entitled to receive a written lease from his landholder, and a landholder upon delivering or tendering to a non-occupancy tenant a lease consistent with the provisions of this Act, is entitled to receive from him a counterpart thereof."

I think the two parts of this section must be read together so as to get at the real meaning, and that the one is the converse of the other. A landlord is not entitled to get a counterpart from his tenant until he delivers or tenders a lease. Similarly, it seems to me that the first part of the section applies to a person who is in possession of the land as a tenant but who has not obtained a lease in writing. Such a person under the section may require the landlord to give him a written lease.

On the second point I do not think section 197 can be read so as to give the Civil Court jurisdiction in a case of this kind. The obvious remedy for the plaintiff was to bring a suit for specific performance in the Civil Court. Such a suit could not be brought against the Maharaja under the circumstances of this case as the Local Government had refused sanction. Whether it could have been brought against defendants Nos. 2 and 3 without joining the Maharaja is another matter which I do not think need be considered. The Maharaja was joined as a party to this suit and it seems to me it was only because the plaintiff found that he could not bring his suit in the Civil Court that he tried to obtain the remedy which he could have got from a Civil Court by bringing the suit in this form in the Revenue Court. As the suit brought by him was not maintainable it seems to me there was nothing left for the learned District Judge to do but to dismiss the suit. I can scarcely imagine that it could be held that if a suit for sale on a mortgage, let us say, was brought in a Revenue Court that if the matter went up in appeal, the District Judge would be bound to go into the merits of the case just as if the suit had been properly brought in the only Court which had jurisdiction to try it, *viz.*, the Civil Court.

In my opinion the appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 642 OF 1921.
November 27, 1922.

Present:—Mr. Justice Gokul Prasad.

MOHAMMAD QASIM—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL BOARD, SAHARANPUR, AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P. Municipalities Act (II of 1916), Ss. 96, 97—Contract—Municipal Board, acceptance by, of contract as valid—Third party, whether can question validity—Second appeal—New point raised for first time.

Where a Municipal Board accepts the validity of a contract, made otherwise than as provided in section 96 of the U. P. Municiplaties Act, and its liability thereunder, it is not open to a third party to challenge the validity of the contract. [p. 608, col. 1.]

A point not raised in the Trial Court and which requires a finding on a question of fact cannot be entertained if raised for the first time in second appeal. [p. 608, col. 1.]

Second appeal against a decree of the District Judge, Saharanpur, dated 9th February 1921.

Mr. *Peary Lal Banerji*, for the Appellants.

Mr. *L. M. Banerji*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for restoration of the yard of an enclosure to its original state and for recovery of a certain amount as damages for the occupation of certain rooms in that compound by the Municipal Board. The plaintiff also pray from an injunction restraining the Municipal Board form realising a certain amount alleged by them to have been spent in paving the yard with bricks to make it sanitary. It appears that the plaintiff has a compound in the City of Saharanpur in which there are 21 shops. In April 1917, a notice was give to the plaintiff by the Municipal Board to pave the yard of the compound in such a way that the water therefrom be properly drained and this was to be done by paving the yard with bricks or *kankar* or stone ballast. Later on, he was served with another notice directing him to pave the yard as aforementioned or in the alternative to raise its level by putting on earth so that the water might be easily drained away and the place might not become muddy by the coming in and going out of the carts which come to that compound. The plaintiff made some attempt by placing earth towards making the yard sanitary. This was not approved by the Municipal Board who prosecuted him criminally. The plaintiff after that once more tried to make the yard better but this, too, did not find favour with the Municipality. The Municipality therupon gave him the last notice which was served on him on the 30th of May 1917, telling him further that if he did not comply with the order within three months, action would be taken under section 307 of the Municipalities Act. All these notices purported to be under section 271 of the Municipalities Act. The plaintiff made no further attempt to comply with this notice and, at last, in April 1918, that is, about a year afterwards, the Municipal Board had the yard made *pacca* with bricks on edge and sent the bill amounting to about Rs. 315 to the plaintiff for payment to defendant No. 2, the contractor who had done the work. The plaintiff thereupon brought the present suit.. The Municipal Board contended in defence that they were justified in the action which they took and that their contractor, the defendant No. 2, was entitled to the money. The first Court decreed the claim for recovery of Rs. 250, as damages and dismissed the rest of the suit. On appeal the learned Judge has come to the conclusion that the action of the Municipal Board was perfectly legal and within its powers and that the plaintiff was not entitled to

the decree which he got. He has found that the plaintiff did not comply with the notice sent to him and that the materials of the Municipal Board were kept in the two rooms with his consent, and that he was not entitled to the rent of those rooms. The plaintiff comes here in second appeal. The first argument advanced on his behalf is that the contract between the Municipal Board and the contractor, defendant No. 2, was not binding on him because it was neither in writing nor was it sanctioned by any resolution of the Municipal Board and reliance was placed on sections 96 and 97 of the Municipalities Act. It is not easy to understand this contention. Under section 97 of the Act any contract made in any way other than that prescribed by section 96 of the Municipalities Act would not be binding on the Municipal Board, but if the Municipal Board accepts liability under that contract I do not see how a third party can come in and say that the contract is illegal. In my opinion the Municipal Board having accepted the validity of the contract the plaintiff cannot challenge its validity. There is no force in this contention and I repel it. The next contention raised on behalf of the plaintiff is that he had done what the Municipal Board had asked him to do and the Municipal Board was not justified in having the pavement made as it did. This argument must fail on the finding of the First Court which has been accepted by the lower Appellate Court and is to the following effect: "The plaintiff did not put earth or brick kiln earth, etc., in the *sahan* as directed by the notice served on him by the defendant No. 1 (*i.e.* the Municipal Board)." This ground of appeal also fails. Another plea which was taken before the lower Appellate Court and which has been pressed before me is that the notice sent by the Municipal Board was not valid inasmuch as it was not signed by the Chairman. There are no materials on the record to show whether the Secretary who signed the notice was authorised by any resolution or otherwise of the Municipal Board to sign such notices. The point was not taken in the First Court and as it requires a finding on a question of fact, I refuse to entertain it. The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1109 OF 1922.

December 13, 1922.

Present:—Mr. Justice LeRossignol.

CHIRAGH DIN—DEFENDANT—APPELLANT

versus

GHULAM MUHAMMAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 26, Expl. — Easement — Period of user necessary to establish easement— Interruption—Denial of right—Cause of action.

A mere denial of right affords a cause of action and any person whose property is threatened with a servitude may bring a suit for a declaration that an easement is enjoyed on sufferance and not as of right. The effect of the Explanation to section 26 of the Limitation Act is to confer an indefeasible right of easement on any person after an enjoyment of anything over nineteen years, provided he waits less than one year before challenging an interruption and the beginning of his enjoyment arose twenty years before suit. But the Explanation does not come into operation where, at the time of the suit, there had been no interruption. [p. 609, col. 1.]

Second appeal from the decree of the District Judge, Amritsar, dated the 11th January 1922, affirming that of the Munsif, First Class, Amritsar, dated the 5th July 1921.

Mr. *K. J. Rustomji*, for the Appellant.

Mr. *P. N. Rozdon*, for Mr. *Nur-ud-Din*, for the Respondents.

JUDGMENT.—Plaintiff and defendant are the owners of a party-wall; defendant on 5th October 1899 obtained sanction to build his house and in the upper storey let into the wall the windows which are the subject of this litigation, but there is no evidence when the windows were actually made.

The plaintiff in his turn wished to build on the party-wall and to close the said windows and was met with opposition from defendant whereupon he instituted this suit

for an injunction to restrain defendant from opposition.

The Courts below have decreed for plaintiff, holding that defendant had enjoyed the easement for less than 20 years on 1st August 1919 the date of institution.

This appeal was admitted on the plea that defendant had no cause of action, inasmuch as his building was not actually obstructed but there are other grounds to the effect that an enjoyment of a little over 19 years is sufficient to establish the right of easement.

The finding of both Courts is that the plaintiff wished to build against the windows and defendant objected; in my opinion this gave plaintiff a right of action for his liberty of dealing with his own property was threatened.

A mere denial of right affords a cause of action and I see no reason to doubt that any person whose property is threatened with a servitude, may bring a suit for a declaration that an easement is enjoyed on sufferance and not as of right. In other words, as soon as my neighbour by opening windows, etc., in the common wall affects my property, I am at liberty to sue for a declaration that his enjoyment shall not be deemed an easement as of right but on sufferance. It is true that the effect of the Explanation to section 26 of the Limitation Act is to confer an indefeasible right of easement on any person after an enjoyment of anything over nineteen years, provided he waits less than one year before challenging an interruption and the beginning of his enjoyment arose twenty years before suit, but in this case the Explanation does not come into operation, for at the time of this suit there had been no interruption.

At that date, the easement had not been enjoyed for twenty years, and as the date of the construction of the windows is not ascertained, it cannot be said that it had been enjoyed for even ninteen years.

But on the assumption that it had been in existence for ninteen years, the defendant even had he been the plaintiff would not have succeeded for he would still have had to prove a twenty years user under the first and cardinal clause of section 26.

The Explanation does produce anomalous results, but we must apply the law as we find it.

I hold that plaintiff had a cause of action and that the defendant has not established the easement contended for.

The appeal is dismissed with costs.

Z.K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 985 OF 1921.

October 25, 1922.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Gokul Prasad.

FIRM HAZARI LAL-CHHANGA MAL—PLAINTIFFS—APPELLANTS

versus

SOHAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 28, applicability of—Hundi *signed by* Munim *of firm*—Munim, *whether personally liable.*

Section 28 of the Negotiable Instruments Act has no application where a *hundi* is signed by a person in his capacity as the *Munim* of a firm, so as to make him personally liable.

Second appeal from the decree of the Second Sub-Judge, Cawnpore, dated the 1st April 1921.

Mr. *Kamuda Prasad*, for the Appellants.

Messrs. *S. M. Sulaiman*, *K. N. Katju* and *M. A. Aziz*, for the Respondents.

JUDGMENT.—The plaintiffs brought the suit out of which this appeal has arisen for recovery of money alleged to be due upon a *hundi*, dated the 26th of December 1917, executed in their favour on behalf of the firm of Ajudhya Prasad-Sheikh Kallu. The *hundi* was signed by the first defendant Sohan Lal and by the second defendant Husain Bakhsh. The plaintiffs alleged that Husain Bakhsh had paid Rs. 800 out of Rs. 1,600, the amount of the *hundi*. They accordingly claimed the balance of Rs. 800, and interest against both the defendants. Sohan Lal's contention was that he was not a partner in the firm of Ajudhya Prasad-Sheikh Kallu and that he had signed the *hundi* in his capacity as *munim* of that

firm and that consequently he was not personally liable for the amount of the *hundi*.

The Court of first instance overruled this objection and made a decree against Sohan Lal. Sohan Lal appealed to the lower Appellate Court and that Court, for reasons stated in its judgment, came to the conclusion that Sohan Lal was not a partner in the firm of Ajudhya Prasad-Sheikh Kallu and that he was only a servant of the firm and was receiving a salary from it. This is a finding of fact with which we cannot interfere in this second appeal. It may be a right finding or a wrong finding, but the fact remains that the lower Appellate Court found that Sohan Lal was only *munim* of the firm. That Court accordingly dismissed the suit against Sohan Lal and allowed his appeal. The plaintiffs have preferred this appeal and the first contention on their behalf is that as Sohan Lal had signed the *hundi* a decree ought to have been made against him. Section 28 of the Negotiable Instruments Act has been relied on. We think that, in view of the finding of the lower Appellate Court, namely, that Sohan Lal signed the *hundi* as *munim* and that money was lent not to him in his personal capacity but to the firm, that is, the persons who owned the firm, section 28 can have no application to a case of this kind. Sohan Lal has, therefore, upon the finding of the lower Appellate Court, been rightly exempted from the claim. It is next urged that the Court ought to have made a decree against Husain Bakhsh and reference is made to O. XLI. r. 33 of the Code of Civil Procedure. It is true that had Husain Bakhsh been a party to the appeal in the Court below, the Court might have made a decree in the plaintiffs' favour against Husain Bakhsh in pursuance of the provisions of rule 33, but, unfortunately for the plaintiffs, Husain Bakhsh was not made a party to the appeal. The Court did not exercise its powers under r. 20 of O. XLI and add him as a party, nor did the plaintiffs move the Court to make Husain Bakhsh a party. As Husain Bakhsh was not a party to the appeal in the Court below no decree could be made against him under O. XLI r. 33. Therefore, the plaintiffs have now lost all their remedy in the present suit as against both the defendants, and this appeal must fail. We dismiss it with costs including in this Court fees on the higher scale.

Appeal dismissed.

W. C. A.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1390 OF 1922.

January 26, 1923.

Present:—Mr. Justice Abdul Raoof.

Lala DEWAN CHAND—PLAINTIFF—APPELLANT

versus

NIZAM DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 15—Village immoveable property—Question of fact—Appeal, second—Custom prevailing in town, whether applies to suburb—Machine Mohalla, *Jhelum City.*

The question whether a particular piece of land is village immoveable property or has become part of a town is a question of fact and cannot be agitated in second appeal. [p. 611 col. 1.]

Mamud v. *Jumma*, 5 Ind. Cas. 646; 28 P. R. 1919, 1 P. L. R. 1920, followed.

It is possible that a village may become absorbed in a town. [p. 611, col. 2.]

Kishan Dial v. *Ali Bakhsh*, 87 P. R. 1890, relied on.

It is not necessary that a custom of pre-emption prevailing in a town should apply to its outgrown *mohallas* or suburbs. [p. 611, col. 2.]

Umar Bakhsh v. *Abdul Karim*, 70 P. R. 1898, *Karim Ilahi* v. *Babua Mal*, 21 P. R. 1900, and *Abdulla* v. *Punnu Ram*, 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R. 1906, followed.

The Machine *Mohalla* has become a suburb of Jhelum City and has ceased to be a part of the village of Jira Ghaib. [p. 611, col. 2.]

There is no custom of pre-emption in the Machine *Mohalla* of Jhelum City. [p. 611, col. 2.]

Second appeal from a decree of the District Judge, Jhelum, dated the 10th March 1922, confirming that of the Senior Sub-Judge, Jhelum, dated the 17th March 1921.

Lala *Mool Chand*, R., S., and Mr. *Ghulam Rasul*, for the Appellant.

Malik *Barkat Ali*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for pre-emption. One Nizam

Din *Lohar*, sold 1 *kanal* 18 *marlas* of land to defendants Nos. 2 to 4 for Rs. 1,368. This piece of land is situated in the Machine *Mohalla* which is said to be a suburb of the Jhelum City. This *Mohalla* is carved out of a village called Pira Ghaib. *Lala* Diwan Chand instituted this suit for pre-emption on the ground that he was a proprietor in the village Pira Ghaib and thus had a right of pre-emption. The vendees resisted the suit on the ground that the land was neither agricultural, nor was it village immoveable property, for, although at one time it formed part of the village it has ceased to be so by reason of its being attached to the Jhelum City as a suburb. The vendees further pleaded that the Machine *Mohalla* having been only recently attached to the Jhelum City, the custom of pre-emption, if any, prevailing in the City proper cannot effect the lands situated in that *Mohalla*.

Both the Courts below have found that the land is neither village immoveable property, nor is it effected by the custom of pre-emption prevailing in the Jhelum City.

The plaintiff has preferred this second appeal and it has been contended on his behalf that, inasmuch as the land is found to be within the limits of Pira Ghaib, it must still be considered to be a part of that village and as such subject to the right of pre-emption under section 15 of the Punjab Pre-emption Act, I of 1913. It is contended on behalf of the respondents that it has been found as a fact that the land covered by the Machine *Mohalla* has ceased to be a part of village Pira Ghaib and has become a suburb of the Jhelum City and that, therefore, it is not open to the appellant to challenge that finding in second appeal. On the other hand, it has been urged on behalf of the appellant that the question whether a certain land is village immoveable property is a question of law and that it is open to the appellant to challenge the finding of the lower Appellate Court on this point. It was held in the case of *Mahmud* v. *Jumma* (1), that the question whether a certain place is a town for the purposes of the Punjab Pre-emption Act is a question of fact and cannot be raised in second appeal. It cannot be denied that, whenever such a question arises it is to be decided upon the evidence and the particular circumstances of each case. It is, therefore, difficult to hold that it is a question of law. I must, therefore, hold that the finding of the lower Appellate Court on this point is conclusive. In the case of *Kishan Dial* v. *Ali Bakhsh* (2) it was held that a village may be absorbed in a town. On the question whether the custom of pre-emption prevailing in the Jhelum City should apply to the Machine *Mohalla*, also it is contended, that, according to the authorities, it is not necessary that a custom prevailing in the town should apply to the outgrown *Mohallas* or suburbs. Reliance is placed upon the following cases:—

Umar Bakhsh v. *Abdul Karim* (3), *Karam Ilahi* v. *Babua Mal* (4) and *Abdulla* v. *Punnu Ram* (5).

This contention is fully borne out by the above authorities.

On behalf of the appellant reliance is placed upon a judgment of Mr. Shafi, Munsif, (Exhibit P. 6) in proof of the alleged custom. An examination of that judgment shows that the land in dispute in that case was held to be agricultural land. Reliance is also placed upon a judgment of Mr. Prabh Dayal, (Exhibit P. 3) which related to a *Mohalla* of the Jhelum City. That *Mohalla* was held to be a part of the old town of Jhelum and was as such governed by the custom of pre-emption. These judgments, therefore, can hardly be of any use for the decision of the question of custom in this case. Having regard to the findings recorded by the two Courts below, it is not necessary to discuss the various rulings cited on behalf of the appellant in support of his contention, for each case must be decided upon its particular facts. In this case the facts found are opposed to the contention of the appellant.

The appeal fails and is dismissed with costs.

Z. K. [*Appeal dismissed.*

(1) 54 Ind. Cas. 646; 28 P. R. 1919; 16 P. L. R. 1920.

(2) 87 P. R. 1890.

(3) 70 P. R. 1895.

(4) 21 P. R. 1900; P. L. R. 1900, p. 170.

(5) 42 P. R. 1906; 5 P. L. R. 1907; 79 P. W. R. 1906.

ALLAHABAD HIGH COURT

LETTERS PATENT APPEAL NO. 6 OF 1923.

February 15, 1923.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Syed SAMASUL HASAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Syed HASAN—DEFENDANT—RESPONDENT.

Second Appeal—Point not raised in Trial Court, effect of.

When a point is not taken in the lower Court, that operates as a conclusive bar to an appeal to the High Court. As soon as it is established that the point ought to have been taken in the Trial Court the appeal should be dismissed.

Letters Patent Appeal against the judgment of Mr. Justice Stuart, dated 5th December 1922, reported as 71 Ind. Cas. 296.

Mr. *Mushtaq Ahmed*, for the Appellants.

JUDGMENT.—A Muhammadan lady, by name Khudija-al-kubra, died on the 29th of November 1906, in child birth. The dower-debt owing by her husband was said to be Rs. 5,000 and a female member of the family who was present stated that the lady had an apprehension of death. There was apparently some difficulty in reference to the delivery of the child which was then in her womb, and she, it is said, having the fear of death on her, did renounce her dower in favour of her husband after having asked him to forgive her faults and expressing manifestly the opinion that she was about to die. She in fact died shortly after. In 1919, after a lapse of thirteen years, the plaintiffs who were minors in 1906 brought this suit for the recovery of their share of the dower in accordance with their degree of relationship. The defendants pleaded that *Musammat* Khudija-al-kubra gifted her dower-debt before her death according to the practice of the brotherhood. No particulars were asked as to when, where and under what circumstances such renouncement was made and the matter got into the Court of the Subordinate Judge. There he framed an issue as to the amount of the dower-debt of the lady and whether she had remitted her dower-debt at the time of her death. It was, therefore, known to everybody then, when that issue was framed, that it was done very shortly before her death. Then was the time when the plaintiffs should have taken the point that, even conceding this to have happened, the lady was suffering from *marz-ul-maut*. The Subordinate Judge did not believe in the renouncement of the dower as a fact and he decided in favour of the plaintiffs. The matter then went up to the District Judge where, it may be said, the *marz-ul-maut* point need never have been brought to the attention of the lower Court as a matter of argument, because he decided that such renouncement had not been made. Nevertheless, it was absolutely necessary that the plaintiffs should have debated this matter in the Court of first instance as a conclusive answer in law to the alleged renouncement. Nothing was said about it in the Court of the Subordinate Judge. The matter came up before the lower Appellate Court which set aside the decision of the Subordinate Judge on the ground that it was unable to understand why the Court should have rejected the testimony of the lady who was present at the time when the renouncement was said to have taken place. There would have been the time for this question of *marz-ul-maut* to have been referred to in the lower Appellate Court as an answer to that opinion of the Judge. That is to say, if the *marz-ul-maut* issue had been on the record, Counsel for the plaintiffs could have said that, even if the learned Judge accepted the evidence of the solitary witness who was present, nevertheless that evidence in law did not help the defence. When the matter came up here, Mr. Justice Stuart allowed there to be a discussion on this matter. We think it ought to be understood that when a point is not taken in the lower Court that is conclusive bar to an appeal in this Court. As soon as it is established that the point ought to have been taken in the Court of first instance the appeal should be dismissed. We dismiss the appeal.

W. C. A. *Appeal dismissed.*

MUKAMBIKA SHETTITHI *v.* SHIDDAYA SHETTI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 501 OF 1921.

July 23, 1923.

Present:—MR. Justice Odgers and Mr. Justice Hughes.

MUKAMBIKA SHETTITHI AND ANOTHER—DEFENDANTS NOS. 7 AND 8 —APPELLANTS

versus

SHIDDAYA SHETTI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 6—RESPONDENTS.

Practice—Suit for possession based on ownership —Title by adverse possession found by First Court —No plea of prejudice on appeal—Appeal, second—Adverse possession, plea of, not definitely set up in the plaint whether can be urged.

Where in a suit for possession the plaintiff based his title *inter alia* on ownership and the Court of first instance found plaintiff and his predecessor had been in possession of the suit property for over the statutory period and decreed the suit and on appeal no plea was raised by the defendants-appellants that he was prejudiced or taken by surprise by the plaintiff's title by prescription being considered by the First Court, the defendant in second appeal is not entitled to contend that plaintiff's title by adverse possession was not definitely pleaded in the plaint.

Sundari Dassee v. *Mudhoo Chunder Sircar*, 14 C. 592; 7 Ind. Dec. (N. S.) 392, followed.

Somasundarum Chetty v. *Vadivelu Pillai*, 31 M. 531; 4 M. L. T. 344, *Shiro Kumari Debi* v. *Govind Shaw Tanti*, 2 C. 418; 1 Ind. Dec. (N. S.) 556, distinguished.

Second appeal against a decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 129 of 1920, (in A. A. No. 194 of 1920, on the file of the District Court), preferred against the decree of the Court of the District Munsif, Kundapur, in O. S. No. 240 of 1919.

MR. *B. Sitarama Rao*, for the Appellants.—The lower Court was wrong in giving a decree to the plaintiff on title based on adverse possession. Such a title was not set up in the plaint nor was there any issue on it. The Court was wrong in granting a decree on title neither stated in the plaint nor raised in the issues. *Somasundarum Chetty* v. *Vadivelu Pillai* (1).

MR. *K. Y. Adiga*, for the Respondents.—Firstly, this is not a declaratory suit and there is a well-recognised distinction between a declaratory suit and one for possession. In the case of the former, where the granting of any relief is discretionary, if the specific title set up is not found, no decree can be given, but in the case of a suit in ejectment, relief may be given on any title found on the evidence, the only matter for consideration is whether the other side is not prejudiced. Here the title by adverse possession was found by the Trial Court and no objection was taken in appeal. The point cannot be raised now. See *Sundari Dassee* v. *Mudhoo Chunder Sircar* (2).

The decision in *Somasundarum Chetty* v. *Vadivelu Pillai* (1) refers to and distinguishes the cases in *Shiro Kumari Debi* v. *Govind Shaw Tanti* (1) and *Sundari Dassee* v. *Mudhoo Chunder Sircar* (2).

Secondly, the present case is not a case strictly of adverse possession. Plaintiff claims title by assignment, but the assignor himself on the date of conveyance had completed his title by prescription and full title, therefore, passed under the assignment. The plaintiff was owner at the date of the conveyance. The decree of the lower Court is correct.

JUDGMENT.—In this appeal it is contended that the question of adverse possession has not been properly pleaded or considered. The plaintiff at first based his title on purchase of *mulı* right which is said to refer to a Judicial Decision in 1897 whereby the suit property was declared to belong to the ancestors of defendants Nos. 7 and 8. Defendants Nos. 7 and 8 were not original parties but subsequently added as parties to the present suit and the plaint was accordingly amended and plaintiff based his right on ownership also. It is urged for defendants Nos, 7 and 8 that this only arose in 1916 when the *artha-mulgeni* interest was assigned to plaintiffs by certain members of the Kajabettu Marjeya's family who had held the land since 1887 at least. It is said that this title by adverse possession to the ancestors of defendants Nos. 7 and 8 ought to have been distinctly pleaded and that defendants Nos. 7 and 8 have been prejudiced by this omission. It is to be remarked that by 1919, the date of the present suit, the plaint-

(1) 31 M. 531; 4 M. L. T. 344.

(2) 14 C. 592; 7 Ind. Dec. (N. S.) 392.

(3) 2 C. 418; 1 Ind. Dec. (N. S.) 556.

If had acquired title by the assignment of 1916, and that long before this the prescriptive title of the Kanabettu family had accrued. The Munsif went very carefully into the facts and came to the conclusion that plaintiff and his predecessors had been in possession of the suit property through their *chalgeni* tenant (the first defendant) for over the statutory period and that defendants Nos. 7 and 8 were never in possession. On appeal these defendants did not plead that they had been prejudiced or taken by surprise, or that plaintiff's title by prescription ought not to have been considered by the District Munsif. The lower Appellate Court gave judgment to the same effect as the District Munsif. There is no evidence that any objection was taken at the trial as to the consideration of these facts. We think the plaint sufficiently raises the question of plaintiff's title and that the lower Courts were justified in considering the steps by which plaintiff's title had been completed. The plaintiff was entitled to rely on his assignment of 1916 as to the ownership in that title. Mr. Sitarama Rao relies on the case of *Somasundarum Chetty* v. *Vadivelu Pillai* (1) for authority that a declaratory decree cannot be passed on a title neither stated in the plaint nor raised by the issues and a plaintiff who simply alleges title cannot succeed on the basis of title by adverse possession. This case follows *Shiro Kumari Debi* v. *Govind Shaw Tanti* (3) which was distinguished in *Sundari Dassee* v. *Mudhoo Chunder Sircar* (2) which was a case (as here) for possession upon proof that plaintiff was entitled to the land. The present case is closely analogous to the later Calcutta decision. *Somasundarum Chetty* v. *Vadivelu Pillai* (1) has no application. We dismiss this second appeal.

V. N. V. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1385 OF 1921.

March 8, 1923.

Present:— Mr. Justice Lindsay.

JAGANNATH SINGH—DEFENDANT—APPELLANT

versus

SADAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—Widow—Reversioners, adverse possession against, commencement of.

Where during the lifetime of a widow a stranger is in possession of her estate such possession does not become adverse against her reversioners until after her death. [p. 615, col. 1.]

Second appeal against the decree of the District Judge, Budaun, dated 12th August 1921.

Mr. *S. H. Haider*, for the Appellant.

Mr. *Iqbal Ahmed*, for the Respondents.

JUDGMENT.— In my opinion the decision of the lower Appellate Court in this case is correct.

The property in question belonged to one Kuber Singh who died and was succeeded by his widow, *Musammat* Anandi.

It appears that after Kuber's death the appellant here, Jagannath Singh, took possession of the property. A suit was brought by *Musammat* Anandi for the ejectment of Jagannath Singh and in that case a compromise was arrived at between the parties. It was declared that Jagannath Singh had given possession to *Musammat* Anandi and that she was to pay Jagannath Singh in instalments a sum of Rs. 50 which Jagannath had paid on account of her husband's debts. In the terms of this compromise the suit of *Musammat* Anandi was dismissed.

It is said that this compromise never took effect and that Jagannath has remained in possession all along.

The present suit has been brought by the transferees of the daughter's son of Kuber Singh. They claimed to be entitled to the possession of this property and asserted that *Musammat* Anandi having died twelve years before the suit their suit was still within time.

In the Courts below Jagannath Singh resisted the claim on a plea of adverse possession. Both the Courts below have decided that plea against him and there can be no question that this decision

is correct. Adverse possession could not run against the present plaintiffs until after the death of the widow.

It is argued here, however, that, on the principle which was laid down by their Lordships in the case of *Katama Natchier* v. *Rajah of Shivagunga* (1), the plaintiffs' suit is incompetent for they are barred by the terms of a decree which was fairly obtained against *Musammat* Anandi who, it is said, was representing the estate.

Assuming, if it can be assumed, that in the suit which *Musammat* Anandi brought she was really representing the estate of her deceased husband and was not really suing on her own behalf to enforce the right she had as a widow to possession, it is for the defendant to show, if he appeals to the doctrine which is laid down in the *Shivaganga case* (1) referred to above, that he is in possession under and by force of a decree which is binding against the widow. Obviously, this cannot be done because the position of the defendant really is that he has been in possession of this property not under the decree but in spite of decree; and so we come back again to the old plea of adverse possession which cannot avail the defendant-appellant in the present case. The decision of the Court below must be affirmed. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

W. C. A. *Appeal dismissed.*

(1) 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 305; 19 E. R. 843.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL NO. 1689 OF 1922.

November 9, 1922.

Present:—Mr. Justice Scott-Smith.

THE FIRM PHALLU MAL-HIRA LAL—JUDGMENT-DEBTOR—APPELLANT

versus

BANARSI DAS—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O XLI, r. 6 (2)—Stay of execution—Appeal, whether lies—Application to stay sale—Court, duty of.

The expression "an order relating to the execution of a decree" in section 47 of the Civil Procedure Code is comprehensive enough to include an order relating to the stay of execution, and such an order is, therefore, appealable.

Srinivas Prosad Singh v. *Kesho Prosad Singh*, 12 Ind. Cas. 745; 14 C. L. J. 489, relied on.

When an application is made under r. 6 (2) of O. XLI of the Civil Procedure Code, it is obligatory on the Court to stay the sale on such terms as to giving security or otherwise as it thinks fit.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, First Class, Ambala, dated the 13th June 1922.

Lala *Jagan Nath*, for the Appellant.

Mr. *Manohar Lal*, for the Respondent.

JUDGMENT.—This is an appeal from the order of a Subordinate Judge refusing to stay a sale of immoveable property in execution of decree, during the pendency of an appeal in this Court, under the provisions of O. XLI, r. 6 (2) of the Civil Procedure Code. Mr. Manohar Lal on behalf of the respondent raises a preliminary objection that no appeal lies. To this Mr. Jagan Nath replies that the order is really one relating to the execution of the decree and comes within the purview of section 47, Civil Procedure Code and is, therefore, appealable. He cites *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (1), wherein it was held that the expression "an order relating to execution of a decree" under section 47 is comprehensive enough to include an order relating to the stay of execution thereof. Mr. Manohar Lal has nothing to say against this view and I fully agree with appellant's Counsel and hold that an appeal does lie.

Now, O. XLI, r. 6 (2) says that, where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. The lower Court summarily rejected the application of the judgment-debtor for stay of sale and this was clearly erroneous. It was obligatory on the Court

(1) 12 Ind. Cas. 745; 14 C. L. J. 489.

to stay the sale on such terms as to giving security or otherwise as it thought fit.

I, therefore, accept the appeal and, setting aside the order of the lower Court, direct it to make an order staying the sale on such terms as to giving security or otherwise as it thinks fit. Mr. Monahar Lal has referred to the case reported as *Ram Nath Singh* v. *Kamleshwar Prasad Singh* (2), and has urged that the Court should demand very ample security in a case of this sort. It will be for the lower Court to decide what security is sufficient. I make no order as to costs in this Court.

Z. K.

Appeal accepted.

(2) 9 Ind. Cas. 323; 15 C. W. N. 432.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 659 OF 1921.

November 27, 1922.

Present:—Mr. Justice Stuart.

Moulvi AHMAD HUSAIN—PLAINTIFF APPELLANT

versus

SIRAJUDDIN—DEFENDANT—RESPONDENT.

Grove land—Tenant, rights of.

While grove land has the characteristics of a grove the tenant thereof can do what he wishes upon it, and there is no objection to his constructing houses for agricultural purposes, or for any other purposes upon it; he may even construct a residential house upon it. Where, however, the land loses its characteristics of a grove, the case may be altered. [p. 617, col. 1.]

Second appeal from a decree of the Sub-Judge, Moradabad, dated the 9th February 1921.

Mr. *Mohan Lal Sandal*, for the Appellant.

Mr. *Durga Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of one of the many cases of small valuation in which *zemindars* endeavour to exercise pressure upon their tenants by distorting the facts. The facts are these.—In the village of Govindpur in the Moradabad District was grove No. 183 in area either 2 *bighas* and 19 *biswas* or 2 *bighas* and 9 *biswas*. In one set of proceedings the first area is given and in another set of proceedings the second area is given, but there can be no doubt as to the identity of the grove. It is No. 183. This grove was originally granted to a man called Chhidda. He died some years ago. It was recorded as rent-free *muafi*. On Chhidda's death Sirajuddin and his other sons who are occupancy tenants in the village succeeded to the grove. They are still in possession. In 1913 Ahmad Husain, the present plaintiff-appellant, instituted proceedings in the Revenue Court against the sons of Chhidda for resumption of this grove which he describes as a rent-free grant. The Assistant Collector decided, on the 17th February 1914, that the grant was a rent-free grant but that it was not resumable. He noted in his judgment that at that time there were cow-shed and other buildings for agricultural purposes upon the land but the land was still a grove. In appeal the Commissioner decided on the 26th May 1914 that the Rent Court had no jurisdiction as the grove had not been granted nor was it held for agricultural purposes. He accordingly upheld the order of dismissal of the suit and referred the parties to the Civil Court. In 1920 Ahmad Husain instituted the suit out of which the present appeal has arisen, possession Sirajuddin on the allegation that against din and his brothers had cut down Sirajud- of the trees in the grove and constructed some buildings upon it in some of which buildings persons resided. He nowhere suggested that the land had ceased to possess the characteristics of a grove. He asserted that Sirajuddin and his brothers had agreed to pay him rent in respect of the buildings constructed and that they had not done so for three years. He claimed 12 rupees as arrears of rent or in the alternative 12 rupees as damages for use of the houses, or any other relief which the Court might deem proper to grant. It is to be observed that he in no way challenged the title of defendant as a grove-holder of a rent free *muafi* grove and that he set up a specific agreement to pay rent, putting it, it is true, in the alternative, that if he could not prove his specific agreement he should be granted damages.

He made no attempt to explain how he had a cause of action for damages. The Trial Court found that there was such an agreement to pay rent and decreed the suit. The lower Appellate Court found on the facts that there was no agreement to pay rent. It, therefore, dismissed the suit. The plaintiff appeals here. He takes two grounds that the defendant having been a rent free tenant of the grove had no right to convert the land into a site of houses for residential purposes and that he was entitled to damages for use and occupation.

The finding of fact that there was no agreement to pay rent is final. The case then stands thus: The defendant has cut down a certain number of trees in the grove which he holds rent-free. The Revenue Courts have held that the special provisions of the Tenancy Act which permit *zemindars* to resume rent-free grants has no application in this case. There is nothing in the civil law which would permit the resumption of this grove. So the defendant is holding in perpetuity this grove without payment of rent. So long as the land has the characteristics of a grove he cannot be ejected. The plaintiff never suggested that the land has lost the characteristics of a grove. While it has the characteristics of a grove the defendant can do what he wishes upon it. There is no objection, if he chooses, to his constructing houses for agricultural purposes or for any other purposes upon it. If he wishes to construct a residential house upon it he has every right to do so. When the land loses its characteristics of a grove the case may be altered, but at present the plaintiff has not even suggested that the land has lost its characteristics as a grove. The learned Subordinate Judge rightly dismissed the suit. I dismiss this appeal with costs which include fees on the higher scale.

W. C. A. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 239 AND 253 OF 1921.

June, 13, 1922.

Present—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

VITHAL DHONDJI DEVLI AND OTHERS —DEFENDANTS—APPELLANTS

versus

SURYAJI RAMCHANDRA NAIK— PLAINTIFF—RESPONDENT.

Summary Settlements Act (Bom. Act VII of 1863), s. 7, proviso—Sanad *describing temple lands as private property of temple servants, effect of* —Gaukar, *whether debarred from establishing that lands were* devasthan *lands—Suit for recovery of possession—Cause of action.*

Where lands are conveyed to temple servants by a *sanad* under the Bombay Summary Settlement Act, the lands being described in the *sanad* as the private property of the holders, the *sanad* would not negative the right of a person to establish, if he can, that the lands are really *devasthan* lands and not private property. [p. 618, col. 1.]

The fact of the *sanad* having been granted would not constitute a cause of action upon which to maintain a suit. [p. 619, col. 1.]

Second appeal from a decision of the District Judge, Ratnagiri, in Appeals Nos. 30 and 26 of 1919, confirming the decree passed by the Subordinate Judge at Vengurla, in Civil Suit No. 56 of 1916.

Mr. *A. G. Desai*, for the Appellants.

Mr. *K. N. Koyajee*, for the Respondents.

JUDGMENT.

Shah, Ag. C. J.—These two appeals arise out of a suit filed by the plaintiff, as representing Gaukars of the village of Khanoli entitled to the management of the temple, against the defendants who were the Devlis and the Bhavnis connected with the temple as servants, and defendants Nos. 29 and 30 who were alienees from defendant No. 1. The plaintiff's case was that the lands in suit were really Devasthan lands given to the defendants Devlis and Bhavnis for the services which they rendered to the temple, and that the alienation of

these lands was invalid. He sued for a declaration that the property was Devasthan property and prayed for possession of the lands.

The defendants in substance pleaded that these lands were Jat-inam property of the Devlis and that they were entitled to alienate the lands. It was apparently common ground in the lower Court that if it was found that these lands were Devasthan property, the alienation would be clearly invalid. The Trial Court found in favour of the plaintiff and passed a decree making the necessary declaration and ordering that the land in the possession of defendants Nos. 29 and 30 should be restored to the plaintiff.

In the appeals to the District Court, the same points were in controversy between the parties, and the result of the decision of that Court was that the decree of the Trial Court was confirmed.

Two appeals are now preferred to this Court one by defendants Nos. 29 and 30 and the other by defendant No. 27. The contentions urged in support of these appeals are that the finding of the lower Appellate Court that the property was not the Jat-inam property of the defendant but the Devasthan property is wrong, and that it was not open to the lower Appellate Court to come to that conclusion in view of the fact that a *sanad* under the Summary Settlement Act (VII of 1863) was granted to the defendants in which the property was described as the private property of the holders. Further, it is urged that the plaintiff's claim is time-barred and that the amendment as to the claim for possession should not have been allowed.

As regards the first point, which is clearly the only point of importance in the case, it is no doubt true that the *sanad* granted to the defendants in respect of the lands in suit under Act VII of 1863 describes the property as the private property of the holders. But it is clear from the proviso to section 7 of that Act that "the rightful owners of the property shall not by this Act or anything therein contained be deprived of any right or remedy to which they may be entitled against the holders and their heirs and assigns for the recovery of the said lands dealt with under the Act." It follows that the *sanad* granted to the defendants does not negative the right of the present plaintiff to establish, if he can, in this suit, that the lands are really the Devasthan lands and not the private property of the defendants.

Mr. Desai has not been able to suggest any answer to the effect of this proviso to section 7 to which I have referred, and his argument on this point, when analysed, really comes to this that the evidence upon which the lower Appellate Court has relied in coming to the conclusion that the property is Devasthan property and not the Jat-inam property does not really justify that inference. It is also suggested in the course of the argument that a part of the evidence referred to by the lower Appellate Court was not admissible in evidence. It does not appear that any point as to the admissibility of evidence was taken either in the Trial Court or in the lower Appellate Court. Mr. Desai has not been able to point out how any particular statement is inadmissible in evidence. Treating the statements referred to by the lower Appellate Court as evidence in the case, it is really a question of appreciation of the evidence on the point. Both the Courts have decided in favour of the plaintiff and against the defendants and I do not think that in second appeal any valid reason is shown for disturbing that finding. But I may add that there is one broad consideration which strongly supports the finding and that is that the defendants who are servants of the temple have been rendering service to the temple; and it is not shown in the course of argument before us by Mr. Desai as to what other remuneration these persons have been receiving for this service. The plaintiff's case is that the remuneration they receive is the income of the land which they hold on behalf of the Devasthan. That is the inference which the lower Appellate Court has drawn, and it seems to me almost inevitable under the circumstances. In the absence of any explanation on the part of the defendants as to how they are otherwise remunerated

for their services, is a circumstance which tells against their contention.

As regards the point of limitation, the only Article relied upon is Art. 120 of the Indian Limitation Act. But I do not see how it could be said that the fact of the *sanad* having been granted to the defendant constitutes a cause of action upon which the plaintiff could sue the defendants. They performed their services and rightfully enjoyed the profits of the land during all this time, and it was only when they attempted to alienate the land wrongfully to strangers that the occasion for filing the present suit arose. It could not be said that the right to sue accrued within the meaning of Art. 120 at the time when the *sanad* was issued. No authority has been cited in support of this contention raised, and on the general ground I am quite unable to accept the view that the mere fact that the *sanad* has been issued is sufficient to give rise to the cause of action to which the suit relates. It may be that he might have been able to institute a suit for a declaration that it was not Jat-inam property but Devasthan property soon after the *sanad* was granted; as to that I express no opinion. But I do not think that the fact that the *sanad* was granted rendered it necessary for him to institute the present suit. The Art. 120 does not apply to the case, as there is a claim for possession. It is also clear that the amendment of the plaint was very properly allowed. It would be quite wrong to allow the strangers who are alienees to continue to hold possession of the Devasthan land, and if the Court came to the conclusion that it was Devasthan property, it was quite proper to order defendants Nos. 29 and 30 to restore the possession to the plaintiff. It is not necessary for us to consider in these appeals whether the plaintiff is entitled to possession in preference to defendant No. 1, who held the lands originally and alienated the same to defendants Nos. 29 and 30. Defendant No. 1 has not appealed and he has not appeared either before the lower Appellate Court or before us.

It is urged, however, by the plaintiff by way of cross-objections against defendant No. 27 that though he has been rendering services to the temple, the fact that he contended that the lands in suit were not Devasthan land but the private property of the Devlis was sufficient to entitle him to the possession of the lands from the temple servants. Both the lower Courts have declined to give effect to this plea in the exercise of their discretion. In my opinion they were perfectly justified in declining to give possession to the plaintiff and in not depriving the defendants of their possession of these lands which have been in their possession for many years as remuneration for their services which they have been rendering to the temple, and which they are still ready to render. On these grounds, I am of opinion that the appeals must fail.

The result is that the decree of the lower Appellate Court is confirmed and the appeals and cross-objections are dismissed with costs.

Crump, J.—I agree.

W. C. A. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 637 OF 1921.
November 28, 1922.
Present:—Mr. Justice Gokul Prasad.
GHULAM HUSAIN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
GANESH LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Defendant agreeing to be bound by decision of Trial Court, whether can question decision in appeal.

The mere fact that the defendant in a suit offers to be bound by the decision of the Trial Court arrived at after a local inspection, would not estop him from questioning the correctness of that decision in appeal, when it is not shown that the plantiff had also agreed.

Shahzadi Begam v. *Muhammad Ibrahim*, 59 Ind. Cas. 787; 43 A. 266; 19 A. L. J. 14, distinguished.

Second appeal against a decree of the District Judge, Moradabad, dated the 25th February 1921.

Mr. *M. L. Sandal*, for the Appellants.
Mr. *Panna Lal* for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for possession of a certain plot of land and demolition of a wall erected thereon by the defendants. The plaintiffs had also claimed damages, etc., but we are not concerned with this portion of the case in appeal. The defence was that the plot of land on which the wall in dispute stood belonged to the defendants and a new wall had been built up in place of the old one. The Munsif found in favour of the plaintiffs and decreed the claim in part, namely, he allowed the plaintiffs possession of the land and decreed Rs. 30 as damages. On appeal the lower Appellate Court came to the conclusion that the plaintiffs had failed to prove their ownership of the land in dispute and has reversed the decree of the First Court and dismissed the suit. The plaintiffs come here in second appeal and their main ground is that the defendants themselves, whilst objecting to the Commissioner's report, offered to be bound by the decision which the Court arrived at on inspection of the locality and were not competent to appeal to the lower Appellate Court and reliance is placed on *Shahzadi Begam* v. *Muhammad Ibrahim* (1) and an unreported decision of Mr. Justice Stuart in Second Appeal No. 1213 of 1919 decided on the 23rd of June, 1921, [*Ram Lal* v. *Satya Ranjan Sircar*]. In my opinion these cases have no bearing on the present case. In these cases there were agreements of the parties agreeing to be bound by the decision of the Trial Court on the question involved. In the present case there was no such agreement. An application was put in by the defendants but there is nothing to show that the plaintiffs had agreed to it, and neither the Court nor the parties took it seriously in this sense and later on went into the evidence. Under these circumstances the application put in by the defendants does not estop them from questioning the correctness of the decision of the Munsif. The learned Judge of the lower Appellate Court has on considering the evidence come to a finding of fact that the plaintiffs do not own the land in dispute. The suit was, therefore, rightly dismissed by him. I, therefore, dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

(1) 59 Ind. Cas. 787; 43 A. 266; 19 A. L. J. 14.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 5 OF 1923.

July 12, 1923.

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

V. E. RAJAHBATHER MUDALIAR —PETITIONER—RESPONDENT

versus

A. M. VISWANADHA REDDI AND ANOTHER—RESPONDENTS.

Madras District Municipalities and Local Boards (Amendment) Act (II of 1922)—Madras Local Boards Act (XIV of 1920)—Election of President of Taluk Board—Members without oath of allegiance—Legality.

The election of a President of a Taluk Board by members of that Board who have not taken the oath of allegiance as prescribed by Madras Act II of 1922 is invalid.

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 Subordinate Judge, Vellore, in Original Petition No. 8 of 1922, dated the 11th December 1922.

Messrs. *K. Rajah Iyer*, and *V. Ramaswami Iyer*, for the Petitioner.

Mr. *P. Venkatarama Rao*, for the Respondents.

JUDGMENT.—Madras Act II of 1922 declares that no person elected as a member of a Local Board shall take his seat till he has made an oath of allegiance. Until each member takes his seat no business can be transacted. The election of a President is the first business to be transacted at the first meeting of the Board. (*Vide* r. 15 Schedule X of Madras Act XIV of 1920). It follows that the election of a President by persons who had not taken the oath was invalid. The lower Court was right. The civil revision petition is dismissed with costs.

V. N. V. *Petition dismissed.*

RAMMAN BIBI *v.* MATHRA PRASAD.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 663 OF 1921.
November 27, 1922.
Present:—Mr. Justice Stuart.
Musammat RAMMAN BIBI—PLAINTIFF-APPELLANT
versus
MATHRA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Estate—Inheritance—Death of last holder—Reversion of estate.

If an estate is an absolute estate of inheritance it cannot revert, in any circumstances, to the original grantor, for the law regards the Crown as the heir of the last holder. But if the estate is a limited estate, such as a fixed rate tenancy, it reverts on the death of the last holder without heirs not to the Crown but to the *zemindar*. [p. 622, col. 1.]

Second appeal from a decree of the District Judge, Farrukhabad, dated the 3rd February 1921.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Mukhtar Ahmed* for Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—The plaintiff, *Musammat* Ramman Bibi, is the *zemindar* of the village Amrauli. A certain Hari Ram resided in Amrauli as an agricultural tenant. He occupied a dwelling house in the *abadi* and he was the holder of a certain grove with the rights of a tenant grove-holder. It is alleged that he owed money on a deed to a certain Mathra Prasad. Hari Ram died. At the time of his death it was alleged that he had not satisfied the amount due to Mathra Prasad. Mathra Prasad instituted a suit against a child called Bilaso, who, he alleged, was the daughter of Hari Ram in respect of the amount which Hari Ram, was alleged to have owed him. He obtained a decree against the assets of Hari Ram in the hands of Bilaso. I am unable to ascertain whether this decree was obtained *ex parte* or after contest. In execution of that decree he brought to sale the interests of Hari Ram in the house and grove. They were purchased by Lachmi Narain brother of Mathra Prasad. Lachmi Narain is now in possession of those interests. The plaintiff instituted a suit against Mathra Prasad and Lachmi Narain for possession of the house and grove, her case being that Bilaso was not the daughter of Hari Ram; that Hari Ram had died without heirs or successors, and that she as *zemindar* had succeeded to the house and grove upon his death. Mathra Prasad and Lachmi Narain contested the suit. Bilaso was not a party. The Courts below have arrived at a concurrent finding of fact to the effect that Bilaso was not the daughter of Hari Ram and that Hari Ram died without heirs or successors. The Trial Court decreed the suit in full. The learned District Judge considered that the plaintiff as *zemindar* could only succeed to the house and grove on condition of paying off the debts of Hari Ram. He accordingly made her success conditional on the payment of those debts with the result that he awarded the materials of the house to the purchaser and awarded him the grove in consideration of the fact that the value of the materials and the grove together were less than the debts due from the deceased.

The plaintiff appeals here.

The first point taken is this. On the findings of both Courts *Musammat* Bilaso was not the daughter of Hari Ram, so there is no force in the decree in favour of Mathra Prasad against Bilaso. It was, however, open to the defendants to prove *aliunde* their debt from Hari Ram. They do not appear to have done so. Had the decision of this appeal turned on that point alone, it might have been necessary to remit further issues for proof upon this point. The non-joinder of Bilaso does not defeat the suit (O. I, r. 9) and, as I read O. XLI, r. 20, it is not possible to join her now.

But the second point remains. It was decided by their Lordships of the Privy Council in 1876 in *Sonet Kooer* v. *Himmut Bahadoor* (1) that the principles of the English Law of escheat have no application to the case of a Hindu *zemindar*, although they have application to the case of escheat to the Crown on failure of heirs. It was decided in 1910 by a Full Bench of this Court in *Tulshi Ram Sahu* v. *Gur Dayal Singh* (2) that on the death of a fixed rate tenant without heirs, his tenancy did not escheat to the Crown but reverted to

(1) 1 C. 391 at p. 402; 3 I. A. 98; 25 W. R. 239; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.).
(2) 7 Ind. Cas. 231; 33 A. 111; 7 A. L. J. 1021 (F. B.).

the *zemindar*. The question whether the *zemindar* would be liable to pay the debts of such a tenant was considered but not decided in that appeal. Their Lordships in the previous case had decided that an *istimrari mokarrari* tenure escheated on the death of the last-holder to the Crown and not to the *zemindar*. The *ratio decidendi* in this matter is comparatively simple. If an estate is an absolute estate of inheritance it cannot revert in any circumstances to the original grantor for the law regards the Crown as the heir of the last-holder. But if the estate is a limited estate such as a fixed rate tenancy it reverts on the death of the last-holder without heirs not to the Crown but to the *zemindar*. The circumstance that the interest is transferable will not affect the matter. A fixed rate tenancy is transferable. The right of the tenant to reside in a house in the inhabited site of an agricultural village of this Province and the right of a tenant groveholder to a grove in this particular village are both limited estates. When the last holder of such a house dies without heirs the house reverts (the word escheat should not be used, though it frequently is used in common parlance to express the process) to the *zemindar*, and in this particular village when a tenant groveholder dies without heirs, the trees and the land revert to the *zemindar*. It is good law that, in the case of escheat to the Crown, the Crown is liable to pay off the debts of the last-holder; the Crown is so liable because it succeeds as heirs. But the question which remains to be decided is, does the *zemindar* succeed as heir? I agree with the learned Counsel for the appellant that he does not succeed as heir. The *zemindar* has divested himself both in the case of the house and the grove of his interest in the property for a period which terminates when the last holder dies without heirs. This period may be indefinitely prolonged but nevertheless it is a terminable period and the estate is a limited estate. It could not be questioned that if a *zemindar* divested himself of his title and property for a definite term of years, the interest returning to him absolutely at the end of that term of years; the holder of the limited interest could not encumber more than the limited interest, and in no circumstances could the *zemindar* be held responsible for the debts of the last holder. It appears to me that the same rule must be applied in the case of all limited estates and that, therefore, the *zemindar* is entitled to recover the house and the grove absolutely on the death of the last holder without heirs.

I, therefore, allow this appeal. I set aside the decree of the learned District Judge and restore the decree of the learned Munsif. The defendants-respondents will pay their costs and those of the plaintiff-appellant in all Courts. These costs will include in this Court fees on the higher scale.

W. C. A. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 231-B OF 1922.

July 21, 1923.

Present:—Mr. Prideaux, A. J. C.

ANNAJI—PLAINTIFF—APPELLANT

versus

LAXMAN AND OTHERS — DEFENDANTS —RESPONDENTS.

Evidence Act (I of 1872), s. 110—Lease unregistered — Admissibility in evidence —Relationship of landlord and tenant—Ownership.

An unregistered lease deed is admissible in evidence to show the position of landlord and tenant and would, under section 110 of the Evidence Act, tend to show ownership.

Appeal from a decree of the First Additional District Judge, Akola, in Civil Appeal No. 459 of 1921, decided on 15th February 1922.

Messrs. *A. V. Khare*, and *D. T. Mangalmurti*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—Plaintiff sued for an open site and the *gadhi* at Borgaon, Taluq Basim, which he had bought from defendants Nos. 1 and 2 by a sale-deed dated 29th May 1918.

He states that he had already been in possession as the licensee of the father of defendants Nos. 1 and 2 from 1896. Both Courts have found that plaintiff has failed to prove that the site belonged to defendants Nos. 1 and 2 or that they had any right to sell. The findings are findings of fact and are not to be challenged in second appeal without good reasons.

The first ground upon which the decision of the Courts below is assailed is that there is a presumption that the *gadhi* in a village belongs to the Deshmukh. I know of no such presumption and, during many years of service in the Province from which this appeal arises, never heard of it. The second and last ground is that the lease of 28th November 1894, though inadmissible because of want of registration, has been held admissible for collateral purposes. It is executed by one Maroti in favour of Tapaji, the grandfather of defendants Nos. 4 and 5, who claim the site. The admissibility of the document for a collateral purpose is not challenged but it is stated that it is no evidence against the plaintiff. It seems to me to have been rightly admitted to show the position of landlord and tenant and would, under section 110 of the Evidence Act, tend to show ownership. What is evidence against plaintiff's sellers is evidence against the plaintiff as he claims through them and the fact that in 1894 the purchaser of defendants Nos. 4 and 5 leased the site to Maroti, and there is ample evidence to show that Maroti did occupy the site, unquestionably raises a presumption that at that time the family of defendants Nos. 4 and 5 were the owners of the site. Nothing exists to vitiate the findings of fact of the lower Appellate Court upon which the decision of this appeal turns. For these reasons this appeal fails and is dismissed with costs. The appellant will pay the respondents' costs.

G. R. D. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 173 OF 1921.
April 16, 1923.

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

GUNNAM AKKAMMA—DEFENDANT NO. 2—APPELLANT

versus

NUNE VENKATAPATHI AND ANOTHER—DEFENDANT NO. 1 AND PLAINTIFF—RESPONDENTS.

Legal representative—Wife impleaded as legal representative of deceased husband in a suit for maintenance—Subsequent suit in personal capacity.

It is not open to a person who is added as a legal representative of a deceased judgment-debtor, to raise any defences personal to himself or herself.

In a suit for maintenance a charge for maintenance was declared against certain properties of the judgment-debtor. Some of these items were, however, the *stridhanam* properties of his wife. Pending appeal, the judgment-debtor died and his wife was brought on the record as his legal representative. In a subsequent suit for enhanced maintenance:

Held, it was open to the wife or her representative-in-interest to plead that the charge in the prior suit against her properties was not binding on her and her personal estate.

Second appeal against the decree of the District Court, Godavari, at Rajamundry, dated the 13th March 1920, in Appeal Suit No. 229 of 1919, preferred against the decree of the Court of the Subordinate Judge, Cocanada, dated the 22nd July 1919 in Original Suit No. 49 of 1918.

Mr. *T. S. Raghunatha Rao*, for the Appellant.

Messrs. *G. Lakshmanan*, *A. Satyanarayana* and *A. Venkatayallah*, for the Respondent.

JUDGMENT.—The lower Appellate Court has found that items Nos. 6 to 11 of plaint A schedule were the *stridhanam* properties of plaintiff's mother-in-law and did not belong to her father-in-law's estate. On this finding no charge should have been given on those items for any part of the maintenance allowed. The learned District Judge apparently thinks that because the mother-in-law was made a party to the second appeal as the legal representative of her deceased husband and in that suit a charge was declared for Rs. 72 a year on properties including those pro-

perties, the same is binding on her and her estate. We are unable to concur with this view. She was only added as a legal representative in the previous litigation and it was not open to her as such to raise any defences personal to herself. It was, therefore, open to her and is now open to her representative, the 2nd defendant, to plead that the charge was not a proper charge on their properties and as on the finding of the lower Appellate Court the charge is not a proper one, effect can and should be given to it by disallowing any charge on those lands. There is no question raised about the amount of maintenance allowed. The decree of the lower Appellate Court must, therefore, be reversed and that of the First Court restored. The first defendant will pay 2nd defendant's costs in this and the lower Appellate Court and the plaintiff will bear his own costs in both those Courts.

V. N. V.

W. C. A. *Decree reversed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 892 OF 1921.

December 1, 1922.

Present:—Mr. Justice Gokul Prasad.

GAYA PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

METHAI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Vendor and purchaser—Purchase from person without title—Debt of vendor paid by purchaser—Suit by real owner for possession, purchaser whether entitled to reimbursement.

A person who purchases property from one who has no title to sell, and who, to save the property from sale in execution of a decree against the latter, pays the amount of the decree, is not entitled upon dispossession by the real owner of the property, to be reimbursed the amount of the decree paid by him.

Second appeal against a decree of the District Judge, Allahabad, dated the 1st March 1921.

Mr. *M. L. Agarwala*, for the Appellants

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

JUDGMENT.—The facts are as follows:—Ode Beni owned two houses. He died leaving a widow, Ram Dei, the step-mother of his son Mata Ghulam, who survived him. After the death of Mata Ghulam, Sheo Pal, his uncle, is said to have got the property as his heir. On the 6th of July 1918 Sheo Pal sold the two houses to the plaintiff. One Amrit Lal obtained a money-decree from the Court of Small Causes against Sheo Pal and Ram Dei. The amount of this decree was recoverable from the assets of Beni. In execution of this decree he attached the houses purchased by the plaintiff. The plaintiff objected but his objections were disallowed on the 9th of August 1919. On the 24th of November 1919 *Musammat* Ram Dei sold the houses to Gaya Prasad and Sattidin, who paid off the amount of the decree. On the 9th of August 1920, that is, within a year from the date of the disallowance of his objection, the plaintiff brought the present suit for possession against Gaya Prasad and Sattidin, the purchasers. The defence raised to the claim was (1) that no suit having been brought against the decree-holder within a year, the title of the plaintiff had become extinguished, and (2) that the plaintiff could not get possession without paying off the decree of Amrit Lal which had been satisfied by the defendants. The Trial Court decreed the claim for possession conditional on the plaintiffs' paying up the amount of the decree of Amrit Lal which had been satisfied by the defendants. On appeal by the plaintiff, the learned Judge of the lower Appellate Court has modified the decree of the Trial Court by deleting the condition regarding the payment of Amrit Lal's decree by the plaintiff and has given an unconditional decree to the plaintiff. The defendants come here in second appeal. I do not see any principle of law by which the defendants who had, according to the defence, purchased the property from a person who had no title to sell it, could expect to be recouped for the amount which they paid to clear off the decree of Amrit Lal. Because of their purchase they did not acquire any interest in the property and as such their action was that of mere volunteers. The decree of the Court below is a right decree and is not open to any objection. I confirm it and dismiss this appeal with costs including in this Court-fees on the higher scale.

W. C. A. *Appeal dismissed.*

JARI LAL PAL *v.* LAL BEHARI HAZRA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1304 OF 1921.

January 3, 1923.

Present:—Mr. Justice Ghose and Mr. Justice Panton.

JARI LAL PAL —DEFENDANT— APPELLANT

versus

LAL BEHARI HAZRA—PLAINTIFF— RESPONDENT.

Hindu Law—Widow—Surrender, constituents of.

In order that a surrender by a Hindu widow of her widow's estate, inherited from the last male owner, may be effective and valid, there must be a total surrender of that estate, and the arrangement between the widow and the reversionary heir should not be such as can be described as a device to partition the estate between the widow and the reversionary heir. [p. 626, col. 1.]

Second appeal against the decree of the Subordinate Judge, Asansole (Burdwan), dated the 31st March 1921.

Messrs. *Bankim Chandra Mukerjee* and *Charuchandra Sanyal*, for the Appellant.

Mr. *Basak*, for Mr. *Hira Lal Sanyal*, for the Respondent.

JUDGMENT.—The only question involved in this appeal is, whether a lease executed by a Hindu widow, under circumstances to be mentioned hereinafter, passed any title binding against a reversionary heir. The facts of the case have been fully set out in the two judgments of the Courts below and it is unnecessary to repeat them at length. It will be sufficient if the facts are stated shortly so far as the question involved in this appeal is concerned. It appears that a lady of the name of Raj Kumari Deby, who was the widow of one Kenaram Hazra, executed a deed of release in favour of one Ram Das Mukerjee, who was a reversionary heir of her husband. In the deed of release the lady stated that after her husband's death she had been in enjoyment of all moveable and immoveable properties left by her husband. She then went on to state that she was executing the deed of release in favour of the said Ram Das in respect of all immoveable properties left by her husband. She stated that the immoveable properties were all mentioned in the schedule to the deed and that if, through mistake or omission or for any other reason, any immoveable property was left out of the schedule there would be no hindrance to the title or possession of the reversionary heir in respect of the immoveable properties left out of the schedule if such had happened. With reference to the moveable properties, she declared that she would retain the same in her possession and that, after her demise, the said Ram Das would be the owner of the same. It is argued by Mr. Bankim Chandra Mukerjee, who has conducted this appeal with much ability, that the words of the deed of release taken as a whole conveyed the entirety of the estate left by the grantor's husband and that, if that was so, the deed of release fulfilled the conditions laid down by their Lordships of the Judicial Committee in the case reported in *Sureshwar Misser* v. *Maheshrani Misrain* (1), and that, therefore, it should be held that the deed of release passed a title which was binding as against the reversionary heir. There is another point which has been argued, namely, that the reservation of the right of residence in the homestead did not in any way contravene the conditions laid down by the Privy Council in the case referred to above and also in other cases decided by their Lordships of the Judicial Committee dealing with the question of surrender by widows of their estate. So far as the last point is concerned, namely, whether the reservation of a right of residence in a family dwelling house or in a homestead can or cannot be stigmatized as a device to divide the property which belonged to the last male owner, between the lady, and the reversionary heir, need not be gone into in this case and the reason is this. Looking at the words of the deed itself, we are satisfied that the entirety of the estate, composed of moveable as well as immoveable properties, did not pass by the deed of release. No doubt, so far as the immoveable property was concerned, there was a complete surrender by the lady in favour of Ram Das. But as regards the moveable properties the words that occur in the concluding portion of the deed conclusively

(1) 57 Ind. Cas. 325; 25 C. W. N. 194; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 47 I. A. 233; 48 C. 100 (P. C.)

ZARIF-UN-NISA v. SHAFIQ-UZ-ZAMAN.

show that the title thereto, namely, the title of the lady in her husband's estate to the moveables, remained unaffected by the document in question and that after her demise the title as well as the possession thereof would pass to Ram Das. In our opinion, the terms of the deed of release were not sufficient to pass the entirety of the estate left by the last male owner to Ram Das and, that being so, inasmuch as there was not a total surrender by the widow of her estate which was inherited from the last male owner in favour of Ram Das it can hardly be contended that the deed passed any title binding as against the reversionary heir.

Our attention has been drawn to numerous cases decided in the Courts in India and also to the recent Privy Council decision on the question of surrender by widows of their estate. The last case, namely, the case reported in *Sureshwar Misser* v. *Maheshrani Misrain* (1), laid down two working rules, namely, (1) that there must be a total surrender by the widows of her widow's estate inherited from the last male owner, and (2) that the arrangement between the widow and the reversionary heir should not be such as can be described as a device to partition the estate, between the widow and the reversionary heir. So far as the first point is concerned, Mr. Mukerjee's client obviously fails on the terms of the deed. In this view, there is no escape from the conclusion that no title whatsoever, in the circumstances of this case, passed to the grantee sufficient to bind the reversionary heir.

The appeal, therefore, fails and must be dismissed with costs.

W. C. A. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 13 OF 1918 AND 50 OF 1921.

April 4, 1923.

Present:—M. Kanhaiya Lal, A. J. C., and Mr. Dalal, A. J. C.

Chaudhrain ZARIF-UN-NISA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Chaudri SHAFIQ-UZ-ZAMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates Act (*I of* 1869), *ss.* 8, 13, 22, 23, *scope of—Interpretation—"A person who would have succeeded according to the provisions of the Act," meaning of—Family settlement, nature of—Award, whether a settlement—Award when binding a person whose interests are analogous to those of parties to arbitration—Award, by whom may be questioned—Civil Procedure Code* (*Act V of* 1908), *s.* 11, *Expln. VI, applicability of—Muhammadan Law—Devise in favour of one heir, without consent of others, effect of—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 141, 144, *applicability of—Will, inoperative—Consent of parties, effect of—Court of Wards, statements by Deputy Commissioner and Board of Revenue, effect of.*

Section 13 of the Oudh Estates Act, 1869, was devised to impose restrictions on sudden freaks of impulse. It insisted upon certain formalities in the case of gifts and devises and fixed certain time limits for the performance thereof in order that the strongest proof might be available of a disposing mind of deliberate intention in case the donee or legatee happened to be a person who was not the legal heir to the estate under the special rules of succession or the ordinary law applicable to such estates or one of his younger sons. [p. 633, col. 2.]

Indar Kunwar v. *Jaipal Kunwar*, 15 I. A. 127 at p. 148; 15 C. 725; 12 Ind. Jur. 377; 5 Sar. P. C. J. 150; Rafique and Jackson's P. C. No. 102; 7 Ind. Dec. (N. S.) 1067 (P. C.), referred to.

The expression "a person who would have succeeded according to the provisions of the Act" in section 13 of the Oudh Estates Act, is confined to the persons or one of the persons to whom the estate would have descended according to the provisions of the special clause of section 22 of that Act applicable to the particular case. [p. 634, col 2; p. 635, col. 1.]

The proper intrepretation of sub-section (1) of section 13 appears to be that the privilege is confined to the one person who would succeed to the *talukdar's* estate under the Act, and that the words "under the ordinary law to which persons of the donor or testator's tribe and religion are subject" govern cases falling under section 22, clause 11, and section 23 of the Act. If there is a person existing, who would succeed under the special provisions of section 22 (first ten clauses) that person alone would be the privileged person. [p. 635, col. 2.]

Bhaiya Rabidat Singh v. *Indar Kunwar*, 16 C. 556; 16 I. A. 53; 13 Ind. Jur. 98, 5 Sar. P. C. J. 505; Rafique and Jackson's P. C. No. 220, 9 Ind. Dec. (N. S.) 36; (P. C.), *Ali Muhammad Khan* v. *Sajjadi Begum* [*Syed Azam Shah* v. *Syed Ahmad Shah*], 33 Ind. Cas. 516; 2 O. L. J. 758, *Balraj Kunwar* v. *Jagatpal Singh*, 26 A. 393; 8 C. W. N. 699; 31 I. A. 132; 1 A. L. J. 384; 7 O. C. 248; 11 Bom. L. R. 516; 8 Sar. P. C. J. 639 (P. C.), referred to.

A family settlement implies a mutual settlement by certain contending parties belonging to the same family of some disputed claims and rights. An award of arbitration is not a settlement of that character. It is a decision of a tribunal constituted by the contending parties for the settlement of their disputes, and in so far as it is a lawful and valid award, it is binding on the parties to the arbitration proceedings and their privies,

ZARIF-UN-NISA *v.* SHAFIQ-UZ-ZAMAN.

Whether such an award is binding on persons whose interests are analogous to those of the parties to the arbitration proceedings, is a matter which is not capable of an inflexible answer. In each case it has to be determined whether the person who agreed to the reference to arbitration was seeking to assert a right common to himself and others and had acted fairly in representing those whose interests he had undertaken to protect. [p. 641, col. 2.]

An arbitration award can be questioned by those only who were no parties to the arbitration proceedings, but not by a person who was a party to the arbitration or to the decree passed in accordance with it, or by his representatives-in-interest. [p. 643, col. 2.]

Section 11, Explanation VI, of the Civil Procedure Code, applies to a common right asserted by certain persons on behalf of themselves and others, but not to rights which are not common but several and distinct. [p. 642, col. 2.]

Under the Muhammadan Law a devise in favour of one of several heirs is inoperative without the consent of the other heirs. [p 643, col. 2.]

Article 144 of the Limitation Act, 1908, does not apply where a suit is otherwise specially provided for. [p 645, col. 1.]

Ranchordas Vandravandas v. *Parvatibai*, 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 26 I. A. 71 . Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.), followed.

Article 141 provides for a suit by a person entitled to possession on the death of a Hindu or Muhammadan female but, it does not apply where the Hindu or Muhammadan female has been in possession of a full estate. [p. 645, cols. 1 & 2.]

Ghisa Singh v. *Gajraj Singh*, 33 Ind. Cas. 371; 18 O. C. 289; 3 O. L. J. 45, *Bisheshar Bakhsh Singh* v. *Rameshar Bakhsh Singh*, 44 Ind. Cas. 68; 21 O. C. 1; 4 O. L. J. 648, followed.

Any statement made by a Deputy Commissioner or the Board of Revenue in derogation of the rights of a person on whose behalf an estate is held by the Court of Wards cannot be deemed to have been made on that person's behalf or as his agent. [p. 644, col. 2.]

A Will which fails to satisfy the conditions imposed by section 13 of the Oudh Estates Act is inoperative, and, being thus void and unenforceable, the mere consent of parties would not validate it. It may create a new title to take the place of that which was inchoate, defective or imperfect. [p. 647, col. 1.]

The use of the word "ordinarily" in List No. 2 prepared under section 8 of the Oudh Estates Act implies that an occasional variation by consent or otherwise would not affect the custom of devolution. [p. 652, col. 1.]

Murtaza Husain Khan v. *Mohammad Yasin Ali Khan*, 36 Ind. Cas. 299; 38 A. 552; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 1 M. L. J. 804; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538; 43 I. A. 269 (P. C.), followed.

IN FIRST CIVIL APPEAL NO. 13 OF 1918.

Appeal against a decree of the Sub-Judge, Mohanlalganj, Lucknow, dated the 30th November 1917.

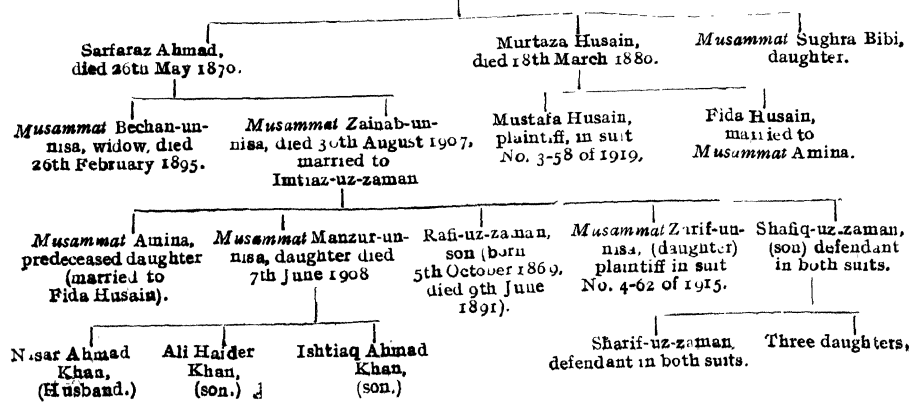
IN FIRST CIVIL APPEAL NO. 50 OF 1921.

Appeal against a decree of the Second Additional District Judge, Lucknow, dated 21st July 1921.

Dr. *S. M. Sulaiman*, Messrs. *Hyder Hussain* and *Bisheshwar Nath Srivastava*, for the Appellants.

Messrs. *Kamta Nath Singh*, *Wazir Hasan*, *Ali Mohammad*, *Gokul Prasad*, *Har Dayal*, *Ganga Dayal*, *Hargobind Dayal*, *Niamat Ullah*, *Zahur Ahmed* and *Makund Lal*, for the Respondents.

JUDGMENT.—These are two connected appeals arising out of two suits brought by rival claimants to the same estate. The short pedigree given below will elucidate the connection between the principal parties to the two suits:—



ZARIF-UN-NISA *v.* SHAFIQ-UZ-ZAMAN.

The property in dispute consists of Taluqas Bhilwal and Khanpur, situated in the District of Bara Banki, and Taluqa Sikandarpur, situated in the District of Rae Bareili. These estates were settled with Chaudhri Sarfaraz Ahmad in 1858 and *sanads* were afterwards granted to him. His name was entered in respect of Taluqas Bhilwal and Khanpur at No. 13 of List II and in respect of Taluqa Sikandarpur at No. 10 in List V appended to Act I of 1869.

Taluqa Bhilwal, otherwise known as Bhilwal Hasa pur, belonged to Chaudhri Lutf-ul-lah. He died in 1254 Fasli leaving a daughter, *Musammat* Bechan-un-nisa, who was married to Chaudhri Sarfaraz Ahmad, and a brother, Qalandar Bakhsh. Qalandar Bakhsh held the estate for sometime but the revenue payable in respect thereof fell into arrears. The *kabuliyat* of the estate was then granted to certain other persons, but the latter similarly made default in the payment of the revenue, and the estate was eventually sold and purchased by Arjun Singh sometime before the Mutiny. Arjun Singh did not, however, succeed in getting possession. The confiscation of Oudh followed. Chaudhri Sarfraz Ahmad managed to secure possession of the estate and his title thereto was recognised by the British Government at the Summary Settlement and a primogeniture *sanad* was granted to him in 1816 (Exhibit C 46). Taluqa Khanpur belonged to Chaudhri Husain Bakhsh. It devolved on his death on his son Sarfaraz Ahmad. Taluqa Sikandarpur had been granted to Chaudhri Sarfaraz Ahmad by the British Government.

On the 3rd May 1870 Chaudhri Sarfaraz Ahmad deposited with the Chief Commissioner of Oudh what he described as his last Will and Testament in the presence of Raja Farzand Ali Khan, the *taluqdar* of Jahangirabad, and Nawab Ali Khan, the *taluqdar* of Salempur, both of whom attested the presentation of the Will (Exhibit 1). The Will purports to bear the signature of Chaudhri Sarfaraz Ahmad, but it bears no date and it is not clear whether the said signature was made in the presence of the Chief Commissioner and the above witnesses. Both, Raja Farzand Ali Khan and Nawab Ali Khan are dead. The genuineness of the Will is not, however, disputed by the main contending parties and may also be presumed from the circumstances established. On the 26th May 1870, *i.e.*, within 23 days of its presentation, Chaudhri Sarfaraz Ahmad died without taking any step to get the said Will registered in the manner required by section 13 of Act I of 1869. He left his mother, *Musammat* Chand Bibi; a widow, *Musammat* Bechan-un-nisa; a daughter, *Musammat* Zainab-un-nisa; a brother, Murtaza Husain; and a sister, *Musammat* Saghira Bibi, surviving him. By virtue of the Will the entire Taluqa Bhilwal with the villages Sharifabad and Allahpur of Taluqa Khanpur had been devised to *Musammat* Bechan-un-nisa for her life and after her to her daughter *Musammat* Zainab-un-nissa, and after her to the children of the latter, male and female, and the rest of the Taluqa Sikandarpur were to be enjoyed by Murtaza Husain and *Musammat* Bechan-un-nissa in equal shares, the latter holding her share for her life with remainder after her death to her daughter, *Musammat* Zainab-un-nissa; and after her to her children male or female. The Will enjoined on the legatees to live on the income of the property and declared that none of the heirs succeeding to the estate shall have any power of alienation. In regard to Taluqa Khanpur the Will further said that the *lambardari* and *qaem muqami* (succession) shall vest in the male issue and the daughter would have a right to maintenance. The validity and effect of the devises made by the Will form one of the subject-matter of contention in this litigation. If the Will was invalid, the person entitled to the estate of Chaudhri Sarfaraz Ahmad in preference to his widow *Musammat* Bechan-un-nisa, was his brother, Murtaza Husain, under section 22, clause (6), of Act I of 1869, as he had left no male issue. He had a grandson, Rafi-uz-zaman, by his daughter, *Musammat* Zainab-un-nisa, who was a minor about seven months old.

On the death of Chaudhri Sarfaraz Ahmad a contest arose between *Musammat* Bechan-un-nisa and Murtaza Husain. *Mussammat* Bechan-un-nisa claimed to be entitled to the estate under the Will of her husband. Murtaza Husain claimed to be the joint owner of the estate along with his brother, Chaudhri Sarfaraz Ahmad

and also claimed a right to inherit the estate under section 22, clause (6), of Act I of 1869. On the 3rd August 1870 mutation of names was effected, presumably on the reports of the *patwaris* of the villages concerned in accordance with the allotments made by the Will (Exhibits 4 and 5), but on the 7th September 1870 Murtaza Husain applied for mutation of names in his favour, alleging that the Will was invalid and claiming to be the sole heir to the estate under Act I of 1869 (Exhibit A 54). Meanwhile, on a reference made by the Deputy Commissioner of Bara Banki, the Commissioner took the view that Rafi-uz-zaman had a preferential right and he directed the Deputy Commissioner accordingly to assume the superintendence of the estate on behalf of Rafi-uz-zaman (Exhibit A 52). Apprehending that his right would be thereby endangered, Murtaza Husain sought to rely on the Will to show that Rafi-uz-zaman was described by Sarfaraz Ahmad as his daughter's son and was never adopted or treated in all respects as his own son. The Financial Commissioner, however, did not agree with the Commissioner and directed that the orders passed in the mutation proceeding relating to succession should not be interfered with (Exhibit A 55).

On the 9th February 1871 the parties agreed before the Deputy Commissioner of Bara Banki to abide by the Will of Sarfaraz Ahmad and to refer their disputes about certain provisions of the Will to abrbitration (Exhibit 2). On the 14th February 1871 they executed an agreement of reference to arbitration appointing Chaudhri Ghulam Farid, *taluqdar* of Bari, Pargana Rudauli, and Raghunath Singh, *taluqdar* of Pali, arbitrators, to settle the dispute between Chaudhri Murtaza Husain and Chaudhrain Saheba, the widow of Sarfaraz Ahmad, in accordance with the provisions entered in the Will of Sarfaraz Ahmad and about the property not entered therein and agreeing that they shall be bound by any decision the referees may give on considering the terms of the Will and other matters (Exhibit 6). The agreement was followed by prolonged proceedings before the arbitrators in which each party set up his or her respective rights. They ultimately agreed in regard to the property covered by the Will that the arbitrators should abide by the Will and "construe and explain" its provisions about certain matters in regard to which the parties were at difference (Exhibits 8 and 9). An award followed dealing with the property covered by the Will and that not covered thereby and distributing the same in a certain manner, (Exhibit 12). *Taluqa* Khanpur, excluding the villages Sharifabad and Allahpur, was to be divided equally between *Musammat* Bechan-un-nisa and Murtaza Husain; Taluqa Sikandarpur was to be similarly divided between them, and Taluqa Bhilwal, also known as Bhilwal Hasanpur, and the villages Sharifabad and Allahpur of Taluqa Khanpur were to go to *Musammat* Bechan-un-nissa exclusively. The villages not covered by the Will were also to be divided between *Musammat* Bechan-un-nisa and Murtaza Husain and each party was to be the owner of such moveable property as was in his or her possession. In regard to the direction contained in the Will restricting the power of alienation, the arbitrators declared that it was only admonitory and not intended to restrict the rights of Murtaza Husain in regard to what was his ancestral property. The exact scope of the authority given to the arbitrators and the construction to be placed on the award and the legal effect thereof form other important issues in this litigation. On the 21st August 1871 *Musammat* Bechan-un-nisa filed an application to enforce the award (Exhibit 14) to which certain objections were taken by Murtaza Husain. A decree was ultimately passed in accordance with the award on the 20th December 1871 (Exhibit F 7), which was upheld by the Privy Council on the 13th July 1876 (Exhibit A65). A perfect partition of the estate was subsequently effected between *Musammat* Bechan-un-nisa and Murtaza Husain by the Revenue Court. On the 30th December 1882 (see Exhibit 22 paragraph 3) the Court of Wards assumed the superintendence of the estate of *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa had meanwhile given birth to another son named Shafiq-uz-zaman. In June 1891, Rafiq-uz-zaman died. On the 15th September 1893 *Musammat* Bechan-un-nisa executed a Will by which she gave her entire estate to *Musammat* Zainab-un-nisa

and Shafiq-uz-zaman jointly for their lives without any power of alienation with an absolute and heritable vested remainder in favour of the latter on the death of the former (Exhibit A-97). On the 26th February 1895 *Musammat* Bechan-un-nisa died. *Musammat* Zainab-un-nisa thereupon applied for the entry of her name and that of her minor son Shafiq-uz-zaman, in the place of the deceased; and Mustafa Husain, son of Murtaza Husain, made an application to the same effect, claiming that he was the sole heir to the estate of Sarfaraz Ahmad. The Board of Revenue directed the Deputy Commissioner of Bara Banki, who was in charge of the estate to apply for mutation of names in favour of *Musammat* Zainab-un-nisa alone on the basis of the Will executed in her favour by Sarfaraz Ahmad (Exhibit 316). An application to that effect was accordingly made by the Court of Wards (Exhibit 6) which was contested by Mustafa Husain who was ultimately unsuccessful. On the 30th August 1907 *Musammat* Zainab-un-nisa died. The Court of Wards continued the superintendence of the estate on behalf of Shafiq-uz-zaman and got mutation of names effected in his favour without any objection having been raised by Mustafa Husain or any other person claiming to be interested in the property. The estate was then indebted to the extent of Rs. 39,000. Shafiq-uz-zaman raised a loan from the Upper India Bank, Limited, Meerut, for that amount on the joint security of himself and Hari Kishen Das and got the estate released on the 6th November 1908 (Exhibit W5).

The history of the estate thereafter is one of successive alienations and transfers by Shafiq-uz-zaman. He took various loans from time to time from different persons and eventually borrowed two lacs of rupees from the Upper India Bank, Limited, on the security of the estate for the payment of his liabilities. He transferred different portions of the property to different persons who are parties to the suit. On the 30th January 1912 he executed a deed of trust with the intention of making over the estate to the trustees for the benefit of his son, Sharif-uz-zaman, but soon after the trustees got possession, he took back possession. On the 27th January 1914 Shafiq-uz-zaman was adjudicated an insolvent on the application of one of his creditors and the Deputy Commissioner of Bara Banki was appointed Receiver of the estate for the benefit of his creditors.

Shafiq-uz-zaman had three sisters, *Musammat* Amina, *Musammat* Zarif-un-nisa and *Musammat* Manzur-un-nisa of whom *Musammat* Amina had died in the lifetime of her mother, *Musammat* Manzur-un-nisa died on the 7th June 1908, leaving as her heir her husband Nisar Ahmad Khan, and two sons Ali Haider Khan and Ishtiaq Ahmad Khan. *Musammat* Zarif-un-nisa and the heirs of *Musammat* Manzur-un-nisa claim to be the owners of half the estate by inheritance from *Musammat* Zainab-un-nisa. They sold a half of their interest in the estate to Raja Syed Abu Jafar of Pirpur. The first of the suits to which these appeals relate was filed by *Musammat* Zarif-un-nisa, the heirs of *Musammat* Manzur-un-nisa and the said transferee for possession of half of the estate and for mesne profits appertaining thereto, which was dismissed by the learned Subordinate Judge, Mr. Mohammad Raza on the 30th November 1917. His finding was that *Musammat* Bechan-un-nisa and after her her daughter, *Musammat* Zainab-un-nisa were given successive life-estates by the Will of Sarfaraz Ahmad with a vested remainder in favour of the children of the latter, that except the devises in favour of the children of *Musammat* Zainab-un-nisa, the said devises were not invalid for want of registration under section 13 of Act I of 1869 and that the award did not confer an absolute estate on *Musammat* Bechan-un-nisa but merely confirmed the devises granted by the Will. He further held that the award was conclusive only in regard to the rights of the parties represented in the arbitration proceedings and that the devise in favour of the children of *Musammat* Zainab-un-nisa being invalid, the reversion vested in the heir-at-law of the testator, that is Mustafa Husain. In the alternative he held that a custom of impartibility attached to the property held by *Musammat* Zainab-un-nisa, and that even if she were considered to be a full proprietor by inheritance from her mother, *Musammat* Bechan-un-nisa, the property

would go on her death to Shafiq-uz-zaman in preference to her daughters by virtue of that custom. It was also held that a family custom by which the daughters were excluded from inheritance from the paternal estate in the presence of sons was proved.

Encouraged by the above decision, Mustafa Husain followed with a suit for possession of the entire estate with mesne profits. It was tried by the Second Additional District Judge, Pandit Sitla Prasad Bajpai, who differed in some respects from the conclusions at which Mr. Muhammad Raza had arrived in the previous litigation. He agreed that by the Will of Chaudhri Sarfaraz Ahmad, *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa were only given successive life-estates but he held that the bequest in their favour and in favour of the children of the latter was void for want of registration. He then proceeded to consider the effect of the award and came to the conclusion that it confirmed the devises to *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa and the sons of the latter and gave them collectively an absolute interest in the estate, and that, though the possession of *Musammat* Zainab-un-nisa was not adverse, the plaintiff was not entitled to go behind the award, which was binding on the parties to the present litigation. He further held that some of the transferees acted in good faith and after due enquiry and were protected by section 41 of Act IV of 1882. A question was also raised before him as to whether Chaudhri Sarfaraz Ahmad held Taluqa Bilwal as a trustee for *Musammat* Bechan-un-nisa, but his finding on that point was that no trust was established. The correctness of the above findings is challenged here in these appeals.

The first question for consideration is, whether by virtue of the Will of Chaudhri Sarfaraz Ahmad anything more than a succession of life-estates was given to *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nissa and the children of the latter, and, if so, what was the nature of the estate given to each and were the devises made valid and enforceable. In the first paragraph of the Will, the testator declared that he had no son but only one daughter *Musammat* Zainab-un-nisa; that *Musammat* Zainab-un-nisa had a son, Rafiuz-zaman, and three daughters and that after him the ornaments, clothes and cash in their possession would remain in their full ownership one after another (*bad ek digar*). In the second paragraph he described his property, Taluqa Bhilwal Hasanpur and Khanpur, as ancestral and hereditary and Sikandarpur as a grant from the Government and asserted that he had under the *Sanad* full rights of transfer therein. He then proceeded to declare that after him his widow, after her, his daughter and after her, her issue, whether male or female, and his brother Murtaza Husain should obtain settlement thereof *in accordance with the terms of the Will* and be considered owners (*malik*) and his successor.

Paragraphs 3 to 7 referred to certain charges and other matters not relevant to the present dispute. In paragraph 8 the testator imposed a restriction on the right of every heir and successor of his to mortgage, sell or transfer the estate or any part thereof and enjoined every one of them to live on the profits and not to commit any waste.

In paragraph 9 he referred at the commencement to the proposed marriage of his daughter, *Musammat* Amina, with Fida Husain and gave directions about certain *Fateha* offerings. Then he gave separate directions about every *taluqa* and the charges of *guzara* and other payments imposed separately on each. As regards Hasanpur Bhilwal he said that it was the self-acquired property of his father-in-law Lutfullah and that after him its owner (*malik*) would be his wife Bibi Bechan; that the settlement of the revenue and of the *lambardari* thereof shall be made with her and after her with her only daughter *Musammat* Zainab-un-nissa; that after her her issue, male or female, shall be the owners and representatives, but the *lambardari* and representation (*qaem muqami*) shall be with the male issue and the daughters shall be entitled to *guzara* and maintenance. The direction regarding Taluqa Khanpur was "After me the settlement of revenue shall be with my wife and Murtaza Husain, my brother, Mauza

Sharifabad and Allahpur with the villages appertaining to them shall be in the possession and control of my wife and after her of her issue, either male or female. The Government shall recover the fixed revenue and they shall live on the profits. It would be better if the management of the other half of the *taluqa* also remained with Murtaza Husain and he defrayed the door expenses and paid the parol debts appertaining thereto. Accounts may be settled every year. When my grandson, Rafi-uz-zaman, attains the age of discretion he may manage his share of the property himself. This (course) will be advisable so long as Murtaza Husain is alive. This is my advice but ultimattely it will rest with the heirs to carry it out or not."

As regards Sikandarpur the directions were: "The settlement of Taluqa Sikandarpur which is a grant from the Government shall be made half with my wife and her issue and half with Murtaza Husain my brother."

By prescribing the manner of enjoyment and restricting the right of transfer for all time to come, the testator probably intended to create an entailed or an inalienable proprietary estate consisting of holders of successive life-estates of a certain description.

Paragraphs placing a restraint on the owner of alienation over all the heirs, applied equally to remote successors after the widow and daughter. Such an entail is not permitted under the Indian Law and would fail even if the Will had been valid by complying with all the conditions laid down in section 13 of Act I of 1869. In the second paragraph the testator declared his wife to be *malik* (proprietor) and *qaemmukam* (representative) of his, and the words used along with the name of his wife, *Musammat* Bechan-un-nisa, indicate how he desired the succession in entail to continue. In paragraph 9 also he described his wife as *malik* after his death and subsequently detailed the succession in various terms. As regards Bhilwal he mentioned in the entail her issue, *Musammat* Zainab-un-nisa and after her the daughter's issue, male or female. With regard to Khanpur the words are, "After his wife her issue, male or female" and in connection with Sikandarpur a general term is used, "My wife and her issue." The testator knew well enough what words to use for a life estate, because certain allowances were granted to certain people for lifetime in the Will and the words used in that connection were *ta hin hayat* (during the lifetime). The testator's intention clearly was to circumscribe the estate of his wife and his granddaughter as much as that of the successors to come after them. He had no power, however, to create an entailed estate. He could give a successive life-estate to certain persons, within the limits prescribed by section 12 of Act I of 1869, but the ultimate reversion must in that case be absolutely granted to a person or persons in existence on the expiry of the last life-estate and no restraint on alienation inconsistent with the grant of a full estate to the ultimate beneficiary or legatee can be recognised.

The devise must, therefore, be deemed to have comprised successive life estates to *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa with a full and unrestricted remainder on the death of latter in favour of her issue. The Will defines the issue (*aulad*) as either male or female but it goes on to say that if there be children both male and female the *lambardari* and the representation (*qaem muqami*) shall be vested in the male issue and daughters shall only be entitled to maintenance and support (*mustahaq guzara wa nan nafqa ki hongi*). The language used is somewhat unhappy and obscure, but reading it as a whole, it is obvious that the testator did not intend to exclude the female children of his daughter absolutely. His intention probably was that the property should devolve on the death of his daughter on her children, whether male or female, but if there were children both male and female, the *lambardari* and the succession would go only to the male children, and the female children would only be entitled to maintenance. A right to claim maintenance is much more limited in character than a right to claim accounts or a share of the profits and, except in the manner above suggested, it is not possible to arrive at any consistent intrepretation of the provisions of the Will in this particular.

ZARIF-UN-NISA *v.* SHAFIQ-UZ-ZAMAN.

According to Chaudhri Murtaza Husain, Chaudhri Sarfaraz Ahmad was in the habit of studying Act I of 1869 and had always kept a copy of it in his *basta*, or bundle of papers, and he used to keep himself informed of the provisions of the Act by reading it and hearing it read out (Exhibit A59). He failed, however, to realize that under section 13 of Act I of 1869 the registration of his Will was necessary under certain conditions or to take legal advice about the matter. Section 13 lays down that no *taluqdar* or grantee has any power to give or bequeath his estate or any portion thereof or any interest therein to any person not being either a person who, under the provisions of the Act, or under the ordinary law to which persons of the donor or testator's tribe and religion are subject, would have succeeded to such estate or to a portion thereof or to an interest therein, if such *taluqdar* or grantee, heir or legatee had died intestate except by an instrument of a gift or Will executed and attested not less than three months before the death of the donor or testator in the manner therein provided in the case of a gift or Will, as the case may be, and registered within one month, from the date of its execution. The Will of Chaudhri Sarfaraz Ahmad was neither executed and attested three months or more before his death in the manner provided by law nor registered within a month, from the date of its execution. Possibly, he imagined that the persons who were to be the objects of his bounty were persons who would succeed to the estate under the ordinary law to which persons of his tribe and religion were subject. But the ordinary law there referred to is the law governing the succession to such estates as described by section 23 in contradistinction to the special provisions about succession contained in section 22 of the Act. As their Lordships of the Privy Council observed in *Indar Kunwar* v. *Jalpal Kunwar* (1), section 12 is a "most difficult section" and its interpretation has given rise to much trouble in the past. Under the *Sanads* granted to the *taluqdars* an unlimited power of disposition was granted to them, which but for the *Sanads* many of them could not perhaps have exercised under their personal law. The Chief Commissioner, Sir Charles Wingfield, apprehended that some of them in their dotage, yielding to the influence of their wives, concubines and corrupt dependents, might disinherit their legal heirs in favour of younger sons and even of illegitimate offspring and devise their property in a manner opposed to all public feelings, justice or morality. Section 13 was devised to impose restrictions on sudden freaks of impluse. It insisted upon certain formalities in the case of gifts and devises and fixed certain time limits for the performance thereof in order that the strongest possible proof might be available of disposing mind, of deliberate intention in case the donee or legatee happened to be a person who was not the legal heir to the estate under the special rules of succession or the ordinary law applicable to such estates or one of his younger sons. The words " ordinary law " occur in section 13, 22 clause (11), 23, 30 and 31 of the Act ; but while sections 23, 30 and 31 deal with the question of succession to the estate where the special rules of succession laid down in section 22 are not or cease to be applicable thereto, and section 22, clause 11, deals with the rule of succession to the estate entered in the second, third and fifth of the lists on certain contingencies, section 13 deals with the rules of succession to the estate entered not only in the second, third and fifth of the lists but also with those entered in the fourth and sixth of the lists above referred to. The special provisions of the Act embodied in section 22, govern the succession to the estates mentioned in the second, third and fifth of the lists, while the ordinary law to which the persons of the donor's or testator's tribe and religion are subject govern the succession to the estates entered in the fourth and sixth lists. In the former class of estates the person who would succeed to the estates, if the *taluqdar* or grantee were to die intestate would be the person to whom the special provisions of section 22 would apply. In the latter class of estates the person, who would succeed to the estate, if the *taluq*

(1) 15 I. A. 127 at p. 148 15 C. 725; 12 Ind. Jur. 377; 5 Sar. P. C. J. 150; Rafique & Jackson's P. C. No. 102; 7 Ind. Dec, (N. S.) 1067 (P. C.).

dar or grantee died intestate, would be the person whom the ordinary law of the tribe or religion of the *taluqdar* or grantee would select. If the estate is one entered in Lists Nos. 2, 3, and 5 the succession to which is regulated by promogeniture or the special rules of succession laid down in section 22, the ordinary rules of the tribe and religion of the *taluqdar* or grantee would obviously be inapplicable, because the heir to such an estate would only be one individual, and the ordinary law may point to many. If the estate was one entered in Lists Nos. 4 and 6, the ordinary law of the tribe and religion of the testator would govern the succession to such an estate, and the person entitled to succeed to the same may be one or more, but they must be persons of equal degree. In other words, section 13 provides an exception in favour of a person who would have succeeded to the estate, if the *taluqdar* or grantee had died intestate under the special provisions relating to succession embodied in the Act, if the estate was one to which those special provisions relating to succession were applicable or under the ordinary law of the tribe and religion of the *taluqdar* or grantee, if the special provisions relating to succession, so laid down, were not applicable. The person in whose favour the exception has been made would in any case be the person who would have been the immediate heir or the heir-at-law of the *taluqdar* or grantee had the latter died intestate, according to the law applicable to his estate. A similar exception is made in favour of the younger son of the *taluqdar* or grantee if the estate was one entered in the third or the fifth of the lists mentioned in section 8, because by the rule of premogeniture or impartibility applicable to such estate, such a younger son would be out of the pale of immediate succession, and a gift or devise in his favour would not divert the estate out of the line.

The learned Subordinate Judge, who decided the first of these suits, held that the devises in favour of *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa were not invalid for want of registration, because they would have succeeded to the estate under the Muhammadan Law to which Chaudhri Sarfaraz Ahmad was subject had he died intestate. But the estate held by him was an estate governed by the provisions of section 22 of Act I of 1869 by which the operation of the Muhammadan Law was excluded. *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa could not have succeeded to the estate of Chaudhri Sarfaraz Ahmad had he died intestate because under section 22 clause (6) his heir-at-law or immediate heir was his brother, Murtaza Husain. The learned Additional District Judge, who decided the subsequent suit, rightly held that the ordinary law of the tribe and religion of Chaudhri Sarfaraz Ahmad was not applicable to the estate in question. They were estates entered in Lists Nos. 2 and 5, the succession to which was governed by the special rules of succession laid down in section 22. The devises in favour of *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa and the issue of the latter must, therefore, be regarded as invalid and unenforceable.

A reference has been made to a decision of this Court in *Tribhuwan Dat Ram* v. *Shambhu Dat Ram* (2) and certain observation in *Itraj Kuar* v. *Bacha Mahadeo Kuar* (3) but the value of those decisions is considerably shaken by the subsequent decisions of their Lordships of the Privy Council in *Balraj Kunwar* v. *Jagatpal Singh* (4), where, referring to the expression "would have succeeded" used in section 14, their Lordships held that those words must be confined to persons in the special line of succession that would have been applicable to the particular case if the donor or testator had died intestate, and the death had occurred at the date of the gift or in the case of a Will at the time when the succession opened. In other words, the expression 'a person who would have succeeded according to the provisions of the Act" was held to be equivalent to the persons or one of the persons to whom the estate would have descended according to the provisions

(2) Select Case No. 222.
(3) 5 O. C. 345.
(4) 26 A. 393; 8 C. W. N. 699; 31 I. A. 132; 1 A. L. J. 384; 7 O. C. 248; 11 Bom. L. R. 516; 8 Sar. P. C. J. 639 (P. C.).

of the special clause of section 22 applicable to the particular case. In the course of their examination of the other provisions of the Act their Lordships referred to section 13 and observed:—

"The learned Counsel for the respondent argued quite correctly that section 15 must be read in connection with sections 13 and 14, his contention was that Bisheshar was a person who would have succeeded, within the meaning of section 14, if Pirthipal had died without having made a transfer of the property and intestate. The real question is what is the meaning of the words 'would have succeeded' in sections 13 and 14. Of course if Bisheshar's case falls within section 14, section 15 can have no application to it.

"Their Lordships think that the learned Judges in the Court of the Judicial Commissioner have gone too far in holding as they did that any person mentioned in section 22 as a possible heir may be said to be a person who would have succeeded according to the provisions of the Act to the estate, if the testator had died intestate within the meaning of section 14. They think that the expression 'would have succeeded' must be confined to persons *in the special line of succession that would have been applicable to the particular case* if the transferor or testator had died intestate and the death had occurred at the date of the transfer, or in the case of a gift by Will, at the time when the succession opened. In short, they think that the expression 'a person who would have succeeded according to the provisions of the Act' is equivalent to the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of section 22 applicable to the particular case. Their Lordships do not agree with the view of the learned Counsel for the respondents that clause (2) of section 13 was introduced by mistake and may be disregarded altogether. On the contrary, they think that that clause throws a good deal of light on the words in dispute. A younger son of a *taluqdar* named in List No. III or List No. V is, no doubt, among the possible heirs of his father, but he is not within the prescribed line of succession, if the father leaves an eldest son or a male lineal descendant of an eldest son."

In *Bhalya Rabidat Singh* v. *Indar Kunwar* (5) their Lordships of the Privy Council held that the word 'intestate' in this sub-section (1) meant intestate as to the *talugdari* estate, that is, the estate as that expression is defined by the Act, the *taluqa* or moveable property to which alone the Act is declared to extend. It would appear from the decision in that case that their Lordships held the privileged person to mean the one person in the special line of succession according to the Act. The proper interpretation of the sub-section appears to us to be that the privilege is confined to the one person who would succeed to the *talugdar's* estate under the Act and that the words "under the ordinary law to which persons of the donor or testator's tribe and religion are subject" govern cases falling under section 22, clause (11) and section 23 of the Act. If there is a person existing, who would succeed under the special provisions of section 22 (first ten clauses), that person alone would be the privileged person. The word "or" distinguishes the person succeeding under the special provisions, from the person succeeding under the ordinary law, as circumscribed in the sub-section. It cannot be taken to have the significance of 'and'. If it were the desire of the Legislature to include in sub-section (1) all those persons who would be heirs under the ordinary law, it would not have been necessary to enact clause (2) in favour of a younger son of a *taluqdar* or grantee, whose name appears in the third or the fifth of the lists mentioned in section 8. It may be presumed from sub-section (2) that a younger son of a *taluqdar* whose name appears in List No. II would not be privileged under sub-section (1), so the only possible interpretation of sub-section (1) is that the privileged person is the heir under the special provisions of this Act, or the ordinary law applicable to that particular estate.

It is interesting to note that when Murtaza Husain appealed to the Privy Council against the Civil Court decree for the filing of the award made by the arbitrators their Lordships considered the disposition

(5) 16 C. 556; 16 I. A. 53; 13 Ind. Jur. 98; 5 Sar. P. C. J. 505; Rafique & Jackson's P. C. No. 110; 8 Ind. Dec. (N. S.) 367 (P. C.).

in Chaudhri Sarfaraz Ahmad's Will in favour of his wife and her successor to be invalid. After reviewing the facts of the Will and the reference to arbitration their Lordships* observed:—"In this state of things the brother, whose claim to inherit the Taluqs was liable to be defeated only by proof of the recognition of the grandson as a son .....was induced to enter into a submission to arbitration, the effect of which was to make his rights and the rights of the widow determinable according to the terms of the Will of the testator, and, therefore, for the purposes at all events of that arbitration, to recognise the sufficiency of the Will" (K 3 p. 274). Obviously, it was taken for granted that the bequests to the widow and daughter under an unregistered Will were not valid or that the Will did not stand in the way of Murtaza Husain's claim to the *taluqdari* property under section 22 (6) of Act I of 1869.

In *Ali Muhammad Khan* v. *Sajjadi Begam* [*Syed Azam Shah* v. *Syed Ahmad Shah*] (6) a similar view was taken of section 13. In that case a Muhammadan *taluqdar* had executed a gift of his estate in favour of his wife *Musammat* Hurmuzi Begam while his sons were alive. The learned Judges decided that *Musammat* Hurmuzi Begam was not one of the persons who would have succeeded to the estate, had Ahmad Ali Beg died intestate, without making a transfer and that, therefore, the property held by *Musammat* Hurmuzi Begam was governed by the Muhammadan Law.

It is difficult to conceive that it was intended to extend the exception as much to persons, who would have been entitled to inherit under the ordinary law in case of intestacy as if Act I of 1869 had not been passed as to those who would have succeeded under sections 22 or 23 of Act I of 1869 because, in that event, the scope of the exception would be so widened as to defeat the very object of the provision itself. It is noticeable that clause (2) of section 13 excludes from its operation List No. II altogether because List No. II deals with family custom the incidents of which include tanistry or the selection of the fittest person though he may be younger or junior in the line. As their Lordships say in *Balraj Kunwar* v. *Jagatpal Singh* (4), the expression "'a person who would have succeeded according to the provisions of the Act' is equivalent to 'the person or one of the persons whom the estate would have descended according to the provisions of the special clause of section 22 applicable to the particula rcase'." They are used in antithesis to the words "under the ordinary law," the former referring to the specific provisions relating to succession contained in the Act and the latter to the ordinary law made applicable by section 23 according as the estate which is the subject of devolution falls in one or the other of the lists. To find the person who would have succeeded to the estate entered in the Lists Nos. 2, 3 and 5 by applying the ordinary law would be as analogous as to find him by applying the special provisions of the Act relating to succession to the estates entered in Lists Nos. 4 and 5. The devises made in favour of *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa and the issue of the latter, so far as they relate to the estates entered in Lists Nos. 2 and 5, must, therefore, be regarded as unenforceable.

The next question for consideration is whether the award of the 16th March 1871 and the decree subsequently passed in accordance therewith has had the effect of confirming the devises made by the Will and confirming successive life-estates of *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa and whether that decree is binding on the parties to the present litigation. To appreciate the award and the proceedings which led up to it, it will be necessary to examine the claim put forward by each of the contending parties. By virtue of the Will certain properties were awarded to Murtaza Husain who would have been entitled to the whole estate of his brother, Chaudhri Sarfaraz Ahmad, under section 22, clause (6) of the Act had he died intestate; the devise made in his favour did not, therefore, require registration. But Murtaza Husain was afraid that he might lose the property, if Rafi-uz-zaman who was the son of *Musammat* Zainab-un-nisa, the daughter of Chaudhri Sarfaraz Ahmad, claimed the entire estate under section 22 clause (4), by asserting that he had been treated by Chau-

(6) 33 Ind. Cas. 516; 2 O. L. J. 758.

*Sec. 3 I. A. 209—[*Ed.*]

dhri Sarfaraz Ahmad in all respects as his own son. On the 5th August 1870 he entered into an agreement with Imtiaz-uz-zaman. the father of Rafi-uz-zaman, to consider the Will of Chaudhri Sarfaraz Ahmad invalid and to divide the whole property with him (Exhibit A47). Meanwhile mutation of names had already been effected in favour of *Musammat* Bechan-un-nisa in respect of the entire Taluqa Bhilwal Hasanpur and the villages of Sharifabad and Allahpur of Taluq Khanpur and in favour of *Musammat* Bechan-un-nisa and Murtaza Husain jointly in respect of the remaining portion of Taluqa Khanpur (Exhibits 4 and 5) but certain proceedings were pending in regard to Taluqa Sikandarpur. On the 27th September 1870 Murtaza Husain filed certain objections claiming that he was entitled to the entire estate of Chaudhri Sarfaraz Ahmad under section 22, clause (6), of Act I of 1869, and that the Will executed by the deceased was invalid and unenforceable (Exhibit A54). The Deputy Commissioner of Bara Banki was inclined to favour the Will but the Commissioner disagreed and expressed his opinion that Rafi-uz-zaman was entitled to the entire estate (Exhibit A51). On the 7th November 1870 the Financial Commissioner, however, directed that the orders passed by the Deputy Commissioner of Bara Banki in the mutation proceedings should not be interfered with (Exhibit A55). Subsequently, Murtaza Husain wrote two letters to Imtiaz-uz-zaman, the father of Rafi-uz-zaman, expressing his chagrin at attempts being made by certain persons to put Rafi-uz-zaman forward as the daughter's son, treated as a son by Chaudhri Sarfaraz Ahmad, and to obtain mutation of names in respect of the entire estate in his favour (Exhibits A113 and A114).

Soon after there was a conflict between *Musammat* Bechan-un-nisa and Murtaza Husain over the management of Taluqa Khanpur (Exhibits 16 and 17) and efforts were made by the Deputy Commissioner of Bara Banki to get a compromise effected. On the 9th February 1871 he wrote to the Deputy Commissioner of Rae Bareli, requesting him to postpone passing final orders in the mutation proceedings relating to Taluqa Sikandarpur and stating that the parties had agreed "to abide by the provisions of the Will of the late Chaudhri Sarfaraz Ahmad", certain passages of which had caused the disputes, and that the issue raised in respect thereof would be submitted to private arbitration (Exhibit 2). The Deputy Commissioner of Rae Bareli, however, refused to postpone the mutation proceedings and directed mutation of names to be effected in favour of Murtaza Husain (Exhibit 3). But on the 14th February 1871 *Musammat* Bechan-un-nisa and Murtaza Husain decided to refer the matters in dispute between them to arbitration and executed an agreement (Exhibit 6), the material portion whereof ran as follows—"Whereas in the presence of Mr. William Glynn, the Deputy Commissioner of Bara Banki, with our consent Chaudhri Ghulam Farid, *taluqdar* of Bari, Pargana Rudauli, and Raghunath Singh, *taluq dar* of Pali, have been appointed arbitrators to settle the dispute between the executant (Murtaza Husain, and the Chaudhrain Saheba, the the widow of brother Sarfaraz Ahmad, in accordance with the provisions entered in his Will and about the property not entered in the above-mentioned Will, now we do hereby declare and execute this document according to Act XVIII of 1869 (Act VIII of 1859) that on considering the terms entered in the Will and other matters in whatever way our referees will decide and settle our disputes we shall fully accept now and hereafter, and we will raise no objection to or resile from that decision hereafter." It is obvious from the agreement that the parties accepted the terms of the Will but were disagreed as to the interpretation of its terms and the application of some of the provisions thereof. There were also certain disputes about some other properties not covered by the Will. They wanted that the assistance of the Will should be invoked for the settlement of the disputes relating to the property covered thereby and they gave the arbitrators full authority to interpret and construe the Will and enforce its provisions in such manner as they thought proper. There were various statements of claim and replication put in by the parties between the 16th and the 19th February 1871, some

of which went beyond the Will and were even inconsistent with it. If these statements are read serially it will be observed that, on the one side, Murtaza Husain went on urging his claim even apart from the Will and repelling any possible claim by the daughter's son, and, on the other, the lady insisted upon bringing Murtaza Husain back to the Will, the terms of which he had accepted under the agreement to refer to arbitration. The lady's further pleas were that Bhilwal Hasanpur was really her own property, as it belonged to her father, and that Murtaza Husain should not be allowed to manage the half share of Khanpur bequeathed to her by her husband. On the 19th February 1871 the arbitrators recorded a proceeding as to the matters in issue between the parties. They narrated, first, the pleadings of the parties and then the final statement of Murtaza Husain that the decision ought to be based on the Will and that of the lady that the only things to be looked at were the provisions of the Will. They then observed that the real dispute was over the provisions of paragraph 8 of the Will, and that the other dispute was whether Murtaza Husain should remain the manager of the half share of the lady in Taluqa Khanpur, excluding Sharifabad and Allahpur. They recorded the statements of the parties on each of those matters and about certain liabilities and assets, moveable and immoveable, not covered by the Will. In the course of the proceedings, Safdar Ali, the general agent of *Musammat* Bechan-un-nisa, stated that the case had been referred to the arbitrators to explain the meaning of the Will and Murtaza Husain agreed that the decision ought to be made on the basis of the Will (Exhibit 8). Both of them then gave up the other titles set up by them in regard to the properties covered by the Will, and on the 19th February 1871 the arbitrators recorded: "After a long discussion the parties have agreed to this that they do not further press their different causes of action, namely, the claim for a partition according to the Muhammadan Law, and the inheritance based on custom and statutory law, but are agreed that the contents of the Will, in so far as they are disputed by them, be construed and explained, that in other respects the Will be upheld, but a decision be given with regard to such properties as are not mentioned in the Will, for instance, such villages as are separate from Taluqas Bhilwal and Khanpur mentioned in the Will, as also immovcable property in the possession of Chaudhrain Saheba and specification of debts and *dastgardan* (oral) liabilities be made to ascertain as to how much should be paid by each party (Exhibit 9). They then framed certain issues, the first two of which are of importance,—

(1) What is the true interpretation of paragraph 9 of the Will and what was the real intention of the testator, that is, whether the shares of both the parties should be partitioned with proprietary powers (*malikana*) in Taluqa Khanpur with the exception of Sharifabad and Allahpur where mutation is made in favour of the widow? (Note that it is refers to paragraph 8 of the Will). Who shall bear the *darwazi* expenses in each case?

(2) Whether Chaudhri Murtaza Husain should remain manager of the Khanpur estate according to the Will or whether the partition of that *taluqa* will be to the benefit of both the parties?

The next four issues are not pertinent to the present enquiry and the last and seventh issue was by way of test as to what each party would inherit under the Muhammadan Law.

The proceedings of the arbitrators make it clear that, to their understanding, their duty in regard to the properties covered by the Will was confined to the interpretation of clauses 8 and 9 of the Will. There were further statements put in by the parties (Exhibits A57 and 10) but they do not carry the matter any further so far as the arbitrators were concerned. On the 16th March 1871 the award was made. The decree at the end of the award gives in a tabular form the properties which were assigned in proprietary possession to Murtaza Husain and *Musammat* Bechan-un-nisa, respectively. To Murtaza Husain were given half of Taluqa Khanpur, half of Taluqa Sikandarpur and half the villages not covered by the Will. To *Musammat* Bechar-un-nisa were allotted Bhilwal, half of Taluqa Khanpur, half of Taluqa Sikandarpur, Sharifabad, and Allahpur, and a

half of the villages not included in the Will. The claims of both the parties to the cash and moveables were dismissed. Addressing themselves to the question whether the partition between *Musammat* Bechan-un-nisa and Murtaza Husain should be effected with proprietary rights or without any power in the capacity of *munsarim* or manager, they said that the provision in clause 8 of the Will, restraining an heir or successor from effecting a transfer, was entered simply for the sake of the protection of the property in that they could not accept it, firstly, because this wording was added, simply with a view to save the property from being wasted by way of advice (*nasihatan*); secondly; the withholding of the power of transfer in respect of such ancestral properties as have been divided in the lifetime of Chaudhri Sarfaraz Ahmad between him and Murtaza Husain is an obvious act of oppression; thirdly, such a Will in favour of the heirs is not allowed by the Muhammadan Law for the heir himself becomes the permanent owner; and, generally, according to the Muhammadan Law, the Will in favour of the heirs cannot be enforced without the consent of all the heirs. Referring to clause 9 they said. "As regards this point that Chaudhri Murtaza Husain, as long as he is alive, may remain the *munsarim* and when the daughter's son will be major he himself will look after his own affairs, we are of opinion that this wording is meant only for the management of the other half of Taluqa Khanpur and not as affecting the title (*haqiat*) of any party. Therefore, in our opinion, it should be partitioned with proprietary rights and the expenses to be incurred at the door will be paid by each party." (Exhibit 12). There cannot be any doubt on these facts that the arbitrators gave proprietary possession to each party with a full right of alienation according to their interpretation of the Will. Chaudhri Ghulam Farid wrote the judgment and the other arbitrator, Babu Ramnath Singh, appeneded a note, emphasizing: "I would not have agreed under any circumstances to the proprietary partition of the property of the *taluqa* but with a view to enforce the Will and in view of the reasons given in the judgment I agree with Chaudhri Ghulam Farid."

The learned Counsel for Mustafa Husain contends that the arbitrators had no power to go outside the reference and extend the estate created by the Will and that they could have only confirmed it. But the agreement gave full power to the arbitrators to settle the matters in dispute between the parties after due consideration of the terms of the Will and in view of what the parties subsequently stated, agreeing that the contents of the Will, in so far as they were disputed by them, be construed and explained (Exhibit 9) the arbitrators must be deemed to have had full authority to put such interpretation on clauses 8 and 9 of the Will as they thought proper. It is argued that the general agent of *Musammat* Bechan-un-nisa had admitted that under clause 8 of the Will no heir had any right of mortgage, sale or transfer and that his client had also no such right. But Murtaza Husain was not agreeable to that interpretation and contended that he was entitled to transfer as he was an heir and not merely a successor by devise. He further contended that he was entitled to manage the entire Taluqa Khanpur and to share in the village Sharifabad and Allahpur also. The arbitrators construed clause 8 as merely containing a direction or advise for the legatees to follow and came to the conclusion that each party was entitled to the division of the estate in proprietary right. In the view they took of clause 8 they could not have held it to be mandatory with regard to one person and directory in regard to another. A decree followed in accordance with the award which was confirmed by their Lordships of the Privy Council. It was not then contended that the award of proprietary right to Murtaza Husain or to *Musammat* Bechan-un-nisa was beyond the jurisdiction of the arbitrators and *ultra vires* and after a decree passed in accordance therewith, no such objection can now be entertained. In the course of their judgment confirming the award their Lordships observed.—"They are sensible, on the one hand, of the extreme impolicy of allowing parties to get out of awards upon objections which really do not affect the substantial justice of the case, and, on the other hand, they feel the necessity of not allowing arbitrators to act without

jurisdiction by doing that which the terms of the submission to arbitration do not entitle them to do. Upon the whole, however, their Lordships have come to the conclusion that the objection is not fatal to the filing of the award." *Chowdhry Murtaza Hossein* v. *Musammat Bibi Bachun-un-nissa* (7). As the award gave full proprietary estate to *Musammat* Bechan-un-nisa and to Murtaza Husain in the properties respectively awarded to them on what the arbitrators considered to be a right interpretation of clause 8 of the Will it is not open to the plaintiff who claims to derive his title from Murtaza Husain to go behind the decree and impeach the validity of what was then granted. The decree gave *Musammat* Bechan-un-nisa a full title and validated what might have been but for the award an act of trespass. She remained in proprietary possession thereafter in pursuance of the decree till her death in 1895.

The subsequent conduct of Murtaza Husain through whom one of the plaintiffs, Mustafa Husain, claims to derive his title, confirms the same view. On the 11th June 1878 Murtaza Husain and *Musammat* Bechan-un-nisa executed a mortgage-deed for a lac of rupees in favour of the Allahabad Bank, Ltd., (Exhibit C5) out of which Rs. 20,000 were taken by Murtaza Husain to pay the decree obtained by the Bank of Bengal against him and Rs. 80,000 were taken by *Musammat* Bechan-un-nisa to redeem a prior mortgage of certain villages of the Bhilwal estate and to pay personal debts due by her. The property mortgaged comprised certain villages of Taluqa Khanpur belonging to Murtaza Husain and *Musammat* Bechan-un-nisa and certain villages of Taluqas Bhilwal and Khanpur belonging solely to *Musammat* Bechan-un-nisa, the latter being described as owned and possessed by her. On the 14th June 1878 an indemnity bond was executed by *Musammat* Bechan-un-nisa in favour of Murtaza Husain, acknowledging that she was liable for Rs. 80,000 out of the sum of one lac taken from the Allahabad Bank, Ltd., and hypothecating certain villages of Taluqa Bhilwal for the discharge of any liability which Murtaza Husain might have incurred on account of her share of the debt, (Exhibit C6). In that indemnity bond the village Sharifabad and the six villages mortgaged with the Allahabad Bank, Limited, by *Musammat* Bechan-un-nisa were described as her separate property. The property hypothecated in that indemnity bond consisted of six villages of Taluqa Bhilwal other than those mortgaged before with the Allahabad Bank, Limited, and among other covenants an undertaking was given to *Musammat* Bechan-un-nisa that she shall not alienate or incumber any of the property hypothecated therein. At the time of registration *Musammat* Bechan-un-nisa was identified by Murtaza Husain, one of the present rival claimants.

On the 29th May 1880 *Musammat* Bechan-un-nisa executed another mortgage for Rs. 1,10,000 in favour of the Allahabad Bank, Limited, for the purpose of paying the money due by her on account of the previous mortgage and hypothecated certain villages of Taluqa Bhilwal and Taluqa Khanpur, describing the same as owned and possessed by her (Exhibit C29). A similar mortgage was made by Mustafa Husain and Fida Husain, sons of Murtaza Husain, who had died meanwhile, for Rs. 35,000 to pay the money due by their father on account of the previous mortgage (see reference in Exhibit C39).

Musammat Bechan-un-nisa was identified again at the time of registration by Mustafa Husain. If *Musammat* Bechan un-nisa had only a life-interest under the award it is hardly likely that Murtaza Husain would have joined her in executing the mortgage-deed in favour of the Allahabad Bank, Limited, or obtained an indemnity bond from her, much less allowed her to describe herself as the owner and possessor of the villages mortgaged Mustafa Husain, too, would have hardly attended at the time of registration to help her in getting the deeds registered.

On the 2nd October 1879 *Musammat* Bechan-un-nisa applied for the partition of certain villages of Taluqas Khanpur and Sikandarpur, basing her claim on the award and decree confirming the same

(7) 3 I. A. 209 at pp. 216, 217; 26 W. R. 10; 3 Sar. P. C. J. 663; Bald 86; Rafique & Jackson's P. C. No. 43; 3 Suth. P. C. J. 342 (P. C.).

and describing herself as holding proprietary rights therein (Exhibit A67). This application was opposed by Murtaza Husain who claimed that he was entitled to manage the same under the Will of Chaudhri Sarfaraz Ahmad until Rafi-uz-zaman attained majority, but he asserted no title of any kind in himself, vested or contingent (Exhibit A73). He, no doubt, referred to the award of the 16th March 1871 and mentioned that the arbitrators had no power to make a decision contrary to the Will, but his sole object in referring to that was to protect the interest of Rafi-uz-zaman as between whom and *Musammat* Bechan-un-nisa no decision, he said, had been arrived at. The objections of Murtaza Husain were disallowed by the Assistant Commissioner of Bara Banki on the 10th January 1880 (Exhibit A75) and the partition was eventually completed on the 15th February 1882 (Exhibit C4).

On the 14th September 1885 *Musammat* Bechan-un-nisa executed a Will by which she devised her entire estate to Rafi-uz-zaman, the son of her daughter *Musammat* Zainab-un-nisa, (Exhibit C27) but owing to the death of Rafi-uz-zaman on the 9th June 1891 she had to alter her disposition and appointed *Musammat* Zainab-un-nisa as her heir and successor on her death (Exhibit C28).

Subsequently, *Musammat* Zainab-un-nisa gave birth to her second son Shafiq-uz-zaman. *Musammat* Bechan-un-nisa then altered her disposition again. On the 15th September 1893 she executed a Will by which she devised her entire property in favour of Shafiq-uz-zaman and *Musammat* Zainab-un-nisa for their lives without any power of alienation with a heritable and vested remainder in favour of the latter on the death of the former (Exhibit A7). In that she referred again to the award and its confirmation by their Lordships of the Privy Council and claimed to have been in proprietary possession of the entire estate as the sole owner with full power of transfer.

Meanwhile, on the 30th December 1882, the Court of Wards took the property under the superintendence of the estate of *Musammat* Bechan-un-nisa at her request for the purpose of paying debts due by her. During the course of their management the Court of Wards paid a *guzara* allowance of Rs. 50 per mensem to *Musammat* Manzur-un-nisa and *Musammat* Zarif-un-nisa each. These were continued, according to the evidence of Nisar Ahmad Khan, the husband of *Musammat* Manzur-un-nisa (P. W. No. 2), even after the death of *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa, and there are pay bills and receipts on the record evidencing these payments (Exhibits F49, F50, F52, and F60 to F62). Some of the latter payments were made by Shafiq-uz-zaman and his trustees. If *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa possessed only a life-estate the acceptance of a *guzara* from the Court of Wards, which held the charge of their estates, may be conclusive, but the acceptance of the *guzara* from Shafiq-uz-zaman whose title is now disputed and his trustees is not without its significance.

The learned Additional Judge, who decided the subsequent suit, treated the awards as a family settlement. But a family settlement implies a mutual settlement by certain contending parties, belonging to the same family of some disputed claims and rights, and an award of arbitration is not a settlement of that character. It is the decision of a tribunal constituted by the contending parties for the settlement of their disputes and, in so far as it is a valid and lawful award, it is binding on the parties to the arbitration proceedings and their privies Whether such an award is binding on persons whose interests are analogous to those of the parties to the arbitration proceedings is a matter which is not capable of an inflexible answer. In each case that has to be determined whether the person who agreed to the reference to arbitration was seeking to assert a right common to himself and others and had acted fairly in representing those whose interests he had undertaken to protect. *Musammat* Bechan-un-nisa did not seek in the present case to represent the interests of *Musammat* Zainab-un-nisa or Rafi-uz-zaman. There is no reference to the interest claimable by them in the agreement of reference. *Musammat* Bechan-un-nisa had already succeeded in getting mutation of names effected in pursuance of the Will in regard to the property allotted to her except Taluqa Sikandarpur, about which

an application for mutation of names was pending. The danger of Rafi-uz-zaman getting the entire property under section 22, clause (4) of Act I of 1869 in defeasance of the Will was present and troubling Murtaza Husain. *Musammat* Bechan-un-nisa was setting up her rights under the Will. Murtaza Husain was deniyng the validity of the Will and claiming certain rights independently of Chaudhri Sarfaraz Ahmad and also as his heir. For the latter purpose he was also anxious to show that Rafi-uz-zaman was not an heir under section 22, clause (4) of Act I of 1869 and had no preferential right. He subsequently agreed to abide by the Will in regard to the property covered thereby and asked the arbitrators to decide the matters in difference between him and *Musammat* Bechan-un-nisa by construing and explaining the Will as far as it affected their rights. In regard to the property not covered by the Will the arbitrators asked themselves how the division would have to be made, if the Will had been in existence. They determined the legal shares to which *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa and other heirs of Chaudhri Sarfaraz Ahmad would be entitled and decided to allot a half share to Murtaza Husain and the remainder to *Musammat* Bechan-un-nisa after taking into consideration what they had already received under the Will. They admitted that *Musammat* Zainab-un-nisa was entitled to an 8-anna share under the Muhammadan Law but they preferred to treat Taluqa Khanpur, including the village Sharifabad, as the property of Chaudhri Husain Bakhsh and Taluqa Bhilwal Hasanpur and Sikandarpur as the property of Chaudhri Sarfaraz Ahmad and they awarded Murtaza Husain a 7/20ths share out of the former and a 10/72nds share out of the latter, exclusive of the property not covered by the Will, in proprietary right. No rights were reserved in favour of *Musammat* Zainab-un-nisa.

Musammat Bechan-un-nisa applied to enforce the award as if she was claiming a proprietary interest in the property covered by the Will. She ignored the rights of *Musammat* Zainab-un-nisa under the Muhammadan Law in regard to the property not covered by the Will. Before the arbitrators she insisted on the rights conferred by the Will being considered, but when she sought to enforce the award she claimed the rights conferred on her by the award to the detriment of the rights conferred on *Musammat* Zainab-un-nisa and her issue, by the Will. The right to the immediate possession of the estate after the death of Chaudhri Sarfaraz Ahmad was the main question which the arbitrators had before them for consideration and by a curious medley of the provisions of the Will and the provisions of the Muhammadan Law they arrived at the conclusion that Murtaza Husain was entitled to certain properties in proprietary right. By granting a decree for partition in proprietary right, the award practically ignored the rights claimable by *Musammat* Zainab-un-nisa and her issue and it cannot be said that *Musammat* Bechan-un-nisa was representing them when she obtained a decree in enforcement of the award.

It is argued on behalf of the plaintiffs that the right awarded to *Musammat* Bechan-un-nisa by the award represented in a cumulative form the rights of *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa and the issue of the latter, but in the application made by her to enforce the award she said nothing to indicate that she was seeking to enforce rights common to her and to her daughter and her issue (Exhibit 14). Section 11, Explanation VI, of the Code of Civil Procedure applies to a common right asserted by certain persons on behalf of themselves and others but not to rights which are not common but several and distinct as in this instance. The validity of the Will might have been an issue common to the rights claimable by *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa and the issue of the latter, but the rights awarded to each by the Will were separate and distinct, and any construction placed in regard to the validity of the Will or the rights conferred thereby would not bind persons who were not parties to the litigation and did not derive title through them.

The plaintiff Mustafa Husain, derives his title through his father, Murtaza Husain who would have been entitled to the estate under section 22, clause (6) of Act I of 1869, had Chaudhri Sarfaraz Ahmad

died intestate, Murtaza Husain accepted the Will and agreed before the arbitrators that his rights and those of *Musammat* Bechan-un-nisa, the contending claimant, should be determined on the basis of the Will, and the interpretation or construction then placed on some of the provisions of the Will and the rights awarded by the arbitrators are, therefore, binding on him and the plaintiff Mustafa Husain, who derives his title from him.

By virtue of the Will *Musammat* Bechan-un-nisa was awarded an absolute estate. The plaintiff Mustafa Husain does not seek to claim any title through her. *Musammat* Zainab-un-nisa was one of her heirs and she and her heir can set up the award and the decree passed in accordance with it as a bar to the determination of any question then decided between *Musammat* Bechan-un-nisa and Murtaza Husain. To that extent the award and the decree are binding on Mustafa Husain and the legal representatives of *Musammat* Bechan-un-nisa. On behalf of some of the plaintiffs reliance is placed on the decision in *Badar Bee* v. *Habib Merican Noordin* (8), *Ramachandra Rao* v. *A. N. S. Ramachandra Rao* (9) and *George Henry Hook* v. *Administrator-General of Bengal* (10). In the case first mentioned, there was a decision on the construction of the testator's Will as to the destination of the funds realised from the operation of the trust and that decision was recognised or re-affirmed by a subsequent decree which was duly served on such of the residuary legatees as were not parties to the proceedings, and it was held in those circumstances that the decision was practically a decision *inter partes* and cannot be re-opened. In the second case, a decision in a land acquisition dispute as to whether a certain person had an absolute estate or a life-interest was held to be a bar to a subsequent decision of the same matter between the persons whose titles were so declared or their representatives-in-interest. In the case last mentioned, the decision in an administration suit, in which the question of the destination of the income or the *corpus* of the fund on the happening of a certain contingency, was held to bar the subsequent determination of the same matter. Those cases bear no analogy to the present case. By virtue of the award *Musammat* Bechan-un-nisa was not granted a life-estate. She was granted a full proprietary title. The award could be questioned by those who were no parties to the arbitration proceedings and who denied that *Musammat* Bechan-un-nisa had anything more than a life-estate under the Will, but not by a person who was a party to the arbitration or to the decree passed in accordance with it or by his representatives-in-interest. The effect of the award and the decree is to bar any rights claimable by Murtaza Husain or his representatives-in-interest in excess thereof. The property in dispute must, therefore, be deemed to have been held by *Musammat* Bechan-un-nisa in proprietary right and it passed on her death to her heirs under the Muhammadan Law.

The devise made by *Musammat* Bechan-un-nisa in favour of *Musammat* Zainab-un-nisa and Shafiq-uz-zaman by her Will of the 15th September 1893 is inoperative because under the Muhammadan Law a devise in favour of one of the heirs is inoperative without the consent of the other heirs. The heirs of *Musammat* Bechan-un-nisa at the time of her death were her daughter and two residuaries, Ahmad Husain and Abdul Razzaq. It is stated that they were present at the time the Will was executed, but, as the learned Subordinate Judge who decided the first of these suits points out, the evidence produced on that point is untrustworthy. Ahmad Husain and Abdul Razzaq did not at any time claim the estate. *Musammat* Zainab-un-nisa obtained mutation of names in her favour in respect of the entire estate and she remained in possession thereof till her death in 1907.

(8) (1909) A. C. 615; 78 L. J. P. C. 161; 101 L. T. 161.

(9) 67 Ind. Cas. 405; 45 M. 320; 30 M. L. T. 104; 26 C. W. N. 713; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. P. C.) 80; 20 A. L. J. 684; 43 M. L. J. 78, 24 Bom. L. R. 963 (P. C.).

(10) 63 Ind. Cas. 931; 48 C. 411; 19 A. L. J. 396; 40 M. L. J. 423; 29 M. L. T. 332; (1921) M. W. N. 333; 33 C. L. J. 105; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 I. A. 187 (P. C.).

Her possession was adverse to the said residuaries and she will be deemed to have acquired an absolute title to the entire property partly by inheritance and partly by adverse possession for a period of more than twelve years at the time of her death.

It is argued on behalf of one of the plaintiffs that *Musammat* Zainab-un-nisa was content to take a life-estate in pursuance of the Will of her father Chaudhri Sarfaraz Ahmad, and that she never set up any higher title during the period of her possession. It appears that an application was made by *Musammat* Zainab-un-nisa on the 22nd March 1895 on behalf of herself and her son, Shafiq-uz-zaman wherein she stated that her mother, *Musammat* Bechan-un-nisa, was in proprietary possession of the property in dispute as an absolute owner under the award of the 16th March 1871, and set up a claim on the basis of the Will executed by her on the 15th September 1893. The Deputy Commissioner thereupon reported the facts to the higher Authorities and asked for their instructions before taking any action. On the 1st April 1895 an application was filed by Mustafa Husain for mutation of names in his favour in respect of the same property; but it was opposed by *Musammat* Zainab-un-nisa on the ground mentioned in her previous application and also on the ground that she was entitled to inherit irrespective of her mother's Will (Exhibit A 99). The Board of Revenue directed the Deputy Commissioner of Bara Banki to have mutation of names effected in favour of *Musammat* Zainab-un-nisa alone on the basis of the Will of the late Chaudhri Sarfaraz Ahmad. On the 20th June 1895 the Chief Commissioner of Oudh directed that *Musammat* Zainab-un-nisa was disqualified to hold the estate and that the Court of Wards should continue in possession of the same as manager on her behalf. An application for mutation of names was made accordingly by the Deputy Commissioner in charge of the estate on behalf of *Musammat* Zainab-un-nisa as the heir of her mother, *Musammat* Bechan-un-nisa. It was opposed by Mustafa Husain who contended that *Musammat* Bechan-un-nisa had only a life interest and that on her death the estate devolved on him according to the custom of the family and Act I of 1869. The Assistant Collector directed mutation of names to be effected in favour of *Musammat* Zainab-un-nisa, holding that she was entitled to the said property by virtue of the Will effected by Chaudhri Sarfaraz Ahmad and that executed by *Musammat* Bechan-un-nisa in her favour. On appeal it was held that if the Will executed by Chaudhri Sarfaraz Ahmad granting a limited interest to *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa was invalid, the possession of *Musammat* Bechan-un-nisa must be deemed to have been adverse and the claim of Mustafa Husain was in any event barred by limitation. It was also held that the decree passed in accordance with the award was binding on the parties (Exhibit A102). The order directing the entry of the name of *Musammat* Zainab-un-nisa in the place of her deceased mother was, therefore, upheld. *Musammat* Zainab-un-nisa thereafter remained in possession of the estate till her death in 1907.

There is nothing in the applications for mutations of names made by *Musammat* Zainab-un-nisa to show that she claimed only a life-interest in the property in dispute. The letter sent by the Board of Revenue to the Deputy Commissioner of Bara Banki (Exhibit 316) no doubt directed that mutation of names should be obtained in favour of *Musammat* Zainab-un-nisa on the basis of the Will of the late Chaudhri Sarfaraz Ahmad, but the Court of Wards was then in possession of the estate pending the decision of the question of title in the mutation proceedings, and till the lady was declared to be disqualified the Deputy Commissioner of Bara Banki was directed to retain superintendence of the estate on her behalf under sections 162 and 165 of the Oudh Land Revenue Act (XVII of 1876) then in force. Any statements made either by the Deputy Commissioner or by the Board of Revenue in derogation of her rights would not be deemed to have been made by them on her behalf or as her agent. What was said by the Board of Revenue was, moreover, merely an expression of opinion by persons who had no authority to bind *Musammat* Zainab-un-nisa at the time.

In the applications made by the Deputy Commissioner of Bara Banki for mutation of names on her behalf she was only described as an heir of *Musammat* Bechan-un-nisa (Exhibit 6). The judgment of the Assistant Collector who decided the mutation proceedings indicates that *Musammat* Zainab-un-nisa prosecuted the litigation herself through her Counsel and claimed full proprietary title for herself and her son (Exhibit A9). The order for mutatition of names contained no reservation that she was only to have a life-estate. *Musammat* Zainab-un-nisa all along asserted her title under the Will of her mother and under the Muhammadan Law. She perfected her title by adverse possession against her residuary heirs, Ahmad Husain and Abdul Razzaq, who never claimed any share by remaining in possession for over twelve years. She could tack her possession to that of *Musammat* Bechan-un-nisa who had similarly been in possession under the award, which gave her a proprietary title since 1871.

If *Musammat* Bechan-un-nisa had an absolute title and *Musammat* Zainab-un-nisa had been in adverse possession of the disputed property since the death of her mother, Mustafa Husain would not have any right whatever. If, on the other hand, *Musammat* Bechan-un-nisa had only a life-estate the claim of Mustafa Husain would still be barred under Art. 141 of the Indian Limitation Act (IX of 1908) as he took no steps to obtain possession after he failed in the mutation proceedings within twelve years of her death. Art. 144 has no application for as observed in *Runchordas Vandravandas* v. *Parbatibai* (11) that Article does not apply where a suit is otherwise specially provided for. Art. 141 provides for a suit by a person entitled to possession on the death of a Hindu or Muhammadan female, but, as explained in *Ghisa Singh* v. *Gajraj Singh* (12) and *Bisheshar Bakhsh Singh* v. *Rameshar Bakhsh Singh* (13), it does not apply where the Hindu or Muhammadan female has been in possession of a full estate.

A reference has been made on behalf of Mustafa Husain to the application made by *Musammat* Bechan-un-nisa on the 23rd October 1889 for the release of her property from the management of the Court of Wards (Exhibit 22) and to a similar application made by *Musammat* Zainab-un-nisa on the 12th April 1898 (Exhibit 23). In the former application it was stated on behalf of *Musammat* Bechan-un-nisa by her Counsel that she had presented a petition on the 14th September 1882 asking the Court of Wards to assume the management of her estate because under the Will of her husband she and her daughter *Musammat* Zainab-un-nisa had only a life-interest in the said property and her grandson, Rafi-uz-zaman, was a minor. In the latter application *Musammat* Zainab-un-nisa made a similar reference to the Will of Chaudhri Sartaraz Ahmad and stated that the property in question had been bequeathed to *Musammat* Bechan-un-nisa for her life with remainder to her daughter, the petitioner, and the remainder over to such issue, male or female of the petitioner as should survive her. But any admissions of that character made by *Musammat* Bechan-un-nisa or Zainab-un-nisa as to the construction or the effect of the Will of Chaudhri Sarfaraz Ahmad would not estop them from claiming the full estate, if it was subsequently discovered that their interpretation of the Will was not correct or that by virtue of a subsequent award larger rights had been conceded. If Murtaza Husain could not go behind the award, his son, Mustafa Husain, could still less do so. An application was made by Shafiq-uz-zaman, during the lifetime of *Musammat* Zainab-un-nisa for the entry of his name in the revenue papers in the place of *Musammat* Zainab-un-nisa in accordance with the Will of *Musammat* Bechan-un-nisa of the 15th September 1893 (Exhibit 195). He suggested that he was the holder of an absolute estate under that Will and that his mother, *Musammat* Zainab-un-nisa, held and enjoyed the property with him during the term of her natural life, without any power of transfer. The Special Manager of the

(11) 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 26 I. A. 71; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.).
(12) 3 Ind. Cas. 371; 18 O. C. 289; 3 O. L. J. 45.
(13) 44 Ind. Cas. 3[illegible]; 21 O[illegible]. 1; 4 O. L. J. 648.

Court of Wards called on *Musammat* Zainab-un-nisa to enquire what she had to say about the matter. Her reply was that she would be pleased if the name of her son was entered jointly with her name in the Government and estate papers provided there was no partition of the estate as long as she was alive and that she spirit of the Will under which both she and her son inherited the property from *Musammat* Bechan-un-nisa was strictly maintained (Exhibit C 18). On the 30th November 1906 the Board of Revenue replied that the Will of *Musammat* Bechan-un-nisa was not consistent with that of Chaudhri Sarfaraz Ahmad under which Shafiq-uz-zaman was only allowed a reversionary interest and asked the Deputy Commissioner to intimate to Shafiq-uz-zaman its inability to accede to his request, (Exhibit 198). For the purpose of combating that view, Shafiq-uz-zaman took steps to obtain the opinion of the late Sir Sundar Lal, an eminent Advocate of these Provinces, in regard to his title to the estate. In that opinion the late Sir Sundar Lal, after giving a statement of the case and question submitted to him for opinion said:—"Under the recent ruling of the Privy Council in the case of *Balraj Kunwar* v. *Jagatpal Singh* (4) the Will in favour of *Musammat* Bechan-un-nisa was void under section 13 of Act I of 1869. Chaudhri Sarfaraz Ahmad was a *taluqdar* within the meaning of that Act and on his death the estate passed to his brother. By the award made between the brother on the one side and *Musammat* Bechan-un-nisa on the other which was confirmed by the Privy Council, the lady got the property in dispute in absolute estate. She was not a *taluqdar* and the succession to her property is governed by the rules of Mahammadan Law. She could by Will dispose of this estate to the extent permitted by the Muhammadan Law. By the Will she has made, her estate is conferred on her daughter and her daughter's son jointly. The daughter has a life-estate with remainder to the son. The daughter's son has no present right in the estate under the Muhammadan Law, but as the daughter assents to the estate conferred on her by the Will, there is no difficulty" (Exhibit C31). This opinion was given on the 20th October 1907. *Musammat* Zainab-un-nisa died on the 30th August 1907. Shafiq-uz-zaman then got mutation of names effected in his favour and obtained a release of the estate from the Court of Wards by raising a loan from the Bank of Upper India, Limited, and paying the debt then due by the estate.

It would be necessary to refer to the opinion of the late Sir Sundar Lal hereafter in another connection. It is sufficient here to state that neither *Musammat* Zainab-un-nisa nor Shafiq-uz-zaman relied at any time in support of her or his title on the Will of Chaudhri Sarfaraz Ahmad. In the application for mutation of names made by *Musammat* Zainab-un-nisa she relied on the Will made by *Musammat* Bechan un-nisa and also on her right of inheritance. Shafiq-uz-zaman similarly relied on the Will of *Musammat* Bechan-un-nisa and asserted his absolute title to the property left by her. So far as *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa and Shafiq-uz-zaman were concerned, the Will of Chaudhri Sarfaraz Ahmad was, for all intents and purposes, invalid under section 13 of Act I of 1869 and he must, therefore, be deemed to have died intestate as to his estate. The effect of the award was to help the legatees to carry out what the arbitrators thought represented the wishes of the testator; or, in other words, to substitute for the title sought to be granted by the Will a title recognised and validated by the award. The arbitrators attempted to act in conformity with that Will, so far as they could interpret it, it is immaterial whether they interpreted it rightly or wrongly. They had the authority and the jurisdiction to interpret the same and they gave their award in accordance with their interpretation of it. That award was confirmed by a decree by which, if *Musammat* Bechan-un-nisa and Murtaza Husain were awarded absolute estates, the parties who claim to derive their title from them must be deemed to be bound. It is equally immaterial what *Musammat* Bechan-un-nisa and *Musammat* Zainab-un-nisa thought about the construction of the Will. The title of *Musammat* Bechan-un-nisa rested on the award and the decree confirming it. The award gave a proprietary right which passed on the death

of *Musammat* Bechan-un-nisa to *Musammat* Zainab-un-nisa, her daughter, and on the death of the latter to her lawful heir, as if no Will of Chaudhri Sarfaraz Ahmad had been in existence.

The consent of the parties cannot validate a Will, which is otherwise void or unenforceable. It may create a new title to take the place of that which was inchoate, defective or imperfect. Whether the award and the decree created such a new title or merely confirmed and validated the disposition made by the Will in favour of *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa and the children of the latter, the claim of Mustafa Husain must in any event fail.

We now come to a discussion of the most difficult question in the suit filed by one of the sisters and the heirs of another sister as to the persons entitled to succeed to the property on the death of *Musammat* Zainab-un-nisa; in other words, whether Shafiq-uz-zaman was entitled to the whole estate on the death of *Musammat* Zainab-un-nisa or whether the plaintiffs in the earlier of these suits were entitled to half the estate under the Muhammadan Law It is argued on behalf of the latter that under the Will of Chaudhri Sarfaraz Ahmad the children of *Musammat* Zainab-un-nisa were entitled to share equally, and, that if the Will was not operative, the burden lay on the defendants to prove any custom varying the ordinary Muhammadan Law of inheritance. The Will was clearly inoperative, because of its failure to satisfy the conditions imposed by section 13 of Act I of 1869. The arbitrators passed no decree in favour of *Musammat* Zainab-un-nisa or her children. They divided the estate covered by the Will and that not covered by it between *Musammat* Bechan-un-nisa and Murtaza Husain and directed each of them to pay half the debts. They refused to allow *Musammat* Bechan-un-nisa the dower-debt due to her which, even according to Murtaza Husain, amounted to nothing less than Rs. 30,000. They referred to the share to which *Musammat* Zainab-un-nisa would have been entitled under the Muhammadan Law in the property not covered by the Will but they awarded no share to her. They awarded the properties allotted respectively to *Musammat* Bechan-un-nisa and Murtaza Husain in proprietary rights, and as the Will executed by *Musammat* Bechan-un-nisa was invalid, we are relegated to the method of succession to be followed in the case of a woman dying intestate in the family of Chaudhri Sarfaraz Ahmad. Chaudhri Sarfaraz Ahmad did not hold the Bhilwal estate as a trustee for *Musammat* Bechan-un-nisa. After the confiscation of Oudh the settlement of the estate was made with him and a *Sanad* was granted recognising his absolute title to it. His name was entered in List No. II in respect of Taluqas Bhilwal and Khanpur showing that the succession to his estate was governed by the family custom of a single heir succession. By virtue of the award the estate passed to a person who would not have succeeded to if under Act I of 1869 and the incidents of succession, applicable to the estate, as laid down by the Statute, ceased to be applicable to the estate after it passed into the hands of *Musammat* Bechan-un-nisa. The family customs governing the possession to the estate, however, continued to be applicable. Two such customs were pleaded by the defence (1) a single heir succession and (2) exclusion of daughters by sons. The custom of the family of Lutf-ullah ceased to be applicable, because the estate was no longer the estate of Lutf-ullah, and *Musammat* Zainab-un-nisa, who inherited it in part from *Musammat* Bechan-un-nisa and acquired it in part by adverse possession, was not governed by it. The family custom of impartibility governing the estate in the hands of Chaudhri Sarfaraz Ahmad could govern it in the hands of *Musammat* Zainab-un-nisa. In the hands of the former section 8 of Act I of 1869 raised a conclusive presumption that the estate was governed by the custom of a single heir succession. In the hands of the latter the existence of such a family custom could be deduced from the entry of the estate in List No. II, but the deduction would be rebuttable. In *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (14)

(14) 36 Ind. Cas. 299; 38 A. 552; 20 M. L. J. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 704; (1916) 2 M. W. N. 555; 25 C. L. J. 11; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 81; 4 L. W. 538; 43 I. A. 269 (P. C.).

the dispute centered round certain non-*taluqadari* properties a share in which was claimed by a younger son and it was held by this Court and by the Privy Council that the presumption applicable to an estate entered in List No. II would also apply to an estate not so entered but in regard to the latter the presumption would not be conclusive. We think that the presumption cannot be wholly done away with on the estate being removed from the provisions of the Act so long as it remains in the family, though it may not be conclusive under section 10. From the entry in List No. II based on a specific family custom, there arises a presumption of a pre-existing custom attached to that estate, on which the inclusion of that estate in List No. II was based.

In *Ali Muhammad Khan* v. *Sajjadi Begam* [*Syed Azam Shah* v. *Syed Ahmad Shah*] (6) it was held that the effect of a transfer to a third person was to render the property partible and that the mere fact that the alienee was the wife of the alienor made no difference. In the opinion of the learned Judges, property given to a woman becomes, under the Muhammadan Law, an independent stock of descent and the character if impartibility ceases to be applicable to the estate because the custom is not one by which an alienee can be bound. In the present suit the property has come back to Chaudhri Sarfaraz Ahmad's family and we are not discussing succession to Sarfaraz Ahmad's widow. In the case above cited, the learned Judges applied the ordinary Muhammadan Law of succession to the property held by a daughter and by a son which they received by inheritance from the widow *Musammat* Hurmuzi Begam. But it should be noted that there was no discussion there about the applicability of the custom of the family to properties in the hands of a daughter and a son of Jamshed Ali Khan. It does not appear to have been argued. It may also be pointed out that the judgment was delivered a year prior to the judgment of the Privy Council in *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (the *Deegaon case*) (14). There is also a distinguishing feature in so far that *Musammat* Hurmuzi Begam was a transferee under a valid deed of gift and the provisions of section 15 of the Act applied to her, while *Musammat* Bechan-un-nisa was not. *Musammat* Bechan-un-nisa may properly be said to have acquired the property under a decree of Court, a kind of transfer to which no particular incidents are attached in the Act. The entail provisions of Act I of 1869 have repeatedly been examined by their Lordships of the Privy Council and all these decisions have been recently considered in the case of *Sitla Bakhsh Singh* v. *Sital Singh* (15). That particular case related to the property of a *taluqdar* in List No. III in whose case no presumption of a pre-existing custom of single heir succession arose. The rule of primogeniture in List No. III was a creature of Statute Law and when the property was freed from the limitations of the Act the rule failed to apply. As regards the property of *taluqdars* of List No. II, the pre-existing custom will cease to have application while it is in the possession of a person out of that particular family. While it was in the hands of *Musammat* Bechan-un-nisa, the rule attaching to it of a single heir succession was removed, because the custom of Chaudhri Sarfaraz Ahmad's family did not apply to her. "If the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the fetter of the entail, such as it is, should no longer apply to the estate" [*Balraj Kunwar's case* (4)]. At the same time the custom in Chaudhri Sarfaraz Ahmad's family was not abrogated and would attach to the property when it returned to the family in the hands of *Musammat* Zainab-un-nisa. The property was not an estate under the Act in the hands of *Musammat* Zainab-un-nisa; and so, though we may not agree with the learned Subordinate Judge that there was under section 10 conclusive evidence of the existence of the custom which cannot be rebutted, the entry of Chaudhri Sarfaraz Ahmad's name in List No. II is a fact of importance and the evidence on the record must be examined from that point of view.

(15) 60 Ind. Cas. 548; 24 O. C. 107; 19 A. L. J. 337; 40 M. L. J. 449; 8 O. L. J. 214; 25 C. W. N. 721; 33 C. L. J. 520; 43 A. 245; 29 M. L. T. 390. (P.C.).

in the light of the presumption of the existence of the custom of a single heir succession, in his family deducible therefrom.

It should be made clear that the Sikandarpur estate entered in List No. V will not be differently treated. On the establishment of a particular custom in Chaudhri Sarfaraz Ahmad's family that property also will devolve according to custom. When this estate went out of the limitations of the Act on the death of Chaudhri Sarfaraz Ahmad, the rule of descent by primogeniture accepted by Chaudhri Sarfaraz Ahmad disappeared but the family custom of succession remained.

Before proceeding to consider the evidence adduced in the case it is necessary to examine briefly the history and the vicissitudes of the family to which the estate belonged. The family is descended from one Khwaja Suleman, who had three sons, of whom Muhammad and Nasir had children. The two stocks are alluded to in the evidence of witnesses as Mohammadi and Nasiri (*vide* the evidence of Fida Husain D. W. No. 8) Ghulam Husain, son of Khwaja Mohammad, is said to have founded the *taluq*. He was succeeded by his son, Ghulam Shafi, who was succeeded by his son Jamal-ud-din, It is not clear whether Ghulam Shafi and Jamal-ud-din were only sons or not. A cousin, Mohammad Qaem, killed Jamal-ud-din, took over his estate and mortgaged it by conditional sale to Barahat-ullah, his nephew. Barahat-ullah left one son, Nur Ali, whose widow was *Musammat* Kifayat Bibi, and six daughters one of whom was Bibi Barwan, wife of Imam Bakhsh, grandfather of Chaudhri Sarfaraz Ahmad. Mohammad Qaem had one son, Mohammad Mah, who left two widows, *Musammat* Bikani and *Musammat* Raji and one daughter, *Musammat* Amiran, who was married to Mansur Ali. Chaudhri Sarfaraz Ahmad and his father Husain Bakhsh, obtained deeds from *Musammat* Bikani, *Musammat* Kifayat and Mansur Ali. These facts appear from the deeds of transfer and the Court proceedings in litigation between Husain Bakhsh and Chaudhri Sarfaraz Ahmad, on the one side and Husain Bakhsh's half brother, Azam Ali, on the other. Husain Bakhsh was a son of Imam Bakhsh by one wife, Bibi Barwan, and Azam Ali by another wife. The deeds of gift of *Musammat* Kifayat in favour of Chaudhri Sarfaraz Ahmad and of *Musammat* Bikani and Mansur Ali in favour of Husain Bakhsh, are of 1237 (or 1825 A. D.) 1260 and 1266 *Hijri* respectively. The earliest litigation is of 1845 when the Royal Decree of the *Nawabi* times was passed. The Court held that except Sulemanpur the rest of the property was not paternal ancestral estate of the plaintiff, Azam Ali, and that Husain Bakhsh had inherited the property from his mother. The Court, therefore, dismissed the plaintiff's suit except as regards Sulemanpur, which was ordered to be divided between the parties in accordance with the Muhammadan Law. This judgment shows that Nur Ali survived his father. In this case only the office of *chaudhri* and the *nankar* right attached to it were claimed on behalf of the defendant by right of primogeniture according to custom. The finding of the Court was that the defendant should remain in possession of the property inherited from his mother and of the office of *chaudhri* and the *nankar* right attached to it, but should partition the village of Sulemanpur, which was ancestral property. After the death of Husain Bakhsh the same dispute arose between Azam Ali and the sons of Husain Bakhsh and in 1856 the matter was referred to arbitration, who passed an award. It is mentioned in this award that the *ilaqa* and village of Khanpur had been scattered like the leaves of trees in autumn after the death of Mohammad Qaem and that Imam Bakhsh, father of Husain Bakhsh, got the property together under one ownership through inheritance and gift. The arbitrators held that 8 villages were held jointly by both branches of the family (Mohammadi and Sulemani) and that they should be divided between the descendants. As regards the other 34 villages they held that Husain Bakhsh was the rightful owner and the plaintiffs had no title to it. There was also a dispute about the property of Mohammad Mah between Mohammad Mah's son, Roshan Ali, and daughter's son, Haji Ahmad. The arbitrators ordered that the two shares out of

the property would go to Roshan Ali and one to Haji Ahmad. No action appears to have been taken on this award and in the following year there was a second arbitration where all the surviving descendants of Mohammad and Nasir claimed their shares of the property from Chaudhri Sarfaraz Ahmad and Murtaza Husain. The second award recites that the disputes in the neighbourhood are decided on the basis of custom and the parties to the suit are also in the habit of acting upon custom and are not acquainted with the dogmas of religion, but in this particular case they promised to abide by the decision of the arbitrators according to Muhammadan Law. In this award it was ordered that 16 villages shall be divided between the parties and that Chaudhri Sarfaraz Ahmad and Murtaza Husain shall remain exclusive owners of the other villages. The division of the 16 villages was left to the parties who agreed by mutual consent to fix their shares. The two awards did not have effect, because the Mutiny followed soon after and the desire of the British Government was to settle the property with a single owner. Chaudhri Sarfaraz Ahmad was in actual possession and obtained Summary Settlement in his favour in 1858. As regards Khanpur Taluqa Chaudhri Sarfaraz Ahmad declared:—"This *taluqa* was in the possession of me, the deponent, since three years and I have got another brother Murtaza Husain. No other person has been in possession or joint. We are in possession of one village only named Lakhri." Whether this was a declaration of the interest of Murtaza Husain or not the settlement was made with Chaudhri Sarfaraz Ahmad alone. In 1864 Azam Ali again tried to oust Chaudhri Sarfaraz Ahmad, this time from one village Thalwara. The defence then put forward by Chaudhri Sarfaraz Ahmad was that he was its owner according to the custom of the country which was for the eldest brother to possess the estate and maintain his relatives. He alleged that Thalwara was leased to Azam Ali by way of maintenance. As already observed, the Local Government was at the time desirous of conserving *taluqdar* property under the belief that a succession by primogeniture was the custom of the country. The Settlement Officer observed: "There can be no doubt that the custom of the country as regards the possession of the estate is as stated by the defendants. Moreover, the settlement was made with the defendant alone as *taluqdar* without any mention at that time of co-sharers," Azam Ali's suit was, therefore, dismissed and this decree was confirmed by the Commissioner. The Settlement Commissioner, however, did not depend on any custom of the country but was of opinion that, according to the custom of the family, the eldest so inherited the property while the younger sons obtained only maintenance and that it was not customary in the family for the estate to be divided. In 1867 Azam Ali again essayed to establish title to a share in the Khanpur Taluqa against Chaudhri Sarfaraz Ahmad. The plaintiff based his claim by right of inheritance as one of the heirs of Imam Bakhsh. The defendant raised various pleas, and urged *inter alia*,—

(1) that the matter was settled by the Royal Decree referred to above,

(2) that after the British rule the defendant had obtained a settlement,

(3) that in the Settlement Court it was proved that a custom existed under which the eldest son succeeded to the estate and looked after the younger brothers,

(4) that the defendant inherited the property from the mother of his father Husain Bakhsh.

The British Indian Association's judgment reviewed the previous litigation including the orders of the Settlement Court. In that judgment is quoted a judgment of the Financial Commissioner to the effect "Whatever may be the plaintiff's proprietary rights there is no proof of their existence during the native rule and whatever may be his rights they have been destroyed for good by the Summary Settlement dated 30th May 1867." As regards the custom on which the decision of the Settlement Court was based the Association observed: "But as a matter of fact the defendant never proved this alleged custom and the Royal Decree also does not show any clear finding as to the existence of any such custom in respect

of *zemindari ilaqa*." The Association, however, disallowed the plaintiff's claim on the ground that the entire *taluqa* was acquired by the defendants' father by right of inheritance through his mother who was not the mother of the plaintiff Azam Ali. The only award in favour of the plaintiff was that the defendant should pay a cash allowance of Rs. 600 per annum to the plaintiff by way of maintenance or land yielding the same amount of profit. It may be noted that before the Association Chaudhri Sarfaraz Ahmad filed the three deeds of gift as may be seen from the proceedings of the Association. The *wajib-ul-arzes* of Subeha, Bhilwal and Khanpur throw no light on the matter of any custom of the family. In the *wajib-ul-arz* of Khanpur it is stated that the village was established by Chaudhri Khan Mohammad, but no such name appears in the pedigree supplied by both parties.

On the basis of this history the appellants' learned Counsel argued that no custom of single heir succession existed and that Chaudhri Sarfaraz Ahmad based his title on the deeds of gift obtained from various persons. On behalf of the defence it was urged that the deeds of transfer were fictitious; that the awards referred to above were in the nature of a compromise and not really decisions of arbitrators, and that when Mohammad Qaem transferred his property to Farhat-ullah, nothing could have remained with his heirs *Musammat* Bikani and Munsur Ali to transfer. It was also pointed out that the two deeds of gift by *Musammat* Bikani and Munsur Ali were subsequent to the Royal Decree which raised the presumption that they were obtained by Chaudhri Sarfaraz Ahmad by way of precaution against attacks by possible claimants to the property. The first deed by Bibi Kifayat gives no details of property and it is significant that the *Nawabi* Government had settled Taluqa Khanpur with Husain Bakhsh ten years previously. The deed is of 1237 *Hijri*, and it is mentioned in the Royal Decree that the Khanpur Taluqa was settled with Husain Bakhsh since 1227 *Hijri*. It is obvious that Imam Bakhsh obtained possession of the Khanpur Taluqa with the strong hand, when no one remained in the family of his wife to compete with him to obtain the good will and favour of the *Nawabi* rule. As rightly commented upon by the learned Counsel for the defence, one main fact holds the attention that there was always a single owner of the *taluqa*. Just as Imam Bakhsh possessed himself of his father-in-law's property in Khanpur, we have seen that Chaudhri Sarfaraz Ahmad took hold of Bhilwal, the *taluqa* of his father-in-law. The strongest men in the family, even though a connection only by marriage, succeeded to a *taluqa* in the pre-British times of unsettled Government. This was to be expected, as he would be the person most likely to pay the revenue to the Government. One thing is clear, there was always one owner and never more than one. It may be conceded that in the Royal Court, Husain Bakhsh based his claim on inheritance from his mother and not on single heir succession and that the British Indian Association gave an opinion adverse to the establishment of such a custom. These, however, are not material points. The object of a litigant is to win and Husain Bakhsh may have considered it more advisable to plead succesion to his mother's estate. It may be remembered that such a defence would save him from paying maintenance allowance to his half-brother, Azam Ali. The opinion of the British Indian Association may be taken as that of a Court, which was not pertinent because a decree was passed in favour of Chaudhri Sarfaraz Ahmad on other grounds. Against this opinion there is the opinion of the Settlement Commissioner in favour of a family custom.

Some stress has been laid on behalf of the plaintiff to the first of these suits on the instances in certain cases in which a division was decreed in accordance with the Muhammadan Law. But, as stated by Suleman Ahmad (P. W. No. 8), customs were at times disregarded during the pre-British period and the rules of the Muhammadan Law were enforced to regulate the succession. Sometimes the parties agreed to waive the custom, at other times the rules of the Muhammadan Law were forced upon them. The law did not then extend to custom the sanctity which has now been extended to it by the Oudh Laws Act (XVIII of 1876). The award of

the 21st April 1865 affords an instance in which the custom appears to have been set up and waived (Exhibit 245). It says "Whereas disputes are often settled in this neighbourhood on the basis of custom and these people are also in the habit of acting upon customs and are not aware of the local dogmas, we hesitated considerably; but these people insist and promise that they will abide by the decision passed according to the Muhammadan Law, even if it apparently hurt any of them. They accordingly executed an agreement to that effect and we also agree to decide the point according to the procedure laid down in the laws of Islam." In fact a reference was made in that case under an agreement that the dispute was to be settled in accordance with the Muhammadan Law regardless of the custom. If a division was accordingly directed in that and certain other instances in accordance with the Muhammadan Law by mutual consent, it is sufficient to establish either that no custom was in existence or that the custom had fallen into desuetude too. As their Lordships of the Privy Council say in *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (14), the use of the word 'ordinarily' implies that an occasional variation by consent or otherwise would not affect the custom of devolution The family of Husain Bakhsh belonged to a family of Chaudhris, the eldest of whom held that office and used to obtain a *kabuliyat* for the payment of Government revenue in his name. The office was practically hereditary, except where superior force intervened and used to devolve on the eldest son with the rights appertaining thereto. The Royal Decree of 1256 *Hijri* (Exhibit 256) refused to recognise the claim of Azam Ali to a share of the *zemindari* and *malguzari* villages including the *kabuliyat* of Chaudhri Husain Bakhsh, who had succeeded, his father, Imam Bakhsh, in the office of the *chaudhri* of pargana Subeha on his death in 1226 Fasli. The orders passed in the Settlement proceedings referred to the existence of a custom of primogeniture and the reference made to it by the entry of the estate in List No. II appended to Act I of 1869 amply confirms it.

Coming to the oral evidence we find it overwhelming in favour of the defence. The present head of the family Mustafa Husain, son of Murtaza Husain (D. W. No 33), his younger brother Fida Husain (D. W. No. 9), his son Wajid Husain (D. W. No. 29) and Ehsan Husain, son of Fida Husain (D. W. No. 35) have all deposed in favour of single heir succession. On behalf of the plaintiff's sisters, no one of that standing in the family was produced. Even a witness of the plaintiffs, Abdul Rahman, deposes that in the family of the parties the rule of primogeniture had always prevailed (P. W. 3). The conduct of *Musammat* Bechan-un-nisa and *Musammat* Zainab-ur-nisa also indicates the existence of such a custom in the family. By the Will of 1885 *Musammat* Bechan-un-nisa made a bequest of her property in favour of Rafiuz-zaman and after the death of that boy she made a Will in favour of *Musamma* Zainab-un-nisa and her son, Shafiq-uzzaman, in 1893. In 1889 she applied to the Court of Wards to release her property and make it over to Rafi-uz-zaman. After the death of *Musammat* Bechan-un-nisa, *Musammat* Zainab-un-nisa desired mutation of names both in her own name and in favour of her son, Shafiq-uz-zaman, When in 1906 during the lifetime of *Musammat* Zainab-un-nisa, Shafiq-uz-zaman applied to the Court of Wards for the release of the property in his favour *Musammat* Zainab-un-nisa consented to the arrangement in so far that Shafiq-uz-zaman's name also may be entered along with her self in the village records. The silence of the sisters for nearly seven years between the death of *Musammat* Zainab-un-nisa and the institution of their suit is another indication of a belief in the family of a single heir succession. When in 1912, Shafiq-uz-zaman executed a deed of trust in favour of his son, Mati-uz-zaman, husband of one of the plaintiffs, *Musammat* Zarif-un-nisa, was appointed one of the trustees and accepted the position. These acts of the members of the family do not operate by way of estoppel against the suit of the sisters but are relevant to find out the belief of the members of the family in the existence of the custom under discussion. After the death of Murtaza Husain, the names of his eldest son, Mustafa Husain,

and the second son, Fida Husain were both entered in the village records, and this fact was put forward on behalf of the appellants to negative the custom. Mustafa Husain, however, subsequently sued for the recovery of half of the property and under a compromise it was settled that he should be the owner of 2-3rds and Fida Husain of 1rd of their father's property. The Will of Chaudhri Sarfaraz Ahmad in favour of his brother was, as already pointed out, valid under section 13 of Act I of 1869, as the brother was heir-at-law under section 22 (6) of the Act and as the provisions of section 22 would apply to the succession to the property of Murtaza Husain, no question of custom could arise in that case. A private arrangement between the two brothers raises no presumption either in favour of the non-existence of such a custom or the abrogation thereof. It is true that, with regard to small arreas of property and under-proprietary rights, there has not been a single heir succession, but in the nature of things, the same custom may not govern the devolution to *taluqdari* properties and to small areas of land or under-proprietary tenures, alike. We have formed the opinion that the custom of single heir succession was a custom observed in the family of Chaudhri Sarfaraz Ahmad, that it governed the devolution of the property of *Musammat* Zainab-un-nisa and that, therefore, Shafiq-uz-zaman was the only heir to that property.

* * * * *

It only remains to consider how far the claim of some of the defendants is barred by section 41 of the Act IV of 1882. The Bank of Upper India, Limited, acted on the faith of the representations made by Shafiq-uz-zaman supported by the opinion of the late Sir Sundar Lal, the copies of certain *khewats* and a copy of the judgment of the Privy Council affirming the award, and as a business concern it could not have come to a conclusion different from that at which it arrived. Mr. Goodall, the Manager of the Lucknow Branch, states that he had satisfied himself by enquiry that Shafiq-uz-zaman had a good title and that though he was aware that he had sisters in existence, he had come to know that they were receiving allowances by way of maintenance from him. Raj Kishore, an employee of the Bank, similarly states that Mr. Nasim, an eminent Advocate of Lucknow, had gone with Shafiq-uz-zaman two or three times to get loans advanced to him and had recommended the grant of those loans. The sisters of Shafiq-uz-zaman since the death of their mother took no steps to get their names entered in the revenue papers or to enforce a payment of their share of the profits against Shafiq-uz-zaman. They accepted the *guzara* allowance fixed by the Court of Wards and the husband of one of them agreed to act as a trustee when a deed of trust was executed by Shafiq-uz-zaman for the administration of his estate and the discharge of his liabilities.

The defendant, Raja Bhagwan Bakhsh Singh, purchased certain villages in pursuance of a public advertisement issued by Shafiq-uz-zaman. He had attested the Will of *Musammat* Bechan-un-nisa and heard of the award and accepted the title of Shafiq-uz-zaman as shown by those papers and the entries in the *khewats* without any warning having been issued or steps taken by the sisters of Shafiq-uz-zaman to assert their title either at the time of the death of *Musammat* Zainab-un-nisa or afterwards since 1907. The defendant Mohammad Nasim, similarly, acted on the faith of the title of Shafiq-uz-zaman, as shown by the *khewats* and his possession of the disputed property supported by what some Pleaders had advised about the alleged title of Mustafa Husain.

The defendants, Raja Rameshar Bakhsh Singh, *Musammat* Ashraf-un-nisa and the late Bunyad Husain, similarly acted in good faith and with due care on the basis of the ostensible title and possession of Shafiq-uz-zaman to the exclusion of his sisters who had been accepting *guzara* allowance from him as if they had no independent title of their own. They are transferees for valuable consideration and, having regard to the circumstances above set forth, they are equally protected against the belated claim now put forward on behalf of the sisters of Shafiq-uz-zaman.

It is hardly necessary to refer to the various alternative pleas, which have been

set up by the Counsel on either side in support of their various claims. It is sufficient to say that neither of the plaintiffs have proved their title to the estate. House No. 21 of List B stands in Subeha, Taluqa Khanpur. Chaudhri Sarfaraz Ahmad used to dwell in it and it must be deemed to be a part of the Khanpur estate.

No documents had been improperly rejected. The other pleas taken in the Memorandum of Appeal have not been pressed.

The appeals fail and are dismissed with costs.

Appeal dismissed.

K. S. D. & W. C. A.

LAHORE HIGH COURT.

CIVIL APPLICATION No. 305 OF 1922.

July 24, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

DHANNA MAL AND OTHERS—DEFENDANTS—PETITIONERS

versus

Rai Sahib Lala MOTI SAGAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Suit regarding nature of tenancy—Subject-matter, value of.

Where the subject-matter of a suit is solely the nature of a tenancy, the value of which was Rs. 2,000, the fact that the tenancy affected property worth over Rs. 10,000 would not give a right of appeal to the Privy Council.

Application, under sections 109 and 110 of the Civil Procedure Code, for leave to appeal to the Privy Council, against the judgment of the High Court in Civil Appeal No. 924 of 1918, dated the 17th March 1922.

Mr. *Sardha Ram*, for the Petitioners.

Bakhshi *Tek Chand*, for the Respondent.

ORDER.—This is an application for the grant of a certificate for leave to appeal to His Majesty in Council against a judgment and decree of this Court passed on the 17th March 1922.*

The suit was for the ejectment of the present applicants from the site, on which certain buildings stood, valued at Rs. 300, and for the recovery of Rs. 1,700, being the rent due for 17 months at Rs. 100 per mensem. The defence set up was that the present applicants were permanent tenants of the site. The decision of this Court now sought to be appealed against was that the applicants were tenants-at-will, and, therefore, liable to eviction. The value of the buildings had been estimated in the course of the trial to be Rs. 23,479-5-0. As the plaintiff expressed his willingness to pay for the buildings if the present applicants did not wish to remove them, the applicants were given a period of three months within which to decide whether they would remove the buildings or accept the sum of Rs. 23,400 as their value. The suit throughout has been valued, for purposes of jurisdiction and Court-fees, at Rs. 2,000. Mr. Sardha Ram on behalf of the applicants contended that, inasmuch as the buildings standing on the site had been found to be of the value of over Rs. 10,000, his clients were entitled to the certificate asked for. He cited *Karm Singh* v. *Khem Singh* (1), *Ghulam Rasul Khan* v. *Secretary of State* (2), *Surendra Nath Roy* v. *Dwarka Nath* (3), *Maung Bya* v. *Maung Kyi Nyo* (4), *Srinath Pal* v. *Girindra Chandra Pal* (5) and *Sibt Husain* v. *Munwarulnissa* (6), and contended that these authorities laid down that, for the purpose of an appeal to the Privy Council, the value of the subject-matter of the suit meant the value of the property in dispute. With this contention we are in accord. At the same time, we are unable to see that the subject-matter of the suit in the present instance was other than that involved in the decision of the question whether the applicants were permanent tenants of the site, or mere tenants-at-will. Nor are we able to see that the decree of this Court involved directly or indirectly any claim or question to or respecting property of the value of

*See 72 Ind. Cas. 177—[*Ed.*]

(1) 60 P. R. 1905; 150 P. L. R. 1905; 85 P. W. R. 1905.
(2) 65 Ind. Cas. 239; 2 L. 297; 26 P. L. R. 1922; (1922) A. I. R. (L.) 31
(3) 35 Ind. Cas. 695; 24 C. L. J. 350; 44 C. 119; 21 C. W. N. 530.
(4) 66 Ind. Cas. 696; 11 . B. R. 152.
(5) 6 Ind. Cas. 593; 1 . W. N. 651.
(6) 16 Ind. Cas. 431.

Rs. 10,000 or upwards. The plaintiff in this case laid no claim whatever to the buildings on the site. Indeed, his prayer was that the said buildings should be removed. The matter in dispute between the parties was solely the nature of the tenancy of the site. In *Appala Raja* v. *Rangappa Natcker* (7) it was held that paragraph (2) of section 110, Civil Procedure Code, was intended to extend the privilege given by the first paragraph only to cases where a claim regarding rights of Rs. 10,000 or upwards in value were involved indirectly though not directly. The second paragraph meant that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims were worth Rs. 10,000 or upwards, not that the rights affected properties whose value was Rs. 10,000 or more. Similarly, in *Manilal Jugaldar* v. *Banubai Framji* (8) it was held by the Bombay High Court that where the subject-matter of a suit was an easement the value of which was less than Rs. 10,000, there was no right of appeal to the Privy Council, although the easement affected property worth over Rs. 10,000. It seems to us, therefore, that in the present case the value of the buildings cannot be considered inasmuch as the decree sought to be appealed against did not involve any claim relating to the buildings. We, therefore, dismiss this application with costs.

W. C. A. *Application dismissed.*

(7) 40 Ind. Cas. 680; (1917) M. W. N. 414; 6 L. W. 12; 33 M. L. J. 481.
(8) 63 Ind. Cas. 588; 23 Bom. L. R. 374.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 101 OF 1921.
July 6, 1922.
Present:—Mr. Justice Sulaiman.
Syed ABDUL RAUF—DEFENDANT—APPELLANT
versus
RAJU MUHAMMAD SHAH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Occupancy tenancy—Trees standing on tenancy—Tenant, rights of.

An occupancy tenant acquires no transferable rights in trees standing on the occupancy tenancy, even though the trees were planted by himself with the consent of the landlord.

Daya Kishen v. *Mohammad Wazir Ahmad*, 30 Ind. Cas. 565; 13 A. L. J. 833, relied on

Muhammad Ismail Khan v. *Mithu Lal*, 17 Ind. Cas. 656; 11 A. L. J. 649, *Habibullah* v. *Kalyan Das*, 25 Ind. Cas. 169; 12 A. L. J. 1080 and *Muhammad Yasin* v. *Ilahi Bakhsh*, 16 Ind. Cas. 455; 34 A. 545; 10 A. L. J. 73, distinguished.

Second appeal against a decree of the Additional Sub-Judge, Azamgarh, dated the 27th March 1920.

Mr. *U. S. Bajpai*, for the Appellant.

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

JUDGMENT.—This is a defendant's appeal arising out of a suit brought by a *zemindar* for recovery of possession of four mango trees which had been purchased by the defendant in execution of a mortgage-decree against the widow of Dubri Koeri, a tenant. The plaintiff's case was that his tenant had no transferable right in this grove-land. The main plea on behalf of the defendant was that his mortgagor had the rights of a grove-holder in this plot and that the trees were saleable. Both the Courts below have decreed the suit.

It appears that at the time of the Settlement in 1869, the ancestor of Dubri Koeri was recorded as an occupancy tenant of plot No. 293 which was shown as a culturable area. A portion of this plot seems to have been reserved for cultivation but on another portion some mango trees were planted. About the year 1899 this plot was divided into sub-divisions, namely, plot No. 293-1 and 293-2 and at the recent Settlement 293-1 was recorded as occupancy holding and 293-2 was described as a grove. Subsequently, this Sub-Division 293-2 came to be recorded as *Parti Qadim* (old waste land). At the time of the Settlement there were only four mango trees on this plot. It is really a misnomer to call plot No. 140 a grove. On the findings recorded by the lower Appellate Court, these trees were planted presumably with the consent of the *zemindar* on the occupancy holding by the tenant. The tenant can, therefore, acquire no transferable right in the trees standing on the occupancy tenancy. This view is supported by the case of *Daya Kishen* v. *Mohammad Wazir Ahmad* (1). The learned Vakil for the appellant relies on a string of cases reported as *Muhammad Ismail Khan* v. *Mithu Lal* (2), *Habibullah*

(1) 30 Ind. Cas. 565; 13 A. L. J. 833.
(2) 17 Ind. Cas. 656; 11 A. L. J. 649.

v. *Kalyan Das* (3) and *Muhammad Yasin* v. *Ilahi Bakhsh* (4), but in all those cases land had been expressly granted by a *zemindar* to a tenant for the purpose of planting a grove. In those cases trees had not been planted on an occupancy land. They are, therefore, clearly distinguishable from the present case, which is really governed by the case first mentioned. The lower Appellate Court has found that the plaintiff *zemindar* himself has been in actual possession of these trees and also of the culturable area of the land for some time past. The mortgagee took the mortgage with his eyes open and he has himself to thank for the consequences. The result is, that this appeal fails and is hereby dismissed with costs.

W. C. A. *Appeal dismissed.*

(3) 25 Ind. Cas. 169; 12 A. L. J. 1080.
(4) 16 Ind. Cas. 455; 34 A. 545; 10 A. L. J. 73.

LAHORE HIGH COURT.

CIVIL REVISION NO. 546 OF 1922.
January 31, 1923.
Present:—Mr. Justice Abdul Raoof.

THE FIRM GOPAL MAL-GANDA MAL OF PINDI BHATTIAN, THROUGH GANDA MAL—PLAINTIFFS—PETITIONERS
versus
HARA CHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 4—Review, order granting, without notice to opposite party—Prejudice—Opportunity given to object—Legality of order.

An order granting an application for review of an order dismissing a suit in default is not illegal merely because notice of the application was not given to the opposite party, if that party had been given every opportunity to raise any objection that he could raise, and was, therefore, in no way prejudiced by non-issue of notice to him.

Taj Muhammad v. *Kanshi Mal*, 19 Ind. Cas. 864; 237 P. L. R. 1913; 135 P. W. R. 1913, relied on.

Revision against a decree of the Senior Subordinate Judge, Gujranwala, dated the 22nd February 1922.

Diwan *Mehar Chand*, for the Petitioners.
Mr. *Madan Gopal*, for the Respondent.

JUDGMENT.—The petitioner before me filed a suit for the recovery of Rs. 273 due on *bahi* account. The 10th of July 1920 was fixed for hearing. The hearing was adjourned to another date, fixing the 20th of July 1920, for this purpose. The plaintiff was directed to pay fresh process-fee. On the date fixed the defendant did not appear and it was discovered that his non-appearance was due to the non-payment of the process-fee on the part of the plaintiff. The suit was accordingly dismissed under O. IX, r. 2, Civil Procedure Code by Lala Sawan Mal, Munsif, Hafizabad, District Gujranwala. On the 10th of August 1920, an application for the restoration of the suit was disallowed. On the 27th October 1920, an application for review of the order of the 10th of August 1920 was presented to Lala Sawan Mal. The ground for review stated in the petition was that the process-fee had been paid by him to the *Munshi* of the Pleader and that it was not due to his fault that the defendant had not been served. Lala Sawan Mal made no order on the application. He did not even issue notice to the opposite party. He was succeeded on his transfer by Lala Hans Raj who on the 7th February 1921 made the following order:

"Following *Janaki Nath* v. *Prabhasini Dasi* (1), I hold that under the circumstances of the case I can review the order of my predecessor rejecting the application for restoration without notice being given to the opposite party by my predecessor under O. XLVII, r. 2. I, therefore, order the applicant to adduce evidence in support of his allegation in the review application."

On the 21st of February 1921, two witnesses were examined on behalf of the petitioner namely, Sham Das and Brij Lal. The latter witness is the Pleader's agent. He admitted that the plaintiff had handed over the process-fee to him and that it was due to his negligence that the process-fee was not paid into the office. Sham Das, the other witness, appears in no way to be connected with the parties

(1) 30 Ind. Cas. 898; 43 C. 178; 19 C. W. N. 1077; 22 C. L. J. 99.

but he had been present on the occasion when the process-fee was handed over by the plaintiff to the Pleader's agent. Upon this Lala Hans Raj was satisfied that a good case had been made out for a review. Accordingly, in the interests of justice, he granted the review by an order, dated the 2nd of March 1921. The case was restored to its original number when notice was sent to the defendant to appear. The defendant filed pleas in defence of the suit and he raised the question of the illegality of the order granting review, the main ground for the objection being that the order had been passed behind his back and that the Court had acted illegally in making the order without issuing notice required by O. XLVII, r. 4, Civil Procedure Code. The Munsh overruled the objection, proceeded to decide the case on the merits and granted a decree in favour of the plaintiff.

Against the decree an appeal was preferred by the defendant to the lower Appellate Court. In the memorandum of appeal the objection as to the illegality of the order of review was again raised. The learned Judge of the Court below has given effect to that objection and has set aside the decree passed by the Trial Court upon this ground alone.

The plaintiff-petitioner has come up to this Court in revision and Mr. Mehar Chand on his behalf has contended that no notice was necessary in this case because the order dismissing the suit had been made in the absence of the defendant. He has relied in support of his contention on a Calcutta ruling in the case of *Janaki Nath* v. *Prabhasini Dasi* (1). It is not necessary for me to express any opinion as to the view expressed by the learned Judges of the Calcutta High Court in that case, for the case may be decided upon another ground on which the case of *Taj Muhammad* v. *Kanshi Mal* (2) was decided.

Now, in this case, the defendant did not appeal against the order granting review, but he was allowed to raise the question in the trial of the suit for the very reason that he had had no opportunity of raising the question. The learned Judges who decided the case reported as *Taj Muhammad* v. *Kanshi Mal* (2) made the following observation:—

"Lala Sangam Lal, for respondent, urges that the application for review should not have been accepted without notice to his client under O. XLVII, r. 4, Civil Procedure Code. This appears to be correct, and I have, therefore, to consider the order of 11th May 1910, as one merely admitting the application for review subject to any objections that might be urged."

The defendant was given every opportunity to raise any objection that he could raise. He is in no way, therefore, prejudiced by reason of the fact that no notice was issued to him. The learned Judge of the Court below ought to have taken into consideration this circumstance and ought not to have set aside the decree passed by the Trial Court merely on the ground that no notice had been issued to the defendant before granting review of the judgment.

I accordingly accept this petition for revision, set aside the order of the lower Appellate Court and remand the case under O. XLI, r. 23, Civil Procedure Code, with the direction that the appeal be reinstated on its original number in the register of pending appeals and be disposed of according to law. Costs will abide the result.

W. C. A. *Petition accepted.*

(2) 19 Ind. Cas. 864; 237 P. L. R. 1913; 135 P. W. R. 1913.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 111 OF 1921.

June 23, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

Musammat DHOLA KUAR—PLAINTIFF—APPELLANT

versus

MATHURA SINGH—DEFENDANT—RESPONDENT.

Custom—Proof required—Second appeal—Duty of Court.

A custom is a matter which has to be proved with more thoroughness and with greater precision than a case which merely affects the parties, who are on the record and does not adversely affect

DHOLA KUAR *v.* MATHURA SINGH.

parties who themselves are not present in Court, but are nevertheless interested by virtue of belonging to the same community.

In second appeal the Court should consider, whether the evidence that is brought forward to prove a custom is not only legally admissible, but where the sum total of that evidence regarded from the point of *quantum* is of sufficient weight to justify the Court coming to the conclusion that the custom has been proved.

Letters Patent Appeal against the judgment of Mr. Justice Walsh, dated the 5th July 1921.

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

JUDGMENT.—We are of opinion, that this appeal should be allowed The point that was taken in the case was that, in the particular community in question to which the parties belong, the daughter of a Hindu did not inherit any part of the family property. There was a Record of Rights put forward in defence, which contained the following sentence: "*Musalman haq dukhtari dete hain; Hindu nahin dete.* (The Muhammadans give to their daughters the rights due to them, but Hindus do not)," Mr. Uma Shankar Bajpai has said very fairly that that document is his sheet anchor. Besides that document, four witnesses went into the witness-box and deposed to what they said was a recognised custom, to the effect that a Hindu daughter had no right of inheritance. That custom, if it exists, is, of course, in contravention of the prevailing rule of Hindu Law. A custom is, in our opinion, a matter which has to be proved with more thoroughness and with greater precision than a case which merely affects the parties who are on the record and does not adversely affect parties who themselves are not present in Court, but are nevertheless interested by virtue of belonging to the same community. There is no doubt whatever that the view which has been taken by this Court is that, in second appeal, the Court may, and indeed should, consider whether the evidence, that is brought forward to prove a custom is not only legally admissible evidence, but whether the sum total of that evidence, regarded from the point of *quantum*, is of sufficient weight to justify the Court coming to a conclusion that the custom has been proved. Now, there is no doubt whatever that if the custom, as set out in the Record of Rights, does prevail amongst this community, there could have been a very much better quality of evidence and a very much greater body of evidence forthcoming and it behoves every person who is alleging a custom, and who is seeking for the first time a judicial decision on that alleged custom, to leave no stone unturned to prove the fact of that custom most definitely, most clearly, and most fully. That has not been done in this case There has been, as we have said, the *Wajib-ularz* and there has also been the evidence of four witnesses; and though every thing that those four witnesses said was admissible in evidence we have come to the conclusion that, though admissible, it was not of that weight that is necessary in order to prove a custom which will disturb and upset the ordinary presumption of Hindu Law, We do not say that a custom of this kind does not exist amongst this community: what we are saying is, that in this particular case there has not been such clear, full and cogent evidence as to make it proper for us to dismiss this appeal. We, therefore, are of opinion that, notwithstanding that the Subordinate Judge came to the conclusion that the alleged custom had been proved and that a Judge of this Court of long experience as a Practitioner of the Bar thought that he ought to affirm the decision of the Subordinate Judge, we feel that it is important from a public point of view that it should be generally recognised that these cases of custom have to be proved with care and thoroughness. For these reasons we allow the appeal, set aside the decree of the Judge of this Court and of the lower Appellate Court, and restore that of the Court of first instance with costs throughout.

W. C. A. *Appeal allowed.*

RAKHI *v.* BAZA.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 895 OF 1922.

December 11, 1922.

Present: —Mr. Justice Broadway.

Musammat RAKHI—DEFENDANT—APPELLANT

versus

BAZA—PLAINTIFF—RESPONDENT.

Custom—Will—Awans of Kot Sarang, Tahsil Tallagang, District Attock.

A sonless Awan of Kot Sarang in the Talagang Tahsil of the Attock District has no power to dispose of his ancestral property by Will.

(Case-law examined and discussed.)

The power to gift *inter vivos* does not necessarily include a power of testation. [p. 660, col. 2.]

Second appeal from a decree of the District Judge, Attock, at Campbellpur, dated the 22nd February 1922.

Mr. *Badruddin Kureshi*, for Dr. *Nand Lal*, for the Appellant.

JUDGMENT.—Baza, son of Gaman, an Awan of Kot Sarang, in the Talagang Tahsil of the Attock District, sued *Musammat* Rakhi, wife of Azim, for possession of certain lands, on the allegation that he, as the nearest collateral of Zaman, the father of *Musammat* Rakhi, was entitled to the same. It was averred that the land was ancestral and that on Zaman's death without male issue, his collaterals and not his daughter succeeded.

The defence was, that Zaman had left a Will devising the property to his daughter as *khana damad* and that the Will was valid. The ancestral nature of the property was also contested. The Trial Court found that the property was ancestral but that the defendant had proved the execution as well as the validity of the Will propounded by her. The plaintiffs' suit was accordingly dismissed and he preferred an appeal to the District Court.

The learned District Judge agreed with the Trial Court in holding that the property was ancestral and that the Will propounded was genuine and had been duly executed by Zaman. He, however, held that Zaman "had not free powers of testation" and, accepting the appeal, decreed the plaintiff's suit. *Musammat* Rakhi has come up to this Court in second appeal having obtained a certificate under section 41 (3) of the Punjab Courts Act. The custom, the validity of which is now in question, is stated in the certificate to be as follows:—Whether a sonless Awan of Kot Sarang, Tahsil Talagang, has a free power to dispose of his ancestral property by Will. There is practically no evidence on the record to support the contention put forward by *Musammat* Rakhi. She only produced three witnesses, none of whom gives any instances, while one of them, Sadu, states that no male in this tribe had died sonless.

Mr. Kureshi, who appeared for the appellant, was constrained to admit that the evidence on the record was insufficient, but he contended that as Awans in this part of the Punjab had large powers of alienation and gift they should be assumed to have the power to devise their ancestral property by Will and in support he cited certain authorities which I proceed to consider.

Bano v. *Fateh Khan* (1). Here it was held that under Punjab Customary Law the distinction between the power to gift *inter vivos* and the powers of testation was a matter of degree and form only, and when the power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation. It will be seen that Clark, C. J., dissented from this proposition, and the danger of extending custom by logical processes, such as analogy, was pointed out in *Bhambul Devi* v. *Narain Singh* (2).

In *Amir Ali* v. *Baggo* (3) a custom was found proved by which a sonless proprietor could make a bequest of ancestral property in favour of his daughter. This was a case relating to Awans of the Rawalpindi Tahsil and was considered in *Yakub Khan* v. *Fateh Khan* (4), (which dealt with Awans of the Attock Tahsil), and found to be of no assistance in cases arising in other parts of the Province.

In *Ali Muhammad* v. *Dulla* (5) the custom now set up was found to exist among Awans of the Shahpur District. It is, however, well-known that Awans in that District have very wide powers of alienation.

(1) 48 P. R. 1903; 111 P. L. R. 1903 (P. B
(2) 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916.
(3) 15 P. R. 1907; 4 P. L. R. 1908; 35 P. W. R. 1907.
(4) 20 Ind. Cas. 14; 5 P. R. 1914; 253 P. L. R. 1913; 161 P. W. R. 1913.
(5) 26 P. R. 1901; 65 P. L. R. 1901.

CHANNULAL *v.* PUNA.

In *Nura* v. *Tora* (6) it was found that by custom a childless male proprietor could make a gift accompanied by possession in favour of his wife's sister's son. This was a case of Awans of the Talagang Tahsil and, having regard to the decision of the majority in *Bano* v. *Fateh Khan* (1), would give rise to an initial presumption in favour of the appellant.

Nur Ahmad v. *Ghulam Husain* (7) was a case among Awans of the Rawalpindi Tahsil, and related to the powers of a sonless proprietor to alienate his ancestral property.

In *Khudayar* v. *Fatteh* (8) it was found that, among Awans of the Talagang Tahsil, a sonless male proprietor could make a gift of his ancestral property in favour of his daughter's son for services rendered. Having regard to *Bano* v. *Fateh Khan* (1) his, too, is in point.

In *Nur Khan* v. *Sarfraz* (9), another case of Awans from the Talagang Tahsil, an alienation of ancestral property by a sonless male proprietor in favour of a near collateral was found valid by custom.

Khuda Bakhsh v. *Waham Ali* (10) relates to Awans of Talagang Tahsil and lays down that a male proprietor can alienate his ancestral property in the presence of a son.

In *Sher Muhammad* v. *Ali Muhammad* (11) Kensington, J., was obviously not quite convinced as to the custom applicable to the case, but it may be treated as authority for the proposition that Awans of the Talagang Tahsil have wide powers of alienation.

It seems to me that authorities relating to other parts of the Province can afford little assistance in the present case.

Assuming, on the authority of *Bano* v. *Fateh Khan* (1), read with *Nura* v. *Tora* (6) and *Khudayar* v. *Fatteh* (8), that an initial presumption arises in favour of the appellant, that presumption is rebutted by the *Riwaj-i-am* of this Tahsil where the right to make a Will is clearly negatived so far as ancestral property is concerned. See answer to Question 8 at page 53 of Talbot's Tribal Custom in the Jhelum District. A custom to be valid must be ancient, and at page 7 Mr. Talbot points out that Wills were almost unknown and, as far as known, were almost entirely a recent development.

Nor do I think that the power to gift *inter vivos* would necessarily include a power of testation. By a gift the sonless proprietor deprives himself of the subject-matter of the gift, while by a testamentary disposition he is depriving his reversioners. As a result, I hold that the appellant has failed to prove a custom by which her father could validly devise his ancestral property to her in the presence of the plaintiff-respondent, and I accordingly dismiss the appeal. The respondent did not put in any appearance and I make no order as to costs.

W. C. A. *Appeal dismissed.*

(6) 46 P. R. 1900; P. L. R. 1900 p. 404.
(7) 30 Ind. Cas. 90; 56 P. R. 1915; 135 P. W. R. 1915; 51 P. L. R. 1916.
(8) 8 P. R. 1906; 64 P. L. R. 1906; 27 P. W. R. 1906.
(9) 16 Ind. Cas. 21; 100 P. R. 1912; 249 P. L. R. 1912; 238 P. W. R. 1912.
(10) 10 Ind. Cas. 36; 88 P. R. 1911; 144 P. L. R. 1911; 116 P. W. R. 1911.
(11) 25 Ind. Cas. 715; 60 P. W. R. 1914; 151 P. L. R. 1914.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 26 OF 1921.
September 6, 1922.

Present:—Mr. Prideaux, A. J. C., and Mr. Kotwal, A. J. C.

CHANNULAL AND ANOTHER —APPLICANTS —APPELLANTS

versus

PUNA AND OTHERS—NON-APPLICANTS—RESPONDENTS.

Will—Execution—Delay of twenty years in applying for Probate—Delay unexplained, effect of—Evidence Act (I of 187), s 90, applicability of.

An application was made for Probate of a Will some twenty years after the Will was alleged to have been executed, and the witnesses who purported to have attested the execution of the Will were dead; no explanation was forthcoming as to the delay in bringing the Will into Court for purposes of Probate, nor any evidence as to the custody of the Will before it was produced in Court, and the only evidence of execution offered was, that of persons who professed to identify the signatures on the Will:

CHANNULAL *v.* PUNA.

Held, that the execution of the Will had not been satisfactorily proved, and that the provisions of section 90 of the Evidence Act could not be applied to the case.

Miscellaneous appeal against the decision of the District Judge, Jubbulpore, dated 16th June 1921.

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

Mr. *G. C. Hatvalne*, for the Respondents.

JUDGMENT. Channulal and Motilal, father and son who describe themselves as the *Sarbarakars* of the idol of Shri Gaurishankerji Pelipathai of Kamania Phatak, Jubbulpore, applied for the grant of Probate or Letters of Administration to the estate of one Bachcha Halwai who is said to have died on the 1st August 1899. Bachcha is alleged to have executed the Will (Exhibit 1-A-1) on Aghan Badi 11, Sambat 1945 corresponding to the 11th November, 1887. The Will dedicates three houses in favour of the temple of Gaurishankerji subject to the condition that the testator's wife is to enjoy the rent during her lifetime. After her death the testator's five daughters are to get the rent of one room during their lives. After giving some directions, which need not be particularised, the Will recites that the possession of the property and worship of the idol should always remain with testator's *kutumb* (family) and *khandan* (house). The applicants allege that they are members of Bachcha's family and sole *Sarbarakars* of the temple and executors by implication and are entitled to Probate. In any case, they say they have a right to get Letters of Administration. They allege that the non-applicant Puna, the daughter of the deceased, is in possession of the property and is wasting it. Binia, another daughter, admits the applicants' claim. Mulchand, a son of Bachcha's brother Nawale, is said to be colluding with Puna. The property which is likely to come into the petitioner's hands is described in the application as two houses and two *bagichas*. The application was contested by *Musammat* Puna. One of her pleas was that the Will was not genuine. The application has been dismissed on the ground that the execution of the Will by Bachcha has not been satisfactorily proved.

The body of the Will purports to be written by Mithulal Tiwari. The attesting witnesses are Nathu Halwai, Mohanlal Brahmin and Darbarilal. All these persons are now dead. Fakirchand (A. W. No. 1), the son of Mohanlal, is examined to prove his father's signature as an attesting witness. He states that he has no papers with his father's signature on them. He identifies the signatures on Exhibits 1-A-2, 1-A-3 and 1-A-4 as his father's. The last two Exhibits are bonâ fide in favour of A. W. No. 2. A. W. No. 2 is an illiterate person. He says, that they were scribed by Mohanlal. A. W. No. 3, a milkseller, aged 27 years, professes to identify the handwriting of Mithulal, the scribe of the Will. A. W. No. 8 professes to identify Darbarilal's signature on the Will; A. W. No. 5 is the son-in-law of Bachcha. He deposes that Bachcha executed a Will of houses and other property 30 or 35 years ago in his presence in Jubbulpore at his house and gave his houses to the temple on the Gaori Ghat Road. He identifies Bachcha's singnature on the Will. He admits he is not fully literate and cannot read Bachcha's signature letter by letter. The evidence of this witness is the only direct evidence as to the execution of the Will by Bachcha. The lower Court has discounted it on account of the witness's admission that he visited Bachcha in Jubbulpore eight or ten years before his death and till his death did not meet him again. We see no reason to differ from the lower Court's opinion about the weight of this witness's evidence. A. W. No. 6 is the son of Bachcha's daughter. He professes to identify Bachcha's signature on the Will; He is the grandfather (apparently maternal) of the applicant Motilal. He says that Bachcha used to write letters to his father. A. W. No. 7 states that Bachcha was a bit of a physician and wrote prescriptions for him. He identifies Bachcha's singnature on the Will, but produces no prescription or other writing of Bachcha.

The Will purports to be executed in 1887. It was brought to light for the first time in 1907 when it was produced in a Court of Law. In 1910 an application for Probate in respect of it was made by Chokhelal, a brother of the applicant Channulal, but the application was ultimately withdrawn. At that time the attesting witness Mohanlal alone is said to have been alive. Yet no further attempt was made to bring the Will into Court till some ten years later when even that witness was dead. The

lower Court is of opinion that the application was delayed deliberately with a view to take advantage of the provision of section 90 of the Evidence Act. We see no reason to hold that this opinion is not justified. There is no reasonable explanation about the delay after 1910 in making the application for Probate. There is no evidence as to the custody of the Will before 1907. We fully agree with the lower Court in refusing to apply the provisions of section 90 in this case. We also agree with the lower Court in holding that the evidence as to the handwriting of the scribe and the attesting witness is not convincing and falls short of the standard which should be required in the circumstances of the present case. Even if the handwriting of the scribe and attesting witnesses is proved, the execution of the Will by Bachcha is not proved thereby. The evidence of A. W. No. 5 is not worth anything. That of A. Ws. Nos. 6 and 7 who profess to identify Bachcha's signature on the Will is not convincing. We note one point, it is that, whereas at the date of the Will, according to the witnesses for both parties, (*vide* N. A. W. No. 1, N. A. W. No. 2 A. Ws. No. 4 and A. W. No. 6), Bachcha had only four daughters living, the Will refers to five daughters. We have been offered no reasonable explanation of this discrepancy. There is reason to believe that Bachcha desired to make a bequest in favour of the temple but this fact does not help us to conclude that this particular Will was executed by Bachcha. On the whole we agree with the lower Court in holding that the execution of the Will by Bachcha has not been satisfactorily proved. The appeal is, therefore, dismissed with costs. Pleader's fee Rs. 5.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 322 OF 1922.

July 15, 1922.

Present:—Mr. Justice Brasher.

ABDUL HAFIZ—DEFENDANT—PETITIONER

versus

Musammat RASHIDA KHATUN—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 44—"Case" meaning of.

The word "case" in section 44 of the Punjab Courts Act does not necessarily mean the whole case, but it at least means a particular branch of a case for which an independent remedy or different procedure is provided by the Civil Procedure Code. Consequently, where, after framing a preliminary issue, the Court decides that a suit can be brought in the form in which it was presented, that does not amount to the decision of a case within the meaning of the section.

Petition, under section 44 of Punjab Act VI of 1918, for revision of an order of the Senior Sub-Judge, Delhi, dated the 31st March 1922.

Mr. *Moti Sagar*, for the Petitioner.

Kunwar *Dalip Singh*, for the Respondents.

JUDGMENT.—The lower Court has decided after framing a preliminary issue, that the suit can be brought in its present form, *i.e.*, as a suit for administration and rendition of accounts. A preliminary objection is raised that the order is not one which is open to revision, and I am of opinion that this objection must be upheld. It cannot be said that any case has been decided which would give this Court power to call for the record under section 44 of the Punjab Courts Act. The word "case," as was held in *Pandit Ram Kant* v. *Pandit Rajdeo* (1), does not necessarily mean the whole case, but it must at least mean a particular branch of a case for which an independent remedy or different procedure is provided by the Code.

In *Mahtab Rai* v. *Kaman Lal* (2) the same meaning was assigned to the word "case" and it was there held that an order overruling an objection as to jurisdiction was, even if erroneous, not one calling for interference by way of revision.

These authorities were followed in *Sawan Mal* v. *Kanhaya Lal-Gopal Das* (3), where

(1) 0 P. R. 1897 (F. B.).
(2) 51 P. R. 1899.
(3) 59 Ind. Cas. 680; 40 P. W. R. 1921.

it was held that no revision lay from a decision of a Court that it had jurisdiction to entertain a suit.

In the present case, the Court has merely overruled an objection by the defendant as to the frame of the suit. It cannot be said that a "case" has been decided, and, even if the decision be erroneous, I do not think that the revisional powers of this Court should be exercised. I accordingly dismiss the petition with costs.

W. C. A. *Petition dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 200 OF 1921.

July 27, 1922.

Present:—Mr Justice Gokul Prasad.

IRSHAD MUHAMMAD KHAN—PLAINTIFF—APPELLANT

versus

JWALA PRASAD—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 160, suit under, by mortgagee in possession, whether maintainable.

A suit under section 160 of the Agra Tenancy Act by a person who is recorded in the Revenue Papers a mortgagee is not maintainable, and an Appellate Court is not competent to go behind such an entry and to find that, although the plaintiff's name is so recorded, he is not actually in possession.

Durga Parshad v. *Hajari Singh*, 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025 and *Ahmad Said Khan* v. *Masi Ullah Khan*, 1 Ind. Cas. 9, 5; 34 A. 250; 9 A. L. J. 152, relied on.

Second appeal against a decree of the District Judge, Farukhabad, dated the 1st November 1920

Mr. *Mukhtar Ahmad*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for recovery of arrears of revenue under section 160 of the Tenancy Act. The plaintiff was a usufructuary mortgagee of the defendant's share under two mortgages of the 14th June 1913 and the 12th December 1913 respectively. The defendant made a simple mortgage of his property in the year 1324 and the simple mortgagee paid up the usufructuary mortgage of the plaintiff dated the 12th of December 1913. The mortgage of the 14th of June 1913 was not redeemed. The plaintiff's name continued to be recorded as mortgagee notwithstanding the fact that one of the mortgages had been redeemed. He had to pay the Government revenue for the years 1324 and 1325 *Fasli*. He now sues for recovery of the proportionate amount of the money which he had to pay on account of that share of the defendant which had already been redeemed, the defence was that the plaintiff was in possession of the whole of the mortgaged property and the suit, therefore, did not lie. The first Court came to the conclusion that the plaintiff's name continued to be recorded as mortgagee and, further, that the plaintiff was in possession and dismissed the plaintiff's claim. The learned Judge of the Appellate Court does admit that the plaintiff's name is still recorded as mortgagee notwithstanding the fact that one of his mortgages had been redeemed and then assumes that the plaintiff was not in possession of the property redeemed and gives him a decree for the Government revenue which he had paid on account of that share of the defendant which had been redeemed. It is contended before me, on the strength of the case of *Durga Parshad* v. *Hajari Singh* (1), that the name of the plaintiff being recorded in the revenue papers as mortgagee, the learned Judge of the lower Appellate Court was not competent to go behind this entry and to find that, although the name of the plaintiff was so recorded he was not actually the mortgagee in possession. This argument seems to have considerable force. This view of mine is supported by the case of *Ahmad Said Khan* v. *Masi Ullah Khan* (2), where this Court held that, where a person's name was entered as a lessee the Revenue Court was not competent to go behind the entry and to find that he was not a lessee. In my opinion, the decree of the first Court was right and should not have been disturbed. I allow the appeal, set aside the decree of the lower Ap-

(1) 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025.

(2) 13 Ind. Cas. 975; 34 A. 250; 9 A. L. J. 152;

pellate Court and restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

W. C. A. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 358 OF 1922.

August 14, 1923.

Present:—Mr. Baker, A. J. C

IBRAHIM—PLAINTIFF—APPELLANT

versus

Musammat SUGRABAI—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), ss. 71, 73, 77—Denial of execution—Refusal of registration—Remedy—Application under section 73, not filed—Suit to compel registration, maintainability of—Appeal to Registrar, when can be treated as application under s. 73—Application, otherwise maintainable—Section wrongly mentioned—Duty of Court—Dismissal, whether legal—Suit under s. 77, scope of.

In a suit to compel registration under the Registration Act, the Court has simply to determine the fact of execution and, if a *prima facie* case of execution is made out and the requirements of the law complied with, to order the registration of the document. [p. 664, col. 2.]

Raj Lakhi Ghose v. *Debendra Chundra Mojumdar*, 24 C. 668; 1 C. W. N. 444; 12 Ind. Dec. (N. S.) 1114 and *Balambal Ammal* v. *Arunachala Chetti*, 18 M. 255; 6 Ind. Dec. (N. S.) 527, relied upon.

If a Sub-Registrar refuses to register a document on the ground of the denial of execution by the executant, the person seeking registration is bound, under the Registration Act, to make an application to the Registrar under section 73 of the Act in order to establish his right to have the document registered. [p. 665, col. 1.]

Such an application must be in writing and must be accompanied by a copy of the reasons recorded under section 71 and the statements in the application should be verified by the applicant in the manner required by law for the verification of plaints. [p. 665, col. 1.]

Such an application is necessary prior to a suit being brought under section 77 of the Registration Act, and if this is not complied with the suit is liable to be dismissed. [p. 665, col. 1.]

Udit Upadhia v. *Imam Bandi*, 24 A. 402; A. W. N. (1902) 99, followed.

An appeal to the Registrar, if it conforms to all the requirements of section 73 of the Registration Act, may be treated as an application under the Act and it may suffice to save the suit from being dismissed for non-compliance with the provisions of section 73 of the Registration Act. [p. 665, col. 2.]

A Court in the administration of justice should not refuse an application, which on the merits it ought to grant and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section. Regard should be had to the susbtance rather than to the form of the proceedings. [p. 665, cols. 1 & 2.]

Bechun Sahu v. *Syed Ali Rasul*, 16 Ind. Cas. 614, relied upon.

The scope of a suit under section 77 of the Registration Act depends upon the proved or admitted facts and circumstances, and not upon the erroneous mention of a section of a Statute in an application to the Registrar. [p. 665, col. 2.]

Appeal from a decree of the District Judge, Nimar, dated the 22nd November 1922, in Civil Appeal No. 180 of 1921.

Mr. *M. Gupta*, for the Appellant.

Dr. *H. S. Gour* and Mr. *S. B. Gokhale*, for the Respondent.

JUDGMENT.—The plaintiff brought a suit against the deceased defendant under section 77 of the Registration Act for a decree directing the registration of a sale-deed. The Trial Court (First Munsif, Burhanpur) passed a decree in the plaintiff's favour, but on appeal the District Judge, Nimar, reversed the decision on the ground that the agreement between the parties made registration conditional upon the payment of Rs 700. The plaintiff makes this second appeal.

The Courts below do not appear to have considered the law on the point, and it is necessary to set it out in some detail. It is settled law that in a suit to compel registration under the Registration Act the Court has simply to determine the fact of execution and, if a *prime facie* case of execution is made out and the requirements of the law complied with, to order registration of the document. It cannot go into other considerations. A number of cases will be found quoted in Desai Narotam's Indian Registration Act, 6th Edition, page 202. I need only refer to *Raj Lakhi Ghose* v. *Debendra Chundra Mojumdar* (1) and *Balambal Ammal* v. *Arunachala Chetti* (2). The Trial Court found correctly on this point in issue No. 6 and then proceeded to go into a number of other considerations.

In the present case the defendant in his written statement had admitted the execution of the document and, therefore

(1) 24 C. 668; 1 C. W. N. 444; 12 Ind. Dec. (N. S.) 1114.

(2) 18 M. 255; 6 Ind. Dec. (N. S.) 527.

a decree for registration would follow as a matter of course provided the suit will lie. The contention of the respondent is that the suit will not lie because the plaintiff has misconceived his remedy. Registration was refused by the Sub-Registrar on the ground of denial of execution under section 71 of the Registration Act. That this is so is shown by the endorsement of the Sub-Registrar which shows that the refusal was made under section 37 (*f*) of the Registration Rules which refers to the denial of execution. We are not concerned to enquire whether this order is right or wrong. It is the nature of the order that determines the relief to be sought against it. Consequently, the plaintiff was bound, under the Registration Act, to make an application to the Registrar under section 73 of the Act in order to establish his right to have the document registered. Such an application must be in writing and must be accompanied by a copy of the reasons recorded under section 71, and the statements in the application should be verified by the applicant in the manner required by law for the verification of plaints. That such an application is necessary prior to a suit being brought under section 77, Registration Act, has been held in *Udit Upadhia* v. *Imam Bandi* (3). In the present case what the plaintiff did was to make an appeal under section 72, whereas no such appeal lay, registration having been refused on the ground of denial of execution. It has been contended that the appeal under section 72 should be treated as an application under section 73. In *Bechun Sahu* v. *Syed Ali Rasul* (4), when registration was refused by the Sub-Registrar, the person in whose favour the document was executed moved the Registrar under section 72 of the Registration Act, although the application was, as a matter of fact, one under section 73, and was accompanied by a copy of the reasons recorded by the Sub-Registrar for refusing to register and was verified as required by section 73. It was held that the suit was maintainable. A Court in the administration of justice should not refuse an application, which, on the merits, it ought to grant and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section. Regard should be had to the substance rather than to the form of proceedings. The scope of the suit under section 77 of the Registration Act depends upon the proved or admitted facts and circumstances and not upon the erroneous mention of a section of a Statute in an application to the Registrar.

It will be observed that in that case the application conformed to all the requirements of section 73, being accompanied by a copy of the reasons recorded by the Sub-Registrar, and verified as required by that section. There is no evidence in the present case on this point. The application made by the plaintiff to the Sub-Registrar is not on record. In *Ganga Din* v. *Mata Din* (5), which is very similar to the present case, the Sub-Registrar refused to register because the defendant denied execution. The plaintiff appealed from the order of the Sub-Registrar to the District Registrar, but his appeal was dismissed on the ground that no appeal lay. On his bringing a suit under section 77 it was held that the suit would not lie. It was held in *Edun* v. *Mahomed Siddik* (6) that a person omitting to make an application to the Registrar, as provided by section 73, cannot be said to have complied with the conditions precedent to a suit under section 77. In that case the application was barred by limitation.

The question of limitation does not arise in this case. In the case quoted above, *Udit Upadhia* v. *Imam Bandi* (3), it was held that the right of suit given by section 77 of the Registration Act arises only when the Registrar on an application complying with the provisions of the second paragraph of section 73 of the Act having been presented to him has upheld the orders of the Sub-Registrar and has refused to direct the document to be registered. It will be seen, therefore, that, before a suit under section 77 can lie, there must be

(3) 24 A. 402; A. W. N. (1902) 99.
(4) 16 Ind. Cas. 614.
(5) 2 O. C. 77.
(6) 9 C. 150; 11 C. L. R. 440; 5 Shome L. R. 351; 4 Ind. Dec. (N. S.) 752.

compliance with the provisions of section 73.

I do not think that the fact that the appeal purported to be under section 72 would deprive the plaintiff of his remedy if the conditions of section 73 were complied with. But there is nothing on the record to show that this is so. In these circumstances, I think the case must be remanded for the purpose of enabling the plaintiff to produce a copy of his application to the Registrar in order that it may be seen whether the provisions of section 73 were complied with. If they were, the fact that the application was described as an appeal would be a mere technical defect which would not affect the merits of the case. But if the provisions of section 73 were not complied with, the present appeal would not lie. The case is accordingly remanded for that purpose; finding to be returned within two months. Costs will abide the result.

G. R. D. & W. C. A. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 262 OF 1921.
July 19, 1922.
Present:—Mr. Justice Gokul Prasad.
TIRBENI SAHU—DEFENDANT—APPELLANT
versus
LACHMI PANDE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 164—Suit by dispossessed mortgagee against mortgagor for profits, whether maintainable.

A suit under section 164 of the Agra Tenancy Act by a dispossessed mortgagee against his mortgagor for profits is not maintainable.

Hanuman Din v. *Ram Bisal*, 14 Ind. Cas. 260, relied on.

Second appeal against the decree of the District Judge, Gorakhpur, dated the 18th December 1920.

Mr. *Kumuda Prasad*, for the Appellant.

Mr. *N. Upadhiya*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for profits for the years 1323, 1324 and 1325 *Fasli*. It appears that the defendant-appellant owns an 8-annas share in the village and is also a *Lambardar*. In the year 1314 *Fasli* he executed a mortgage of a 3-annas 1-pie out of the 8-annas share in favour of the plaintiffs, the plaintiffs giving them a lease for 7 years of the mortgaged property. The period of lease expired in 1322 *Fasli* but the defendant continued to make collections and now prevents the plaintiffs from making collections from the tenants. The mortgage has not yet been admittedly redeemed. The plaintiffs brought the present suit under section 164 of the Tenancy Act as a suit for recovery of profits. One of the pleas raised in defence was, that such a suit did not lie. The learned Assistant Collector fixed Issue No. 3 on this point and came to the conclusion that the plaintiffs being co-sharers, such a suit was maintainable. This decree was confirmed on appeal after certain findings had been obtained on issues remitted by the lower Appellate Court. The defendant comes here in second appeal, and the first point taken before me in appeal is, that such a suit does not lie at all and reliance is placed on the case of *Hanuman Din* v. *Ram Bisal* (1) decided by Mr. Justice Banerji. In that suit his Lordship came to the conclusion that a suit like this by a dispossessed mortgagee did not lie against his mortgagor. That decision is on all fours with the present one and I see no reason to differ from the conclusion arrived at by Mr. Justice Banerji in that case. Mr. Uma Shanker Bajpai on behalf of the plaintiffs-respondents contended that in that case it was alleged by the defendants that the mortgage had ceased to exist because of the want of possession of the mortgagee for more than 12 years but I do not see how this distinction will help the plaintiffs. Mr. Justice Banerji remarks in that case as follows:—

"The Courts below have dismissed the suit on the ground that this is not a suit for profits by a recorded co-sharer against a *Lambardar* but is in reality a suit by the mortgagees against their mortgagor who dispossessed them. No doubt, the names of the plaintiffs are recorded in the Revenue papers. But the defendant fills two capa-

(1) 14 Ind. Cas. 260.

RAMJI LAL *v.* SHIBBA.

The plaintiff has appealed claiming to redeem for Rs. 450 only. His Memorandum of Appeal bears a stamp on that amount only. The preliminary objection is made that Court-fee is payable on the difference of Rs. 450 and the amount decreed by the Court below as the price of redemption.

This objection must be upheld. The case is exactly similar to Civil Appeal No. 3433 of 1915, reported as *Lekh Ram* v. *Ramji Das* (1). That judgment cites the authorities for the applicability of Art. 1, Schedule I of the Court-Fees Act to cases such as this and, for the reasons given in it, I refuse to grant the appellant time to make up the deficiency under section 149, Civil Procedure Code. The appellant's attention was drawn by the Court office to the fact that his Memorandum of Appeal was insufficiently stamped at the time when it was presented. His Counsel refused to pay any additional Court-fee, asserted that *Chuni Lal* v. *Beli Ram* (2) quoted by the office was distinguishable and incorrect, and quoted in rejoinder a Bombay ruling, *Umarkhan* v. *Mahomedkhan* (3), which does not apply to the facts of the present case and another ruling *Pirbhu Narain Singh* v. *Sita Ram* (4), which has been disapproved in a subsequent judgment of the same Court. The learned Counsel for the appellant is quite unable to explain to me how *Chuni Lal* v. *Beli Ram* (2) is distinguishable, and in his search for rulings to justify his position he must have come across another Punjab ruling *Banwari Das* v. *Nathu Shah* (5) and also *Nepal Rai* v. *Debi Prasad* (6) which differed from *Pirbhu Narain Singh* v. *Sita Ram* (4). There was, in my opinion, no *bona fide* mistake about the Court-fee and the omission to pay the full amount was deliberate.

In these circumstances, the appeal can only be taken as one for reduction of Rs. 450 from the sum decreed by the lower Appellate Court as payable for redemption.

The first contention in appeal is, that Rs. 250 were improperly decreed as the cost of repairs. The finding, however, is one of fact that repairs of this value were effected and the decree provides for the cost of such repairs to be recovered at redemption.

The second objection is against the decree for payment of interest for 41 years. This point is covered by what has been laid down in the recent Full Bench decision *Motan Mal* v. *Muhammad Bakhsh* (7).

I have read the mortgage-deed and I agree with the lower Appellate Court that its terms indicate an intention by the parties that, should there be no foreclosure by sale, interest would continue to be paid up to the date of redemption. Even if this were not so, there is nothing about the case to take it out of what is laid down in *Motan Mal* v. *Muhammad Bakhsh* (7), as the ordinary rule that a mortgagee is entitled to *post diem* damage at the rate of interest stipulated in the instrument of mortgage and for the whole period during which the principal sum has remained unpaid.

Cross-objections are filed against the refusal of the lower Appellate Court to allow interest on the cost of repairs. There is no provision for such interest in the mortgage-deed and I see no reason why it should be given. Counsel for the respondent has quoted *Radha Kishen* v. *Muhamdu* (8), but this question has to be decided with reference to the terms of the particular contract under consideration.

I dismiss both the appeal and the cross-objections. The appellant will pay the respondent's costs.

W. C. A. *Appeal dismissed.*

(1) 57 Ind. Cas. 215; 3 L. L. J. 370; 1 L. 234; 144 P. L. R. 1920.
(2) 30 Ind. Cas. 104; 58 P. R. 1915; 166 P. W. R. 1915; 58 P. L. R. 1916.
(3) 10 B. 41; 5 Ind. Dec. (N. S.) 411.
(4) 13 A. 94; A. W. N. (1890) 231; 7 Ind. Dec. (N. S.) 59.
(5) 9 Ind. Cas. 676; 5 P. R. 1911; 48 P. L. R. 1911; 59 P. W. R. 1911.
(6) 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40.
(7) 66 Ind. Cas. 771; 3 L. 200; (1922) A. I. R. (L.) 254; 4 U. P. L. R. (L.) 55; 42 P. L. R. 1922 (F. B.).
(8) 57 P. R. 1888;

RAMJI LAL *v.* SHIBBA.

The plaintiff has appealed claiming to redeem for Rs. 450 only. His Memorandum of Appeal bears a stamp on that amount only. The preliminary objection is made that Court-fee is payable on the difference of Rs. 450 and the amount decreed by the Court below as the price of redemption.

This objection must be upheld. The case is exactly similar to Civil Appeal No. 3433 of 1915, reported as *Lekh Ram* v. *Ramji Das* (1). That judgment cites the authorities for the applicability of Art. 1, Schedule I of the Court-Fees Act to cases such as this and, for the reasons given in it, I refuse to grant the appellant time to make up the deficiency under section 149, Civil Procedure Code. The appellant's attention was drawn by the Court office to the fact that his Memorandum of Appeal was insufficiently stamped at the time when it was presented. His Counsel refused to pay any additional Court-fee, asserted that *Chuni Lal* v. *Beli Ram* (2) quoted by the office was distinguishable and incorrect, and quoted in rejoinder a Bombay ruling, *Umarkhan* v. *Mahomedkhan* (3), which does not apply to the facts of the present case and another ruling *Pirbhu Narain Singh* v. *Sita Ram* (4), which has been disapproved in a subsequent judgment of the same Court. The learned Counsel for the appellant is quite unable to explain to me how *Chuni Lal* v. *Beli Ram* (2) is distinguishable, and in his search for rulings to justify his position he must have come across another Punjab ruling *Banwari Das* v. *Nathu Shah* (5) and also *Nepal Rai* v. *Debi Prasad* (6) which differed from *Pirbhu Narain Singh* v. *Sita Ram* (4). There was, in my opinion, no *bona fide* mistake about the Court-fee and the omission to pay the full amount was deliberate.

In these circumstances, the appeal can only be taken as one for reduction of Rs. 450 from the sum decreed by the lower Appellate Court as payable for redemption.

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I have read the mortgage-deed and I agree with the lower Appellate Court that its terms indicate an intention by the parties that, should there be no foreclosure by sale, interest would continue to be paid up to the date of redemption. Even if this were not so, there is nothing about the case to take it out of what is laid down in *Motan Mal* v. *Muhammad Bakhsh* (7), as the ordinary rule that a mortgagee is entitled to *post diem* damage at the rate of interest stipulated in the instrument of mortgage and for the whole period during which the principal sum has remained unpaid.

Cross-objections are filed against the refusal of the lower Appellate Court to allow interest on the cost of repairs. There is no provision for such interest in the mortgage-deed and I see no reason why it should be given. Counsel for the respondent has quoted *Radha Kishen* v. *Muhamdu* (8), but this question has to be decided with reference to the terms of the particular contract under consideration.

I dismiss both the appeal and the cross-objections. The appellant will pay the respondent's costs.

W. C. A. *Appeal dismissed.*

(1) 57 Ind. Cas. 215; 3 L. L. J. 370; 1 L. 234; 144 P. L. R. 1920.
(2) 30 Ind. Cas. 104; 58 P. R. 1915; 166 P. W. R. 1915; 58 P. L. R. 1916.
(3) 10 B. 41; 5 Ind. Dec. (N. S.) 411.
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(5) 9 Ind. Cas. 676; 5 P. R. 1911; 48 P. L. R. 1911; 59 P. W. R. 1911.
(6) 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40.
(7) 66 Ind. Cas. 771; 3 L. 200; (1922) A. I. R. (L.) 254; 4 U. P. L. R. (L.) 55; 42 P. L. R. 1922 (F. B.).
(8) 57 P. R. 1888;

on the 26th August 1918 it was found to contain only two pieces of tweed and one dozen Jharans. One piece of Kashmira and one dozen Jharans were evidently found missing.

The question for consideration is, whether limitation should be computed in these circumstances from the 26th August 1918 when the plaintiff ascertained the loss and the delivery was not made, or from the 10th August 1918 when the parcel first arrived. The parcel was short in weight when it came; but the right to claim compensation for the loss of the goods accrued when, on the parcel being opened, it was found that certain articles were wanting. The occurrence of the loss could not have been definitely ascertained or brought home before the 26th of August 1918 and the claim of the plaintiff was, therefore, within time. As the suit was decided by the Courts below on a preliminary point, the appeal is allowed and the suit remanded to the Court of first instance with directions to reinstate it under its original number and to dispose of it after determining the other points involved in the manner provided by law. The costs here and hitherto will abide the result.

W. C. A. *Suit remanded.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 31 OF 1922.
August 16, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

Maharaja Bahadur KESHO PRASAD SINGH—DEFENDANT—APPELLANT
versus
BHAGWAT SARAN PANDE—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 32, 105, 109—Suit for abatement of rent—Plaintiff, what must prove—Question of determination of area, whether can be gone into in civil suit.

In order to succeed in a suit for abatement of rent, brought under section 32 of the Bengal Tenancy Act, the plaintiff must show that there has been a diminution of area in the land held by him at the date of the suit. [p. 671, col. 1.]

In order to assess a fair rent upon a holding it is necessary for the Settlement Officer to ascertain what is the area held, and for this purpose he may either accept the area entered in the Record of Rights, or alter it after taking evidence. It is not necessary that a direct issue should be raised as to the area of the holding. [p. 671, col. 2.]

As the question of the determination of the area held forms the subject of proceedings taken before the Settlement Officer, under section 105 of the Bengal Tenancy Act, the question of area cannot be again raised in a Civil suit. [p. 671, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Das in Second Appeal No. 911 of 1920, dated the 10th July 1922, published as 67 Ind. Cas. 710.

Mr. *Nirsu Narain Sinha*, for the Appellant.

Mr. *Siva Nandan Roy*, for the Respondent.

JUDGMENT.

Mullick, J.—The plaintiff alleges that he took settlement of 3 *bighas* 3 *kathas* and 16 *dhurs* of land from Government at a rent of Rs. 5 per *bigha* and that he has acquired occupancy rights therein. The proprietary rights in the land were subsequently sold by Government to the defendant, the Maharaja of Dumraon, who is now the plaintiff's landlord.

At the last Cadastral Survey the area of the holding was entered in the Record of Rights as 2 *bighas* 3 *kathas* and 4 *dhurs*. Thereafter, an application was made under section 105 of the Bengal Tenancy Act by the landlord for the settlement of fair and equitable rents in the *mouza* with the result that the Settlement Officer raised the plaintiff's rent as recorded in the Record of Rights from Rs. 15-15-0 to Rs. 17-13-9.

The present suit is brought under section 52 of the Bengal Tenancy Act for abatement of rent on the ground that there has been a diminution of area from 3 *bighas* 3 *kathas* 16 *dhurs* to 2 *bighas* 3 *kathas*

on the 26th August 1918 it was found to contain only two pieces of tweed and one dozen Jharans. One piece of Kashmira and one dozen Jharans were evidently found missing.

The question for consideration is, whether limitation should be computed in these circumstances from the 26th August 1918 when the plaintiff ascertained the loss and the delivery was not made, or from the 10th August 1918 when the parcel first arrived. The parcel was short in weight when it came; but the right to claim compensation for the loss of the goods accrued when, on the parcel being opened, it was found that certain articles were wanting. The occurrence of the loss could not have been definitely ascertained or brought home before the 26th of August 1918 and the claim of the plaintiff was, therefore, within time. As the suit was decided by the Courts below on a preliminary point, the appeal is allowed and the suit remanded to the Court of first instance with directions to reinstate it under its original number and to dispose of it after determining the other points involved in the manner provided by law. The costs here and hitherto will abide the result.

W. C. A. *Suit remanded.*

PATNA HIGH COURT.

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versus
BHAGWAT SARAN PANDE—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 32, 105, 109—Suit for abatement of rent—Plaintiff, what must prove—Question of determination of area, whether can be gone into in civil suit.

In order to succeed in a suit for abatement of rent, brought under section 32 of the Bengal Tenancy Act, the plaintiff must show that there has been a diminution of area in the land held by him at the date of the suit. [p. 671, col. 1.]

In order to assess a fair rent upon a holding it is necessary for the Settlement Officer to ascertain what is the area held, and for this purpose he may either accept the area entered in the Record of Rights, or alter it after taking evidence. It is not necessary that a direct issue should be raised as to the area of the holding. [p. 671, col. 2.]

As the question of the determination of the area held forms the subject of proceedings taken before the Settlement Officer, under section 105 of the Bengal Tenancy Act, the question of area cannot be again raised in a Civil suit. [p. 671, col. 2.]

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JUDGMENT.

Mullick, J.—The plaintiff alleges that he took settlement of 3 *bighas* 3 *kathas* and 16 *dhurs* of land from Government at a rent of Rs. 5 per *bigha* and that he has acquired occupancy rights therein. The proprietary rights in the land were subsequently sold by Government to the defendant, the Maharaja of Dumraon, who is now the plaintiff's landlord.

At the last Cadastral Survey the area of the holding was entered in the Record of Rights as 2 *bighas* 3 *kathas* and 4 *dhurs*. Thereafter, an application was made under section 105 of the Bengal Tenancy Act by the landlord for the settlement of fair and equitable rents in the *mouza* with the result that the Settlement Officer raised the plaintiff's rent as recorded in the Record of Rights from Rs. 15-15-0 to Rs. 17-13-9,

The present suit is brought under section 52 of the Bengal Tenancy Act for abatement of rent on the ground that there has been a diminution of area from 3 *bighas* 3 *kathas* 16 *dhurs* to 2 *bighas* 3 *kathas*

4 *dhurs*. The Munsif decreed the suit and allowed an abatement of Rs. 5-12-4 per annum. That decision was affirmed by the District Judge in appeal and also by a learned Judge of this Court in second appeal. The present Letters Patent Appeal is preferred by the landlord.

The learned Judge of this Court, finding that the District Judge had committed an error of procedure in relying only upon the pleadings for the purpose of coming to a decision on the question whether the original settlement made with the plaintiff was for a consolidated rental of Rs. 15-15-0 irrespective of the area held or at a rental of Rs. 5 per *bigha* on the area actually held, heard the second appeal before him as a first appeal and examined the evidence himself, and he came to the conclusion that the land was settled with the plaintiff at the rate of Rs. 5 per *bigha*.

In my opinion it is not necessary for our present purposes to follow the procedure of the learned Judge and to examine the correctness of the learned Judge's finding, for the plaintiff must fail upon a question of law.

In order to succeed in his suit the plaintiff must show that he was paying a rent of Rs. 17-13-9 upon 3 *bighas* 3 *kathas* 16 *dhurs* and that the land now in his possession according to the same standard of measurement is 2 *bighas* 3 *kathas* and 4 *dhurs*. Now there is no finding that there has been any diminution of area since the Settlement Officer settled a fair rent for the holding. The learned District Judge does find that the standard of measurement at the inception of the tenancy was the same as that in the Cadastral Survey, but this is directly in conflict with the finding of the Assistant Settlement Officer who finds that the standard was a pole of 5½ cubits in the Cadastral Survey and 5 cubits at the inception of the tenancy. The Record of Rights shows 2 *bighas* 3 *kathas* 4 *dhurs* as the area of the holding and from the Assistant Settlement Officer's judgment it would seem that, in his opinion, there had been no change in the quantity of land held by the plaintiff and that the difference was due to a difference in the two standards of measurement. It does not appear that in the Courts below regard has been paid to the necessity for finding what was the area in respect of which the Settlement Officer made his assessment.

The next point is, that section 109 is a bar to the present suit. Section 105 requires the Revenue Officer to assess a fair rent upon the area actually held by the tenant, and section 105 (A) empowers him, either at the instance of the parties or of his own motion, to raise certain issues regarding the area and other matters. In order to assess a fair rent upon a holding it is necessary for the Settlement Officer to ascertain what is the area held and for this purpose he may either accept the area entered in the Record of Rights or alter it after taking evidence. In the present case the Settlement Officer did not disturb the entry in the Record of Rights as to the area, and the question is, whether the determination of the area is a matter which has already been the subject of an application made in the suit instituted or proceedings taken before the Settlement Officer under section 105. In my opinion the answer is in the affirmative. It is not necessary that a direct issue should have been raised as to the area of the holding. If it was impossible for the Settlement Officer to assess a fair rent in respect of the land held by the tenant without ascertaining the quantity, then the question of area was one of the matters which was the subject of the proceedings under section 105. In my opinion, therefore, the question of area cannot be again raised in the present civil suit.

It is contended that there can be no application of the rule of *res judicata* by analogy and the reliance is placed upon *Nawab Bahadur of Murshidabad* v. *Ahmad Hussain* (1) and *Apurba Krishna Roy* v. *Syama Charan Pramanik* (2). In my opinion these cases have no applicaion to the facts before us. There is no question at all of applying the rules of *res judicata* by analogy. The sole point is, whether section 109 of the Bengal Tenancy Act, which is couched in very wide language covers the present case. It is contended by the respondent that in the present case the Assistant Settle-

(1) 35 Ind. Cas. 695; 21 C. W. N. 1004; 25 C. L. J. 556; 44 C. 783.
(2) 54 Ind Cas. 952; 24 C. W. N. 223.

ment Officer never applied his mind to the question of area and that he was only considering whether any enhancement could be allowed on the ground of a rise in prices upon the rental entered in the Record of Rights, *viz.*, Rs. 15-15-0. It is urged that a decision on a point which was never raised is not *res judicata* merely because it might have been raised. It is difficult to see how the landlord could have raised the point as his case was that there had been no change in the area. The tenant certainly would not have raised it if he thought that his area has diminished from 3 *bighas* 3 *kathas* 16 *dhurs* to 2 *bighas* 3 *kathas* 4 *dhurs*. But whether the tenant or the landlord raised it or not, it was the duty of the Assistant Settlement Officer to raise it in order to assess the rent. The contention that the Assistant Settlement Officer merely considered how many annas per rupee were to be allowed as enhancement on the ground of rise in prices and that he did not consider the question of area at all implies that the Assistant Settlement Officer neglected to perform his duty, and it cannot be accepted without proof. It may be that every entry in a Record of Rights need not be the subject of a proceeding under section 105, and that in respect of some matters a subsequent suit either under section 106 of the Bengal Tenancy Act before a Revenue Officer or an ordinary title suit before a Civil Court would not be barred. It is not necessary for our purposes to examine that question. It is sufficient to say that in the present case it has not been shown that there has been any diminuation in the area on which rent was last assessed, and that no suit for abatement can lie. The appeal is, therefore, decreed with costs to the appellant in all Courts.

Miller, C. J.—I agree.

W. C. A. *Appeal decreed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 752 OF 1921.

January 9, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

Sahu BISHESHAR NATH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ABDUL WAHID—DEFENDANT—RESPONDENT.

Second appeal—Finding of fact—Adverse possession, finding on question of.

A finding on the question of adverse possession is a finding of fact, and cannot be questioned in second appeal.

Jai Chand v. *Girwar Singh*, 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814, distinguished.

Second appeal against a decree of the Sub-Judge, Moradabad, dated the 3rd February 1921.

Mr. *K. N. Katju*, for the Appellants.

JUDGMENT.—This was a suit for possession of a house situated in the town of Bijnor of which the plaintiff is *zemindar*. The plaintiff's case was that the house was occupied by the defendant's father as tenant.

The defendant's case was that his father occupied it adversely.

The lower Appellate Court finds that the defendant's father occupied the house adversely more than twelve years before the suit. This finding is fatal to the appeal. The ruling in *Jai Chand* v. *Girwar Singh* (1) which has been referred to, does not apply to the facts of this case. The appeal fails and we accordingly dismiss it. We make no order as to costs as the respondent is not represented.

W. C. A. *Appeal dismissed.*

(1) 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814.

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MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 51 OF 1922.

March 23, 1923.

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

MAJETI SUBBIAH AND CO.,—PLAINTIFFS —APPELLANTS

versus

MESSRS. TETLEY AND WHITLEY—DEFENDANTS—RESPONDENTS.

Arbitration Act (IX of 1899), s. 10—Contract, construction of—Dispute to be referred to arbitration—Damages, claim for, whether can be referred—Stay of suit—Discretion of Court.

A contract for delivery of goods provided that, "should any disputes arise as to the interpretation of the contract or any matter in connection therewith or the carrying out thereof, the same shall be submitted to arbitration:"

Held, that claims for damages for breach of contract were not excluded under the clause.

A suit for damages for alleged breach of contract can be stayed by a Court in a proper case pending reference to arbitration.

But it is open to the Court to decline to stay the action either by reason of the fact that there are charges of fraud, or by reason of the Court coming to the conclusion that in arbitration complete justice cannot be obtained between the parties, or for some other proper cause that the matter should be kept in Court rather than be referred to arbitration.

Wallis v. *Hirsch*, (1857) 1 C. B. (N. S.) 316; 26 L. J. C. P. 72; 140 E. R. 131; 28 L. T. (O. S.) 159; 107 R. R. 677 and *Piercy* v. *Young*, (1880) 14 Ch. D. 200; 42 L. T. 710 28 W R.845, referred to.

Nobel Brothers Petroleum Production Co. v. *P. Stewart and Co.*, (1890), 6 T. L. R. 378, distinguished.

Appeal from the judgment, dated the 20th February 1922, of Mr. Justice Kumaraswamy Sastri, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 1150 of 1921.

Mr. *P. Venkataramana Rao*, for the Appellants.

Messrs. *Short, Bewes & Co.*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—In this case the dispute arises under a contract as to whether the vendors had broken the contract by failing to deliver at the proper time, and whether the purchasers were entitled to sue in respect of the alleged breach and, if so, whether they are entitled to any and what damages

[From the correspondence it would appear that there might be a counter-claim also on the ground that the vendors allege that the purchasers failed to take and pay for the goods as they were bound to do under the contract. The contract contains an arbitration clause, Art. 12, in the following terms: "Should any dispute arise as to the interpretation of this contract or any matter in connection therewith or with the carrying out thereof, the same shall be submitted to arbitration," and it gives the merchants an option as to the form of arbitration. An application was made to stay the suit pending reference to arbitration under Art. 12 of the contract. The learned Judge stayed the action and this is an appeal from that order.

It is argued before us that the learned Judge had no power to stay the action, because the claim made, as appears from the plaint, was for damages for breach of the contract, and it was argued that, under such an arbitration clause, claims for damages for breach of the contract are excluded. I asked, in the course of the argument, if such claims were excluded, and I received no answer. Authority for the proposition there is none. Reference to arbitration under similar clauses in respect of breaches of contract is of daily occurrence in England and, as far as my experience goes, no one ever ventured to suggest to the Court there that there was no power to refer in matters of breach of contract, the real reason being that it is only in respect of breaches of contract that references arise. There may be questions of interpretation of contract not involving a breach which would also be covered, but these must be very rare. The ordinary scope of such a clause is that the ordinary commercial disputes which almost always involve an alleged breach, on one side or the other should be referred to a Tribunal chosen by the parties, namely, arbitration, instead of going to Court. The learned Judge puts the test in this way: "The test is whether the claim is made in respect of a contract which parties declare binding on them or in respect of a matter arising *de hors* the contract in a cause of action based on its invalidity." I do not know where those words come

from, but I think they are quoted from some leading authority and, at any rate, in my judgment, correctly state the position in law. If the case is on a matter arising out of the contract, the most usual instance of that being a case of breach of contract like the present, there is no doubt whatever that there is power in the Court to refer to arbitration. It is true that in certain cases the Court will not exercise that power. Those are cases where, either by reason of the fact that there are charges of fraud, or by reason of the Court coming to the conclusion that in arbitration complete justice cannot be obtained between the parties, or for some other proper cause that the matter should be kept in Court than be referred to arbitration, the Court can decline to stay the action. There is nothing of that sort in this case, and, in my judgment, the learned Judge was perfectly correct in staying this action. This appeal must be dismissed with costs.

Ramesam, J.—I agree. *Wallis* v. *Hirsch*, (1) is a case in which a question of fraud was raised and the learned Judges refused to exercise their discretion in referring the case to arbitration and staying all proceedings *Nobel Brothers Petroleum Production Co.* v. *P. Stewart & Co.* (2) does not help the appellant, as the facts are rather peculiar. But, apart from this, the case seems to be one of doubtful authority and very near the line. The decision in *Piercy* v. *Young* (3) states the principle correctly and it is clear that the appellant has no case.

V. N. V. *Appeal dismissed.*

(1) (1857) 1 C. B. (N. S.) 316; 26 L. J. C. P. 72; 140 E. R. 131; 28 L. T. (O. S.) 159; 107 R. R. 677.
(2) (1890) 6 T. L. R. 378.
(3) (1880) 14 Ch. D. 200; 42 L. T. 710; 28 W. R. 84.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2077 OF 1922.

May 16, 1923.

Present:—Mr. Justice Moti Sagar.

TARA CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAHMAN SHAH AND OTHERS—PLAINTIFF—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity — Recitals in deed, evidentiary value of.

Recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain, but when a long time has elapsed between an alienation and the suit challenging it, and when all those who could have given evidence on the relevant points have grown old or have passed away, a recital in the deed of transfer, consistent with the probabilities and circumstances of the case, assumes greater importance and cannot lightly be set aside.

Nanda Lal v. *Jagat Kishore Acharyya*, 36 Ind. Cas. 420; 44 C. 186, 20 M. L. T. 335, 31 M. L. J. 503; (1916) 2 M. W. N. 336, 4 L. W. 458, 18 Bom. L. R. 768, 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225 10 Bur. L. T. 177, 43 I. A. 249 (P. C.), followed.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 28th April 1922, modifying that of the Junior Subordinate Judge, Rawalpindi, dated the 23rd December 1921.

Mr. *D. C. Kalla*, for the Appellants.

Malik *Mukammad Tofail*, for the Respondents.

JUDGMENT.—On the 27th of April 1898, *Musammat* Khanam Ji, widow of one Fateh Shah, sold 62 *kanals*, 5 *marlas* of land in *Mauza* Dheri Shahan in Fateh Jang Tahsil of the Campbellpore District to one Shankar Das for Rs. 800. On the 28th of April 1899 she sold another plot of 8 *kanals* of land in the same village to Bhagwan Das and others for Rs. 96. In June 1920 the plaintiffs brought this suit for possession alleging that they were the reversioners of Fateh Shah, the husband of *Musammat* Khanam Ji; that the land was ancestral, and that the alienation was without consideration and legal necessity. The defendants repudiated these allegations and contended, that the land was the self-acquired property of the deceased; that the alienation was for considera-

tion and necessity, and that in the presence of daughters the plaintiffs had no right to maintain the suit. The Trial Court found in favour of the defendants-vendees on all points and dismissed the plaintiffs' suit. On appeal the learned District Judge upheld the finding of the Trial Court in so far as the first deed of 1898 was concerned but came to a contrary finding on the question of the plaintiffs' *locus standi* to maintain the suit and also with regard to the nature of the property which he found to be ancestral. He further held that no necessity and consideration had been established for the second sale-deed of 1899, and he accordingly passed a decree in favour of the plaintiffs for possession of the land covered by that sale deed.

Against this decision a second appeal has been preferred to this Court by the defendant-vendee, and it has been contended on his behalf that the finding of the learned District Judge as to the second sale-deed not being for necessity and consideration is not very clear and definite and that it should be set aside. A preliminary objection is raised on behalf of the respondents that the finding is one of fact and cannot be impugned in second appeal. In my opinion there is no force in the respondents' objection, and it must be overruled. The consideration, as recited in the sale-deed, was made up of the following three items:—

		Rs.	a.	p.
(1)	Due on account of a decree for arrears of rent ..	71	13	0
(2)	Paid cash for registration	8	0	0
(3)	Due on account of the price of corn by the vendor	16	3	0
	Total ..	96	0	0

The learned District Judge does not definitely find that there was no decree in existence on account of which Rs. 71-13-0 were paid by the vendor. His finding only amounts to this that the recital in the sale-deed has not been sufficiently corroborated by other evidence on the record. But it should be remembered that the sale-deed was effected in 1899 and that the original vendee is now dead. It has been held by the Judicial Committee in *Nanda Lal v. Jagat Kishore Acharjya* (1) that recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain, but that, when a long period has elapsed between the alienation and the suit to set it aside, and when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. This authority is exactly in point and I do not think that in this case the recitals in the sale-deed, which are clear evidence of the representations that must have been made to the vendee, can be disregarded after such a length of time. The learned District Judge admits in his judgment that the mortgage-deeds (D. 15 and D. 17), dated the 9th of January 1880, executed by Nigah Ali Shah, the father of Fateh Shah, in favour of Prabh Dial, the father of Tara Chand, and of Bhagwan Das, vendee, show that there must have been dealings between Nigah Ali Shah's family and the family of the vendee. This circumstance, coupled with the recitals in the sale-deed, is quite sufficient to support necessity for the deed, and I do not see any sufficient reason why the alienation in question should be set aside.

I accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Z. K. *Appeal accepted.*

(1) 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 25 OF 1921.

February 26, 1923.

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

RAM LAL RAI—PLAINTIFF—APPELLANT

versus

Musammat MURTA KUER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 118—Suit for declaration that adoption invalid—Limitation, terminus a quo

The period of limitation for a suit for a declaration that an adoption by a Hindu widow is invalid and for a further declaration that the plaintiff is a reversioner of the husband of the widow, commences to run, under Art. 118 of Sch. I to the Limitation Act, from the date of the knowledge of the alleged adoption.

First appeal against a decree of the Subordinate Judge, Gazipur, dated the 11th December 1920.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for a declaration that the adoption of Bishunath Rai, defendant No. 2, by *Musammat* Murta Kuer, the widow of Basudeo Rai, on the 24th of January 1908, under a registered deed was null and invalid for reasons given in the plaint and for a further declaration that he, the plaintiff-appellant, was a reversioner of Basudeo Rai. A similar suit, it seems, was brought by the plaintiff-appellant in 1912 which he withdrew with leave to bring a fresh one, if so advised. One of the objections taken to the present suit was that the claim was barred under Art. 118 of the Indian Limitation Act.

The learned Subordinate Judge in whose Court the suit was filed on the 8th of December 1919 allowed the plea of limitation and dismissed the claim. In appeal before us it is contended on behalf of the plaintiff-appellant that the view of law taken by the Court below is not sound. It is argued that, if the adoption is void *ab initio*, Art. 118 would not apply. We are unable to accede to this contention. The language of Art. 118 of the Indian Limitation Act is quite clear. Time begins to run from the date of the knowledge of the alleged adoption. Had the plaintiff been suing for possession on the ground that he was the reversioner of Basudeo

Rai, and had he further alleged that the adoption of Basudeo Rai was invalid under the Hindu Law, Article 118 would not have been applicable and the plaintiff would have had twelve years within which to sue. The present suit is merely for declaratory relief and Art. 118 is clearly applicable.

The appeal, therefore, fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

W. C. A.

PATNA HIGH COURT.

MISCELLANEOUS APPEALS NOS. 112 TO 114 OF 1921.

February 7, 1922.

Present :—Mr. Justice Jwala Prasad.

JAGDHARI RAI AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

LANGAT GOPE AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 170 (2)—Decree for arrears of rent, sale held in execution of—Application to set aside sale, after holding knocked down to auction-purchaser, competency of—Order refusing to set aside sale—Second appeal, whether lies.

Section 170 (2) of the Bengal Tenancy Act operates as a bar to an application by the holder of a decree for arrears of rent to set aside a sale held in execution of that decree on the ground that the decree has been satisfied out of Court, when such application is made after the tenure or holding has been knocked down to the auction-purchaser.

An order refusing to set aside a sale held in execution of a decree for arrears of rent is not open to second appeal.

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

Messrs. *L. N. Singh* and *Rai Bepin Behari Saran*, for the Respondents.

JUDGMENT.—These second appeals arise out of sales held in execution of rent-decrees obtained by the decree-holders-appellants. The sales were held on the 9th of August 1920. The case of the decree-holders is that, before the sales were held, their Pleader told the *Nazir* not to hold the sales inasmuch as petitions of satisfaction of the decree were going to be filed and the *Nazir* assured him

that the sales would not be held. At that time, it is said, the Presiding Officer was in his Chamber and consequently the applications were filed, after he came out of his Chamber. The *Nazir* was examined in this case and he stated that no doubt the Pleader of the decree-holders told him not to hold the sales, but at that time the sales had already taken place.

We find in the order-sheet two orders of the 9th of August, namely, Nos. 3 and 4. In Order No. 3 the Court recorded the following order:

"Sale held and the property purchased by Jagdip Singh, other than the decree-holder, for Rs. 21. Earnest-money deposited. The balance of the purchase-money to be deposited within 15 days. Put up on 26th August 1920 for further orders."

Order No. 4 runs as follows:

"Afterwards the decree-holders filed a petition certifying full satisfaction of the decretal money. Put up in the presence of the Pleaders."

On the 10th August the auction-purchaser filed a petition opposing the petition of satisfaction filed by the decree-holders. This also was ordered to be put up in the presence of the Pleaders concerned.

On the 11th August the decree-holders filed a petition stating that the sales were held after a petition of satisfaction had been filed and prayed that the sales may not be accepted. In view of the difference between the parties as to when the petition of satisfaction was filed by the decree-holders and as to whether there was a real *bona fide* petition of satisfaction, the Court took evidence on behalf of both the parties in support of their respective cases.

On the 7th September the Munsif held that the petitions of satisfaction were not *bona fide*, and that the decrees were, as a matter of fact, not satisfied. In his view it did not matter whether the petitions of satisfaction were filed before or after the sales had taken place, inasmuch as the intimation to the *Nazir* not to hold the sales was not valid under O. XXI, r. 69, which requires that a sale held within the precincts of the Court-house shall not be adjourned without the leave of the Court, and the *Nazir* who was conducting the sales had no right to adjourn the sales.

On appeal by the decree-holders the learned Subordinate Judge differed from the view of the Munsif that the petition of the decree-holders was not fit to be entertained inasmuch as the petitions of satisfactions were not *bona fide*. He was of opinion that it was not the business of the Court to make any enquiry as to whether the payments had actually been made to the decree-holders or not, or whether the petitions of satisfaction filed by the decree-holders were *mala fide* or bogus. According to him, after a petition of satisfaction is filed by the decree holder, whether *bona fide* or *mala fide*, the sale could not take place. In his view he is supported by the case cited by him in *Nawab Haider Mirza* v. *Pandit Kailash Narain Dar* (1). The learned Subordinate Judge is also supported in his view by section 170 of the Bengal Tenancy Act though he does not expressly refer to it. This section seems to have been lost sight of by the Munsif for he does not refer to it in his judgment. Clause (2) of that section clearly provides for a decree-holder to make an application for a release of the tenure or holding on the ground that the decree has been satisfied out of Court. Upon such an application the tenure or holding shall be released from attachment provided the application is made before the tenure or holding is knocked down to the purchaser. Under that section no enquiry is needed as to whether the application is *bona fide* or not. The only condition laid down is that the application should have been made before the tenure or holding is knocked down to the auction-purchaser. The evidence of the *Nazir* was that the decree-holder's Pleader asked him not to hold the sales after the sales had taken place. The Orders Nos. 3 and 4 in the order-sheet of the Munsif referred to above clearly show that the decree-holder's petition certifying full satisfaction of the decretal money was made after the sales were held and the property was purchased by the auction-purchaser and earnest-money was deposited. In Order No. 3 the Court, therefore, had already accepted the sale.

(1) 47 Ind. Cas. 177; 21 C. C. 161; 5 C. L. J. 482.

The petition filed by the decree-holders was, therefore, a little too late. None of the Courts has come to a definite finding as to whether the verbal intimation to the *Nazir* was made before or after the sales had actually taken place. The parties were at variance on this point. If it were held that the intimation was given to the *Nazir* of full satisfaction of the decrees and, therefore, not to hold the sales, perhaps the *Nazir* would not have been justified to persist in knocking down the holdings in question, for section 170 of the Bengal Tenancy Act does not require either a written application or that an application for release of the tenure or holding, on the ground that the decree has already been satisfied out of Court, should be made to the Court and not to the Officer conducting the sale. I do not agree with the view of the Courts below that O. XXI, r. 69 had any application to the present case if in fact the intimation of satisfaction of the decree was given to the *Nazir* before the sales had taken place, regard being had to the fact that the Presiding Officer of the Court was in Chamber and it was almost physically impossible to make the application to the Court, though, as the Munsif says, there was nothing to prevent the decree-holders' Pleader coming into his Chamber; but that would have been an unusual thing and the decree-holders' Pleader might or might not have liked to go into the Chamber. Had the matter rested there, I would have considered it to be a case of illegal sale in contravention of section 170, clause (2) of the Bengal Tenancy Act; but it appears from the orders referred to above that the application by the decree-holder certifying full satisfaction of the decrees was made to the Court after the Court had accepted the sales. Presumably, the order accepting the sales was signed when the Presiding Officer came out of his Chamber and sat on his *ijlas*, in the absence of any proof that Order No. 3 was signed by the Presiding Officer in his Chamber. In this view, the application of the decree-holder was made after the sales had taken place and the bid was accepted by the Court (not only by the *Nazir*), and, therefore, the sales cannot be set aside on account of the application made by the decree-holders for the release of the tenure or holding on the ground that the decrees were satisfied out of Court.

When the case was first argued before us there was a talk of compromise, and the Vakil on behalf of the decree-holders offered to pay 5 per cent. of the purchase-money as compensation to the purchaser. The compromise, however, ultimately failed and the case had, therefore, to be heard again. Considering that the case was a hard one, I was myself inclined to think that this was a fit case to be compromised. At that time my attention was not drawn to section 170, Bengal Tenancy Act, and in fact neither the Courts below nor the learned Vakils appearing on behalf of the parties in this case drew my attention to that section. On a fuller consideration of the case I hold that section 170, Bengal Tenancy Act, bars the application of the decree-holders to have the sales set aside. In fact, no proper application for having the sales set aside was made under O. XXI, r. 90 of the Code of Civil Procedure on the ground of irregularity in publishing or conducting the sales. The application of the 9th of August was an application for satisfaction of the decree. The application of the 11th August was an application asking the Court not to accept the sales. Obviously, the decree-holders treated the sales as being wholly without jurisdiction.

It appears to me that second appeals in this case from the order of the Court below are incompetent. The learned Vakil on behalf of the appellants asked me to convert the appeals into applications for revision. Even if his request is acceded to, it has already been shown that there is no want of jurisdiction or any illegality or irregularity in the order of the Court below and consequently this Court will not have power to revise the order of the Court below.

The result is, that the appeals are dismissed. In view of the circumstances of the case, I would make no order as to costs.

W. C. A. *Appeals dismissed.*

MAHADEO *v.* RAM BHAROSE.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 399 OF 1921.
November 15, 1922.
Present:—Mr. Justice Stuart.
MAHADEO—DEFENDANT—APPELLANT
versus
RAM BHAROSE AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Tenant's house falling down —Test for determining whether site reverts to landlord— Abandonment, what is.

The test for determining whether, when the house of a tenant falls down, the site reverts to the landlord, is whether the tenant has abandoned the premises. The mere fact that he has not repaired the premises for a considerable time is no proof of abandonment.

Second appeal against the decree of the Additional Subordinate Judge, Banda, dated the 22nd December 1920.

Mr. *N. Upadhiya*, for the Appellant.

Messrs. *K. N. Katju* and *H. K. Kaul*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are these:—

Ram Bharose and Chakkoo were the owners of a house and *chaupal* in the village of Marka in the Banda District. Some 8 or 9 years ago the house fell down. The land was not cleared and the dilapidated house remained in possession of the plaintiffs. The defendant opened a door in his house which adjoins, facing on the dilapidated house in a manner which would interfere with the privacy of the occupants of the house when the house was re-built and again became occupied. The plaintiff's case is that in 1920 they commenced to repair the dilapidated house. The defendant interfered with their possession of the house and *chaupal*; hence the suit for possession of the dilapidated house and *chaupal* and for the closing of the door. The Munsif found that as the house had fallen down, the plaintiffs had lost all title therein, the ruin and the site having escheated to the *zemindar*; and he, therefore, dismissed the suit in respect of possession of the dilapidated house and the closing of the door, but as he found that the plaintiffs had good title to the *chaupal*, he decreed the suit for possession of the *chaupal*.

The Additional Subordinate Judge found that the dilapidated house was still a house; that the plaintiffs had title to it which they had never lost; that the defendant had interfered with their possession both over the house and the *chaupal*, and that the opening of the door was prejudicial to the plaintiffs' title. He, therefore, decreed the claim in full. The defendant comes here in second appeal.

The main point taken by his learned Counsel is that, when a tenant's house falls down the site reverts to the *zemindar*. I cannot accept this conclusion. If it were accepted, the consequences would be somewhat surprising, for there is not a year in this Province when a large number of tenants' houses do not fall down. In a year such as the present, in which the rains have been very intense for a short period, in many villages the greater part of the tenants' houses have practically melted away, and if it were decided that this circumstance involved the escheating of the site to the *zemindar*, a large number of agricultural tenants would be homeless at the present moment. There is no authority for the view propounded. The real test is this: Has the tenant abandoned the house? A tenant is not expected to keep his house up to any particular standard of repair. If he lets the roof fall in and chooses to reside in a roofless building he cannot be ejected for the reason that he has allowed the disrepair to get beyond a certain point. The question is, have the premises been abandoned? And on the learned Subordinate Judge's finding it is quite clear that these premises were never abandoned. The plaintiffs have certainly taken a considerable time for repairing them but they are at liberty to repair them now. It is to be noted that no claim has been asserted by the *zemindar* in the matter. I, therefore, find that the learned Subordinate Judge was right. The plaintiffs have good title to the dilapidated premises as well as to the *chaupal*. They have every right to repair those premises. The opening of the door interferes with their user. I, therefore, dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

WALI MUHAMMAD v. FATEH KHAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 964 OF 1922.
December 8, 1922.

Present:— Mr. Justice Broadway.

WALI MUHAMMAD— PLAINTIFF— APPELLANT

versus

FATEH KHAN AND ANOTHER— DEFENDANTS— RESPONDENTS.

Custom— Alienation—Necessity, presumption as to—Lapse of time—Question of proof.

A male proprietor is not entitled to anticipate necessity for an alienation; nor can such necessity be presumed.

Khazan Singh v. *Suhel Singh*, 54 Ind. Cas. 923; 156 P. R. 1919 and *Miran Bakhsh* v. *Goude Ram*, 13 Ind. Cas. 556; 89 P. W. R. 1912, followed.

Mere lapse of time does not remove the need for proving necessity although it may render the quantum of proof comparatively small.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 19th January 1922.

Mr. *Mehr Chand*, for the Appellant.

Mr. *B. N. Kapur*, for the Respondents.

JUDGMENT.— On the 11th September 1905, one Ali Bakhsh sold certain land to Fateh Khan for Rs. 1,200. Mutation was effected on the 7th July 1907. On the 21st June 1920, Wali Muhammad, son of Ali Bakhsh, instituted a suit for possession of the land sold alleging that it was ancestral and that the sale had been effected without consideration and necessity. The vendee contested the suit pleading both consideration and necessity, and also that the plaintiff was a major at the date of the sale and by word and act had waived his right to contest the transaction, and the suit was barred by time. The Trial Court held that the plaintiff was a minor at the date of the sale and that the land was ancestral. The sale was then found to have been effected for consideration and necessity and the plaintiff's suit was dismissed without any discussion or decision of the remaining issues. The plaintiff preferred an appeal to the District Judge attacking the finding of the Munsif on the question of necessity. The consideration was made up of the following items:— (*a*) Due to the vendee on a previous mortgage, Rs. 200. (*b*) Due to Jemal Khan, previous mortgagee, Rs. 300. (*c*) To be taken in *Jeth Sambat* 1963, Rs. 400. (*d*) Registration and other expenses, Rs. 24. (*e*) Paid before the Sub-Registrar, Rs. 276.

The learned District Judge has treated the case in what he terms "a spirit of common sense," and has found that it was difficult for the vendee to show after this lapse of time what the actual necessity for the alienation was. He has not discussed the items of Rs. 200 and Rs. 300, but apparently the arguments before him centered round the items of Rs. 400 and Rs. 276. There appears to be no evidence whatever relating to the necessity for this sum of Rs. 400 which was to be paid (and was apparently paid) on the 20th May 1906. It has been laid down in *Khazan Singh* v. *Suhel Singh* (1) that a male proprietor is not entitled to anticipate necessities. The mere lapse of time does not remove the need for proving necessity although it may render the quantum of proof comparatively small. *Qua* these Rs. 400 the authority cited above appears to me to be conclusive. *Qua* the item of Rs. 276 there is no evidence on the record from which necessity can be gathered. It certainly cannot be presumed— *vide Miran Bakhsh* v. *Goude Ram* (2). These circumstances appear to me to prove that the decision of the lower Appellate Court on the question of necessity is erroneous. Mr. B. N. Kapur for the respondent wished to go into the question of limitation but this point was specifically left undecided by the Trial Court and I am unable to see that there is any material on the record to enable me to come to any definite conclusion as to it.

I, therefore, accept this appeal and return the case to the Court of first instance for disposal of the remaining issues in the case. Costs in this Court will follow the event.

W. C. A. *Appeal accepted.*

(1) 54 Ind. Cas. 923; 156 P. R. 1919.
(2) 13 Ind. Cas. 556; 89 P. W. R. 1912.

PATNA HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 211 OF 1922.

March 12, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

NRIPENDRA NATH CHATTERJI AND OTHERS—APPELLANTS

versus

JHUMAK MANDER AND OTHERS—RESPONDENTS.

Practice—Paper-book—Appeal in execution proceedings—Papers to be printed.

Where the question in appeal was whether a decree was capable of execution and the Registrar refused to get the decree and the agreement on which it was passed printed on the ground that they were not exhibited, though they formed part of the record:

***Held,* that the decree should be printed in the paper-book, but as regards other papers, if they formed part of the decree, they should be printed, otherwise not.**

Application against an order of the Registrar, dated the 16th February 1923.

Messrs. *Jagannath Prasad* and *Subal Chander Mazumdar*, for the Appellants.

Mr. *Reyasut Hussain*, for the Respondents.

ORDER.—This application is directed against the order of the learned Registrar, dated the 16th of February 1923, declining to print certain papers in the paper-book. The petition upon which the application was made admitted that the "papers were not formally exhibited though the Court was requested to do so." It sets out the fact that, though these papers were not exhibited, the Court treated the papers as part of the record and has even mentioned those papers in its judgment. On these facts it was quite impossible for the learned Registrar to accede to the application of the applicant. But it now appears that the papers, which the petitioners want to be printed in the paper-book are, first, the decree passed by the Court and, secondly, the agreement between the parties upon which the decree was passed and which forms part of the decree. The appeal is from an order of the learned Subordinate Judge refusing to execute the decree. It is obvious that the decree is part of the record and it was not necessary for the applicant to tender the decree formally in evidence. The whole question in appeal will be whether the decree is capable of execution. That is the question which the learned Subordinate Judge has decided and the appellant will contend in appeal that the decree is in fact capable of execution.

These facts were not placed before the learned Registrar and the result was that the learned Registrar refused the application of the applicant.

We direct that the decree be printed in the paper-book. As regards the other papers, if they form part of the decree, then they will be printed; if not, then they will not be printed.

M. D. J. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 465 OF 1921.

November 22, 1922.

Present:—Mr. Justice Stuart.

KANDHIYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat RAJ RUP KUNWAR—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 57, 63—Hindu widow's estate, what is—Widow, alienation by—Suit by reversioner for ejectment, whether maintainable.

A Hindu widow's estate is not a life-estate, nor is it an estate held in trust for reversioners. The widow represents the estate and has the power to make alienations subject to the right of the reversioner to have the alienations set aside if they are found to be either not for legal necessity or not for the benefit of the estate; until such alienations are set aside, they do not cease to be operative, and operate as a bar to a suit by a reversioner for the ejectment of the alienee.

Second appeal against a decree of the District Judge, Benares, dated the 23rd December 1920.

Mr. *K. Verma*, for the Appellants.

Mr. *G. Banerjee*, for Mr. *P. L. Banerjee*, for the Respondent.

JUDGMENT.—The facts of the suit out of which this appeal arises are as follows: A certain lady, called Aswamedh Kuer, had what appears to have been a Hindu widow's estate in a certain village. She gave perpetual lease of certain plots to one Gopal. Under this perpetual lease Gopal had power to transfer his rights The plots were agricultural land. After the lady's death Gopal transferred these plots to Kandhaiya and Gawal, defendants-appellants. The lady was succeeded by the present plaintiff-respondent, *Musammat* Raj Rup Kunwar.

The defendants-appellants constructed a house upon these plots and planted trees. The plaintiff-respondent sued to eject them under sections 57, 63 (*b*). The Assistant Collector permitted the ejectment subject to a proviso that if the defendants paid Rs. 50 compensation and removed the house and trees they should be permitted to retain possession. The learned District Judge in appeal set aside the latter portion of the order and decreed unconditional ejectment. The defendants appeal here.

The plea taken on their behalf must, I think, succeed. The suit, as brought, was premature. There is nothing to show that the lady who granted the permanent lease had an estate other than a Hindu widow's estate in the property in question. It appears to have been found by the learned District Judge that she had such widow's estate. Now that estate is not a life-estate, and it is not an estate held in trust for reversioners. She represented the estate and had power to make alienations subject to the right of the reversioners to have those alienations set aside if they were found to be either not for legal necessity or not for the benefit of the estate, but until such alienations are set aside they do not cease to be operative. The defendants-appellants are in the same position as Gopal and it was necessary for the plaintiff-respondent to set aside the alienation which the lady had made in favour of Gopal as precedent to instituting a suit for the ejectment of the defendants-appellants through the Revenue Courts. I, therefore, allow this appeal and direct that the suit of the plaintiff-respondent be dismissed. The plaintiff respondent will pay his own costs and those of the defendants-appellants in all Courts. These costs will include in this Court fees on the higher scale.

W. C. A. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 9 OF 1921.
CIVIL RULES NOS. 49 AND 140 OF 1921 AND No. 593 M. OF 1922.
February 8, 1923.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Panton.

HEMANGINI DASSI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHAGWATI SUNDARI DASSI AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Compromise on behalf of minor—Court, duty of—Opinion of next friend or guardian, whether can be ignored—Guardian acting improperly—Procedure.

It is settled law that, although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of their next friend or guardian *ad litem* in the action. [p. 685, col. 2.]

In re Birchall, Wilson v. *Birchall*, (1882) 16 Ch. D. 41; 44 L. T. 113; 29 W. R. 27, followed.

If the Court finds that a guardian or next friend is acting improperly and against the infant's interests in refusing to assent to an arrangement which appears clearly beneficial to them, steps may be taken to remove him and substitute some other person. [p. 685, col. 2.]

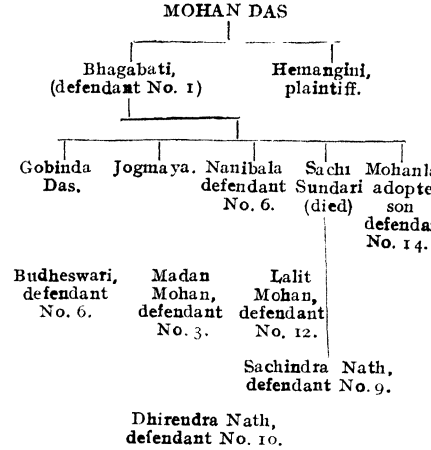
Appeal against the order of the Subordinate Judge of Rajshahi, dated the 15th of December 1920.

Babus *D. N. Chakrabarty* and *Jatindra Mohan Chowdhury*, for the Appellants.

Babus *Mohendra Nath Roy* and *Phanindra Lal Moitra*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal and to the connected Rules, shortly stated, are as follows:—One Mohunmohan Das, who was possessed of considerable properties both moveable and immoveable died on the 2nd March 1908 leaving him surviving his two widows, Hemangini Dassi and Bhagbatti Sundari Dassi, and a son, alleged to be of unsound mind, named Gobind Chand Dass by the said *Srimati* Bhagbati

Sundari Dassi, a deceased daughter's son and two unmarried daughters named Nanibala and Khudibala by the said Bhagbati Sundari and Hemangini respectively. The said Khudibala died unmarried sometime in 1320 B. S. Gobind Chand Dass died on the 10th April 1908 without any issue leaving him surviving his widow *Srimati* Bundeswari Dassi. Manmohan Das left a Will by which he appointed six executors and the Will directed that, in the event of there being difference of opinion between the executors in respect of any matter relating to the estate of the testator, the opinion of the majority should prevail. Application having been made by the said six executors for Probate of the said Will, the said two widows intervened and applied to be appointed as executrixes on the ground that they had been appointed impliedly so under the said Will. On the 18th January 1909, Probate of the said Will was granted by the District Judge of Rajshahi to the said six executors and to the said two widows. Sometime in 1912—13 two out of the said six executors died and thereafter the estate was administered by the surviving executors and by the two widows. In 1319 Nanibala was married to one Lalit Mohan Podder and a dispute subsequently arose between the two widows regarding the adoption of a boy named Shyamapada Das as a son to the testator. This dispute was compromised some time in *Ashar* 1325, when it was settled between the parties that the accumulations of the income of the estate amounting to Rs. 77,000 should be divided between the two widows, Nanibala and the grandson (Sachindra) of the testator in certain proportions and that Hemangini Dassi should execute an *ekrar* in favour of her co-widow acknowledging the validity of the adoption by her of the said Shyamapada Das. In *Kartick* 1325 the adopted son Shyamapada Das died. In 1919 Hemangini Dassi who had not been paid her portion of the said accumulations instituted a suit being Suit No. 361 of 1919, for construction of the said Will and for administration of the estate of the said testator. The defendants in that suit were no less than fourteen in number, *i.e.*, the four surviving original executors and certain other parties, the relationship between whom appears from the following geneological table:—



On the 16th September 1920, the plaintiff, Hemangini, filed a petition prayng that the suit may be disposed of in accordance with certain terms of compromise arrived at between her of the one part and three of the executors, namely, defendants Nos. 2, 4 and 5 of the other part. One of the terms of the said compromise was that a sum of Rs. 24,500 should be paid out of the estate of the said testator to Hemangini in accordance with the terms of Settlement of *Ashar* 1325. Along with this petition of compromise, an affidavit by one Rakhal Chandra Das was filed in which it was pointed out that although the proposed compromise was beneficial to the infant defendant No. 14 the defendant No. 1 as the guardian *ad litem* of the said infant had refused to give her consent to the said settlement and that in the circumstances it was necessary that defendant No. 1 should be removed and another person, namely, one Girish Chandra Das, the natural father of the infant, should be appointed guardian *ad litem* in place of the defendant No. 1 *Srimati* Bhagbati Dassi. The defendant No. 14, it may be noted here, was adopted as a son by *Srimati* Bhagbati after the death of Shyamapada Das who has been referred to above. On the 18th September 1920 the said Girish Chandra Das filed a petition

praying that he may be appointed guardian *ad litem* of the minor defendant No. 14 in place of *Srimati* Bhagbati. By the terms of the proposed compromise the junior widow, *i.e.*, the plaintiff, relinquished all claims to the estate of the said testator and admitted the validity of the second adoption recognising the minor adopted son of the senior widow namely, the defendant No. 14, as the sole heir to the said estate; but these admissions and the withdrawal were made conditional on the payment to the plaintiff of the said sum of Rs. 24,500. The applications referred to above were vigorously contested by the other widow *Sreemati* Bhagbati and the dissenting executor Madan Mohan Das before the Subordinate Judge before whom the administration suit was pending; but, meanwhile, a separate application had been brought by the plaintiff before the District Judge for permission to compromise the said suit in terms of the draft petition of the compromise filed before the Subordinate Judge and for sanction to the payment of Rs. 24,500 out of the said estate to the plaintiff. The District Judge called for a report from the Subordinate Judge. The latter reported on the 7th October 1920, that the petition of compromise should be approved of by the Court; but in disposing of the application filed by the plaintiff he recorded the following order on the 7th October 1920 in the order-sheet of the said Suit No. 361 of 1919:—"An application has been made before the District Judge for permission to compromise this suit according to the draft *Solenama* filed before me and for sanction for the payment of Rs. 24,500 to the plaintiff. The District Judge has called for my report which will be submitted to-morrow. It is not desirable and proper that final orders should be passed by this Court in the matter until the application pending before the District Judge is disposed of. It is necessary that the matter should be re-considered in the light of the order passed by the District Judge. Plaintiff is directed to file a certified copy of the District Judge's order. Put up on the 29th November 1920 for further hearing."

It appears that the learned District Judge, after perusing the report of the learned Subordinate Judge, expressed himself in the following manner on the 8th October 1920 against the acceptance of the compromise:—"Circumspection is very necessary owing to the charges of maladministration urged by the junior widow herself as plaintiff. I also do not feel safe in expressing approval of the terms—the payment of Rs. 24,500 for which a somewhat dictatorial demand is made, such that it looks as if this were the *ratson d'etre* of the *Solenama*. The questionably advisable payment of Rs. 24,500 will not save the estate from litigation, and the safest course is to seek for a surer basis in the determination of the administration suit in regular course." Thereafter, a fresh application to compromise the suit on the terms which had already been mentioned to the Court was filed before the learned Subordinate Judge on the 4th December 1920, on behalf of the plaintiff and defendants Nos. 2, 4 and 5, containing, among others, the following prayers:—"That an order may be passed that the defendant No. 1 may be removed from the guardianship of the minor defendant No. 14 in connection with this suit for the reason of her offering opposition to the amicable settlement against the interest of the said minor defendant No. 14, and that the aforenamed Girish Chandra Das, the natural father of the minor defendant No. 14, may be appointed his guardian *ad litem*."

On the 15th December 1920, the Subordinate Judge, by his order of that date, held that there were not sufficient grounds for the removal of defendant No. 1 and for the appointment of Girish Chandra Das as guardian *ad litem* of defendant No. 14 in place of defendant No. 1. He further held that, inasmuch as a second suit for administration of the said estate had already been commenced by the defendant No. 1 on behalf of herself and as next friend of her adopted son and by the dissenting executor, the proposed compromise even if given effect to, would not end the litigation relating to the estate and he accordingly dismissed the plaintiff's application. Against this last mentioned order, the present appeal from Original Order has been preferred by the plaintiffs and the defendants Nos. 2, 4 and 5. The Civil Rule No.

49 of 1921 is directed against the order of the District Judge, dated the 9th October 1920, refusing permission to make over War Bonds of the value of Rs. 15,000 to the plaintiff in part satisfaction of her claim for Rs. 24,500. The Civil Rule No. 140 of 1921 which was obtained by defendant No. 10, who is the husband of the said Nanibala, is directed against Order No. 178 in the order-sheet dated the 15th December 1920 by which the names of defendants Nos. 10 and 12 were expunged from the record of Suit No. 361 of 1919. Lastly, the Civil Rule No. 593 M of 1922 was obtained by the defendant No. 1 *Sreemati* Bhagbati Dassi calling upon the plaintiff and the said defendants Nos. 2, 4 and 5 to show cause why a Receiver should not be appointed of the estate of the said testator pending the hearing of the said appeal from the Original Order No. 9 of 1921.

On behalf of the plaintiff and the defendants Nos. 2, 4 and 5, who are the appellants before us, it has been contended, in the first place, that the findings of the Court below are inconsistent with its own findings contained in the report submitted to the District Judge on the 7th October 1920, and, in the second place that the Court below ought to have held on the facts on the record that the defendant No. 1 was acting fraudulently in opposing the said compromise and that accordingly the Court below should have removed the defendant No. 1 from the guradianship of the infant defendant and should have appointed Girish Chandra Das or some other person as guardian *ad litem* of the infant defendant in place of the defendant No. 1.

As regards the first contention, we do not think that the learned Subordinate Judge was precluded from re-considering the matter by reason of what he had said in his report to the learned District Judge on the 7th October 1920. There may, perhaps, be room for criticism as regards the terms of the order made by the District Judge on the 8th October 1920; but it must be remembered that that order was invited by the applicants themselves on their application made to the District Judge. There may also, perhaps, be room for criticism of the terms in which the order of the 7th October 1920 was expressed by the learned Subordinate Judge; but, after all said and done, what was there on the record which tied down the learned Subordinate Judge to the opinion which he had expressed in his report to the learned District Judge? It was, no doubt, irritating to the appellants when they found that in his final order, dated the 15th December 1920, the learned Subordinate Judge had expressed an opinion contrary to that contained in his report to the learned District Judge, but, in law and on the facts of this case, the learned Subordinate Judge was free to change his opinion as often as he liked until he had definitely made a final order, which, as will be seen from the above, was not made till the 15th December 1920. There is, therefore, no substance in the appellant's first contention and it accordingly fails.

As regards the second contention, it is settled law that, although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of their next friend or guardian *ad litem* in the action. In the case of *In re Birchall, Wilson* v. *Birchall* (1) (where Jessel, M. R., stated the practice adopted by himself and his predecessor Lord Romilly, M. R.) it was definitely ruled that no compromise can be enforced upon infants against the opinion of their guardian or next friend. No doubt, if the Court found that a guardian or next freind was acting improperly and against the infant's interest in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person. These being the principles to be borne in mind, can it be said in this case that the action of the learned Subordinate Judge in refusing to remove the defendant No. 1 and in refusing to appoint Girish Chandra Das in place of the defendant No. 1 is unsustainable? We have anxiously considered the whole of the record and we have come to the conclusion that it is impossible for us to say, at this stage of the litigation, that the terms of the proposed compromise are so entirely

(1) (1882) 16 Ch. D. 41; 44 L. T. 113; 29 W. R. 27.

BADRI PRASAD v. RAJ KUNWAR.

for the benefit of the minor that no further enquiry should be made into the validity of the plaintiff's claim for Rs. 24,500 and that she should straight away get a decree for Rs. 24,500 to be paid out of the estate of the testator. Further, as has been pointed out by the lower Court, this compromise, even if given effect to, will not end the litigation relating to the estate of the said testator, for important questions of construction of the Will of the said testator have been raised and, whether in this suit or in the suit started by the defendant No. 1, they will have to be determined by the Court. It is said, however, that the second suit for administration at the instance of the defendant No. 1 is a *mala fide* suit and has been instituted only with a view to prevent the compromise, referred to above, being sanctioned by the Court. It is sufficient for us to observe that allegation is not proof and that on the materials on the record at this stage it is difficult to express an opinion on the merits of this accusation. We have not seen the Will of the testator, nor have we heard any argument before us as regards the rights of the various parties in this case in and to the estate of the said testator: the matters alleged by the plaintiff in paragraphs 9 to 13 of her plaint clearly call for investigation: we have no materials before us which enable us to say that an enquiry into these matters should now be burked and the disputes adjusted in the manner proposed by the plaintiff. For these reasons, in our opinion, the second contention is equally untenable. The appeal from Original Order No. 9 must, therefore, be dismissed. With it must also fail Civil Rule No. 49 of 1921. As regards Civil Rule No. 593-M of 1922 no orders are now necessary. As regards Civil Rule No. 140 of 1921 the order complained of was one under O. I, r. 10, Civil Procedure Code, and, in our opinion, it does not come within the purview of section 115, Civil Procedure Code. The result, therefore, is that appeal from Original Order is dismissed with costs which we assess at five gold *mohurs*. There will be no order for costs as regards Civil Rule No. 49 of 1921 and Civil Rule No. 593-M of 1922. The Civil Rule No. 140 of 1921 is discharged with costs which we assess at two gold *mohurs*.

S. C. M. & K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1626 OF 1920.

July 4, 1922.

Present:—Mr. Justice Stuart.

BADRI PRASAD—DEFENDANT—APPELLANT

versus

RAJ KUNWAR—PLAINTIFF—RESPONDENT.

Construction of document—"Construction," meaning of—Second appeal—Decision as to meaning of words, whether can be challenged in second appeal.

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

Chatenay v. *Brazilian Submarine Telegraph Co*, (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295, 63 L. T. 739; 39 W. R. 65, relied on

A decision, therefore, as to the meaning of words, and apart from their legal effect, used in a mortgage-deed describing the property transferred cannot be challenged in second appeal.

Second appeal against the decree of the Subordinate Judge, Moradabad, dated the 6th July 1920.

Mr. *Durga Prasad*, for the Appellant.

Mr. *P. L. Banerjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for a declaration brought by a vendee of property at a sale in execution of a decree that the property in question was not covered by a certain mortgage. The Courts below have found that the mortgage in question did not affect that property and that the property could not be and has not been transferred by a sale in execution of a decree obtained upon that mortgage. The appeal questions that decision. It appears to me that such a point cannot be raised in second appeal, for the plea challenges a question of fact. It challenges the decision as to the meaning of the words used in the mortgage describing the property transferred. It does not challenge the legal effect of the words. I need only refer to the decision of Lindley, L. J., in *Chatenay* v *Brazilian Submarine Telegraph Co.* (1): "The expression 'construction,' as applied to a document, at all events as used by English lawyers, includes two

(1) (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65.

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."

I, therefore, consider that, on the findings of the Courts below, the appeal must fail. I dismiss it with costs, which include fees on the higher scale.

W. C. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 273-B OF 1921.

August 14, 1923.

Present:—Mr. Kotval, A. J. C.

ZUGLAI—DEFENDANT NO. 1—APPELLANT

versus

RATAN AND OTHERS—DEFENDANTS NOS. 2 AND 3 AND PLAINTIFF—RESPONDENTS.

Construction of document—Will or gift.

A document which was throughout called a Will began by reciting that the executor's death was drawing near and he was too weak to go to the Office of the Sub-Registrar and that, therefore, he executed the Will in presence of the *Panches*. It also recited: "While I am alive out of the entire lands mentioned in this Will I have given forthwith half to my younger brother:"

Held, that the words "While I am alive" and "forthwith" did not imply a gift *in praesenti* and that the document was a Will. [p. 688, col. 2.]

Appeal from the decree of the Additional District Judge, Amraoti, in Civil Appeal No. 43 of 1921.

Mr. *R. R. Jawant*, for the Appellant.

Messrs. *S. C. D. Chaudhury* and *M. R. Dixit*, for the Respondent.

JUDGMENT.—The plaintiff's claim is based on the allegation that his brother Tukaram, who died on the 31st August 1917, had given to him the property in suit which consists of a joint half share in some fields and a house by a deed of gift on the 24th August 1917, and that when he went to take possession in April 1918 the defendants obstructed him and did not deliver possession to him. The plaintiff claims joint possession. The defendants are the widow of Tukaram and her lessees. Defendant No. 1, the widow, pleaded that Tukaram was lying unconscious for 15 days before his death; that he did not execute the alleged deed of gift; that the deed itself states that it is a Will and that it is not properly registered and is, therefore, void. The document purports to be endorsed by the widow and, in view of this fact, she pleaded that her thumb-mark was forcibly taken by the plaintiff on a piece of paper a few days before Tukaram's death and the Will is probably written on that paper. Defendants Nos. 2 and 3, who are lessees for a year only, adopted the defence of defendant No. 1. In reply, the plaintiff pleaded on the 10th September 1919 that the document was validly registered and was a gift as possession was immediately to be taken and given. On the 23rd March 1920 the plaintiff pleaded that the transaction was intended by Tukaram and understood by the plaintiff to be a Will but that, when the document was presented to the Sub-Registrar, he construed it as a gift and charged stamp-duty and penalty. Therefore, the defendants pleaded that it was a gift-deed. It was admitted that it was the intention of Tukaram to give possession and this is what was expressed in the document by the words *miyajala lagalich dili* (I have given him forthwith) it was pleaded that some of the fields which were in possession of *Bataidars* could not be given into the plaintiff's possession physically and that Tukaram neither told the plaintiff to take possession immediately nor to recover crops and rent from the lessees nor were the tenants sent for. Further on, the plaintiff pleaded that two or three days after the deed was executed Tukaram told the plaintiff to take rent and crops and possession and that both Tukaram and plaintiff thought at the time of the execution of the deed that the direction

about the immediate delivery of possession would not change a Will into a gift. The defendant then admitted that the deed was a gift-deed as it transferred immediate ownership to the plaintiff. They also admitted that the property was in possession of lessees as alleged by the plaintiff and that another field No. 25 was also in possession of a lessee.

The Trial Court found that Tukaram executed the document in favour of the plaintiff Maroti while in his senses, and that defendant No. 1's thumb-mark was not taken forcibly on a blank paper but that she attested the document with full knowledge of its contents. It held that as the document was registered after Tukaram's death in the absence of his legal representative Zuglai, defendant No. 1, and on a false representation by the plaintiff that he was himself Tukaram's representative and on his admission of the execution by Tukaram the registration was invalid and the deed void as a gift-deed. It also held that the gift, if any, not being completed by delivery of such possession as was possible under the circumstances was void. However, the Trial Court held that the document was really a Will and did not require registration and decreed the plaintiff's claim. The lower Appellate Court held that the document was a Will duly executed by Tukaram while in his proper senses. It further held that, even if the document was a gift-deed, the registration was valid since the plaintiff as the assignee of Tukaram was the proper person to admit execution of the document. It confirmed the Trial Court's decree. Defendant No. 1 appeals.

The only point argued in appeal is, that the document is a gift-deed and is invalid for want of proper registration.

There can be no doubt that the document is badly worded and the pleadings on behalf of the plaintiff have furnished ground for arguing that it is a gift. The plaintiff has explained how he came to call the document a gift. He himself was uncertain as to whether it will be construed as a Will in his favour and has made apparently disingenuous pleas which might support a gift in case it was held that the document was a gift-deed. I am not prepared to lay much stress on this fact. On the whole, it appears that the document was meant to be a Will and not a gift-deed. It is throughout called a Will. It begins by reciting that the executant's death is drawing near and that he has grown very weak and is unable to go to the office of the Sub-Registrar, and that, therefore, he executes the Will in presence of the *Panchas*. These recitals indicate that the testator was thinking of how his property was to be disposed of after his death and of the way in which it could be disposed validly without having to go to the Sub-Registrar. Stress is laid on the passage translated "While I am alive out of the entire land mentioned in this Will I have given forthwith (*lagalich dili*) half to my younger brother Maroti." I do not think that the use of the words "While I am alive" (*mi jiwant asta*) and "forthwith" (*lagalich*) imply a gift *in præsenti*. Reading the document as a whole, the words seem to be used not to imply that the transfer was made at the very time but to show that by the very document that was being executed the property was to go to the plaintiff. Agreeing with the lower Courts that the document is a Will, I dismiss this appeal, but in view of the unsatisfactory way in which the plaintiff made his pleas I direct that the parties pay their costs throughout as incurred.

G. R. D. & W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 869 OF 1922.
December 22, 1922.
Present:—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.
DARAZ—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, 304 —Culpable homicide, when murder.

Culpable homicide is not murder unless the act by which the death is caused is done with the intention stated in one or more of the clauses of section 300. Where the question is, whether the injuries caused are sufficient in the ordinary course of nature to cause death, the nature of the weapon used and of the injuries caused must be taken into consideration. [p. 690, col. 1.]

Accused assaulted the deceased and inflicted no less than fifty injuries, but no blow was inflicted on any vital part with sufficient violence to cause serious damage, such as fracture of the skull:

Held, that the case fell under the second clause of section 304 of the Penal Code. [p 691, col. 1.]

Criminal appeal from an order of the Sessions Judge, Jhelum, dated the 31st July 1922.

Mr. *Niaz Muhammad*, for the Appellant.

Mr. *Des Raj Sawhny*, for the Respondent.

JUDGMENT.—The two brothers, Daraz, appellant, and Buta, were charged under section 302, Indian Penal Code, with the murder of their third brother Niaz, and on trial in the Court of Session at Rawalpindi, the former was convicted and sentenced to transportation for life, while the latter was acquitted of murder but convicted of simple hurt under section 323, Indian Penal Code, and sentenced to rigorous imprisonment for six months. He has not appealed.

That the appellant attacked Niaz and caused injuries to him is not denied before us, nor is there any contest with regard to the main facts as they appear in the account of the assault given by the prosecution witnesses. It is, therefore, not necessary to state these facts at great length and we summarise them as below,—

Some three years before the event, the two convicts, Buta and Daraz, purchased 48 *kanals* of land for Rs. 2,500 and had it mutated in their names. Niaz was at that time in service out of the village, but claimed to have remitted to his brothers his quota of the purchase-money. He left service and came back to his village and had been cultivating the land for about one year jointly with his brother Buta when Daraz, who had for the whole of this year been absent in Rawalpindi, came back at the harvest time, only eight days before the fateful day. On that day, which was the 8th May last, the three brothers with their wives, mother and farm labourer Raushan, were at their threshing floor in the land in question, at 11 A. M. Wheat had already been threshed and was lying there. Daraz claimed his share and wanted to have it divided there and then. Niaz demurred to it saying that it should be carried home and divided there and not before his name was entered in the revenue papers as a co-owner of the land. This led to an altercation and assault upon Niaz by Daraz and Buta. Niaz was felled to the ground and given a prolonged beating by Daraz with a *mungli* or cudgel. His mother and the farm labourer Raushan and Fazal Ilahi *Mochi*, who had come up, endeavoured to rescue him but in vain. Then his wife, *Musammat* Fatto, fled towards the village for help. On the way she met the *Patwari* and told him that her husband was being beaten by his brothers. On reaching the village she gave information to Mir Sahib Khan, *lambardar*, who at once rode to the spot where he found Niaz and his mother both lying injured. The eye-witnesses were *Musammat* Fatto, widow of the deceased, *Musammat* Karam Bibi, the mother of the three brothers, Raushan, their farm labourer, and Fazal Ilahi *Mochi* (P.Ws. Ns. 3 to 6) who deposed to the facts stated above. Further, there was the evidence of the *Patwari* who proceeded to the spot immediately and on arrival there found Niaz lying on the ground. He called to him and enquired what had happened to him. It was with difficulty that he replied that he had been beaten by his brothers. They, too, were still there with their wives and mothers.

As there could be no more trustworthy and reliable witness than the mother of the appellant who deposed that Niaz was killed by him and as the appellant himself stated that the fight took place between him and the deceased and that Buta did not take part in it, the learned Counsel did not think it proper to contest the fact that Niaz was killed by Daraz and confined his arguments to showing that the offence committed was not murder and that the sentence was excessive.

DARAZ *v.* EMPEROR.

The learned Sessions Judge found that "the assault was absolutely unpremeditated, that there was a sudden quarrel and that the deceased was attacked and beaten in the heat of passion and that there was no intention to cause death," but convicted the appellant of murder, arguing that "any person who beats another so mercilessly and with such utter disregard for the consequences must be deemed to have had the knowledge that death was likely to result from the effects of the injuries caused by him, and to have inflicted them with the intention set out in clauses *secondly* and *thirdly* of section 300, Indian Penal Code." But even if, as held by the learned Sessions Judge, the appellant had the knowledge that death was likely to result from the effects of the injuries caused by him, he was guilty not of murder but of culpable homicide only. According to clause (2) of section 299, Indian Penal Code, "whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death commits the offence of culpable homicide, and culpable homicide is not murder unless the act by which the death is caused is done with the intention stated in one or more of the four clauses of section 300. These four clauses are to be interpreted in the light of the four illustrations appended to it—one for each clause. Now, if clause (2) be read with illustration (*b*) it becomes clear that it does not apply unless the offender knows "that the *particular person injured* is likely either from peculiarity of constitution or immature age or other special circumstances to be killed by an injury which would not ordinarily cause death." Clause (3) does not apply unless the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, and illustration (*c*) shows what sort of injury is sufficient in the ordinary course of nature to cause death, "a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature." Therefore, the question is whether the injuries caused in this case were sufficient in the ordinary course of nature to cause death. To answer this, we have to take into consideration the nature of (1) the weapon used and (2) the injuries caused. Unfortunately, the weight of the weapon was not ascertained and proved as it ought to have been, and we are, therefore, unable to judge exactly the effect with which it would be used, though we know the effect that it actually produced. If it was so light that even if used with sufficient violence, no lethal blow could be inflicted with it, it would follow that it was used to give a thrashing and not to inflict fatal or dangerous injuries. In this connection, we may invite the attention of the learned Sessions Judge to the Rules and Order of the Chief Court, Volume II, page 162, paragraph 33, according to which the weight of the weapon ought to have been proved.

As regards the injuries, they were numerous according to the evidence of the medical witness who made the *post mortem* examination, but were all simple with the exception of three which were fracture of (1) the right eighth rib, (2) right ulna bone and (3) fourth metacarpal bone. "The cause of death was shock from multiple injuries on various parts of the body." These injuries were described under 27 heads. Among the simple hurts there were three contused wounds, one on the head and one on the right shin, a tooth bite and two punctures. The rest were all contusions but some were so large as to indicate that each was the result of several blows, for instance the following:—

No. 16 a broad contusion on the right buttock 6" *by* 3½".

No. 19 a contusion 8" *by* 5" on the back of the right upper arm,

No. 27 a broad contusion on the back 12" *by* 9".

These injuries show that the number of blows given were not less than 50, but no blow was inflicted on any vital part with sufficient violence to cause serious damage such as fracture of the skull. It cannot be said that the injuries which the appellant intended to inflict were sufficient in the ordinary course of nature to cause death. All that can be inferred from his act of prolonged beating is that he knew that the injuries that he was inflicting might cause death.

Where the prisoner assaulted a thief so severely that 141 marks of separate

blows were found on his body and several of his ribs were broken, and he died, *Queen* v. *Man* (1) where the husband and the father of a woman, who had been enticed away, laid in wait for the offender and fell upon him when he came up, beat him unmercifully with sticks and broke several of his ribs causing injury to his lungs, and he died from the effects of the injuries [*Faqir Muhammad* v. *Empress* (2)] and where a man killed his wife by a single blow, it was held that they had committed culpable homicide and that their offence fell under the latter part of section 304. Similarly, in *Reg.* v. *Govinda* (3), in which the prisoner knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain, and she died in consequence, it was held that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed was not murder but culpable homicide.

In the present case the cudgel used by the prisoner does not appear from the sketch of it which is on the record to be a formidable weapon, and though a few blows were inflicted on the head, they were not dealt with any great violence because they caused simple hurts only. Therefore, we are of opinion, that the case falls under clause (2) of section 304, Indian Penal Code, and accordingly we accept the appeal so far as to alter the conviction to that under section 304, Part II, and reduce the punishment to rigorous imprisonment for ten years.

W. C. A. *Appeal accepted.*

(1) 5 N. W. P. H. C. R. 235.
(2) 10 P. R. 1890 Cr.
(3) 1 B. 342; 1 Ind. Jur. 378; 1 Ind. Dec. (N. S.) 228.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 954 OF 1922.
(CRIMINAL REVISION PETITION NO. 794 OF 1922).

August 17, 1923.

Present :—Mr. Justice Krishnan.

In re K. V. S. RAMA CHANDRA RAO—ACCUSED—PETITIONER.

Madras District Municipalities Act (V of 1920), s. 249, Sch. V, cl. (q)—"Likely to be dangerous to human life, health or property," interpretation of—Machinery—Presumption of danger—Conversion of paddy into rice, whether industrial purpose.

The expression "which is likely to be dangerous to human life or health or property" occurring in Schedule V, clause (*q*), of the Madras District Municipalities Act must be read as qualifying not only the last clause "any industrial purpose" but has to be read with each one of the preceding clauses. [p. 692, col. 1.]

Ordinarily, any large machinery is dangerous to human life, but this cannot be presumed with reference to any particular machinery, such as a rice mill for converting paddy into raw rice. [p. 692, col. 1.]

The conversion of paddy into rice is an industrial purpose within the meaning of clause (*q*) of Schedule V in Madras Act V of 1920. [p. 692, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment, dated the 27th July 1922, of the Court of the Joint Magistrate, Rajamundry, in Criminal Appeal No. 12 of 1922, preferred against the judgment of the Court of the Second Class Bench Magistrate, Rajamundry, in Bench Case No. 254 of 1921.

Mr. *P. Venkataramana Rao*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—This case raises the question of the construction of section 249 of Madras District Municipalities Act, V of 1920, taken with clause (*q*) of Schedule V. The accused keeps a rice mill for converting paddy into raw rice, within three miles of the Municipal limits of Rajamundry. A Notification was issued under section 249 of that Act and as the result of that the parties doing anything for one or more of the purposes specified in Schedule V were obliged to take out licenses from the Chairman. The accused has been convicted for not taking out a license accordingly for this rice mill within the time allowed.

It is argued before me that the conviction is wrong, as accused's mill was not used

for any of the purposes mentioned in Schedule V. The point turns on how clause (*q*) of Schedule V, is to be construed, particularly whether the last words of it "which is likely to be dangerous to human life or health or property" are to be read as qualifying the last clause "any industrial proces" or are to be read with each of the clauses preceding it beginning with "storing any explosive or combustible materiel." Some clue to the construction of this clause "*q*" is given in the proviso to it wherein the words "for private use" have to be clearly read with each one of the preceding words as otherwise it will be a direct contradiction of clause (*n*) above. It seems to me reasonable to read "likely to be dangerous to human life, health or property" as qualifying each one of the previous classes in "*q*" and not merely the last. The object seems to me to bring under Municipal control by the method of issuing licenses the keeping or using of things which are dangerous to human life, health or property. To hold otherwise will be to give undue extension to the clauses dealing with the using of fuel or machinery for industrial purposes. The purely grammatical construction of the language of clause "*q*" would seem also to suggest that the last clause qualifies all the previous clauses.

In the view taken by the lower Courts the question whether the machinery used by the accused was dangerous to human life, health or property has not been considered. Ordinarily, any large machinery is dangerous to human life, but we cannot presume it with reference to any particular machinery. The case must, therefore, go back to the Trial Court to be re-tried in the light of the above observations.

It may be stated in conclusion that I do not accept the argument that the conversion of paddy into rice is not an industrial purpose. It is clearly one.

The conviction is set aside and the case remanded to the Bench Magistrate for a fresh trial and disposal. The fine, if paid, will be refunded.

N. V. *Conviction set aside.*
Case remanded.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 934 OF 1923.

June 22, 1923.

Present :—Mr. Justice Moti Sagar.

MUNSHI AND ANOTHER—ACCUSED —PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 107, 514—Security to keep the peace—Conviction for rioting—No order as to security—Proceeding, separate, for confiscation of security, validity of.

If a Criminal Court, knowing that a person charged before it is under security to keep the peace or to be of good behaviour, in sentencing that person in the case before it makes no reference to the confiscation of that security and takes no steps towards its confiscation, it is not competent for that Court or any other Court in a subsequent and separate proceeding to take such steps.

Emperor v. *Mawaz*, 18 Ind. Cas. 403; 13 P. R. 1913 Cr.; 7 P. W. R. 1913 Cr.; 14 Cr. L. J. 67; 39 P. L. R. 1913 (F. B.), followed.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the District Magistrate, Ludhiana, dated the 8th January 1923, affirming that of the Honorary Magistrate, First Class, Rai Kot, District Ludhiana.

Mr. *R. C. Soni*, for the Petitioners.

JUDGMENT.—On the 1st of October 1918, the petitioner Munshi was bound down to be of good behaviour for one year in the sum of Rs. 500 with one surety under section 107 of the Criminal Procedure Code. Before the term of the bond had expired, he was convicted of rioting and sentenced to six months' rigorous imprisonment and a fine of Rs. 50 under section 147 of the Indian Penal Code. On appeal to the learned Sessions Judge the conviction was maintained, but the sentence was reduced to three months' rigorous imprisonment and a fine of Rs. 30 only. An application for revision was made to the High Court, and the order as to fine was set aside. With regard to the sentence of imprisonment it was observed by the learned Judge that there was no clear ground for interference in revision inasmuch as the sentence of imprisonment had already expired. Subsequently, proceedings were taken against the petitioner and the surety for the forefeiture of their bonds under section 514 of the Criminal Procedure Code.

GULAB *v.* EMPEROR.

On the 21st of December 1922 the petitioner's bond was forfeited and an order passed to the effect that Ram Kishen, who had stood surety for him, should forfeit his security to the extent of Rs. 300. An appeal against this order was preferred to the District Magistrate but dismissed on the 8th of January 1923.

The petitioners have now come up in revision to this Court, and it has been contended on their behalf that the order passed by the Courts below with regard to the forfeiture of the bond and the security is illegal and should be set aside. It is pointed out that the District Magistrate, who convicted the accused of rioting under section 147 of the Indian Penal Code, knew that he was under security and yet did not take any steps towards its confiscation. My attention has been drawn to the statement of Gopal Das, a witness for the defence, who deposed to the effect that he and Munshi had both been bound down together, and reliance is placed on *Emperor* v. *Mawaz* (1) in which it has been laid down that if a Criminal Court knowing that the person charged before it is under security to be of good behaviour, in sentencing that person in the case before it makes no reference to any confiscation of that security and takes no steps towards its confiscation it is not competent for that Court or any other Court in a subsequent and separate proceeding to take such steps.

This ruling, in my opinion, is exactly in point and applies fully to the facts of the present case The order passed by the learned Magistrate in taking action for the forfeiture of the bond and the security is clearly illegal and must be set aside. I accept the revision and order accordingly.

Z. K. *Revision accepted.*

(1) 18 Ind. Cas. 403; 13 P. R. 1913 Cr.; 7 P. W. R. 1913 Cr.; 14 Cr. L. J. 671; 39 P. L. R. 1913 (F. B.).

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 868 OF 1922.

December 30, 1922.

Present :—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

GULAB—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 25, scope of—Murder—Accused indicating spot where body buried, effect of.

Section 25 of the Evidence Act lays down that a confession to a Police Officer shall not be used *as against* the person making it, it does not say that such a confession shall be inadmissible for all purposes. Such a confession may be used for the purpose of arriving at a conclusion whether a subsequent judicial confession should be believed or not. [p. 694, col. 2.]

Where in the case of a murder a person gives information which leads to the recovery of the dead body, that fact alone would not be sufficient to connect him with the murder. [p 695, col. 1.]

Criminal appeal from an order of the Sessions Judge, Rawalpindi, dated the 17th August 1922.

Mr. *Niaz Muhammad*, for the Appellant.

Mr. *Des Raj Sawhny*, Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal by Gulab from the order of the Sessions Judge of Rawalpindi convicting him of the murder of Fazal Haq on or about the 9th March 1922, and sentencing him to transportation for life.

We have already passed orders accepting the appeal, acquitting Gulab, and directing his release, and we now proceed to record our reasons.

The facts are fully stated in the judgment of the Court below and need not be repeated at length. The motive for the murder is said to be that the deceased had intimacy with one *Musammat* Bhari, who is the wife of a relation of Gulab, and that Gulab also had intimacy with her. The evidence as to motive is extremely slender but it is unnecessary for us to refer to it in detail as we consider that the evidence connecting the accused with the murder is insufficient to support the conviction. Fazal Haq's wife had disappeared from home some time before the occurrence and Fazal Haq had been in the habit of leaving his house to search for her. He left his house on the early morning of the 19th March, and as he had not returned by the 27th Alaf, the

brother of the appellant, and others reported his disappearance at the Police Station. The Police went to the spot, and on the 2nd April, the appellant is said to have given information which led to the discovery of the dead body of Fazal Haq which was buried some 10 feet below the surface of the ground under the bank of a field belonging to the appellant himself and not very far from the village. On the same day the Head Constable sent a *rukka* (Exhibit P. C.) to the *Thana*, which has been treated as the First Information Report in the case and which contains the confession of Gulab made to the Police. This confession, having regard to section 25 of the Indian Evidence Act, cannot be proved as against Gulab. On the 8th April, Gulab's confession was recorded by a First Class Magistrate. On the 30th April, an application was made by a Pleader on behalf of the appellant to the effect that he had made the confession in consequence of a promise that he would be examined as an approver in the case. The conviction is thus based upon a retracted confession together with the evidence that the appellant pointed out the place where the dead body of Fazal Haq was buried. Bostan Khan, *Patwari*, (P. W. No. 6) was the person who persuaded Gulab to make his confession to the Police. He has admitted that he held out some inducement to Gulab and the learned Sessions Judge remarks that it is plain that the promise made by the *Patwari* referred to the charge against the accused person, and that it was sufficient to make it appear to him that by making it, *i.e.*, the confession, he would gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him. The learned Sessions Judge, however, was of opinion, that this only applied to the confession made to the Police on the 2nd April, and that the influence brought to bear upon Gulab by the *Patwari* was no longer effectual at the time when he made a confession to the First Class Magistrate on the 8th April. It is strongly urged on behalf of the appellant that after he made the confession on the 2nd April, under the influence of some inducement it is not at all likely that this influence had ceased to affect him on the 8th April. In our opinion, there is a good deal of force in this argument and we doubt whether it would be safe to hold, under the circumstances, that the confession of the 8th April was a voluntary one. The main argument, however, urged against it was that it differs materially from that made to the Police on the 2nd April. The Public Prosecutor who appeared for the Crown objected to any use whatsoever being made of the confession to the Police. He referred to section 162 of the Criminal Procedure Code which lays down that no statement made by any person to a Police Officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence. Now, this argument has no force, because at the time when the appellant made his confession to the Police there was no investigation being held into any offence under Chapter XIV of the Code. At that time the Police were merely investigating the alleged disappearance of Fazal Haq and there was no evidence that any offence had been committed. The Public Prosecutor also referred to section 25 of the Indian Evidence Act which requires that no confession made to a Police Officer shall be proved as against a person accused of any offence. Now, all that this section lays down is that such a confession shall not be used *as against* a person making it. It does not lay down that such a confession shall be inadmissible for all purposes and in Woodroffe and Ameer Ali's Law of Evidence, 7th Edition, at page 267, the learned commentators point this out and say that the confession may be proved for other purposes. We have no doubt at all that the confession may be used for the purpose of arriving at a conclusion as to whether the subsequent judicial confession of the 8th April should be believed or not. Now, in the confession made to the Police Gulab mentioned Fazal Karim, the husband of *Musammat* Bhati aforesaid, Qaim Din and Sardar as his accomplices, whereas in the judicial confession he mentioned Alaf, his brother and one Muhammad, a stranger, as his accomplices. In the Police confession he said that he was holding the legs of Fazal Haq at the time of the murder whilst Qaim

Din sat on his chest, whereas in the judicial confession he says that he himself sat on Fazal Haq's chest and did not say that any one held his legs. In the Police confession he states that after the murder Fazal Karim and Qaim Din carried the corpse whilst he himself carried a *kassi*, whereas in the judicial confession he said that he and Alaf Din carried the corpse. In the Police confession in which he named Qaim Din, a stranger, as his accomplice, he says that after the burial of the corpse all his companions went straight off to their own houses. In the judicial confession he said that Muhammad who was a stranger came back with him and stayed in his house till the morning. These discrepancies show, at all events, that one of the two confesssions is certainly not a true confession. Under these circumstances, we think that it would be extremely unsafe to put much reliance on the confession of the 8th April.

There is what appears to be fairly reliable evidence that Gulab gave the information which led to the discovery of the dead body. There is, however considerable force in Counsel's argument that certain independent witnesses who are said to have been present at the time have not been produced in Court. It is stated that Muhammad Hussain (P. W. No. 4), Yusuf (P. W. No. 7) and Muhammad Ilahi (P. W. No. 11) dug up the earth at the place of burial after that place had been pointed out by Gulab. These persons, however, have all unanimously deposed that it was not Gulab but the Police who pointed out the place to them.

Their evidence tends to throw some doubt upon the story of Gulab pointing out the place of burial, but even if we hold it to be satisfactorily proved that Gulab did give the information which led to the recovery of the dead body, that fact alone would not be sufficient to connect him with the murder, because a person may very well know where the body of a murdered man has been buried without himself having joined in committing the murder.

As we are unable to rely upon the retracted confession of Gulab there is no sufficient evidence in support of his conviction. His appeal is, therefore, accepted and he is acquitted.

W. C. A. *Appeal accepted.*

MADRAS HIGH COURT.

REFERRED TRIAL No. 175 OF 1922.
CRIMINAL APPEALS Nos. 1848 AND 1849 OF 1922.
March 6, 1923.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Odgers.

In re THACKROTH HYDROSS AND OTHERS—PRISONERS.

Criminal Procedure Code (Act V of 1898), ss. 154, 157, 162, 342, 540—Local inspection by Magistrate, when permissible—Results, whether can be embodied in the testimony of witnesses.

It is competent to a Magistrate to make a local inspection for the purpose of enabling him to understand better the evidence which is laid before him and to use the evidence of his own eyes to test the truth of what the witnesses have deposed to, and it is immaterial that the result of such inspection is not at once put on record and laid open to the scrutiny of parties; nor is it necessary that the accused or their representatives should invariably be present at a local inspection. [p. 697, col. 1.]

Where, after a local inspection, the Magistrate recalls the prosecution witnesses under section 540, Criminal Procedure Code, and really embodies the results of his inspection in the examination of such witnesses on re-call and the accused are afforded a full opportunity of cross-examining them with reference to the facts then elicited, the procedure adopted is not illegal nor prejudicial to the accused. [p. 697, col. 2.]

Queen-Empress v. *Manikam*, 19 M. 263; 6 M. L. J. 143; 2 Weir 725; 6 Ind. Dec. (N. S.) 888; *Babbon Shaikh* v. *Emperor*, 5 Ind. Cas. 365; 37 C. 340; 14 C. W. N. 422; 11 Cr. L. J. 121; 11 C. L. J. 335; *In the matter of the petition of Lalji*, 19 A. 302; A. W. N. (1897) 52; 9 Ind. Dec. (N. S.) 198; *Sudhama Upadhya* v. *Queen-Empress*, 23 C. 328; 12 Ind. Dec. (N. S.) 219; *Alia Rai* v. *Jhingur Tewari*, 13 Ind. Cas. 844; 39 C. 476; 16 C. W. N. 424; 15 Cr. L. J. 403; 13 Cr. L. J. 156, considered.

Section 342 of the Criminal Procedure Code does not make it legally incumbent on a Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses after the framing of the charge when they are re-called by the Magistrate under section 540, Criminal Procedure Code, though it is highly desirable that he should so question the accused if the evidence contains any new matter of importance. [p. 697, col. 2.]

Referred Trial 160 of 1922, followed.

A Deputy Superintendent of Police is an officer legally competent to investigate the facts

of offences of murder and dacoity within the meaning of section 157, Indian Evidence Act, and a statement of a witness recorded by such an officer is not inadmissible merely because it was not recorded as required by section 154, Criminal Procedure Code. [p. 698, col. 2.]

Trial referred by the Court of the Special Judge, Malabar, Calicut, for confirmation of the sentences of death passed upon the said prisoners in Special Judge Case No. 110 of 1922.

Appeal by the first prisoner and by the second and third prisoners, respectively, against the said sentences.

Messrs. *R. N. Aiyengar* and *P. Govinda Menon*, for the Accused.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

JUDGMENT.

Ayling, J.—The three accused in this case have been convicted of dacoiting the house of one Krishnan Nair of Olavatoor and murdering him by beating him to death. The offence was committed on the night of 24th October 1921 in the course of the Moplah Rebellion. The prosecution evidence tends to show that about nightfall a band of some 25 armed rebels attacked a small hamlet consisting of about five houses of which, Krishnan Nair's was one. All were looted; the inmates of these houses escaped but Krishnan Nair was caught and beaten twice, the second time with fatal results and his body thrown into a well. The well is said to have subsequently been filled up and the body has not been found, but in the light of the evidence in this case we see no reason whatever to doubt that Krishnan Nair was killed that night in the course of the dacoity. We have the evidence of four of the inhabitants of the hamlet who depose to this occurrence and to having seen the three appellants who were well known to them, beat Krishnan Nair and throw his body in the morning into the well.

Before discussing the merits of the case, I shall deal with two preliminary objections taken to the procedure of the Special Judge. It appears that when the first accused was examined under section 342, Criminal Procedure Code, he asked that a plan should be prepared of the scene of the offence. This was not done, but the Special Judge personally visited the scene of offence, 18 miles from his headquarters, with the prosecution witnesses, and observed for himself the relative positions of the huts and the places from which the witnesses claim to have seen the acts deposed to by them. After this, acting under the powers vested in him by section 540, Criminal Procedure Code, he re-called these prosecution witnesses, or rather three of them, and examined them in such a way as to put on record the most important points which he had observed at his personal inspection. The witnesses were then cross-examined by the defence. It is argued that the Special Judge's procedure has been illegal in two particulars and that on that ground the conviction should be set aside. It is contended first that he was not entitled to use the results of his personal inspection to test the truth of the prosecution witnesses' story, and, next, it is contended that it was his duty to again question the accused under section 342, Criminal Procedure Code, with reference to the evidence which the prosecution witnesses gave, when re called as stated above. As regards the first point we have been referred to several rulings by the learned Counsel for the first accused, the most important of which is *Queen-Empress* v. *Manikam* (1). In that case, as I understand it, two learned Judges of this Court laid it down that the accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence and which they have had no opportunity of testing by cross-examination and of rebutting. At the same time they say that a Magistrate may make a local inspection for the purpose of enabling him to understand better the evidence which is laid before him; but for no other purpose. The distinction seems to be between enabling a Magistrate to undestand such matters as the description of the locality which may be confusing or obscure, and enabling him to test the truth of the witness's statement of a physical fact by the Magistrate's own ocular observation. I think

(1) 19 M. 263; 6 M. L. J. 143; 2 Weir 72 6 Ind. Dec. (N. S.) 888.

this distinction is also brought out in a Calcutta case *Babbon Shaikh* v. *Emperor* (2) but two of the learned judges who dealt with that case, Woodroffe and Chatterjee JJ., seem to have held that it was open to the Court to use its local inspection also to test the sworn testimony on record by the light of its own observation. This is also the effect of the judgement of Sir John Edge, C. J. in *In the matter of the petition of Lalji* (3) a very high authority. The learned Public Prosecutor has referred us to a case reported as *In re Davaraja Nayagar* (4) in which Sir Arnold White, C. J. of this Court, declined to follow the 19 Madras ruling [*Queen-Emperess* v. *Mankam* (1)] on the ground that it was no longer applicable after the amendment of the Code affected in 1898. Speaking for myself, I should be inclined to agree with the judgment above quoted and to hold that it is open to a Magistrate to use the evidence of his own eyes to test the truth of what the witnesses have deposed to and that in the present case the Special Judge has made no improper use of his local inspection.

But it is objected that he has failed to observe two precautions which two of the learned Judges in *Babbon Shaikh* v. *Emperor* (2) have held to be necessary. One is that the result of the inspection must at once be put on record and laid open to the scrutiny of the parties. Chatterjee, J. says:—"To spring such opinions or inferences upon the accused at the time of pronouncing judgment is an error of procedure that may have materially prejudiced the accused, and they are quite justified in complaining that they have not had a proper trial." It was further stated by the judgment in *Queen-Empress* v. *Mankam* (1) that when any inspecton is made, the Magistrate should invariably be accompanied by both parties or their representatives. It is stated that this was not done and that the accused were not represented at the inspection in the present case. Sir John Edge in the 19 Allahabad case [*In the matter of the petition of Lalji* (3)] on the other hand, is at pains to point out that it is not necessary that the accused or their representatives should invariably be present at a local inspection and he says nothing whatever about the necessity of making a note or record at once of what the Magistrate has seen.

In the present case, as I have already stated, the Magistrate has really embodied the results of his inspection in the examination of the prosecution witnesses on re-call and the accused have had a full opportunity of cross-examining them with reference to the facts then elicited.

The fact more pressed by the argument that the accused persons were not afforded an opportunity of being represented at the local inspection and before deciding as to the effect of such an omission we deemed it best to call for a special report from the Special Judge as to his procedure. From this it appears that the argument is based on no foundation. Previous intimation of the inspection had been given to both the defence Vakils; and one of them, Mr. T. M. Krishnaswamy Nedungadi, was actually present on behalf of all three appellants. On the whole, I do not think that the Special Judge in this case has used his local inspection illegally or in such a way as to prejudice the accused.

As regards the point based on section 342 it has been held in a recent case, Referred Trial No. 160 of 1922, in which I was one of the Judges, that section 342 does not make it legally incumbent on the Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses after the framing of the charge when they are re-called by the Magistrate under section 540, Criminal Procedure Code. It may be highly desirable that he should so question the accused if the evidence contains a new matter of importance, but after carefully scrutinizing the evidence in this case elicited on re-call I do not think it can be classed in that category. The learned Counsel for the appellant has referred us to three passages in the re-call evidence of the most important witness P. W. No. 1. One is "As there were thicker jungles on Krishnan Nair's side of the paddy field, I went

(2) 5 Ind. Cas. 365; 37 C. 340; 14 C. W. N. 422; 11 Cr. L. J. 121; 11 C. L. J. 335.
(3) 19 A. 302; A. W. N. (1897) 52; 9 Ind. Dec. (N. S.) 198.
(4) 2 Weir 728.

there. The jungles on Krishnan Nair's side of the paddy field are thicker than those on my side. The second is "The place where P. W. No. 5 hid was only 10--15 feet from where I was, but I never saw him at the time." The third is, "I say that the well of the deceased's house is visible from my house. I could also see persons drawing water from that well from my yard." None of these passages appear to me to contain such a new and important matter that it could be said that the accused were prejudiced because they were not asked what they had to say with respect to them, especially if it is remembered that they were defended in the lower Court. As regards the latter two points the Special Judge in paragraphs Nos. 17 and 18 of his judgment has recorded that he thinks that P. Ws. Nos. 1 and 5 must have seen each other although they say they did not, and he feels very doubtful whether P. W. No. 1 could have witnessed from his house next morning the dragging of the deceased to the well. As regards the thickness of the jungle all he says is; "There is a thick jungle to the south and west of the house. At night time it would be safe enough to hide where the witnesses say they did, and to watch what was happening." I do not think that any of these points are points on which it was imperatively necessary to further question the accused. I would dismiss both these legal objections for the trial as untenable.

Passing to the merits of the case, I may observe that the important question is whether the statements of P. Ws. Nos. 1, 3, 5 and 7 that they observed the three appellants either among the dacoits or taking part in the actual murder of Krishnan Nair and disposing of his body can be accepted. One of the witnesses, P. W. No. 1, is said to have made a statement to the Deputy Superintendent of Police at Calicut five days after the offence, in which he gave an account of what occurred and named six persons including the three appellants as among the Moplahs who looted the houses and murdered Krishnan Nair. It has been objected that this statement, Exhibit A, is not admissible in evidence. The Deputy Superintendent of Police is an officer legally competent to investigate the facts of the murder and dacoity within the meaning of section 157 of the Indian Evidence Act—*vide* section 551, Criminal Procedure Code. The requirements of section 157 are, therefore, complied with, and I cannot accept the contention that Exhibit A which records the statement taken down by the officer is inadmissible because it was not recorded as required by section 154, Criminal Procedure Code. At the time when it was made the Rebellion was in full progress, and it was impossible to fulfill the requirements of section 154. The statement in question was undoubtedly the First Information given to the Police of the commission of this crime and it is not affected by any such provision of law as is contained in section 162, Criminal Procedure Code, which renders statements of witnesses to a Police Officer in the course of an investigation inadmissible in evidence. It is admitted that it would have been open to the Deputy Superintendent to give oral evidence of what P. W. No. 1 told him and even to refresh his memory by a reference to Exhibit A, and, in the absence of a specific legal prohibition, I am prepared to hold that it was open to the Court to take in evidence his written record of what P. W. No. 1 actually said to him. The inclusion of the names of these appellants in a statement made so early after the crime (having regard to the conditions of the country) seems to be an important piece of corroboration of the identification of the appellants by witnesses in the Special Court.

I feel, however, considerable doubt as to whether we can accept the evidence of P. Ws. Nos. 5 and 7 as to the second beating of Krishnan Nair by the appellant which is said to have caused his death. The Special Judge himself seems to entertain some doubts as to whether the witnesses have not to some extent added to what they saw, and it is curious that all the four witnesses with one accord ascribe to these three appellants before us all the actions leading up to or connected with the death of Krishnan Nair. It is these three men and one other absent man, named Aidruman, who are said to have beaten him when they first came to his house, to have dragged him out at midnight and beaten him again and caused his death and lastly to have

dragged his body to the well in the morning. It would seem as if none of the other 22 rebels took any part in any of this. I doubt very much whether the midnight beating was watched by any of the neighbours and I cannot agree with the Special Judge that it is likely that P. W. No. 7 would have ventured to come down out of the jungle and penetrate into the compound of Krishnan Nair to see the final act of the murder. The preliminary beating clearly did not cause the man's death, and it cannot be said that, because the appellants dragged the body to the well in the morning it must be taken that it was they who beat him to death at midnight especially in view of the number of the gang. Nor do I think it can be said that the murder of Krishnan Nair is shown to be part of the common intention of the dacoits so that all the members of the dacoit gang could be convicted of the murder.

I think that the conviction for murder must be set aside. As regards the conviction for dacoity, I see no reason whatever for doubting that these appellants took part in the dacoity and were recognised by the witnesses. The allegation of enmity and the *alibi* evidence adduced for the defence have been dealt with by the Special Judge. I would set aside the convictions for murder, confirming those for dacoity, and in place of the sentence of death, sentence each of the three appellants to transportation for life.

Odgers, J.—In this case two preliminary points have been taken on behalf of the accused, either of which, it is said, amount to an illegality and would, therefore, vitiate the trial. The first is that the Special Judge made an inspection of the locality where the crime is said to have been committed and, further, that he tested the statements of certain of the prosecution witnesses by his personal observation of the spot. The second point is that he failed to examine the accused under section 342, Criminal Procedure Code.

To deal with the first point, the trial of the case began on the 9th of September 1922. The inspection by the Special Judge is said to have taken place during the trial. Section 556, Criminal Procedure Code. Explanation, lays down that a Judge or Magistrate shall not be deemed to be a party or personally interested, within the meaning of the section "by reason only that he has viewed the place in which an offence is said to have been committed * * * * and made an enquiry in connection with the case." There are certain authorities which have been cited to us in support of the contention taken for the accused. The most important, from our point of view, is that contianed in *Queen-Empress* v. *Manickam* (1) where it was held that a Magistrate's view of the *locus in quo* was what influenced him in finding that the complaint of actual damage being caused was true and that the defence that no damage was caused was false. The learned Judges there say: "We are satisfied that such inspection should only be made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that. To this we would add that where any inspection is made with the object stated, the Magistrate should invariably be accompanied by both parties or their representatives." This view finds support in *Sudhama Upadhya* v. *Queen-Empress* (5) where the investigations of the Police preliminary to a trial had been directed to a considerable degree by a Magistrate. That was held to disqualify the Magistrate from trying the case. *Babbon Shaikh* v. *Emperor* (2) where the two learned Judges who originally heard the the petition differed, Stephen, J., was of opinion that the Magistrate may visit the scene of an alleged offence in order to test the evidence he has heard on a question of fact. Woodroffe, J., on the other hand, held that, as it was a matter of speculation how far the Magistrate was influenced by what he saw, as distinguished from what was deposed to, the trial was vitiated. The third Judge Chatterjee, J., agreed with Woodroffe, J., on the ground that the Magistrate had done more than merely view the place for the purpose of following and understanding the evidence and testing it. The Magistrate had imported into his judgment matters of opinion and that was an error or procedure, that might have prejudicially

(5) 23 C. 328; 12 In. Dec. (N. S.) 219.

affected the accused. In *Alla Rai* v. *Jhingur Tewari* (6) where the question was somewhat different, namely, the effect of the failure of the Judge to place on record the results of a local investigation, the learned Judges held that a Magistrate may view the place of occurrence in order to follow or understand the evidence. On the contrary, there is the opinion of an Ex-Chief Justice of this Court, Sir Arnold White, in *In re Davaraja Nayagar* (4) where he was of opinion that the amendment to the Explanation of section 556, Criminal Procedure Code, was apparently made to meet the decision in *Queen-Empress* v. *Manikam* (1) and that the judgment of a Magistrate is not vitiated by the fact that he inspected the *locus in quo* and stated in his judgment what he saw there.

Sitting as a Single Judge, Sir John Edge, C. J., in *In the matter of the petition of Lalji* (3) said. 'It is highly convenient that a Magistrate should go and see the locality for himself if the evidence is conflicting or if the guilt or innocence of the party depends upon local peculiarities of situation which cannot be understood except by the Magistrate seeing the place himself." The judgment is illustrated with special reference to a dacoity, which is also the subject of the present case before us. There seem to me strong grounds for the opinion that the amendment of the Explanation to section 556, Criminal Procedure Code, was devised mainly to overcome the rulings referred to above in *Queen-Empress* v. *Manikam* (1) and *Sudhama Upadhya* v. *Queen-Empress* (5) and that, if this is so, the authority of *Queen-Empress* v. *Manikam* (1) must be taken to have been shaken. Holding then, as I do, that the learned Judge did not disqualify himself from trying the case by reason of his having held an inspection of the spot, the question arises whether any material prejudice has arisen sufficient to say that a failure of justice has occurred.

We have called for a report from the Special Judge as to whether or not the Vakils for the defence were present at his local enquiry and the answer is in the affirmative and the Special Judge also reports that he gave previous notice to the Vakils for the defence of his intention to inspect the *locus in quo*. Again the learned Judge did not "spring any opinion of his own" nor any facts observed by him in his local investigation upon the accused, who, as stated, were defended, for the first time in his judgment, for he re-called as Court witnesses the prosecution witnesses, who had previously described the hiding places they took up and from which they alleged they witnessed the stages of the crime. These witnesses on re-call by the Court were further cross-examined by the defence, so that any opinion that the Judge had formed from the local inspection came through the prosecution witnesses as Court witnesses. From these considerations I am unable to say either that the Judge acted illegally or that any material irregularity resulted to the prejudice of the accused.

The second point under section 342, Criminal Procedure Code, can be very shortly dealt with. In my opinion, this case does not fall within the Full Bench judgment recently delivered by this Court in Criminal Revision Case No. 384 of 1922 [*In re Varisal Rowther* (7).] There the learned Chief Justice says: "In my judgment the words 'after the prosecution witnesses have been examined' (citing the words of section 342) "mean 'after the prosecution has finished calling evidence.'" If fresh evidence is called by the prosecution after the charge has been framed, then on the termination of that evidence the accused must be examined under the section. The short answer to the objection really is that the prosecution here called no fresh evidence, the prosecution witnesses, as stated above, having been re-called by the Court and re-cross-examined by the defence. On the same question of prejudice to the accused, it is pointed out that there are three important points on which the Court should have questioned the accused. They are all contained in the re-examination of P. W. No. 1 by the Court. They are as follows: (1) "As there were thicker jungles on Krishnan Nair's side of the paddy field I went there." (2) "when the Court inspected the place, P. W. No. 5 showed the Court where he hid. That

(6) 13 Ind. Cas. 844; 39 C. 476; 16 C. W. N. 426; 15 Cr. L. J. 403; 13 Cr. L. J. 156.

(7) 73 Ind. Cas. 163; 44 M. L. J. 567; 17 L. W. 722; 32 M. L. T. 3 5; 46 M 449; (1923) M. W. N. 477; (1923) A. I. R. (M.) 609; 24 Cr. L. J 547 (S. B.)

place was only 10 to 15 feet from where I was but I never saw him at the time." (3) "I say that the well of the deceased's house is visible from my house." As before stated, the witnesses were re-cross-examined by the Vakil for the defence and it cannot, in my opinion, be said that the interests of the accused in any way suffered by the accused not being re-examined under section 342, Criminal Procedure Code. This disposes of the preliminary objections.

With regard to the merits, I do not propose to say more than that I have had the advantage of reading the judgment of my learned brother and I agree with him as to the view he takes of Exhibit A and of the rest of the evidence adduced in this case. On the whole, I think it would be unsafe to act on the testimony of the prosecution witnesses as to the identification of the actual murderers of the deceased. I agree with the conviction and sentence proposed.

V. N. V. *Sentence altered.*

W. C. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 52-B OF 1923.

July 21, 1923.

Present:—Mr. Prideaux, A. J. C.

Musammat RADHI AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 30—Confession, whether evidence against co-accused.

A confession made by an accused person can be taken into consideration and used as evidence not only against himself, but also against a co-accused tried jointly with him for the same offence. [p. 702, col. 2.]

Emperor v. *Kehri*, 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360, followed.

Appeal against the judgment of the Sessions Judge, Akola, in Sessions Trial No. 10 of 1923, dated the 12th May 1923.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT—This judgment also disposes of Criminal Appeal No. 53-B of 1923. The two appellants *Musammat* Radhi, wife of Ragho, and Shripati, son of Ganpati, have been found guilty by the Sessions Judge, Akola, of the offence of murder and sentenced each to transportation for life.

The facts found are these. One Ragho, who lived at Chichamba, is the husband of the female accused. He married her some 2½ years ago and their married life does not appear to have been particularly happy. The woman's story is that her husband kept a concubine and, therefore, beat her. She had a son by him, called Ananda, aged 8 months at the time of his death. On the Sunday preceding the death of this infant Radhi's mother accompanied by Shripati went to Radhi's house at Chichamba and in the absence of her husband brought the woman back to her parent's house at Risod. Ragho appeared there the same evening and took away his wife next morning. On the following Tuesday Radhi disappeared from home taking her son Ananda with her. There is ample evidence to show that she was seen in some bushes near a well in the jungle of Risod on the Tuesday and Wednesday. On the Tuesday night Narayan (P. W. No. 12) says he saw Shripati, who was a servant of the same master as himself, sleeping in the field in his hut with the woman Radhi and the child. Next morning one Krishnappa (P. W. No. 7) saw the woman standing near the well of Gulab Rao. Radhi's husband had been making enquiries as to his wife's whereabouts and went to Risod in search of her. Krishnappa, therefore, told Gopal Rao, who is an Honorary Magistrate of Risod. Gopal Rao went with others and questioned the woman, found the dead body of the child in the well, and the woman told them that Shripati had taken the child from her and thrown it into the well. Police investigation started and resulted in the two accused being put on trial for murder with the result already stated.

The offence took place on the 14th March last. The woman's confession was recorded by the Sub-Divisional Magistrate Basim, seven days later. It has been translated thus:—

"My husband has kept a woman. For her he beats me. I ran away from his house. Shripati said to me 'Stay with me. I shall maintain you at Risod.' I ran away to Risod. The next day my husband and Rama Boradia came in search of me. Shripati said (we two shall run away). I refused. Shripati asked me again and again to ran away but I refused to

do so. My child was crying and so Shripati took it from me and threw it in the well I have to say nothing besides this."

Before the Committing Magistrate the woman's statement runs as follows:—

"He always beat me. I took my child Ananda to Risod. It was aged 8 months. I stayed in the hut in Shripati's field. At that time Shripati was in that field That night I stayed in Shripati's hut The next morning I concealed myself in the bush pointed out by the witnesses at the instance of Shripati. The field containing that bush adjoins the field in which I passed the night. Thereafter Shripati came to me and said 'your husband and some other persons are searching you and they will come hearing the cries of your child. Let us, therefore, throw that child into water.' I then made over that child to Shripati with this object that he should throw it into water. Then Shripati threw that child into water. At that time we were near the well."

Before the Sessions Judge the female accused denied these previous statements but eventually stated:—

"Shripati came and said to me 'Your husband has come in your search and so we shall throw the child into water.' On my asking him the reason he said that he would hear his crying. I refused to do so saying that I had brought up the child for 8 or 9 months. In the meantime, Shripati forcibly snatched the child from me and then threw it into water. But I do not know where he threw it. At that time I was not near the well."

And again:—

"When Shripati snatched the child from me I began to cry and so he gagged me with *dhoti* and struck me."

She admits that the body found in the well was that of her son Ananda.

Against the woman there are her own statements and it has to be noticed that in the Magistrate's Court she admitted that she gave up the child to Shripati with the object that it should be thrown into the well. That she was seen with Shripati the previous night is proved by the testimony of Narayan (P. W. No. 12). There is no reason to disbelieve this witness. That she was found near the well in some bushes the following morning is clear from the statements of Krishnappa (P. W. No. 7), Bhayylal (P. W. No. 8), Balaji (P. W. No. 9) and Gopalrao (P. W. No. 14). Krishna (P. W. No. 11) saw her on the previous day with the child at that place and she told him that Shripati had told her to stay there. This was some 800 feet from the well. It is also proved that she told the witnesses who found her near the bushes on the morning of the murder that Shripati had taken the child from her and thrown it into the well. I find it established that she left her husband's house with the intention of eloping with Shripati; that she went with him to Risod; that he concealed her on the night of the 13th March, and that on the 14th the child was thrown into the well. An infant of 8 months could not well fall into water by mistake. Her own statement that she made over the child to Shripati to throw into the well is corroborated by the fact that she raised no alarm when the child was thrown into the water. Unless she has been a party to her lover's act, she would have raised an alarm but it seems that both were apprehensive that crying of the infant might lead to their discovery by the husband. The evidence on record, together with the woman's own statements, justify the conviction. I confirm in her case conviction and sentence and dismiss her appeal.

With regard to Shripati, the principal evidence against him consists of the various statements of the female accused. These statements can be taken into consideration and used as evidence not only against the person making them but also against the person tried jointly with the confessing accused of the same offence: see *Emperor* v. *Kehri* (1). And as regards such co-accused though corroborative evidence should by itself be sufficient to support a conviction, the evidence of Narayan (P. W. No. 12) conclusively proves that Radhi spent the previous night with the accused Shripati. His going to fetch her with her mother the previous Sunday shows that he was acquainted with the woman and there is little doubt that the woman's statement that he wished to elope with her is true. The two were together the previous night some eight

(1) 29 A; 434; 4 A; L; J; 310; A; W; N; (1907) 140; 5 Cri L; J; 360;

or nine hundred feet from the well in which the child's body was subsequently found. It is extremely unlikely that, except on pressure from her lover, the woman would have consented to the murder of her infant, and it is unlikely that she would herself commit the murder, though a party to it and being present makes her punishable as the principal. Taking the facts of the case, together with the confessions and statements of *Musammat* Radhi, I have no doubt that Shripati took an active part in the murder of Ananda and that he was present at it. I confirm his conviction and sentence and also dismiss his appeal.

Appeal dismissed.

J. R. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 68 OF 1923.

June 20, 1923.

Present:—Mr. Baker, Offg. J. C.

PARMANAND PARWAR—APPLICANT

versus

KARTAR NATH—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction for prosecution—Evidence in original suit—Court, whether can go beyond.

In giving or upholding a sanction under section 195 of the Criminal Procedure Code a Court is not restricted to the evidence recorded in the original suit. It has inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it under sub-section (6) of the section.

In re Paree Kunhammed, 26 M. 116; 2 Weir 189, dissented from.

Budhu Lal v. *Chattu Gope*, 39 Ind. Cas. 465; 21 C. W. N. 269 at pp. 279, 280; 25 C. L. J. 193; 18 Cr. L. J. 497; 44 C. 816, relied on.

Revision from an order of the District Judge, Saugor.

ORDER.—Parmanand Parwar and Pannalal Parwar, applicants, have filed these two applications in revision against the order of the District Judge, Saugor sanctioning prosecution of the applicants under section 193, Indian Penal Code, for giving false evidence. The facts are as follows:—

The applicant, Parmanand, is a dealer in saltpetre at Khurai in the Saugor District. He bought some bags of saltpetre at Sujatpur on the East Indian Railway, but these bags were not delivered at Khurai within a reasonable time and Parmanand brought a suit against the East Indian Railway for damages and obtained a decree. The applicant Pannalal, who is Parmanand's *munim*, was examined as a witness and stated that he had gone himself to Sujatpur and purchased the saltpetre at Rs. 47-12 a maund. After a considerable interval the Sub-Inspector of Police suspecting that the suit was a false one made an application for the prosecution of the applicants for making a false claim under section 210 and for giving false evidence, under section 193, Indian Penal Code. The Munsif refused to grant sanction under either section, but on appeal the District Judge, Saugor, while upholding the order refusing to grant sanction under section 210, granted sanction against both the applicants for giving false evidence under section 193, Indian Penal Code. Hence the present applications for revision.

The statements in respect of which the sanction has been granted are as regards the purchase by Pannalal personally of the saltpetre at Sujatpur at Rs. 47-12 a maund, there being documentary evidence from the applicant Parmanand's own books that the original price paid was Rs. 13-8 a maund, and the Police being prepared to produce evidence that Pannalal never went to Sujatpur at all, the goods being sent by V. P. P.

It has been contended on behalf of the applicants that there is no evidence whatever on the record in support of these allegations and that the Court could only decide the question on the evidence on record in view of the ruling *In re Paree Kunhammed* (1) in which it was held, "that it is the duty of the authority giving sanction or upholding it, under section 195 to go into the merits of the applications for sanction, with reference to the evidence before it, which is relied on as justifying the according of sanction." I do not

(1) 26 M. 116; 2 Weir 189.

think that this ruling can be held as restricting the Court to the evidence recorded in the original suit. As a matter of fact, the District Judge when he gave sanction relied on the plaintiff's accounts before him in which there was an entry of the purchase of the saltpetre in question at Rs. 13-8 a maund, and in any case the case of *Budhu Lal* v. *Chattu Gope* (2) is an authority for holding that the Court had inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it under section 195 (6) of the Code of Criminal Procedure. In addition to the plaintiff's accounts, the District Judge had before him an affidavit from the Sub-Inspector that he was prepared to produce the evidence of the vendors of the saltpetre at Sujatpur as to the price paid and the manner in which the transaction was effected.

It is argued that there is no evidence to show that the applicant Parmanand's statement that he was told by Pannalal that the price paid was Rs. 47-12 per maund is false, that would be a matter for the Trying Court to consider in view of the entry in his account-books. It is contended that the statement in question was not material to the case since the only important issue in it was the price at which saltpetre could be sold at Khurai on or about the date on which the goods ought to have been delivered by the Railway Company. Hence it is argued that the question of the price paid for the saltpetre was perfectly immaterial to the case and still more was the manner in which the purchase was effected. The plaint does not refer to the price paid for the saltpetre. The rate at which damages were asked for was Rs. 1-5 per seer which comes to Rs. 52-8 per maund and this amount he obtained. The Judge who tried the case is unfortunately dead. The statement regarding the price of the saltpetre at Sujatpur was made in answer to the questions put by the Court and while, in the absence of the Judge, it will not be possible to say what his object in putting these questions was, it seems very probable that his view as to the rate of the saltpetre may have been affected by the price alleged to have been paid, namely, Rs. 47-12 a maund. The difference between the price actually paid, *i.e.*, Rs. 13-8 a maund, and the rate at which damages were claimed, *i.e.*, Rs. 52-8 a maund, that is, very nearly four times as much, is very great. I will admit that the question as to whether the goods were purchased personally by Pannalal or were ordered to be sent by V. P. P. seems at first sight immaterial, since the Railway Company acknowleges the receipt of the goods, but there is a *prima facie* case that the statements both as to the price and the manner in which the goods were bought are false, and the plaintiff who is a regular trader must have brought the case after consulting his books; and could not be under any misapprehension as to the real state of affairs. In these circumstances, it seems very probable that the value of the goods when purchased was overstated with a view to the claim for damages, and as evidence is available to prove the overstatement, and the depositions of both Parmanand and Pannalal on this point apparently are false, I agree with the learned District Judge that this is a proper case for sanction and I, therefore, confirm the order of sanction and dismiss both the applications.

Applications dismissed.

G. R. D.

(2) 39 Ind. Cas. 465; 21 C. W. N. 269 at p. 279, 280; 25 C. L. J. 193; 18 Cr. L. J. 49 44 C 816.

PATNA HIGH COURT.

DEATH REFERENCE NO. 15 OF 1923 WITH CRIMINAL APPEAL NO. 92 OF 1923.
CRIMINAL APPEAL NO. 2 OF 1923, (CUTTACK.)
June 27, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

SUKA RAUT AND ANOTHER—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 30—Confession of co-accused—Substantial self-implication—Admission of actual guilt, whether necessary—Confession, retracted, value of—Corroborative evidence.

All that is required to make the confession of an accused person admissible against a co-accused under section 30 of the Evidence Act is that the confession shall substantially implicate its maker in regard to the offence with which he and his co-accused are charged. It is not necessary that there should be an admission of actual guilt. The admission may establish constructive guilt only. [p. 711, col. 2.]

Empress of India v. *Ganraj*, 2 A. 444; 4 Ind. Jur. 581; 1 Ind. Dec. (N. S.) 851 and *Empress of India* v. *Mulu*, 2 A. 646; 5 Ind. Jur. 263; 1 Ind. Dec. (N. S.) 991, explained.

A retracted confession ought to be viewed with the greatest suspicion even as against the maker himself, but where the corroborating evidence is clear and convincing there is no reason to discard it. [p. 712, col. 1.]

Criminal appeal from the decision of Sessions Judge, Cuttack, dated the 23rd May 1923.

Mr. *B. P. Jamuar*, for the Appellants.
The Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—The appellants, Suka Raut and Jhulan Raut, have been sentenced to death for having about 6-30 P. M. on the 15th March last murdered Loka Raut at *Mauza* Uttarpratap in the District of Cuttack. Suka is about 30 years of age and Jhulan about 25. As is usual with the inhabitants of Orissa, Suka went in search of work to Calcutta at an early age and comes home from time to time on occasional visits. Three or four years ago he married and he has now a child 14 months of age. He last returned from Calcutta about one-and-a-half months before the murder. Loka who was about 14 years of age was his youngest brother and was a pupil at a Day School in *Mauza* Lahangapatna about quarter of a mile south-east of his house. From Suka's statement it would seem that he was not on good terms with his father Jagu Raut, and that he suspected him of relations with his wife, and that he had been anxious to remove from the family house. On the 14th March Suka lodged a complaint before the manager of his *zemindar* (the Raja of Madhupur) alleging that his father was favouring his other brothers and was not making suitable provision for his maintenance. The manager sent a peon to Jagu Raut directing him to appear at his office on the 23rd March. The arrival of the peon on the morning of the 15th led to a quarrel between Suka and his father with the result that Suka was turned out of the house and he and his wife and child took shelter in the house of a neighbour, named Bhikhari Palai, but later, owing to the intervention of Banchanidhi Raut, Jagu relented and Suka's wife and daughter came back to the house in the course of the afternoon. The evidence shows that Suka also came back but only for a short time. His father was then away from home and Banchanidhi says that he saw Suka going towards his house about 1 *ghari* before sunset and told him that the next day he would get his father to pay him his fare to Calcutta which was about Rs. 4. Between that time and 9 P. M., when he confessed to his father and a number of other villagers that he had killed Loka, we have no information as to Suka's movements except from his confession.

The events which led up to this confession are as follows. Loka had come home from school at midday for his meal as usual. He went back again about 4 o'clock and would, in the ordinary course, have come about 6. Owing to his failure to return, his father, his cousin Kelu, his brother Parikhit and others began to make a search. They went to the school and were told that the boy had left in company with some school-fellows about sunset and had last been seen going towards a deserted garden known as Madhei Sahu's Bari through which his

way home would lie. It is said that, while the search for the boy was going on, Kelu received information from a goldsmith named Brinda that Suka had been to him a little earlier in the evening and had tried to pawn two silver bangles and a waist chain. Jagu had just before this seen Suka sitting in the yard of Bhikhari Palai and he went straight to Suka and brought him to a *Khamar* (*zemindar's* home farm) near the garden. Suka at first denied that he had seen Loka but when confronted with Brinda he confessed that he and Jhulan had killed the boy and robbed him of his jewellery and that he had last seen him in the Bari when going away to pawn the silver trinkets. On being taken to the garden and finding that the body was not there he said that Jhulan had told him that if he found that the boy was not dead he would throw him into the well in the garden. A visit was then made to the well but the garden being thought to be haunted and it being night no body was willing to enter the water. The *Chaukidar's* brother was then put in charge of the well and Jagu and the villagers returned to the *Khamar* with Suka. At this stage Jhulan appeared at the *Khamar*. There is some conflict as to whether he was fetched or whether he came of his own accord, but the learned Sessions Judge finds that he came of his own accord. On being questioned, he denied having seen Loka but he and Suka were both taken by Indra Mullick *Chaukidar* to the *Thana* which is three miles off and which was reached about 2 A M. The Sub-Inspector was awakened and Jagu Raut's information was recorded. The Sub-Inspector then searched Suka's person and Suka gave up an *Anta Suta* (waist chain) which was his own and Rs 1-3-5 in cash. Jhulan was next asked to shake his *dhoti* and as soon as it was loosened two *Nolis* and one *Fasia* belonging to Loka fell on the ground. Early the following morning the Sub-Inspector arrived at Madhei Saha's Bari and searched the well and the body of Loka was recovered from the bottom. The body was naked but a *gamcha* with a heavy stone about 20 seers in weight was tied round the middle, evidently for the purpose of preventing it from floating. Round the throat and over the mouth there was another *gamcha* tied tightly and it was obvious that the boy had been either throttled or strangled to death. Later in the day, Banchu, the brother of the goldsmith Brinda, handed over to the Sub-Inspector one waist-chain and two silver bangles belonging to Loka, which, he said, had been brought to him for sale about 7 o'clock the previous night by the accused Suka, who wanted to sell them as he was leaving for Calcutta the following day. Banchu further told the Sub-Inspector that he could not fix the price without testing the metal and that Suka thereupon hurried off saying that he would call for them the next morning.

On the 18th March Suka was placed before a Magistrate and was asked whether he desired to make any statement. His reply was that he knew nothing.

A commitment inquiry was then begun and both accused were examined by the Magistrate under section 209, Criminal Procedure Code, on the 7th April. Suka who by that time had apparently re-considered his position then made a long and detailed statement describing how he and Jhulan had attacked and robbed Loka while returning through Madhei Saha's Bari, but he attempted at the same time to exculpate himself to some extent by saying that he tried to prevent Jhulan from killing Loka and that he was driven away by Jhulan and Jhulan's father Nira, as to whose complicity no hint had been given in the confession of the 15th March, Jhulan, on the other hand, still protested his innocence and said that he had been working in the *Khamar* until 2 *gharis* of the night with a number of labourers; that, shortly after he had gone home, Suka's brother came and informed him that Suka had thrown Loka into Madhei Saha's well, that he came at once to the *Khamar*, that he was there questioned by Dinabandhu Sahu, and that in spite of his protestations he was taken to the *Thana*. He denied that any gold ornaments were found on him.

In the Sessions Court Suka made a still further variation. He admitted

making the statement which the Committing Magistrate had recorded, but he added that it was his father who had killed Loka in order to revenge himself against Jhulan and Nira and that he had been tutored by his father to accuse Jhulan falsely, with whose family his father had been quarrelling for about four years about a wall and a fence. He also said that he suspected his father of tampering with his wife. Jhulan's statement was practically the same as that made before the Committing Magistrate and he still denied that the *Nolis* and the *Fasia* were found in his possession.

Agreeing with the three assessors as regards Suka and disagreeing with them as regards Jhulan, the Sessions Judge has sentenced both appellants to death for an offence under section 302, Indian Penal Code.

Now, the case against Suka presents no difficulty. His movements between 1 *ghari* before sunset and 9 P. M. on the 15th March can only be ascertained from his confession before the Committing Magistrate. His account is that, after he went back to his father's house with his wife and child, he waited some time at the house but was not given anything to eat. He then went to the *Khamar* and found Jhulan and his father there. With regard to what followed, I quote his own words: "Jhulan then said "Do they not give you anything to eat? Have you got money with you?" I said "No". He said "You had two rupees with you." I said "I have spent a part of that money in filing the application there is a balance of Rs. 1-3-0." Jhulan then said "What more will you do—your brother Loka has gone to Chatsai (Patsala). As there is no money we shall take bracelets and waist chain from him and by that money we shall go to Calcutta." He next proceeds to relate how Jhulan's father Nira also worked upon his feelings and advised him to go the following day to the *zemindar's Kachahri*. After this he waited till dusk at the *Khamar* and saw his brother Loka coming from school whereupon Jhulan said "He is going by that road. Let us go by this way Catch hold of him." The confession then proceeds as follows: "I went and caught hold of his hand and pulled him in that Bari. There is a Sahara tree there which was in darkness then. He cried, Jhulia put his hand in his mouth and thrusting his hand from the side of his legs carried him to Madhei Sahu's Bari. I took off his bracelets and waist chain. He took off his *Nolis* (ear rings) with the help of his nails. As the *Fasia* did not come out he pulled it. While he was taking off these articles he put a cloth in his mouth and pressed him with his knee. Loka was throwing about his legs. After taking out the *Noli* and *Fasia* Jhulia began to strangle him. He was holding his neck. I pulled out his hand and said "He is my brother he will die, I shall not be able to bear it." He said "What do you know—you keep quiet. We shall kill him. You are taking the waist chain and Khadu. Your father and mother will let you off. They will arrest me of theft. We shall kill him. I am tying his hand and feet; you go to the goldsmith's house and come back after selling the *Khadu* and *Suta*." He tied the legs with a red napkin and the face with the old one and said "I am now going to the *Khamar*; I was working there; I shall ascertain if there is work for to-morrow. You go to the Bania's house; I shall come back just now. If I shall see that he is dead then alright, otherwise I shall throw him into the well." I went to the Bania's house and he to the *Khamargarh*. When I went towards the road my conscience pricked me (or I felt uneasy). I thought, why should I kill him I came back and untied the legs and was about to untie the face when Jhulia and his father arrived. I put off the cloth from the mouth and raised him and made him sit. He sat. Nira Raut said "Why did you make him sit? The *Sala* is half dead. Why do you make him sit? Let us kill him." I said "No, we shall not kill him." He said "Sala, what do you know? I married two wives, I killed the first wife. As soon as she died I put some Torani (rice water). All knew that she died of Maidan (diarrhoea or cholera); who could know that? Did the Police catch me we shall kill him in the same way. You go away. Don't tell this to any one." I was driven

out, I fled away keeping my eyes over them at times. I went to a distance and from thence I looked at them. Nira Raut and Jhulia said "Why are you standing on? Go away." I went away to Bania's house. I took the articles to Brunda at Bania's house. He said "I have no money." Then I went to Banchu Bania and said to him "Will you take the *Khadu* and *Anta Suta*." He said "Why not"? I then said "What will you pay for each *Vari*." He said "I shall pay 11 annas for each *Vari*, let the articles remain here till to-morrow morning when you will come and have them weighed and take the price." I then came away from that place and sat in the Gonda's house. My father went there to call me. With him I came to the Khamar. There I confessed everything. Gentlemen say that I stated that I killed him which is not so. I stated "We left him at that place."

There is no foundation for the suggestion that this statement was inspired by the appellant's father. On the other hand, it is difficult to follow the workings of the appellant's mind and to explain his conduct, first, before the villagers, then before the Magistrate on the 17th March and then before the Committing Magistrate on the 7th April and finally before the Sessions Judge on the 11th May. There can be no doubt that, as soon as he was taxed by his father and his co-villagers regarding the disappearance of Loka, he made a clean breast of the whole affair. This is proved by Jagu, Dinabandhu, Kelu, Giridhari, Narain, Dhruba and Brinda. The reason for this confession at least is clear for he was confronted with Brinda to whom he had just taken the two bracelets and the waist chain and he evidently had not the presence of mind to concoct any plausible explanation. The evidence of Dinabandhu on this point seems to me to be perfectly straight-forward and reliable and I quote the material portions of it in his own words:—

"Jagu Raut said that his boy was not found and asked what he should do. We asked him to search in the village, and just then Kelai Raut, Jagu's nephew, arrived and said that Brunda Maharana was saying at the Khamar that Suka had taken bangles, waist chain to him for sale. Kelu asked Jagu to see where Suka was. Jagu and Kelu went to fetch Suka, Jagu having seen Suka at Bhikhari Palai's house. They asked us to go to the Khamar as Brinda was there. So we went to the Khamar. Brinda was sitting there. Padmalabh the man in charge of the Khamar was not there. We spoke to Brinda and Jagu and Kelu arrived there with Suka. I asked Suka saying that Brinda was saying that he, Suka, has taken bangles and waist chain to him. Suka denied it. I said that Brinda was no stranger to him and had been saying it, Suka after saying that Brinda might be saying it and that he (Suka) could not prevent it, kept quiet for some time. Then he said that he had taken the ornaments to Brinda. I then asked him what he had done with his brother Loka; now that he admitted taking the ornaments to Brinda, Suka said nothing. Then he said "*Mari Pakaichhi*" (I have killed him). We were disgusted, and he said that he had left Loka in the Bari of Madhei Sahu. We thought that the boy might by some chance be alive, and we wanted to hurry to the spot and get up when Kelu seized the *Batua*, Exhibit 1, from Suka's waist. Dhruba Raut asked Kelu what was the point of taking the *Batua*. Kelu said that the silver ornaments had been taken to the goldsmith but the gold ornaments—*Nolis* and *Fasia*—may be in the *Batua*. Suka said that Jhula had taken the gold *Nolis* and *Fasia*. I asked Suka why Jhula had taken those things and Suka said that he and Jhula together had killed Loka. He added that after killing him they had left him tied in Madhei Bari, and that Jhula had said to him "take silver ornaments to a Bania and sell them. Let the body remain here. As I have been working at the *Khamar*, I will go and see the *Khamar* people. I will come later on and see the body. If I find life gone, well and good, otherwise I will throw him into the well." So we all went to Madhei Sahu's Bari. There I asked him to point out the place where the body was left. I asked him why it was not there, and he said that

Jhula must have thrown it into the well. We tried to look into the well with a lantern, but as it was night, nothing could be seen. So we came out of the Bari and sat on the road in front of the Bari; that road is called the Kodigna Padia (a fallow where transactions in Cowries used to take place). Banchu Raut was sent to fetch the *Chaukidar* Indra Mallik with his brother. Suka was with us, and I asked Suka how he had killed Loka and Suka said that Jhula had seized Loka by the legs, that he (Suka) had tied a cloth over his mouth and neck tightly, that after throwing Loka in that condition Suka had gone to the Bania, and that he could not say what happened after that. Then the *Chaukidar* and his brother Narsing Mallik arrived; they had not come when Suka told us how he had tied his brother. Soon after, the *Chaukidar* came Jhulan. He had not been sent for at all."

While the statement before the Committing Magistrate is obviously incorrect in so far as it seeks to reduce Suka's guilt there is, in my opinion, no doubt that the above confession made to the villagers was a true and accurate account of the events that happened. From the 17th March Suka was in custody in Jail and between that date and the 7th April he had ample time to prepare a carefully considered defence. In my opinion the skill displayed in the preparation of the statement of the latter date makes it quite impossible to accept the suggestion that Suka is a person of weak intellect and that he was coerced into joining in the robbery under the influence of a stronger mind. As for the statement made before the Sessions Judge about a month later, it clearly bears evidence of both malice and cunning. There is no evidence whatsoever that Jagu Raut, the old man, was carrying on an intrigue with the appellant's young wife, and as for the suggestion that Jagu Raut killed his own son, who was the youngest child and the favourite of the family, not only is there no evidence but the motive is wholly inadequate. It seems that two years before the occurrence there was a criminal case about a fence between Jagu Raut and Nira which was compromised and that, shortly before the occurrence, Nira had beaten one of Jagu Raut's sons in the course of a quarrel about a boundary and that the two families were not on good terms, Nira suspecting that Jagu had estranged Jhulan from him It further appears that Nira and Jagu had not been on speaking terms for three or four years; but, all the same, these disputes and quarrels do not to my mind afford a sufficient motive for Jagu's killing his own son in order to fasten a false charge upon Jhulan; on the contrary, the suggestion is that Jagu was siding with Jhulan against Nira. At the same time, the statement before the Sessions Judge shows that Suka had a very lively appreciation of the situation created by his confessions and that he fully realised the necessity of neutralizing their effect. It is true that in his petition to the *Zemindar* on the 14th March he said that as he was not more intelligent than his other brothers his father was insulting him in various ways and was unwilling to allow him his proper share or to give him access to the house. This admission of intellectual inferiority is counter-balanced by the assertion that he was earning more money than his brothers, and I can find nothing on the record to show that the appellant is of such weak mental capacity that it would be unsafe to rely upon anything that he has said.

The medical evidence also corroborates the story told by him. It discloses the following injuries upon Loka:

(1) The eyelids of both eyes ecchymosed one small lacerated wound $\frac{1}{4}$" *by* $\frac{1}{8}$" skin deep below the lower eyelid on the right side—the bridge of the nose also ecchymosed.

(2) Three small ecchymoses with swellings on the forehead one at the middle $\frac{1}{2}$" *by* $\frac{1}{2}$" one $\frac{1}{2}$" *by* $\frac{1}{2}$" on the left side, another $\frac{1}{2}$" *by* $\frac{1}{2}$" on the right. On incision extravasation of blood found in the tissues.

(3) One scratch mark on the right side of neck just behind the angle of jaw 1$\frac{1}{2}$" *by* $\frac{1}{8}$" probably caused by finger nails. Another on the right cheek $\frac{1}{2}$" *by* $\frac{1}{8}$" probably caused by finger nails. On incision extravasation of blood found on all ecchymoses.

(4) Two small scratch marks one on the right arm above elbow on the outside probably caused by finger nails.

SUKA RAUT v. EMPEROR.

(5) Laceration of the left ear-lobe from the upper bore for ornaments: a portion ½" in length completely torn.

Death was due to asphyxia, probably caused by suffocation and no sign of drowning was present. In the opinion of the Sub-Assistant Surgeon the above superficial injuries were not sufficient in themselves to cause death. The ecchymoses on both eyelids and the bridge of the nose and the condition of the conjunctivae show that something was tied round the face and the small scratches on both arms, the neck and the cheek indicate a struggle and the use of finger nails. This evidence, in my opinion, strongly corroborates the account given by Suka to Dinabandhu and I have no doubt that Loka was throttled or strangled to death.

There is yet another piece of evidence which corroborates the confessions and that is the delivery of the two bracelets and waist chain to the goldsmith Banchu after the murder. On this point we have the evidence of Brinda and Banchu. It was possibly owing to the confusion following the discovery of the murder that Banchu was not examined that night, and apparently the first thought of the villagers was to hurry Suka and Jhulan to the Police Station. It was not till the following day that Banchu produced this jewellery, but there can be no reason whatsoever for disbelieving his evidence and that of his brother Brinda as to Suka's part in the matter. Suka offered the jewellery first to Brinda and finding that Brinda had not the money he went to Banchu who told him he would keep the ornaments and give him the money the next day after ascertaining their weight. The evidence of Ankuri Sahu and Sura Sahu establishes the fact that these articles were made by them for Jagu and Jagu's evidence shows that they were being worn by Loka on the day of the occurrence. There can be no doubt that Suka was speaking the truth when he stated before the villagers and repeated in the Committing Magistrate's Court that he robbed Loka of this jewellery and disposed of it in the manner alleged by Banchu.

A point has been made that the evidence of the witnesses who support the confession in the village cannot be accepted because, if Suka had in fact confessed, an attempt would have been made to search the well that night. The explanation is that nobody was willing at that hour to enter the well. The well was carefully guarded the whole night and the discovery of the body in it also corroborates the confession.

Suka's statement both before the villagers and in the Committing Magistrate's Court that he was not present when the body was actually thrown into the well may be true but probably it is not. One reason for doubting its truth is that the body was weighted with a stone weighing about 20 seers; as the distance from the place, where Loka was killed, to the well (according to his own statement) was about 5 yards, it would have been difficult, though not impossible, for one man to carry the body that distance and to throw it with sufficient care into the well so as not to touch the sides; from the state of the body it would seem that care was taken to see that the head did not strike the brick work inside the well.

I am satisfied therefore, that Suka was one of the persons who caused the injuries from which Loka died and I do not believe his later statement that he made an effort to save Loka.

The only inference that can be drawn from his conduct is, that from the outset his intention was to kill and even if he went away to the Bania's shop to pawn the things after the assault, he had no intention of averting fatal consequence; either Loka was dead when he went away or he was nearly dead and Suka's statement to Dinabandhu that Jhulan said, "If I find on my return that he is dead, all right, if not, I will throw him into the well" demonstrates beyond doubt that Suka made no effort to undo what he had done. The probability is that both he and his accomplice threw the body in to the well and the absence of signs of drowning shows that life was then extinct.

The learned Counsel for the appellants urges that the motive disclosed is wholly inadequate. Now, the evidence shows that Suka had quarrelled with his father and that he was anxious to leave on the 16th March for Calcutta. He had appal-

rently no money to pay the fare. He had a sum of Rs. 2 out of which he spent 7 annas for the petition to the *zemindar* and he had the balance in his possession when searched at the Police Station. He required about Rs. 4 for the Railway fare to Calcutta and, in my opinion, his object in killing his brother was robbery. There may possibly have been some idea of revenge against his father also but the principal motive was undoubtedly to get the money. The total price of the jewellery taken is said to be a little over Rs. 25, the golden ornaments, that is, the *Fasia* and the two *Nolis* which are said to have been taken by Jhulan were worth about Rs. 15; Suka's share, therefore, amounted to about Rs. 10 which was ample for his expenses to Calcutta. So small a sum might seem an inadequate motive for fratricide, but murders have been committed even for less adequate motives and the insufficiency in the present case is not, in my opinion, a ground for disbelieving the evidence.

I have already declined to accept the plea that Suka was incapable of forming any intention of his own and was completely under the will and influence of some superior mind, and to my mind the crime offers no redeeming features. Suka had been earning his own living in Calcutta for 15 or 16 years, and there is nothing to suggest that he was not fully capable of realizing the nature of his act. In these circumstances, no sentence other than death will, in my opinion, be proper. His appeal is, therefore, dismissed.

Ths case against Jhulan is more difficult. We have no informaton at all of his movements on the day of occurrence except from the statements of Suka and the first question is, whether the confessions of Suka can be received as evidence against him. It is contended that the statement before the Committing Magistrate certainly cannot be admitted inasmuch as Suka exculpates himself and throws the whole blame of the murder upon Jhulan. The law on the subject is contained in section 30 of the Indian Evidence Act; and if Suka's statement before the Committing Magistrate can be regarded as a confession, then it is permissible to take it into consideration against his co-accused. The statement is certainly a confession as to the robbery. Is it necessary that in order to be capable of being taken into consideration against Jhulan there must also be a clear and unequivocal admission of murder? Various authorities have been cited before us to show that, unless a confessing prisoner implicates himself as fully as his co-accused, the statement will not be admissible, the principle being there is no guarantee that the maker of the confession is speaking the truth; and reliance is placed upon *Empress of India* v. *Ganraj* (1) and *Empress of India* v. *Mulu* (2). In my opinion no general rule can be laid down and each case must be decided on its own facts. All that is required is that the confession shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged. It is not necessary that there should be an admission of actual guilt. The admission may establish constructive guilt and the question in the present case is, whether Suka's statement to the Committing Magistrate, taken with the fact that the body was found in the well, would be sufficient to raise an inference that he and his accomplice had the common intention of killing the deceased and that the act which caused death was done in furtherance of that intention. In my opinion the answer to this question is in the affirmative and, therefore, the statement is admisible in evidence.

But the prosecution are on firmer ground when they urge that, whatever may be said of the satement to the Committing Magistrate, the statement to the villagers is certainly a clear and direct admission of guilt and as such it fully complies with the strict rule laid down by the Allahabad and the Calcutta High Courts. I have already referred to Dinabandhu's evidence which proves that the confession was made by Suka as soon as he was confronted with Brinda. Jhulan was not present, but the confession has been legally proved and, therefore, it is admissible even though it was

(1) 2 A. 444; 4 Ind. Jur. 581; 1 Ind. Dec. (N. S.) 851.
(2) 2 A. 646; 5 Ind. Jur. 263; 1 Ind. Dec. (N. S.) 991.

SUKA RAUT v. EMPEROR.

made in his absence. In that confession Suka used the words "I have killed him." He also admitted that Jhulan had seized Loka by the legs, that he (Suka) had tied a cloth over his mouth and neck tightly, that after throwing Loka down in that state he had gone to the Bania, and that he could not say what happened after that. He further said that, after killing Loka he and his companion had left him tied in Madhei Bari and that Jhulia then said: "Take the silver ornaments to a Bania and sell them. Let the body remain here. As I have been working at the *Khamar*, I will go and see the *Khamar* people and ascertain whether there is work for to-morrow. You go to the Bania's house, I shall come back just now. If I shall see that he is dead, then all right; otherwise, I shall throw him into the well." There can be no doubt that these statements constitute a full and complete admission of the offence of murder and there is no reason why it should not be taken into consideration against Jhulan. It is true that this confession was partially varied in the Committing Magistrate's Court and completely retracted in the Sessions Judge's Court. It is needless to observe that retracted confessions ought to be viewed with the greatest suspicion even as against the maker himself, and in the present case, if there had not been any corroborating evidence against Jhulan, I do not think it would have been safe to convict him; but the corroborating evidence is clear and convincing and, in my opinion, the learned Sessions Judge was right in disagreeing with the assessors as to its value.

I refer to the fact that two *Nolis* and one *Fasia* were found upon the person of Jhulan at the *Thana* when he was searched. The evidence of Parikhit shows that he got these ornaments made in Calcutta two years before the occurrence and that he gave them to his father who proves that Loka was wearing them on the day of the occurrence. As Jhulan denies that the ornaments were found on his person an inference that they were found at all at the *Thana*, it is necessary to examine with some care the evidence bearing upon this part of the case. It appears that at 2 A. M. Jhulan and Suka had arrived at the *Thana* in the custody of the *Chaukidar* Inara Mallik and of Jagu, Kelu and Bandhu. The Sub-Inspector, Akbar Khan, was asleep, but on being awakened he caused two independent persons named Sirajuddin, a cultivator, and Sadhucharan Das, a stamp-vendor, to be fetched. These persons were present when Jagu's first information was recorded and the Sub-Inspector took the precaution of taking their signatures upon it. At that time the Sub-Inspector was sitting in the *verandah* of the Police Station with Sirajuddin and Sadhu. According to the evidence of Sadhu, the two accused were about 10 cubits to the left of the Sub-Inspector near the end of the *verandah*. Jagu and his co-villagers were immediately below the Sub-Inspector in the yard before the First Information was recorded, but he came up afterwards. Near the accused there were some Constables, but they were below in the yard. The Sub-Inspector had a lantern, the Constables had one or two lanterns and the villagers had brought a lantern of their own so that there seems to have been sufficient light. After recording the First Information the Sub Inspector recorded the statements of two or three witnesses; he then called the accused up to him and recorded their statements; he next asked Suka to loosen his *dhoti*; Suka did so, and he gave up one *Suta* and some money, and nothing else of importance was found upon him. According to the Sub-Inspector Jhulan was next made to stand up and to shake his *dhoti* and as soon as he did so two *Nolis* and a *Fasia* fell on the floor of the *verandah* about one cubit from Jhulan. A Constable then picked up the ornaments. Jagu immediately identified them as being Loka's. Sadhu's account is a somewhat fuller one, but I do not think there is any material difference between it and the Sub-Inspector's, and wherever there is a discrepancy I prefer to trust to Sadhu's memory. Sadhu states that just before Jhulan and Suka were ordered to stand up, two Constables were called from the yard up to the *verandah* and that Suka gave the money and the waist chain to the

Constables. With regard to Jhulan, Sadhu stated before the Committing Magistrate that a Constable untied Jhulan's cloth and in explanation of this statement he said in the Sessions Court that as Jhulan hesitated a little the Constable put his hand on Jhulan's *dhoti* and that Jhulan shook it after the Constable had untied it. The Constable picked up the jewellery and handed it to the Sub-Inspector. The Sub-Inspector deposes that he asked Jhulan where he had got the ornaments and that Jhulan replied that he had got them from Suka; but there is no corroboration on this point. Indeed Sirajuddin is positive no one asked him any question on this point. On other points his evidence generally corroborates Sadhu.

In these circumstances, it does not appear that it was possible for any of the prosecution witnesses or Suka to make the ornaments fall out Jhulan's *dhoti*. To any one familiar with the way money and small articles are rolled up in the folds of the *dhoti* at the waist it is clear that the only person who could have done it was the Constable who is alleged to have untied the *dhoti*; but in order to fasten the act upon him, it would be necessary to show that he was in possession of the *Nolis* and the *Fasia*. There is, however, no reason for believing that any of the prosecution witnesses brought these articles to the *Thana* and afterwards handed them to the Constable in order to create evidence against Jhulan and the evidence of Sirajuddin and Sadhu Charan who are absolutely disinterested witnesses is wholly destructive of the theory that there has been any manufacture of false evidence in this connection. It is difficult to conceive that a wickedly malicious conspiracy of this nature between the prosecution witnesses present at the *Thana* and the Police could have been carried out without detection by these two persons. On the other hand, it is contended by the learned Counsel that it is equally inconceivable that Jhulan should have kept the spoils of his crime upon his person so long. This point has certainly to be met and we have to inquire how it was that he came to the *Khamar* at all after the murder. Jagu said in had confessed, he and his co-villagers went to Jhulan's house and questioned him, but he gave no answer and that Suka then took his co-villagers to the garden and showed them the well into which Loka's body was thrown. The evidence given at the trial shows that this statement was incorrect. Having regard to the fact that the First Information was recorded at 2 A. M. the error, in my opinion, is intelligible. Jagu now denied that he went to Jhulan's house and says that he cannot say whether any one brought him to the *Khamar*. Dinabandhu's evidence, however, is quite clear and he is certain that Jhulan was not sent for at all and that he arrived shortly after the *Chaukidar*, and the learned Sessions Judge is also of this opinion. Jhulan himself stated before the Committing Magistrate that he was at home reading a sacred book when one of Suka's brothers came and told him that Suka had thrown Loka into the well and that he at once came to the *Khamar*, and it would seem that his case is that he arrived after Suka had made his confession and pointed out the well. I think this is correct, and we can only speculate as to Jhulan's reason for carrying the ornaments upon his person. It may be that as he had gone to the length of risking his life for the sake of the ornaments, the desire to retain physical possession of them overpowered the dictates of ordinary prudence. He might certainly have thrown away or hidden the ornaments, but it is possible that so completely dominated was he by the feeling of greed that he was not willing to relinquish his custody of the articles even for one moment. It is true that the value of the articles was only about Rs. 15, but as in the case of Suka the smallness of the value is immaterial. It may also be that Jhulan did not know that he had been accused by Suka or that, if he did know, he intended to brazen out the accusation. He may have thought that he would be able to deny successfully that the articles belonged to Loka if they were found in his possession at the *Khamar* or that nobody would have the courage to search him against his will. In this

last surmise he was certainly right, because, as a matter of fact, he was not searched till he got to the *Thana*.

I am, therefore, not much pressed with what men of ordinary intelligence would have done under similar circumstances. If Suka was capable immediately after the murder of pawning the silver ornaments with the goldsmith Banchu in utter disregard of the fact that he would certainly be caught as soon as the disappearance of Loka became known, it is scarcely surprising that Jhulan should have committed the indiscretion of carrying about the stolen property upon his person.

It is next urged that Jhulan could have thrown them away on the way to the *Thana*; but the evidence is that he was tied with a rope and that his hands were not free. Indeed, after his arrival at the *Khamar* he had no opportunity of disposing of the ornaments. He asserts that he was not tied and the prosecution witness Dhruba supports him on this point, but this witness was not present when the villagers started with Jhulan for the *Thana*. On the other hand, the *Chaukidar* Inder Mallik, Bandhu and Jagu all depose that Jhulan was dead and, in my opinion, their evidence should be accepted.

It may be asked why Jhulan was not searched. From Dinabandhu's evidence it would appear that he was not quite certain that Jhulan ought to be sent to the *Thana* and that, when Jagu protested that Jhulan ought not to be left behind, Dinabandhu said that the *Chaukidar* was to decide. This may explain why Jhulan was not searched by his co-villagers. Or it may be that there is really no explanation to give. As the villagers did not take the precaution to search Suka who was confessing, there was perhaps nothing strange in their omitting to search a man as to whose guilt there was some doubt.

Finally, there is evidence of association between Jhulan and Suka. Jagu states that he believes that Jhulan and Suka work together at the General Post Office in Calcutta. There is also a somewhat curious statement by Suka in his confession which points to an intimate connection. From his confession it would appear that Jhulan knew that Suka had Rs. 2 in his possession and questioned him about it shortly before the murder. It is not likely that this part of the confession was pure invention and, in my opinion, it is established that Jhulan and Suka were close friends.

With regard to Jhulan's father Nira, there was no mention of him in the confession to the villagers, and it does not appear that he took any part in the proceedings at the *Khamar* before Jhulan and Suka were sent to the *Thana*. His name was introduced by Suka for the first time in the Committing Magistrate's Court and it is probable that Suka's object was to account for the disposal of the body. He had realized that it would have been difficult to make people believe that, weighted with a heavy stone, it was removed by Jhulan alone.

It is unnecessary to discuss the evidence of the defence witnesses called by Jhulan. They seek to prove that he was working in the *Khamar* at 6-30 P. M. but their evidence is inconclusive.

The result, therefore, is that, in my opinion, the learned Judge was right in finding that Jhulan took part in the murder and that he has committed an offence under section 302, Indian Penal Code. There are no extenuating circumstances in the case. The offence was committed in a cruel and callous manner and with a disregard for consequences verging on contempt. In my opinion, death is the only proper penalty in the circumstances and the sentences passed by the learned Sessions Judge upon both appellants will be affirmed.

The appeal of Jhulan is also dismissed.

Bucknill, J.—I agree.

M. D. J.

Appeal dismissed

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 262 OF 1923.

May 21, 1923.

Present:—Mr. Justice Rankin, Mr. Justice Buckland and Mr. Justice Cuming.

DIBAKANTA CHATTERJEE—ACCUSED—PETITIONER

versus

GOUR GOPAL MUKERJEE—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—"Examined," meaning of—Examination of accused after cross-examination of prosecution witnesses, whether obligatory.

The word "examined" in section 342 of the Criminal Procedure Code does not merely refer to the examination-in-chief of the prosecution witnesses but includes their cross-examination and re-examination. [p. 719, col. 1]

Mazahar Ali v. *Emperor*, 71 Ind. Cas. 662; 27 C. W. N. 99; 36 C. L. J. 417; 24 Cr. L. J. 198; (1923) A. I. R. (C.) 196; 50 C. 223, followed.

Per *Buckland, J.*—In all cases, whether additional witnesses have been called after a charge has been framed or not, the obligatory examination of the accused under section 342 of the Criminal Procedure Code should take place after all the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence. [p. 717, col. 1.]

Per *Cuming, J. (dissenting).*—The expression "examined" used in section 342 of the Criminal Procedure Code does not include cross-examination or re-examination. [p. 717, col. 2.]

Rule against an order of the Deputy Magistrate, Hughly, dated 15th November 1922.

Babu *Narendra Kumar Bose* for Babus *Manmatha Nath Mukherjee* and *Jajneswar Mazumdar*, for the Petitioners.

Babu *Debendra Nath Mondol*, for the Opposite Party.

JUDGMENT.

Buckland, J. (*April 19th*, 1923).—The point involved in this Rule has come before the Court recently on several occasions, and it arises upon the interpretation to be given to section 342, Criminal Procedure Code. The complainant and five witnesses for the prosecution were examined-in-chief on the 7th July 1922. On the 20th July 1922 five other witnesses for the prosecution were examined-in-chief. The accused was then examined under section 342. On the 7th August a charge was framed. No further witnesses for the prosecution were examined-in-chief, but on that and on subsequent dates the witnesses for the prosecution were cross-examined. On the 18th September six witnesses for the defence were examined. The question is, whether or not the obligatory examination of the accused under section 342 of the Criminal Procedure Code should have taken place after the witnesses for the prosecution had been cross-examined.

It has been submitted to us that, in much as there was no examination of the accused under that section after the witnesses for the prosecution had been cross-examined and before he was called upon to enter upon his defence, the provisions of the section have not been complied with. In point of fact, the accused was examined after the witnesses for the prosecution had been examined-in-chief and before he was called on for his defence. But the contention is that the word "examined" in section 342 includes cross-examination and that, in consequence, the provisions of the section have been contravened.

We have been referred generally to recent decisions of this Court and particularly to the judgment in *Mazahar Ali* v. *Emperor* (1) in which the learned Chief Justice referring to the words of the section said: "That must mean after the witnesses for the prosecution have been examined, and after the cross-examination and re-examination, if any, of such witnesses, for ordinarily the accused is not called on for his defence until the case for the prosecution is closed." I do not understand that by this it is necessarily meant that the word "examined" includes cross-examination and re-examination if any. It .....seems to me that the decision is based upon broader grounds, for a few lines earlier in the judgment I find it stated: "In my judgment it is clearly indicated in that part of the section that the time at which the Court shall question the accused generally on the case, is, after the prosecution case is completed and before the accused person is called on for his defence."

I agree with this conclusion and I desire to state my reasons with reference to the procedure laid down in Chapter XXI for the trial of warrant-cases. Section 252 provides for the examination of the complainant and of witnesses for the prose-

(1) 71 Ind. Cas. 662; 27 C. W. N. 99; 36 C. L. J. 417; 24 Cr. L. J. 198; (1923) A. I. R. (C.) 196; 50 C. 223.

cution in the first instance. As regards them it is open to the defence to cross-examine them if they choose to do so as they are called or to reserve the cross-examination until the opportunity provivided later. When those witnesses have been examined or at any previous stage of the case, which means before they have all been examined, the Magistrate, under section 254, is entitled to frame a charge in writing against the accused. The charge is then read and explained to the accused and he is asked to plead to it. Then, if he does not plead guilty or has to be tried, the accused is given an opportunity of cross-examining the witnesses for the prosecution whose evidence has already been taken, and after those whom he desires to re-call for that purpose have been cross-examined and re-examined they are discharged. Next, the evidence of the remaining witnesses for the prosecution is taken and after cross-examination and re-examination they too are discharged. There the case for the prosecution closes and it is at that stage and before the accused is called upon to enter on his defence which is the next stage that the obligatory examination of the accused under section 342 should take place.

There may, therefore, be cases where all the witnesses for the prosecution are examined before a charge is framed and they are only cross-examined thereafter and cases where additional witnesses are called for the prosecution after a charge has been framed.

With regard to trials in which such additional witnesses are called for the prosecution, in my opinion, which I might have to re-consider if the point directly arose for decision at any further time, such additional witnesses for the prosecution should be cross-examined and re-examined one by one as they are called. As regards witnesses called before a charge is framed an opportunity is provided to them for cross-examination but there is no such provision as regards the additional or remaining witnesses for the prosecution. Failure to observe this procedure is one source of error with regard to questioning a prisoner under section 342, Criminal Procedure Code. But if the additional witnesses for the prosecution are examined-in-chief, cross-examined and re-examined one by one then, as a matter of course, it will follow that the stage at which the Court shall question the accused generally on the case will be after the prosecution case is complete and before the accused is called on for his defence and no question can possibly arise as to whether the word "examined" in section 342 does or does not include the word "cross-examined".

In cases, however, where no additional witnesses are called after a charge has been framed, errors in the observance of section 342 are even more frequent. As to these cases the procedure laid down, even if followed with the utmost precision, does not lead with the same directness to the point of which sight cannot be lost at which the obligatory questioning of the accused must take place. The reason for this is that, if the accused is questioned after the witnesses for the prosecution have been examined-in-chief, but before they are cross-examined, and also, of course, before he has been called on for his defence, the terms of the section so far as they require him to be questioned "after the witnesses for the prosecution have been examined and before he is called on for his defence" have been complied with unless the word "examined" is held to include "cross-examined". But this is not all that the section says. The words quoted indicate that the accused is to be questioned at least after all the witnesses for the prosecution have been examined-in-chief, and I know of no case where it has been argued that the section is not contravened if witnesses for the prosecution are examined-in-chief after the accused has been examined and he is not again questioned before he is called on for his defence. The section also provides that the accused shall be questioned "generally on the case" and to hold that to question him before the witnesses for the prosecution have been cross-examined is sufficient is to lose sight of this very important phrase. For it may well be that circumstances demanding explanation have been elicited by the cross-examination, and whether that is so or not it cannot by any stretch of language be said that to question the accused for the purpose of enabling him to explain

the examination in chief but to give him no opportunity to explain away or even clear a part of the cross-examination of the witnesses for the prosecution is to question him generally on the case. This reasoning applies equally to cases where additional witnesses for the prosecution are called after a charge has been framed but for reasons which I have given its application to such cases should be unnecessary.

For these reasons I am of opinion that, in all cases, whether additional witnesses are called after a charge has been framed or not, the obligatory examination of the accused under section 342 should take place after all the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence.

Before I conclude I should say that my judgment is not intended by such general observations as I have made to suggest that where in his discretion the Judge or Magistrate rightly permits a witness or witnesses for the prosecution to be called or cross-examined after the accused has been called on for his defence a further examination of the accused under this section must take place. The section only deals with an obligatory examination of the accused before he is called on for his defence, and should any such question arise hereafter the point will then have to be decided.

In my judgment this Rule should be made absolute and the order of the Trial Court, dated the 15th November 1922, should be set aside and the trial should be resumed by the Magistrate from that point at which the obligatory examination under section 342 should have taken place.

As my learned brother dissents, the case will have to be referred under section 429, Criminal Procedure Code.

Cuming, J.—(*April 19th, 1923*).—I would discharge this Rule. The Rule was granted on the ground that in the absence of examination of the petitioner according to the mandatory provisions of section 342 of the Criminal Procedure Code the conviction of the petition cannot be sustained. From the body of the petition it appears that it is alleged that the provisions of the section were not complied with, in that the accused person was not examined after the cross-examination of the prosecution witnesses and it would appear from the order-sheet that this was so. It appears that after the examination of the prosecution witnesses-in-chief the accused was examined and the prosecution witnesses were subsequently cross-examined. In my opinion and with great respect to the learned Judges who decided the case of *Mozahar Ali* v. *Emperor* (1) this was a sufficient compliance with the provisions of the section. Section 342 states: "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any enquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." As I read the section, the expression "examined" means examination-in-chief and does not include cross-examination or re-examination of the prosecution witnesses. A perusal of the Code will show that the Code apparently contemplates three distinct stages in the examination of the witness—his examination, his cross-examination and his re-examination, and where the Code uses the expression 'examined' in section 342, it seems to me that the Code intended to refer to examination and not necessarily to cross-examination or re-examination; in other words, the expression "examined" as set out in section 342 does not include cross-examination or re-examination. My reasons are these. Consider, for instance, the sections dealing with the trial of warrant-cases.

Section 252 provides that the Magistrate will hear the complainant and take all the evidence which may be produced in support of the prosecution. After taking their evidence the Magistrate examined the accused under section 253. The Magistrate may then either discharge him or frame a charge. The charge could be framed previously at any stage under section 254 but as soon as the charge is framed the accused is called on to cross-examine

the witnesses for the prosecution who have already been examined. They are then re-examined if necessary and discharged. The remaining witnesses for the prosecution are then examined, cross-examined and re-examined; the accused then is called on to enter on his defence. Section 257 provides for the accused re-calling and cross-examining prosecution witnesses after he has entered on his defence.

It will be noticed that the different stages, examination, cross-examination and re-examination may take place at different times. These sections set out the procedure to be followed in warrant-cases and after section 253, which alone provides for the examination of the accused, no mention whatever is made of such examination. No doubt the Code contemplates in certain cases further witnesses for the prosecution being examined after the charge, and reading section 342 which is in the general provisions for trials, the accused must also be examined after these witnesses have been examined in order that he may explain anything that may appear against him in their evidence. Now, if the object of the examination is to allow the accused to explain anything which may appear against him in the evidence of the prosecution there would be no necessity to examine him after the cross-examination, for the object of the cross-examination is, I understand, to destroy the evidence for the prosecution and in itself to explain away facts which might appear against the accused. I am, therefore, of opinion that the expression "examined" in section 342 refers to the examination-in-chief of the prosecution witnesses and does not include their cross-examination or re-examination and that, therefore, in the present case the requirement of the Code have been complied with.

Rankin, J.—(*May 21st*, 1915) —In this case the accused person was standing his trial in a warrant-case on a charge under section 500 of the Indian Penal Code. After the prosecution witnesses had been examined-in-chief the accused was questioned generally on the case by the Magistrate. Thereafter cross-examination of the posecution witnesses took place and the objection now under consideration is this: That section 342, Criminal Procedure Code, was not complied with as, after the cross-examination of the prosecution witnesses, the accused was not again examined generally on the case in terms of the section. The view taken by Mr. Justice Buckland, following the decision in *Muzahar Ali* v. *Emperor* (1), was that in those circumstances the provisions of section 342 had not been complied with, the requirements of the section being that after the witnesses for the prosecution have been examined in the sense that the examination, cross-examination and re-examination have concluded, the accused is entitled to the advantage of being called upon to explain any matter against him. Mr. Justice Cuming has taken the view that, upon the wording of the section, the words "after the witnesses for the prosecution have been examined" do not mean more than that the witnesses for the prosecution have been examined-in-chief.

To begin with, in this reference the learned Vakil for the complainant has drawn my attention to sections 255, 256 and 289 of the Code of Criminal Procedure. He has contended that the words of section 342, "and before he is called on for his defence" mean the same thing as the expression, "shall be asked whether he is guilty or has any defence to make", and that they do not mean the same thing as the words in section 256 where it says that the accused "he shall then be called upon to enter upon his defence and produce his evidence." In like manner, he distinguishes the language of section 342 from the concluding words of section 289 "the Court shall call upon the accused to enter on his defence." Now, it is quite true that the phrase "before he is called on for his defence" is slightly different from the phrase "called on to enter on his defence" but in my judgment they mean exactly the same thing and the reference at the end of the first sub-section of section 342 is to the same point, or to the same matter as is dealt with at the end of the first sub-section of section 256. Section 255 deals with plea. The question is not one of calling on the accused for his defence or of entering upon a defence but only of ascertaining whether there is any defence or not. If there

is a plea of guilty, it will not be necessary to hear further evidence for the prosecution. In most cases the stage in the case pointed out by the first sub-section of 255 will not immediately be followed by the accused person entering on his defence or being called upon for his defence but will be followed by the prosecution proceeding to prove their case.

The next point taken is that, if one looks at various sections of the Code, one will find that examination, cross-examination and re-examination are used in contradistinction to one another. It is, however, quite clear that examination-in-chief, cross-examination, and re-examination are different sub-species of what is called more broadly examination. A witness is said to be examined when the whole process has been completed. In this connection I will refer to section 231 of the Code. It seems to me that it is quite clear that the word "examine" is there used in the larger sense and that it would cover cross-examination. In the same way it seems to me that the frame of section 342 must be considered. A particular stage of the trial is indicated by saying "after the witnesses for the prosecution have been examined and before he is called on for his defence." Does that mean that the witnesses for the prosecution have been completely heard and finished and the evidence for the defence is about to begin, or does it mean that the witnesses for the prosecution have been part heard, have been examined-in-chief and that at any time during the succeeding stages but before the accused is called on to enter on his defence the accused is to be examined by the Court? In my judgment the end of sub-section (1) of section 342 indicates a perfectly definite stage, namely, after the prosecution case is finished and before the defence case is begun. It is difficult in a long Code to maintain a special meaning for ordinary English words, and in section 342, just as in section 231, the word "examined" is to be taken, in my judgment, in the ordinary English sense in which it covers all kinds of examination including cross-examination and re-examination. The language of section 137 of the Indian Evidence Act shows the primary meaning of the word because it says that the examination of a witness shall in some circumstances be called examination-in-chief in others cross-examination and in others re-examination.

For these reasons I am of opinion that the judgment of Mr. Justice Buckland and the order proposed by him is right and the judgment of Mr. Justice Cuming dissenting from it ought not be upheld. I propose in this case to make the same order as Mr. Justice Buckland proposed to make, namely, to make the Rule absolute, to set aside the order of the Trial Court and direct the trial to be resumed by the Magistrate from that point at which the examination under section 342 should have taken place.

K. S. D. *Rule made absolute.*

PATNA HIGH COURT.

GOVERNMENT APPEAL NO. 2 OF 192..
March 9, 1922.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Ross.

GOVERNMENT ADVOCATE, BEHAR AND ORISSA—APPELLANT
versus
GANGA PRASAD—ACCUSED.

Bengal Municipal Act (III of 1884), s. 356, Sch. IV—Distress Warrant—Constituent of regular service—Omitting to specify date of return, effect of—Penal Code (Act XLV of 1860), s. 21 (10)—Public Officer—Tax Collector of Municipality—Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Public Officer, complainant—Sanction, whether necessary.

Where service of a Distress Warrant, issued under the Bengal Municipal Act, cannot be effected personally on the addressee, the fact that it is left at his house and presented to an adult male member of his family constitutes regular service under section 356 of the Act. [p. 720, col. 2; p. 721, col. 1.]

GOVERNMENT ADVOCATE, BEHAR AND ORISSA *v.* GANGA PRASAD.

The mere omission to specify the date of return in a Distress Warrant issued in the proper form provided by the Bengal Municipal Act, Sch. IV, does not render the warrant illegal. [p. 721, col. 1.]

A person employed by a Municipality for the purpose of collecting taxes is a Public Officer under section 21 (10) of the Penal Code. [p. 721, col. 1.]

The sanction of a Public Officer for a prosecution under section 195, of the Criminal Procedure Code is not necessary in a case where the complainant is himself the Public Officer concerned. [p. 721, col. 2.]

Appeal from an order of the Honorary Magistrate, Second Class, Sadikpur, dated the 25th October 1922.

The Government Advocate, for the Crown.

Mr. S. *Dayal*, for the Accused.

JUDGMENT.

Miller, C. J.—This is an appeal from an acquittal by an Honorary Magistrate of the Second Class of the Sadikpur Bench in Patna on the 25th October last year. The complainant is a Tax Collector employed by the Municipality of Patna. The accused is in occupation of a house within that Municipality. The name of the accused is Ganga Prasad but the house is entered in the name of his brother, Tulsi Lal, who appears to be the actual owner of the house. Ganga Prasad, however, is in occupation and the taxes, although levied on Tulsi Lal, have hitherto been collected from Ganga Prasad. The offences with which the accused is charged are offences under sections 504 and 186 of the Indian Penal Code. Section 504 refers to intentionally insulting or giving provocation to a person intending or knowing it to be likely that such provocation will cause a breach of the peace or some other offence. Section 186 refers to voluntarily obstructing a public servant in the discharge of his public functions. It appears that on the 14th July last the complainant proceeded to the house in question with a distress warrant in order to attach the property in the house by reason of a default in payment of the taxes due. The tax due was a small sum of Rs. 1-14-0 or thereabouts. A demand notice had previously been served; no payment had been made and consequently something more than a month later the distress warrant having issued was given to the complainant, who is the Tax Collector or employed by the Municipality, in order to serve it. What happened has been described by the complainant himself and by four or five other witnesses. He went to the house occupied by Ganga Prasad and when Ganga Prasad appeared he presented the warrant with the result that he was called filthy and abusive names and Ganga Prasad apparently got angry and went for a stick which he brought out and he chased the complainant away threatening and abusing him. I ought perhaps to add, before this assault took place the complainant upon being refused the amount of the tax had ordered his peon to attach two of the chairs in the house and it was upon the peon's attempting to do so that the accused was guilty of the offences charged against him. The evidence given by the complainant is supported in its main incidents by Gopi, the peon, and by one Chhotto, a toddy seller, by Ganga, a Telegraph peon, and by Lalloo Ram, a Collectrate peon, and by Luchmi Prasad, a Waterworks tax collector in Bankipore also employed by the Municipality. There can be no doubt, if the evidence of these witnesses is relied upon, that the accused not only threatened the complainant and chased him with a stick but also used extremely abusive and insulting language to him such, that it was certainly very likely, unless the complainant showed great restraint, as to result in a breach of the peace.

In answer to these charges there is not a scrap of evidence given on behalf of the defence. The learned Honorary Magistrate before whom the case came dismissed it upon three grounds. He said that as the distress warrant was addressed to Tulsi Lal in whose name the house stood in the Municipal Register and as it was served merely at his house or upon the accused Ganga Prasad there was, therefore, no proper service of notice. He was clearly wrong in this because, under the Bengal Municipal Act, 1884, section 356 provides that every notice, summons, or other demand under this Act may be served personally on or presented to the person to whom the same is addressed or may be left at his usual place of abode with some adult male member or servant of his family. Now, what was done in this case was that it was left at

Tulsi Lal's house and was presented to an adult male member of his family, *viz.*, his brother. There can be no doubt, therefore, in my mind as to the regular service of the notice.

The second point upon which the learned Honorary Magistrate dismissed the suit was, that the distress warrant was illegal inasmuch as there was no date of return mentioned in the said warrant. I am unable to imagine under what law the learned Honorary Magistrate considered that it was necessary to have any date mentioned for the return of the warrant. It was issued in the proper form provided in Schedule IV of the Bengal Municipal Act and that form does not require that any date should be put in the warrant for return and this is hardly surprising when one considers that the warrant is merely an order directed to the Tax Collector, or whoever may be the proper person to serve it, directing him that if the tax cannot be recovered he should attach the property belonging to the defaulter. Thereupon, armed with that warrant, the Tax Collector proceeds to the house and endeavours to carry out the duty enjoined upon him.

The next ground upon which the learned Honorary Magistrate thought that the case should be dismissed was that the complainant was not a public servant. The complainant is undoubtedly a person employed by the Municipality for the purpose of collecting taxes and has been so employed for some time. Under section 21 of the Indian Penal Code it is distinctly provided in the 10th clause, that the word "Public Servant" shall apply to every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district. It seems quite clear that the learned Honorary Magistrate did not have his attention properly drawn to the law upon this subject. Another matter which he considered was fatal to the present prosecution was that no sanction had been properly accorded for the prosecution in this case under section 195 of the Criminal Procedure Code. Again, the learned Honorary Magistrate's law is at fault. Had he taken the trouble to consider the matter in the least and read the section in question it would have been at once manifest to him that sanction was not necessary in a case where the complainant was himself the public officer in question.

Therefore, in so far as the learned Magistrate has acquitted the accused upon these grounds of law, his judgment cannot possibly stand. The learned Honorary Magistrate did not in his judgment find that the facts upon which the charge is based had not been proved although he said there were certain discrepancies in the evidence and, therefore, we are unable to say whether, if he had not misdirected himself as to the law, he would have convicted the accused of the offences charged. In appeal before us to-day the law laid down by the learned Honorary Magistrate has not been supported, but it has been contended that upon the evidence given we ought to come to the conclusion that nothing of the sort occurred as is alleged by the witnesses. The account given is, as I said at the beginning, an account which shows not only an attack and threats but also very abusive language used against a public officer in the attempted discharge of his duties. But it is said that there are certain discrepancies in the evidence given by these witnesses which ought to lead us to the conclusion that none of the evidence can be accepted. I am entirely unable to come to that conclusion. It is quite true in a case of this sort, as so frequently happens where you get accounts given by different witnesses, there are some discrepancies. The main discrepancy which has been relied upon is that Tabafak Hosain, the complainant, stated in his cross-examination in one place that on the day of the occurrence he went to accused only with a warrant peon. It appears from his evidence, however, a little later on, also in cross-examination, that when the incidents which are complained of took place Luchmi Prasad and several others were present at or very near the house when the accused threatened to beat him. The evidence given by Luchmi, it is said, is in conflict with this. What Luchmi said was that he had gone

the same morning to the same house to try and collect the water-tax but had been unsuccessful, but later in the day he met Tabarak Hosain also on his way to the house of the accused and he went back with him thinking perhaps he might have better luck that time. He was outside the house at the time when the occurrence took place and he corroborates the other witnesses as to the assault and the bad language used. The only discrepancy, if it be a discrepancy at all, is that, whereas Tabarak Hosain said he went to the accused only with a warrant peon, the other witness, Luchmi, says he met him before he got there. Now the complainant certainly does in his evidence also say that, Luchmi and other men, some of whom have given evidence, were present when the occurrence took place. I do not think myself that there is any real discrepancy in the evidence. It may well be that when he gave the first part of his evidence he was referring to the time when he actually began to proceed to the house to collect the debt.

Another matter which has been drawn to our attention is, that Gopi, the warrant peon, who accompanied the complainant says that when they went to the house there were two boys reading in the *dalan* and he asked them to call Tulsi Lal which they did, and accused then came out whilst Tabarak, the complainant, does not in fact refer to these boys being there at all. He certainly does not contradict the evidence but he has omitted the incident altogether. What he says is, "I went to the house of the accused at 10 A. M. and demanded taxes which he refused to pay. I informed and showed him the warrant" and so on. There is, no real discrepancy there. It merely means this that, whereas Gopi had gone into evidence which was really not material leading up to the actual assault, the complainant had not considered it necessary to give all these details but has gone straight to the material points. I can find no discrepancies in the evidence such as would lead us to reject the whole of it and consider that the whole case was got up for some ulterior purpose.

A suggestion has been made in the written statement that there was enmity between the complainant and the accused because the accused had threatened to charge him with committing a nuisance by going to the house, of a prostitute at night somewhere in the neighbourhood of the accused's own house, but there is not a word of evidence in support of this charge and I think it may at once be dismissed as altogether unfounded.

The result is, that we have come to the conclusion that the charge in this case has been made out. It is essential that people in the position of Tax Collectors who are always very unpopular should not be subjected to insults and annoyance by those who are by law bound to pay their taxes and we think, therefore, that some punishment should be inflicted upon the accused. Fortunately, no damage was done and, although the complainant was threatened, he was not in fact beaten. We think, in the circumstances of the case, the accused should be fined a sum of Rs. 50 or in default one month's simple imprisonment for the offence under section 504. We also consider him guilty under the other section but we do not pass any separate sentence under that section.

Ross, J.—I agree.

W. C. A. *Order reversed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1005 OF 1922.

January 4, 1923.

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

JAGAT CHANDRA GHOSE—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 36—Touts, publication of list of—Fourth Presidency Magistrate, jurisdiction of.

Inasmuch as the Court of a Fourth Presidency Magistrate is subordinate to that of the Presidency Magistrate, the presiding officer of that Court has no jurisdiction to publish a list of touts applicable to Courts, other than his own, which are not subordinate to his Court.

Messrs. *Santosh Kumar Bose, Santosh Kumar Pal* and *Amulya Chandra Sen*, for the Petitioner.

JUDGMENT.—This Rule is directed against an order passed under section 36 of the Legal Practitioners Act including the petitioner's name in a list of touts.

It appears that the order for the inclusion of the petitioner's name was passed by the Fourth Presidency Magistrate and on this order the petitioner's name was added to the list of touts for the Court at Jorabagan. It appears, however, that the Court at Jorabagan is subordinate to the Chief Presidency Magistrate and consists of several Courts presided over by several Presidency Magistrates, one of whom is the Fourth Presidency Magistrate, Mr. J. N. Sarkar, who passed this order. But, the powers of a Presidency Magistrate to publish list of touts is limited by section 36 to his own Court and the Courts subordinate thereto. The list in which the petitioner's name has been published is applicable to Courts other than that in which the Fourth Presidency Magistrate presides and those Courts are not subordinate to his Court. We must, therefore, hold that the order was bad as having been made without jurisdiction.

We accordingly make this Rule absolute and set aside the order of the Fourth Presidency Magistrate directing that the petitioner's name be included in the list of touts for the Jorabagan Court.

W. C. A.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION NO. 435 OF 1923.

August 9, 1923.

Present:—Mr. Justice Kulwant Sahay.

Shaikh AMJAD ALI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 117—Evidence of mere suspicion, value of—Prosecution, duty of—Evidence of good repute—Court, duty of—Powers to be exercised with caution—Joint trial, objection to, when should be taken.

Evidence of mere suspicion of a person having taken part in certain criminal offences is not evidence of general repute within the meaning of section 117, clause (3), Criminal Procedure Code. [p. 726 col. 2.]

Raham Ali v. *Emperor*, 20 Ind. Cas. 231; 11 A. L. J. 461; 14 Cr. L. J. 407, referred to.

In order to bind a person down in security to be of good behaviour under section 110 of the Criminal Procedure Code, there should be evidence in which the accused is proved to have been concerned in certain criminal cases, or some direct evidence to establish his complicity in such cases; the evidence ought to be of such a nature as to lead to a reasonable and definite ground for coming to the conclusion that the accused is a habitual thief. [p. 726, col. 2.]

When proceedings under section 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence and should find substantial reasons for not believing the evidence before it makes an order. [p. 726, col. 2; p. 727, col. 1.]

Hakim Singh v. *Emperor*, 31 Ind. Cas. 826; 13 A. L. J. 1055; 16 Cr. L. J. 810, referred to.

The powers given to a Court by section 110 of the Code should be exercised with extreme caution and with very great discretion. [p. 727, col. 1.]

An objection to the joint trial of accused persons ought to be taken at the beginning of the trial, or, at least, at an early stage thereof. Such an objection taken after the witnesses on both sides have been examined and when the case is being argued, cannot be entertained. [p. 724, col. 1.]

Revision from the decision of the District Magistrate, Purnea, dated the 9th June 1923, confirming that of the Sub-Divisional Magistrate, Kishenganj, dated the 29th March 1923.

Mr. *Muhammad Hasan Jan*, for the Petitioner.

JUDGMENT.—The petitioner has been ordered to execute a bond of Rs. 200 with two sureties of Rs. 100 each to be of good behaviour for a period of one year under section 118 of the Criminal Procedure Code by the Sub-Divisional Officer of Kishenganj. He was tried along with another person named Kalu who was also ordered to execute a similar bond to be of good behaviour for one year. They appealed to the District Magistrate of Purnea who discharged the order as against Kalu but affirmed the order as against the petitioner, Shaikh Amjad. The petitioner has filed the present application in revision against the said order of the learned District Magistrate. The proceedings against the petitioner as well as against Kalu were drawn up under clauses (*a*), (*b*), (*d*) and (*f*) of section 110, but the prosecution only tried to prove that the accused persons were by habit house-breakers and thieves. The petitioner objected to the joint trial and the learned District Magistrate agrees with the Sub-Divisional Magistrate that the petitioner has not been prejudiced by such joint trial. He says that if the petitioner had really

apprehended prejudice, he could have objected to the joint trial at the beginning of the proceedings, but he did not do so. It has been contended by the learned Vakil for the petitioner that it was not possible for him to object to the joint trial at the beginning before the nature of the evidence adduced in Court was known and it was only when the evidence was given in Court for the prosecution that he was in a position to object to the joint trial. There is some force in the argument of the learned Vakil, but, having regard to the circumstances of the case, this ground by itself is not sufficient to set aside the order. The petitioner knew from the proceedings drawn up by the learned Sub-Divisional Magistrate what the nature of the case of the prosecution against him was and he ought to have made his objection, if not at the beginning, at least at an early stage of the trial. The objection, as a matter of fact, was taken only after all the witnesses for both sides had been examined, and when the case was being argued by the learned Vakil for the petitioner. I am, therefore, of opinion that this objection on the ground of joint trial is not sufficient to set aside the order.

Turning to the merits of the case, the learned District Magistrate holds that the evidence of general repute produced in the case was not in his opinion particularly strong. On going through the evidence he found that a great many men only began to suspect the accused of being thieves and *badmashes* after the present proceedings had been started. He, therefore, does not rely upon the evidence of general repute. He observes that "the prosecution in this case stands or falls not so much on proof of general repute of the accused as on proof of specific instances in which they were suspected on reasonable grounds or actually detected in the commission of crimes." He divides the evidence upon which he relies and to which he attaches great weight, under two heads. The first head consists of evidence furnished by records of information given to the Police and written in the form of station diary entries, First Information reports, etc. The second head consists of the evidence of specific instances in which crimes were committed regarding which no statements recorded by the Police had been filed in Court, but which have been sought to be proved by evidence of witnesses. Under the first head the learned Magistrate observes that there are seven Exhibits, but, as a matter of fact, two duplicate copies of the same documents had been admitted in evidence and, therefore, there were really five documents of the nature described under the first head. Of these five documents, three relate to the present petition, namely, Exhibits 1, 4 and 6.

Exhibit 1 is a slip of paper containing a statement made by one Gouri Nath Das regarding a burglary in his house. Gouri Nath did not see the burglars, but suspected Amjad as being one of them, his reason being that Amjad was known to make money by thefts and burglaries. The Magistrate does not apparently rely upon this Exhibit. The witness examined in support of this Exhibit was prosecution witness No. 7, Ghogha Sahu, who referred to a burglary in his house and said that he gave a slip to the Sub-Inspector, prosecution witness No. 92, and the Sub-Inspector produced the slip in Court which is marked Exhibit 1. But this slip, Exhibit 1, is signed by Gouri Nath Das and refers to a burglary in Gouri Nath's house and Gouri Nath was not produced as a witness in this case. The learned Magistrate remarks that it is not clear from the document itself that it has any connection with the case of Ghogha and he observes that the prosecution ought to have explained the matter or to have produced the writer of the slip. This document, Exhibit 1, therefore, is not of any importance in the present case.

The second document against the petitioner is Exhibit 4-a, First Information Report of one Jafar Ali, dated the 1st October 1921, relating to dacoity in his house. Jafar could not recognize the dacoits, but at the end of the First Information Report it is stated that he suspected Amjad and several others because they were men of bad character. Jafar Ali was examined as a witness in this case and he stated that a slip was written out giving the names of the dacoits recognized at the time. This slip is said to have been written by Mabud who is prosecution witness No. 30. The list is alleged to have

included the name of Amjad. This list, however, has not been produced and the explanation given for its non-production is that it was taken away from the hand of Jafar by the *Chaukidar* Chethroo on their way to the *Thana*. It appears that the *Chaukidar* Chethroo was prosecuted under section 201, Indian Penal Code, for causing disappearance of this list containing the names of the dacoits, and the finding of the learned Magistrate in that case was that there was no evidence that any dacoity had, as a matter of fact, taken place and the accused *Chaukidar* was acquitted. Prosecution witness No. 29 was examined as a witness in that case against the *Chaukidar* and a copy of his deposition in that case is Exhibit B in this case. This witness is the father of Jafar Ali and the list is said to have been written by prosecution witness No. 30 at the dictation of witness No. 29. In that deposition the present witness No. 29 stated that he could not identify any of the dacoits, he merely suspected Amjad. Therefore, the list of the names in that slip contains the names of persons who were suspected and not of those actually seen in the dacoity. In the present case, however, witness No. 29 says that he identified Amjad amongst the dacoits. Having regard to these circumstances, I do not think it safe to attach much importance to this document, Exhibit 4.

The last document is Exhibit 6-a First Information given by Sheikh Dilkhosh regarding a dacoity in his house. This document does not contain the name of Amjad amongst the list of persons given by Dilkhosh as having taken part in the dacoity, but Dilkhosh, who is prosecution witness No. 4 in the present case, stated that Amjad had come to his house the previous day and this gave some ground of suspicion against Amjad. To my mind this evidence is of no value. This disposes of the evidence under the first head.

Turning to the evidence under the second head in which there are no records of statements, but which consists of instances wherein the present petitioner was suspected to have taken part in dacoities of thefts. There is evidence of ten instances in which the present petitioner was so suspected. The first is a dacoity in the house of one Dadni of Baldiaghat. Dadni is prosecution witness No. 10 in this case and he says that he told the Sub-Inspector that he suspected Amjad. Prosecution witness No. 59 has also been examined in connection with this matter. He is a *Tahsildar Punch* and he states that he was coming from Kharudih on the night of the dacoity. He heard the voices of some persons in the garden and got smell of cigarette smoking. At that time Amjad was a *Dafadar*. The witness was coming on a pony and Amjad obstructed his way and asked him who he was. On his answering, the two recognized each other and the witness was allowed to go. While going, he turned round and saw that Amjad entered the garden. It appears that Amjad was a *Dafadar* of Circle No. 10 of Islampur *Thana* in the Sub-Division of Kishenganj for about two years-and-a-half and the suggestion in the cross-examination of this witness is that Amjad was on his rounds in the usual discharge of his duty; that he was in his uniform and as he saw a man going in the dark near the garden he accosted him. The evidence of this witness is not sufficient for the purpose of coming to a finding that the petitioner is a habitual thief. The second instance consists of a dacoity at the house of Chand Bux. The learned Magistrate remarks that the prosecution witness No. 11, Chand Bux, saw a man like Amjad wearing a red *pugri* among the dacoits, but this is not what this witness states. What he says is, that there was a dacoity in his house in *Chait* and certain articles and cash were taken by the dacoits; that he was severely beaten and when he recovered his senses one Torab Ali informed him that a tall man with red *pugri* was among the dacoits. Now this witness expressly says that he did not see the tall man with the red *pugri*. He, moreover, says that he did not know the accused persons in the dock and the learned District Magistrate appears to be under a misapprehension when he says that the witness saw a man like Amjad amongst the dacoits. Torab Ali is witness No. 12 in this case and he says that he noticed a man of the stature of Amjad amongst the dacoits, but that he could not say definitely if the accused Amjad was the man whom he saw on the night

of the dacoity. The third instance is that of a theft of buffaloes of one Chirag Ali. Chirag Ali is prosecution witness No. 15. The learned District Magistrate observes that Amjad had wanted to take away this man's buffaloes for grazing and he approached him for the purpose. On the same night the witness missed his buffaloes. Prosecution witness No. 16 was sent to search and found the buffaloes with Amjad. Now, turning to the evidence of these two witnesses we find that Chirag Ali has stated that he had asked Amjad to take his buffaloe for grazing, not that Amjad had asked him as put by the learned Magistrate. It may be stated here that Amjad takes leases of lands for grazing purposes and is in the habit of taking charge of cattle of other people on payment of some fees for grazing on those lands. Prosecution witness No. 16 states that he found the buffaloes tied in the *Hat* and Amjad was standing at some distance and that there was no man near the buffaloes. The fifth instance is that of theft in the house of Sahabu, prosecution witness No. 17. This witness did not suspect any one as a suspect before the Police who came to enquire about the theft and the reason assigned is that he was given an assurance by Idar that his property would be restored to him if he did not do so. This man now says that he suspected the two accused. Very little reliance could be placed on the deposition of this witness. Next instance is that of an attempted dacoity at the house of one Sheikh Gaisal, prosecution witness No. 18. The only reason for suspecting Amjad in this attempted dacoity, as stated by this witness, is that Amjad had been to his house just before the occurrence and questioned him about his arrangements. The next instance is that of burglary in the house of one Rasik Lal, prosecution witness No. 27. This man laid an information before the Police, but did not name the petitioner though he says he suspected the petitioner as having taken part in the burglary. The last instance is that of the burning of the houses of Amrit and Labukant two days after these two witnesses had deposed against the petitioner before the Police in the present proceedings. The learned Magistrate remarks that this seems to him to be a clear case of terrorism, and, although there is no direct evidence to connect the present petitioner with this affair, the inference drawn by the learned Magistrate is that it is almost inevitable that one or both of the accused persons in the present case had a part in it.

Now, this is all the evidence in the case referred to by the learned Magistrate as against the present petitioner. The evidence at the most discloses merely a case of suspicion. The evidence is of a very vague nature and the evidence of mere suspicion of a person having taken part in certain criminal offences is not an evidence of general repute within the meaning of section 117, clause (3), Criminal Procedure Code. In the case of *Raham Ali* v. *Emperor* (1) Mr. Justice Rafique observes that, "evidence as to cases in which the applicant was suspected cannot be said to fall within the meaning of general repute under section 117 of the Code of Criminal Procedure" These are instances of mere suspicion which, to my mind, are not sufficient in order to bind down a person to be of good behaviour under section 110. The evidence in such a case must be evidence in which the petitioner is proved to have been concerned or some direct evidence to establish the complicity of the petitioner in such cases. The evidence ought to be of such a nature as to lead to a reasonable and definite ground for coming to the conclusion that the petitioner is a habitual thief. Such evidence is wanting in the present case. Moreover, the petitioner has examined no less than 145 witnesses in his favour to testify to his good character. Of these 145 witnesses, 24 witnesses belong to his own village and they all come and bear testimony to the good character of the petitioner. The learned Magistrate does not consider this evidence at all. As was laid down by the Chief Justice of the Allahabad High Court in the case of *Hakim Singh* v. *Emperor* (2), where proceedings under section 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention

(1) 20 Ind. Cas. 231; 11 A. L. J. 461; 14 Cr. L. J. 407.
(2) 31 Ind. Cas. 826; 3 A. L. J. 1055; 16 Cr. L. J. 810;

to such evidence. By this it was no doubt not meant that the Court must necessarily believe those witnesses, but the Court should find substantial reasons for not believing the evidence before it makes an order. Powers given by the Code under section 110 should be exercised with extreme caution and with very great discretion. A person must be found upon evidence to have habitually committed or attempted to commit offences before he could be bound to be of goood behaviour. Such evidence is, to my mind, wanting in this case. I have gone through some of the evidence in this case as I was invited to do so by the learned Vakil for the petitioner on the ground that the evidence had been misapprehended by the learned Magistrate and on going through the evidence referred to by the learned Magistrate I am bound to say that, in my opinion, that evidence is not sufficient in order to require the petitioner to furnish security to be of good behaviour. The order passed by the learned Sub-Divisional Magistrate must be set aside. If the petitioner has given any security such security will be cancelled.

K. S. D. & W. C. A. *Order set aside.*

OUDH JDUICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 79 OF 1923.

September 20, 1923.

Present:—Mr. Dalal, J. C.

DAL CHAND—COMPLAINANT—APPLICANT

versus

RAM LAL AND OTHERS—ACCUSED—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 494—Code of Criminal Procedure (Amendment Act XVIII of 1923), Sch. II, cl. XX—First Class Magistrate—Jurisdiction—Order of discharge after defence, value of.

Under the Code of Criminal Procedure, as modified on the 1st of September 1923, a Magistrate of the First Class has jurisdiction to try an offence under section 494, Penal Code, and dispose of the same without committing the case to the Court of Session, and an order of discharge passed by the Magistrate in such a case, after the accused had been called upon to enter on his defence, is tantamount to an acquittal.

Application against an order of the Sessions Judge, Sitapur, dated the 1st February 1923, upholding that of the Magistrate of the First Class, Kheri, dated the 16th October 1922.

Mr. *Moti Lal Saksena*, for the Applicant.

Mr. *Ghulam Hasan*, for the Opposite Party.

ORDER.—No sufficient cause appears for interference. The complainant, Dal Chand, instituted a complaint so far back as 1st July 1922 against a woman whom he called his wife, for a bigamous marriage, and against her father and her present husband and a go-between who brought about the present marriage, for abetment of the offence. The proceedings were held before a Magistrate who was a Hindu gentleman presumably well-acquianted with marriage ceremonies among Brahmans to which caste the parties belong. He recorded the evidence both of the complainant and of the accused and then refused to commit the case to the Court of Session. Under the Code of Criminal Procedure, as modified on the 1st September, the Magistrate himself would have jurisdiction. This is a relevant fact at present in so far that, if the Magistrate be held to have jurisdiction to dispose of the matter, his order of discharge would be tantamount to an acquittal, because he had put the accused to the trouble of entering on their defence. The matter depends upon oral testimony and, as I have pointed out, the Magistrate who heard the evidence was in a good position by the fact of himself being a Hindu to adjudge the value thereof. My attention was called to bond, Exhibit A, alleged to have been executed by the girl's father for a sum of Rs. 98 in consideration of marriage fixed on 23rd June 1922. This bond executed nine days prior to the date fixed for the marriage does not raise a presumption that the marriage did take place on the date stated in the bond. It is quite possible that the girl's father, Ram Lal, was either making a fool of the complainant or broke his promise on discovering that his daughter was marketable at a higher price. I also think that the Criminal Law affords a quick remedy by creating offences relating to marriage some of them unknown in other countries. I do not think that the Criminal Law is meant to apply to a litigation like the present so long drawn out. Having regard to all the circumstances of the case I refuse to interfere and dismiss this application.

K. S. D. & W. C. A. *Application dismissed.*

In the matter of NARENDRA NATH ROY.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE NO. 55 OF 1923.

July 16 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Kulwant Sahay and Mr. Justice Foster.

In the matter of NARENDRA NATH ROY, PLEADER—APPELLANT.

Legal Practitioners Act (XVIII of 1879), ss. 13 (b), (f), 14—Jurisdiction of Subordinate Judge to order enquiry—Pleader asking Bench Clerk before judgment is pronounced as to what is the trend of judgment—Professional misconduct.

A Subordinate Judge is quite competent, under section 14 of the Legal Practitioners Act, to order an enquiry into the facts and circumstances of a case whether it comes under clause (*b*) or whether it comes under clause (*f*) of section 13 of the Act. [p. 729, col. 2.]

No Pleader, standing, as he does, in a fiduciary position towards the Court, is entitled either out of motives of curiosity or still less out of other less excusable motives to endeavour to find out before judgment is delivered, or when the judgment is written or partly written what in fact is the effect of it. Such conduct although in some cases it may be innocent enough, in other cases may lead to most improper practices, amounts to professional misconduct. [p. 729, col. 2.]

Messrs. *Hasan Imam* and *G. C. Pal*, for the Apppellant.

The Government Advocate, for the Crown.

JUDGMENT.

Miller, C. J.—This is an application on behalf of Narendra Nath Roy, a Pleader, practising at Ranchi, asking us to quash proceedings which have been instituted against him by the Subordinate Judge of Ranchi under section 14 of the Legal Practitioners Act. The facts of the case may be shortly stated. The petitioner was engaged as Pleader for the defendant in a suit for damages. On the 9th May this year the hearing of the case was concluded and judgment was reserved. The case against the petitioner is that on the 14th May, before the judgment was delivered in Court, he went to the Subordinate Judge's Bench Clerk and asked him how far the judgment had proceeded and what the trend of it was and the suggestion is that this was done with an improper motive. On the following day, the 15th May judgment was pronounced in open Court decreeing the plaintiff's suit. Before the judgment was pronounced, however, it appears that an application was made to the learned Judge by the defendant himself asking for stay of judgment and further proceedings pending an application to the Judicial Commissioner at Ranchi to transfer the whole case from the file of the Subordinate Judge to that of the Judicial Commissioner. The grounds of that application which has been put before us, were entirely trivial and it has been described by Mr. Hasan Imam who appeared on behalf of the present applicant as a perfectly insane application. It may or may not be that the endeavour, if he did endeavour, on the part of the petitioner to ascertain from the Bench Clerk what was likely to be the effect of the judgment was directly connected with the application to remove the case from the file of the Judge to that of the Judicial Commissioner. There is no direct evidence before us nor indeed are we concerned at present with the evidence which may eventually be put forward connecting the action of the petitioner with the application for transfer. The learned Subordinate Judge refused the application for stay and, in my opinion, quite rightly and pronounced judgment on the 15th May. It transpired subsequently, a fact which was not known to the Subordinate Judge at the time, that the application for transfer had already been presented to the Judicial Commissioner on the same morning and had been rejected by him. That, however, is not a material factor in considering this case. The fact that the petitioner had endeavoured to ascertain from the Bench Clerk what was likely to be the effect of the judgment was brought to the notice of the Subordinate Judge a few days later. He then apparently wrote a letter on the 18th or 19th May asking the petitioner for an explanation of his conduct. No reply appears to have been received to that letter until the 24th by which time the Subordinate Judge had drafted an order directing an enquiry into conduct of the petitioner under section 14 of the Legal Practitioners Act. The order was withheld as on that day the petitioner apparently wrote a letter in reply in which he did not deny that he had asked the Bench Clerk when the judgment would be delivered but he did deny that he had enquired what the

purport of it was. This explanation apparently did not satisfy the learned Subordinate Judge who still considered that it was a matter for enquiry. He had, on the one hand, a direct statement by the Bench Clerk that the petitioner had enquired what the purport of the judgment was or what it was likely to be; he had on the other hand a denial by the petitioner. He accordingly framed a charge which was delivered to the petitioner calling upon him to show cause why he should not be dealt with for an offence committed within the meaning of section 13 clauses (*b*) and (*f*) of the Legal Practitioners Act.

The present application is one asking us to quash those proceedings. No very precise ground has been urged before us for exercising our powers in this case except that it was suggested that the offence, if it were an offence, was in any case of a very trivial nature and that the petitioner was a young man on the very threshold of his career, and even if a judicial enquiry should take place with the result that he should be acquitted that would, nevertheless be a serious deterriment to him in the practice of his profession in the future. It was also argued, although I think under a misconception, that the learned Subordinate Judge in acting under section 14 of the Legal Practitioners Act was restricted in ordering an enquiry to offences mentioned under clauses (*a*) and (*b*) only of section 13 and that he could not order an enquiry in respect of any offence coming under clause (*f*). In support of that contention he relies upon a dictum of Mr. Justice Hill in the case of *In the matter of Purna Chunder Pal* (1) the passage in question being at page 101. In that case Mr. Justice Hill, relying upon a decision of the Privy Council in *In the matter of Southekal Krishna Rao* (2), decided in the year 1887, took the view that the Subordinate Court acting under section 14 was only entitled to hold an enquiry in respect of offences coming within clauses (*a*) and (*b*) of section 13. That dictum, however, was referred to and explained by Mr. Justice Mukerji in the case of *In the matter of Rasik Lal Nag* (3), where he pointed out that at the time when the Privy Council decision was given the clauses of section 13 were equivalent to what are now clauses (*a*) and (*b*) of that section, but that the section had since been amended and the other clauses (*c*) (*d*) (*e*), and ( ) had subsequently been added. That explanation clearly shows that Mr. Justice Hill was acting under a misapprehension and in any event it seems to me that the view he took with regard to the interpretation of the present sections of the Legal Practitioners Act was an extremely narrow view and unjustifiable. I have no doubt, therefore, that the learned Subordinate Judge was quite competent to order an enquiry into the facts and circumstances of the present case whether it came under clause (*b*) or whether it came under clause (*f*) of section 13 of the Act. In my opinion, therefore, this application ought to be rejected.

The matter is one clearly for enquiry. It may be or it may not be that the petitioner did in fact ask the Bench Clerk what was the trend of the judgment. If he did so, that was in itself, to my mind, clearly professional misconduct on the part of the Pleader. No Pleader, standing, as he does, in a fiduciary position towards the Court, is entitled either out of motives of curiosity or still less out of less excusable motives to endeavour to find out before judgment is delivered or when the judgment is written or partly written what in fact is the effect of it. It is obvious that such conduct although in some cases it may be innocent enough in other cases may lead to most improper practices and, therefore, it is the class of conduct which clearly ought to be taken notice of and certainly should be stopped. The question is really one of fact whether the Pleader is accurate in saying that he did not make the enquiry which he is alleged to have made or whether the Bench Clerk is telling the truth when he says that the Pleader did in fact endeavour to find out what the

(1) 27 C. 1023; 4 C. W. N. 389; 14 Ind. Dec. (N. S.) 671.

(2) 14 I. A. 154; 15 C. 152; 12 Ind. Jur. 111; 5 Sar. P. C. J. 96; 7 Ind. Dec. (N. S.) 685 (P.C.).

(3) 38 Ind. Cas. 980; 24 C. L. J. 190; 20 C. W. N. 1284; 44 C. 639; 18 Cr. L. J. 440.

trend of the judgment was. In so far as the gravamen of offence is concerned that of course must depend upon what the object was, if in fact the enquiry was made, in making it. If the object was on finding that the judgment was against his client to assist his client in preparing an application for transfer, then I think the offence must be considered a grave one. If, on the other hand, assuming that the offence was committed out of pure curiosity in order to ascertain what he was not entitled to know until judgment was delivered then the offence was clearly not of such a grave character, but in either case these attempts to endeavour to find out what until it is disclosed ought to be kept secret are matters which the Court cannot but look upon as professional misconduct. We are not in a position to judge one way or the other in the present case as to the facts or as to the conduct of the petitioner or as to the gravamen of the offence if in fact it was committed. At the same time, I think this is a case in which we ought not at this stage to stay the proceedings. In these circumstances, it seems to me that this application must be dismissed.

Kulwant Sahay, J.—I agree.

Foster, J.—I agree.

P. D. *Application dismissed.*

M. D. J.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 171 OF 1923.

May 16, 1923.

Present:—Mr. Justice Kanhaiya Lal.

CHUNNI LAL AND ANOTHER—APPLICANTS

versus

BALDEO—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 522—Criminal trespass, conviction for—Criminal force, use of, absence of—Restoration of possession, order for, whether can be made.

Petitioners were convicted of an offence under section 447 of the Penal Code by reason of their having continued to cultivate certain fields in spite of their ejectment. There was nothing to indicate that the offence was attended by the use of criminal force;

Held, that an order under section 522 of the Criminal Procedure Code directing the restoration of possession of the fields to the complainant, could not, in the absence of a finding as to the use of criminal force, be made in the case. [p. 731, col. 2.]

Criminal reference made by the District Magistrate, Aligarh, dated the 21st February 1923.

REFERRING ORDER.—This is an application for revision in connection with an order passed by the Honorary Magistrate of Sasni under section 522 of the Code of Criminal Procedure.

The facts are as follows:—A complaint was filed against the applicants, Chuni Lal and Indra, as well as two others, under sections 447 and 323 of the Indian Penal Code. It was alleged that the two applicants had been lawfully ejected from certain fields, but that, in spite of the ejectment, they still continue to cultivate the fields and when the complainant remonstrated with them, they ordered the other two accused to give him a beating. On October the 18th 1922 the two applicants were convicted under section 447 and fined Rs. 5. each. But the Honorary Magistrate disbelieved the story of any beating, and held that only an altercation had taken place. There was, therefore, no conviction under section 323, and the other two accused were acquitted.

On October the 24th the complainant filed an application before the Court under section 522, and on December the 14th 1922 the Honorary Magistrate allowed this application and passed orders directing delivery of possession of the fields to the complainant.

I have heard and considered the arguments of both parties in this matter. It has been pointed out that the action of the two applicants in still retaining possession of the fields, in spite of their conviction under section 447, amounts to a species of contempt of Court. It has been suggested that the two applicants being admittedly rank trespassers, are entitled to no consideration at the hands of the Court. They did not even appeal against their conviction under section 447. I have also been asked to consider what

is likely to happen if possession is restored to the two applicants, the suggestion being that a riot is likely to take place over the crops standing in the fields. It seems to me, however, that if any violence is likely to be used at all, it is just as likely to be used if possession is not restored to the applicants, as it seems clear from the arguments before me, that the standing crops must have been sown by the applicants themselves. The applicants urge that these crops are worth Rs. 400, though this is no doubt a considerable exaggeration.

I do not think, however, that I am at present concerned with any of the above matters. The question is, whether or not the order passed by the Honorary Magistrate was a legal one. There are many rulings to the effect that an essential ingredient of section 522 of the Code of Criminal Procedure is that the offence of which the person concerned is convicted must have been attended by criminal force, or, at the very least by the show of criminal force. An almost parallel case is to be found in fact in *Churaman* v. *Ran Lal* (1). It is impossible to go behind the finding of the Honorary Magistrate himself to the effect that no offence under section 323 of the Indian Penal Code was committed, and that an altercation was all that took place. In the circumstances, I am of opinion that section 522 did not apply, and that the order passed was, therefore, an illegal one. Two remedies were open to the complainant he could either have filed another complaint under section 447 against the applicants, or else he could have sued for their ejectment in the Civil Courts. What was not open to him was to apply for delivery of possession under section 522 of the Code of Criminal Procedure.

Under section 438 of the Code of Criminal Procedure this case will accordingly be reported for the orders of the Hon'ble High Court, with the recommendation that the order passed by the Honorary Magistrate unde section 522 should be set aside, and that possession should be ordered to be restored to the two applicants.

(1) 25 A. 341; A. W. N. (1903) 59.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The learned District Magistrate finds that the applicants, Churni Lal and Indra, were convicted of an offence under section 447 of the Indian Penal Code by reason of their having continued to cultivate certain fields in spite of their ejectment and that there was nothing to indicate that the offence of criminal trespass was attended by the use of the criminal force. Section 522, Criminal Procedure Code, cannot, on these facts, apply and the order of the learned Honorary Magistrate directing the delivery of possession of the fields in question with the crops standing thereon to the complainant cannot be sustained. The Reference is, therefore, accepted and the order of the Honorary Magistrate passed under section 522 of the Code of Criminal Procedure is set aside. It is open to the complainant to seek any other remedy open to him in the manner provided by law. Let the record be returned.

Z. K. *Reference accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 256 OF 1923.

May 5, 1923.

Present:—Mr. Justice Zafar Ali.

ALLAH DAD AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 147, 353—Rioting and assault on public servant—Illegal attachment—Resistance—Offence—Charge in case of rioting—Common object, proof and specification of.

A bailiff, acting under an illegal warrant of attachment, seized the cattle of one of the accused and was proceeding to remove them, whereupon the accused resisted the removal and in doing so inflicted slight injuries on the companions of the bailiff:

Held, that the accused were not guilty of any offence under section 147 or section 353 of the Penal Code.

Bisu Haldar v. *Emperor*, 11 C. W. N. 836; 6 C. L. J. 127; 6 Cr. L. J. 38, relied on.

Before a conviction can properly be maintained for the offence of rioting it is necessary that there

should be a clear finding as to the common object of the unlawful assembly; and also that the common object so found should have been clearly stated in the charge so that the accused person might have an opportunity of meeting it.

Sabir v. *Queen-Empress*, 22 C. 276; 11 Ind. Dec. (N. S.) 185, relied on.

Petition for revision, under sections 435, 439 of the Criminal Procedure Code, of an order of the Sessions Judge, Gujranwala Division, dated the 10th January 1923, dismissing the appeal and confirming an order of the Magistrate, First Class, Gujrat, dated the 2nd December 1922.

Mr. *Abdul Latif*, for the Petitioner.

JUDGMENT.—Criminal Revisions Nos. 256 and 672 of 1923 arise out of the same case and both will be disposed of by this judgment. The petitioners, fifteen in number, have been convicted under sections 147 and 353 coupled with section 149, Indian Penal Code, of rioting and assault on a public servant, *i. e.*, a bailiff. It appears that Allah Dad, *Lambardar*, petitioner, was the *sapurdar* of the attached property of a judgment-debtor, but failed to deliver it when called upon to do so. The Executing Court, therefore, issued a warrant of attachment of his moveable property and with this warrant the bailiff along with some seven men went to his residence and there attached his cattle. As he was proceeding to remove the cattle a number of men appeared on the scene and rescued the same.

The bailiff was not hurt but his companions received slight injuries.

One of the grounds of appeal was that the warrant of attachment was illegal; but this is not touched by the learned Sessions Judge who throughout his judgment speaks of Allah Dad as judgment-debtor. It is clear that the Court executing the decree was not competent to issue a warrant for the attachment of the property of the *sapurdar*. A *sapurdar* is not a Receiver appointed by Court and, therefore, the provisions of the Code of Civil Procedure relating to a Receiver appointed by Court do not apply to a *sapurdar* to whom attached cattle or other articles are made over by the bailiff. Therefore, the warrant was illegal and the *sapurdar* and his partisans were competent to resist the removal of his cattle from his house and were not guilty of any offence if in the exercise of that right they inflicted slight injuries to the companions of the bailiff. Where a warrant issued under section 96 of the Criminal Procedure Code was illegal, it was held that the accused, eight in number, who used criminal force upon the Sub-Inspector of Police and his companions to prevent them from executing it, were justified in doing what they did in the exercise of the right of private defence. [*Bisu Haldar* v. *Emperor* (1)] In the present case it appears that some trouble was apprehended and, therefore, the bailiff took a number of men with him in order to overcome resistence. But the petitioners do not seem to have exceeded their right of private defence and as they did not cause hurt to the bailiff or use criminal force to him it cannot be said that they were guilty of the offence defined in section 353, Indian Penal Code.

Another point that may be noticed here is that the particulars of the offence under section 147, Indian Penal Code were not stated in the charge framed against the accused. The charge runs as below:—

"That you * * * assaulted and snatched the attached cattle of Allah Dad from the bailiff Allah Jawaya and thereby committed an offence punishable under sections 353 and 147, 149, Indian Penal Code."

In *Sabir* v. *Queen-Empress* (2), it was held that, "before a conviction can properly be maintained for the offence of rioting, it is necessary that there should be a clear finding as to the common object of the unlawful assembly, and also that the common object so found should have been stated in the charge in order that the accused person might have an opportunity of meeting it."

Having regard to all that is stated above, the convictions cannot be upheld. Therefore, I accept the petitions and acquit the petitioners and discharge them from their bail bonds.

Z. K.

Petition accepted.

(1) 11 C. W. N. 836; 6 C. L. J. 127; 6 Cr. L. J. 38.

(2) 22 C. 276; 11 Ind. Dec. (N. S.) 185.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 292 OF 1923.

July, 5, 1923.

Present :—Mr. Justice Daniels.

JHANDU SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 169—Evidence against accused in connection with substantive offence of no value—Discharge of accused under s. 169—Evidence, whether can be used to support charge under s. 110—Magistrate acting on information obtained from Special Diary improper.

Where the evidence against an accused person in connection with a dacoity is considered by the Police to be of so little value as to result in his release under section 169 of the Code of Criminal Procedure, without even being placed before the Court, it is contrary to all accepted principles to make use of this evidence as a ground for binding the accused over on a charge under section 110. Nor is it open to a Magistrate to act upon information not given in evidence but obtained from a perusal of the Special Diary.

Criminal revision against an order of the District Magistrate, Budaun, dated the 21st March 1923.

St. *C. Thompson*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application by Jhandu Singh who has been bound over under section 110 of the Code of Criminal Procedure and sentenced to rigorous imprisonment on the failure to give security. An appeal was filed to the District Magistrate who in a very brief judgment dismissed the appeal. The learned District Magistrate says that he has read the evidence that the Magistrate has written a fair and convincing judgment and that he fails to see how the Trying Magistrate could have come to any other conclusion with regard to the guilt of the appellant. I regret to say that the judgment of the Trying Magistrate produces an entirely opposite impression on me from that which it has produced on the learned District Magistrate. The applicant was admittedly at enmity with the Mukhia Nawab Singh and was a witness for the prosecution in a case in which the Mukhia was accused of murder. The applicant was tried with eight other persons as forming one gang. The Magistrate expressly finds that the evidence that they did form one gang

is unworthy of credit. He had also acquitted several of the accused on the ground that they were implicated through enmity. His chief reason for convicting the applicant is that he believes that certain evidence goes to show that the applicant took part in a dacoity which was committed in December 1922 shortly after the murder case. Now, the applicant was actually arrested in connection with the dacoity in question, but the Police considered the evidence against him of so little value that he was released under section 169 of the Criminal Procedure Code without even being placed before the Court. It is contrary to all accepted principles to make use of this evidence as a ground for binding the accused over on a charge of being a bad character. If the evidence was insufficient to implicate the accused in the offence to which it relates it was equally insufficient to be used for influencing the Court against him on a question of his general character. It was equally not open to the Magistrate to act on information not given in evidence but obtained from a perusal of the Special Diary. Although the Magistrate says at the conclusion of his judgment that there is some evidence against the accused and the other persons who have been convicted of cutting crops. It is clear from the judgment that the main grounds on which he has convicted the accused are the evidence tendered to show that he took part in the dacoity case and a perusal of the special diary. The order of the Court below cannot, therefore, be upheld. I allow the application and setting aside the order passed against the accused direct his immediate release.

W. C. A. *Application allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 695 OF 1922.

January 25, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

SHEO RAM AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence—Accused a Brahmin, whether sufficient to reject evidence otherwise reliable.

SHEO RAM v. EMPEROR.

The mere fact that an accused person is a Brahmin is not a sufficient reason for rejecting the evidence of witnesses who testify against him, and who are *prima facie* reliable. [p. 735, col. 1.]

Criminal appeal from an order of the Sessions Judge, Hissar, dated the 14th July 1922.

Messrs. *M. L. Puri* and *N. C. Pandit*, for the Appellants.

Mr. *F. M. Mackay*, for the Government Advocate for the Crown.

JUDGMENT.—This is an appeal by seven persons who have been convicted by the Sessions Judge of Hissar of causing grievous hurt to *Musammat* Bhagi and hurt to Norang by beating them on the night intervening between the 25-26th of January 1922. The accused were sentenced to four years' rigorous imprisonment under section 325 and a fine of Rs. 25 each under section 323, Indian Penal Code. Two other persons Rulia and Shoram, son of Hanso, were also tried but were acquitted by the Court below. It is common ground that there was intimacy between Norang *Jat* (P. W. No. 3) and *Musammat* Bhagi who was a widow. The appellants and Shoram who was acquitted, are nearly related to *Musammat* Bhagi's deceased husband, Moman being alleged to be the nearest reversioner. Appellants Nos. 1 to 4 are brothers and appellants Nos. 5 and 6 are also brothers.

The theory for the prosecution is that, on the night of the occurrence, Norang and *Musammat* Bhagi were sleeping together in the latter's *Nohra* when the appellants came and demanded admittance and being refused broke open the door and administered a severe beating first to *Musammat* Bhagi and then to Norang. An alarm was raised and P. Ws. Nos. 4 to 7 came up and rescued Norang from his assailants. They found *Musammat* Bhagi lying on her bed crying and she said that she had been beaten by the Brahmins. Nothing occurred on the 26th of January but on the 27th the dead body of *Musammat* Bhagi was found in a well 200 yards distant from the village. The *Lambardar* sent Shankar, one of the appellants, to the *Thana* to make a report. In this he referred to the intimacy between *Musammat* Bhagi and Norang and said that on the night of the occurrence Norang was seen at her house and that he (Shankar) had abused Norang and that the next day the women of the *Muhalla* had abused *Musammat* Bhagi. He went on to say that on the 27th of January *Musammat* Bhagi had been found in the well, into which she herself had jumped in order to commit suicide owing to the disgrace brought upon her by her having been found with Norang.

The theory for the prosecution is, that *Musammat* Bhagi was killed by the appellants who had beaten her on the night between the 25th-26th of January and that some of them subsequently came and threw her body into the well. The medical evidence shows that the deceased woman received very serious injuries which will be found detailed on page 19 of the printed record. The injuries include extensive fracture of the skull, bruising of the chest, fracture of the left leg, dislocation of the right knee, laceration of the liver and effusion of blood in the kidneys. The Civil Surgeon was of opinion that all the injuries, with the exception ofthe fracture of the leg and the dislocation of the right knee joint, were caused before death. There are several difficulties in the way of the prosecution theory. The evidence of the eye-witnesses shows that they all apparently considered that an ordinary beating had been given to *Musammat* Bhagi and Norang. This is clear from the fact that on the 26th of January no report was made to the Police either by Norang or by Sarasti, *Lambardar* (P. W. No. 5). The witnesses say that she was speaking when they went into the house. According to the Doctor she could not have spoken after receiving the injuries to her head and, therefore, it is clear that at that time she had not received the injuries. When the witnesses arrived, her assailants had left her and were holding Norang, round whose neck they had placed a rope. They had apparently finished with *Musammat* Bhagi. The witnesses say that when they rescued Norang they left the appellants at *Musammat* Bhagi's house and Mr. Mackay, who argued the case for the Crown, propounded the theory that after Norang had been rescued, the appellants inflicted a fresh beating upon

Musammat Bhagi and then caused her death. This theory does not appear to have been put forward in the Court below and in our opinion it is not a plausible one. The appellants had, as already stated by us, finished beating *Musammat* Bhagi when the witnesses arrived, and there was no reason why they should again beat her, and give her such a severe beating as to cause her death. It is unlikely that they would have done this, seeing that a number of people had recognised them in the house of *Musammat* Bhagi. Moreover, she had a little daughter, aged six or seven years, living with her and there is no evidence on the record to show what this child was doing on the 26th of January. If her mother had been killed on the previous night she would surely have raised the alarm on the 26th and the whole village would have become aware that *Musammat* Bhagi had been killed.

There is, moreover, reliable evidence, including that of the two *Lambardars* (D. Ws. Nos. 29 and 30), to the effect that *Musammat* Bhagi was seen by them alive and well on the 26th of January, *Prima facie* these *Lambardars* are reliable witnesses, and the only ground which the lower Court has given for disbelieving them is that appellants are Brahmins and that the deceased is a woman and that the witnesses do not condsider the death of a mere woman of any importance compared with the lives of some Brahmins who are accused of her murder. In our opinion, the mere fact that the appellants are Brahmins is not a sufficient reason for rejecting the evidence of witnesses who are *prima facie* reliable. There is also evidence, including that of these *Lambardars* and two others (D. Ws. Nos. 31 and 32), that when the body was being got out of the well the first time, the rope broke and the body fell down into the water again. According to the evidence the well is a very deep one, the water being 85 *haths* or say, 120 to 130 feet below the surface of the ground. It is made of two concentric cylinders of brick, the diameter of the lower one being about a foot or 18 inches less than that of the upper one. There was thus a ledge of masonry sticking out all round about ⅔ths of the way down. If the woman had jumped into the well she might very easily have struck this ledges and received injuries to her head and also the rupture of her liver and other injuries to the body. The *post mortem* injuries to the leg and right knee might similarly have been caused when the rope broke as the body was being taken out of the water. In fact, the theory for the prosecution is that those injuries were caused when the dead body was thrown into the well after the murder.

Another point to be noticed is that the body had ordinary clothes on it and all its ornaments when it was taken out of the water. It hardly seems likely that if the woman had been murdered and her dead body had been thrown into the well by the murderers, they would left all the ornaments on it.

Having regard to all the above facts and considerations we are of opinion that it cannot be considered proved that she died as the result of a beating administered to her by the appellants on the night between the 25th-26th of January. In our opinion it is clearly proved that the appellants, perhaps accompanied by others, broke into *Musammat* Bhagi's house and gave her and Norang a severe beating, but that it is not proved that they caused her grievous hurt on that occasion. It is possible that some of the appellants or other persons may have beaten her to death on the following night and then thrown her body into the well, or the theory of the defence may be the correct one that she threw herself into the well in order to escape from the disgrace on account of her having been found at night in company with Norang. It is, however, unnecessary for us to decide the point. It is sufficient to say that we consider that the only offence proved against the appellants is that they voluntrily caused hurt to *Musammat* Bhagi and Norang by beating them on the night between the 25th and 26th of January. No doubt, they committed house trespass or even house-breaking because they broke into her house in order to give her a beating, but they were not tried for house breaking and, therefore, we think they might be prejudiced if they were convicted of that offence.

SHER BAHADUR SINGH *v.* FAZAL ALI.

We, therefore, accept the appeal and, setting aside the convictions and sentences under section 325, Indian Penal Code, convict the appellants instead, of voluntarily causing hurt to *Musammat* Bhagi under section 323, Indian Penal Code, and for that offence we sentence them each to one year's rigorous imprisonment. The convictions and sentences under section 323, Indian Penal Code for causing hurt to Norang will stand.

The Judge in Chambers before whom this appeal came directed that notice should issue to the appellants to show cause why they should not be convicted under section 302, Indian Penal Code, and why their sentences should not be enhanced. If we had concurred with the learned Sessions Judge that *Musammat* Bhagi was beaten to death on the night of the occurrence, we should have felt bound to alter the convictions into one under sections 304/149, Indian Penal Code, and to very materially enhance the sentences.

W. C. A. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 80 OF 1923.

August 30, 1923.

Present:—Mr. Dalal, J. C.

Kunwar SHER BAHADUR SINGH —APPLICANT

versus

FAZAL ALI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute over property—Preliminary order—Omission to mention source of information—Jurisdiction.

The jurisdiction of a Magistrate to take proceedings under section 145 of the Criminal Procedure Code, is not ousted by his merely omitting to mention in the preliminary order the source of information upon which he was satisfied that a dispute existed concerning certain property and was likely to cause a breach of the peace.

Application against an order of the Sub-Divisional Magistrate, First Class, in charge of Mahona, Tahsil, Lucknow, dated the 30th June 1923.

Messrs. *Ram Prasad* and *Bhawani Shanker*, for the Applicant.

Mr. *Abdul Rauf*, for the Opposite Party.

JUDGMENT.—This is an application in revision from an order purporting to have been passed under Chapter XII of the Code of Criminal Procedure. Under section 435 (3) no revision lies to this Court unless the Magistrate has acted without jurisdiction. In the present case the applicant himself applied to the Magistrate who passed an order on the 9th June 1923 under clause (1) of section 145 requiring the parties concerned in the dispute about a grove to attend his Court and to put in written statements of their respective claims as respects the facts of actual possession of the subject-matter in dispute. The parties appeared and put in their statements and on 30th June the Magistrate passed an order in favour of the opposite party declaring him to be entitled to possession of the grove. Two omissions in bar of the Magistrate's jurisdiction were pointed out by the learned Counsel for the applicant, (1) that in the preliminary order of 9th June the Magistrate had not stated the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning a grove, (2) that on the 30th June the Magistrate failed to examine the witnesses produced by the applicant.

As regards the first point, it is true that Mr. Hopkinson did not refer to the report he had received from another Magistrate, Mr. Jardine, but from a slip on the record of even date it is obvious that the ground for Mr. Hopkinson's belief was the information sent to him by Mr. Jardine after making personal enquiries. The mere omission of the mention of the source of the information when in fact the Court is assured of the existence of such a source cannot oust the Magistrate's jurisdiction. As regards the second point the learned Counsel for the opposite side does not admit that the applicant's witnesses were present or were offered for examination on the 30th June. It appears that witnesses were summoned but there is no note that any were present or offered for examination. There is no affidavit presented by the applicant to this Court in the matter. Under the circumstances the second alleged omission is not proved.

This Court has, therefore, no jurisdiction to interfere and this application is dismissed.

W. C. A. *Application dismissed.*

MUNICIPAL COMMITTEE, PIND DADAN KHAN v. BHAGWAN SINGH.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 825 OF 1922.

November 15, 1922.

Present:—Mr. Justice Broadway.

THE MUNICIPAL COMMITTEE, PIND DADAN KHAN—

DEFENDANT—PETITIONER

versus

BHAGWAN SINGH—PLAINTIFF AND HUKAM CHAND AND OTHERS—

DEFENDANTS—RESPONDENTS.

Punjab Municipal Act (III of 1911), ss. 84, 86—Tax levied illegally—Suit to recover amount paid, whether maintainable—Civil Courts, jurisdiction of.

The special procedure enacted in sections 84 and 86 of the Punjab Municipal Act relates only to appeals against the assessment or levy of a tax under the Act and does not provide a remedy for an act which might be done in violation of the provisions of the Act. [p. 738, col. 2.]

Section 86 of the Punjab Municipal Act does not oust the jurisdiction of the Civil Courts to relieve one subject of the Crown against an illegality imposed upon him by any other subject. [p. 739, col. 1.]

G. I. P. Railway Co. v. *Amraoti Municipality*, 16 Ind. Cas. 449; 8 N. L. R. 107, relied on.

A Civil Court has jurisdiction to entertain a suit to recover the amount of a tax illegally levied by a Municipality on the plaintiff, and failure on the part of the plaintiff to take action under section 84 of the Punjab Municipal Act does not bar the suit. [p. 738, col. 2.]

Committee of Notified Area, Una v. *Chatar Behari Narain*, 44 Ind. Cas. 910; 74 P. L. R. 1918; 74 P. W. R. 1918, followed.

Petition for revision of the decree of the Senior Subordinate Judge, Jhelum, dated the 3rd January 1921, reversing that of the Munsif, First Class, Pind Dadan Khan, District Jhelum, dated the 23rd June 1919.

Mr. *M. L. Puri*, for Bakhshi *Tek Chand*, for the Petitioner.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—One Bhagwan Singh, son of Ganda Singh, is a tenant of three shops situate in Gur Bazar Mandi, within the Municipality of the town of Pind Dadan Khan. The Municipal Committee levied a tax called *teh bazari* from him and recovered Rs. 72, which was paid by Bhagwan Singh under protest. This tax was levied on the ground that Bhagwan Singh had been using a plot of land measuring 10 ft. *by* 40 ft. in front of the shops of which he was the tenant, which land belonged to the Municipal Committee and had been occupied without its permission. Having paid the tax Bhagwan Singh instituted a suit in the Court of the Munsif against the Municipal Committee for recovery of the sum, so paid with Rs. 3 interest, on the ground that he was not liable to pay the said tax, the Committee not being the owner of the land. The Trial Court dismissed the suit, but on appeal by him the Senior Subordinate Judge, holding that the Committee had failed to prove its ownership of the land occupied by the appellant and that the Municipality had acted arbitrarily and without justification in recovering the amount, decreed the plaintiff's suit. Against this decree the Municipal Committee has preferred a second appeal to this Court through Mr. Tek Chand.

On behalf of Bhagwan Singh Mr. Nanak Chand raised a preliminary objection to the effect that no second appeal lay, the suit being of the nature of a small cause. Mr. Mukand Lal Puri, who has appeared on behalf of the appellant, admitted the soundness of this objection, but urged that the appeal should be treated as a revision and I have heard him on that basis, no second appeal being competent.

It has been contended that the Civil Courts have no jurisdiction to try the case, firstly, because section 84 of the Punjab Municipal Act, 1911, lays down the procedure to be adopted when a person wishes to contest the levy of any tax, and my attention was drawn to *Municipal Committee, Ambala* v. *Mohender Singh* (1), where it was held that when a special Act, such as the Municipal Act, provides a certain remedy by appeal against the acts of the Committee the failure to comply with that special procedure would bar a suit in the Civil Courts. Secondly, it was contended that section 86 of the Act ousted the jurisdiction of the Civil Courts to adjudicate upon any objection regarding the liability of any person to be assessed and provided that "no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of this Act."

(1) 9 Ind. Cas. 1000; 38 P. R. 1911; 118 P. L. R. 1911; 97 P. W. R. 1911.

Mr. Mukand Lal Puri contended that in this respect the language used in the Municipal Act was far more extensive than that used in the Municipal Acts in other Provinces, and my attention was drawn to *Kamayya* v. *Leman* (2) and *Municipal Council, Nellore* v. *Rangayya* (3). In the former case the suit had been brought for recovery of the amount of a professional tax levied by the Municipality on the plaintiff. On behalf of the Commissioners an objection was taken to the jurisdiction of the Civil Courts to deal with the question of the liability to taxation of the plaintiff and that objection was sustained by the High Court. In *Municipal Council, Nellore* v. *Rangayya* (3), the plaintiff sued to recover certain moneys paid by him to the Municipal Council, Nellore, on the ground that he had paid a tax to which he had been improperly assessed. The High Court held that, section 262 of the Municipal Act being applicable, the suit was not maintainable.

At the same time, in *Municipal Council of Tuticorin* v. *South Indian Ry., Company* (4), the Municipality at Tuticorin called on the South Indian Railway Company to pay a professional tax which the Company had already paid to the Municipality at Negapatam. The Company paid the amount under protest and sued the Municipality for a refund. The High Court held that the suit was maintainable and granted the Company a decree.

Mr. Nanak Chand for the respondent first contended that this Court should not interfere in revision, inasmuch as there had been a decision on the question of jurisdiction, which, even if decided wrongly, should be regarded as final, having regard to the pronouncement of their Lordships of the Judicial Committee in *Amir Hassan Khan* v. *Sheo Baksh Singh* (5). He further contended that section 86 of the Municipal Act, 1911, did not deprive persons of their ordinary remedies under Common Law and referred to a case reported as *Committee of Notified Area, Una* v. *Chatar Behari Narain* (6), in which Scott-Smith, J., held that the power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner did not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers. He also held that a Civil Court had jurisdiction to determine the question whether the imposition of a tax was illegal and *ultra vires* and to give relief if a tax had been levied from a person who was not liable to pay the same.

In *G. I. P. Ry. Company* v. *Amraoti Municipality* (7), the G. I. P. Ry. Company instituted a suit against the Municipality of Amraoti seeking to recover a sum of Rs. 500 which they alleged had been illegally levied from them by the Committee and paid by the Company under protest. The Company also asked for an injunction restraining the defendant from recovering, or attempting to recover, any such tax in future. *Inter alia*, the Committee pleaded that the Civil Courts had no jurisdiction to entertain the suit, and this particular question came up before the Additional Judicial Commissioner of Nagpur. The Berar Municipal Law contains provisions similar to those to be found in the Punjab Municipal Act. Section 51 provided for an appeal against the assessment or levy of a tax under the Berar Municipal Law, *i.e.*, provided a procedure similar to that laid down in section 84 of the Punjab Municipal Act. Section 53 of the Berar Municipal Law contained a provision similar to that to be found in section 86 of the Punjab Municipal Act. It was held that the special procedure laid down by the Berar Municipal Law related only to appeals against the assessment or levy of a tax *under the law* and did not provide a remedy which might be done in *violation of that law*. It was also held that section 53 of the Berar Municipal

(2) 2 M. 37; 3 Ind. Jur. 22; 1 Ind. Dec. (N. S.) 297.
(3) 19 M. 10; 6 Ind. Dec. N. S.) 711.
(4) 13 M. 78; 4 Ind. Dec. (N. S.) 765.
(5) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No 83; 5 Ind. Dec. (N. S.) 760 (P. C.).
(6) 44 Ind. Cas. 910; 74 P. L. R. 1918; 74 P. W. R. 1918.
(7) 16 Ind. Cas. 449; 8 N. L. R 107.

Law did not oust the jurisdiction of the Civil Court to relieve one subject of the Crown against an illegality imposed upon him by any other subject. Section 53 of the Berar Municipal Law is almost word for word the same as section 86 of the Punjab Municipal Act.

On the finding in the present case, that the Municipal Committee is not the owner of the site in front of the shops tenanted by Bhagwan Singh, the said Bhagwan Singh was not liable to be taxed as he has been. The action of the Municipal Committee in levying the tax from him, therefore, gave him a cause of action in a Civil Court.

Following *G. I. P. Ry. Company* v. *Amraoti Municipality* (7) and *Committee of Notified Area, Una* v. *Chatar Behari Narain* (6), I hold that the Civil Court had jurisdiction to try this case and that the failure on the part of Bhagwan Singh to take action under section 84 of the Act is no bar to the suit, inasmuch as the tax was levied illegally.

Mr. Mukand Lal Puri further contended that the decision of the Court below was bad on other grounds. I am, however, unable to see any ground for revision and I accordingly dismiss this petition with costs.

Z. K. *Petition dismissed.*

MADRAS HIGH COURT

STAMP REGISTER NOS. 20595 AND 20594 OF 1922
AND
SECOND CIVIL APPEAL NO. 580 OF 1922.
February 6, 1923.

Present:—Justice Sir Francis Oldfield, KT., and Mr. Justice Venkatasubba Row.

GOVINDU KAVIRAJ PUROHITO—APPLICANT—APPELLANT
versus
GAURANGA SAW AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 153, O. I, r. 10—Appeal filed against deceased respondent—Procedure—Application to amend cause title by substituting names of legal representatives of deceased, maintainability of.

Where an appeal is filed by mistake against a respondent who had died prior to the presentation of the appeal, the proper procedure to adopt is to file another appeal and to have the delay, due to the mistake committed in good faith, excused.

An application to amend the cause title of the memorandum of appeal by susbstituting for the name of the deceased respondent, the names of his legal representative is unsustainable and does not lie. Neither O. I, r. 10 of the Civil Procedure Code nor section 153 of the Code is applicable to such a case.

No such proceeding as an appeal against a party who is dead is authorised by the Code of Civil Procedure.

IN S. R. NO. 20595 OF 1922.

Petition sought to be presented to the High Court to excuse delay in seeking to amend the cause title in S. A. No. 580 of 1922 preferred to the High Court against a decree of the District Court, Ganjam, in A. S. No. 442 of 1919, preferred against a decree of the Court of the Principal District Munsif, Berhampore, in O. S. No 184 of 1917 and to amend the cause title in the said S. A. by adding thereto legal representatives of the deceased respondent.

IN S. R. NO. 20594 OF 1922.

Petition sought to be presented to the High Court to amend the cause title in the above said S. A. No. 580 of 1922 on the file of the High Court by bringing on record therein (1) Gauranga Saw, (2) Kirpasindhu Saw, (3) Ramachandra Saw, (4) Sripati Saw (5) Bhavani Saw and (6) Shektra Saw as the legal representatives of the deceased respondent, Vogodhu Subudhi Ratno therein.

IN S. A. NO. 580 OF 1922.

Second appeal against a decree of the District Court, Ganjam, in A. S. No, 442 of 1919, preferred against a decree of the Court of the Principal District Munsif, Behrampore, in O. S No. 84 of 1917.

Mr. *C. Sambasiwa Rao*, for the Appellant.

Mr. *B Jagannadha Das*, for the Respondents.

JUDGMENT.—These are applications to the Court to amend the cause title in a second appeal and to excuse the delay in seeking that relief. It will, of course,

be unnecessary to consider the second application, unless the first succeeds. The circumstances in which the amendment is asked for are that the respondent, whose name is entered in the appeal as presented died before the presentation. We are now asked to substitute for his name those of the legal representatives. In the objection to this that an appeal cannot be presented against a person who has ceased to exist O. I, r. 10 is relied on, but we do not see our way to apply it here, since it refers to suits instituted in the name of a wrong person, and we do not think that it is applicable to a case, such as the present. The power conferred by section 153 is general, but again we do not think we ought to use it, while another course is open to the petitioner, that course being to file another appeal and to have the delay due to his mistake committed in good faith excuse

Taking this view, we must dismiss these applications and also the second appeal on the ground that no such proceeding as an appeal against a party, who is deceased, is authorised by the Code. There will be no costs in second appeal but the petitioner will pay the respondent's costs in the petitions.

V N. V.

Petitions dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2988 OF 1922.

April 18, 1923.

Present:— MR. Justice Broadway.

PALU AND OTHERS—DEFENDANTS—APPELLANTS

versus

RASILU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings, construction of—Ejectment suit—Redemption, decree for, whether can be passed—Power of Court.

Pleadings must be strictly construed and parties must be restricted to what they allege in their plaint or in their written statements, as the case may be. [p. 742, col. 2.]

A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. [p. 742, col. 2.]

Parshotam Bhairshankar v. *Rumal Zunjar*, 20 B. 196; 10 Ind. Dec. (N. S.) 680, relied on.

Plaintiffs sued for possession of certain land on the allegation that a sale of the land in favour of the defendants by the widow of a deceased reversioner of the plaintiffs was without consideration and necessity. The Court found that a mortgage executed by the widow in favour of the defendants in respect of a portion of the land was binding on the property and gave the plaintiffs a decree for possession on payment of the amount of the mortgage :

Held, that the Court was competent to pass a decree for redemption in the suit as it tended to reduce litigation. [p. 742, col. 2.]

Second appeal from a decree of the District Judge, Gurdaspur, dated the 3rd August 1922, reversing that of the Munsif, First Class, Pathankot, District Gurdaspur, dated the 4th October 1921.

Lala *Mehr Chand Mahajan*, for the Appellants.

Pandit *Sheo Narain*, R. B., for the Respondents.

JUDGMENT.—One Chuhru died in 1892-93 leaving him surviving a widow, *Musammat* Matti, who inherited 47 *kanals* of land from her husband. On the 17th July 1917 *Musammat* Matti acquired by pre-emption 144 *kanals* 12 *marlas* of land, and on the 9th of November 1917 she mortgaged her entire holding to Palu and three other persons for Rs. 350. Mutation of this mortgage was sanctioned on the 27th February 1918.

On the 22nd May 1920 *Musammat* Matti died and on the 9th of August 1920 Palu and the other mortgagees applied for and obtained mutation, of the land mortgaged to them, as owners on the strength of a document described as a 'Will' claiming to have acquired the ownership of the land mortgaged to them on payment of Rs. 600. This mutation was sanctioned on the 7th January 1921. On the 12th February 1921 Rasilu and others sued Palu and the other mortgagees-vendees for possession of the land on the ground that the said land was ancestral and that the sale and mortgage set up by Palu and his

companions were without consideration and necessity. In the plaint the mortgage of the 9th November 1920 was referred to and it was pleaded that the defendants having been called upon to surrender possession, had set up a sale in their favour by *Musammat* Matti, which it was said the plaintiffs knew nothing about, but that, in any event, there had been no necessity for the alienation. The defendants definitely and clearly pleaded that on the 16th May 1920 *Musammat* Matti had sold the property in suit to them under an *oral sale* for Rs. 600, the consideration being Rs. 350 on account of the previous mortgage and Rs. 150 already taken by the lady and Rs. 100 left with the vendees for the cremation of the vendor if she died and to be paid to her if she survived the illness from which she was on that day suffering. The learned Vakil for the defendants also made a statement, prior to the settlement of issues, and there clearly stated that *Musammat* Matti had, for consideration and necessity, sold the land in suit to the defendants for Rs. 600 *under an oral sale* and had subsequently executed a "Will." Various other pleas were raised challenging the *locus standi* of the plaintiffs and disputing the ancestral nature of the property. The Trial Court held that the plaintiffs were collaterals of Chuhra in the 5th degree and the land *qua* them was not ancestral; that the vendees were in possession of the land, and that certain daughters of *Musammat* Matti were not the daughters of Chuhra. The plaintiffs' suit was dismissed.

They thereupon preferred an appeal to the District Court and the learned District Judge found that out of the land sold 47 *kanals* were ancestral and the remaining 144 *kanals* were the self-acquired property of *Musammat* Matti. It appears that there is no evidence whatever of the alleged oral sale with the exception of the document referred to by the defendants' Counsel in the Court below, dated 16th May 1920. This document was regarded and relied on by the learned District Judge as evidencing no more than an intention on the part of the widow to sell the land but he held that no sale had been completed and the defendant had failed to prove the sale set up by them. The plaintiffs were accordingly granted a decree for possession of the ancestral land, *i.e.*, 47 *kanals*, without any payment, and a decree for the possession of the remaining 144 *kanals* on payment of Rs. 350 the amount due under the mortgage, dated 9th November 1920, which it was held the plaintiffs could not challenge.

Against this decree the defendants have come up to this Court through Mr. Mehr Chand and I have heard Mr. Sheo Narain for the respondents. So far as the ancestral land is concerned, *i.e.*, 47 *kanals*, Mr. Mehr Chand has given up the appeal. The property being ancestral and the plaintiffs being reversioners of the last male-owner they were entitled to challenge the alienation that affects their reversionary rights and it has been found that there was no necessity for any alienation of the land.

Qua the remaining land, however, it has been strongly urged that the land being the self-acquired property of *Musammat* Matti was capable of being alienated by her without any interference on the part of the plaintiffs. It was urged that the construction placed by the learned District Judge on the document of 16th May 1920 was erroneous and that that document evidenced an oral sale which had already been completed, and that inasmuch as the defendants-appellants had, subsequent to the death of their vendor, obtained possession of the land in suit, the plaintiffs had no right to any decree. It was also contended that, in any event, the plaintiffs could not have been granted what practically amounted to a decree for redemption of the mortgage in the present suit. *Qua* the document, in the alternative it was argued that if the construction of the Court below was correct this document amounted to an agreement of sale, that *Musammat* Matti having full power to sell, her heirs, whoever they might be, were bound by her contract and that, therefore, the appellants could enforce specific performance of the same, and it they could do this, they could contest the present suit on that ground. I may say at once that a reference to the document in question in my opinion shows

that the construction placed thereon by the learned District Judge cannot be said to be entirely erroneous. It is true that it recites that the property had been sold and that possession thereof had been given. The recital as to possession is, however, not of much importance inasmuch as the defendants were already in possession as mortgagees. Further, the reference to the expenditure of Rs. 100 on her funeral ceremonies or the payment of that amount to her if she survived, and her subsequent undertaking to execute a duly registered deed may, in my opinion, be regarded as an intention on her part to sell, but it cannot be definitely said that this document affords sufficient proof that she had already completed the sale.

As to the alternative argument that the agreement being one to sell the appellants could defend their title on that ground, reference was made to *Laxman Madhavrao Jahagirdar* v. *Bhagvansingh Narsingbhau Navalurkar* (1). The facts of that case are, however, somewhat dissimilar. There the owner of a certain property entered into an agreement with the defendant for sale of the property and received a part of the consideration as earnest-money. Before the sale-deed could be executed he died and his widow, who was then a minor, completed the transaction and put the defendants in possession of the property receiving the balance of the consideration money. Subsequent to this, she adopted a certain person, who sued for recovery of possession of the property contending that the sale was invalid and the widow was a minor when she executed it. It was held that the widow was entitled to carry out the agreement entered into by her husband and that the defendant by reason of his having obtained possession under the sale could successfully resist the plaintiffs' suit to eject him. However, as urged by Mr. Sheo Narain, this defence was never pleaded in the Court below, the appellants relying on a completed sale in their favour. Mr. Mehr Chand has practically asked me in second appeal to allow him to amend his pleas so as to bring in this defence as an alternative. He is, however, unable to show me any authority which would justify my doing so at this late stage. The appellants based their defence on a definite plea that they were holding under a completed sale, and it was that plea that was put in issue and has been decided against them. It has been repeatedly pointed out that pleadings must be strictly construed, and that parties must be restricted to what they allege in their plaint or in their written statements, as the case may be, and I am, therefore, unable to see my way to allow such an amendment in the defendants-appellants' pleas at this late stage of the case.

The next point for consideration is, whether the learned District Judge was right in decreeing the plaintiffs' suit for possession on payment of Rs. 350 on the ground that the plaintiffs as the heirs of the deceased *Musammat* Matti were entitled to redeem the mortgage. My attention has been drawn by Mr. Sheo Narain to *Parshotam Bhaishankar* v. *Rumal Zunjar* (2) where it was held that a Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. The plaintiffs came into Court alleging that they were entitled to possession on the ground that the alienation was made by a widow without necessity. Cases of this nature are common and decrees constantly have been given for possession on payment of money which has been found to have been a charge on the property as being for necessity. It is admitted that the only charge on the property is Rs. 350 and it seems to me that it would tend to reduce litigation if in a case, such as the present one, a decree, such as has been passed by the learned District Judge, was allowed. As laid down in *Parshotam Bhaishankar* v. *Rumal Zunjar* (2), the Court has discretion to pass such a decree. I see no reason to interfere with the discretion exercised by the lower Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 60 Ind. Cas. 581; 45 B. 434; 23 Bom. L. R. 55.

(2) 20 B. 196; 10 Ind. Dec. (N. S.) 689.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 212 OF 1916.

January 23, 1923.

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

BHOGILAL KIRPASHANKAR—APPLICANT

versus

DARASHA KOOVERJI CONTRACTOR—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Assignment of interest pending suit—Records sent to High Court in interlocutory matter—Application for substitution—Court, proper.

Where in the case of an interlocutory appeal the High Court sends for the records of a pending suit for the purpose of dealing with that particular matter, for all other applications the suit continues pending in the Trial Court, and that Court has jurisdiction to entertain an application under O. XXII, r. 10, of the Civil Procedure Code, for substitution of an assignee from a plaintiff in his place, and a refusal to entertain such an application amounts to a failure to exercise jurisdiction.

Application against an order passed by the District Judge, Surat, in Miscellaneous Appeal No. 26 of 1920, confirming an order passed by the Subordinate Judge at Surat, in Civil Suit No. 238 of 1917.

Mr. *H. V. Divatia*, for the Applicant.

Mr. *M. B. Dave*, for the Opponent.

JUDGMENT.—We think the initial error was made by the Trial Court when the present applicant applied to be put on the record in the place of Sorabji who was dead. At that time there was an appeal against an interlocutory order pending in the High Court. The learned trial Judge thought that on account of that appeal its functions were entirely suspended. Even if, in the case of an interlocutory appeal, the High Court sends for the record for the purpose of dealing with that particular matter, for all other applications the suit is pending in the Trial Court. Therefore, the Trial Court had jurisdiction to entertain the application, since in the death of a party it is necessary to place his representatives on the record. It seems to me, therefore, that once we hold that the Trial Court failed to exercise its jurisdiction and that error is at the root of all later proceedings, it is really not necessary to consider why the applicant has been still unsuccessful in getting his name on the record in the place of the deceased Sorabji. There has been a failure to exercise proper jurisdiction. On these grounds, we think the Rule must be made absolute with costs in this Court and in the lower Appellate Court. Other costs will be costs in the cause.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 396 OF 1923.

May 23, 1923.

Present:—Mr. Justice Moti Sagar.

GOPALI RAM—PLAINTIFF—APPELLANT

versus

Chaudhri DEWAK RAM—DEFENDANT—RESPONDENT.

Specific performance—Delay in suing, effect of.

Mere delay, which is short of the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right, is no bar to a suit for specific performance unless it is shown to have prejudiced the defendant. [p. 744, col. 1.]

Jaugal Singh v. *Ghulam Mahomed*, 67 Ind. Cas. 790; 4 U. P. L. R. (L.) 100; 3 L. 376; 32 P. W. R. 1922; (1922) A. I. R. (L.) 461 relied on.

Second appeal from a decree of the District Judge, Delhi, dated the 8th November 1922, modifying that of the Munsif, First Class, Delhi, dated the 28th April 1922.

Mr. *Shamair Chand*, for the Appellant.

Lala *Sardha Ram*, for the Respondent.

JUDGMENT.—The facts of this case are very simple and are briefly these:—

The houses of the plaintiff and the defendant adjoin each other. On the first December 1918 the defendant agreed to sell the superstructure of his house to the plaintiff for Rs. 290 and received Rs. 5 as earnest-money. The defendant having failed to perform his part of the contract the plaintiff sued in July 1920 for specific performance and for damages which he assessed at Rs. 290. The defendant admitted the agreement but pleaded that the superstructure

was owned jointly by him and his son and that as the latter had refused to join in the sale the plaintiff had refused to purchase and had cancelled the contract himself. The Trial Court held that the onus of proving the defendant's exclusive ownership of the property was upon the plaintiff and that he had failed to discharge this onus. He further held that defendant had failed to establish that the agreement had been cancelled by the plaintiff and that, in these circumstances, he was liable to pay damages. In spite of this finding, the learned Munsif dismissed the plaintiff's suit holding that it was not at all clear what was the defendant's share in the house and that, therefore, the amount of the damages could not be determined. Against this decision an appeal was preferred to the District Judge who disagreed with the finding of the Trial Court on the question of onus and held that it was for the defendant to prove that he was not the exclusive owner and that his son was also entitled to a share in the superstructure. He further held on the evidence that the defendant had failed to discharge this onus and that he must be held to be the owner for all intents and purposes. On the question as to who was guilty of breach the finding was entirely in favour of the plaintiff, and it was found that the defendant had broken the contract. The learned District Judge, however, concurred with the Trial Court in dismissing the suit for specific performance on the ground that the plaintiff was guilty of laches because he had brought the suit more than twenty months after the date of the breach of the contract.

Against this decision a second appeal has been preferred to this Court by the plaintiff through Mr. Shmair Chand, and I have heard Mr. Sardha Ram on behalf of the respondent.

In my opinion the judgment of the lower Appellate Court is obviously wrong and must be set aside. There is ample authority for holding that mere delay, which is short of the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right, is no bar to a suit for specific performance unless it is shown to have prejudiced the defendant. In the case of *Jugal Singh* v. *Ghulam Mahomed* (1) it was held by a Division Bench of this Court that "delay in bringing a suit for specific performance may, in certain cases, be evidence of abandonment or acquiescence, but, on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of the defendant, does not disentitle the plaintiff to sue for specific performance." In the present case laches were not even pleaded by the defendant and the only point on which the parties went to trial was whether the defendant was a joint owner of the superstructure with his son and whether the plaintiff had himself cancelled the contract owing to the son's refusal to join in the sale. No issue was framed on the question as to whether the right to claim specific performance had been abandoned by the plaintiff, and no evidence was consequently given by the parties upon this point. In my opinion the delay in this case is not so great as to induce me to hold that the plaintiff has forfeited his right under the agreement. I accordingly accept the appeal and decree the plaintiff's suit with costs throughout.

Z. K. *Appeal accepted.*

(1) 67 Ind. Cas. 700; 4 U. P. L. R. (L.) 100; 3 L. 376; 32 P. W. R. 1922; (1922) A. I. R. (L.) 461.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 249 OF 1922.

March 21, 1923.

Present:—Mr. Hallifax, A. J. C.

Musammat RUPIBAI—APPLICANT

versus

SADASHIV AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5—Pauper application—Claim doubtful—Rejection of application.

An application for leave to sue as a pauper cannot be rejected on the ground that the claim is "doubtful," that is to say, weak, as it is impossible to say whether it is weak till it has been tried.

ORIENT BANK OF INDIA LTD., *v.* HABIBULLAH KHAN.

Application for revision of an order of the Subordinate Judge, Nagpur, dated the 25th September 1922, in Miscellaneous Case No. 26 of 1922.

Mr. *K. A. Potay*, for the Applicant.

Mr. *M. R. Indurkar*, for the Non-Applicant.

ORDER.—The learned Subordinate Judge appears to have rejected the application through a complete misunderstanding of the amendment proposed to be made in the plaint. The written application for amendment is as follows: "If the Court holds that the plaintiff has no right to claim possession of the village in suit, then she submits that she has a right to receive Rs. 90 every year from the two first defendants for her maintenance and nothing at all has been paid during the last three years, and she, therefore, prays that an amended (prayer) be made that the defendants do pay Rs. 270 to the plaintiff for her maintenance for the last three years and that this payment be made a charge on the estate of the plaintiff's husband in the hands of the defendants." This appears to be exactly the claim which the learned Judge held in the first part of his order to be the proper claim for the plaintiff to make. I may remark that an application for leave to sue as a pauper cannot be rejected on the ground that the claim is "doubtful," that is to say, weak, even if there were no better reasons than that it is impossible to say whether it is weak till it has been tried. The order of the lower Court is set aside. The application for leave to sue as a pauper will be taken up again and fully considered. The costs in these proceedings, in which the Pleader's fee will be Rs. 15, will be costs in the lower Court.

G. R. D. *Order set aside.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1977 OF 1918.

March 2, 1923.

Present:—Mr. Justice LeRossignol and Mr. Justice Broadway.

THE ORIENT BANK OF INDIA LIMITED, IN LIQUIDATION LAHORE, THROUGH JOINT LIQUIDATOR—APPELLANT

versus

HABIBULLAH KHAN—RESPONDENT.

Companies—Company in liquidation—Shareholder, liability of, as contributory—Fraud, plea of, whether can be put forward.

Once an application has been made for the compulsory winding-up of a Company, a shareholder cannot be relieved of his liability as a contributory in the winding-up proceedings on the ground that he was induced to purchase the shares allotted to him by a fraudulent representation.

Miscellaneous first appeal from an order of the District Judge in charge of Liquidation Work, Lahore, dated the 29th April 1918.

Babu *S. K. Mukerji*, for the Appellant.

Lala *Mool Chand*, R. B., for the Respondent.

JUDGMENT.—In accordance with the order dated 23rd February 1921 in Civil Appeal No. 546 of 1920, a report has been received to the effect that the forfeiture of the shares held by *Musammat* Ghulam Fatima was illegal. Under Articles 42 to 44 of the Articles of Association, however, the Bank had a lien on the shares in question and was entitled to sell the said shares in exercise of that lien.

The respondents in this and the connected Appeals Nos. 1978 and 1979 of 1918 seek to contest their liability on the ground that they were induced to buy the shares allotted to them by a fraudulent representation that they were to purchase new stock. This they cannot be allowed to do, inasmuch as a shareholder cannot be relieved of his liability as a contributory in the winding-up proceedings on the ground of fraud. Once an application has been made for the compulsory winding-up of the concern, *vide Alister West* v. *Beni Pershad* (1), *Piara Singh* v. *Peshawar Bank, Limited in Liquidation* (2) and *Hakim Rai* v. *Kharak Singh* (3).

This appeal is, therefore, accepted with costs.

Z. K. *Appeal accepted.*

(1) 24 Ind. Cas. 236; 69 P. R. 1914; 165 P. L. R. 1914; 113 P. W. R. 1914.
(2) 28 Ind. Cas. 537; 54 P. R. 1915; 22 P. L. R. 1915; 235 P. W. R. 1915.
(3) 46 Ind. Cas. 21; 42 P. R. 1918.

GHULAM MUHAMMAD *v.* MEHRAJ DIN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 3030 OF 1922.

April 25, 1923.

Present:—Mr. Justice Campbell.

GHULAM MUHAMMAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MEHRAJ DIN—PLAINTIFF—RESPONDENT.

Muhammadan Law—Breach of promise of marriage—Damages, measure of—Contract Act (IX of 1872), s. 73.

Under the Muhammadan Law in a suit by a plaintiff for damages for breach by the defendant to give his daughter in marriage to the plaintiff, the latter is entitled only to receive compensation under section 73 of the Contract Act for any loss or damage caused to him by the breach, or which the parties knew would be likely to result from the breach of it. [p. 747, col. 1.]

Abdul Razak Keval v. *Mahomed Hosein Dalvi*, 38 Ind. Cas. 771; 19 Bom. L. R. 164; 42 B. 499, relied on.

Second appeal from a decree of the Additional District Judge, Gujranwala, dated the 13th November 1922, reversing that of the Munsif, First Class, Gujranwala, dated the 23rd August 1922.

Sheikh *Niaz Muhammad*, for the Appellants.

Lala *Mool Chand*, R. S., and Diwan *Mehr Chand*, for the Respondent.

JUDGMENT.—This second appeal is the result of a suit brought by Mehraj Din, minor, against Fazl Ilahi, father of *Musammat* Zainab and Ghulam Muhammad, adoptive father of Fazl Ilahi, for Rs. 1,000 as damages for breach of a betrothal contract entered into between the plaintiff's father and the two defendants for the marriage of the plaintiff with *Musammat* Zainab. The Trial Court dismissed the suit, holding that *Musammat* Zainab, who is now a Muhammadan woman of full age and would be entitled to repudiate any actual marriage contracted for her during her minority, has refused to marry the plaintiff, that the defendants have no control over her and that thus the contract is one falling under section 56 of the Contract Act which has become impossible of performance, and, therefore, void.

On appeal to the Additional District Judge, a different view was taken. The learned Additional District Judge agreed that *Musammat* Zainab was 18 years of age and was at liberty to repudiate her betrothal with the plaintiff arranged by the defendants, but he found that the defendants had entered into negotiations for marrying *Musammat* Zainab elsewhere and had actually betrothed her to another man. This action, he considered, rendered them instrumental in the breach of the previous contract since, in his opinion, it would have been impracticable for *Musammat* Zainab, who observes *purdha*, to have arranged her betrothal herself. The defendants accordingly were held to have committed a breach of contract. Further, it was found by the learned Additional District Judge that gifts to the value of Rs. 100 had been made to the defendants in connection with the betrothal; that the plaintiff was entitled to recover this sum, and that he was also entitled to Rs. 200 as damages, it being remarked that the amount claimed by him of Rs. 450, for general damages was excessive. The plaintiff accordingly was given a decree for Rs. 300, with full costs, an order which was interpreted, when the decree was drawn up, as costs on the full Rs. 1,000 originally claimed.

In second appeal it is argued that there was no breach of contract by the defendants; that it would not be unlawful for them to contract any marriage on behalf of *Musammat* Zainab, and that the contract fell within the purview of section 56 of the Contract Act as one which had become void owing to the act to be done having become impossible or unlawful.

Secondly, it is contended for the defendant-appellants that the plaintiff, as ruled by the Bombay High Court in *Abdul Razak Keval* v. *Mahomed Hosein Dalvi* (1), could not in any case recover damages such as are recoverable in an action for breach of promise of marriage under the English Law, but could only recover damages proved under section 73 of the Contract Act and a return of the actual sum expended by him for the benefit of the defendants.

On the other side, reliance has been placed on the discussion in *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas* (2) regarding the liability of persons

(1) 38 Ind. Cas. 771; 19 Bom. L. R. 164; 42 B 499.

(2) 21 B. 23; 11 Ind. Dec. (N. S.) 16.

who enter into an absolute contract to give a girl in marriage and the exact meaning of the word "impossible" in section 56 of the Contract Act. This case related to a Hindu betrothal, but the discussion referred to proceeded on lines independent of Hindu Law and sentiments, and much of it is in point in the present case where the defendants, instead of disapproving of *Musammat* Zainab's refusal to marry the plaintiff and declining to assist her in arrangements for another marriage, actually encouraged her in the attitude which she took up and negotiated her second betrothal. It is not necessary, however, to go into the question of breach by the defendants, since their learned Counsel admits that the plaintiff is entitled to the Rs. 100 held as a fact by the lower Appellate Court to have been expended by him or his father in presents. Obviously, if the defendant-appellants' contention is accepted that the contract has become void under section 56, the plaintiff is entitled to recover the Rs. 100 under section 65 of the Contract Act and this is conceded.

As regards the remaining Rs. 200 decreed by the lower Appellate Court, the ruling referred to [*Abdul Razak Keval* v. *Mahomed Hosein Dalvi* (1)] is clear that under the Muhammadan Law in a suit by a plaintiff for damages for breach by the defendant to give his daughter in marriage to the plaintiff, the latter would be entitled only to receive compensation under section 73 of the Contract Act for any loss or damage caused to him by the breach, or which the parties knew would be likely to result from the breach of it. If the plaintiff-respondent were to be taken to have established his point that there was an actionable breach of contract by the defendants in the present case there is no evidence on the record on which damages under section 73 could be awarded. No such evidence is referred to by the learned Additional District Judge. The plaintiff is a minor himself and he has not been shown to have suffered in reputation or otherwise. There were no grounds, therefore, for the decree so far as it related to the Rs. 200.

I accept the appeal to the extent of reducing the decree to one for Rs. 100, and the plaintiff will have his costs in all Courts on this sum alone

Z. K.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 314 OF 1923.

June 6, 1923.

Present :—Mr. Justice Moti Sagar.

Musammat GAURAN—JUDGMENT-DEBTOR—OBJECTOR—APPELLANT

versus

CHANDU LAL AND ANOTHER—DECREE-HOLDERS, AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r 58—Execution of decree—Attachment—Objection by party against whom suit was dismissed, nature of—Appeal, whether lies

A defendant against whom a suit has been dismissed is a party to the suit, within the meaning of section 47 of the Civil Procedure Code, and where an objection lodged by such a person to the attachment of certain property in execution of the decree passed in the suit is dismissed the order dismissing the objection is open to appeal. [p. 748, col. 2.]

The mere fact that an objection to an attachment by a party to the suit is lodged under O. XXI, r. 58 of the Civil Procedure Code, would not disentitle the objector from pleading that the objection was really under section 47 of the Code and that O. XXI, r. 58 of the Code was relied on under a mistaken view of the law, and that an appeal is competent from the order dismissing the objection. [p. 748, col. 2.]

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Simla, dated the 11th November 1922.

Lala *Gobind Ram Khanna*, for the Appellant.

Bakhshi *Tek Chand* and Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of execution proceedings. The property in dispute is situated at Sabathu in the Simla District, and belonged originally to one *Musammat* Ganeshi who executed a deed of mortgage in respect thereof in favour of the present decree-holders in 1906. After the execution of the mortgage-deed in 1908 *Musammat* Ganeshi

assigned her rights in the property to *Musammat* Gauhran, the present appellant. In 1915 the mortgagees brought a suit in the Court of the Subordinate Judge of Simla to enforce their mortgage impleading both *Musammat* Ganeshi and *Musammat* Gauhran as defendants to that suit. The case was subsequently referred to the arbitration of Mr. Jai Lal and Mr. Mir Muhammad Khan who gave their award on the 7th June 1917 and passed a simple money-decree in favour of the plaintiffs for Rs. 7,700 against *Musammat* Ganeshi only exempting *Musammat* Gauhran altogether from the operation of that decree. The award was couched in the following terms:—

"Our award is that simple money-decree be passed in favour of the plaintiffs against *Musammat* Ganeshi only for Rs. 7,700. No future interest and parties to bear their own costs. The execution of the decree will be deferred till three months after the conclusion of the War but in the meantime the property recited in the mortgage-deed will be subject to a lien for the payment of the decree."

On the 3rd April 1916 a decree was passed by the learned Subordinate Judge against *Musammat* Ganeshi in the terms of the award. Subsequently, the decree was put into execution and the property at Sabathu which had been mortgaged with the decree-holders attached in execution of that decree. An objection was filed by *Musammat* Gauhran against this attachment under O. XXI, r. 58 of the Civil Procedure Code and it was prayed that the property attached should be released inasmuch as it did not belong to the judgment-debtor and was not made the subject of a charge under the decree. The learned Subordinate Judge disallowed the objection holding that the objector was a party to the suit and that, therefore, it was not competent to her to lodge her objections under O. XXI, r. 58 which was meant only for third parties. He further held that the assignment in her favour was made subsequent to the mortgage and it was, therefore, not binding upon the decree-holders. Against this decision an appeal has been preferred to this Court through Mr. Gobind Ram and I have heard Mr. Tek Chand and Lala Faqir Chand on behalf of the decree-holders and the judgment-debtor.

A preliminary objection is raised that no appeal lies, inasmuch as the objection lodged was under O. XXI, r. 58, and that an order made on an objection under that provision is not appealable under the Civil Procedure Code. I am unable to agree with this contention. *Musammat* Gauhran, the present appellant, was clearly a party to the suit, and O. XXI, r. 58 had no application to her case. The mere fact that the objection was lodged under a wrong section does not disentitle the appellant to plead that the objection was really under section 47 and that O. XXI, r. 58 was relied on under a mistaken view of the law. Under section 47, Civil Procedure Code, a defendant against whom a suit has been dismissed is a party to the suit and I have no hesitation in holding that the suit against *Musammat* Gauhran was, for all intents and purposes, dismissed under the award given by the arbitrators. She was, therefore, a party to the suit and fully competent to lodge an appeal under section 47 of the Civil Procedure Code.

Next, it is contended that the judgment-debtor's representative has not been made a party to the appeal within the time of limitation and that the appeal should, therefore, be dismissed in its entirety. I fail to understand how the representative of the judgment-debtor was a necessary party to the appeal. The dispute only related to the property which was in possession of *Musammat* Gauhran who filed an objection in the Court below. In my opinion the objector was the only necessary party to this appeal and it was wholly unnecessary to implead the judgment-debtor who was merely a formal party to the case. Moreover, it should be observed that the judgment-debtor's representative made an application to this Court for his being impleaded as a respondent to the appeal. That application was granted by Mr. Justice Martineau on the 4th May 1923 and he was allowed to be impleaded as a respondent to this appeal. I do not see any force in this objection and overrule it.

MAGANMAL *v.* RAGHUNATHRAO.

On the merits there can be no doubt that the order of the lower Court is wrong and must be set aside, the decree was obviously a simple money-decree and in execution attachment could only be effected against the property which belonged to the judgment-debtor. Long before the decree was passed, an assignment of the property at Sabathu had been made in favour of *Musammat* Gauhran, and she was in possession as an owner. There was no decree against this property and I fail to see how attachment could be taken out against the property which was not owned by the judgment-debtor. There is no doubt that the property was at one time mortgaged to the decree-holders, but the effect of the award given by the arbitrator and of the decree obtained on the basis of that award was that the mortgage was cancelled and in lieu thereof a simple money-decree granted in favour of the plaintiffs-decree-holders. It is not, therefore, now open to the decree-holders to say that they can attach this property because it was once held by them under a mortgage. Whatever rights the plaintiffs had under this mortgage became merged in the decree and they are not now entitled to go behind it. I accept the appeal and direct that the property should be released from attachment. The respondents should pay the costs of the appellant in this appeal.

Z. K.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 107 OF 1922.

August 10, 1923.

Present:—Mr. Kotval, A. J. C.

Seth MAGANMAL AND OTHERS—PLAINTIFFS—APPLICANTS

versus

Raja RAGHUNATHRAO DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 73—Application for rateable distribution—Powers of Court executing decree—Suit by one decree-holder for injunction to stop payment to another.

A Court charged with the distribution of assets under section 73 of the Civil Procedure Code has no power to go into the question of the *bona fides* of a decree in respect of which an application for rateable distribution is made to it. [p. 750, col. 1.]

Ghunsham Das v. *Uma Pershad*, 50 Ind. Cas. 264; 15 N. L. R. 68; 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.); *In re Sunder Dass*, 11 C. 42; 5 Ind. Dec. (N. S.) 785; *Puran Chand Boid* v. *Surendra Narain Singh*, 16 Ind. Cas. 795; 17 C. W. N. 326; 16 C. L. J. 582, discussed and dissented from.

Peary Lal Das v. *Peary Lal Dawn*, 22 Ind. Cas. 407; 19 C. W. N. 903; 18 C. L. J. 646; *Chhaganlal* v. *Fazarali*, 13 B. 154; 7 Ind. Dec. (N. S.) 103, followed.

In distribution proceedings under section 73, Civil Procedure Code, it is open to an aggrieved decree-holder to file a suit immediately and stop payment to the opposite party by obtaining an injunction. [p. 751, col 1.]

Revision of an order of the Additional District Judge, Jubbulpore, dated the 17th February 1922, in Execution Case No. 1 of 1919.

Messrs. *M. Gupta*, *V. Bose* and *N. G. Bose*, R. B., for the Applicants.

Mr. *M. B. Niyogi*, for the Non-Applicant.

JUDGMENT.—After the decision of their Lordships of the Privy Council in *Ghunsham Das* v. *Uma Pershad* (1), that the mortgage by Dhanroopmal in favour of Chandmal was a mere device for reserving the bulk of the available assets of Dhanroopmal for the benefit of his family and indirectly for himself, the present applicants, the sons and grandsons of Chandmal, brought this suit based on accounts against Dhanroopmal in the Court of the Additional District Judge at Ajmere-Merwara. The

(1) 50 Ind. Cas. 264; 15 N. L. R. 68; 17 A. L. J. 410; 36 M. L. J. 483; (1919) M. W. N. 513; 10 L. W. 511; 21 Bom. L. R. 472; 23 C. W. N. 817; 1 U. P. L. R. (P. C.) 86 (P. C.).

MAGANMAL *v.* RAGHUNATHRAO.

claim admittedly included the consideration of the mortgage. The suit was referred to arbitration and a decree was passed in favour of the plaintiffs in accordance with the award. The decree was sent to the District Court at Jubbulpore for execution and the plaintiffs applied for rateable distribution of certain assets of Dhanroopmal held by Jubbulpore Court. Other holders of the decree against Dhanroopmal opposed the application on the ground that the plaintiffs' decree was obtained by collusion, no debt being really due by Dhanroopmal. The applicants contended that the Court had no power to investigate into the question of the *bona fides* of the decree. The Court deciding that it had that power has fixed a date for the submission of detailed statements by the various parties. The applicants have come up in revision.

The point to be decided in the present case is, whether a Court charged with the distribution of assets under section 73, Civil Procedure Code, has power to go into the question of the *bona fides* of a decree in respect of which an application for rateable distribution is made to it.

The earliest case cited on the point is *In re Sunder Dass* (2), where it was held that the words "decree-holders" or "persons holding decrees for money against the same judgment-debtor", in section 295 of the Code of Civil Procedure, corresponding to section 73 of the present Code, meant *bona fide* holders of decrees against the judgment-debtor and that if, in point of fact, a decree in respect of which rateable distribution was applied for was a sham decree the Court had a right to enquire into the question and to exclude its holder from the distribution of assets. It was held that the Court was bound to see when assets were to be distributed whether the claimants were *bona de* decree-holders within the meaning of the section. It was pointed out that if a view contrary to the one taken in the case was adopted the section would give rise to a great deal of fraud and all the assets might be swept away from *bona fide* decree-holders by sham decree-holders. This case was followed in *Puran Chand Boid* v. *Surendra Narain Singh* (3) and *Peary Lal Das* v. *Peary Lal Dawn* (4). In *Puran Chand Boid* v. *Surendra Narain Singh* (3) the reasons which induced the Judges to accept the view in *In re Sunder Dass* (2) were (1) the fear of a contrary view giving rise to fraud, (2) the fact that the view in *In re Sunder Das* (2) was followed in *Chhaganlal* v. *Fazarali* (5), and (3) that the Legislature with the knowledge of these two rulings did not alter section 295 so as to indicate that the view taken in these two rulings was erroneous. The decision in *Peary Lal Das* v. *Peary Lal Dawn* (4) was by the same Judges as in *Puran Chand Boid* v. *Surendra Narain Singh* (3).

A different view was taken in *Saravana Pillai* v. *Arunachalam Chettiar* (6), where it was held that an enquiry under section 73 of the Civil Procedure Code is of a non-judicial character and a Court charged with the distribution of assets under that section had no power to enquire into the validity of the *bona fide* of a decree on the strength of which rateable distribution is claimed. Reliance was placed upon the opinion of their Lordships of the Privy Council in *Shankar Sarup* v. *Mejo Mal* (7) that "the scheme of section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights." It may be noted that in *Raghu Nath Gujrati* v *Rai Chatraput Singh* (8), Mcalean, C. J., had some doubt as to the soundness of the decisions in *In re Sunder Dass* (2) and *Chhaganlal* v. *Fazarali* (5). In *Dattatraya Govindseth* v. *Purshottam Narayanseth* (9) and *Chhaganlal* v. *Fazarali* (5) was expressly overruled and it was held that, where the Court is concerned with distributing assets under section 73 it has no power to go behind the decrees which are pre-

(2) 11 C. 427; 5 Ind. Dec. (N. S.) 785.
(3) 16 Ind. Cas. 795; 17 C. W. N. 326; 16 C. L. J. 582.
(4) 22 Ind. Cas. 407; 19 C. W. N. 903; 18 C. L. J. 646.
(5) 13 B. 154; 7 Ind. Dec. (N. S.) 103.
(6) 38 Ind. Cas. 117; 40 M. 841; 21 M. L. T. 225; (1917) M. W. N. 280; 5 L. W. 538; 32 M. L. J. 553.
(7) 23 A. 213; 5 C. W. N. 649; 3 Bom. L. R. 713; 28 I. A. 203; 8 Sar. P. C. J. 72 (P. C.).
(8) 1 C. W. N. 633.
(9) 65 Ind. Cas. 600; 46 B. 635; 24 Bom. R. 15; (1922) A. I. R. (B.) 31.

sented by the various decree-holders asking for rateable distribution.

I prefer the view taken in *Saravana Pillai* v. *Arunachalam Chettiar* (6) and *Dattatraya Govindseth* v. *Purshottam Narayanseth* (9) to that taken in *In re Sunder Dass* (2). The reasons in those cases commend themselves to me and need not be repeated. The third of the reasons given above which induced the Judges in *Puran Chand Bord* v. *Surendra Narain Singh* (3) to accept the view in *In re Sunder Dass* (2) has been met in *Saravana Pillai* v. *Arunachalam Chettiar* (6). As regards the fear that a contrary view would give rise to fraud it may be answered that it would be always open to the aggrieved decree-holder to file a suit immediately and stop payment to the opposite party by obtaining an injunction. The view in *In re Sunder Dass* (2) is based upon one consideration of expediency but it overlooks another, namely, whether it is expedient to allow lengthy investigation into the validity of one or more decrees in a proceeding under section 73. In support of its decision to make the enquiry into the *bona fides* of the decree in question the lower Court argues that it does not find anything in section 73 of the Civil Procedure Code which prevents it from making the enquiry. The argument is without force. Because the section does not prohibit an enquiry, it does not follow that the Court has power to make it. I fail to see that section 151, Civil Procedure Code, on which the respondents' Pleader relies has any application in the case.

Holding that the lower Court had no power to enter into an investigation as to the *bona fides* of the plaintiffs' decree, I direct it to proceed with the distribution in accordance with law. The application is allowed with costs. Pleader's fee Rs. 25.

G. R. D. & N. H.

Application allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 20 OF 1922.

July 26, 1922.

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

BANSI—DEFENDANT—APPELLANT

versus

RAM BARAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Pre-emption—Wajib-ul-arz, *entry in, presumption as to rebuttal of.*

The *Wajib-ul-arz* of a village drawn up at the Settlements of 1833 and 1860 recorded the existence of a custom of pre-emption. At the time of the Settlement of 1860, however, a note was recorded that the village was waste or desolate up to 1829:

Held, that the note was insufficient to rebut the presumption of the existence of the custom of pre-emption.

First appeal from an order of the Subordinate Judge, Gorakhpur, dated the 29th of November 1921.

Dr. *Kailas Nath Katju* and Pandit *Hari Kishen Kaul*, for the Appellant.

Dr. *S. M. Sulaiman*, Munshi *Jang Bahadur Lal* and Mr. *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.—The question in issue is whether the plaintiff claiming pre-emption has proved the existence of a custom of pre-emption in the village in suit. The entries in the *wajib-ul-arzes* drawn up at the two Settlements of 1833 and 1860 are *prima facie* records of an existing custom. There were at least three co-sharers in the former year and a number of co-sharers in the latter year. The main contention before us is that this evidence is sufficiently rebutted by a note recorded at the time of the Settlement of 1860, to the effect that this village had been waste or desolate up to the year 1829. We do not think this is sufficient to rebut the presumption raised in favour of the plaintiff. We dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

CHUNI LAL *v.* GULZARI LAL.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 101 OF 1923.

July 28, 1923.

Present:—Mr. Justice Baker, Offg. J. C.

CHUNI LAL—DECREE-HOLDER—APPLICANT

versus

GULZARI LAL—JUDGMENT-DEBTOR—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 49 —Assignment of decree—Equities of judgment-debtor against original decree-holder—Effect on assignment.

R obtained a decree on 9th February 1922 against *C* and assigned it to *C*, on the same date. *G* filed a suit against *R* on 13th June 1922 on a separate cause of action and obtained a decree on 30th August 1922. *G* deposited the amount due under the decree of *R* and got it attached in execution of his own decree. *C* applied to have the attachment raised:

Held, in revision that as *G* had made cross-claim in the suit by *R*, the latter had notice of the claim though the suit was actually brought afterwards and assignee took the assignment subject to the claim of *C* under section 49 of the Civil Procedure Code.

Under section 49 of the Civil Procedure Code, the transferee of the decree holds it subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Application for revision of an order of the Small Cause Court, Khurai, dated the 24th February 1923, in Execution Case in Civil Suit No. 1765 of 1921.

Mr. *K. V. Deoskar*, for the Applicant.

Mr. *G. L. Subedar*, for the Non-Applicant.

ORDER.—The facts of this case are that one Ram Bharose obtained a decree against the non-applicant Gulzarilal in the Small Cause Court at Khurai on 9th February 1922 and on the same day assigned it to the applicant Chunilal. The non-applicant raised a contention that the transfer was fraudulent and bogus. That contention has now been decided and it has been held that the transfer was genuine and for consideration.

On the 13th June 1922 the non-applicant Gulzarilal filed a regular suit against the assignor and obtained a decree on the 30th August 1922. The non-applicant deposited the decretal amount of Rs. 148-10-0 due under the decree which was assigned to the present applicant and then got it attached in execution of his own decree. The applicant applied to have the attachment raised, but the Small Cause Court dismissed the application holding that the case was governed by section 49 of the Civil Procedure Code and relied on *Kristo Ramani Dassee* v. *Keder Nath* (1) and *Sinnu Pandaram* v. *Santhoji Row* (2).

It is contended that neither of these cases will apply because in *Kristo Ramani Dassee* v. *Keder Nath* (1). the suit was pending at the date of the assignment and *Sinnu Pandaram* v. *Santhoji Row* (2). refers to cross-decrees passed on the same day. I am, however, of opinion that the view of the lower Court is correct, as the non-applicant put in a cross-claim in the Small Cause Court, in which the applicant, assignor, obtained a decree but the non-applicant was referred to a regular suit. He, therefore, had notice of the claim, though the suit was not actually brought till afterwards. In *Mon Mohan* v. *Dwarka Nath* (3) it was held that notice is not necessary. Under section 49 of the Code of Civil Procedure the transferee of the decree holds it subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder. Had there been no transfer and had Ram Bharose remained the original decree-holder, the judgment debtor could have prevented the execution of the decree against him until the disposal of his own suit.

The application is accordingly dismissed with costs.

G. R. D. *Application dismissed.*

(1) 16 C. 619; 8 Ind. Dec. (N. S.) 408.
(2) 26 M. 428; 12 M. L. J. 398.
(3) 7 Ind. Cas. 55; 12 C. L. J. 312.

MANNA LAL *v.* EMPEROR

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 275 OF 1923.
August 29, 1923.
Present:—Mr. Wazir Hassan, A. J. C.

MANNA LAL AND OTHERS— ACCUSED— APPELLANTS
versus
EMPEROR—COMPLAINANT— RESPONDENT.

Evidence Act (I of 1872), ss. 27, 114, 133—Accomplice, testimony of—Corroboration—Circumstantial evidence—Retracted confession, value of—Confession to Police—Discovery consequent upon confession—Statement, how far admissible—Criminal Procedure Code (Act V of 1898), s. 162—Police diaries, use of.

The rule of law enacted in section 133 of the Evidence Act must be subjected to the test deduced from the accumulated experience of human conduct in relation to the testimony of an accomplice. The guiding rule in this behalf is furnished by Illustration (*b*) of s. 114 of that Act which lays down "that an accomplice is unworthy of credit unless he is corroborated in material particulars." [p. 755, col. 2.]

An accomplice is too immoral a person to be worthy of credit without corroboration in material particulars and if corroboration is not forthcoming, because it is not possible in the nature of things that it should be forthcoming, it does not make the accomplice less immoral or his uncorroborated testimony less unworthy of credit. [p. 755, col. 2.]

It would be wholly unsafe to treat a piece of circumstantial evidence which is widely dissociated from the *corpus delicti* as a material particular to be of any corroborative value to the testimony of an accomplice. [p. 756, col. 1.]

In cases dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [p. 756, col. 1.]

The favourable impressions on the Judge's mind as to the demeanour of an accomplice in Court cannot take the place of corroboration in material particulars to make the testimony of the accomplice worthy of credit. [p. 756, col. 1.]

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of his guilt without independent corroborative evidence. But the credibility of a confession is in each case a matter to be decided by the Court in the light of the circumstances in which the confession was originally made and in which it was afterwards withdrawn. [p. 756, col. 2.]

So much of a confession made to the Police as directly leads to the recovery of certain articles is admissible in evidence but a further statement with regard to them, for instance, that they were stolen property, is no part of the information directly leading to their discovery and is inadmissible under section 27 of the Evidence Act. [p. 758, col. 1.]

Section 162 of the Code of Criminal Procedure forbids reference to Police diaries or to their use as evidence either for or against an accused person and a consent or desire on the part of the defence Counsel cannot legalise such reference or use. [p. 760, col. 1.]

Appeal against an order of the Second Additional Sessions Judge, Lucknow, dated the 10th May 1923.

Mr. *Ajit Prasad*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—The appellants, Manna Lal, Lachman Singh and Deep Singh, have been convicted and each has been sentenced to seven years' rigorous imprisonment under section 395 of the Indian Penal Code, by the learned Second Additional Sessions Judge of Lucknow.

The case is a difficult one and I have given it prolonged and anxious thought. All the three appellants were represented before me by a Counsel and the arguments occupied two days' time. Since the close of the arguments I took time to consider my judgment in the case.

On the night following the 2nd November 1922, a dacoity was committed in the house of one Ganga Sewak, in village Lalupur, in the District of Unao. That the dacoity was committed is not disputed before me. It is urged, however, on behalf of the appellants that none of them took part in the commission of the dacoity. The case for the prosecution as a whole rests on the statement of Ganga Prasad (P. W. No. 27) and the retracted confession of Manna Lal, appellant. To that statement and to that confession are added the testimony of two witnesses, Ganga Sewak, the victim of the dacoity, and Ram Adhar, son of Ganga Sewak, in so far as the complicity of the appellant, Lachman Singh, is concerned and the recovery of some stolen property in so far as the other two appellants are concerned. Ganga Prasad, to quote the learned Judge, "is on his own showing very nearly an accomplice" Manna Lal retracted his confession as soon as he was put before the Committing Magistrate.

The story related by Ganga Prasad reveals startling details of a plan concerted by a party of fourteen persons including himself and the appellants, Manna Lal and Deep

Singh for the commission of the dacoity in question. It so happens that Ganga Prasad breaks off at a tangent from the party about three hours before the actual execution of the plan, with the result that he does not participate in the commission of the crime. His version is, that 8 or 9 months before the dacoity under consideration, those fourteen persons organised themselves into a gang for the purpose of committing dacoities; that previous to the dacoity in question various members of this gang committed larceny by housebreaking on three occasions and two unsuccessful attempts at similar offences in each of which Ganga Prasad participated: that two or three days before the last *Diwali* festival plans were made for the commission of the dacoity in question at a meeting of the gang held in the house of Deep Singh, appellant, and the scene of the dacoity was fixed upon at the suggestion of one Puttu Lal, whose uncle, Debi Dial, lived in village Lalupur; that Puttu Lal paid a visit to his uncle on the *Diwali* day and he was accompanied by Manna Lal and on his return reported that the coast was safe and clear for the contemplated action; that two days before the *Katiki* festival, that is, on the eve of the dacoity eleven members of the gang, including Ganga Prasad and the appellants, Manna Lal and Deep Singh, assembled at the house of the last mentioned person in the City of Cawnpore and a messenger was sent to village Banthar to fetch three other persons from there; that a guava grove on the Unao side close to the Gangaghat bridge was fixed upon as the spot of rendezvous: that ten members of the gang came to this grove from Cawnpore and were subsequently joined by four others from Banthar, and that Ganga Prasad left the party consisting of thirteen members in the grove and went to the *bazar* at Gangaghat in order to purchase cigarettes where he came across his uncle, Jamna Narain and the two went to Cawnpore.

The First Report relating to the dacoity in question was made at the Police station Unao on the 3rd November 1922 after 4 P. M. by the *Chaukidar* of the village, named Sheo Ratan. Raghubar Dial, Sub-Inspector, arrived at the scene of the dacoity at 4 A. M. on the 4th November 1922. Three or four days after, he arrested Lachman Singh, appellant, but as there was no sufficient evidence against him he was released under section 169 of the Code of Criminal Procedure. Nothing seems to have transpired till the 30th November 1922 when Ganga Prasad visited the house of Jiwan Singh, the Officer-in charge of the Police station Colonelganj, in the City of Cawnpore, and laid information in respect of the dacoity under consideration. On the basis of the said information Jiwan Singh arrested several persons, including Manna Lal, appellant, and recovered several articles from the possession of the arrested persons which were said to be the property stolen at the dacoity in question. Manna Lal was admitted into the Cawnpore Jail on the 2nd December 1922 and on the 4th December 1922 he made a confession which was recorded within the Jail precincts by a Magistrate of the First Class exercising jurisdiction in Cawnpore. After several remands had been obtained from a Magistrate of Cawnpore, and during all of which Manna Lal was in the custody and company of the Police of Cawnpore for the avowed object of securing his assistance in the matter of investigation, the case was presented by the Police before Babu Shambhu Nath, a Magistrate of the First Class of Unao, for inquiry on the 20th December 1922. For some reason or another the hearing of the case was adjourned on several occasions till the 9th January 1923 when the first witness for the prosecution was examined. The inquiry began as against the following thirteen persons:—

(1) Sardar Singh of village Jarkal, Police station Bahdeo, District Cawnpore,

(2) Kashi Prasad of village Nari, Police-station Unao.

(3) Dania Singh of village Nari, Police-station Unao.

(4) Sohan Lal of village Nari, Police-station Unao.

(5) Deep Singh of village Nari, Police-station Unao.

(6) Manna Lal of Sukhan Sarai, Police-station Safipur, District Unao.

(7) Puttu Lal *alias* Putti of village Bharsar Nao Snara. Police-station Fatehpur Chaurasi, District Unao.

(8) Raghuraj Singh of village Paithara, Police-station Achalganj; District Unao.

(9) Gajraj Singh of village Paithara, Police-station Achalganj, District Unao.

(10) Bhore Singh of village Paithara, Police-station Achalganj, District Unao.

(11) Mannu Singh of village Paithara, Police-station Achalganj, District Unao.

(12) Ram Narain of village Paithara, Police-station Achalganj, District Unao.

(13) Lachman Singh of Lalupur, Police-station Unao.

On the 6th February 1923 the inquiry in the Court of the Committing Magistrate was closed. On the same date the case against the following six accused persons:—namely, Mannu Singh, (2) Raghuraj Singh, (3) Gajraj Singh, (4) Sardar Singh, (5) Sohan Singh, and (6) Dania Singh, was withdrawn by the prosecution and the remaining seven persons, that is, (1) Manna Lal, (2) Puttu, (3) Lachman Singh, (4) Deep Singh, (5) Kashi Prasad (6) Ram Narain, and (7) Bhore Singh, were committed to the Court of Session for trial on a charge under section 395 of the Indian Penal Code. These seven persons were consequently tried by the Court of Session with the result that Kashi Prasad, Bhore Singh, Ram Narain and Puttu were acquitted and the remaining three, that is, Manna Lal, Deep Singh, and Lachman Singh, were convicted and sentenced as stated at the outest of this judgment. They are the appellants in this Court.

The first question for consideration is, how far the evidence of Ganga Prasad can be trusted in the circumstances of this case. The learned Additional Sessions Judge has given to his evidence the treatment which would be accorded to the evidence of an accomplice and I am of opinion that the learned Judge has acted rightly in doing so. On the merits of his evidence, the learned Judge is of opinion that Ganga Prasad has spoken the truth. He observes, and I think rightly, that from the very nature of Ganga Prasad's statement it is obvious that there is little room for corroboration. He relies too largely on the impression left on his mind by the demeanour of the witness in the box and also by "his statement all along." According to section 133 of the Indian Evidence Act, a conviction would not be illegal because it proceeds upon the uncorroborated testimony of an accomplice. The learned Judge has, however, refrained from basing his order of conviction on the testimony of the accomplice alone. I also am of opinion that, in the circumstance of this case, Ganga Prasad's testimony without material corroboration could not safely be made the basis of conviction. The rule of law enacted in section 133 of the Indian Evidence Act must be subjected to the test deduced from the accumulated experience of human conduct in relation to the testimony of an accomplice. The guiding rule in this behalf is furnished by Illustration (*b*) of section 114 of the Indian Evidence Act, which is as follows :—"that an accomplice is unworthy of credit unless he is corroborated in material particulars." The learned Judge and I are agreed that a conviction cannot be based on the uncorroborated testimony of Ganga Prasad. It follows that if, in the nature of the thing itself, corroboration is not possible at all or at any rate, is not possible with regard to material particulars, Ganga Prasad's statement must be rejected as unworthy of credit. I cannot conceive how the absence of corroboration in material particulars can be a substitute for corroboration in those particulars where corroboration is not possible. It would be a perversion of the lesson gained by accumulated experience of the conduct of an accomplice to adopt any such rule of practice as that where no corroboration is possible his testimony may be accepted as true without corroboration. An accomplice is too immoral a person to be worthy of credit without corroboration in material particulars and, if corroboration is not forthcoming because it is not possible in the nature of things that it should be forthcoming, it does not make the accomplice less immoral. It is admitted that there is no corroboration of Ganga Prasad's testimony except on one matter and that matter is that Manna Lal and Puttu visited Lalupur and stayed at the house of the uncle of the latter on the *Diwali* day. The incident of the visit may be true but it has no bearing, even the remotest, on the guilt of the appellants. Further, the visit may be explained by a

reasonable hypothesis supported by evidence on the record. Debi Dial, the uncle of Putti, residing at Lalupur, has been produced as a witness on the side of the prosecution. He said that, ever since Putti left Lalupur ten or eleven years ago, he (Putti) used to visit his house on ceremonial occasions only. He came twice or four times every year. He used to stay one or two days and then go away. Putti's visit, therefore, to his uncle's house on the *Diwali* day was in consequence of his usual practice. The fact that Manna Lal accompanied him is also reasonably probable on a hypothesis other than the guilt of the appellants. It is proved that Manna Lal and Putti were friends. It is also proved that they lived in the same quarter, though in different rooms, at Cawnpore, and were both employed in a Factory at that place. Manna Lal, therefore, might reasonably be expected to have accompanied Putti to the latter's native village when he was making a visit to it on a day of festival. At the best, the fact that they both paid this visit is a piece of circumstantial evidence but so widely disassociated with the *corpus delicti* that it would be wholly unsafe, in my opinion, to treat it as a material particular at all. As has just now been pointed out, this visit of Putti is as consistent with innocence as with the guilt of the appellants, other than Lachhman Singh, that it cannot have any probative force. The principle is a fundamental one and of universal application in cases dependent on circumstantial evidence that, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. I am, therefore, of opinion, that there is no corroboration whatsoever of the testimony of Ganga Prasad. As pointed out before, the learned Judge seems to be much impressed with the demeanour of Ganga Prasad in the witness-box. To my mind such impressions are too ephemeral in their character to take the place of corroboration in material particulars to make the testimony of an accomplice worthy of credit. There is one fact which looms large in the evidence of Ganga Prasad and I attach very great importance to it. Taylor in his well-known book on the Law of Evidence quotes the following passage from Macaulay's History of England in dealing with the evidence of an accomplice: "It used to be a popular saying that they fished for prey, like tame cormorants, with ropes round their necks." Taylor on Evidence, 11th Edition, Volume I, page 661. There can be no doubt that Ganga Prasad threw his net too wide. He wanted to make a big haul of thirteen persons all of whom were eventually accused by the Police and put before the Committing Magistrate as persons who had committed the dacoity in question. As against six of these thirteen men the case broke down in the Court of the Magistrate. Out of the remaining seven, four have been acquitted by the learned Additional Sessions Judge. On the principle that of things which are not proved and of things which are non-existent the reckoning is the same in a Court of Law, I must hold that these ten men were not guilty of the offence with which they were charged and the evidence of Ganga Prasad implicating them was false. What is the conclusion to which we are driven? It is, that the proportion of falsehood over truth is so great in the testimony of Ganga Prasad that it would be fairly reasonable to characterise it as false *in omnibus*. The guarantee for truth by corroboration does not exist as shown before. The *intrinsic* merit is the preponderance of falsehood. Ganga Prasad's evidence must, therefore, be rejected as unworthy of credit.

Now, I turn to Manna Lal's confession. As stated before, Manna Lal was arrested on the night of the 30th November 1922. He was admitted into the Cawnpore Jail on the 2nd December 1922. Within that interval he was in the custody of the Police. Yet another day elapsed before his confession was recorded in Jail on the 4th December 1922. It appears from Exhibit Q on the record that Manna Lal returned to the Police custody and was in their company during the progress of the investigation. Two conclusions flow from the above facts:—(1) the confession was a belated one; (2) Manna Lal was an instrument in the hands of the Police for the purpose of investigation. These conclusions raise, in my judgment, a cloud of suspicion as regards the truth of Manna

Lal's confession, though on the evidence I must hold that it was a voluntary one but that is quite a different thing from being a true one. The learned Judge observes more than once in his judgment, that "it is not easy to understand the psychology of a confessing prisoner and he cannot always be expected to state not only the truth but the whole truth." But it is the foremost duty of a Judge to bring to bear his knowledge and expreience of human conduct, in circumstances like these, on the consideration of the evidential value of the confession of a prisoner. The first thing to be borne in mind is that the confession with which we are concerned in this case was retracted at the earliest opportunity. Further, the learned Judge has given cogent reasons for the opinion that the bulk of the statement made by Manna Lal in retracting his confession is untrue. It follows that Manna Lal has no conscience. In the *Reg.* v. *Thompson* (1), Cave, J., made the following observation :—"I would add that for my part I always suspect these confessions which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession ;— a desire which vanishes as soon as he appears in a Court of Justice." Such being the setting in which Manna Lal's confession is placed, I have grave doubts as to its being true. "False confessions are generally made by a prisoner who, oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession, and the same result may have arisen from a morbid ambition to obtain an infamous notoriety, from an insane or criminal desire to be rid of life, from a reasonable wish to break off old connections, and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade, or even from the delusion of an overwrought and fantastic imagination." Taylor on Evidence, 11th Edition, Volume I, section 863.

It seems now to be the settled opinion of all the High Courts in India that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of his guilt without independent corroborative evidence. To this opinion I respectfully bow, but the weight to be given to such a confession must depend upon the circumstances in which the confession was originally made and the circumstances in which it was afterwards withdrawn. The credibility of a confession is in each case a matter to be decided by the Court in the light of the circumstances of every particular case. The treatment accorded by the Police to Manna Lal previous to and after the making of the confession and Manna Lal's conduct on both these periods while in the custody of the Police lends strong support to his statement that he made the confession in hopes of his being turned into a Crown witness. For my purposes it is not necessary to find so positively. It is enough if the circumstances of the case afford reasonable grounds for suspecting the truth of the confession. It is to be noted that Manna Lal's confession has been used not only as against him but also as against his co-accused. This is permissible under section 30 of the Indian Evidence Act, but we must not forget the precise terms prescribed by that section for using such a confession as against other co-accused. The section says that as against them "the Court may take into consideration such confession." This confession, therefore, by itself cannot be treated as sufficient evidence upon which a conviction could be based either of Manna Lal himself or of his co-accused.

Now arises the question whether this confession is corroborated *aliunde* by reliable and independent evidence bearing on material particulars. The learned Judge thinks that there is such a corroboration. First, as against Manna Lal himself. Exhibit 1 is a yellow sheet of cloth found in Manna Lal's room at the

(1) (1893) 2 Q. B. 12 at p. 18; 62 L. J. M. C. 93; 5 R 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P. 312.

time of his arrest at Cawnpore. This is an article which would ordinarily be possessed by a man in the position of Manna Lal. A similar one might also have been possessed by Ganga Sewak and lost in the dacoity. No particular characteristics are stated in the evidence relating to the identification of Exhibit 1 which would make it out beyond reasonable doubt that it was the property of Ganga Sewak and of nobody else. The recovery of Exhibit 1, therefore, from the possession of Manna Lal is not, to my mind, a sufficient corroboration of the retracted confession. Exhibits 2, 3 and 5 are cloths recoverd by the Police from the house of the brother of Manna Lal's father-in-law in village Piarepur, situate at a distance of more than 12 miles from the residence of Manna Lal at Cawnpore. So much of the confession of Manna Lal which he made to the Police as directly led to the recovery of these articles, namely, Exhibits 2, 3 and 5, is admissible in evidence, but his further statement with regard to them that they were stolen property is clearly inadmissible. The last mentioned statement was no part of the information which directly led to the discovery of those articles (*Vide* section 27 of the Indian Evidence Act). Exhibit 2 is a *lahnga*, skirt; Exhibit 3 an *orhni*, and Exhibit 5 a *dupatta*. Manna Lal's case is that these articles belong to his wife. Whether this is true or not I am clearly of opinion that their recovery has no bearing on the guilt of Manna Lal. They were not recovered from his possession nor were they recovered from a place which was accessible to him alone or even under his control in any sense of the word. Manna Lal's father-in-law is the *zemindar* of Piarepur owning a 4-pies share and his brother from whose house articles 2, 3 and 5 were recovered is also a *zemindar* owning a 12-pies share in the same village. According to the prosecution Manna Lal had stated that Exhibit 2, the *lehnga*, would be found in his wife's possession at his father-in-law's house. As a matter of fact, it was not found in his wife's possession or in that house, but it was discovered in a separate house of the brother of Manna Lal's father-in-law. Besides, these articles are of very common nature likely to be possessed by persons of Manna Lal's father-in-law's or his brother's status. In the circumstances, I am unable to treat this evidence as corroborative of Manna Lal's confession as to his own guilt or the guilt of his co-accused.

As against the appellant Deep Singh, the corroborative evidence consists of the recovery of a waistcoat, Exhibit 7, from his house in village Sheikhpur Nari. Deep Singh lives and works at Cawnpore. The village Sheikhpur Nari is at a distance of about ten miles from Cawnpore. The dacoity in question was committed about 30 days before this recovery. There is no evidence that in the interval Deep Singh visited his native village. His brother, Dunia Singh, was also one of the persons *challaned* by the Police but discharged in the Court of the Committing Magistrate. Besides him, three other accused, who have since been either discharged or acquitted, that is, Kashi Prasad, Sardar Singh and Sohan Singh, are also resident of Sheikhpur Nari. In the circumstances, therefore, the fact that Exhibit 7 was found in one of the houses in the village does not to my mind bring home to Deep Singh the responsibility for the possession of that article. In fact, it would be wholly an incorrect use of the language to say that Deep Singh was found in the possession of this article.

As against Lachman Singh, the corroboration rests on the testimony of Ganga Sewak and his son, Ram Adhar. I agree with the learned Judge that if these two witnesses are believed there can be no doubt about Lachman Singh's guilt but, for the reasons now to be stated, I am unable to believe them. As I have said, the first report was made by the *Chaukidar* of the village. He was examined as a witness at the trial in the Court of Session. He confirms the report which he made. The report distinctly says that what he stated was on the information supplied by Ganga Sewak. According to the report all that Ganga Sewak said with regard to Lachman Singh was that somebody called out to open the door and that he thought that it might be Lachman Singh. In his evidence She oratan said as follows:—"Ganga Sewak told us that Lachman Singh, the *mukhia* of Lalupur, called at his door and that he

opened the door on recognising Lachman Sihgh's voice. He said that Lachman Singh had called at his door at about 12 o'clock in the night. When he opened the door two dacoits caught him and two others caught his son and the remaining dacoits entered the house." In cross-examination he stated, "When I asked Ganga Sewak if he had recognised any one of the dacoits he said that he had not. . . . .Ganga Sewak also said that he did not see Lachman Singh, accused, with his own eyes but only recognised Lachman Singh's voice. Ganga Sewak and Ram Adhar also told me that the dacoits held them down and closed their eyes so that they were unable to identify any one of the dacoits." On the other hand, Ganga Sewak said in his evidence in the Court of Session that when he went out, he saw Lachman Singh and thirteen or fourteen other persons standing outside, and that Lachman Singh caught hold of him by the hand and then turned round to his companions and said "hold this *sala* securely" two of the dacoits then caught hold of me and Lachman Singh then left the place." After the dacoits ran away some of the villagers, including Lachman Singh, came to the house of Ganga Sewak. Amongst these villagers, were Debi Dial (P. W. No 11), Durga Chaube (D. W. No. 2) and Badri Singh (D. W. No. 3). Ganga Sewak says, "It was before all these people that I mentioned the whole incident how Lachman Singh called me, how I came out, how Lachman Singh caught me and then made me over to the safe custody of his companions." The story related by Ram Adhar is substantially the same as that given by his father, Ganga Sewak. Debi Dial says: "So long as I stayed there Ganga Sewak and Ram Adhar did not state that Lachman Singh caught hold of Ganga Sewak when the latter came out of his house and made him over to other dacoits who seized him." Ganga Sewak and Ram Adhar are, therefore, clearly contradicted on a very material point by Sheo Ratan, the *Chaukidar*, and Debi Dial. Durga Chaube (D. W. No. 2), who was admittedly present on the occasion when Ganga Sewak related the story of the dacoity, says: "I asked Ganga Sewak how the dacoits entered the house. He replied that he opened the door of the house on the call of Lachman Singh. I then asked if he recognised Lachman Singh. He replied that he did not identify anybody because ten or twelve men caught hold of him as soon as he came out of the door and closed his eyes." The evidence of Badri Singh (D. W. No. 3) gives the same version. It will thus be seen that the statements of Durga Chaube and Badri Singh fall in with the evidence of Sheo Ratan, *Chaukidar*, and Debi Dial (P. W. No. 11). I cannot dismiss the evidence of these two persons nor of the *Chaukidar* on the conjecture that they are supporting the case of Lachman Singh by deliberately concocting a false version as to what happened when the villagers assembled at Ganga Sewak's house soon after the dacoity. Further, it should be remembered that Lachman Singh was at first arrested but was shortly afterwards released under section 169 of the Code of Criminal Procedure obviously on the ground that there was no sufficient evidence against him, as Raghubar Dial, the Police Officer, who first made investigation in the case, says. We have also from him that a *badmashi* case was lodged against Lachman Singh after his release under section 169 of the Code. That case was, however, dropped when he was subsequently arrested in connection with the dacoity under consideration. Raghubar Dial in his statement in the Court of Session says: "In their statements before me Ganga Sewak and Ram Adhar said that the dacoits had closed their eyes and so they could not identify any body." The learned Judge says, that the Counsel for the accused dropped the point after that statement was made, but he pursued it and the result was that Raghubar Dial, in answer to questions put by the Court, said: "From the statement of Ganga Sewak made before me it was clear that he identified Lachman Singh not only by the latter's voice but after the door of the house had been opened." I confess my inability to reconcile the two statements quoted above. They are clearly contradictory of each other and thus support the view that Ganga Sewak and Ram Adhar are not telling the truth in this behalf.

Before I take leave of the case, there is

one matter to which I wish to make a particular reference. Frequent use is made by the learned Judge of the general and the special diaries of the Police for the purpose either of supporting the evidence of a prosecution witness or rebutting the arguments of the Counsel for the defence. To begin with, the special diary of the 1st December 1922 is referred to for the purpose of showing that Manna Lal, accused, had made his confession to Jiwan Singh, Sub-Inspector of Police, at Cawnpore to whom the first clue was supplied by Ganga Prasad. Again, reference is made to the same diary for the purpose of discovering the details of Manna Lal's confession made to the Police and recorded therein. Yet, again, reference was made to the special diary of Raghubar Dial with a view to find out as to whether Ganga Sewak and Ram Adhar had or had not mentioned to that officer that they had identified Lachman Singh. Lastly, Raghubar Dial's special diary is again referred to to support the identification of Exhibit 7 by its description given by Ganga Sewak and recorded in the diary. It appears from the judgment of the learned Judge that some of the references were made with the consent, or at the desire, of the Counsel for the defence. This consent or desire cannot, however, legalise the procedure adopted at the trial of this case in the matter of using these diaries as evidence in the case either for or against the accused. Such a procedure is clearly prohibited by section 162 of the Code of Criminal Procedure. These diaries have so often been relied upon by the learned Judge on points of substance in the case that it would be difficult to say that if they had not been so relied upon the learned Judge would have come to the same conclusion as he did in respect of the guilt of these appellants. "In a criminal proceeding the question is not alone whether substantial justice has been done according to law. All proceedings in *poenam* are, it need scarcely be observed, *strictissimi juris*" per Cockburn, C. J., in *Martin* v. *Mackonochie* (2).

I, therefore, allow the appeals, set aside the conviction and sentence as against each of these three appellants and direct that they be released forthwith.

M. D. J. & N. H. *Appeal accepted.*

(2) (1878) 3 Q. B. D. 730 at p. 775.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 516, 517 AND 518 OF 1923.

August 16, 1923.

Present:—Mr. Justice Krishnan.

THE PUBLIC PROSECUTOR—APPELLANT

versus

PACHAPPA MUDALIA AND OTHERS—ACCUSED—RESPONDENTS.

Madras Local Boards Act (XIV of 1920), s. 129—Absence of drain or cesspool—Sewage water allowed to overflow on road—Offence.

There is no provision in the Madras Local Boards Act, XIV of 1920, which imposes upon a local authority any obligation to construct a drain or cesspool in every street. The absence of a drain or cesspool is not an excuse or justification for the owner of the premises for letting sewage water flow over the neighbouring road. Such an act is an offence under section 129 of the Act. [p. 761, col. 2]

Queen-Empress v. *Sevudappayyar*, 15 M. 91; 1 Weir 747; 5 Ind. Dec. (N. S.) 412, *Emperor* v. *Nagan Chetty*, 30 M. 221; 17 M. L. J. 372; 6 Cr. L. J. 235, followed.

Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Second Class Magistrate, Arni, North Arcot, in C. C. Nos. 2, 3 and 4 of 1923 respectively on his file.

Mr. *V. Ramaswami Iyengar*, for the Accused.

The Public Prosecutor, for the Crown.

JUDGMENT.

CRIMINAL APPEAL NO. 516 OF 1923.
(C. C. No. 2 of 1923).

The accused has been prosecuted by the Union Board of Arni under section 129 of the Madras Local Boards Act, XIV of 1920, for having allowed his sewage water to run over the adjoining Union road. The Magistrate has found that the sewage water runs into the street and that apparently it gets into a drain on the other side of the street, because the Magistrate says that there is a

drain on the side of the street opposite to where the accused's house stands. The Magistrate has acquitted the accused on the ground that he cannot be expected to construct a culvert or a channel to let the sewage water from his house to flow into the opposite channel without spreading into the street. The Magistrate thinks that it is the duty of the Union to construct such a channel and as they have not done so, the accused must be acquitted.

Now, my attention has not been drawn to any section in the Madras Local Boards Act which imposes upon the Union any obligation to construct a drain or cesspool in every street, though ordinarily one would expect that such a work would be done by the Union for the benefit of the inhabitants of the Union. The absence of a drain does not seem to me to be any excuse or justification under the Act for letting one's sewage water flow over the neighbouring road. Section 129 which runs thus, "No owner or occupier of any premises shall allow the water from any sink, drain, latrine or stable, or any other filth to flow out of such premises to any portion of a public road except a drain or a cesspool" is not governed by any condition that he can do this if there is no drain or a cesspool in the street. Apparently, the idea is that if there is no drain into which the sewage water of the house can be led into without overflowing into the neighbouring road, some arrangement must be made by the house owner to have some place in his own premises to collect and retain the sewage water and either with the help of the Taluk Board or the Union Board under section 127 of the Act or by some other means, see that it is disposed of so that it does not cause nuisance to the neighbours.

A similar question had to be considered with reference to section 222 of the District Municipalities Act, IV of 1884 in two cases, the first reported in *Queen-Empress* v. *Sevudappayyar* (1) and the second in *Emperor* v. *Nagan Chetty* (2). In both these cases it was held that the absence of a drain or cesspool did not justify the owner of the premises to let his sewage water overflow on the road. The obligation is placed upon him by that section just in the same manner as it is placed by section 129 of the Madras Local Boards Act, XIV of 1920, to see that the neighbouring roads are not spoiled by his sewage water, and it was held that if the house-owner broke that obligation he was liable to be convicted and punished though the absence of a drain or a proper place into which the drainage or the sewage water might be allowed to flow could be taken into consideration in assessing the penalty. The position is just the same under section 129 of the Madras Act, XIV of 1920, with which I am now dealing.

I must, therefore, hold that the Magistrate was wrong in acquitting the accused on the ground he took and that the accused is really guilty of an offence under section 129. In the circumstances of the case, I think a nominal fine is sufficient. I would, therefore, convict him of an offence under section 129 and impose upon him a fine of one rupee.

CRIMINAL APPEAL NO. 517 OF 1923.

In this criminal appeal the circumstances are exactly the same as in the previous appeal, and, for the same reasons, I convict the accused of an offence under section 129 and sentence him to pay a fine of rupee one.

CRIMINAL APPEAL NO. 518 OF 1923.

In this case the finding of the Magistrate is that the back door of the house opens upon a street which is three feet lower in level than the adjoining street and as there is no way of carrying the water which flows into the street, it must be necessarily soaking there and the accused is not responsible. But that consideration is quite irrelevant in this matter, for the obligation that is vested upon the accused is, that he should not let his drainage or sewage water run into the street at all and if he does run it there, he is guilty of an offence under section 129. It is not necessary to consider, therefore, what happens to the water after it flows into the street. He is also convicted under section 129 and sentenced to pay a fine of one ruppee.

V. N. V. *Acquittal cancelled.*

(1) 15 M. 91; 1 Weir 747; 5 Ind. Dec. (N. S.) 412.

(2) 30 M. 221; 17 M. L. J. 372; 6 Cr. L. J. 285.

LAHORE HIGH COURT.

FIRST APPEAL FROM ORDER NO. 319 OF 1922.
June 15, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Campbell.

HARPHUL—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164 (2), 364—Confession not recorded in accordance with law—Conflict with prosecution evidence—Confession, value of.

A confession which is not recorded in accordance with the procedure laid down by section 164 (2), read with section 364, of the Criminal Procedure Code, and the details of which conflict with the evidence for the prosecution, and which is retracted on the first possible occasion, is of no value as evidence as against the person making it. [p. 763, col. 2.]

First appeal from an order of the Sessions Judge, Karnal, dated the 22nd March 1922.

Mr. *Nanwa Mal*, for the Appellant.

Mr. *Jai Lal*, R. B., Government Advocate, for the Respondent.

JUDGMENT.—This appeal is by Harphul, a *Jat*, aged 25, of Dhakla, Tahsil Jhajjar, District Rohtak, who has been convicted under section 302, Indian Penal Code, of causing the death, on or about the 8th September 1921, of Kallu, aged 23, a *butcher*, of Rewari. The appellant has been sentenced to death and, together with his appeal, the sentence is before us for confirmation.

The facts found by the learned Sessions Judge are as follows :—On the 8th of September a cattle fair was in progress at Batolak in Jind State, and Chuna, father of the deceased, a cattle-dealer, had come to attend it with his two sons, Kallu, deceased, and Mallu. On the morning of the 8th Kallu entered into negotiations with the appellant for the sale of a bullock and was seen by a lad named Suleman, also a *butcher* of Rewari, about 9 A. M. outside the fair ground with the appellant. The appellant said that they were going to try the animal in a plough and Suleman understood that the animal had been sold for Rs. 105 and that the deceased had been paid Re. 1 as earnest-money. Later in the day, Bakhtawar of Kanithi and Dand Ram of Sentham, both villagers in the Jind State, saw the appellant with the bullock and a young man, who appeared to be a Mussalman, about two *kos* from the fair ground. They were speaking of trying the animal in a plough, but Dand Ram did not allow them to use his plough, and they went away in the direction of the place where the deceased's body was afterwards found. In the afternoon, about 3-30, Chuna and Mallu saw the appellant in the fair with the bullock trying to sell it. They went up and asked him where the deceased was, and he said he did not know. Chuna and Mallu forthwith accused him of making away with Kallu. The bullock was seized and a report was made to the State Officer in charge of the fair and as a result, a Sub-Inspector of State Police arrived from Dadri about sunrise on the 9th. The Sub-Inspector ordered search to be made for Kallu and towards the evening the appellant offered to point out the deceased's dead body. A party proceeded to a piece of waste ground covered with bushes about 3¼ miles from the fair ground, and there the appellant showed the Sub-Inspector the deceased's body lying beneath a tree. The place was within the limits of a village named Barohar in the Rohtak District, and a letter was sent, therefore, to Salhawas *thana* stating shortly that Kallu had been missed and that after search and inquiry Harphul had pointed out his dead body. The letter was received at Salhawas early in the morning of the 10th of September. The Sub-Inspector of Salhawas, Sadiq-ud-din, arrived at the spot about mid-day. On the same day a confession by Harphul, appellant, was recorded by a Tahsildar Magistrate of the Second Class in Jind State, in which the appellant stated that he and two other persons, Jot Ram and Har Lal, had killed the deceased with *lathis*. Sub-Inspector Sadiq-ud-din examined the body and prepared the usual statements. It was already decomposed. The chest was blood-stained. A *dhoti* and a *chadar* had blood on them. There were scratches on the hands and feet and rents in the neck and stomach. A note was made in the *naqsha mazrubi* that death appeared to be due to *lathi* blows, but there was no note of marks of such blows.

The *post mortem* examination of the dead body was held by the Civil Surgeon of Rohtak on the 11th. Decomposition

was so far advanced that the Civil Surgeon could certify to no cause of death. There was a rent about 3 inches long on the left side of the neck and there was a large rent in the abdominal wall measuring 12 inches by 6 inches and exposing the intestines. No bones were broken and no marks of injury were visible to account for death.

The appellant was sent up for trial with Jot Ram and Har Lal, but the latter two were discharged by the Committing Magistrate. The appellant was committed and has been convicted by the learned Sessions Judge on the strength of the evidence that he had left the fair ground, had been seen with the deceased by Dand Ram and Bakhtawar the same afternoon, had on the night of the following day pointed out the dead body of the deceased, had made a confession before a Magistrate, and had been unable to give any explanation of why the witnesses should give evidence against him. The assessors were unanimous that the appellant was guilty.

We have heard Mr. Nanwa Mal for the appellant and Mr. Jai Lal, Government Advocate, in support of the conviction.

We see no reason to doubt that the body found was that of Kallu, although Mr. Nanwa Mal has suggested that it was not properly recognisable. We also believe the evidence that the deceased and the appellant went away together with the bullock to arrange its sale and that the appellant returned alone with the bullock to the fair ground in the afternoon. The appellant has retracted his confession and has denied all this, but we are satisfied that the evidence regarding it is true. Dand Ram and Bakhtwar have given evidence, but their statements do not prove that the person whom they saw with the appellant was really the deceased.

We can, however, find nothing else reliable to connect the appellant with the death of Kallu. In the first place, as regards the confession, it was not recorded in accordance with the procedure laid down by section 164 (2), Criminal Procedure Code, read with section 364. This in itself might be of minor importance, since the Magistrate was called and examined in the Committing Court and his evidence was transferred to the Sessions record under section 33 of the Indian Evidence Act. But Chuna, the father of the deceased, has stated that the appellant was beaten on the 4th, before he told the Jind Police what had happened, and the Magistrate has stated that the appellant was returned to the Police after making his confession. Further, there are details in the confession which conflict with the evidence for the prosecution; for instance, statements regarding the payment of money to the deceased for the bullock and the implication of Jot Ram and Har Lal. The learned Government Advocate has asked us to regard certain portions of the confession as false. Finally, the confession has been retracted on the first possible occasion. In our opinion it was not genuine and it is of no value as evidence against the appellant.

This being so, we are left with no evidence at all that the deceased met his death by means other than natural. The Dadri Sub-Inspector stated in Court that he observed marks of injury on the head of the corpse which appeared to have been caused by *lathi* blows, but no writing made at that time is produced to support the statement and the *post mortem* makes it clear that the skull was not fractured. The blood on the chest and the clothes of the deceased might have been due to anything. There is no proof that it came from a wound inflicted with a weapon. Thus, even if the evidence be accepted that the appellant pointed out the dead body to the Police it would hardly suffice to convict him of having caused the death.

We are not, however, satisfied with the evidence about the pointing out. There is much confusion between the statements of the various witnesses. Sub-Inspector Mukand Lal of Dadri said that the body was found at 9 o'clock at night on the 9th September and was identified by Chuna and one Bakhshallah by the light of lanterns in the presence of Nathu and Chandgi, *Lambardars* of Santhavr. Bakhshallah has not been produced at all. Chuna has stated that the body was recovered on the third day from the 8th, (*i. e.*, the 10th) and was pointed out by the appellant in his presence. The description given by

the two *Lambardars* does not indicate that the discovery was made by lamplight. Both say that Chuna was present. Molar, a third *Lambardar*, who states that he came up after the body was found and helped to guard it afterwards, stated that there was a *Kasai* with the party, thereby meaning, we take it, Chuna or, one of his party. The learned Sessions Judge, however, came to the conclusion that Chuna was not present, that the body was identified by Bakhshullah, and that Chuna was brought to see it the next day.

There is also the evidence that orders were given to search the whole neighbourhood on the 9th and, presumably, a search was made during that day. We are not convinced that the evidence about the place being discovered on information given by the appellant is above suspicion, and we incline to the belief that the body was originally discovered by someone else.

We accept it as proved that the body was discovered on the 9th some three miles from the fair ground, but this fact and the facts that the appellant was the last person seen with the deceased on the 8th and that he was, later on that day, in possession of a bullock which the deceased had offered to him for sale do not justify a presumption that the death of the deceased was caused by the appellant, in the absence of any evidence of the cause of death. Still less could it be presumed that the death was caused by the appellant with such intention or knowledge as to render him guilty of an offence under section 302, Indian Penal Code.

We accept the appeal, set aside the conviction and sentence and acquit the appellant who will be released

W. C. A. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 334 OF 1922.

July 18, 1923.

Present:—MR. Kotwal, A. J. C.

THE LOCAL GOVERNMENT—APPLICANT *versus*

NANMANT RAO AND ANOTHER—NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 110—"By habit" and "habitually", meaning of—Penal Code (Act XLV of 1860), s. 383—Extortion—Picketing shops and realising fines—Offence.

The word "by habit", as used in section 110 (*d*), Criminal Procedure Code, means persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts. The word does not merely signify an inclination by nature to do such acts. The word "habitually" in the same section means repeatedly or persistently. [p. 766, col. 2]

The realisation of fines by means of picketing for the purpose of preventing the sale of foreign cloth, is extortion within the meaning of section 383 of the Penal Code.

Criminal revision against an order of the Magistrate, First Class, Jubbulpore, in Criminal Case No. 16 of 1922, dated the 11th September 1922.

Mr. *G. P. Dick*, Standing Counsel, for the Appellant.

Mr. *M. Gupta*, for the Non-Applicants.

ORDER.—This is an application on behalf of the Crown to set aside the order of the Magistrate refusing to bind over the non-applicants, Hanmantro and Bhaiyalal, under section 110, Criminal Procedure Code. The non-applicants had been called upon to show cause why they should not be bound over for a period of one year to be of good behaviour, by an order dated the 28th June 1922. The order discharging them was made on the 11th September 1922. The order to bind them over, if made, would have expired on the 10th September 1923. Some explanation of the delay in the disposal of this application is, therefore, necessary. The application was filed on the 11th December 1922, that is, three months after the Magistrate's order of discharge. The record was then sent for and on the 21st December it was fixed for hearing the applicant. On the 17th January the Standing Counsel was heard, and, in view of certain matters pointed out by me, further orders were postponed, from time to time at the request of the Standing Counsel, till the 21st February 1923 when he said that he had no further submission to make. Notices was then issued to the non-applicants and the 11th April 1923 was fixed for hearing the case. The ap-

plication for revision urged that the non-applicants should have been convicted under section 110 (e), Criminal Procedure Code. At the hearing the Standing Counsel stated that section 110 (e) was a mistake for section 110 (d) and that he wished to press the case under the latter sub-section. Counsel for the non-applicants not being prepared to meet the case under section 110 (d) the case was adjourned to the 25th April 1923. On that date the case was again adjourned at the request of the Standing Counsel and the 20th June 1923 was fixed by the consent of the parties as the non-applicants' Counsel was going out of Nagpur for the vacation. The case was then heard on the 20th, 21st and 25th June when the arguments were completed.

The proceedings were started on a report of the Circle Inspector that the non-applicants, Hanmantrao and Bhaiyalal, who were leaders of the Non-Co-operation Committee in Katni Murwara, had prohibited the cloth-merchants at Katni from buying foreign cloth and threatened to fine and boycott them socially if they did so and to picket them if the fines were not paid; that they actually fined some merchants; that they threatened those who refused to pay the fines with picketing and boycott and actually picketed them and issued instructions to other merchants to boycott them in their business when the threats had no effect, and by these means compelled them to pay the fines. It was also stated that the non-applicants compelled, by means of picketing, those merchants who refused to sign an agreement not to buy foreign cloth to sign it. Thus, it was said, the non-applicants habitually committed extortion. There were other charges in respect of matters falling under section 110 (e) with which we are now not concerned. The Magistrate held a preliminary enquiry at which four witnesses on the point of extortion were examined. These have been examined again in the case as P. Ws. Nos. 1, 2, 3 and 14. It is clear that if the case, as sworn by the Circle Inspector, was proved there were clear instances of extortion established against both the non-applicants.

The order under section 112, Criminal Procedure Code, only charges the non-applicants in general terms with habitually committing extortion. It should have given some details, but I do not think that the non-applicants have been prejudiced as they may be taken to have understood from the record of the preliminary enquiry what they were charged with and expected to meet.

In order to prove that the non-applicants have been habitually committing extortion the prosecution have examined a number of witnesses. The Trying Magistrate has dealt with the evidence in a general and summary way in paragraph 4 of his order. All that he has said in this connection is,—

"In accordance with the definition of extortion in section 383 of the Penal Code there is ample evidence on the side of the prosecution to show that the accused caused pressure to bear on several cloth merchants in the town to sign agreements not to import foreign cloth and also to pay such fines as were rightly or wrongly imposed on them by the organisation which the accused represented."

The Magistrate has not attempted to analyse, criticise or weigh the evidence. It has been contended by the non-applicants that some of the evidence is unreliable, and the rest, even if believed, does not prove extortion. The evidence has, therefore, been gone into in this Court by Counsel on both sides at great length. The learned Counsel for the Crown relied on P. Ws. Nos. 1 to 4, 7 to 11 and 14.

It appears from the evidence that, about the beginning of October 1921, most of the cloth merchants of Katni Murwara entered into an agreement not to sell foreign cloth till the 13th January 1922. These merchants have been referred to by witnesses as the Bazaz Committee. In meetings held subsequently the period during which foreign cloth was not to be imported and sold was extended. The last of such meetings was on the 28th March 1922. The evidence shows that a few merchants P. Ws. Nos. 1, 2, 3 and 14, who refused to sign the new agreement, were threatened with picketing or were actually picketed and made to sign the agreement. Some who had sold foreign cloth were asked

to pay the amount of profits realised by them from the sales plus a small sum of Re. 1 or Rs. 5 by way of penalty. On their refusal to pay the amount they were picketed till they paid up or consented to pay (P. Ws. Nos. 2, 7 and 14). The picketing consisted in locating in front of the shops of the defaulting parties volunteers who by supplication induced the customers to turn away from the shops. The evidence shows that the picketing was directed by the Bazar Committee and was supervised by Hanmantrao. Hanmantrao and Bhaiyalal are not themselves dealers in cloth. Being educated men they were taken as members of the Bazar Committee and helped in recording its proceedings. It is probable that Hanmantrao was instrumental in bringing the Committee in existence. The evidence fails, in my opinion, to prove that Bhaiyalal acted otherwise than as the scribe of the Committee or; that he had any substantial part in the Committee's proceedings or in the direction and supervision of the picketing. On the evidence, I do not think that a sufficient case for taking security is made out against Bhaiyalal. The order of the Magistrate with regard to him must be confirmed.

As regards the case against Hanmantrao the following contentions have to be considered:—

It is said that the picketing was the work of the Committee of which the persons picketed were themselves members and, therefore, no extortion can be said to have been committed against them. What was done in their case, it is contended, was what they had agreed should be done under certain circumstances. This argument can have no application to the cases where persons were compelled to sign the fresh agreement by means of picketing. As to the realisations of fines it is clear that the original agreement did not provide that the fines were to be realised by means of picketing and I do not think a mode of exaction of the fines subsequently decided upon by the Committee can be said to have been consented to by the memebers who had not actually agreed to it. In any case, where the signature by way of assent to the subsequent agreement to extend the time was brought about by picketing, no assent to the picketing for the realisation of the fines can be inferred. I am, therefore, of opinion that the action of Hanmantrao in getting the agreement signed and in realising fines by means of picketing was extortion within the meaning of section 383, Indian Penal Code.

It is next contended that, assuming that a few instances of extortion are proved, the non-applicants cannot be said to be habitually committing extortion. It is said that the words "by habit" and "habitually" means inclined by nature, and that section 110 (*d*), Criminal Procedure Code, refers to persons whose inclination by nature is such that they must commit a particular offence and are, therefore, likely to be dangerous to society. It is said that persons like the non-applicants who commit certain acts in the carrying out of a particular political object cannot be said to be habitually inclined to commit those acts and, therefore, cannot be classed as persons dangerous to society. I do not think that the narrow interpretation contended for by the non-applicant's Counsel should be put upon the words "by habit" or "habitually". It would be difficult to prove "habit" in the sense of inclination by nature. The Legislature must be taken to have used the word "habit" as meaning persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts. "Habitually" must in my opinion be taken to mean repeatedly or persistently.

Reference is made to *Hari Telang* v. *Queen-Empress* (1) and it is contended that section 110 is not applicable as it cannot be said that the non-applicants are in the habit of committing extortion as individual members of the community for it was only during their employment by the Bazar Committee that they committed the acts and not from any personal interest. It is also said that at the time that the non-applicants were called upon to give security picketing had ceased and it cannot be said that the habit was then continuing and there was a likelihood of the picketing being repeated. I am

(1) 27 C. 781; 4 C. W. N. 531; 14 Ind. Dec. (N. S.) 511.

not pressed by these arguments. It is not proved that the movement against the sale of foreign cloth is dead and the Bazaz Committee had ceased to exist or that Hanmantrao has severed his connection with it. Picketing for the purpose of preventing the sale of foreign cloth is not a thing which the non-applicant is interested in doing only so long as he is employed by the Bazaz Committee. He may be likely to resort to it just as much out of personal inclination as by the direction of the Committee. The case *Hari Telang* v. *Queen-Empress* (1) is distinguishable.

The prosecution witnesses generelly admits that both the non-applicants are respectable persons and held in esteem by the community for their unselfish services to the public. It is argued that this shows that the non-applicants will not personally repeat the acts complained of. The non-applicant may be of unimpeachable respectability and moral character but there is no guarantee that he will not repeat acts which, though prohibited by the law, he personally believes are necessary in the interests of his country, *vide* his written statement.

Picketing, in the circumstances referred to above, amounts to extortion. The number of instances of extortion proved in this case is, in my opinion, sufficient to prove habit, that is, persistent use of picketing whenever occasion for its use in the non-applicant's opinion has arisen.

I, therefore, set aside the order of the Magistrate discharging Hanmantrao and direct the Magistrate to bind him over for the remaining period of the year commencing from 11th September 1922, the date when the Magistrate should have passed the order under section 118.

It has been urged that the District Magistrate refused to move this Court against the Magistrate's order of discharge and that this shows that it is not necessary to bind over the non-applicant. The District Magistrate has not agreed with the reasons of the Magistrate but, so far as I can gather, he has given no specific reasons for not proceeding further in the matter. I am, therefore, unable to attach that weight to his refusal which it would have been entitled to if accompanied by reasons. It will be open to the non-applicant to move the District Magistrate under section 125, Criminal Procedure Code. I confirm the order of the Magistrate discharging Bhaiyalal.

G.R.D. & W. C. A. *Revision partly accepted.*

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NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 124 OF 1923.
August 4, 1923.

Present:—Mr. Baker, Offg. J. C., and Mr. Halifax, A. J. C.

DHANIA KUNBI—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder by father of newly born illegitimate child—Mitigating circumstances—Sentence.

In the murder of her newly born illegitimate child by a woman there are mitigating circumstances sufficient to reduce the appropriate penalty of death very much below a sentence of transportation for life.

Most of these circumstances apply, though certainly in a less degree, to the case of the father of such a child, more especially where the mother is his own sister.

Appeal against the finding and sentence of the Sessions Judge, Bhandara, dated the 28th June 1923, in Sessions Trial No. 9 of 1923.

Mr. *R. N. Padhye*, for the Appellant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—If the evidence given in this case is to be believed, it proves the following facts. Kachni Kunbin, a widow, aged about 23, gave birth to a live female child begotten on her by her brother, the appellant Dhania, whose age is recorded as about 30. He was present at the birth of the child and immediately took hold of it and killed it by doubling it up and twisting it in his hands. We are not only unable to find any reason for doubting the truth of the considerable body of evidence given in proof of these facts, but we find it impossible to disbelieve it. The conviction for murder must, therefore, be maintained. The murder was certainly deliberate, and the intention to kill the child as soon as it was born was probably formed some time before its birth, on the failure of the attempts to procure an abortion which have been proved.

In re GARAPATI KOTAYYA.

For this offence Dhania has been sentenced to death. It has invariably been held in all the Courts in India that in the murder of her newly born illegitimate child by a woman there are mitigating circumstances sufficient to reduce the appropriate penalty very much below a sentence of transportation for life. Without discussing the principles underlying and justifying that proposition, we think it can safely be said that most of them apply, though certainly in a less degree, to the case of the father of such a child, more especially where the mother is his own sister. For these reasons we maintain the conviction but alter the sentence by reducing it to one of transportation for life.

G. R. D. *Sentence reduced.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 755 OF 1922.

CRIMINAL REVISION PETITION NO. 634 OF 1922.

March 2, 1923.

Present:—Mr. Justice Krishnan.

In re GARAPATI KOTAYYA AND ANOTHER—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 353—Execution of warrant after expiry of time fixed by Nazir—*Obstruction to* Amin—*Offence.*

An *Amin* who executes a warrant before the expiry of the time fixed by the Munsif for its return but after the time given by the *Nazir*, acts in the proper discharge of his duty within the meaning of section 353 of the Penal Code, since he derives his authority to execute the warrant in virtue of his office from the Court and the fact that the *Nazir* directs an earlier return, as a matter of office routine, does not affect the *Amin's* authority.

Sabed Ali v. *Emperor*, 19 Ind. Cas. 706; 40 C. 849; 14 Cr. L. J. 274; 17 C. W. N. 941, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise an order of the Court of the Sub-Divisional Magistrate, Ellore, in Criminal Appeal No. 33 of 192-, preferred against an order of the Court of the Sub-Magistrate, Chintalapadi, in C. C. No. 126 of 1921.

Messrs. *P. Narayanamurthy* and *K. Kamanna*, for the Petitioners.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.

ORDER.—The first point taken is that the warrant had become time-expired when it was sought to be executed by the *Amin*, and, therefore, he could not be treated as having acted in the proper discharge of his duty. The time fixed by the Munsif for the return of the warrant had, however, not expired; only the time given by the *Nazir* had expired. The *Amin* derives his authority to execute the warrant in virtue of his office from the Court, that is, the Munsif. The *Nazir* could not and did not take away that power. He only directed an earlier return as a matter of office routine and that did not affect the *Amin's* authority. The same view is taken in *Sabed Ali* v. *Emperor* (1). Following that ruling I must overrule the first objection.

It is next argued that there is no evidence of any assault under section 353, Indian Penal Code, against the first accused. The prosecution witnesses prove that the first accused left the place where the disturbance was and came back with a stick in his hand, and, as they apprehended that he would attack them, they disarmed him. I think the evidence is enough to justify the inference of both the lower Courts that first accused on coming back to the scene armed with a stick, was making preparations to use criminal force to the *Amin* and the constables. That they apprehended such a result is clear from the evidence and from their action in disarming him. The second ground also fails. As against second accused there is clear evidence that he pushed the *Amin* and thus committed assault.

The convictions under section 353, Indian Penal Code, are correct and are confirmed.

As regards the sentences, I am inclined to think that, in the circumstances of this case, considering that no serious violence was used, it is not necessary to give the accused rigorous imprisonment. I set aside the sentences of two months' rigorous imprisonment passed on the accused and substitute a fine of Rs. 50 against each of the accused in default one month's rigorous imprisonment.

V. N. V. *Sentence modified.*

(1) 19 Ind. Cas. 706; 40 C. 849; 14 Cr. L. J. 274; 17 C. W. N. 941.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 303 OF 1922.

June 16, 1923.

Present:—Mr. Baker, J. C.

KAMRUDDIN—PLAINTIFF—APPLICANT

versus

Musammat INDRANI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Suit cognizable by Small Cause Court—Trial by Court under its ordinary powers—No objection to jurisdiction, either in Trial or Appellate Court—Revision—High Court, whether will interfere.

Where a suit cognizable by a Court of Small Causes is tried by a Munsif under his ordinary jurisdiction without objection to his jurisdiction, and the parties have had a full trial and an appeal to the District Judge without objection on the point of jurisdiction, the High Court will not interfere in revision. [p 770, col. 1.]

Ram Lal v. *Kabul Singh*, 25 A. 135; A. W. N. (1902) 219, followed.

Suresh Chunder Maitra v. *Kristo Rangini Dasi*, 21 C. 249; 10 Ind. Dec. (N. S.) 798, discussed and followed.

Ramasamy Chettiar v. *Orr*, 26 M. 176; 12 M. L. J. 264, *Kollipara Seetapaty* v. *Kankipaty Subbayya*, 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718; 6 M. L. T 121 and *Shankarbhai* v. *Somabhai*, 25 B. 417; 3 Bom. L. R. 129, distinguished.

Revision of the judgment and decree of the District Judge, Saugor, dated the 31st August 1922, in Civil Appeal No. 49 of 1922.

Mr. *Fida Hussain*, for the Applicant.

Dr. *H. S. Gour*, for the Non-Applicant.

ORDER.—The facts of this case are exactly those discussed in Mulla's Civil Procedure Code, 6th Edition, at page 771, under O. XLVI, r. 7, Civil Procedure Code.

A suit cognizable by a Court of Small Causes has been tried by a Munsif under his ordinary jurisdiction without objection to his jurisdiction and a decree passed for plaintiff. The defendant appealed to the District Judge without any reference to the question of jurisdiction. The District Judge reversed the decree of the Munsif and the plaintiff applies to this Court under section 115, Civil Procedure Code, for revision of the order of the District Judge.

There are severa conflicting decisions of the High Courts on the subject. The Allahabad High Court, in *Ram Lal* v. *Kabul Singh* (1), refused to interfere as the question of jurisdiction was not raised before the Small Cause Court. That case was the converse of the present case, as the case was tried as a Small Cause Court suit, when it was not so. The High Court held that parties should not be assisted to set aside decrees on points which they did not raise before the Court which tried the matters in issue, and of which they gave no notice to the opposite party.

The Calcutta High Court took the same view in *Suresh Chunder Maitra* v. *Kristo Rangini Dasi* (2) which was a case very similar to the present. The High Court held that both parties having submitted to the jurisdiction of the ordinary Courts it was not competent to either of them in second appeal to plead the want of jurisdiction so as to render the proceedings taken in the suit void.

A contrary view was, however, taken by the Madras High Court in *Ramasamy Chettiar* v. *Orr* (3), which is also a case similar to the present. All the proceedings were set aside and the plaint returned for presentation to the proper Court.

In the Full Bench case of *Kollipara Seetapaty* v. *Kankipaty Subbaya* (4), the Madras High Court while approving the decision in *Ramasamy Chettiar* v. *Orr* (3) set aside the decision of the Appellate Court and restored that of the Munsif. It is not clear from the decision whether the Munsif in that case had Small Cause Court powers, but as he was a District Munsif and the suit was only for Rs. 45, presumably he had, and this would appear from the reference made in the judgment approving the Bombay case of *Shankarbhai* v. *Somabhai* (5). In that case the Subordinate Judge who had Small Cause Court jurisdiction tried a Small Cause Court suit under his ordinary jurisdiction. It was held that the character of the suit was not altered by the mode in which the Subordinate Judge had exercised his jurisdiction and that his decree being final was not appealable to the District

(1) 25 A. 135; A. W. N. (1902) 219.

(2) 21 C. 249; 10 Ind. Dec. (N. S.) 798.

(3) 26 M. 176; 12 M. L. J. 264.

(4) 1 Ind. Cas. 543; 33 M. 323; 20 M. L. J. 718; 6 M. L. T. 121.

(5) 25 B. 417; 3 Bom. L. R. 129.

Court. This is not the case here. The Munsif of Saugor had no jurisdiction to try the present suit which was of a Small Cause Court nature and valued at Rs. 4 so.

This distinguishes the present case from those in 33 Madras and 25 Bombay [*Kollipara Seetapaty* v. *Kankipaty Subbaya* (4) and *Shankarbhai* v. *Somabhai* (5),] in which the decision of the lower Appellate Court was set aside and that of the Munsif restored, because he had jurisdiction to try the suit as a Small Cause suit although he did not exercise it.

Having thus distinguished these two cases there remain 25 Allahabad, 21 Calcutta and 26 Madras [*Ram Lal* v. *Kabul Singh* (1), *Suresh Chunder Maitra* v. *Kristo Rangini Dasi* (2) and *Ramasamy Chettiar* v. *Orr* (3).] In all these cases the Munsif exercised a jurisdiction which was not vested in him by law. In the Allahabad case which is the converse of the present case the Munsif tried the case as a Small Cause Court suit when it was not so. Presumably, the Munsif could have tried it under his ordinary jurisdiction, and, under the Bombay ruling above quoted, the character of the suit could not have been altered by the mode in which he exercised his jurisdiction. There was no first appeal in that suit and the High Court refused to interfere in revision for reasons above given.

The facts in the 21 Calcutta and 26 Madras cases [*Suresh Chunder Maitra* v. *Kristo Rangini Dasi* (2) and *Ramasamy Chettiar* v. *Orr* (3)] are the same as the present case. I may say that the question of setting aside the decree of the lower Appellate Court and restoring that of the Munsif does not, in my opinion, arise in the present case, because the cases in which that course was followed were cases in which the First Court had jurisdiction to try the suit although it failed to exercise it.

In the present case the Munsif had no jurisdiction to try the suit and the question is, therefore, whether I should decline to interfere on the ground that the parties have submitted to the jurisdiction of the ordinary Courts, which is the view taken by the Calcutta and Allahabad High Courts, or whether the whole of the proceedings should be set aside and the plaint returned for presentation to the proper Court as was done in 26 Madras [*Ramasamy Chettiar* v. *Orr* (3)]. There is no ruling of the Bombay High Court exactly on the point in issue, as I have already explained, and the balance of authority is in favour of the former course, the latter view being taken by the Madras High Court alone.

In this case the parties have had a full trial before the Munsif and an appeal to the District Judge without objection on the point of his jurisdiction, and I respectfully agree with the view of the Allahabad and Calcutta High Courts. I, therefore, decline to interfere and dismiss the application with costs.

W. C. A. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 278 AND 332 OF 1922.

May 28, 1923.

Present:- MR. WAZIR HASAN, A. J. C.

RAM NATH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM HARAKH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Legal necessity—Recitals in a deed, value of—Onus on creditor.

The creditor of a member of a joint Hindu family must prove facts which embody the representations of the alleged needs of the family estate and the motives influencing the immediate loan. This onus is not discharged by merely relying on the recitals contained in a deed. A recital is not a substitute for evidence of the facts which a creditor must prove. [p. 773, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.); *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 420; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.); *Brij Lal* v. *Inda Kunwar*, 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; (1914) M. W. N. 405; 12 A. L. J. 495; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794 19 C. L. J. 479 (P. C.), and *Nanda Lal* v. *Jagat Kishore Acharjya*, 36 Ind. Cas. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W.

RAM NATH v. RAM HARAKH.

N: 225] 10 Bur. L. T. 177] 43 I. A. 249 (P. C.), referred to and relied upon.

Appeal against a decree of the District Judge, Rae Bareli, dated the 31st July 1922, reversing that of the Munsif, Partapgarh, dated the 30th June 1921.

Mr. *Ali Mohammad*, for the Appellants.

Mr. *Radha Kishen*, for the Respondents.

JUDGMENT.—The facts are as follows:—Rajapal Singh, defendant No. 1, is a member of a joint Hindu family consisting of his father, his sons, his brother and his brother's sons. All these persons are defendants to the suit out of which these appeals have arisen. On the 31st October 1907 he executed a deed of mortgage in favour of the plaintiff's father for a sum of Rs. 150 carrying interest at the rate of 2 per cent. per mensem. This suit is brought for the purpose of enforcing that mortgage by sale of the mortgaged property. The other defendants are prior and subsequent transferees of the property in suit. The suit was dismissed by the Court of first instance but on appeal the District Judge has reversed the decree of the Court of first instance and decreed the suit. This is an appeal from the last-mentioned decree. In the decree of the lower Appellate Court the plaintiff's costs of both the Courts are directed to be paid by the defendants. Amongst these defendants are included defendants Nos. 4 and 5, who were impleaded as prior mortgagees. Appeal No. 278 is by them and the only ground urged before me to-day by the learned Pleader for the appellants is the question of costs. The learned Pleader for the respondents accepts the invalidity of the objection by the appellants as against the decision of the Court below in the matter of costs. That appeal will, therefore, be allowed and the appellants will be discharged from any liability to pay the costs of any other party to the suit. I am not prepared to go further than that and award costs to the appellants as against the other parties.

The property mortgaged is admittedly the joint family property and the decree with which I am now concerned raises the question as to whether the loan for the security of which the mortgage was executed or any part of it was incurred by Rajapal Singh for legal necessity. The details of the entire sum of Rs. 150 may be gathered from the deed of mortgage to be as follows:—

(1) To meet the expenditure of the suit in *re Ram Singh* v. *Kandha Singh* in the Court of the Subordinate Judge of Partabgarh..... Rs. 25;

(2) Price of grain seed taken from the mortgagee for the purpose of the cultivation of the *sir* and *khudkasht* of Ram Singh, the father of the executant ..... Rs. 500;

(3) Taken in cash on the date of the execution of the land for the purpose of paying the Pleader's fee in the case mentioned above..... Rs. 75.

It was admitted that the defendant No. 1 had paid Rs. 300 through Chandrapal Singh, defendant No. 7, who is a subsequent transferee, as stated before, to the plaintiffs towards the debt due under the bond in suit (*vide* paragraph 7 of the plaint) and it is common ground between the parties that this payment was made on the 14th October 1916. The plaintiffs have given credit for this amount to the mortgagee.

As to the first item, the Court of first instance held that no legal necessity with reference to it was established and it declined to treat the recital in the deed as sufficient evidence of legal necessity in the particular circumstances of this case. As regards the second item, that Court came to the conclusion that a sum of Rs. 60 out of Rs. 75 was for legal necessity as having been paid to the Pleader in the case mentioned in the deed towards the payment of his fee. As regards the third item, that Court held that there was no reliable evidence *aliunde* the deed to prove that that amount was taken for the purposes mentioned in the deed. In conclusion, it held that the only part of the money borrowed under the mortgage in suit was the sum of Rs. 60 paid to the Pleader in the case which is mentioned in the document. But in view of the fact that the plaintiffs had already received a sum of Rs. 300 towards the satisfaction of the debt in suit which amount was more than was validly binding on the family property it dismissed the plaintiff's suit altogether. The plaintiffs appealed to the

Court of the District Judge of Rae Bareli. That Court has held that the whole of the amount borrowed under the mortgage in suit was for legal necessity.

As regards item No. 1, that is, the sum of Rs. 25. I am of opinion that the finding of the lower Appellate Court that it was borrowed for legal necessity is correct. Exhibit 2 is the plaint of the suit mentioned in the document. It was filed on the 25th June 1907 and the recital in the mortgage-deed is that this item was borrowed on the 23rd June 1907. It is, therefore, reasonably probable that this sum of Rs. 25 was borrowed for the purpose of the suit which began by the plaint of the 25th June 1907 and the recital contained in the deed with reference to this sum is true.

As regards item No. 2 it is admitted before me that the sum of Rs. 60, borrowed for the object of paying the Pleader's fee, was borrowed for legal necessity and, therefore, it is effective as against the family property. But it is contended that there is no evidence outside the recital in the deed in suit to prove legal necessity with reference to the remaining sum of Rs. 15.

As regards the third item of Rs. 50, it is contended that, apart from the recitals, there is no evidence whatsoever to justify the finding that this sum represents the price of grain seed utilised in the cultivation of the family *sir* and *khudkasht* lands. The decision of the learned District Judge in respect of the two points just now mentioned is exclusively based on the recitals contained in the deed. The learned Pleader for the plaintiffs-respondents attempted to support the finding with reference to the evidence of a witness as well. That witness is Chandrapal Singh (P. W. No. 2). The Court of first instance rejected his evidence on this part of the case as unreliable and gave excellent reasons for doing so. The judgment of the learned District Judge makes no reference to that evidence except in the sentence: "The story of accounting for the grain debts, whether true or not, does not affect the question of the grain purchased for sowing *sir* and *khudkasht* as set forth in the recital of the mortgage-deed." The story referred to in this quotation is the one which was narrated by the witness Chandarpal Singh. The Court of first instance disbelieved this story and the inference from the observation of the learned District Judge is, that he was not prepared to believe it either. I must, therefore, not allow that evidence to be used in second appeal before me.

The point of law in which this appeal resolves itself is this:—Has the lower Appellate Court properly applied the rule of law allowing the recitals in the deed of mortgage to be used as evidence against the other members of the family? In the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) Lord Shaw made the following observation in respect of the powers of the manager and head of a joint family with regard to the joint family property:—"The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *muth* or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interest justified, the expenditure, then those entitled to the estate are bound by the transaction." On the question of the onus of proof, his Lordship quoted the following passage from the judgment of Lord Justice Knight-Bruce from the well known case of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (2):—"The presumption proper to be made will vary with circumstances and must be regulated by and dependent on them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him

(1) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Com. 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; 39 A. 487 (P. C.).

(2) 6 M. I. A. 393 at p. 420; 18 W. R. 81; 1 Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 W. R. 147 (P. C.).

than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan."

The rule of law, therefore, is that the creditor must prove facts which embody the representations of the alleged needs of the estate and the motives influencing the immediate loan. The question in this case is:—"Has this onus been discharged by merely reading the recitals in the deed in suit?" I am clearly of opinion that a recital is not a substitute for evidence of the facts which a creditor must prove under the dictum of Lord Justice Knight-Bruce quoted above. If it were not so, the principle of the protection of the joint family property enunciated by the Mitakshara will become wholly illusory for it will be always possible for a creditor to prepare the deed charging the family property in a manner so as to make it contain both the representations and the motives influencing the loan and thereby be entitled to the verdict of having discharged the onus that the law placed on him. In the case of *Brij Lal* v. *Inda Kunwar* (3) Mr. Ameer Ali, in delivering the judgment of their Lordships of the Privy Council, made the following observation:—"The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the appellant has adduced no evidence to prove legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale-deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*." At the best, such recitals may serve as an aid in the determination of the question of legal necessity provided that there are circumstances or direct evidence *aliunde* the deed in suit supporting the truth of the recitals. In cases where "time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside:" per Lord Buckmaster in the case of *Nanda Lal* v. *Jagat Kishore Acharjya Chowdhuri* (4). No party can be asked to prove the impossible, and when proof of the facts justifying legal necessity or representations in respect of such a necessiy has become impossible by lapse of time the recitals will be sufficient evidence to support the deed provided that there are independent circumstances which are such as would justify a reasonable belief in the truth of the recital.

In the present case the only reason pointed out is that the mortgagee is dead. That, in my opinion, is not enough to attract the application of the rule laid down by Lord Buckmaster in the case just now referred to. Not only that there is no justification for a presumption that no direct evidence bearing on the transaction in question is available but, on the other hand, the plaintiff adduced direct evidence in support of their case but it has been disbelieved. If the plaintiffs have a money-lending business, which they seem to have, they should presumably be possessed also of account-books relating to the business. No such account-book has been produced nor any explanation given as to their non-production. I am, therefore, of opinion that the plaintiffs have failed to prove that the sums of Rs. 15 and Rs. 50 were borrowed for legal necessity. I also agree with the Court of first instance that, inasmuch as the plaintiffs have received a sum of Rs. 300 towards the discharge of the debt in suit, and as that sum is more than what will be due to them in respect of the loan of the two items of Rs. 25 and Rs. 60, that is, Rs. 85 in all, together with the

(3) 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; (1914) M. W. N. 405; 12 A. L. J. 495; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794; 19 C. L. J. 492 (P. C.).

(4) 36 Ind. Cas. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

interest at the rate of 2 per cent. per mensem from the date of the execution of the deed in suit to the date of the payment of the sum of Rs. 300 they are entitled to no decree in this suit. The result is that the appeal is allowed the decree of the lower Appellate Court is set aside and that of the Court of first instance restored. The plaintiffs will bear the costs incurred by the defendants Nos. 1, 2, 8, 9, 10, 11 and 14 in all the Courts.

G. H. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 871 OF 1919.

January 17, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

Musammat UTTAM DEVI—DEFENDANT—APPELLANT

versus

DINA NATH—PLAINTIFF, AND THE ALLIANCE BANK OF SIMLA, LTD.—DEFENDANT—RESPONDENTS.

Court-Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—Suit for declaration that plaintiff is entitled to a certain deposit in a Bank—Appeal—Court-fee payable—Hindu Law—Joint family—Partition—Separate acquisition of member—"Gains of science", what are.

Plaintiff obtained a decree declaring that he was entitled to a certain sum lying in deposit with a Bank and directing the Bank to pay the amount to him. Defendant appealed and stamped the memorandum of appeal with a Rs. 10 stamp under Art. 17 (*vi*) of Schedule II to the Court-Fees Act;

Held, that the memorandum of appeal was correctly stamped.

Kirpal Singh v. *Sant Singh*, 13 Ind. Cas. 305; 71 P. R. 1911; 30 P. L. R. 1912; 205 P. W. R. 1911, followed.

The acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint family funds, is his self-acquired property, and is not subject to partition. [p. 778, col. 2.]

Lakshman Mayaram v *Jamnabai*, 6 B. 225; 6 Ind. Jur. 369; 3 Ind. Dec. (N. S.) 608, relied on.

Under Hindu Law the ordinary gains of science are divisible when such science has been imparted at the family expense and acquired while receiving a family maintenance; but it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family. [p. 777, col. 1.]

By the "gains of science" is meant the special training for a particular profession which is the immediate source of the gains, and not the general elementary training which is the stepping stone to the acquisition of all science. [p. 777, col. 1.]

There is no authority in the Mitakshara for the contention that acquisitions made personally and without the aid of joint funds by a member of a joint family, who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. [p. 777, col. 1.]

Meiharam Ramrakhiomal v. *Rewachand Ramrakhiomal*, 44 Ind. Cas. 269; 45 C. 666; 22 C. W. N. 377; 4 P. L. W. 197; 34 M. L. J. 327; 7 L. W. 361; 23 M. L. T. 218; 16 A. L. J. 281; 27 C. L. J. 345; 20 Bom. L. R. 566; (1918) M. W. N. 587; 12 S. L. R. 116; 45 I. A. 41 (P. C.), relied on.

First appeal from a decree of the Senior Subordinate Judge, Simla, dated the 10th April 1919.

Lala *Badri Das*, R. B., and Lala *Balvant Rai*, for the Appellant.

Mr. *B. N. Kapur*, for Mr. *Jai Gopal Sethi*, and Diwan *Mehr Chand*, for the Respondents.

JUDGMENT.—This is a first appeal from the order of the Senior Subordinate Judge, Simla, declaring Dina Nath, plaintiff-respondent, to be entitled to Rs. 10,000 deposited by his deceased uncle, Sham Lal, in the Alliance Bank of Simla, together with interest, and directing the said Bank to pay the total amount due, found to be Rs. 12,310-8-4 on the date of the decree, to the plaintiff. *Musammat* Uttam Devi, defendant-appellant, is the widow of Sham Lal, deceased.

In her appeal she asks that the declaratory decree to the effect that the money belongs to the plaintiff be set aside. She has not appealed against that part of the decree which directs the Bank to pay the sum found due to the plaintiff. She has stamped the memorandum of appeal with Rs. 10 stamp only, and a preliminary objection has been raised by Counsel for the plaintiff-respondent to the effect that the appeal is insufficiently stamped. It is contended that it should have been stamped *ad valorem* on the amount found to be due. Lala Badri Das on behalf of the appellant contends, on the other hand, that there was really no necessity for the plaintiff, in the

first instance to pay Court-fees on the amount alleged to be due by the Bank and that it would have been sufficient for him to sue for a declaration that the money was due to him, and not to *Musammat* Uttam Devi. It is pointed out that the Bank was perfectly willing to pay the amount to any one adjudged by the Court to be entitled thereto. He also points out that all that the widow now wants is that the decree declaring the plaintiff to be entitled to the money should be set aside. He refers to *Kirpal Singh* v. *Sant Singh* (1). In that case the plaintiffs, two members of a joint Hindu family, sued defendant for recovery of Rs. 17,000 principal and Rs. 5,585 interest due on a bond in which the above plaintiffs alone were named as obligees. Defendant admitted execution of the bond and liability thereunder, but pleaded that the money was due to all the members of the joint family and also that he paid the other members of the family Rs. 10,400 on account. The First Court held that the other members of the joint family were not necessary parties and payments made to them need not be accounted for by plaintiffs and decreed the whole amount claimed. Defendant appealed to the Chief Court on a Rs. 10 Court-fee stamp alleging that the value for purposes of Court-fees could not be determined. It was held that, as regards the claim to have the decree of the First Court reduced by the payments amounting to Rs. 10,400, the appellant must pay *ad valorem* duty, but as regards the claim for a declaration as to who was entitled to receive the balance due, a Rs. 10 stamp was sufficient under Art. 17 VI, Schedule II, Court-Fees Act, In our opinion, though the facts are somewhat different from the present case, this authority is in point and the appellant, considering the nature of the appeal, has paid a sufficient Court-fee stamp. We, therefore, overrule the preliminary objection.

The plaintiff based his claim on the allegation that he and his uncle were members of a joint Hindu family and that his uncle adopted him as his son some thirty years before suit. He further alleged that the deposits made by Lala Sham Lal were made by him as a manager of the joint Hindu family out of the joint funds and that, therefore, he was entitled to the deposits as the surviving male member of the family and also on account of his adoption by Lala Sham Lal, the widow being entitled to maintenance only. It should be noted that the deposits were made by Lala Sham Lal in the Bank jointly in his own name and that of *Musammat* Uttam Devi, and were payable to either or to the survivor. Having regard to this, the Bank refused to pay the deposits, after the death of Sham Lal, to the plaintiff. The learned Subordinate Judge has held that Lala Sham Lal and the plaintiff were members of a joint Hindu family, and that plaintiff was adopted by Lala Sham Lal, and further that Lala Sham Lal did not, by making the deposits in the joint names of himself and his wife, intend to make a gift of the money to *Musammat* Uttam Devi.

These findings are traversed by *Musammat* Uttam Devi in her appeal. Lala Sham Lal was in Government service, and at the time of his death, on the 13th June 1914, was a Tahsildar under the Punjab Government. Dina Nath, the plaintiff, was living with his father-in-law in Ludhiana and was carrying on money-lending business there. He and his uncle were, therefore, living apart, and there was no commensality, and there would, therefore, be no strong presumption that they were joint. It was probably on this account that the onus of proving that they were members of a joint Hindu family was placed upon the plaintiff.

The learned Subordinate Judge has referred to the evidence, oral and documentary, at great length and it is not necessary for us to do the same. Counsel for the appellants has relied strongly upon the following facts:—

(1) that Lala Sham Lal built himself a house at his own expense at Solan on the Simla Hills;

(2) that Dina Nath carried on a money-lending business at Ludhiana, and

(3) that uncle and nephew lived apart.

Having regard to the fact that Lala Sham Lal was in Government employ and constantly had to move about, there

(1) 13 Ind. Cas. 305; 71 P. R. 1911; 30 P. L. R. 1912; 205 P. W. R. 1911.

is nothing very remarkable in the fact that his nephew (the plaintiff) did not live with him but preferred to live with his father-in-law. Lala Sham Lal enjoyed a separate income by reason of his official position, and the mere fact that he used a part of that in building a house at Solan would not go very far to show that he and his nephew were not members of a joint Hindu family. Similarly, we do not attach any importance to the fact that Dina Nath carried on a separate money-lending business at Ludhiana. There is ample evidence on the record to show that the uncle and nephew were on the most affectionate terms and that Lala Sham Lal got his nephew married. The letters referred to by the learned Subordinate Judge in his judgment at pages 64 and 65 of paper-book "A," (the original paper book) are very strong evidence in support of the plaintiff's contention that he and Lala Sham Lal formed a joint Hindu family. It is unnecessary for us to refer in detail to these letters. We agree with the learned Subordinate Judge that they show in a most conclusive manner that the uncle and nephew were joint.

The second point is, whether it is proved that Lala Sham Lal adopted Dina Nath as his son. As to this the learned Subordinate Judge says: "I find but with less certainty that plaintiff was adopted by Lala Sham Lal." There is no direct evidence of the adoption. The only evidence really is that of Rai Sansar Chand and of Bawa Sant Singh as to statements made by Lala Sham Lal to the effect that he had adopted Dina Nath. We think that it would be unsafe, merely on this evidence, to hold the adoption proved, especially in view of the fact that in none of the correspondence which passed between the uncle and the nephew did Lala Sham Lal refer to Dina Nath as his son; nor did he refer to his wife as the mother of Dina Nath; on the contrary, he referred to her as his aunt. Moreover, Dina Nath was the only other member of the family and, therefore, Sham Lal's heir and there was no necessity to adopt him. We have no hesitation in holding that the alleged adoption is not proved.

The history of the deposits in suit is given by the learned Subordinate Judge in his judgment at pages 67 and 68 of paper-book "A". The account of Sham Lal with the Bank of Upper India will be found in the supplementary paper-book "B" at page 74 *et seq.* This shows that the account began in April 1892. In October 1896 the credit side of the account totalled Rs. 3,338-11-8, and the debit side Rs. 1,136-2-7. In December 1898 the credits totalled Rs. 8,447, and the debits Rs. 1,136; in other words, there was a credit balance in Sham Lal's favour exceeding Rs. 7,300. In 1900 he made a further deposit of Rs. 500 and in May 1901 he deposited Rs. 1,000 and adding interest thereto there was a credit balance in his favour of Rs. 10,000 in July 1902. From that time on, the account remained about the same and on the 2nd of January 1914, Rs. 10,000 was transferred to Sham Lal's floating account. On the 8th of January 1914 he paid Rs. 10,000 by means of a cheque into the Alliance Bank of Simla and ordered it to be deposited in two accounts in the joint names of himself and of his wife. These are the deposits in dispute in the suit. It is admitted that Lala Jai Gopal, the father of Sham Lal, and the grandfather of Dina Nath, did not die until the year 1900. There is no presumption, much less proof, that during Jai Gopal's lifetime Lala Sham Lal was manager of the joint family or that he was able to handle the family money. There can be no presumption, in our opinion, that the deposits made by him during his father's lifetime in the Bank of Upper India were made out of the joint family money. After his father's death he may very well have added to his deposits out of his official income. He always kept this account separate and did not carry the amounts to his credit to the credit of the joint family funds. In *Lakshman Mayaram* v. *Jamnabai* (2) it was held that the acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint funds is his self-acquired property, and is not subject to partition. Hindu Law texts regarding gains of science

(2) 6 B. 248; 6 Ind. Jur 369; 3 Ind. Dec. (N.S.) 608.

established it as a rule of Hindu Law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance; but that it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family. When the Hindu texts speak of the "gain of science," they intend the special training for a particular profession which is the immediate source of the gains, and not the general elementary education which is the stepping stone to the acquisition of all science. Consequently, the property acquired by a Subordinate Judge who had received elementary education at the family expense, but a knowledge of law and judicial practice without such aid, is impartible. Now, in the present case there is no contention that Lala Sham Lal was specially educated at the family expense or that he received any different education from his brother, Sukhram Das, who was a Subordinate Government official. In accordance, therefore, with the 4 Bombay ruling [*Lakshman Mayaram* v. *Jamnabai* (2)], we hold that Sham Lal's acquisition, which he made as a Government servant, and which he kept quite separate from the joint family funds, is impartible and that he could deal with it as he chose. Similarly, in *Metharam Ramrakhtomal* v. *Rewachand Ramrakhtomal* (3), it was held that there is no authority in the Mitakshara for the contention that the gains made personally, and without the aid of the joint funds, by a member of a joint family, who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible, and not as his self-acquired property. We, therefore, hold that the deposits in question were the self-acquired property of Lala Sham Lal and cannot be regarded as joint family property. He was, therefore, authorised to deal with them as he thought fit and we see no reason to doubt that, at the time when he made these deposits in the Alliance Bank of Simla in the joint names of himself and of his wife, and made them payable to either or to the survivor, he intended that they should be a provision for his widow in case he died. We, therefore, hold that the plaintiff is not entitled to these deposits but that *Musammat* Uttam Devi is so entitled. We, therefore, accept the appeal and set aside as much of the lower Court's decree as declares plaintiff to be entitled to the amount of the deposits in suit with interest, and we direct that the plaintiff should pay *Musammat* Uttam Devi's costs in both the Courts.

Z. K.

Appeal accepted.

(3) 44 Ind. Cas. 269; 45 C. 666; 22 C. W. N. 377; 4 P. L. W. 197; 34 M. L. J. 327; 7 L. W. 361; 23 M. L. T. 218; 16 A. L. J. 281; 27 C. L. J. 345; 20 Bom. L. R. 566, (1918) M. W. N. 587, 12 S. L. R. 116, 45 I. A. 41 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1636 OF 1921 AND 237 OF 1922.

April 26, 1923.

Present:—Mr. Justice Daniels.

BABU LAL—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL BOARD, FARRUKHABAD, AND ANOTHER—DEFENDANTS—RESPONDENTS.

U. P. Municipalities Act (II of 1916), ss. 267, 180, 184—Building, construction of, with sanction—Power of Municipality to order demolition—"Estoppel," meaning of.

A Municipal Board is not debarred from taking action under section 267 of the U. P. Municipalities Act in the interests of public health solely because it has previously given sanction to the construction of a building under section 180 of the Act. Under section 184 no sanction operates as an estoppel or confers or extinguishes any right or disability. The term 'estoppel' used in section 184 is not confined to an estoppel against a plea of title to property, but also includes estoppel raised against a Municipal Board on the ground of its having granted any sanction under the preceding sections. [p. 778, col. 2.]

Municipality of Sholapur v. *Abdul Wahab*, 61 Ind. Cas. 428; 45 B. 797; 23 Bom. L. R. 244, distinguished.

Second appeal from a decree of the Subordinate Judge, Farrukhabad, dated the 2nd August 1921.

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

Dr. *S. N. Sen* and Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—These two connected appeals raise a question whether a Municipal Board has power, under section 267 of the U. P. Municipalities Act, to order the removal of a latrine for the construction of which it had previously given permision. The plaintiff's latrine is of the kind known as *sandas*. It originally opened on the east side of the house and was cleaned from that side. In January 1919 he applied for permission to re-construct it so that it should open on the south side of the house. This application was made under section 178 of the U. P. Municipalities Act and permission was granted by the Public Works Committee on 15th February 1919. The proposed alterations were thereupon carried out. About eight months afterwards, a complaint was made to the Municipal Board that the latrine, as altered, gave forth a very unsavoury smell and constituted a public nuisance and a danger to the health of the persons living in the neighbourhood. The Board were satisfied after inspection by the Health Officer that this was the case and they thereupon issued notice to the plaintiff under section 267 of the Act to close the latrine. This suit was then instituted by the plaintiff praying for a declaration that the resolution of the Municipal Board ordering his latrine to be closed was not authorised by law, and for an injunction restraining the Municipal Board from taking any steps in respect of it.

The suit has been dismissed by the Court below. The plaintiff appeals and pleads that the action of the Municipal Board was *ultra vires*. The appellant relies on a decision of the Bombay High Court in *Municipality of Sholapur* v. *Abdul Wahab* (1), and argues on general grounds that very great injustice may result if it is held to be within the competence of a Municipal Board to order the demolition of a building or part of a building the erection of which it has previously sanctioned. The Bombay case is not quite on all fours with the present case as the Municipality formally revoked a sanction to build which it had previously granted. The case was, moreover, decided on a construction of section 96 of the Bombay Municipal Act the provisions of which, though generally similar to those of the U. P. Municipalities Act, are not identical.

As regards the second plea, there is no doubt that great hardship might be caused if the Municipal Board abused its powers under the Act. This must necessarily be the case whenever a public body is entrusted with wide statutory powers. At the same time, very grave public inconvenience might equally arise if a Municipal Board is held to be debarred from taking action against what is undoubtedly a nuisance because, on some previous occasion, it had sanctioned the erection of the building from which the nuisance proceeds. The case must be decided, not on general considerations but on a construction of the Municipalities Act in force in these Provinces. It is impossible to point to any provision in this Act which debars a Municipal Board from taking action under section 267 in the interests of the public health solely because it has previously given sanction to the construction of the building in question under section 180 of the Act. On the contrary, there is an express provision in section 184 that no sanction shall operate as an estoppel or confer or extinguish any right or disability. It is argued on behalf of the appellant that the reference to estoppel refers only to an estoppel against a plea of title to property, but the words used are very wide and, taken in their ordinary meaning, certainly do provide that no estoppel shall be raised against a Municipal Board on the ground of its having granted any sanction under the preceding sections. It may be added that the lower Appellate Court finds as a fact that the latrine as it now exists does amount to a nuisance, and, therefore, the order complained of was in fact a proper order, though the Municipal Board acted without sufficient care in originally granting sanction for the alteration of the latrine. I agree with the Court below that the notice issued by the Municipal Board was within its statutory powers and I accordingly dismiss the appeals with costs.

(1) 61 Ind. Cas. 428; 45 Bom. 797; 23 Bom. L. R. 244.

There is a deficiency of Rs. 5 on account of Court-fees due from the respondent Municipal Board in Appeal No. 1636. The decree of this Court will, therefore, not issue until this has been made good.

The cross-objection regarding costs was not pressed. It is accordingly dismissed, but without costs.

M. A. A. *Appeal and Cross-objections dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2911 OF 1922.

October 13, 1923.

Present:—Mr. Justice Martineau.

GHULAM SABIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TABA HUSSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Male proprietors, restrictions on powers of — Lohars *of Jagadhari, Ambala District.*

Although the *Lohars* of Jagadhari, in the Ambala District, do not observe the Muhammadan Law in all matters of inheritance, and among them a widow is not competent to alienate except for necessity, there are no restrictions on the powers of alienation by male proprietors.

Second appeal from the decree of the District Judge, Ambala, dated the 25th July 1922, confirming that of the Munsif, First Class, Ambala, dated the 16th and 19th April 1922.

Mr. *W. B. O'Connor*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiffs have sued to contest the sale of a shop effected by their father and uncle, who were *Lohars* of the town of Jagadhari in the Ambala District. The suit has been dismissed, the Court's finding being that the plaintiffs have failed to prove that the power of a male proprietor among *Lohars* of Jagadhari to alienate ancestral property is a restricted one. The plaintiffs have filed a second appeal, having obtained a certificate from the District Judge on the questions of custom.

There are also cross-objections by the vendee with regard to his costs in the First Court which were not allowed.

I agree with the learned District Judge that, although the *Lohars* of Jagadhari do not observe the Muhammadan Law in all matters of inheritance, and although it appears that among them a widow is not competent to alienate except for necessity, it does not follow that the custom prevailing among the agriculturists is applicable to alienations by male proprietors, and the onus is on the plaintiffs to prove that male proprietors have not an unlimited power of alienation. That being so, the suit must clearly fail. There is only one piece of evidence which lends support to the claim of the plaintiffs, namely, a judgment given by Mr. Hurry, Divisional Judge, on the 3rd September 1901, in which he held that the *Lohars* of Jagadhari followed the custom by which a proprietor could not alienate ancestral property except for necessity. That decision, however, is of practically no value as it proceeded solely on the ground that custom was shown to be followed in respect of alienations by widows and in matters of inheritance. A judgment of Major Roe, District Judge, given in 1915, in which he held that an alienation by male proprietors could not be contested, is of greater weight though that decision was an *obiter dictum*. At any rate, the plaintiffs have entirely failed to discharge the onus which lay upon them, and the appeal must fail. There does not appear to be any reason for not allowing the defendant Fateh Muhammad the costs incurred by him in the First Court. I accordingly dismiss the appeal, and accepting the cross-objections direct that the plaintiffs shall pay Fateh Muhammad's costs in all the Courts.

Z. K. *Appeal dismissed.*

BHIKHU MANDAL *v.* BHIKEHAKAR DUTTA.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1123 OF 1920.

December 22, 1922.

Present:—MR. Justice Adami.

BHIKHU MANDAL—DEFENDANT—APPELLANT

versus

BHIKEHAKAR DUTTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appellate Court—Judgment of reversal, contents of.

Where the judgment of an Appellate Court reverses the judgment of the Trial Court, it is absolutely necessary that good grounds should be shown for coming to any finding of fact. There ought, at any rate, to be sufficient material in the judgment to show that the evidence, and the reasons given by the Trial Court, have been duly considered in coming to a contrary decision.

Second appeal from a decision of the Subordinate Judge, Manbhum, Sambalpur, dated the 18th September 1920.

Messrs. *S. N. Dutta, S. K. Mitter* and *S. C. Mitter*, for the Appellant.

Mr. *S. C. Mozumdar*, for Mr. *Jotirmoy Chatterji*, for the Respondents.

JUDGMENT.—The suit giving rise to this second appeal was a suit for recovery of certain lands which previously had been the *jote* of one Moheswar Banerji. In execution of a decree against Moheswar, the lands were sold and purchased by one Punchanan in 1899. Punchanan sold the lands to the wife of Moheswar; and, according to the plaintiffs, Biseswari made the purchase *farzi* on behalf of one of the three sons of Moheswar, namely, Ramsadai. According to the plaintiff's story, Ramsadai having obtained a deed of relinquishment from Biseswari surrendered the lands to the plaintiffs, his landlords, in 1325. The plaintiffs took possession but were subsequently dispossessed by the defendant. "The defendant admitted the case of the plaintiffs up to the point where Biseswari Debi purchased from Punchanan; but, according to his case, Biseswari bought as *farzidar* for her husband Moheswar and the lands devolved, after Biseswari's death, to the three sons of Moheswar. It was asserted that Ramsadai, therefore, had no power to surrender the entire lands and contended that the lands in suit were not the lands which had been transferred to Biseswari.

The learned Munsif in a careful judgment held that the lands in suit were the lands transferred as alleged by the plaintiffs and were included within *jote* Kachulong. He held further that the purchase by Biseswari was a purchase on behalf of Moheswar and that, therefore, Moheswar's three sons would inherit the lands and Ramsadai would not have any power to surrender them to the landlords. He expressed grave doubt as to the *bona fide* character of the surrender by Ramsadai, thinking it possible that the landlords, knowing that they should not obtain the lands by sale, had invented a means of obtaining them by getting a release from one of the three brothers.

The learned Subordinate Judge has agreed with the Munsif with regard to the identity of the lands; but, having come to that finding, he proceeds to discuss the other points in the case and that part of his judgment which deals with law. He has taken a view on very scanty, if any, reasons for disagreement. In fact he merely states that, from evidence adduced in the case, there cannot be any doubt that the disputed land became the property of Ramsadai by virtue of these transfers. But he does not tell us what that evidence is and why that evidence had a different effect in his opinion to the effect which it had in the opinion of the Munsif. He says, "Bepin admits in his evidence that whoever will get *kobala* will be sole owner." I cannot see how this affects the case. The *kobala* was in the hands of Biseswari. Then, later, he says "Bepin's statement proves plaintiff's case." He does not tell us what that statement of Bepin is or whether it is to be found in the evidence. Further on he says: "But it has been satisfactorily proved that the other sons had no interest in the rent-paying lands which came to Ramsadai alone by virtue of the deed of release by his mother." The Munsif had found to the contrary and the learned Subordinate Judge has not shown us how the evidence satisfied him in this direction. Further, he says that "no fraud or collusion has been proved in respect of the surrender." Here, too, he does not give any reasons for differing from the Munsif. The portion of his judgment which deals with the points

in dispute is, in my opinion, not a judgment in accordance with law and is certainly of no help to this Court to come to any finding whether the decision he has come to, in short sentences is correct in law. In a judgment of reversal it is absolutely necessary that good grounds should be shown for coming to any finding of fact. The decision of the learned Subordinate Judge may be right but there is not sufficient material in his judgment to show this Court that he has considered the evidence and duly considered the reasons given by the Munsif in his judgment for coming to a contrary decision.

The decree of the lower Appellate Court must be set aside and the case must be remanded for a re-hearing of the appeal and for judgment according to law. The appellant will get costs in this Court.

W. C. A. *Decree set aside.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 737 OF 1922.

February 10, 1923.

Present:—Sir Shadi La, KT., Chief Justice.

KUNJ LAL—PLAINTIFF—PETITIONER

versus

HARI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Parties—Suit by assignee of bond—Assignor whether necessary party—Limitation Act (IX of 1908), s. 20—Party not necessary for decision of suit, joinder of, after limitation, effect of.

The assignor of a bond, who has received consideration for the transfer, is not a necessary party to a suit brought by the assignee to recover on the bond. If the presence of a party, who is added after the prescribed period, is not necessary to enable the Court to award such relief as may be given in the suit framed by the plaintiff, and he is joined *ex majore cautella*, the suit is not barred merely because limitation had expired at the time when he was impleaded.

Petition for revision of a decree of the Senior Sub-Judge, Gurdaspore, dated 27th July 1922.

Mr. *Mehr Chand Mahajan*, for the Petitioner.

Mr. *Ganpat Rai*, for the Respondents.

JUDGMENT.—The plaintiff is the assignee of a bond executed by Hari Ram, defendant No. 1, on the 2nd November 1915, in favour of another Hari Ram, defendant No. 2. Now, it is beyond dispute that the suit as brought against these two defendants was within limitation; but the Subordinate Judge, dissenting from the Munsif, held that, as the bond was executed in favour of defendant No. 2 in his capacity as the agent of *Musammat* Dhan Devi, and as that lady was impleaded after the expiry of the period of limitation, the suit was barred by time. The learned Judge has, in my opinion, entirely misunderstood the case as presented by the plaintiff in the Court of first instance. He never asked the Court to implead *Musammat* Dhan Devi, his contention on the other hand was that *Musammat* Dhan Devi was not a necessary party. The learned Vakil for the plaintiff argues that the suit as brought by him should have been dismissed if the Court was of opinion that the non-joinder of *Musammat* Dhan Devi was a fatal defect. Considering that *Musammat* Dhan Devi admits that she had authorised her agent to transfer the bond in favour of the plaintiff and that she had received consideration for the transfer, I have no hesitation in holding that she was not a necessary party and that the suit was rightly decreed by the Trial Court.

Section 22 of the Indian Limitation Act does not lay down that a joinder after the period of limitation shall in all cases necessarily involve a dismissal of the suit. If the presence of a party added after the prescribed period is not necessary to enable the Court to award such relief as may be given in the suit framed by the plaintiff, and he is joined *ex majore cautella*, the suit is not barred merely because limitation had expired at the time when he was impleaded. Further, this section provides that the suit shall, as regards the added party, be deemed to have been instituted when he was so impleaded. Now, the plaintiff does not claim any relief against *Musamma* Dhan Devi, and I fail to see why his action against the executant of the bond should be held to be barred by time.

The judgment of the Subordinate Judge

proceeds upon a misapprehension of the case and must be set aside. Accordingly, I accept the application for revision and, reversing the decree of the Subordinate Judge, restore that of the Court of first instance with costs throughout.

W. C. A. *Application accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 36-B OF 1920.
August 20, 1923.

Present:—Mr. Prideaux, A. J. C.

SONAJI—PLAINTIFF—APPELLANT
versus
DAULAT—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 102—Evidence of both parties considered by Court—Burden of proof, question of, whether material.

Where the parties to a suit have led evidence and the Court has, on that evidence, material to go upon for deciding any disputed point, the question of the burden of proof is not very pertinent.

Seturatnam Aiyar v. *Venkatachela Gounden*, 56 Ind. Cas. 117; 43 M. 567 at p. 577; (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.) and *Krishna Kisor De.* v. *Nagendrabala Chaudhurani*, 66 Ind. Cas. 694; 25 C. W. N. 942; 34 C. L. J. 33, relied on.

Appeal from a decree of the Additional District Judge, Akola, in Civil Appeal No. 140 of 1919, dated the 30th September 1919.

Messrs. *V. R. Pandit*, R. B., and *S. R. Pandit*, for the Appellant.

Dr. *H. S. Gour*, Messrs. *M. B. Niyogi* and *P. N. Rudra*, for the Respondent.

JUDGMENT.—One Vithoba, who died in 1899, adopted Daulat, the defendant, in this case. Plaintiff's story is that his mother Rukhma was the *pat* wife of Vithoba and that he was born after Daulat's adoption. Before he came of age he lived sometimes with his maternal uncle and sometimes with the defendant and after attaining majority the same continued; that in 1916 the defendant denied the plaintiff's right to share in his father's property and hence the present suit.

It was pleaded for the defence that Rukhma had been divorced by Vithoba before the birth of the plaintiff and that the plaintiff was not the son of Vithoba.

In the First Court the plaintiff won his case and obtained a decree for four-fifths of the property of Vithoba in the possession of the defendant. On appeal the lower Appellate Court has, after a very careful consideration of the evidence on record and the probabilities of the case, found as established the following facts:—

"(1) that the mother of the plaintiff, before the birth of the plaintiff, left her husband's home and since then neither she nor her subsequently born son, the plaintiff, ever went and lived with Vithoba and his family;

(2) that the plaintiff lived and was brought up in his maternal grandfather's house;

(3) that the plaintiff was married from the house of his maternal relatives and that Vithoba did not take the plaintiff to his house and marry him;

(4) that the plaintiff was married to the daughter of a poor labourer much beneath the station in life of Vithoba;

(5) that the admittedly legitimate son of Vithoba born after the plaintiff named Sonaji, which was the name of the plaintiff."

The Judge held that these facts, combined with other evidence, lead to the inference that plaintiff was never recognised and treated by Vithoba as his son; that though the boy was born some 12 years before Vithoba's death, neither he nor his mother were taken to Vithoba's house and the fact of two sons reputed to be of the same father bearing the same name was impossible. The suit was dismissed and against that dismissal the present appeal is filed.

The first point urged for the appellant is, that the first issue wrongly throws on the plaintiff the task of establishing his legitimacy. This is true and the burden of proof has been wrongly laid. But where the parties have led evidence and the Court has, on that evidence, material to go upon for deciding any disputed point the question of the burden of proof is not very

pertinent. As their Lordships of the Privy Council remarked in *Seturatnam Aiyar* v. *Venkatachela Gounden* (1): "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." Dealing with this question the Judges in *Krishna Kisor De* v. *Nagendrabala Chaudhurani* (2) state:—"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 *Kundan Lal* v. *Begam-un-nisa* (3), and by Sir Lawrence Jenkins in *Seturatnam Aiyar* v. *Venkatachela Gounden* (1), become 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."

Objection is taken to the finding of the lower Appellate Court as regards the document, Exhibit P-1, executed by Vithoba on 6th February 1893. In that document he names Daulat and gives him certain property because its executant had a son born to him. The defence story is that that son is Maroti while the plaintiff says that the son referred to in that document is himself. The defendant produced in Court the Vaccination Register. That shows an entry No. 15, of the vaccination of a child by name Maroti, son of Vithoba, aged 10 months. The Judge writes as regards this: "On which date the vaccination was made does not appear from the register. Under the entry No. 17 the date of vaccination is shown to be 18th May 1894. From this date it is stated that the plaintiff is the son referred to in the document, Exhibit P-1. Vithoba had admittedly other sons born to him and the age in the Vaccination Register is given by *andaz* and if the age of the boy is considered to be 16 months, then he must be in existence in February when the deed of gift was executed. So it cannot be said that it refers to the plaintiff and not to the other son."

The argument for the appellant is based on the fact, if the child was Maroti, he could not have been born on the date of the document taking the date 18th May 1894 as the starting point. That date does not refer to the vaccination of Maroti but to another vaccination and there is little force in the argument advanced on this point.

Objection was also taken to the Court having taken into consideration the statements made by persons now deceased in the mutation proceedings. But it seems to me that the statements were rightly admitted and it is pointed out that the Judge, writing of P. W. No. 2's evidence, made a mistake because the witness did not say that Rukhma lived with Vithoba all the time, and arguments have been based on the misquotation in the judgment of the evidence of P. W. No. 9. These mistakes do not vitiate the judgment of the lower Appellate Court who has considered the evidence on record with care and has drawn proper inferences therefrom.

The facts found, as stated early in the judgment, make the story of the plaintiff extremely improbable. The fact that a subsequent son of Vithoba's was called by the name as the plaintiff unquestionably shows that the plaintiff was not looked on by Vithoba as his son. Two sons of the same father, as far as my experience goes, are never given the same first name. The material findings upon which the decision of this case turns are pure findings of fact and as there is nothing to vitiate them they will stand. The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondent's costs.

G. R. D. *Appeal dismissed.*

(1) 56 Ind. Cas. 117; 43 M. 567 at p. 577; (1920) M. W. N. 61; 27 M. L. J. 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.).

(2) 66 Ind. Cas. 694; 25 C. W. N. 942 at p. 946; 34 C. L. J. 33.

(3) 47 Ind. Cas. 337; 22 C. W. N. 987; 8 L. W. 233 (P. C.).

ANUP CHAND *v.* KAWAL KAUR.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 602 OF 1923.

October 22, 1923.

Present:—Mr. Justice Martineau.

ANUP CHAND—DEFENDANT—APPELLANT

versus

Musammat KAWAL KAUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale, application to set aside—Objection—Proof—Court, duty of.

An execution sale may be set aside under O. XXI r. 90 of the Civil Procedure Code, on the ground of a material irregularity or fraud in publishing or conducting it, but the irregularity or fraud must be proved, and the Court must also be satisfied that the person applying to have the sale set aside has sustained substantial injury by reason of such irregularity or fraud.

An Execution Court is not competent to set aside a sale merely upon objection made to the sale, without any enquiry into the objection.

Appeal from an order of the Junior Sub-Judge, Jhang, dated the 30th January 1923.

Mr. *Shamair Chand*, for the Appellant.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—The Subordinate Judge has set aside a sale of land effected in execution of a decree without any inquiry into the objection which was made to the sale. This he was not competent to do. A sale may be set aside under O. XXI, r. 90, Civil Procedure Code, on the ground of a material irregularity or fraud in publishing or conducting it, but the irregularity or fraud must be proved, and the Court must also be satisfied that the person applying to have the sale set aside has sustained substantial injury by reason of such irregularity or fraud. The objection put forward in this case was that there had been no sale at the spot and Mr. Faqir Chand contends that there was, as a matter of fact, no sale and that the bids were fictitious. This objection must be inquired into before the sale can be set aside.

I accept the appeal, set aside the lower Court's order and direct the Subordinate Judge to pass a fresh order after he has made inquiry into the objection regarding the sale.

The parties will bear their own costs in this Court.

Z. K. *Appeal accepted.*

SHYAM LAL *v.* BADRI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 367 OF 1922.

June 22, 1923.

Present:—Mr. Justice Kanhaiya Lal.

Pandit SHYAM LAL—DEFENDANT—APPELLANT

versus

BADRI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Usurious Loans Act (X of 1918), s. 3—Unconscionable bargain—Illiteracy, and ignorance of legal technicalities, whether a ground of relief.

A Court of Equity may grant relief to a debtor who has entered into an unusual, hard and unconscionable bargain by reason of his illiteracy and ignorance of legal technicalities.

Ghansham Singh v. *Bhola Singh*, 74 Ind. Cas. 411; 21 A. L. J. 465; (1923) A. I. R. (A) 490; 45 A. 506, distinguished.

A stipulation to pay interest at 2 per cent. per mensem compoundable with monthly rests is unconscionable.

Second appeal against a decree of the Subordinate Judge, Shahjahanpur, dated the 22nd August 1921.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage effected by the plaintiffs, Badri and Kidar, in favour of the defendant on the 23rd of December 1915. The mortgage was effected for a sum of Rs. 135, which was re-payable with interest at 2 per cent. per mensem compoundable with monthly rests. The plaintiffs pleaded that they never agreed to pay interest at 2 per cent. per mensem with monthly rest, and that the above term was entered in the bond without their knowledge. They further pleaded that the interest claimed was, in any case, hard and unconscionable. The Trial Court found that there was no proof of undue influence exercised by the creditor and that the terms entered in the bonds were binding on the plaintiffs. It decreed the entire claim of the plaintiffs accordingly. The lower Appellate Court, however, refused to allow interest at the stipulated rate with monthly rests. It observed that the plaintiffs were illiterate persons and ignorant of the technicalities of law or legal expression, and that they could not be expected to have fully realised the stipulation entered in the mortgage in regard to the payment of compound interest with

monthly rests. The stipulation was undoubtedly unusual, hard and unconscionable; and probably had its effect been fully realised by the plaintiffs at the time the mortgage-deed was written they would not have agreed to the transaction. It can not be said that the debtor entered into it with open eyes, for the lower Appellate Court finds, that he was, by reason of his illiteracy and ignorance of legal technicalities, unable to realise the effect of the same. A Court of Equity may, therefore, relieve him and grant such relief as the circumstances of the case may require. The decision in *Ghansham Singh* v. *Bhola Singh* (1) does not apply, because the question here is whether the executants understood and realised the effect of the terms entered in the mortgage-deed, the finding on which is against the plaintiffs. The appeal, therefore, fails and is dismissed with costs.

M. A. A. *Appeal dismissed.*

(1) 74 Ind. Cas. 411; 21 A. L. J. 465 at p. 470; (1923) A. I. R. (A.) 490; 45 A. 506 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 567 OF 1922.
July 6, 1923.
Present :—Mr. Justice Kanhaiya Lal.
JADUBIR—DEFENDANT—APPELLANT
versus
GAJADHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Ancestral property—Sale in execution of decree against father—Suit to set aside sale by sons—Immoral debts—Notice—Want of legal necessity, if sufficient reason—Onus of proof.

Where joint ancestral property has passed out of the joint family either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debtor or under a sale in the execution of a decree for the father's debt, the sons cannot recover that property unless they show that the debts were contracted for immoral purposes and the purchaser had notice that they were so contracted.

Want of legal necessity is not a sufficient ground to defeat an auction-purchaser or his assignee of the rights acquired by virtue of the auction-sale. [p. 786, cols. 1 & 2.]

Girdharee Lall v. *Kantoo Lall*, 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 380 (P. C.) and *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), relied on.

Second appeal against a decree of the District Judge, Benares, dated the 13th of January 1922.

Mr. *Kamuda Prasad*, for the Appellant.
Mr. *H. K. Mukerji*, for the Respondents.

JUDGMENT.—The dispute in this case relates to a portion of plot No. 44 *khasra* situated in the village Pipri. That portion belonged to a joint family consisting of Salik Pande and his sons Ram Jag and Gajadhar. Salik Pande was the manager of the joint family. On the 2nd of July 1890 he and his son Ram Jag made a simple mortgage of the said property in favour of Jagannath. Subsequently, on the 31st of January 1900, he and his co-sharers mortgaged their entire plot No. 44 *khasra* with Mangru and gave him possession. In 1903, Jagannath filed a suit for the recovery of the money due on his mortgage and obtained a decree in execution of which he purchased the mortgaged property. The other son and grandsons of Salik Pande were not made parties to that suit. Jagannath sold the share purchased by him to Jadubir Pande who got mutation of names effected in his favour in the revenue papers in respect of the same.

The present suit was filed by one of the sons and some of the grandsons of Salik Pande for a declaration that the mortgage and auction-sale aforesaid were not binding on them and for the maintenance of their possession over the same. Their allegation was, that the mortgage in question was made without any legal necessity and that they had since acquired the rights of Mangru by paying the money due to him on the subsequent mortgage of the 31st of January 1900. The defendant Jadubir Pande opposed the claim on the ground that he had purchased the property in question in satisfaction of a prior mortgage which was made for a valid family necessity. He denied that the plaintiff was in proprietary possession of the disputed property and pleaded that the claim was barred by limitation and section 42 of the Specific Relief Act. The Courts below repelled those contentions and decreed the claim.

They found that the plaintiffs were in possession of the disputed property by virtue of their redemption of the subsequent mortgage and that the contesting defendant-appellant had failed to establish that the mortgage of the 2nd of July 1890 was made for a legal necessity.

They, however, overlooked the fact that the mortgaged property had already been sold in satisfaction of that mortgage, and rights of a third party had come into existence, which could not be displaced unless the sons and grandsons of Salik Pande, the mortgagor, were prepared to establish that the mortgage in question was made for illegal or immoral purposes. As observed by their Lordships of the Privy Council in *Girdharee Lall* v. *Kantoo Lal* (1), where joint ancestral property has 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 the sons 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. In *Sahu Ram Chandra* v. *Bhup Singh* (2) their Lordships re-affirmed that view The sale was a public sale, which could have been prevented by the plaintiffs, had they taken steps in time, by an assertion of their rights. They took no such steps and they cannot now be permitted to defeat the rights acquired by a third party by simply questioning the transaction entered into by the head of the family, of which they were members. The Courts below erred in throwing the onus on the defendants, as if no sale had taken place, and the rights of the third party had not come into existence. It is no use sending the case back for disposal because in the plaint there was no allegation that the debt in question was incurred for illegal or immoral purposes. All that was said was, that the mortgage was not taken for family necessity, but that ground is not enough to defeat the auction-purchaser or his assignee of the rights acquired by virtue of the auction-sale. The subsequent redemption made by the plaintiffs of the puisne mortgage cannot give them any higher title. The appeal must, therefore, be allowed and the claim of the plaintiffs dismissed with costs here and hitherto.

M. A. A. & W. C. A. *Appeal allowed.*

(1) 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 380 (P. C.).

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 221; 6 L. W. 213; 44 I. A. 126 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1361 OF 1920.

March 4, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Campbell.

THE FIRM OF NARAIN DAS-JAINI LAL OF DELHI—PLAINTIFFS—APPELLANTS

versus

THE FIRM OF JAI NARAIN-BAIN LAL OF DELHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Injunction to restrain arbitration—Award filed in Court, effect of.

An injunction cannot be granted where the thing sought to be prevented has been done and cannot be undone. For instance, an injunction cannot be granted restraining the opposite party from proceeding with an arbitration, where it is found that the arbitration proceedings have already been held, and an award has been made and filed in Court. In such a case the Court is entitled to take into consideration events which have happened pending the suit or appeal.

First appeal from a decree of the Sub-Judge, Delhi, dated the 28th January 1920.

Lala *Moti Sagar*, R. S., for the Appellants.

Pandit *Sheo Narain*, R. B., for the Respondents.

JUDGMENT.—In this suit the plaintiffs stated that the defendants, professing to act in terms of a contract between the plaintiffs and defendants, had given notice to the plaintiffs threatening to appoint arbitrators to decide a leged disputed questions under the contract. They asserted that there was in fact no contract, and

the alternative that, if a contract had en entered into, it was bad on account of ud or misrepresentation. They asked for a declaration that the defendants d no right to appoint arbitrators, there ing no contract or the contract being id, and (*b*) for an injunction restraining e defendants from nominating an arbi-ıtor on behalf of the plaintiffs and from oceeding with the arbitration.

The lower Court held that no injunction uld be granted in view of section 56 (*1*) the Specific Relief Act, and that the aintiffs being able to seek further relief an a mere declaration, *i. e.*, cancellation the contract, were not entitled to the claration prayed for. On these preli-inary points the suit was dismissed and e plaintiffs have appealed.

The first thing which we have to con-ler is, the effect of events subsequent the judgment under appeal. The arbi ıtors have been appointed, arbitration oceedings have been held, an award s been delivered and it has been filed Court under section 11 (2) of the Indian bitration Act. So far, therefore, as e injunction is concerned, the p aintiffs-pellants can have no relief now. The ing sought to be prevented has been ne and cannot be undone.

As regards the declaration, the plaintiffs, ter delivery of the award in January 21, filed a second suit for cancellation the award which is of a very compre-nsive character and in which all questions ating to the existence and validity of e contract have been placed in issue. his suit was decided by the learned Sub-dinate Judge, Delhi, upon certain pre-minary issues but we have set aside his dgment on appeal [*Jai Narain-Babu Lal Narain Das-Jaini Mal* (1), Civil ppeal No. 2216 of 1921] and have re-anded the case for a fresh decision on e above-mentioned questions. In these cumstances, it appears to us useless send the present suit back for re-trial. ne plaintiffs did ask for a consequential lief, *i. e.*, an injunction, and when they alleged that the contract did not exist, they were not bound to ask, simultaneously, for it to be cancelled. Thus, the lower Court was probably wrong in dismissing the prayer for declaration for the reasons stated by it. At the same time, in view of the altered situation, we are not prepared to complicate matters further by reversing the decision under appeal. The plaintiffs can secure in the subsequent suit all relief which they could possibly obtain on their claim now under consideration, and it is unnecessary for them now to ask for the discretion of the Court to be exercised in their favour in the first suit

We dismiss the appea , but order parties to bear their own costs, since it is doubtful whether the lower Court's decisio was correct and our order is based on the change of circumstances.

Z. K. *Appeal dismissed.*

(1) 69 Ind. Cas. 585; 3 L. 296; (1922) A. I. R. .) 369.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 298 OF 1922.

July 5, 1923.

Present:—MR. Hallifax, A. J. C.

LAKSHMICHAND—PLAINTIFF—APPELLANT

versus

DULICHAND—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 145—Civil Procedure Code (Act V of 1908), O. XXI, rr. 44, 45—Attachment of property—Suit for possession from sipurd-dar by owner—Limitation.

The period of limitation for a suit against a *sipurd-dar*, or temporary Officer of the Court in charge of attached property, for the return of the property by the successful objecting owner of the property is thirty years under Art. 145 of Schedule I to the Limitation Act and commences to run from the date when the Court orders the return of the property to the owner, as the relationship of depositor and depositary is created between the owner of the property and the *sipurd-dar* on that date. [p. 788, col. 2.]

Appeal against a decree of the District Judge, Nagpur, in Civil Appeal No. 152 of 1921, decided on the 28th January 1922.

Messrs. *M. B. Kinkhede*, B. B., and *M. R. Bobde*, for the Appellant.

Mr. *M. K. Padhye*, for the Respondent.

JUDGMENT.—The facts with which we are concerned in this case are as follows: On the 28th of November 1914 certain standing crops belonging to the plaintiff-appellant Lakshmichand were attached in execution of a decree against another person who was originally a defendant in the suit but has by this time rightly been allowed to drop out of it. On the same day, under the provisions of rr. 44 and 45 of O. XXI of the Civil Procedure Code, these crops were put in the custody of the defendant-respondent, Dulichand, on behalf of the Court and were subsequently garnered by him. Lakshmichand put in an objection in the Court which had made the attachment and that Court passed an order on the 15th of January 1916 that the attachment should be raised, finding that the crops were the property of the objector Lakshmichand. This, of course, necessarily included an order on Dulichand, the *sipurd-dar*, or temporary officer of the Court in charge of the attached property, to return it to Lakshmichand.

2. Lakshmichand, however, took no immediate steps to enforce the order, and the decree-holder who had obtained the attachment, filed a suit on the 8th of March 1916 for a declaration that the crops were the property of his judgment-debtor and liable to be sold for the satisfaction of his decree. He succeeded in the First Court but the decree was set aside in appeal and that appellate decree was confirmed by this Court. Now Dulichand, the temporary officer of the Court who was in charge of the property, was very strongly and very naturally in sympathy with Dulichand, the attaching creditor, who not only bore the same name but was the same person. Confusion of thought arising out of this dual personality is very common in cases of this nature and traces of it are to be found here. Out of his natural sympathy with the decree-holder the *sipurd-dar* retained the property, and through his inability to realise that the *sipurd-dar* and the decree-holder were two different persons the owner of the property refrained from enforcing the order for its return against the latter till he filed the present suit on the 27th of April 1921.

3. Lakshmichand seems all along to have laboured under the impression that the order for restoration was not enforceable against the *sipurd-dar* till the suit filed against him by the decree-holder had been decided in all the three Courts through which the majority of suits in India pass, and that suit was not finally decided in this Court till the 30th of April 1920. The plaint he did eventually file certainly does not make it perfectly clear that he is suing the *sipurd-dar* and not the attaching creditor, especially as the judgment-debtor was joined as a defendant, though no relief was claimed against him. Perusal of the plaint, however, shows that it was in essence a suit against the *sipurd-dar*, and it only requires very slight verbal amendments, which would have to be allowed if they are necessary, to make this perfectly clear.

4. The reason given by the learned District Judge for repelling the contention that Art. 145 of the Limitation Act governed the case is that the crops passed into the possession of the Court when they were attached and the possession of Dulichand was on behalf of the Court and "no relationship of depositor and depositary was created between plaintiff and defendant No. 1 on the appointment as *sipurd-dar* of the attached property." That relationship was, however, created between them when the Court ordered the return of the property to Lakshmichand on the 15th of January 1916. In this view, it becomes apparent that the period of limitation for the suit is that stated in Art. 145 of the Schedule of the Limitation Act, which is thirty years, and that that period began to run on the 15th of January 1916. The suit has been decided in both the Courts below on the preliminary plea of limitation, as the defendant reserved all his pleas on the merits till that had been decided. It must, therefore, be remanded for a fresh decision on the merits. The costs so far incurred in this and the lower Appellate Court will be treated as costs in the suit.

G. R. D. & W. C. A.

Case remanded.

SHANKAR DAS *v.* KASTURI LAL.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2048 OF 1922.

February 17, 1923.

Present:—Mr. Justice Martineau.

SHANKAR DAS AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

KASTURI LAL AND OTHERS, MINORS, THROUGH AMAR NATH—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XLI, r. 6 (2)—Execution of decree—Stay of sale—Order, nature of—Appeal, whether lies—Court, duty of.

An order relating to the stay of sale of immoveable property in execution of a decree made under O. XLI, r. 6 (2) of the Civil Procedure Code, falls within the purview of section 47 of the Code and is appealable.

Subramania Pillai v. *Kumaravelu Ambalam*, 33 Ind. Cas. 66; 39 M. 541 relied on.

When an application to stay a sale is made under O. XLI, r. 6 (2) of the Civil Procedure Code, it is incumbent on the Court to stay the sale on such terms as to giving security or otherwise as the Court thinks fit. An order directing that the sale be stayed on condition that the decretal amount is deposited and paid to the decree-holders who are not required to furnish security, is against the spirit of the rule as it is tantamount to an order refusing to stay the sale.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ferozepore, dated the 1st August 1922.

Lala *Fakir Chand*, for Lala *Badri Das*, R. B., for the Appellants.

Lala *Anant Ram Khosla*, for Lala *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.—An order having been made for the sale of immoveable property in execution of a decree, the judgment debtors, whose appeal from the decree is pending, applied to the Executing Court under O. XLI, r. 6 (2), Civil Procedure Code, for the stay of the sale. That Court has ordered that the sale be stayed on condition that the decretal amount is deposited and paid to the decree-holders who are not required to furnish security. The judgment-debtors have appealed from the order.

It is contended for the respondents that no appeal lies, and *Janardan Trimbak Gadre* v. *Martand Trimbak Gadre* (1) is cited in support of this contention It is also pointed out that the words "stay of execution," which occurred in section 244 of the Civil Procedure Code of 1882, have been omitted in the corresponding section 47 of the present Code. But the words may have been omitted because they were regarded as superfluous, as was remarked in *Subramania Pillai* v. *Kumaravelu Ambalam* (2), and in that case the learned Judges said that they were not satisfied that the omission of the words in section 47 of the present Code was any indication that matters relating to stay of execution were not within the section. I do not see how the question whether execution of a decree should be stayed can be said to be not a matter relating to the execution. I hold that matters relating to stay of execution fall within section 47, and that the lower Court's order is appealable.

It was incumbent on the lower Court, under O. XLI, r. 6 (2), to stay the sale on such terms as to giving security or otherwise as the Court thought fit until the appeal was disposed of. The order which the lower Court has passed is clearly against the spirit of that rule, as it is tantamount to an order refusing to stay the sale.

Counsel for the respondents urges that on an application of the appellants an *interim* order was passed by this Court on the 9th February 1922 staying the sale on condition that they paid into Court the decretal amount, which was not paid to the decree-holders till further orders unless the latter gave security, and that that *interim* order was discharged on the 6th July because the condition laid down in it had not been complied with. But the appellants failure to fulfil the condition laid down in the *interim* order is immaterial because the sale of the property had not been ordered when that *interim* order was made. As soon as the sale was ordered, the appellants had the right, under O. XLI, r. 6 (2) of the Code, to have it stayed.

I accept the appeal and direct that the sale of the immoveable property attached be stayed until the appeal is disposed of on condition that the appellants furnish

(1) 59 Ind. Cas. 523; 22 Bom. L. R. 1212; 45 B. 241.

(2) 33 Ind. Cas. 66; 39 M. 541.

security for the payment of the decretal amount and of interest thereon at the rate of six per cent. per annum. No order as to costs.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 27 OF 1923.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Daniels, A. J. C.

Syed IJAZ HUSAIN AND ANOTHER—APPLICANTS

versus

LACHMAN DAS AND OTHERS—OPPOSITE PARTY.

Provincial Insolvency Act (V of 1920), s. 34 (2)—Debt, proof of—Limitation plea—Time, point of, at which applicable—Court, power of, to reject application to enter creditors on schedule—Grounds other than limitation.

Under section 34 (2) of the Provincial Insolvency Act, 1920, the date of the adjudication is the point with reference to which it should be determined whether the recovery of a debt is barred by time or not. [p. 794, col. 1.]

When a debt is held to be provable within the meaning of the foregoing section, it is still open to the Court to reject the application for entering the name of the creditor on the schedule, on grounds other than that of the debt being barred by limitation.

Appeal against an order of the District Judge, Lucknow, dated the 21st February 1923.

ORDER OF REFERENCE.

Wazir Hasan, A. J. C.—(*July* 2, 1923.)—This is an appeal against an order passed in an insolvency proceeding under Act V of 1920 by the District Judge of Lucknow. The respondents held a decree for a sum of Rs. 10,727 11-7 against one Agha Saiyed Mujtaba Khan, who died during the pendency of the proceeding in the Court below. They applied for the execution of their decree against the assets of the deceased Agha Saiyed Mujtaba Khan. The Court seized of the execution refused to proceed with the application on the ground that the decree-holders had not obtained permission for execution of the decree under section 16 of Act III of 1907, that is, the Provincial Insolvency Act before it was re-placed by the subsequent Act V of 1920.

On the 31d October 1922 the respondents applied to the Insolvency Court for permission to proceed with the execution of their decree under section 28, clause (2), of Act V of 1920. This application was disposed of by the learned District Judge by his order dated the 21st February 1923, which is the subject-matter of appeal in this Court. The appellants, who are the sons of the deceased insolvent, objected to the permission being granted or to the entry of the respondents in the schedule of creditors on the ground that the application for execution was barred by limitation. The learned District Judge has, by his order already mentioned, rejected the objection lodged by the appellants. The argument in appeal is that the decree being barred by limitation no permission to proceed with its execution should have been granted nor should the respondents have been entered in the schedule of creditors of the deceased insolvent.

It is obvious that the subject-matter of dispute between the parties is the decree which the respondents hold as against the assets of the deceased insolvent and the value of that decree is over ten thousand rupees. This being so, this appeal should originally have been fixed for hearing before a Bench of two Judges. In any event, I think it is a fit case to be so heard. I certify accordingly.

Messrs. *Niamat Ullah* and *Ghulam Husain Naqvi*, for the Appellants.

Messrs. *Bisheshar Nath Srivastava* and *Mahesh Prasad*, for Respondents No. 1 and 2.

JUDGMENT.—This is an appeal under the Provincial Insolvency (Act V of 1920) from an order of the District Judge of Lucknow, dated the 21st of February 1923. So much of the facts as are necessary for the disposal of this appeal are stated in the order of reference made by one of us on the 2nd July 1923. Two points were urged in support of the appeal:—

(1) that the debt was not provable

within the provisions of section 34, sub-section (2) of the Act, and

(2) that even if provable, the names of the creditors should not be entered in the schedule.

As regards the first point, it was urged that the recovery of the judgment-debt was barred by limitation; in other words, that an application for execution of the decree awarding the debt under consideration would be barred by limitation if it were made in a Court of civil jurisdiction. We think that the point of time with reference to which the question as to whether the recovery of a debt is barred by time or not should be determined is the date of the adjudication. The language used in sub-section (2) of section 34 is, in our judgment, perfectly clear on this point. It says: —"All debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable under his Act." It is admitted that the recovery of the debt was not barred on the date of the adjudication. We, therefore, overrule the first point of the argument.

As regards the second point, it may be said that when a debt is held to be provable within the meaning of section 34, sub-section (2) of the Act it is still open to the Court to reject the application for entering the name of the creditor on the schedule. It would not, however, be possible to reject it on the ground that the recovery of the debt is barred by limitation. There may be grounds other than that on which the application may be rejected, and it will still be open for the learned Judge of the Insolvency Court either to accept or reject the application on grounds other than that of the debt being barred by limitation. We express no opinion on that point. The appeal is dismissed with costs.

M. D. J. & W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL APPEAL No. 2591 OF 1922.

February 5, 1923.

Present:—Mr. Justice Moti Sagar.

RAM GOPAL,—PLAINTIFF—PETITIONER

versus

MANPHUL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Sale—Stay of sale pending appeal—Property to remain under attachment—Stay of sale, whether justified.

The continuance of an attachment on property in execution of a decree sufficiently secures the rights of a decree-holder to warrant an order staying sale of the property during the pendency of an appeal against the decree.

Radha Balab Singh v. *Sewa Ram*, 15 Ind. Cas. 876; 94 P. W. R. 1912, followed.

Civil appeal under O. XLI, r. 5, Civil Procedure Code, for stay of execution proceedings.

Mr. *Manohar Lal*, for the Petitioner.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—These are two applications for stay of execution proceedings under O. XLI, r. 5 of the Civil Procedure Code. It appears that on the 26th May 1920 the decree-holders, Manphul Singh and others, obtained a decree for Rs. 10,000 against certain judgment-debtors who are now represented by defendants No. 8 to 10 from the Court of Senior Subordinate Judge, Hissar. In execution of this decree they attached certain property which the plaintiff says is his and that it is consequently not liable to attachment and sale. He filed certain objections which were disallowed. Thereupon, he brought the present usual declaratory suits that the property should not be sold in execution of the decree obtained by the decree-holders against the judgment-debtors. The suits were dismissed. Appeals have been lodged against these decrees and are now pending in this Court. The decree-holders have, in the meantime, applied for the execution of the decree.

In my opinion, the execution proceedings ought to be stayed. If the plaintiff succeeds in his appeals and the property is sold away and passes out of his hand before the appeals are decided, it will become very difficult, if not impossible, for him to recover it back. The case is fully covered

by the case reported as *Radha Balab* v. *Singh* v. *Sewa Ram* (1). The decree-holders will have sufficient security in the property itself which will remain under attachment. I confirm the order passed on 27th October 1922, and direct that the property in suit shall not be sold pending decision of the appeals in this Court, and that it shall remain under attachment. The decree-holders shall, however, be at liberty to execute their decree as to costs. An early date should be fixed for the disposal of the two appeals.

W. C. A. *Order accordingly.*

(1) 15 Ind. Cas. 876; 94 P. W. R. 1912.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1333 AND 1334 OF 1921.

March 16, 1923.

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

SHEO BADAN TEWARI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

SAHEBZADI KUER—DEFENDANT—RESPONDENT.

Custom—Pre-emption—Wajib-ul-arz, *entry in, construction of.*

A clause in a *wajib-ul-arz* provided that in case of a transfer by a co-sharer of his share by sale or mortgage he must give preference to his co-sharers over a stranger, and that, in case a mortgage given by a co-sharer has matured and the mortgagor is unable for want of funds to redeem the mortgage, any of his co-sharers can pay off the mortgage and retain the share so redeemed until the original mortgagor is in a position to pay his co-sharer:

Held, that the clause was merely a statement of matters which the co-sharers had agreed upon and did not amount to a record of custom.

Surajbali Singh v. *Mohammad Nasir*, 48 Ind. Cas. 220; 16 A. L. J 879, relied upon.

Second appeal from a decree of the District Judge, Azamgarh, reversing that of the Munsif, Hawali.

Mr. *Harnandan Prasad*, for the Appellants.

Dr. *Kailas Nath Katju*, for the Respondent.

JUDGMENT.—The two Appeals Nos. 1333 and 1334 are connected, inasmuch as they arise out of one suit brought by the plaintiffs-appellants to pre-empt certain property conveyed by Moti Saran and *Musammat* Sona Kunwar to the contesting defendants. The claim was resisted on the ground, among others, that the custom of pre-emption alleged in the plaint did not obtain in the village in which the property sold was situate. In support of the alleged custom of pre-emption the plaintiffs-appellants produced the *wajib-ul-arz* of the village. The learned Munsif accepted the recital in the *wajib-ul-arz* as evidence of the custom stated in the plaint and decreed the claim. On appeal by the vendees, the learned District Judge construed the clause relating to the transfer of a share by a co-sharer in the village differently. He was of opinion that the phraseology of the clause upon which reliance was placed by the pre-emptors negatived their allegation as regards the custom of pre-emption. The appeal was, therefore, allowed and the decree of the First Court was set aside and the claim of the pre-emptors was dismissed.

In appeal before us it is contended on behalf of the plaintiffs-appellants, the pre-emptors, that the learned District Judge has not interpreted the clause of the *wajib-ul-arz* relating to the transfer of property by a co-sharer correctly. The clause upon which reliance is placed is to the effect that in case of a transfer by a co-sharer of his share by sale or mortgage he must give preference to his co-sharers over a stranger. It further goes on to say that in case a mortgage given by a co-sharer has matured and the mortgagor is unable for want of funds to redeem the mortgage, any of his co-sharers can pay off the mortgage and retain the share so redeemed until the original mortgagor is in a position to pay his co-sharer. *Wajib-ul-arajz* of this kind have come up before this Court more than once, and it has been held that the terms that we find in the present *wajib-ul-arz* do not go to show that they are a record of custom. A reported case on this point is that of *Surajbali Singh* v. *Mohammad Nasir* (1). The *wajib-ul-arz* in the reported

(1) 48 Ind. Cas. 220; 16 A. L. J. 879.

case was also in similar terms to the one before us. In the reported case, on interpreting the *wajib-ul-arz* before them, the learned Judges of this Court held that the entry in the *wajib-ul-arz* on the very face of it disproved the existence of the custom. The clause relied upon by the plaintiffs-appellants, when read as a whole and examined closely and carefully, goes to show that it mentions matters which the co-sharers had agreed upon and does not mention a custom. We agree with the conclusion arrived at by the lower Appellate Court, and hold that the plaintiffs-appellants have failed to prove their allegation of custom. We, therefore, dismiss this appeal with costs.

Z. K. & W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 2779 OF 1922.

March 10, 1923.

Present:—Mr. Justice Moti Sagar.

BAJRANG DAS—JUDGMENT-DEBTOR—APPELLANT

versus

DONGARSEE DAS—DECREE-HOLDER—RESPONDENT.

Appeal—Order declining to accept security, whether appealable.

An order declining to accept the security offered by a judgment-debtor before granting him an injunction staying the execution of a decree against him, is not appealable. Such an order is merely interlocutory, and it is well settled that an appeal lies only from a decree which conclusively determines the rights of the parties with respect to all or any of the matters in controversy.

Miscellaneous First appeal from an order of the Senior Sub-Judge, Hissar, dated the 6th October 1922.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. One Dongarsee Das, a *Mahajan* of Sirsa, obtained an *ex parte* decree for Rs. 9,631-6-6 against one Bajrang Das from the High Court of Calcutta in November 1921. He obtained a transfer certificate and proceeded to execute his decree in the District of Hissar. Certain objections were filed by the judgment-debtor which were overruled. Thereupon the judgment-debtor brought a suit for setting aside the *ex parte* decree on the ground that it had been obtained by fraud in the Court of the Senior Subordinate Judge of Hissar. This suit was also dismissed. An appeal against this decree is now pending in the Court of the District Judge of Hissar. Along with this Memorandum of Appeal the judgment-debtor filed an application for the issue of a temporary injunction that the execution of the decree which was pending in the Court of the Senior Subordinate Judge, Hissar, be stayed. The District Judge granted that application and ordered that the judgment-debtor should file security before execution could be stayed. The judgment-debtor thereupon offered to hypothecate his immoveable property by way of security. The learned Subordinate Judge, however, refused to accept this security as sufficient and allowed two week's time to the judgment-debtor to produce some other person as surety. It is against this order that the present appeal has been lodged.

A preliminary objection has been raised that no appeal lies. In my opinion, this objection must prevail. It is well settled that every interlocutory order passed in the course of execution proceedings is not appealable, and that an appeal lies only from a decree and a decree must conclusively determine the rights of the parties with regard to all or any of the matters in controversy. The order attacked in the present case determines no rights of the parties that are in controversy. The District Judge ordered that execution should be stayed on condition that security should be given. The security was given, but the Executing Court was not satisfied with it. I do not think that this order can possibly be regarded as an order determining any rights of the parties or can be treated as a decree and be the subject of an appeal.

The appeal is accordingly dismissed with costs.

W. C. A. *Appeal dismissed.*

SHEORAJI KUER *v.* DHANI MIAN.

PATNA HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 1094 OF 1920.
July 13, 1923.

Present:— Sir Dawson Miller, KT., Chief Justice, Justice Sir B. K. Mullick, KT., Justice Sir Jwala Prasad, KT., Mr. Justice Foster and MR. Justice Macpherson.

Musammat SHEORAJI KUER—DEFENDANT—APPELLANT

versus

DHANI MIAN—PLAINTIFF—AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 86 —Non-transferable holding—Transfer by occupancy tenant—Landlord, whether entitled to eject transferee —Incumbrance, meaning of.

A surrender of a non-transferable holding by an occupancy *raiyat* to his landlord, where the *raiyat* has previously transferred a portion of the holding to another person, entitles the landlord to enter upon the whole holding and eject the transferee or to settle it with another tenant.

Per *Miller, C. J.*—The transfer of a non-transferable holding is not binding upon the landlord in the sense that it imposes upon him any obligation to recognise the transferee as his tenant. [p. 797, col. 1.]

Dayamoyi v. *Ananda Mohan Roy Chowdhury* 27 Ind. Cas. 61; 42 C. 172; 20 C L. J. 52; 18 C. W. N. 971 (F. B.), referred to.

Mohsenuddin v. *Bhagaban Chandra Sutradhar*, 61 Ind. Cas. 443; 48 C. 605; 25 C. W. N. 29; 32 C. L. J. 286, not followed.

The word "incumbrance" in section 86 of the Bengal Tenancy Act implies a subsidiary interest charged upon or carved out of a parent estate such as a lease, mortgage, charge, easement or other interest limiting the full rights of ownership in the estate to which it appertains. It is something which affects the quality of the parent estate making it something less than it was before the encumbrance was created. [p. 800, col. 2; p. 801, col. 1.]

Mahdeo Lal v. *Langat Singh*, 40 Ind. Cas. 257; 2 P. L. J. 457; 1 P. L. W. 504; (1917) Pat. 169 (F. B.), referred to.

Per *Mullick, J.*—The proper interpretation of section 86 of the Act is that, upon the surrender of an entire holding, the landlord is entitled to eject every occupant on the land except those protected by clause (6) of the section. [p. 802, col. 1.]

Nilkanta Chaki v. *Ghatoo Sheikh*, 4 C. W. N. 667, *Badan Chandra Das* v. *Rajeswari Debya*, 2 C. L. J. 570, *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt*, 12 C. W. N. 878, *Gagan Chandra Choudhury* v. *Alak Chand Saha*, 18 Ind. Cas. 996; 17 C. W. N. 698, and *Ram Udar Singh* [*Raghunath Singh*] v. *William Cox*, 27 Ind. Cas. 564; 19 C. W. N. 268, referred to.

Per *Jwala Prasad, J.*—The sale of a portion or of an entire holding is not an incumbrance within the meaning of clause (6) of section 86 of the Bengal Tenancy Act. [p. 809, col. 2.]

In a non-transferable holding the tenant has no right to transfer without the consent of the landlord and the transfer of the whole or part of it is invalid so far as the landlord is concerned. [p. 810, col. 2.]

Appeal from a decision of the Subordinate Judge, Motihari, dated the 21st June 1920, confirming that of the Munsif, Motihari, dated the 31st October 1919.

MR. *Jadubans Sahay*, for the Appellant.

MR. *Sant Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—The plaintiff in the year 1913 took Settlement from the landlord of a holding measuring about 2½ *bighas* of land. The holding in question had previously been in the occupation of Badar Ahir, but had been surrendered by him to the landlord in the year 1911. Some seven years before the surrender, namely, in the year 1904, Badar Ahir had, by a registered sale-deed, transferred a portion of the holding, measuring 9 *cottahs* 11 *dhurs*, to *Musammat* Sheoraji Kuer, the defendant No. 1. The holding was not transferable by custom and the transfer created no privity between the transferee and the landlord. The defendant No. 1 refused to give up possession to the plaintiff of the part transferred to her by Badar Ahir in 1904. The present suit is brought by the plaintiff to eject her. The landlord is also impleaded as defendant No. 2 in the suit.

The defendant No. 1 challenges Badar Ahir's right to surrender the portion of the holding transferred to her and disputes the landlord's right to settle it with the plaintiff after surrender. The plaintiff has paid rent for the whole holding to the landlord since he took settlement in 1913. The Revisional Settlement Records show the entire holding entered in the plaintiff's name, but the defendant No. 1 is entered in the remarks column as in possession of the portion transferred by virtue of purchase. The defendant No. 1 was never recognised by the landlord as a tenant and her name is not entered in the landlord's *sherishta* which records the plaintiff as the tenant of the whole holding. There is no suggestion of any collusion between the landlord and Badar Ahir when the latter surrendered his holding in 1911, nor is it shown that at that time the landlord was even aware of the transfer.

SHEORAJI KUER *v.* DHANI MIAN.

The Munsif before whom the case came for trial found in favour of the plaintiff and gave the plaintiff a decree for possession after ejectment of the defendant.

The defendant appealed to the Subordinate Judge, who affirmed the Munsif's decision and dismissed the appeal.

The defendant then preferred a second appeal to the High Court. In view of the recent Full Bench decision of the High Court at Calcutta in *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (1), which is in conflict with certain earlier decisions of the same Court, and, having regard to the general importance of the question involved, the case was referred to a Full Bench for determination.

The question for determination is, whether, in the circumstances above-mentioned, a surrender of a non-transferable holding by an occupancy *raiyat* to his landlord, where the *raiyat* has previously transferred a portion of the holding to another person, entitles the landlord to enter upon the whole holding and eject the transferee or to settle it with another tenant.

In approaching this question it is necessary to bear in mind the peculiar features of occupancy rights in land and the extent to which protection is given by legislation to those deriving title from the occupancy *raiyat*. Occupancy rights in land have long been sanctioned by custom in this part of India, but it was not until 1859 that any attempt was made by the Legislature to define the rights of an occupancy *raiyat*. Act X of 1859, by section 6, gave every *raiyat* who has cultivated or held land, not being the landlord's *zerait* or private land, a right of occupancy in the land so cultivated or held by him, whether held under a *patta* or not, as long as he pays the rent payable on account of the same. The section, however, did not apply to sub-lessees from the *raiyat* holding on lease from him for a term or year by year. The 7th section provided that nothing contained in the last preceding section should affect the terms of any written contract for the cultivation of land entered into between a land-holder and a *raiyat* when it contained any express stipulation contrary thereto. The *raiyat* was liable to ejectment for non-payment of arrears of rent, but a *raiyat*, having rights of occupancy, could only be ejected in execution of a decree or order under the provisions of the Act. Section 19 gave the *raiyat* the unfettered right to relinquish his holding after notice to the landlord, and no provision is made in the Act protecting the interest of sub-lessees or other incumbrancers deriving title from the *raiyat*. No mention is made in the Act of the rights of transfer. This was left then, as now, entirely to custom. Apart from custom, a transfer without the consent of the landlord was tantamount to abandonment entitling the landlord to re-enter and eject the transferee as a trespasser. The question in all such cases was, whether there was or was not a custom of transferability: See *Ajoodhya Pershad* v. *Musammat Imam Bandi Begum* (2), *Palakdhari Rai* v. *Manners* (3). Although no restriction was placed by the Act upon the *raiyat's* right of surrender it was held by the Calcutta High Court in 1866, in *Kashee Singh* v. *Onraet* (4), that a *raiyat* holding under a lease for a fixed term did not come under section 19 and could not without his landlord's consent relinquish the tenancy during the term. It was also held in *Heeramonee* v. *Gunganarain Roy* (5) that where a tenant, who held land for a fixed term underlets the land, he parts with his interest therein to the extent of the interest created by the under-lease and cannot, therefore, determine the interest of his sub-lessee by surrendering his own term to the landlord. These cases, however, impose no obligation upon the landlord to recognise any incumbrance or transfer created by an occupancy *raiyat*, who by the Act has a right of surrender. The acquisition of occupancy rights by a *raiyat* gave him a permanent interest in the holding, which was recognised and protected by the Act, but the right of the landlord to ignore alienations made by the *raiyats*, in cases

(1) 61 Ind. Cas. 443; 48 C. 605; 25 C. W. N. 29; 32 C. L. J. 286 (F. B.).

(2) 7 W. R. 528; B. L. R. Sup. Vol. 725.
(3) 23 C. 179; 12 Ind Dec. (N. S.) 119.
(4) 5 W. R. Act X, Rul. 81.
(5) 10 W. R. 384.

where there was no custom of transfer, was always jealously maintained. Although the occupancy *raiyat* acquired for himself and his heirs a permanent interest, he could not, by transfer, impose upon the landlord a tenant not of his own choosing unless there existed by custom a right of transfer. The *raiyat* might surrender but, if he did so, the surrender was complete and the landlord could re-enter and take free of alienations or incumbrances created by the *raiyat*. In the case of tenure-holders, as in the case of *raiyats* holding for a term, the law was different. They could not surrender without the landlord's consent. See *Heera Lall Pal* v. *Neel Monee Pal* (6), *Judoonath Ghose* v. *Schoene Kilburn & Co.*, (7). But if the landlord in such a case accepted the surrender, he was in no better position than an assignee of the tenure-holder and presumably would be bound by incumbrances effected before the surrender.

The Act of 1859 was repealed by Act VIII (B. C.) of 1869, but no substantial improvement was made in favour of incumbrances created by the *raiyat* until the Bengal Tenancy Act of 1885 was passed. That Act recognised and confirmed the right of the *raiyat* to surrender, notwithstanding any contract between him and his landlord to the contrary, but it also conferred upon the landlord, who could not object to the surrender, certain reciprocal rights including the right to re-enter upon the holding and either let it to another tenant or take it into cultivation himself. The tenant's right to surrender was, therefore, firmly established and he could not contract himself out of the right even by a written agreement with his landlord. But if he did surrender, then the landlord's right to re-enter and take possession was also confirmed by the Act. At the same time, some protection, limited in extent, was given to sub-lessees and other incumbrancers deriving title from the *raiyat*. The framers of the Act would appear to have striven to give a measure of protection to sub-lessees and other incumbrancers, whilst avoiding the risk of converting such interests into permanent transfers which would defeat the landlord's rights in cases where no transfer was permissible by custom. Section 178 (3) provides as follows:—

"Nothing in any contract made between a landlord and a tenant after the passing of the Act shall.....

'(c) Take away the right of a *raiyat* to surrender his holding in accordance with section 86."

Section 86 provides, by clause (1), as follows:—

"A *raiyat* not bound by a lease or other agreement for a fixed period may, at the end of any agricultural year, surrender his holding." Clause (2) makes the *raiyat* liable to indemnify his landlord for the loss of rent for the next agricultural year unless three months' notice of the intention to surrender is given. Clause (5) provides that when a *raiyat* has surrendered his holding the landlord may enter on the holding and either let it to another or take it into cultivation himself. Clauses (6) and (7) are the only clauses which protect incumbrancers in the case of surrender. They are as follows:—

"(6). When a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer."

"(7). Save as provided in the last foregoing sub-section, nothing in this section shall affect any arrangement by which a *raiyat* and his landlord may arrange for a surrender of the whole or a part of the holding."

It seems to me that the result of these provisions of the Act is that the *raiyat* has an absolute right of surrender subject to clause (6) of section 86. By that clause, where there is an incumbrance secured by a registered instrument, either the landlord or the incumbrancer can defeat the *raiyat's* right to surrender, but in other cases it would seem clear that neither the landlord nor the incumbrancer can object to the surrender, and the only ground upon which either of them could object is the ground mentioned in clause (6). Nor will it avail the landlord that the *raiyat* had expressly agreed with him in writing not to exercise his right of surrender.

(6) 20 W. R. 383.
(7) 9 C. 671; 12 C. L. R. 343; 4 Ind. Dec. (N. S.) 896.

I apprehend that, under clause (7), the landlord and the *raiyat* might enter into a valid arrangement for surrender as between themselves, but this would not affect the rights of a registered incumbrancer whose interest the landlord would be bound to recognise. Under clause (7) the consent of the landlord is necessary, and he would, therefore, be in no better position than an assignee of the tenancy, who could claim no greater rights than those of his assignor. In all cases, however, not governed by clause (6) the landlord would be bound to accept the surrender. But where he is bound, his rights are clearly stated in clause (5). He may enter on the holding and either let it to another tenant or take it into cultivation himself. Section 87 provides for cases of a voluntary abandonment by the *raiyat*. By that section, if the *raiyat* voluntarily abandons his residence, without notice to his landlord and without arranging for payment of his rent as it falls due, and ceases to cultivate his holding either by himself or by some other person, the landlord may at the end of the agricultural year, enter on the holding and let it to another tenant or take it into cultivation himself. Provision is also made for recovery by the *raiyat* of possession of the land within a limited period when he can show that the abandonment was not voluntary; and by clause (4) where the whole or part of a holding has been sub-let by registered instrument the landlord, before entering, must offer the whole holding to the sub-lessee for the remainder of the term of the sub-lease at the rent paid by the *raiyat* who has abandoned. The sub-lessee must also, if he accepts the offer, pay up all arrears due from the *raiyat*. If he refuses to accept the offer the landlord may avoid the sub-lease and enter on the holding. No provision is made in the Act protecting the interest of the transferee of a part of the whole of a non-transferable holding in cases either of surrender or abandonment. It must be conceded, I think, that the transfer of a non-transferable holding is not binding upon the landlord in the sense that it imposes upon him any obligation to recognise the transferee as his tenant. The transfer of a portion of the holding does not confer upon the landlord any right of re-entry as long as the tenant continues in possession of the remainder and pays the rent. The question was considered by a Full Bench of the Calcutta High Court in 1914 in the case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhury* (8) where it was laid down as follows:—

"The transfer is operative as against the landlord in all cases, in which it is operative against the *raiyat*, provided the landlord has given his previous or subsequent consent. 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."

According to that decision, where there has been a transfer of a portion of the holding and a subsequent relinquishment by the *raiyat*, the landlord is entitled to enter and this appears to me to be in accordance with the provisions of the Bengal Tenancy Act, and, but for the later decision of the same High Court in the case of *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (1), I should have had no hesitation in holding that the plaintiff was entitled to eject the defendant in the present case. In that case the Full Bench, without reviewing the previous decisons on the subject, decided that an occupancy *raiyat*, who has transferred part of his non-transferable holding is not competent to surrender to his landlord the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion. The Court considered that this follows from the principle that no one is permitted to defeat or derogate from his own grant. The Court also considered that the *raiyat's* power of surrender had been extinguished by his own previous dealings with the property in transferring

(8) 27 Ind. Cas. 61; 42 C. 172; 20 C. L. J. 82; 18 C. W. N. 971 (F. B.).

a portion of his holding to another person, and they applied the doctrine of the English authorities applicable to powers, which provides that where the donee of a power deals with the estate so as to create an interest inconsistent with the exercise of the power his option of exercising it becomes extinguished.

The English rule appears to be based either upon the doctrine that a person cannot derogate from his own grant or upon the principle that the power having been in fact exercised there is no property left upon which it can operate. The principles relied on are undoubtedly sound and salutary principles of law, but, in applying them, one must be certain that the circumstances are such as to attract their operation. It is necessary to consider, in the first place, what was transferred in the present case. The transfer was certainly not an assignment of the whole interest of the *raiyat* even in the portion transferred. It created no privity between the landlord and the transferee, the holding being of the description known as non-transferable. The right of surrender, one of the incidents of a *raiyati* interest, was not transferred. The landlord would not have been bound to accept a surrender from the transferee. That right remained with the transferor. The short question is, can the *raiyat* by a contract with a third party defeat the landlord's statutory rights in the event of a surrender? Both parties to the transfer knew the limitation of the *raiyat's* powers of transfer. Both parties knew the landlord's rights in the event of a surrender or abandonment. No express covenant was made agreeing not to surrender, although in the present case it would make no difference, in my opinion, whether the covenant were expressed or merely implied. The result of enforcing such a covenant so as to bind the landlord would be, as it seems to me, to permit the *raiyat* by a contarct with a third party, in effect, to bring about that which by law he can only do with his landlord's consent and the transferee must be taken to have known that without the landlord's consent, he could acquire no interest in the property which would be in derogation of the landlord's rights. The Act limits the *raiyat's* powers of surrender only in a certain specified case, namely, that mentioned in clause (6) of section 86 and by implication affirms it in all other cases. It seems to me to follow from this that unless the case falls within clause (6) the landlord is bound to accept the surrender and cannot object on the ground that the *raiyat* has created incumbrances or otherwise dealt with the land in a manner not contemplated by clause (6). But if the landlord is bound by the surrender his rights, under clause (5), come into operation and entitle him to enter on the land and eject any one not protected under clause (6). To hold otherwise would, in my opinion, place the landlord entirely at the mercy of the *raiyat* in compelling him to recognise a transfer where by custom no transfer is permissible. If the surrender is not valid the landlord can only look to the *raiyat* unwilling any longer to remain on the land, for his rent. He cannot eject the transferee or even claim rent from him as he is not his tenant. He may even have strong objections to him as a tenant. But to accept rent from him is to recognise him as a tenant. It may be argued that if the rent is not paid a rent suit can be brought and the property can be sold with power to annul incumbrances or other unprotected dealings with the land, but it would appear to follow as a corollary of the appellant's argument that there is also an implied covenant by the transferor to pay the rent and perform all acts necessary to keep alive the tenancy, and that the occupancy *raiyat*, who has transferred a portion of his non-transferable holding is no longer entitled in law either to surrender or abandon or to fail to pay his rent or perform any of the other obligations the failure to perform which would entitle the landlord to re-enter, or, after decree, to sell the property with power to annul incumbrances. If the argument is pushed to its logical conclusion I doubt very much if a *raiyat*, being the last of his line with no one to succeed him, would even be entitled to die. Certainly, the question would arise if he voluntarily put an end to his own life. There is, in my opinion, no good ground for applying the doctrine applicable to assignees in the case of English

leases to a case of surrender under the Bengal Tenancy Act. In England the law is that, a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment. [*Walter* v. *Yalden* (9).] If he has created under-leases or incumbrances upon his own interest, they remain notwithstanding the surrender, the reason being that he cannot convey to his landlord, any more than to any one else, that which he had already parted with to another. In England the landlord is in no different position from a third party in this respect. The incidents of an English lease are the creation of contract between the landlord and his tenant and the landlord's consent is necessary to a surrender. The incidents of an occupancy holding in this country are the creation of Statute based on custom, and the consent of the landlord is not necessary to validate a surrender. In England a landlord may or may not accept a surrender but, if he does, he takes an assignment only of that which the tenant has not already parted with. An occupancy *raiyat* in India can create no incumbrances which a landlord entitled to re-enter is bound to recognise, except as provided by the Statute. He cannot legally transfer at all so as to compel the landlord to recognise the transferee unless the landlord consents or unless the transfer is sanctioned by custom. Even in the case of sub-lessees protection is only given to those created by registered instrument and by section 85 of the Act sub-leases for a term of more than 9 years cannot be admitted to registration. It would be a strange result if a transfer which is not recognised by the Statute at all, and which the *raiyat* cannot bind his landlord to recognise, conferred a permanent interest upon the transferee and gave him rights even greater than those of incumbrancers protected by the Statute. There is obviously a difference between the effect of a surrender within clause (1) of section 86 and the arrangement contemplated in clause (7) of that section. The latter requires the consent of both landlord and *raiyat* and is a mutual arrangement in their general interest upon terms agreed between them. It cannot affect the rights of third parties. It is analogous to a surrender in English Law which is really an assignment to the landlord of the rights remaining in the tenant, and the English doctrine may well apply to such a case. The former depends solely on the will of the *raiyat*. The landlord has no say in the matter, and the tenant's motives are, apart from fraud or collusion, immaterial. But once it is conceded that the tenant cannot legally transfer that which by custom is not transferable so as to bind his landlord and, in effect, limit the rights given to the latter by Statute, the Court, should, in my opinion, be slow in such cases to give binding effect to such transfers by applying doctrines which, although applicable to surrenders in favour of a landlord whose consent is a necessary condition of the surrender, appear to have no application in the case of a landlord, who is bound. If it is a question of which of two innocent parties must suffer, I think the equities are all in favour of the landlord, who is bound by the surrender rather than of the transferee who takes what he knows must be a precarious interest depending, largely upon future circumstances or even upon the good will of his transferor. In such a case, I consider that the transferee's remedy should be confined to such compensation as he may be able to obtain from his transferor.

Moreover, if a transfer of a portion of a non-tranferable holding by the *raiyat* prevents him and his heirs ever afterwards from making a valid surrender it must be conceded, I think, that a sub-lease or a mortgage or any other dealing with the property creating an incumbrance, even by an unregistered instrument, would have the same effect. If that be so, it was quite unnecessary for the Legislature to enact clause (6) of section 86 of the Bengal Tenancy Act as, even without legislation, no surrender would be valid, so as to entitle the landlord to re-enter without the consent of the incumbrancer in the case contemplated in the clause; nor, indeed, in any case where an incumbrance, registered or unregistered, existed.

It must be remembered that in the present case no question arises of collusion between the landlord and the *raiyat* with a view to defeating the rights of the trans-

(9) (1902) 2 K. B. 304; 71 L. J. K. B. 693; 87 L. T. 97; 51 W. R. 46; 18 T. L. R. 668.

feree. The surrender was made 7 years after the transfer, and it may be presumed that the tenant had good reasons for wishing to surrender. It was made after due notice within the meaning of section 86 (2). The landlord is not shown to have been aware even of the transfer and no objection could be made by him entitling him to refuse to accept it. There was no question of an arrangement under the provisions of clause (7) of section 86. The facts were not exactly similar to those in the case of *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (1). In that case the tenants transferred a portion of their holdings and, shortly afterwards, when sued by the landlord for arrears of rent, refused to pay the rent of the entire holding on the ground that they had transferred a portion. This was no defence to the suit but the parties came to an arrangement whereby the tenants surrendered to their landlord the land they had sold and took a fresh settlement of the remainder at a lower rent than that which was payable for the whole holding, and a decree in the rent-suit was passed for a smaller sum than that which had been claimed. The landlord then instituted a suit to eject the transferee from the plots in his possession. It was in that suit that the Court refused to give the landlord a decree ejecting the transferee. Whether, in the circumstances of that case, the Court was justified in dismissing the landlord's suit for the reasons given, it is unnecessary for the purposes of the case to determine. The case was very like one of an arrangement under clause (7) of section 86, but if the Court meant to lay down that in no case could the *raiyat* surrender where he had transferred a portion of his non-transferable holding, I find myself, with great respect to the learned Judges who decided that case, unable to follow their decision.

The only other point was, whether the transfer in the present case was an incumbrance within the meaning of section 86 of the Bengal Tenancy Act. If the sale was not an incumbrance it can make no difference that it was effected by a registered instrument.

The term 'incumbrance' is defined in section 161 of the Act, but the definition there given is declared to be for the purposes, of Chapter XIV only, which does not include section 86. The definition, therefore, is not applicable to the word incumbrance as used in section 86. At the same time, the meaning attributed to the word in section 161 is of wide import and includes, in addition to any lien, sub-tenancy or easement, any other right or interest created by the tenant on his tenure or holding, or in limitation of his own interest therein, and not being a protected interest as defined in section 160.

A Full Bench of this Court in *Mahadeo Lal* v. *Langat Singh* (10) unanimously decided that a purchaser from a *raiyat* of a portion of a non-transferable occupancy holding without the landlord's consent is not an incumbrancer and the majority of the Bench considered that he had not an interest within the meaning of that section. In so far as this Court is concerned, I think we are bound by that decision.

The question has also been considered by the Calcutta High Court on more than one occasion. It is sufficient to refer to the decision of Sir Lawrence Jenkins, C. J., in *Abdul Rahman Chowdhari* v. *Ahmadar Rahman* (11). The question there related to a sale of a portion of a tenure, but the grounds of the decision apply with equal force to a holding. The learned Chief Justice there points out that an incumbrance would not ordinarily mean or include an absolute assignment nor would an assignment be a right or interest created in the tenure. He then considered whether the transferee's interest would fall within the definition in section 161, and held that it would not

In my opinion a sale of the whole or a portion of an occupancy *raiyati* interest creates no incumbrance on that interest. The interest remains unimpaired, the ownership alone has changed. No sub-tenancy is created between the vendor and vendee. Both the part transferred and the part retained remain whole and unincumbered. The word "incumbrance" implies a subsidiary interest charged upon or carved out of a parent estate such as a lease, mortgage, charge, easement or other interest limiting the full rights

(10) 40 Ind. Cas. 257; 2 P. L. J. 457; 1 P. L. W. 504; (1917) Pat. 169 (F. B.).
(11) 31 Ind. Cas. 554; 43 C. 558; 22 C. L. J. 361; 19 C. W. N. 1217.

of ownership in the estate to which it appertains: It is something which affects the quality of the parent estate making it something less than it was before the incumbrance was created. A division of the estate between two or more owners does not, in my opinion, impair its quality or incumber it in any way. I would dismiss the appeal with costs.

Mullick, J.—I am of the same opinion as the learned Chief Justice but I think it will be useful to examine the history of the legislation relating to the sale and surrender of occupancy rights and to the protection of derivative titles and also to refer to the case-law on the subject

Although occupancy rights in land were sanctioned by custom long before the accession of the East India Company to the *Dewani* the first legislative enactment which affirmed and defined the right in respect of agricultural tenancies was Act X of 1859. The occupancy *raiyat* was thereby permitted to sublet for a term or year by year and the determination of the tenancy by reason of forfeiture or any other cause carried with it the determination of the sub-tenancy also.

With regard to the transfer by sale or mortgage of an occupancy holding not transferable by custom without the consent of the landlord, the Act was silent; but it was then, as now, settled law that such a transfer was an abandonment and that it entitled the landlord to eject the transferee as a trespasser.

As to surrender, section 19 of the Act empowered a *raiyat* to relinquish the land after notice to the landlord who was thereupon entitled to re-enter and to eject all sub-tenants, incumbrancers and other transferees. It was apparently not then thought necessary to protect persons who held under derivative titles from the *raiyat* and no such transferees had any right to remain upon the land as against a landlord who has re-entered.

But, although Act X of 1859 did not place any restriction upon the right of a *raiyat* to relinquish his lease, it was held in 1866 by a Division Bench of the Calcutta High Court in *Kashee Singh* v. *Onraet* (4) that a *raiyat* who had taken a lease for a fixed term could not, under section 19 of the Act, throw it up during its currency.

Two years later it was held in *Heeramonee* v. *Gunganarain Roy* (5) that a tenant who holds land for a term and underlets it, cannot determine the interest of his under-tenant by surrendering his own term to the landlord. It is necessary to observe that Sir Barnes Peacock in that case was careful to speak of a tenant and not a *raiyat*; a tenure-holder, according to the law as it stood and as it stands now, could not surrender without the consent of his landlord nor could he in any event prejudice the rights of subordinate tenure-holders holding under him: See *Heera Lall Pal* v. *Neel Monee Pal* (6). To the same effect is *Judoonath Ghose* v. *Schoene Kilburn & Co.* (7) where the law was stated as follows by Field, J.: "Of course, the *zemindar* may, if he chooses, accept the relinquishment of the *patni* but by doing so he is in no better position than an assignee of the *patnidar*." And referring to *Kowla Kant Mukherji* v. *Ram Mohun Gosain* (12) the learned Judge further observed: "This case certainly does not shew that either by the law or the custom of the country a *patnidar* has any right of his own option to relinquish his tenure and thereby free himself from future liability for rent."

These last two cases were decided after Act X had been repealed by Act VIII (B. C.) 1869 and no substantial improvement was made in the rights of transferees till the enactment of Act VIII of 1885.

Section 85 of that Act made it competent for any *raiyat* to sub-let either orally or by unregistered instrument with the consent of his landlord and to sub-let by registered instrument for a term not exceeding 9 years without the consent of his landlord. Section 86, while re-affirming the provisions of the old law with regard to surrender by a *raiyat* not bound by a lease or other agreement for a fixed period, provided that when a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer. Clause (5) provided that when a *raiyat* surrenders his holding the landlord may enter upon the holding and either let it to another tenant or take it into cultivation

(12) 2 Sel. Rep. 325; 6 Ind. Dec. (o. s.) 675.

SHEORAJI KUER v. DHANI MIAN.

himself; and section 178 introduced a most important change, namely, that a *raiyat* could not contract himself out of the right of surrender.

In my opinion the proper interpretation of section 86 of the Act is that, upon the surrender of an entire holding the landlord is entitled to eject every occupant on the land except those protected by clause (6) of the section.

The view is supported by *Nilkanta Chakt* v. *Ghatoo Sheikh* (13) where an occupancy *raiyat* sub-let without a registered lease and without the consent of his landlord and the Court held that upon the surrender of the whole holding the landlord was entitled to eject the under-*raiyat* without notice. So, again, in *Badan Chandra Das* v. *Rajeswari Debya* (14) it was held that section 22 of the Bengal Tenancy Act did not cover a case of surrender and that under section 86 whether the surrender was of a whole or a part, the landlord's right of re-entry was undoubted and the learned Judges distinguished *Amirullah Mahomed* v. *Nazir Mahomed* (15) on the ground that a landlord taking by assignment from the *raiyat* was bound by the contracts made by the *raiyat* but that he was not so bound after a surrender. To the same effect were *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt* (16), *Gagan Chandra Choudhury* v. *Alak Chand Saha* (17) and *Ram Udar Singh* [*Raghunath Singh*] v. *William Cox* (18). In the last mentioned case it was held that the landlord after surrender by the *raiyat* could not by letting out the land to another *raiyat* eject a registered mortgagee holding under the former *raiyat*; and, although reference was made to *Walter* v. *Yalden* (9) and to the doctrine in English Law that a lessee cannot effect by surrender anything that he cannot do by assignment to a third person the learned Judges certainly did not say that the protection could, in the face of the provisions of section 86, be applied to any but registered incumbrancers.

What, then, is the position of the purchaser of a portion of an occupancy holding?

If he is not an incumbrancer within the meaning of section 86, then section 86 does not protect him. It was held in *Tamizuddin Khan* v. *Khoda Nawaz Khan* (19) that such a purchaser was not an incumbrancer and that upon the *raiyat's* surrendering the transferred portion the landlord was entitled to re-enter. That case was followed in *Ramoni Mohan Roy* v. *Sheikh Kalimuddi* (20) but a note of warning was sounded for the first time in *Asgar Ali* v. *Gouri Mohan* (21). There, although the transferee was maintained in possession because the surrender to the landlord was collusive, the correctness of the decision in *Tamizuddin's case* (19) was questioned but on grounds other than the ground that a grantor could not derogate from his grant.

In the following year came the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy Chowdhury* (8) where it was laid down in clear and unmistakeable language that upon a transfer of a part of an untransferable occupancy holding the landlord is not ordinarily entitled to re-enter unless there has been (*a*) abandonment under section 87, or (*b*) relinquishment of the holding, or (*c*) repudiation of the tenancy.

Next, on the footing that the Full Bench had re-affirmed the old law, it was held in *Kunya Kesori Pal* v. *Bama Sundari Dasya* (22) that where a tenant declined to pay rent for the whole holding after transferring a portion thereof the landlord was entitled to re-enter and take possession of the holding.

But shortly before this a precisely opposite view had been taken in *Ananda Mohan Roy Chowdhury* v. *Gurudayal Saha* (23). In that case D. Chatterji, J., held that as the Full Bench had decided that a transfer of a portion was binding between the transferee and the transferor and that the landlord could not sue to eject the transferee

(13) 4 C. W. N. 667.
(14) 2 C. L. J. 570.
(15) 31 C. 932.
(16) 12 C. W. N. 878.
(17) 18 Ind. Cas. 996; 17 C. W. N 698.
(18) 27 Ind. Cas. 564; 19 C. W. N. 268.
(19) 5 Ind. Cas. 116; 14 C. W. N. 229; 11 C. L. J. 16.
(20) 17 Ind. Cas. 682; 17 C. W. N. 1101.
(21) 21 Ind. Cas. 58; 18 C. W. N. 601; 18 C. L. J. 257.
(22) 32 Ind. Cas. 781; 43 C. 878.
(23) 49 Ind. Cas. 979; 22 C. W. N. 965.

so long as the contract between him and the *raiyat* subsisted and also as clauses (5), (6) and (7) of section 86 were not applicable to the surrender only of a part of the holding, there was no provision of law under which the landlord could eject the transferee. The learned Judge further held that the *raiyat* could not derogate from his grant and that the surrender was in fact an assignment. In 1917 that decision was affirmed in a Letters Patent Appeal the judgment in which runs as follows: "We think this case was rightly decided by Mr. Justice D. Chatterji. The appeal must, therefore, be dismissed with costs."

In the following year the question again came up for decision in *Tamiz Munshi* v. *Bisweswari Debya* (24). In that case there was a sale of a part of the holding, then a surrender by the *raiyat* of that part and then the taking of a new settlement of the balance of the holding; and it was contended that these operations had resulted in a surrender of the whole and that the landlord was entitled to eject the transferee from the portion which he had purchased. Mr. Justice D. Chatterji again adhered to his former view while Mr. Justice Newbould was of opinion that *Tamizuddin Khan* v. *KhodaNawaz Khan* (19) and *Ramoni Mohan Roy* v. *Sheikh Kalimuddi* (20) were correctly decided. The case finally went in appeal before a Bench of three Judges and Mr. Justice Newbould's view was affirmed, it being held that the relinquishment of a part of a holding and the taking of a new settlement of the remainder operates as a surrender of the whole, expressly as to the former and impliedly as to the later.

The controversy, however, was not ended and shortly afterwards in *Dastur Ali* v. *Ram Kumar Gope* (25) there was a difference of opinion between Teunon and Richardson, JJ., the former relying upon *Ananda Mohan Ray Chowdhury* v. *Gurudayal Saha* (23) and being also of opinion that the sale of a part of a holding was an incumbrance within the meaning of section 86, and the latter relying upon *Tamiz Munshi* v. *Bisweswari Debya* (24). The latter learned Judge's opinion prevailed as it agreed with that of the lower Court.

Two years later the question again came up for consideration in *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (1) and was referred to a Full Bench of five Judges who held that a *raiyat* who had transferred a part of his holding was not competent to surrender either the whole or a part. The learned Judges in arriving at the result did not consider it necessary to refer to the previous case-law on the subject and decided the case on the sole ground that a grantor cannot be permitted to derogate from his grant.

Now, in the case before us there is no dispute as to the facts and unless the transferee who is the purchaser of a part of an untransferable occupancy holding and who holds under a registered deed of sale can be considered to be an incumbrancer within the meaning of section 86, Bengal Tenancy Act; or unless we can apply the rule of equity upon which the learned Judges of the Calcutta High Court have proceeded, his appeal must fail and the plaintiff must succeed.

Assuming for a moment that the decision of the Full Bench of this Court in *Mahadeo Lal* v. *Langat Singh* (10) as to the meaning of the word incumbrance in Chapter XIV of the Bengal Tenancy Act applies also to section 86, it seems to me that we ought not to disregard the whole course of previous legislation and the decided cases simply because they appear to conflict with an established rule of equity.

It may be asked at the outset, does section 86 admit of the application of the rule at all or has it by expressly including incumbrances in clause (6) by implication excluded other forms of transfer? I think an examination of the previous legislation and case-law leads to the conclusion that the answer is in the affirmative.

It is, however, said that the ordinary rule of construction does not apply to section 86, that the Bengal Tenancy Act is not exhaustive and that in the absence of any special provisions regarding a purchaser of a portion of an occupancy holding the general principles of contract which are of universal application must prevail.

Even if we assume that the maxim *expressio unius est exclusion alterius* is not

(24) 46 Ind. Cas. 862; 22 C. W. N. 967.
(25) 50 Ind. Cas. 567; 22 C. W. N. 972.

intended to be applied to section 86, I do not think the equities here are in the transferee's favour.

In the first place, the section itself forbids the application of the rule to incumbrances which are not registered and to that extent modifies it; and if the law is not disposed to regard unregistered incumbrancers with any great tenderness, why then is it necessary to credit it with a more benevolent disposition towards transferees by sale?

In the next place, both the occupancy right and the right to surrender are creatures of Statute. Ordinarily, the landlord here has no opportunity of protecting himself against assignments and in the circumstances it would be unfair to strengthen the position of the assignee.

In the third place, unless there is the strongest necessity, the equitable doctrine that a grantor cannot derogate from his grant ought not to be applied here against an innocent third party. The transferee can compensate himself by an action for damages against his transferor and to hold that the surrender is invalid is to go even further than is contemplated by the analogous provisions of section 115 of the Transfer of Property Act.

In the fourth place, the transferee was fully aware of the title he was buying.

It is true that the doctrine was applied by Sir Barnes Peacock in *Heeramonee* v. *Gunganarain Roy* (5) in the case of a tenant holding for a term, but it has, so far as I am aware, never been applied to the case of an occupancy *raiyat*.

A reference to section 115 of the Transfer of Property Act also clearly shows the deliberate intention of the Legislature to discriminate between agricultural and non-agricultural tenancies. That section provides not that the surrender shall be invalid but that it shall not prejudice the rights of an under-lessee who, unless the surrender is made for the purpose of obtaining a new lease, shall hold the land under the contracts which were binding upon his lessor. It expressly makes a difference between surrender and forfeiture and directs that upon forfeiture unless the forfeiture has been procured by the lessor in fraud of the under-lessees, the under-lease shall be annulled. With regard to agricultural lands, the law has already gone as far as it can; it has affirmed the rule that tenures effected by the Bengal Tenancy Act cannot be surrendered except by agreement with the landlord and, apart from section 86, it has provided for the protection of under-*raiyats* against abandonment and distraint. Having regard to the jealousy with which the law has looked upon the sale of occupancy holdings, I do not think we should extend the protection given to vendees without a clear and unequivocal expression of its intention.

To test the applicability of the rule it is only necessary to enquire what will be the position of the landlord if the rule is so enforced. In the absence of any fraud or collusion, (of which there is no question in the present case), it may be presumed that the *raiyat* has surrendered because he finds himself unable to cultivate the remaining portion of the holding. If the law declines to allow him to surrender, he will leave that part of the holding uncultivated and the landlord's only remedy will be to sue him for the rent of the whole holding and to take possession in execution of his decree. It may be wrong to allow the transferor to derogate from his grant but it is no less inequitable that the landlord should be put to the harassment of a civil suit instead of being able to avail himself of the more summary process of section 86. It must also be remembered that since the days of the Permanent Settlement the object of tenancy legislation has been to promote the cultivation of waste land so that landlords might be enabled to realize to the fullest extent the income of the lands settled with them and might meet with punctuality their engagements with Government: nor should it be forgotten that the rules regarding transfer, surrender and abandonment which have their origin in special local and financial conditions can never be expected to correspond closely with those applicable to English tenures. It was never intended that, simply because he has sold a portion of his land, the landlord must be forced to keep an unwilling *raiyat* upon his holding; nothing could be more detrimental to good husbandry.

Applying yet another test we may ask

what is to be the position of the landlord if the tenant wilfully defaults in payment of rent or incurs forfeiture by a breach of covenant or abandons the land? If the rule is to be applied logically, the landlord would have no right even in those cases to re-enter so as to destroy the right of the transferee, a result which, apart from fraud, would be in the highest degree inequitable.

Or, to take an extreme course, suppose again that the tenant dies intestate and without heirs and by his own hand, is the landlord to be deprived of his right of reversion in that case also?

The truth is that, like all equitable maxims, the rule has its limitations and to apply it in the present connection would be to produce evils far greater than those it is sought to remedy.

The result then is that, when a *raiyat* of an occupancy holding surrenders the entire holding after having sold a part of it the landlord is entitled to re-enter and eject the transferee for the following among other reasons:—

(1) the transferee does not acquire the status of a tenant and the landlord is not bound to recognise him;

(2) the transferor continues to be the sole tenant of the landlord for the purpose of ejectment under section 84 of the Bengal Tenancy Act, enhancement under section 30, suits for rent under section 65, acquisition of land under section 84, abandonment under section 87, distraint under Chapter XII and sale proceedings under Chapter XIV;

(3) to deny the landlord the right to re-enter is tantamount to compelling him to recognise the transfer of a part;

(4) the provisions of clauses (6) and (7) of section 86 of the Act make it clear that the purchaser of a part of a holding is not protected and that the *raiyat* may come to any arrangement he likes with his landlord even though it be to the purchaser's detriment.

With regard to the surrender of a part of the holding, section 86 shows that the right of surrender in this case is conditional on the landlord's consent; but once the landlord does consent the position is the same as in the case of the surrender of the entire holding. In effect the surrender of a portion of the holding, whether it be of the portion already transferred or of the other portion, entails a surrender of the entire holding and the creation of a new holding and, therefore, the landlord's right to eject the transferee remains unaffected. The position is very similar to that where an occupancy *raiyat* sells a part of his holding to one man and the rest to another. The landlord's right of re-entry is based upon the view that the transfer of the entire holding by sale constitutes abandonment. I take it that the sale of a portion and the surrender of the rest has the same result.

In this view of the matter, it is not necessary to devote much discussion to the English cases on the subject of powers.

It is an established rule that where a person is possessed of a power (other than a power coupled with a trust) to dispose of property, he will not be permitted to exercise that power if he has by his own act disentitled himself from such exercise. But the rule has special reference to powers created by deed or Will; it is not based on estoppel but on the principle that the power having been in fact exercised there is no property left upon which it can operate and in *Foakes* v. *Jackson* (26) approving *In re Hancock* (27) the rule is stated by Farwell, J., as follows: "any dealing with the estate by the donee of a power inconsistent with the exercise of the power must put an end to it."

On the other hand, in *Nottidge* v. *Dering* (28) it was held that, in the circumstances of that case, the donee's power to appoint persons had not been released by his concurrence in a disentailing deed.

In this connection, the question also frequently arises whether the power of a tenant for life to consent to a sale is affected by the alienation of or incumbrances upon his life estate. It has been held that, ordinarily, the power cannot be exercised so as to prejudice the rights of the alienee but that, where the deed contains an actual or implied recognition of the liability of the property to conversion, the power of the tenant for life is unaffected in cases

(26) (1900) 1 Ch. 807; 69 L. J. Ch. 352; 48 W. R. 616; 83 L. T. 26.

(27) (1896) 2 Ch. 173; 65 L. J. Ch. 690; 44 W. R. 545; 74 L. T. 658.

(28) (1909) 2 Ch. 647; 101 L. T. 491.

of mere equitable powers: *Hurst* v. *Hurst* (29).

In my opinion it is not possible to apply these technical rules relating to settlements to tenants' rights created by Statute.

Moreover, I think that in the present case the *raiyat* has done nothing inconsistent with or in derogation of his grant. The alienee knew that the law gave the *raiyat* the power of surrender by which his own interest was liable to be determined. In truth there is here no derogation at all from the grant and if it were necessary to refer to any legal maxim, I would be inclined to say that the more appropriate rule is *"cessante statu primitivo cessat derivativus."* That rule applies not only to remainder men and reversioners of estates defeasible on the death of the life tenant (unless confirmed by the remainder men or reversioners) but also to titles derived from estates which are limited by conditions and which are liable to be defeated by the acts of their owners, as by the marriage of a *"tenant durante viduitate"* or by the resignation of the person who has leased the glebe lands or tithes belonging to the living. The principle is not different from that applicable to service tenures in India and I can see no reason why the result which follows when a service tenure-holder relinquishes his service after alienating a part of the tenure should not follow when an occupancy *raiyat* surrenders after selling a portion of his holding.

I think, therefore, that it would be inequitable to apply the English Law in a country where the law of agricultural tenancies has been evolved out of conditions peculiar to itself, where free transfer is not ordinarily permitted and where statutory rights unknown in England are conferred on the landlord; and I take it that this aspect of the matter would not have been overlooked by the learned Chief Justice, Sir Lawrence Jenkins, and his collegues in *Dayamoyi's case* (8) when they laid down the rule that the landlord is ordinarily entitled to re-enter if the occupancy *raiyat* relinquishes his holding after transferring a part of it. It may be said that the learned Chief Justice was perhaps not considering the case of surrender and that the decision does not show whether this was the precise question referred to the Full Bench, and that, rather than weaken its authority in any way by further discussion, it would be wiser to accept the English rule. Apart from the general consideration that the English rule cannot be applied here, I think that the language of the learned Chief Justice was guarded and deliberate and that it was intended to cover the case of surrenders.

In so far as the transferor has by his surrender damnified the tansferee by committing a breach of any implied covenant, the obligation may be viewed as one personal to the transferor and capable of being discharged by payment of damages. It is not necessary for the protection of the transferee to declare that the surrender itself shall be inoperative.

There remains the question whether the transferee in the present case can be considered to be an incumbrancer within the meaning of section 86, of the Bengal Tenancy Act. It may be contended that, for the purposes of section 86, the term incumbrance has a wider meaning than that given to it by definition in Chapter XIV. The contention is arguable, but I doubt whether, in view of the Full Bench decision of this Court in *Mahadeo Lal* v. *Langat Singh* (10) which followed the decision of Jenkins, C.J., in *Abdul Rahman Chowdhuri* v, *Ahmadar Rahman* (11), it will serve any useful purpose to re-open the controversy. The majority of the Judges in both the above cases held that, with reference to a tenancy, the term incumbrance connotes an interest subordinate to and different in quality from the parent interest and does not connote merely a difference in quantity. For the sake of finality, I would be inclined to accept this view.

It follows, therefore, that the transferee in the present case has no right to remain in possession as against the landlord and the landlord's lessee; therefore, the appeal should be dismissed.

Jwala Prasad, J.— The facts upon which this reference has been made are as follows:—

One Bagar Ahir had a holding of two *bighas* 11 *kathas* in Mauza Pursottampur belonging to defendant No. 2 as the proprietor thereof. Bagar sold 9 *kathas* 7

(29) (1852) 16 Beav. 372; 22 L. J. Ch. 538; 1 W. R. 105; 51 E. R. 822; 96 R. R. 179.

dhurs of it to defendant No. 1 by a registered *kabala*, dated the 11th June 1904. In 1911 (1318) he surrendered, through Civil Court, his entire holding in favour of the *thicadar* of the proprietor, the then landlord. The landlord settled the entire holding with the plaintiff whose land was recorded in the Revisional Settlement. The plot in dispute, Survey No. 486 (9 *kathas* 7 *dhurs*), which was purchased by defendant No. 1 was recorded as being in his possession. The plaintiff, therefore, could not get possession of this disputed plot and accordingly he commenced an action in the Court of the Munsif of Champaran for ejecting the defendant No. 1 and succeeded in both the Courts below in obtaining a decree in his favour for *khas* possession with mesne profits. The defendant No. 1 came to this Court in second appeal. The appeal was heard by a Division Bench of the Court by which an order of 12th February 1923 referred the case for decision by a Full Bench inasmuch as the decision of the appeal depended upon a question of law of general importance and upon which there was no previous decision of this Court.

The holding in question is a non-transferable one. The tenant of the holding first transferred a part of it to defendant No. 1 and subsequently surrendered the entire holding in favour of the landlord. The question, therefore, raised in the order of reference is, where an occupancy *raiyat* has transferred a part of his non-transferable holding, is he competent afterwards to surrender to his landlord the whole holding as to entitle the landlord under clause (5) of section 86 of the Bengal Tenancy Act to enter on the holding inclusive of the portion previously transferred by the tenant and either to let it to another tenant or take it into cultivation himself, to use the words of the clause?

The Calcutta High Court, after a good deal of conflict of decisions, has recently in the Full Bench case of *Mohsenuddin v. Bhagaban Chandra Sutradhar* (1) answered the question in the negative. The decision of the case has been based upon the well known principle that no one can be permitted to derogate from his own grant and that a person vested with a power must extinguish that power if he has dealt with his estate and created interests inconsistent with the exercise of that power. Applying these principles, the learned Chief Justice Mookerjee, J., held that an occupancy *raiyat* by transferring a part of his non-transferable holding renders himself incompetent to exercise his right of surrender under section 86 of the Bengal Tenancy Act with respect to the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion.

My Lord the Chief Justice has shown in his judgment that the doctrine applicable to assignees in the case of English leases does not apply to a case of surrender under the Bengal Tenancy Act, and my learned brother Mullick, J., has come to the same conclusion by going into the history of the legislation and the growth of the law regulating the agricultural tenancies in this country. I shall, therefore, briefly discuss the question with reference to the Bengal Tenancy Act by which the holding in question is governed.

The learned Vakil on behalf of the appellant relies upon the aforesaid decision of the Calcutta High Court and upon clause (6) of section 86 of the Bengal Tenancy Act which runs as follows:—"When a holding is subject to incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer". His contention is that the sale to his client of a part of the holding was an incumbrance within the meaning of the word used in the clause, and it having been secured by a registered instrument the subsequent surrender of the holding not having been made with his consent was wholly invalid. This contention would be unanswerable if the sale of a part of a holding were an incumbrance within the meaning of the term used in the clause.

The term 'incumbrance' has been defined in section 161 of the Act for the purpose of Chapter XIV only, and that definition, therefore, is limited in its application to that Chapter only. It says: "The term 'incumbrance' used with reference to a tenancy, means any lien, sub-tenancy, easement or other rights or interest created

by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section."

The Special Bench of this Court in the case of *Mahadeo Lal* v. *Langat Singh* (10) held that the words "any other right or interest created by the tenant on his holding or any limitation on his own interest therein" refer to some right which is *ejusdem generis* with the words "lien," "sub-tenancy", "easement" in the same section. This interpretation saves, to my mind, a sale either of a portion or of an entire holding from being an incumbrance so far as Chapter XIV is concerned. It is not a lien, it is not an easement, it is not a sub-tenancy for the vendee does not hold the land under the vendor tenant of the land, nor is he liable to pay rent to the vendor for the portion sold to him. The vendor has not reserved to himself any right in the land and there is no reversion to him in any case. The vendee may pay rent through the vendor but that will not make him a tenant under the landlord unless his purchase is recognised. The original tenant when compelled by the landlord to pay rent for the entire holding may realise his quota of the rent payable by the transferee as a co-owner of the holding under the general law of contribution, but a co-owner is not a tenant.

"Tenant" under the Bengal Tenancy Act, section 3, clause (3), means "a person who holds land under another person, and is, or but for special contract would be, liable to pay rent for that land to that person." A vendee of a portion of a holding is not a tenant of the vendor under this definition.

Therefore, the sale of a portion of a holding does not create a sub-tenancy and is not an incumbrance within the meaning of section 161 of the Act, and, as held in the Patna case, it need not be annulled under section 167 of the Act before a purchaser in execution of a rent decree is entitled to take possession of the property *vide Abdul Rahman Chowdhury* v. *Ahmadar Rahman* (11) and *Fazarali Mahaldar* v. *Poroo Mian* (30). In the former case it was contended before Sir Lawrence Jenkins at page 1225*, that the language used in section 161 extends the meaning of the term "incumbrance" beyond its ordinary significance so as to include any disposition of the tenancy even of absolute assignment or sale of the entirety or a portion thereof. In overruling this contention his Lordship observed as follows:—"It is difficult to understand why the inferior interests of a lien, sub-tenancy and easement alone should have been mentioned, if the intention was that the superior interest involved in an assignment was to be included in the general words. It runs counter to the first principles of construction. An incumbrance would not ordinarily mean or include an absolute assignment nor would it be a right or interest created on the tenure. Can it be said to be any limitation of a tenant's interest? I think not; These words appear to me to refer not to the area but to the quality of the tenant's interest. This view preserves the essential characteristic of a lien, sub-tenancy or easement, for the idea inherent in these leading words is that of a graft on a subject-matter which is not destroyed but still continues, though in a modified form. The more general words that follow are at least as susceptible of an ordinary meaning which would give effect to that idea as the wider but less appropriate one for which the respondent contend".

According to Sir Lawrence Jenkins, therefore, an absolute assignment of a whole or a part of a holding is not an incumbrance within the ordinary significance of the term. If the sale or assignment of a part of a non-transferable holding does not come within the definition of the term used in section 161 of the Act, far less will it be covered by the ordinary significance of the term used in clause (6) of section 86 of the Bengal Tenancy Act.

An incumbrance in law is a "liability resting on an estate, a legal claim or a lien on an estate for the discharge of which the estate is liable, any right to or an interest in an estate to the diminution of its value but not impeding the passing of the fee by conveyance, as a mortgage, a lien for taxes, a judgment, a right of way, synonyms; load, burden, clog, impediment, check, hindrance". The sale of a part

(30) 48 Ind. Cas. 300; 28 C. L. J. 266.

*Page of 19 C. W. N. [Ed.]

of a holding extinguishes the right of the vendor to pass the fee by conveyance or in any other way and is, therefore, not an incumbrance but is a total extinction of his rights. He cannot, in any circumstances, claim the land back by discharging the burden of the sale upon it. In the absence of any statutory definition of the word in the Act, the word must be taken to have been used in its etymological meaning and in the sense it may have acquired as a term of art in law. Therefore, the word 'incumbrance' in section 86 of the Bengal Tenancy Act does not embrace a sale of a part of a non-transferable holding. This was the view taken in the case of *Tamizuddin Khan* v. *Khoda NewazKhan*(19); that decisionwas baseduponthe ground that an incumbrance implies a limitation of the rights of the tenant and not a total extinction of them as in the case of an out an out sale whether of a portion or of an entire holding. The principle was accepted in the following cases: *Mahanti Lal Sahu* v. *Harkissen Jha* (31), *Abdul Rahman Chowdhuri* v. *Ahmad. r Rahman* (11) and *Fazarali Mahaldar* v. *Paroo Mian* (30). The decision in the case of *Tamizuddin Khan* v. *Khoda Newaz Khan* (19) was commented upon though not expressly disssented from, in the case of *Asgar Ali* v. *Gouri Mohan* (21). The decision of that case, however, turned upon the surrender having been found to be collusive. Undoubtedly, if the surrender be collusive, the tenancy will subsist and so long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding. This is not the case here.

The case of *Chundra Sakai* v. *Kalli Prosanno Chuckerbutty* (32) impliedly took a contrary view when it held that an exchange of land is an incumbrance within the meaning of section 161, but this view was practically dissented from by N. Chatterjea, J., at page 1220* of the case referred to above *Abdul Rahman Chowdhury* v. *Ahmadar Rahman* (11). While doubting the correctness of the decision in *Chundra Sakai* v. *Kalli Prosanno Chuckerbutty* (32), N. Chatterjea, J., said that in any case it ought not to be extended further. Sir Lawrence Jenkins, commenting upon this case in *Abdul Rahman Chowdhury* v. *Ahmadar Rahman*(11) at page 1226,* observes: "The *ratio decidendi* is to be found in these words:—'The exchange by which this land was acquired by the defendant was in limitation, if not in fact in destruction, of the original tenant's right in the holding.' A distinction was thus recognised between limitation and destruction and presumably it was considered an exchange was a limitation, for section 161 does not extend to that which is a destruction of a tenant's right. Whether this be a true view of the effect of an exchange may have to be reconsidered in the future, does not arise now. I am concerned only with an absolute sale and that, in my opinion, is not in limitation but in destruction of the interest to which it relates. On the question referred, therefore, I hold that the interest of an unregistered purchaser of a portion of a *patni* tenure is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act."

In my opinion the definition of the word as given in the case of *Tamizuddin Khan* v. *Khoda Newa Khan* (19) and the view taken therein that the word "incumbrance" in clause (6) of section 86 does not embrace the sale of a part of a non-transferable holding remain unshaken. I, therefore, hold that the sale of the part of the holding in question in favour of the appellant was not an incumbrance within the meaning of clause (6) of section 86.

The question, then, remains as to whether the surrender of the entire holding in the present case under section 86 of the Bengal Tenancy Act is valid so as to give the landlord the right of re-entry on the portion of the holding sold to the appellant prior to the surrender and to let it to the respondent or to take it into cultivation himself under clause (5) of the section. In the Full Bench case of the Calcutta High Court the surrender was with respect to a part of the holding under an arrangement between the landlord and the original tenant and it was held that the surrender was invalid with respect to the portion of the holding previously sold.

(31) 19 C. W. N. (176) CLXXVI.
(32) 23 C. 254; 12 Ind. Dec. (N. S.) 170.

* Page 19 C. W. N.—[*Ed.*].

* Page of 19 C. W. N.—[*Ed.*]

SHEORAJI KUER v. DHANI MIAN.

Surrender consists in the yielding of the term to him who has the immediate estate in reversion in order that the term may merge in the reversion. After the surrender of the holding the liability of the tenant towards the landlord to pay rent, etc., ceases. This may be by mutual agreement or by operation of law. Section 86 of the Bengal Tenancy Act codifies the principles of surrender and prescribes rules for effecting the same. Clauses (1) to (4) deal with surrender by operation of law. The first clause confers upon a *raiyat* not bound by a lease or other agreement for a fixed term a right to surrender his holding at the end of any agricultural year. Clauses (2) to (4) prescribe the way in which this right is to be exercised, that is, by causing a notice to be served upon the landlord. Clause (7) recognises a surrender by mutual agreement between a landlord and a tenant with respect to the whole or a part of the holding. In the Full Bench case of the Calcutta High Court the surrender was with respect to a part of the holding under a mutual agreement between the landlord and the original tenant. Therefore, it was a surrender under clause (7) of the section. The surrender in such a case is in the nature of an assignment by the tenant to his landlord of the whole or a part of the holding. The tenant is required to disclose to the landlord the condition of the tenancy and his previous dealings thereof such as transfer of a part of the holding. The landlord also is required to acquaint himself with the condition of the tenancy and the previous transfers, if any of a portion of the holding. The change of possession which is essential to a valid surrender must in such a case take place by mutual agreement, and the tenant must be in a position to transfer immediate possession of the property. The dealing between the parties must be fair and the transaction must be *bona fide*, and if the mutual dealing between the parties by way of surrender have the effect of destroying the rights of third parties the transaction may be tainted with fraud or dishonesty and it is possible then to apply the principle upon which the decision of the Full Bench case has proceeded, namely, that a person cannot derogate from his own grant. It must be remembered that a surrender by mutual arrangement may be for consideration and that neither the tenant nor the landlord is exercising his rights which would arise under the earlier clauses of section 86 when a tenant as a matter of right surrenders his holding by a notice to the landlord. By mutual agreement the landlord can accept the surrender with respect to the part of the holding when the other part has already been sold to a third person. In that case he will have to recognise the transfer of a part of a non-transferable holding which he can very well agree to do and for which he can take proper compensation while entering into the mutual arrangement with the tenant. Clause (7) has simply recognised the principle of the English Law that a surrender implies a mutual agreement between the landlord and the tenant and can be with respect to the whole or part of a holding *Oastler* v. *Henderson* (33). The Bengal Tenancy Act does not restrict a surrender to a mutual agreement between the parties but confers upon the tenant a statutory right to yield up the term of his tenancy and to put an end to his liabilities to the landlord for holding the land under him, whether the landlord does or does not like it. In other words the tenant has a right to surrender his holding against the Will of his landlord. Therefore, the landlord must have the right to take the landlord from any incumbrance which under the law he is not bound to recognise. In a non-transferable holding the tenant has no right to transfer without the consent of the landlord and the transfer, therefore, of the whole or a part of it is invalid so far as the landlord is concerned. Where the transfer is of the whole of the holding the landlord has the remedy provided for by the law under section 87 of the Act and to treat the holding as abandoned. Where the tenant transfers a part of the holding the landord is not bound to recognise the transfer and has a right still to hold the tenant liable to him for the rent of the entire holding and such other rights that he may have against the tenant.

(33) (1877) 2 Q. B. D. 575; 46 L. J. Q. B. 607; 37 L. T. 22.

Now, the surrender in the present case is through the Court by means of an *Istl'a* (Exhibit 2) under clause (4) of the section. The tenant here has, therefore, exercised his right conferred by clause (1) of the section to surrender the holding. This is the statutory right conferred upon the tenant and there is nothing to prevent his surrendering the holding on account of his having previously transferred a portion thereof. The section does not curtail his right of surrender of the whole holding on previous transfer of a portion thereof. If the surrender were tainted with fraud or dishonesty section 53 of the Transfer of Property Act may perhaps invalidate the surrender, but in this case no fraud or dishonesty has been imputed to the surrender. It is conceivable that a tenant may after transfer of a part of a holding find himself by change of circumstances independent of the transfer, such as, his change of profession and inability to carry on the cultivation of the land, unable to continue to hold the land without serious inconvenience to himself. The surrender in such a case may be a *bona fide* one. His Lordship Mookerjee, A. C. J. in the Full Bench case of the Calcutta High Court, says that by transferring a part of a holding the tenant has dealt with his property in such a manner as to render himself incompetent to exercise the power or right of surrender which he had and hence he cannot be permitted to derogate from his own grant. That the aforesaid principles are not of universal application, particularly in the case of a tenant under the Bengal Tenancy Act is obvious from the fact that the tenant by transferring the remaining portion of his holding to a third person can by his Act cause an abandonment of the holding under section 87 and thereby confer an immediate right in the landord to enter upon the holding and to avoid both the transfers including the previous one. Thus, a tenant can by his act destroy the right previously created by him in the transferee of a part of the holding. It has never been suggested that by transferring a portion of a holding the tenant is debarred from transferring the remaining portion inasmuch as that has the effect of extinguishing the right acquired by the pervious transferee and thus has the effect of a derogation from his previous grant. The principles upon which the decisions of the Full Bench case of the Calcutta High Court is founded cannot affect the rights of the landlord to re-enter on the holding acquired under the statutory provisions contained in clause (5) of section 86 of the Act for he was not a party to the transfer of the portion of the holding by the tenant. The cases relied upon in the Full Bench case of the Calcutta High Court as laying down to the principle that a person cannot be permitted to derogate from his own grant, do not seem to go so far as to affect the right acquired under the Statute on account of the exercise of a right of surrender conferred upon the tenant by the Statute. The tenant's right to surrender given by section 86 of the Act is not, to my mind, affected in any way by his previous transfer of a part of a holding. This was recognised in *Dayamoyi* v. *Ananda Mohan Roy Chowdhury* (8). If a tenant is not allowed to surrender his entire holding after transfer of a portion of the same, he will be deprived of a right which the Bengal Tenancy Act vests in him. The landlord will go on suing for arrears of rent and get decrees against him which may be executed against his person and other properties. Therefore, even when the surrender is *bona fide*, the tenant will be harassed by his not being allowed to surrender the holding on account of the previous transfer of a portion thereof when he might not have anticipated the change in the circumstances beyond his control which compelled him to surrender the entire holding. The transferee of a portion of a holding takes the transfer with his eyes open. He fully knows that his transfer might be avoided in case the original tenant transfers the remaining portion of the holding or abandons it. He also knows that his interest is liable to be extinguished in case the landlord sells the holding in execution of a rent decree obtained against the original tenant. He must also know that by surrender the same consequence would happen.

Therefore, a person who takes a transfer from a person who labours under such limi-

tations takes upon himself the inconvenience and the loss that might accrue to him on account of his transfer having become inoperative by the Act either of the transferor or the landlord who is not bound by the transfer. On the other hand, to take away the right of the landlord to re-enter on account of the surrender of the holding is to compel him, under certain circumstances, to recognise the transfer of a part of a holding and the splitting up of a holding. Therefore, with great respect to their Lordships of the Calcutta High Court, I am unable to subscribe to the view expressed in the Full Bench case of *Mohsenuddin* v. *Bhagaban Chandra Sutradhar* (1).

In the result, I hold that the transfer of a part of a holding is not an incumbrance, as already observed, under clause (6) of section 86 and that it cannot stand in the way of the landlord entering upon the holding and either letting it to another tenant or taking it into cultivation himself under clause (5) of section 86. I also hold that the tenant is not deprived of his right to surrender the entire holding under clause (1) of the section on account of his having previously transferred a portion thereof.

Recently I decided this point in the case of *Ram Oraon* v. *Doman Kalal* (34), in connection with a case arising under the Orissa Tenancy Act, the provisions whereof relating to a surrender are similar to those in the Bengal Tenancy Act with this exception that there is no provision corresponding to clause (6) of section 86 of the Bengal Tenancy Act in the Orissa Tenancy Act. I adhere to the views expressed by me in the aforesaid case.

Therefore,, in concurrence with my bord the Chief Justice, I answer the question referred to in the affirmative and would dismiss the appeal with costs.

Foster, J.—I agree with the judgment which has been delivered by my Lord the Chief Justice.

Macpherson, J.—Having had an opportunity of reading and considering the judgment which has just been delivered by my Lord the Chief Justice, I find myself in complete concurrence with the views expressed therein.

(34) 75 Ind. Cas. 209; 4 P. L. T. 562.

By the Court.—That the the appeal be dismissed with costs.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 518 OF 1922.

February 15, 1923.

Present:—Mr. Justice Martineau

THE FIRM GOKAL MAL-RAMCHAND, THROUGH GOKAL MAL AND RAM CHAND PROPRIETORS—DEFENDANTS—PETITIONERS

versus

THE FIRM NATH MAL-GULZARI MAL, THROUGH *Musammat* GANGA DEVI AND *Musammat* HIRI DEVI—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Misconstruing evidence—Material irregularity.

The misconstruing of evidence amounts to material irregularity and affords good ground for revision.

Civil revision against a decree of the Senior Sub-Judge, Ferozepore, dated the 15th May 1922.

Mr. *Gullu Ram*, for the Petitioners.

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

JUDGMENT.—The plaintiffs sue for money due on book accounts, and the dispute is with regard to two items, one of Rs. 325 and one of Rs. 600, alleged to have been advanced to the defendants, who deny having received them. The First Court found that the plaintiffs had not proved their claim, but the Senior Subordinate Judge on appeal gave them a decree, finding that their books were regularly kept and that the entries were sufficiently corroborated, as the evidence of Shanker Das, who had been the plaintiffs' *munim*, proved the two disputed items.

The defendants have applied for revision, contending that Shankar Das's statement does not prove the items. This contention is correct, as Shankar Das distinctly says that the items of Rs. 325 and Rs. 600 were not paid in his presence and that he did not enter them in the books.

He no doubt admits that he wrote the balances each day in the cash book, and apparently the items in dispute were included in the totals, but Shankar Das's evidence is no proof that those items were genuine and were actually paid to the defendants. The lower Appellate Court has thus misconstrued that evidence, and this is a material irregularity, which affords good ground for revision.

I accept this application, set aside the decree of the lower Appellate Court and direct that Court to give a fresh decision in the appeal that was before it, after considering whether the items are proved by evidence other than that of Shankar Das. The costs in this Court will be costs in the case.

W. C. A. *Application accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 438 OF 1922.

June 29, 1923.

Present:—Mr. Justice Piggott.

UDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Chaudhuri GULAB RAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Village shop-keeper—*Kachcha *shop—Re-building it* pucca*—Ejectment.*

A village shop-keeper who purchased a site in the village from a non-proprietor, constructed a *kachcha* house on it and occupied it for long period without objection by the non-proprietors, does not become liable to ejectment by re-building the house as *pucca*.

Ghorey v. *Shib Lal*, 58 Ind. Cas. 410; 18 A. L. J. 781; 2 U. P. L. R. (A.) 266, relied upon.

Second appeal against a decree of the District Judge, Budaun, dated the 18th February 1922.

Mr. *Panna Lal*, for the Appellants.

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

JUDGMENT.—The plaintiffs in this suit are sole proprietors of a parcel of waste land situated in a village called Singauli Purbea. The contesting defendants have constructed a house upon the parcel of land in question. The plaintiffs came into Court claiming the ejectment of the said defendants, with permission to the latter to remove the materials of their house before vacating the site if they should be inclined to do so. Facts were alleged in the plaint fully sufficient to warrant the plaintiffs in claiming the relief sought for. The difficulty about the case is that the lower Appellate Court has not found in favour of the plaintiffs on the questions of fact raised by the pleadings; nevertheless, the learned District Judge came to the conclusion that, on the facts found by him, the plaintiffs are entitled to the relief claimed. It is contended in second appeal that the learned District Judge was in error in taking this view. It seems advisable to give the facts found in the very words of the judgment of the lower Appellate Court.

"The evidence shows that one Chidu Bania purchased from Chidu Kahar a portion of the latter's house, consisting of a thatched room, about 25 years ago. The purchaser removed the thatch and built a mud house in which he has since kept a shop. Two years ago he re-placed the mud constructions by a masonry house without the consent of the *zemindars*."

Undoubtedly, Chidu Kahar, as the District Judge remarks, had no transferable right in anything except the materials of his house. He could not even convey to Chidu Bania a right of residence on the site in question. He did, however, purport to convey such right of residence, and some 25 years prior to the institution of the suit Chidu Bania, who seems to have been previously residing in the same village, occupied a portion of the house transferred to him and made structural alterations fitting it for use as a shop. No exception was taken to his proceedings by the proprietors of the site. It can scarcely be presumed that they were in ignorance of what had been done. At any rate, there is no finding that they were in ignorance, or continued in ignorance, up to any specified date anterior to the institution of the suit. They did not allege that a cause of action accrued to them when they came to know of the transfer by Chidu Kahar to Chidu Bania; they alleged a different state of facts altogether. If it be taken that Chidu Bania occupied this site with-

out any title and against the will of the proprietors of the same, and that he proceeded to adopt the building previously standing thereon to his own use and occupied the same as a shop for more than twelve years, the inference, in my opinion, would be that he had acquired title by adverse possession against the proprietors of this site. The more correct inference seems to be that Chidu Bania did not occupy the site against the will of the proprietors, but with their consent, and on an express or implied understanding with them that he might have the use of the site for the construction of a shop. I may presume that, although Chidu Bania was not an agricultural tenant, yet he was a member of the village community and his keeping a shop in the village site may well have been a matter of convenience to the community as a whole. If it be presumed that his original possession was permissive, then his subsequent alteration of the premises constituting his shop, by converting the same into a masonry building would not, in my opinion, afford the plaintiff a cause of action. I refer on this point to the decision of a Bench of this Court in the case of *Ghorey* v. *Shib Lal* (1). No doubt, the defendant in that suit was an agricultural tenant, to whom a site was granted for the building of a house; but it does not appear to me that any different principles would apply to the case of a village shop-keeper to whom a site had been granted for the purpose of keeping a shop. Other considerations might possibly have arisen if the plaintiffs had come into Court with a true statement of the facts and had alleged that, under the existing circumstances, they were entitled to claim a small ground rent from the principal defendants; but that question does not arise. Accordingly, I allow this appeal, set aside the decisions of both the Courts below and dismiss the plaintiff's suit, with costs throughout.

M. D. J. *Appeal allowed.*

(1) 58 Ind. Cas. 410; 18 A. L. J. 781; 2 U. P. L. R. (A.) 266.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 293 OF 1921.

April 16, 1923.

Present:— Mr. Justice Krishnan and Mr. Jusitce Coleridge.

KUMARAM UNI ACHAN—PLAINTIFF—APPELLANT

versus

P. KUNHIKRISHNAN NAIR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 101, order under—Suit regarding title to property pending on the date of order—Separate suit, necessity of.

An order under O. XXI, r. 101 of the Civil Procedure Code against a person, unless contested by a suit filed within the time prescribed, becomes conclusive against him, and the fact that there was already a suit pending regarding the title to the property would not absolve him from the obligation of filing a suit under r. 103 if he intended to contest the order under r. 101.

Peela Yarakayya v. *Kanumuri Venkata Krishnamraju*, 41 Ind. Cas 684; 6 L. W. 281; 22 M. L. T. 232; (1917) M. W. N. 721, followed.

The doctrine of *lis pendens* has no application to a declaration by Court relating to possession of property under r. 101. Such a declaration is not a transfer of the right.

Second appeal against a decree of the Court of the Subordinate Judge, South Malabar at Palghat, in Appeal Suit No. 186 of 1919, preferred against a decree of the Court of the District Munsif, Alatur, in Original Suit No. 497 of 1917.

Mr. *S. T. Srinivasa Gopalachari*, for the Appellant:— The plaintiff in this suit, while it was yet pending trial, in execution of a money-decree obtained by him against the defendant in another suit applied for redelivery to him of the suit properties under O. XXI, r. 101. The defendant objected but was overruled and possession delivered to the plaintiff. The present suit remained undisposed off for over a year after the date of the said order. The plaintiff thereupon applied for additional issues to be framed on the point whether the failure of the defendant to file a suit within a year after the date of the order under O. XXI, r. 101 under Art. 11 (a) had not concluded the case against him. The present suit has been disposed off on the said issue alone, both Courts upholding the plaintiff' contention and decreeing the plains claim.

KUMARAM UNI ACHAN v. KUNHIKRISHNAN NAIR.

In second appeal, my submission is two-fold :—

(1) Article 11(*a*) is satisfied by the written statement filed by the defendant within a year of the order.

(2) The order in execution proceedings under O. XXI, r. 101 pending the present suit is vitiated by *lis pendens*.

The first point apparently seems to be concluded by the decision in *Peela Yarakayya* v. *Kanumuri Venkata Krishnamraju* (1). But that decision which purports to follow an earlier decision in *Balur Krishna Rau* v. *Lakshmana Shanbhogue* (2) has not been followed in other Courts and required to be re-considered.

The written statement has the same effect as a plaint in a claim suit. The subject of a suit under O. XXI, r. 103 and that of present suit are the same. The identical title to the identical property is in question between the same parties. Any further suit may have to be tried wit the present one. The result will be the same. It would be futile to insist on the formality of a fresh suit. The written statement makes exactly the same claim that a plaint would. There is no distinction in substance.

Further, unlike in *Peela Yarakayya* v. *Kanumuri Venkata Krishnamraju* (1) case, there was a suit pending here even on the date of the order under O. XXI, r. 10. In any case, that decision cannot apply here. Again a suit under O. XXI, r. 103 is merely in the nature of an appeal. *Krishnappa Chetty* v. *Abdul Khader Saheb* (3), *Phul Kumari* v. *Ghanshyam Misra* (4).

Secondly, section 51 of the Transfer of Property Act, it has been held, is applicable not only to voluntary sales but also to execution sales as well as to revenue sales.

As to execution sales reference may be made to *Faiyaz Husain Khan* v. *Prag Narain* (5); *Radhasyam Mohapattra* v. *Sibu Panda* (6); *Bollapragada Venkatalakshmana Garu* v. *Nenda Seetayya* (7); and as to revenue sales to *Har Shankar Prasad Singh* v. *Shew Gobind Shaw* (8) and *Mathura Prasad Sahu* v. *Dasai Sahu* (9). It is submitted that the principle is the same whether the transfer is by act of parties, or in execution of a decree or by the machinery of the Court. Where the result of an act or order is to confer title on some person, if such act or order is pending a suit, it can only be subject to the decision in the pending suit. The order under O. XXI, r. 101 is, therefore, vitiated by *lis pendens*.

Mr. *S. Ranganadha Aiyar*, for the Respondent, was not called upon to reply.

JUDGMENT.—We think the Subordinate Judge is right in the view he has taken in the case. That view is supported by the ruling of this Court in *Peela Yarakayya* v. *Kanumuri Venkata Krishnamraju* (1). The order under O. XXI, r. 101, Civil Procedure Code, having been against the defendant and he not having filed a suit in time to contest it, it has become conclusive against him. The fact that there was a pending suit regarding the title to the property and the defendant had filed a written statement in it claiming title did not absolve him from the obligation of filing a suit under r. 103 if he intended to contest the order under r. 101. That was what was held in the Law Weekly case. The fact that in the present case the suit was already pending when the order under r. 101 was made, whereas in the Law Weekly case the suit was one subsequently instituted makes no difference.

It was contended that the doctrine of *lis pendens* applies to the present case, but the short answer to it is that there was no transfer of any right here for that doctrine to apply. The Court merely decided that the plaintiff was the person entitled to the possession of the suit property under r. 101 and as the decision

(1) 41 Ind. Cas. 684; 6 L. W. 281; 22 M. L. T. 232; (1917) M. W. N. 721.

(2) 4 M. 302; 1 Ind. Dec. (N. S.) 1046.

(3) 25 Ind. Cas. 11; 38 M. 535; 26 M. L. J. 449.

(4) 35 C. 202; 35 I. A. 22; 12 C. W. N. 169; 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1; 14 Bur. L. R. 41 (P. C.).

(5) 29 A. 339 at p. 345; 9 Bom. L. R. 656; 11 C. W. N. 561; 4 A. L. J. 344; 5 C. L. J. 563; 17 M. L. J. 263; 34 I. A. 102 (P. C.).

(6) 15 C. 647; 7 Ind. Dec. (N. S.) 1015.

(7) 57 Ind. Cas. 764; 43 M. 786; 11 L. W. 466; (1920) M. W. N. 294; 39 M. L. J. 30; 28 M. L. T. 44.

(8) 26 C. 966; 4 C. W. N. 317; 13 Ind. Dec. (N. S.) 1218.

(9) 65 Ind. Cas. 325; 3 P. L. T. 296; 1 Pat. 287; (1922) A. I. R. (Pat.) 542.

has become final before this case was disposed of, effect must be given to it in this suit.

The second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 566 OF 1922.

July 4. 1923.

Present:—Mr. Justice Kanhaiya Lal.

RAM SARAP—DEFENDANT—APPELLANT

versus

Lala MOHAN LAL—PLAINTIFF—RESPONDENT.

Mortgage—Crops still to be sown, hypothecation of—Transfer—Notice—Bona fide *purchaser, liability of.*

A mortgage of a future crop still to be sown and cultivated is recognized in India. The transaction is not governed by the Transfer of Property Act or by the Indian Contract Act, in so far as it is neither a mortgage of immoveable property nor a pledge of existing moveable propery. It is in the nature of an agreement to mortgage moveable property that may come into existence in future, and as such it creates an equitable charge which is valid and enforceable.

Misri Lal v. *Mozhar Hossain*, 13 C. 262; 6 Ind. Dec. (N. S.) 674, followed.

A *bona fide* purchaser of such property without notice of the prior charge is not liable for the money due on such a charge.

Bansidhar v. *Sant Lal*, 10 A. 133; A. W. N. (1888) 35; 6 Ind. Dec. (N. s.) 90 and *Sreeram Narasiah* v. *Bommireddi Venkataramiah*, 47 Ind. Cas. 976; 35 M. L. J. 450; 8 L. W. 517; (1918) M. W. N. 718; 24 M. L. T. 454; 42 M. 59, relied upon.

Second appeal against a decree of the Additional Subordinate Judge, Bareilly, dated the 26th of November 1921.

Mr. *S. C. Das*, for the Appellant.

Mr. *K. N. Malaviya*, for the Respondent.

JUDGMENT.—A mortgage-bond was executed by Sukhraui, the first defendant, in favour of the plaintiff on the 25th of May 1917, whereby he hypothecated his future sugarcane crop for the years 1325 to 1327 *Fasli*. The dispute in the present appeal relates to the sugarcane crop of 1327 *Fasli*, which has been appropriated by the defendant-appellant No. 5, under a sale effected in his favour by defendants Nos. 2, 3 and 4, who are stated to have purchased the same from defendant No. 1. The question for consideration in this appeal is, whether the mortgage can be enforced against the defendant-appellant. A mortgage of a future crop, neither sown nor cultivated at the time, is recognised and enforced in this country as an executory agreement, binding on the parties to the transaction. The transaction is not governed by the Transfer of Property Act or by the Indian Contract Act, in so far as it is neither a mortgage of immoveable property nor a pledge of existing moveable property. It is, to use the language adopted in *Misri Lal* v. *Mozhar Hossain* (1), in the nature of an agreement to mortgage immoveable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable. But, as pointed out in *Bansidhar* v. *Sant Lal* (2) and *Sreeram Narasiah* v. *Bammireddi Venkataramiah* (3), a *bona fide* purchaser of such property without notice of the prior charge is not liable for the money due on such a charge, for the interest of the chargeholder is more or less of the nature of an equitable interest, which it would be undesirable to enforce against a person who was not a party to the contract and had no notice of the sale. The defendant-appellant denied that he had a notice of the charge and the question of notice must, therefore, be tried before any liability can be fastened on him in respect of the money due thereon. The defendant-appellant was added as a party on the application of the plaintiff after the institution of the suit. The circumstances in which he made the purchase are not quite clear. In fact the title-deed, if any, under which he purchased has not been produced. The lower Appellate Court is, therefore, directed to determine, after taking such additional relevant evidence as the parties may adduce, whether the defendant-appellant purchased the sugarcane crop in question or its juice, and had he any notice of the mortgage in suit at the time of such purchase?

Three months' time will be allowed for the return of the finding and ten days will be allowed after the receipt of the finding for the parties to file objections.

M. A. A. *Order accordingly.*

(1) 13 C. 262; 6 Ind. Dec. (N. S.) 674.
(2) 10 A. 133; A. W. N. 1888) 35; 6 Ind. Dec. (N. S.) 90.
(3) 47 Ind. Cas. 976; 35 M. L. J. 450; 8 L. W. 517; (1918) M. W. N. 718; 24 M. L. T. 454; 42 M. 59.

SHRINATH *v.* KANHAIYALAL.

NAGPUR JUDICIAL COMMISSIONRE'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 18 OF 1923.

September 3, 1923.

Present :—Mr. Baker, Offg. J. C.

Seth SHRINATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KANHAIYALAL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6—Partnership—Right to recover past profits—Mere right to sue.

The right to recover past profits of a partnership on taking accounts is not a mere right to sue under section 6 of the Transfer of Property Act but is an actionable claim which is capable of transfer.

Churamoni Mondal v. *Rajendra Kumar Singh*, 42 Ind Cas. 390, applied.

Jagat Chunder Roy v. *Iswar Chunder Roy*, 20 C. 693; 10 Ind. Dec. (N. S.) 468, *Lakhpat Sahai* v. *Tika Ram*, 47 Ind. Cas. 158, referred to.

Appeal against an order of the District Judge, Nimar, dated the 11th April 1923, in Civil Appeal No. 49 of 1923.

Mr. *G. L. Subhedar*, for the Appellants.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The facts of this case are that one Ramlal, a partner in a Ginning Factory at Khirkia, in the Harda Tahsil, sold his interest in the partnership to the plaintiff on 10th April 1922 and the plaintiff has brought the present suit to recover the profits on accounts being taken. It was contended by the defendants that, as regards past profits, the suit would not lie as, under section 6 of the Transfer of Property Act, a mere right to sue cannot be transferred. The first Court framed various issues, but dismissed the suit holding that the sale of past profits was the transfer of a mere right to sue, and the other issues were not decided. On appeal the District Judge of Nimar held that the transfer was not one of a mere right to sue. He reversed the decree and remanded the suit for disposal on the other issues. The defendants prefer this appeal against that decision.

The learned Counsel for the appellants has relied on the decision of this Court in Second Appeal No. 736 of 1915, disposed of on 19th March 1917 [*Lakhpat Sahai* v. *Tikaram* (1)]. That was a suit by the assignee of a co-sharer for past profits of land, and it was held that the assignment of the right to profits prior to the sale was an assignment of a mere right to sue.

The present suit stands on rather a different footing. It is settled law that an execution creditor can attach and sell in execution of his decree the share of his debtor in a partnership business and that the share of the partner is liable to attachment and sale under old section 266, (present section 60) of the Civil Procedure Code: *cf. Jagat Chunder Roy* v. *Iswar Chunder Roy* (2).

In *Churamoni Mondal* v. *Rajendra Kumar Singh* (3) it was held that the right to recover money, which might be found due on taking accounts from an agent, is not a mere right to sue within the meaning of section 6 of the Transfer of Property Act, but is an actionable claim which is capable of transfer; and the transferee can maintain a suit in his own name against the agent for the recovery of such amount as might be found due on taking accounts from him. This principle would presumably apply to a suit to recover past profits of a partnership on taking account.

It is contended on behalf of the appellants that the judgment of the lower Appellate Court is vitiated by the Judge being under the impression that the present suit relates to a Company, whereas it is in fact one relating to a partnership. It is true that, under section 253 of the Contract Act, a new partner cannot be introduced into a firm without the consent of all the partners, and the transfer of his interest by Ramlal would have the effect of dissolving the partnership. That, however, will not prevent a suit by the assignee of a partner. In *Juggut Chunder Dutt* v. *Raaa Nath Dhur* (4) it was held that the effect of clause (b) of section 243 of the Contract Act is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those

(1) 47 Ind. Cas. 158.

(2) 20 C. 693; 10 Ind. Dec. (N. S.) 468.

(3) 42 Ind. Cas. 390.

(4) 10 C. 669; 8 Ind. Jur. 619; 5 Ind. Dec. (N. S.) 450.

parties and other partners as to cause an immediate dissolution of the partnership. If no assent is given by the other partners to the assignment, the assignee is upon dissolution at liberty to sue for an account and for distribution, not as a partner, but as assignee of the right of his assignor in the partnership property. Inasmuch, therefore, as a suit by the assignee will lie for accounts and distribution of the share of his assignor in the partnership property, and the right to recover money which might be found due on taking accounts is not a mere right to sue within the meaning of section 6 of the Transfer of Property Act but is an actionable claim which is capable of transfer, I am of opinion that the view of the lower Appellate Court is correct and must be upheld. The appeal is consequently dismissed with costs.

S. D.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2621 OF 1922

March 22, 1923.

Present:—Mr. Justice Abdul Raoof.

PARABH DAYAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat RADHO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (3), proviso (1)—Jurisdiction of Civil and Revenue Courts—Ejectment suit—Occupancy rights claimed by defendant—Suit, whether cognizable by Revenue Court.

Plaintiffs sued to eject defendants on the ground that they were trespassers. Defendants put forward the plea that they were occupancy tenants of the land in dispute;

Held, that, having regard to proviso (1) to section 77(3) of the Punjab Tenancy Act, the suit was cognisable by a Revenue Court and not by a Civil Court.

Wadhawa v. *Musammat Hassi*, 29 Ind. Cas. 778; 73 P. R. 1915; 111 P. L. R. 1915; 64 P. W. R. 1915, *Mohan Singh* v. *Bhag an Kaur*, 37 Ind. Cas. 390; 111 P. R. 1916; 234 P. W. D. 1916, followed.

Ghulam v. *Jowala Singh*, 48 Ind. Cas. 363; 103 P. R. 1918; 179 P. W. R. 1918; 130 P. L. R. 1918, dissented from.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 13th May 1922, reversing that of the Subordinate Judge, First Class, Hoshiarpur, dated the 11th April 1921.

Lala *Fakir Chand*, for the Appellants.

Lala *Madan Gopal*, for Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit by certain proprietors for the ejectment of certain persons who are recorded in the revenue papers as occupancy tenants. The full history of the dispute between the parties is given in the judgments of the two Courts below. For the purposes of this appeal it is not necessary to state all the facts stated in the judgment under appeal. A few relevant and salient facts must be stated.

The land in dispute is 13 *kanals* and 10 *marlas* in area. One Malok was admittedly its occupancy tenant. On his death his widow *Musammat* Radho succeeded to the occupancy tenancy and the land was mutated in her name. On the 11th of July 1890, *Musammat* Radho sold the land to one Ganoo. Sometime in 1895, *Musammat* Radho died. On the 23rd of March the land was mutated in the name of Ganoo. On the 12th of June 1901 the name of Parabh Dayal, the brother of Ganoo, was also entered in the revenue papers along with that of Ganoo as a joint tenant. In the *jamabandi* the land was shown in the actual cultivation of Mathra and others as non-occupancy tenants under the occupancy tenants Ganoo and Parabh Dayal. The latter served the non-occupancy tenants with a notice of ejectment. Mathra and others, the non-occupancy tenants, contested the notice by a suit and themselves claimed to be the occupancy tenants directly under the the proprietors, the plaintiffs in this suit. In support of their contention they relied on a deed executed by the proprietors conferring the rights of occupancy upon them. On the 6th of July 1917, their suit was dismissed on the ground that they had failed to prove that they were the occupancy tenants of the land. The result was that they were ejected in 1918 and the land came into the actual possession of the brothers Ganoo and Parabh Dayal. The plaintiffs then instituted the present suit

for possession of the land on the allegation that the defendants Gandoo and Parabh Dayal were mere trespassers. The suit was resisted on the ground that the defendants were occupancy tenants and the suit was cognizable by a Revenue Court and the Civil Court had no jurisdiction to entertain it. In addition to this plea of want of jurisdiction, the defendants raised various pleas on the merits also. They pleaded that Mathru and others were non-occupancy tenants under them; that they were put up by the landlords to defeat the rights of the defendants, and that the plaintiffs had accepted rent from the defendants and had by various acts admitted their right of occupancy in the land. The Trial Court decided in favour of the defendants, both on the merits and on the question of jurisdiction and holding that the plaintiffs were estopped from questioning the occupancy rights of the defendants dismissed the suit.

On appeal the lower Appellate Court reversed the decision of the Trial Court on the merits and held that the defendants were mere trespassers and had not succeeded in establishing their right to the occupancy tenancy. It expressed no opinion on the question of jurisdiction and, setting aside the decree of the Trial Court, decreed the plaintiffs' claim.

Parabh Dayal and his nephew Lal Singh, son of Gandoo, (now dead), have preferred this second appeal on various grounds set forth in the Memorandum of Appeal. Only one plea has been urged before me by the appellants' learned Vakil Mr. Faqir Chand, namely, that the suit was not cognizable by the Civil Court. The contention put forward by him is that, in view of the proviso (1) attached to sub-section (3) of section 77 of the Punjab Tenancy Act, even if the suit as framed was cognizable by Civil Courts, the procedure prescribed by the Punjab Act III of 1912 should have been followed and the plaint ought to have been returned for presentation to the Collector. In support of this contention the learned Vakil has relied upon a Division Bench ruling in *Wadhawa* v. *Musammat Hassi* (1). In that case, as in this case, the landlords had filed a suit to oust from the land the defendants who were alleged by them to be trespassers, and the latter had pleaded that they had acquired occupancy rights in the land by succession to their ancestors. The First Court had decreed the suit and the appeal by some of the defendants had been dismissed by the Divisional Court which had refused to entertain the plea that the defendants were entitled to hold the land as occupancy tenants. A second appeal was presented and the learned Judges held that the suit should have been tried by a Revenue Court under Act III of 1912. They accepted the appeal, set aside the decree of the Divisional Court and, acting under section 100 of the Tenancy Act, directed the decree of the first Court to be registered as a decree of an Assistant Collector, First Grade, and sent the case back to the lower Appellate Court directing it to return the Memorandum of Appeal to be presented to the Collector. The learned Vakil also relied upon the case of *Mihan Singh* v. *Bhagwan Kaur* (2) in which the late Mr. Justice Shah Din, relying upon the proviso to sub-section (3) of section 77 of the Punjab Tenancy Act, held that, though the suit was instituted in a Civil Court, the defence raised by the defendants brought the proviso into play and the procedure referred to therein ought to have been adopted by the Munsif. The learned Judge, after setting aside the decision of the Appellate Court, sent the case back to the Munsif with a direction to follow the provisions of the first clause of the aforesaid proviso.

Mr. Madan Gopal, holding the brief of Mr Badri Das, the learned Vakil for the plaintiffs-respondents, has contended that the proviso cannot apply to the facts of this case, inasmuch as the defendants are alleged to be trespassers. He relies in support of this contention on clause (*d*) under the second group of cases mentioned in section 77, and argues that a suit contemplated by that clause is a suit against a person who is admittedly a tenant and that it does not

(1) 29 Ind. Cas. 778; 73 P. R. 1915; 111 P. R. 1915; 64 P. W. R. 1915.

(2) 37 Ind. Cas. 390; 111 P. R. 1916; 234 P. W. R. 1916.

apply to a case of a person who being a mere trespasser claims a right of occupancy. In support of his contention he relies upon the case of *Ghulam* v. *Jowala Singh* (3). This is a decision by the late Mr. Justice Shah Din in which the learned Judge distinguished his previous decision in *Mihan Singh* v. *Bhagwan Kaur* (2). The following passage in his judgment is relied on by Mr. Madan Gopal:—

"It will be observed that in *Mihan Singh* v. *Bhagwan Kaur* (2) the defendants were admittedly 'tenants' holding under the plaintiffs as their landlords, and the sole dispute between the parties was as to whether or not the defendants were 'occupancy' tenants of the land on which stood the trees which they claimed to have a right to cut in case of need. The matter in dispute was, therefore, one which, under clause (*d*) of subsection (3) of section 77 of the Punjab Tenancy Act, could be heard and determined only by a Revenue Court, and upon that ground the 'proviso' to that subsection was clearly applicable to the case. In the present case, on the other hand, the defendant, according to the allegations in the plaint, is not a tenant of the plaintiffs but is a mere trespasser; * * * * * * his claim clearly does not fall within clause (*d*) of sub-section (3) of section 77 of the Act."

I have examined the judgment in *Mihan Singh* v. *Bhagwan Kaur* (2) carefully and I am unable to find anything in it which may go to show that the defendants in that case were admittedly tenants or that the decision in the case proceeded upon that ground. In any case, the opinion expressed by Mr. Justice Shah Din in *Ghulam* v. *Jowala Singh* (3) is clearly opposed to the decision of the Division Bench in *Wadhawa* v. *Musammat Hassi* (1). Therefore, although somewhat inclined to agree with the view expressed in *Ghulam* v. *Jowala Singh* (3) sitting as a Single Judge, I must follow the decision of the Division Bench. According to that decision this appeal must be accepted.

I accordingly set aside the decree of the lower Appellate Court, direct that the decree passed by the Subordinate Judge, First Class, be registered as a Revenue Court decree under section 100 of the Punjab Tenancy Act and remand the case to the lower Appellate Court with the direction that the Memorandum of Appeal be returned to the plaintiffs-appellants to be presented to the Collector. Costs will abide the result. The Court-fee paid on the Memorandum of Appeal shall be refunded to the appellants.

Z. K. *Appeal accepted.*

(3) 48 Ind. Cas. 303; 103 P. R. 1918; 179 P. W. R. 1918; 130 P. L. R. 1918.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 9-B of 1921.

July 26, 1923.

Present :—Mr. Prideaux, A. J. C.

RATANLAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAIDEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of one of several respondents—Application for bringing on record legal representatives not made in time—Abatement—Test—Hindu Law—Joint family—Debt—Liability of members.

In order to determine whether an appeal abates if the representative of one of the respondents is not brought on record, the test is "could the suit *ab initio* have been instituted and prosecuted with the deceased being left out." [p. 821, col. 1.]

Hadu v. *Lala*, 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914, relied upon.

Obiter:—It is settled law that in the case of an ancestral business all members of a Hindu joint family including minors are liable for debts incurred in the course of business to the extent of their shares in the family property. [p. 821, col. 1.]

Raghunathji Tarachand v. *Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72, 11 Bom. L. R. 255, relied upon.

Appeal from the decree of the Additional District Judge, Akola, in Civil Appeal No. 187 of 1920, decided on the 28th September 1920.

Mr. *S. Y. Deshmukh*, for the Appellants.

Mr. *A. V. Khare*, for the Respondents.

JUDGMENT.—I accept as correct that the two ladies who represent the present plaintiffs were at Risod when Jaideo, the first respondent, died. He was related to them; they must have known of his death and this appeal against Jaideo has abated. It is pressed for the respondents that this is a fit case where it should be held that when the appeal abates against Jaideo it abates against the auction-purchasers; for their title to the houses comes from Jaideo who was the decree-holder in the execution proceedings in which the house was sold. It is argued that as the judgment and decree of the lower Appellate Court stand as regards Jaideo they would if they failed here, never be able to get back their purchase-money from Jaideo's representatives, because the plea taken by them would be that, as far as Jaideo was concerned, the house was rightly sold. I am referred to *Hadu* v. *Lala* (1). There seems to me force in the contention. As stated in that case a useful test is, could the suit *ab initio* have been institutad and prosecuted with Jaideo left out? The answer is in the negative.

But proceeding to the appeal on the merits it seems to me that the appellants have no case. The finding by the lower Appellate Court that the debt incurred by Kunjilal upon which Jaideo obtained the decree and attached the house was one incurred by the manager of a trading firm, the plaintiffs being members of that firm, is a finding of fact and it appears to me that it having been come to on a consideration of the oral and documentary evidence on record it cannot be successfully challenged in second appeal. Jaideo, (D. W. No. 10) who was separated uncle of the plaintiffs, tells us that the money was taken by Kunjilal on account of the firm and it seems to me that the finding that the debt was contracted for the purposes which bind the family is correct. It is settled law in the case of an ancestral business that all members of the family including minors are liable for debts incurred in the course of business to the extent of their shares in the family property: *Raghunathji Tarachand* v. *Bank of Bombay* (2). It is admitted here that the family was joint and that Kunjilal was the manager of the joint trading family; but it is contended that the evidence does not sufficiently show that he contracted this particular debt in that capacity. But, as already stated, there is evidence on record to support the finding of the lower Appellate Court. The shares of the minor plaintiffs in the house are liable for the decree obtained by Jaideo. This appeal fails and is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914

(2) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 28 OF 1923.

July 31, 1923.

Present:—Mr. Justice Das and Mr. Justice Ross.

RAGHUNATH PRASAD SINGH—PETITIONER

versus

SADHU SARAN PROSAD SINGH AND ANOTHER—OPPOSITE PARTY.

Motrgage—Mortgagee purchasing portion of mortgaged property—Part redempt on of mortgage—Amendment of mortgage-decree.

Where a mortgagee by his own act in acquiring one of the mortgaged properties has split up the integrity of the mortgage, any person interested in a share of the mortgaged properties may redeem that share on payment of the proportionate amount of the balance of the mortgage-debt and is entitled to get a decree passed on the mortgage amended for that purpose if it does not already make the necessary apportionment in proportion to the value of the properties held by each of such persons. [p. 822, col. 2; p. 823, col. 1.]

Debendra Nath Sen v. *Mirza Abdul Samad Seroji*, 1 Ind. Cas. 264; 10 C. L. J. 150, *Surjiram Marwari* v. *Barhamdeo Prasad*, 2 C. L. J. 202 and *Nawab Azimut Ali Khan* v. *Jowahir Singh*, 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth. P. C. J. 346; 2 Sar. P. C. J. 573; 20 E. R. 602, relied upon.

Messrs. *L. N Singh* and *S. N. Roy*, for the Petitioner.

Messrs. *K. P. Jayaswal* and *S. N. Dutt*, for the Opposite Party.

JUDGMENT.—This is an application by respondent No. 6, the purchaser of one of several properties mortgaged by one Barhamdeo Prasad Singh on the 24th July 1904, for amendment of a decree passed on appeal in the High Court in a suit on the mortgage. It appears that two of the mortgaged properties had been purchased by the mortgagee himself. The relevant portion of the judgment of this Court is as follows:—

"It appears that Chota Narain, one of the mortgagees, purchased two of the mortgaged properties, namely 3-annas 8-pies share in *Mauzah* Chakia, and 4-pies 3-*karants* share in *Mauzah* Nawada Kapur. It is argued on behalf of the defendnts that the integrity of the mortgage having been destroyed by the action of the mortgagee the mortgage-debt must be apportioned as between them in proportion to the value of the properties. The learned Subordinate Judge has dealt with the evidence and has recorded a finding that the contention of the defendants is entitled to succeed but that the plaintiffs have failed to put sufficient material before the Court for ascertaining the value of the various mortgage shares. Now, the learned Subordinate Judge concedes that there was evidence before him but he thought that the evidence was not sufficient. In my opinion he should have decided the point on the evidence good, bad or indifferent, that was placed before him by the parties. We direct, by the consent of the parties, that the learned Deputy Registrar of this Court when drawing up the decree do make the apportionment on the basis of the *khewat* that I understand are on the record. Let the decree be drawn up accordingly."

The decree as drawn up contains the following clause 3:—

"There shall be an apportionment on the basis of the *khewat* as between the mortgagors and the mortgagees for the properties purchased by Chota Narain, the original mortgagee."

In making this apportionment 3-annas 8-pies share of Chakia have been valued at Rs. 67-13 and 4-pies 3-*karants* of Nawada Kapur at Rs. 320-3 a total of Rs. 388. The contention on behalf of the respondent No. 6, who is the purchaser of 3-annas 8-pies share of *Mouzah* Assoya, one of the mortgaged properties, is that under the terms of the judgment of this Court each of the mortgaged properties has to be valued and the mortgage-debt apportioned among them according to their respective values. It is argued on his behalf that as the mortgagee himself split up the mortgage he is no longer entitled to claim that the mortgage should be redeemed in its entirety.

The application is contested by the mortgagee who claims to be entitled to all the remaining properties for the whole of the mortgage-debt except as reduced in proportion to the value of the properties that he himself has purchased.

It seems to me that on the language of the judgment the applicant is entitled to have the mortgage-debt apportioned between the defendants in proportion to the values of the several properties, if there is otherwise no objection to this course.

Section 60 of the Transfer of Property Act, dealing with the right of the mortgagor to redeem, contains the following provision:—

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part the share of a mortgagor." This section seems to imply that where the mortgagee by his own act in acquiring one of the mortgaged properties has split up the integrity of the mortgage any person interested in a share of the mortgaged properties may redeem that share on payment of the proportionate amount of the balance of the mortgage-debt. The principle has been recognised in *Debendra Nath Sen* v. *Mirza Abdul Samad*

SAKHARAM v. GITABAI.

Seroji (1) where at page 175* their Lordships observe as follows.—

"As illustrations of exceptions to the general rule, it may be mentioned that an apportionment will be directed..... where the mortgagee himself has become the owner of a part of the equity of redemption or where by his own conduct there has been a break up of the entire security. Thus an apportionment has been directed where, as in *Surjiram Marwari* v. *Barhamdeo Prasad* (2), a mortgagee has acquired in whole or in part the share of the mortgagor in the equity of redemption or where, as in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (3), a mortgagee has purchased the equity of redemption in one out of several properties comprised in the mortgage security..... The test to be applied in each case is, whether there has been a severance of the security at the instance or with the consent of the mortgagee, and an apportionment will not be enforced upon the mortgagee unless special equitable considerations are established." In the case in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (3) an estate was subject to a mortgage in satisfaction of decrees against the original mortgagor or his representatives, in different parcels. One parcel was purchased by the plaintiffs and another parcel by the mortgagee. In a suit by the plaintiffs as owners of the equity of redemption in the parcel which they had purchased for redemption on payment of their rateable share of the mortgage-debt, the following observations were made by the Judicial Committee. "The appellant (that is, the mortgagee) does not, as their Lordships understand, contest the proposition of the plaintiffs, as purchasers of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of some proportion of the mortgage-debt." See also the decisions in *Hari Kissen Bhagat* v. *Velvat Hossein* (4) and *Surya Bibi* v. *Monindra Nath Roy* (5).

(1) 1 Ind. Cas. 264; 10 C. L. J. 150.
(2) 2 C. L. J. 202.
(3) 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth. P. C. J. 346; 2 Sar. P. C. J. 573; 20 E. R. 602.
(4) 30 C. 755; 7 C. W. N. 723.
(5) 4 C. W. N. 507.

* Page of 10 C. L. J.—[*Ed*].

In view of these authorities and of the actual language of the judgment, it seems to me that the contention of the petitioner is well founded.

The decree must be amended by apportioning the mortgage-debt between the defendants in proportion to the values of the properties held by each.

The petitioner is entitled to the costs of this application: hearing fee two gold *mohurs*.

M. D. J. & N. H. *Decree amended.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 275 OF 1922.
July 12, 1923.

Present:—Mr. Baker, Offg. J. C.

SAKHARAM—PLAINTIFF—APPELLANT
versus
GITABAI—DEFENDANT—RESPONDENT.

Auction sale—Extent of property sold, test of.

The test determining the extent of the property sold at an auction is, to ascertain what the Court intended to sell and what the purchaser understood he bought. The question of what the Court could or should have sold does not arise. [p. 824, col. 1.]

Pettachi Chettiar v. *Sangili Vira*, 10 M. 241; 14 I. A. 84; 11 Ind. Jur. 272; 5 Sar. P. C. J. 38; 3 Ind. Dec. (N. S.) 921 (P. C.), *Abdul Aziz Khan* v. *Appayasami*, 27 M. 131; 8 C. W. N. 186; 31 I. A. 1; 6 Bom. L. R. 7; 8 Sar. P. C. J. 568 (P. C.), *Mahabir Pershad* v. *Moheswar Nath Sahai*, 17 C. 584; 17 I. A. 11; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. S.) 929 (P. C.), relied upon.

Appeal from a decree of the Additional District Judge, Betul, dated the 4th March 1922, in Civil Appeal No. 6 of 1922.

Mr. *M. Gupta*, for the Appellant.

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

JUDGMENT.—The point which arises in this appeal is an unusual one. The facts are, that the defendant is the *malguzar* of a village and in execution of a decree against her 4-annas out of her share in the village was sold and purchased by the plaintiff. It so happened that, prior

to the date of the sale one Govindrao, an occupancy tenant, died without heirs, and his land lapsed to the defendant. It measured over 66 acres. The plaintiff claims ¼th share in the land. His claim was awarded by the First Court, but the decision was reversed on appeal by the Additional District Judge, Betul.

It is clear that the land in dispute was not included in the sale, as it does not appear to have been known to the Collector that the land had lapsed to the defendant. It is argued on behalf of the appellant that as he purchased ¼th share in the entire village, he is entitled to all that the judgment-debtor possessed in the village. The test, however, as pointed out by the learned Judge of the lower Appellate Court, in such cases is, what the Court intends to sell and what the purchaser understands that he bought. This has been laid down by the Privy Council in *Pettachi Chettiar* v. *Sangili Vira* (1). That case lays down that the question of what the Court could, or should, have sold did not arise. All that required decision was what the Court had sold. This case is followed by the Privy Council in *Abdul Aziz Khan* v. *Appayasami* (2): *cf.* also *Mahabir Pershad* v. *Moheswar Nath Sahai* (3).

There can be no doubt whatever in the present case as to what the Court intended to sell and what the purchaser understood he bought. The Collector did not intend to sell the land now in suit, nor did the purchaser understand that he was buying it. The area of the *sir* and *khudkasht* lands mentioned in the sale proceedings was only 5·93 and 16·53 acres respectively, whereas the land in suit measures over 66 acres. If that had been included in the sale, it would probably not have been necessary to sell so large a share of the village or the purchase price would have been much greater. In these circumstances, as the Collector never intended to sell this land and the purchaser did not understand that he was buying it, and in fact did not buy it, the view of the lower Appellate Court that he is not entitled to one-fourth share in it is correct and must be confirmed.

It was admitted in argument that the plaintiff purchased 4 annas share in the village without rights in the *sir* and *khudkasht* lands, and this land became *khudkasht* on the death of the tenant without heirs: the plaintiff would have no right to it on that ground also.

The decree of the lower Appellate Court is, therefore, confirmed and the appeal is dismissed with costs.

S. D. *Appeal dismissed.*

(1) 10 M. 241; 14 I. A. 84; 11 Ind. Jur. 272; 5 Sar. P. C. J. 38; 3 Ind Dec. (N s.) 921 (P. C.).

(2) 27 M. 131; 8 C. W. N. 186, 31 I. A. 1; 6 Bom. L. R. 71; 8 Sar. P. C. J 568 (P. C.).

(3) 17 C. 584; 17 I. A. 11; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. s.) 929 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2132 OF 1919.

December 30, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

LAKHPAT RAI—DEFENDANT—APPELLANT

versus

MAYYA MAL—PLAINTIFF AND OTHERS—DEFENDANTS - RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57—Execution of decree—Proceeding struck off at request of decree-holder—Attachment, whether continues—"Default", meaning of.

The word "default" used in O. XXI, r. 57 of the Civil Procedure Code, is not restricted to default of appearance, but applies also to a failure to do what the decree-holder is bound to do, that is, to go on with his application and have the property sold. [p. 825, col. 2.]

Where an execution proceeding is struck off at the request of the decree-holder, this amounts to a dismissal for default of the decree-holder within the meaning of O. XXI, r. 57 of the Civil Procedure Code, and the attachment ceases to exist. [p. 825, col. 2.]

Fateh Din v. *Qutab Din*, 67 Ind. Cas. 543; 3 L. 7; (1922) A. I. R. (L) 108, *Dildar Husain* v. *Sheo Narain*, 49 Ind. Cas. 113; 41 A. 157; 17 A. L. J. 52, relied on.

Second appeal from a decree of the Additional District Judge, Jullundur, at Ludhiana, dated the 27th May 1919,

LAKHPAT RAI *v.* MAYYA MAL.

reversing that of the Junior Subordinate Judge, Jullundur, dated the 11th June 1918.

Lala *Jagan Nath*, for the Appellant.

Mr. *B. D. Kureshi*, for Malik *Muhammad Hussain*, for the Respondents.

JUDGMENT.—The facts that need be recited to decide this second appeal are but few and simple.

In the execution of a money-decree a house of the judgment-debtor Sukhu was attached on the 19th October 1915, and subsequently orders were made three times for its sale by auction, but it could not be sold as no bidders turned up to buy it. In the meantime, Sukhu applied to be adjudged insolvent, and notice of his application was sent as usual to the Court executing the decree. The next date of hearing in that Court was the 23rd of March 1916, and on that date the decree-holder Mayya Mal appeared and stated as below:—

"Misl filhal dakhil daftar ho jawe. Phir jari karaonga".

(The record may for the present be consigned to the record office. (I) will take out execution again.)

In accordance with the above prayer of his, the execution proceedings were struck off and the file was consigned to the record-office. Not long after that, that is, on the 3rd May 1916, the insolvency petition was dismissed, and on the 6th May, Mayya Mal put in a fresh application for attachment of the house and obtain an order to attach it. Accordingly, it was again attached on the 13th May. But on the same date Sukha mortgaged the house by a registered deed to Lakhpat Rai for Rs. 1,500 and the latter eventually applied to the Court executing the decree that the house should be sold subject to his lien as mortgagee. This was allowed in spite of opposition by Mayya Mal, and the latter, therefore, brought a suit to declare that the mortgage was invalid because (1) it had been effected after attachment and was fictitious, and (2) the house belonged to Rolu, son of Sukhu, and not to the latter. (Rolu, too, was a judgment-debtor along with Sukhu). The Trial Court put these points in issue and decided them against Mayya Mal and dismissed his suit. The plea that the first attachment had not come to an end was not raised at all, nor was specially stated in the grounds of the appeal preferred from the order of the First Court. But it appears that it was raised in the course of arguments before the lower Appellate Court which decided (1) that the first attachment did not cease to exist, as the order consigning the file to the record-office was not tantamount to dismissal of the application for default within the meaning of O. XXI, r. 57, Civil Procedure Code, and could not have the effect of removing the attachment, and (2) that the mortgage was made with the knowledge of the second attachment. Upon these findings the mortgage was declared to be invalid and inoperative as against the attaching creditor.

In this further appeal by the mortgagee it is contended on his behalf, on the authority of *Fateh Din* v. *Qutab Din* (1), that the first attachment came to an end under O. XXI, r. 57 when the execution proceedings were struck off at the request of the decree-holder himself. In the case cited, a Division Bench of this Court accepted the view of the Allahabad High Court expressed in *Dildar Husain* v. *Sheo Narain* (2) that the word *"default"* used in O. XXI, r. 5, is not restricted to default of appearance but applies also to a failure to do what the decree-holder is bound to do, that is, to go on with his application and have the property sold. According to this ruling the first attachment in the present case came to an end when the decree-holder failed to carry on the execution proceedings and had them struck off.

It was not pressed before us that the second attachment had been made before the mortgage, as there is no material on the record to support that contention. On the other hand, it is clear that the terms of the mortgage must have been settled before the 13th May, because on the early morning of that date the parties to it started from their village for Phillour which is 10 *kos* or 15 miles therefrom, and there executed the deed of mortgage and presented it for registration at 11 A.M. It was not proved that the attach-

(1) 67 Ind. Cas. 543; 3 L. 71 (1922) A. I. R. (L.) 108.

(2) 49 Ind. Cas. 113; 41 A. 157; 17 A. L. J. 52.

ment had been made before 11 A. M. The decree-holder, therefore, could not avoid the mortgage. This being so, we accept the appeal, set aside the order of the lower Appellate Court and restore that of the first Court dismissing Mayya Mal's suit with costs throughout.

Z. K.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 2 OF 1923.

August 14, 1923.

Present:—Mr. Hallifax, A. J. C.

JAILALSAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

LAL FATEHSINGH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 102—Suit for mesne profits—Burden of proof—Prima facie *evidence by plaintiff—Burden, whether shifted on to defendant.*

In a suit for mesne profits it is for the person out of possession to prove what profits the man in possession of his property made out of it and the latter can be made to pay only so much of the profits as the ousted owner can manage to find evidence to prove in detail in the face of the opposition from the trespasser, but as soon as the plaintiff gives some evidence proving *prima facie* that the profits were somewhere about the sum alleged, the burden of proving that they were less shifts to the shoulders of the defendant.

Gopala Kunbi v. *Ramkrishnapuri*, 50 Ind. Cas. 930; 15 N. L. R. 95, followed.

Appeal from a decree of the Second Subordinate Judge, Raipur, in Civil Suit No. 108 of 1921, decided on the 26th September 1922.

Mr. *M. Gupta*, for the Appellants.

Messrs. *P. C. Dut* and *M. B. Kinkhede*, R. B., for the Respondent.

JUDGMENT.—It took the plaintiff-respondent, who is a zemindar, three years after the expiry of the defendants' lease of one of his villages to obtain and execute a decree for their eviction, and in the present suit he claimed Rs. 5,310-2-8 as the mesne profits of those three years, with interest thereon at 12 per cent. per annum which brought the total claim to Rs. 6,500. The defendants pleaded that the rent recovered by them during the whole period was only Rs. 393-10-8, and that they had made and could have made no profits at all by the cultivation of the home farm or the collection of "*siwai amdam*," as all the three years were years of famine. It was admitted by the plaintiff that the actual amount collected as rent was only Rs. 393-10-8, but he alleged that with proper diligence much more could have been collected. The issues framed referred to the amount of the profits that were obtained or could with due diligence have been obtained under the three heads of rent, *siwai amdani* and home farm.

2. On these issues the plaintiff examined eight witnesses and the defendants gave no evidence at all. It was held in the lower Court that there was no *siwai amdani* and that the defendants had not left any rent unrealised through negligence and were, therefore, liable only for the amount actually collected. As the plaintiff has not appealed against either of these decisions we are not further concerned with them. As to the profits made by cultivation of the home farm, the learned Subordinate Judge starts by saying that the "plaintiff's evidence on this point is most unsatisfactory," but he holds finally that it proves that the defendants made a net profit out of their cultivation of this land of not less than Rs. 880 in each of the three years, or Rs. 2,640 in all. Adding to this the Rs. 393-10-8 collected as rent and Rs. 673 as interest he gave the plaintiff a decree for Rs. 3,706-10-8. Against this decree the defendants have appealed urging that it should be for no more than the Rs. 393-10-8 admitted by them.

3. It is very commonly supposed, and it was here certainly taken for granted by everybody concerned, that in cases of this nature it is for the person out of possession to prove what profits the man in possession of his property made out of it, and that the latter can be made to pay only so much of the profits as the ousted owner can manage to find evidence to prove in detail in the face of opposition from the trespasser, who is the only person who knows anything about it. Section 106

of the Evidence Act is, however, very clear on the point, and, as was held in *Gopala Kumbi* v. *Ramkrishnapuri* (1), as soon as the plaintiff has given some evidence proving *prima facie* that the profits were somewhere about the sum he alleges, the burden of proving that they were less shifts to the shoulders of the defendant.

4. The learned Counsel for the appellants was constrained to admit that these principles would apply in the case of a mortgagee in possession or of a *Lambardar* of a village, but attempted to urge that they would not apply to the case of a trespasser. The fact that his possession is wrongful seems to me to give them added force, and to increase the weight of the presumptions that can reasonably be made against him. In this case the plaintiff has given evidence proving at least *prima facie* that the profits were not less than the amount he claimed in his plaint, and in the total absence of rebutting evidence a decree for Rs. 6,500 would not have been improper. At any rate, it cannot be said that the evidence is not good *prima facie* proof of the profits being not less than Rs. 3,033-10-8 because it has been held in the lower Court that it is completely satisfactory proof of that fact. The appeal is dismissed and the appellants must pay all the costs.

G. R. P. *Appeal dismissed.*

&

M. D. J.

(1) 50 Ind. Cas. 930; 15 N. L. R. 85.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 24 OF 1920.

January 18, 1923.

Present :— Mr. Justice Scott-Smith and Mr. Justice Moti Sagar.

FIRM RAHMAT ALI-MUHAMMAD FAIZI, THROUGH RAHMAT ALI AND MUHAMMAD FAIZI—DEFENDANTS—APPELLANTS

versus

FIRM DEWA SINGH-MAN SINGH, THROUGH DEWA SINGH, PROPRIETOR AND MANAGER OF THE SAID FIRM—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 62— Novation— Hundi executed in lieu of prior hundi—Suit on subsequent hundi not maintainable—Creditor, whether can fall back on prior hundi—Cancellation, effect of— Negotiability, whether affects liability.

The question as to the negotiability or non-negotiability of an instrument is quite distinct from the question of a party's discharge from liability to the holder, and the liability of the drawer of a bill of exchange or of any subsequent party thereto is not in any way affected by the document being negotiable or otherwise. Nor can a mere cancellation of a bill of exchange have the effect of discharging a party from liability unless it is made with the express intention of discharging that party, for if it is made unintentionally or is made under a mistake it will be inoperative. [p 829, col. 1.]

Where a *hundi* is executed in lieu of a prior *hundi* it is a question of fact in each case whether the parties intended the execution of the subsequent *hundi* as absolute or conditional discharge of the prior *hundi*, the presumption being that the debt is only conditionally discharged. [p. 829, col. 2.]

Where an insufficiently stamped *hundi* is given in renewal of a prior *hundi* and a suit on the basis of the subsequent *hundi* is held not to be maintainable, the creditor can fall back upon the prior *hundi* and section 62 of the Contract Act is not a bar to his doing so. [p. 828, col. 2.]

Sundar Das v. *Puran Singh*, 67 Ind. Cas. 856; 11 P. W. R. 1922; (1922) A. I. R. (L.) 56, relied on.

Case-law discussed.

Second appeal from the decree of the District Judge, Amritsar, dated the 24th November 1919, varying that of the Subordinate Judge, 1st Class, Amritsar, dated the 23rd June 1919.

Mr. *Manohar Lal*, for the Appellant.

Kanwar *Dalip Singh*, for Mr. *D. C. Ralli*, for the Respondent.

JUDGMENT.—This is a second appeal against a decision of the District Judge of Amritsar, dated the 24th November 1919, upholding a decision of the Subordinate Judge, dated the 23rd June 1919, awarding plaintiffs a decree for Rs. 1,050 principal and interest on the basis of a *hundi* dated October the 9th, 1915. The facts of the case out of which the appeal has arisen are very simple, and are shortly these:—

On the 9th October 1915, the defendant borrowed a sum of Rs. 1,000 from the plaintiffs and executed a *hundi* in their favour for that amount. The *hundi* was payable after 150 days. It appears that the defendants were unable to make any arrangements for the retirement of the *hundi* on the due date and they conse-

quently executed on the 5th March 1916 another *hundi* for the same amount in favour of the plaintiffs by way of renewal of the previous *hundi* of the 9th October 1915, and made an endorsement on the back of the latter *hundi* that another *hundi* for Rs. 1,000 had been executed in lieu thereof. On the 23rd June 1917 the plaintiffs brought a suit on the basis of this second *hundi* of the 5th March 1916, but it was dismissed on the ground that the *hundi* was not duly stamped. On appeal this finding was upheld by the District Judge, but it was further held that the plaintiffs could fall back upon the original transaction and sue on the previous *hundi* dated October the 9th, 1915, in lieu of which the second *hundi* was executed. An appeal was preferred against this decision to the Chief Court, but was dismissed by Mr. Justice Wilberforce by his order dated the 9th August 1918, who allowed amendment of the plaint, and confirmed the order of remand passed by the lower Appellate Court in favour of the plaintiffs. The plaint was accordingly amended, and the plaintiffs sued on the basis of the former *hundi* of the 9th October 1915. The defendants pleaded that the *hundi* was without consideration and further contended that it had been discharged and that, consequently, no suit could be maintained on the basis thereof. They also denied the right of the plaintiff to claim interest on this *hundi*. The following issues were framed:—

1. Has the *hundi* dated the 9th October 1915 for Rs. 1,000 been discharged?

2. If discharged, can it now be sued upon?

3. Did defendant not receive full consideration for the *hundi* dated 9th October 1915?

4. To what interest is plaintiff entitled on the *hundi*, dated 9th October 1915?

5. Is plaintiff entitled to costs on the suit as it now proceeds?

The Trial Court found against the defendants on all these issues, and decreed the plaintiff's suit. On appeal the learned District Judge upheld the findings of the Trial Court, and dismissed the appeal preferred by the defendants. He further held that the plaintiffs were entitled to claim interest till realisation, and he accordingly accepted the cross-objections filed by the plaintiffs on this point.

The defendants have now preferred a second appeal against this decision through Mr. Manohar Lal, while Mr. Dalip Singh has appeared on behalf of the respondents. The sole question for determination involved in this appeal is, whether the previous *hundi* of the 9th October 1915 was completely discharged by the execution of the second *hundi* dated the 5th March 1916. On this question we have no hesitation in holding that the judgment of the lower Appellate Court is right, and that the *hundi* was not discharged. In our opinion the giving of the second *hundi* would have operated as a discharge of the previous *hundi* only if the second *hundi* was legally enforceable. As already observed, a suit was brought on the second *hundi* but failed owing to its not being properly stamped. It could not have been contemplated between the parties, nor, as observed by Mr. Justice Chatterjee in *Udho Shah* v. *Hira Shah* (1), could plaintiffs have agreed that they were to take a piece of waste paper for a security legally enforceable and to place themselves entirely at the mercy of the defendants thereafter as regards the payment of their debt. In *Kattayan Chetty* v. *Palaniappa Chetty* (2) it was held that the giving of a *hundi* in payment of the price of goods sold operates as a payment, only if the *hundi* is honoured and that if the *hundi* is dishonoured the right to sue on the original cause of action is revived. In *Sundar Das* v. *Puran Singh* (3), which is a case exactly in point, it was held that where an insufficiently stamped *hundi* is given in renewal of the prior *hundi* and a suit on the basis of the subsequent *hundi* is not maintainable, the creditor can fall back upon the prior *hundi*, and that section 62 of the Contract Act is not a bar to his doing so.

It is urged by Mr. Manohar Lal that when the second *hundi* was given the stamp on the former *hundi* was cancelled, and that an endorsement was made on its back that the defendants had exe-

(1) 71 P. R. 1897.
(2) 27 M. 540.
(3) 67 Ind. Cas. 856; 11 P. W. R. 1922; (1922) A. I. R. (L.) 56.

cuted another *hundi* for Rs. 1,000 in its stead. It is contended that the effect of this cancellation and endorsement was that the *hundi* ceased to be a negotiable instrument any longer and that this circumstance alone was sufficient to indicate that the *hundi* had been completely discharged. We are unable to agree in this contention. In our opinion the question as to the negotiability or non-negotiability of an instrument is quite distinct from the question of a party's discharge from liability to the holder, and we do not think that the liability of the drawer of a bill of exchange or of any subsequent party thereto is in any way affected by the document being negotiable or otherwise. Nor do we think that mere cancellation can have the effect of discharging a party from liability unless it is made with the express intention of discharging that party, for if it is made unintentionally or is made under a mistake it will be inoperative. This rule is laid down in a series of cases in England, and being a rule founded on equity, justice and good conscience, must be held equally applicable to India.

Now, the only circumstances relied on by the defendants in support of this intention are the endorsement on the back of the *hundi*, to which reference has already been made, and the fact that another *hundi* was executed in substitution of the former; and the question for decision is whether these circumstances are sufficient to raise a presumption that the original contract was entirely put an end to and that it was replaced by another contract which may or may not have been legally capable of enforcement. In the case of *Cullianji* v. *Raghowji* (4) Mr. Justice Chandavarkar, following the rule laid down in *In re Romer & Haslam* (5), held that the negotiable security by a debtor to his creditor operated as a conditional payment only and not as a satisfaction of the debt. In *Jambu Chetty* v. *Palaniappa Chettiar* (6), a case cited with approval in *Culhanji* v. *Raghowji* (4), it was held by the Madras High Court that whether it was a note or a bill, it was a question of fact in either case whether the parties intended the same as absolute or conditional payment, and the presumption was that the effect of giving or taking a bill or note was that the debt was conditionally paid. We are in entire accord with the view expressed in these authorities, and hold that there is nothing in the present case to rebut that presumption and that the giving of the second *hundi* only operated as a conditional satisfaction of the debt and not as a real discharge.

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

Z. K.

Appeal dismissed.

(4) 30 B. 271; 6 Bom. L. R. 879.
(5) (1893) 2 Q. B. 286 at p. 296; 62 L. J. Q. B. 610; 4 R. 486; 69 L. T. 547; 42 W. R. 51.
(6) 13 M. L. J. 521; 26 M. 526.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 149-B OF 1922.

August 25, 1923.

Present:—Mr. Kotval, A. J. C.

BALIRAM PIRAJI—DEFENDANT NO. 3—APPLICANT

versus

YESWANTA AND OTHERS—PLAINTIFFS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 1, 2—Pre-emption price ordered to be paid to wrong person—Direction in judgment followed in decree—Error, whether clerical—Review by successor of Judge.

A direction in a decree erroneous but in accordance with the judgment that the pre-emption price should be paid to a wrong person is not a clerical mistake apparent on the face of the decree so as to entitle a person to apply for review of the decree to the successor of the Judge who passed it. [p. 830, col. 2.]

Application for revision of the order of the Munsif, Darwa, dated the 31st July 1922, in Miscellaneous Case No. 38 of 1922.

NAGIER v. KRISHNA CHETTIAR.

ORDER.—This is an application for revision of an order on an application for review of the judgment of the Munsif, Darwah, in Suit No. 191 of 1920. The plaintiff in that suit, Yeshwant Rao, a minor, and defendant No. 1 Vithu are brothers and owned *pot hissa* No. 2 of Survey No. 27 of *Mouza* Brahmi. Vithu acting for himself and the plaintiff sold the *pot hissa* to defendant No. 2 Dattoo on the 1st May 1920 for Rs. 500. Baliram Piraji, defendant No. 3, who owned *pot hissa* No. 1 filed through his uncle Champat as his next friend Civil Suit No. 90 of 1920 against Vithu, Yeshwant and Dattoo for pre-emption of *pot hissa* No. 2 and on the 27th October 1920 obtained a decree. The decree directed that, on Baliram depositing in Court on or before 31st December 1920, Rs. 428-12-0 for payment to Dattoo he should be put in possession of *pot hissa* No. 2. Baliram deposited the amount. It was paid to Dattoo and Baliram was put into possession of the *pot hissa* through the Court. Yeshwant Rao then brought the present suit Civil Suit No. 191 of 1920, through his mother as his next friend for pre-emption of half of *pot hissa* No. 2 ignoring the sale on his behalf by Vithu and treating himself as still the owner of the other half. In this suit he joined Vithu as defendant No. 1, Dattoo as defendant No. 2 and Baliram as defendant No. 3. Vithu and Dattoo did not appear and contest the suit. Ultimately, on the 21st April 1921, a pre-emption decree was passed in favour of Yeshwant Rao directing that he should be placed in possession by the defendants of a joint half share in *pot hissa* No. 2 on his depositing in Court Rs. 250 for payment to defendant No. 1 Vithu. Baliram, alleging that his guardian Champat had neglected his interest, applied through another uncle of his as his next friend for a review of the judgment on the ground that the judgment was, on the face of it, erroneous in that it directed the amount to be paid to Vithu and that the error was apparently a clerical one due to a slip of the pen. The Munsif has dismissed the application for a review and Baliram applies in revision. The judgment sought to be reviewed was delivered and the decree passed by Mr. Damle, Munsif. The application for review was, however, made to his successor Mr. Vaidya.

It seems to me that this application for revision must fail on the ground that the application for review could not have been entertained by Mr. Vaidya. It is clear that this is not a case of a clerical mistake apparent on the face of the decree referred to in r. 2, O. XLVII, First Schedule, Civil Procedure Code. The decree is in consonance with the judgment. What is sought to be corrected is the erroneous direction in the judgment that the pre-emption price should be paid to defendant No. 1 Vithu. It may possibly be argued that this is a mistake or error apparant on the face of the record such as is referred to in r. 1, O. XLVII, but it certainly is not a clerical mistake apparent on the face of the decree in the case of which an application to the successor of the Judge who passed the order is not prohibited. This application is, therefore, dismissed. I make no order as to costs.

G. R. D. *Application dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 332 OF 1922.

August 10, 1923.

Present:—Mr. Justice Spencer and Mr. Justce Devadoss.

M. NAGIER AND ANOTHER—PETITIONERS—SURETIES—APPELLANTS

versus

KRISHNA CHETTIAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145, O. XXI, r. 40—Arrest of judgment-debtor—Execution of security-bond—Non-appearance of judgment-debtor on day fixed—Application by decree-holder for execution of decree against sureties—Amendment adding prayer for production of judgment-debtor—Waiver—Legality of order of arrest.

NAGIER v. KRISHNA CHETTIAR.

execution of a decree the judgment-debtor arrested. He then paid a portion of the ee-debt and as regards the balance put in application under O. XXI, r. 40, Civil Pro- ure Code, that he might be released from custody ecurity being given for re-appearance. A se- ty-bond was executed by which the sureties ertook to produce the judgment-debtor on ty fixed, in default they were to be liable for balance under the decree. The original execu- application was thereafter treated as closed. the day fixed, however, the judgment-debtor not produced. The decree-holder there- a applied by petition for warrants against judgment-debtor and the sureties for balance under the decree; but under direction of the Court the decree-holder nded the relief into one directing the ties to produce the judgment-debtor at ture date and in default to issue warrants nst the sureties, stating at the same time the sureties had committed default in pro- ng the judgment-debtor and had rendered nselves liable for the decretal amount. The rt ordered the arrest of the sureties on the tion under section 145, Civil Procedure Code. the application of the sureties thereupon ancel the said order:

eld, (1) that the fact that the original execution tion was treated as closed did not put an to the liability of the sureties under a later lication; [p. 831, col. 2; p. 832, col. 1.]

ajt Sahoy v. *Odoya Sunderi Mitra*, 14 C. 757; id. Dec. (N. S.) 502, not followed.

undara Reddi v. *Varadharaja Pillai*, 34 Ind. 407; (1916) 2 M. W. N. 273, referred to.

) that the application for execution of the decree the decree-holder by production of the judg- t-debtor on a later date did not constitute aiver or condonation of the right to enforce security-bond already broken through non- duction of the debtor on the previous ring day; [p. 832, col. 1.]

) that the terms of the surety-bond for produc- n of the judgment-debtor on a particular day, having been complied with, the sureties had lered themselves liable for the decretal amount the order of execution against them as finally sed under section 145, Civil Procedure Code, not open to any legal objection. [p. 832, col.

Appeal against the order of the Court the Subordinate Judge, Madura, in ecution Petition No. 118 of 1922 and ecution Appeal No. 292 of 1922 in iginal Suit No. 174 of 1921, dated 4th gust and 31st August 1922.

Mr. K. Rajah Aiyar, for the Appellant.

Messrs. *K. S. Jayarama Iyer* and *R. Murama Sastri*, for the Respondents.

UDGMENT.—The defendant in Ori- al Suit No. 174 of 1921 on the file of the Subordinate Judge's Court of Madura was arrested upon an execution petition, Execution Petition No. 60 of 1922. After arrest he paid Rs. 1,750, and as regards the balance, there was an application (Execution Appeal No. 178 of 1922) under O. XXI, r. 40 that he should be released from custody on security being given for his re-appearance. The surety-bond executed by the appellants in this case provided that the defendant should be brought before the Court on the 4th of July 1922, and that the sureties would be responsible for bringing him before the Court on that date, and that in case of failure to produce him on the said date they agreed that they themselves, their heirs and other properties should be liable for Rs. 7,200, the balance due under the decree. It does not appear whether any proceedings took place in Court on the 4th of July 1922, but on the 20th of July 1922 the decree-holder presented a petition asking for warrants against the defendant and the sureties for the balance due under the decree. It appears from the manuscript execution petition that the relief asked for was altered in consequence of an office-note put up in the Subordinate Judge's Court, and that the relief as finally asked for was that the sureties be ordered to produce the defendant in Court and that, in default, warrants should be issued against the defendant and the sureties. The decree-holder amended the prayer as directed, noting at the same time that the sureties were bound to produce the judgment-debtor in Court on the 4th of July and that by failure to do so they had rendered themselves liable for the decree amount.

The present appeal arises out of an application under section 47 of the Civil Procedure Code, but wrongly described as an application under section 151, for cancellation of the Court's order directing arrest warrants against the judgment-debtor's sureties. The Subordinate Judge held that the order for arrest already passed was a proper order and dismissed the petition.

Now it is argued, first, that as the Execution Petition No. 60 of 1922 had been treated as closed on the 29th April 1922, the liability of the sureties came to an end. In support of this argument, the decision

.n *Lalji Sahoy* v *Odoya Sunderi Mitra* (1) has been cited. That was a decision of the Calcutta High Court upon section 336 of the Civil Procedure Code of 1882. The authority of this decision has been questioned in *Sundara Reddi* v. *Varadharaja Pillai* (2), and as it deals with an application under section 336, which corresponds to section 55 of the present Code, a case of a judgment-debtor expressing his intention to apply to be declared an insolvent and furnishing security for appearing when called upon, this decision has not much bearing on the question now before us. In the present case, although Execution Petition No. 60 of 1922 was noted as "closed" there is no order dismissing the petition and it must be noted that the security was given in connection with Execution Appeal No. 178 which is not shown as disposed of at any time previous to the order directing warrant to issue against the sureties.

Then, it is argued that the effect of the decree-holder asking that the sureties should be produced in Court on a date subsequent to the 4th of July 1922 was that he condoned the default to produce the defendant on the 4th of July. The liability of the sureties to pay the decree amount in the present case is governed strictly by the terms of the bond which they gave. In that bond they distinctly promised to produce the defendant before the Court on the 4th of July and they agreed in default thereof to be liable for Rs. 7,200. The amendment in the execution petition presented on the 20th of July, Execution Petition No. 118, was made under the order of the Court under some mistaken impression that the surety-bond provided for the production of the defendant on any date subsequent to the 4th of July on which the sureties might be required to produce him, and that the bond had not already been broken when the execution petition was presented. If the execution petitioner's Vakil amended the prayer in the petition under the directions of the Court, that will not amount to any relinquishment or waiver of his right to enforce the surety-bond. Although the execution petition was in the proper form when first presented and the sureties were not liable by the terms of their bond to be ordered to produce the defendant at a date after the 4th of July, the order finally passed, against which they appeal, was under section 145, for executing the decree against them, and is not open to any legal objection.

Lastly, Mr. Rajah Aiyar for the appellants argues that the sureties have not been given any notice that the decree-holder intended to proceed against them for default on the 4th of July and thus they have had no opportunity of shewing that they did produce him on that date or of explaining their failure to produce him if in fact they did not do so; but in the grounds of Civil Miscellaneous Appeal it is not anywhere suggested that appellants in fact complied with the terms of their bond and that the lower Court should have found that in fact they produced the judgment-debtor on the 4th of July. The question before the lower Court and in the appeal was only whether the order to arrest the sureties for failure to comply with the terms of their surety-bond was correct and on this point we cannot come to any other conclusion but that the lower Court was right.

The Civil Miscellaneous Appeal is dismissed with costs.

Appeal dismissed.

V. N. V.

(1) 14 C. 757; 7½ Ind. Dec. (N. S.) 502.
(2) 34 Ind. Cas. 407 (1916) 2 M. W. N. 275.

BHONAJEE *v.* SARASWATI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 22-B OF 1922.

September 15, 1923.

Present :— Mr. Prideaux, A. J. C.

BHONAJEE— DEFENDANT— APPELLANT

versus

Musammat SARASWATI — PLAINTIFF— RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 10—Suit for value of grain agreed to be given for maintenance—Decree, form of.

Where in default of an agreement to deliver a certain quantity of grain as maintenance, a suit is brought to recover the money value of the grain, it is not incumbent on the Court under O. XX, r. 10 to decree the grain itself and that only on failure of delivery of grain should a cash payment be enforced. [p. 834, col. 2.]

Appeal against a decree of the Subordinate Judge, Akola, dated the 23rd December 1921, in Civil Suit No. 187 of 1920.

Mr. *D. W. Katnale*, for the Appellant.

Mr. *G. G. Hatvalne*, for the Respondents.

JUDGMENT.—The plaintiff-respondent in the present appeal is a widow of a dead brother of the defendant. After her husband's death she does not appear to have got on very well with her borther-in-law and, on 25th January 1913, an agreement was come to evidenced by a ***kararnama*** executed by each that the defendant should give the plaintiff certain maintenance. That document has been translated as follows:—

"You are my husband's younger brother. I have been living separate from you since the death of my husband. You have agreed to pay me every year 1 *khandis* 4 maunds of *juar* by a ***paili*** of four seers and besides Rs. 72 cash on ***Mitti Magh Shuahi*** 15 as maintenance during my lifetime. I will take (the same) accordingly. I have got two duaghters and I will manage by this to bring them and send them back. You are not responsible. I have hereafter no right to any of your property."

Plaintiff sues claiming Rs. 1,600 as arrears, money and value of grain for the years 1915-18 at Rs. 400 a year and for a declaration that plaintiff is entitled in future to recover Rs. 400 a year from the defendant as her maintenance. She also claimed to have her maintenance made a charge on the defendant's family property. The agreement of January 25th, 1913 has admitted but it was contended that, subsequent to that agreement plaintiff agreed to have her maintenance reduced to Rs. 25 a year and 10 maunds of *juari*, and that plaintiff has been paid at this rate for some years. It was denied that any arrears of maintenance were due, and the value of the *juari* claimed was disputed. It was further contended that the amount fixed by the agreement of 25th January 1913 included the maintenance of plaintiff's two daughters and, as these are no longer dependent on their mother, there is a cause for making reduction in the maintenance. It was urged that the maintenance should not be made a charge on the family property, plaintiff having reliniquished all her right to the property.

The case was tried on the following issues:—

"1. Whether plaintiff, subsequet to the agreement of 25th January 1913, agreed to receive Rs. 25 in cash and 10 maunds of *juar* a year as alleged by the defendant?

"2 Whether defendant paid Rs. 25 and delivered 10 maunds of *juar* a year to the plaintiff till last year since then?

"3. What was the rate of *juar* during the years in question?

"4. Whether there is an estoppel as alleged by defendant?

"5. Whether the allowance in the ***kararnama*** was fixed for plaintiff and her two daughters or for plaintiff alone?

"6. Whether any oral evidence to prove the same can be allowed?

"7. Whether there has been any change in the circumstances to justify a reduction in the allowance as agreed upon in the *kararnama*?

"8. Whether, in the absence of any such circumstances, defendant can be allowed to demand a change in the allowance?

"9. Whether a charge can be allowed, as asked for by the plaintiff?

"10. What are the correct Nos. and the acreage of the fields in possession of defendants?

"11. How much allowance should be fixed for the future?

"12. What relief is plaintiff entitled to?"

The findings of the Trial Court may be summarised as follows:—No subsequent agreement, as pleaded, was proved and it was not established that defendant

BHONAJFE v. SARASWATI.

had been paying plaintiff Rs. 25 and 10 maunds of *juar* yearly. The rate of *juar* was found to be one rupee a *pali*. No case of estoppel had been made out and the maintenance fixed in the *kararnama* was for plaintiff herself and not for her daughters. No oral evidence was permissible to change the contents of the written document, the *kararnama*, and there is no change in the circumstances so as to justify reduction of the allowance. Four years maintenance, at the rate of Rs. 360 a year, amounting to Rs. 1,440 was allowed being made a charge on the property and defendant was directed in future to pay to the plaintiff Rs. 72 and 24 maunds of *juar* on account of maintenance as settled by the original agreement. Against that decision the present appeal is filed.

I do not think that defendant's story that a subsequent agreement whereby the plaintiff agreed to reduce both her money and grain allowance has been proved. His witnesses do not support the defendant and it has been rightly held that this agreement is not established. So we have to go back on to the original agreement of 25th January 1913 (Exhibit D. 1) and it is very clear that the agreement come to was to settle plaintiff's maintenance and was independent of her daughters. It is true that the document states that the woman had two daughters but they were both married at the time and would live a great deal in their husband's families and the fact that the agreement states that the amount settled was to be maintenance during the plaintiff's lifetime effectively disposes of the contention that there was to be a reduction in the money and grain settled when it was no longer necessary for the plaintiff to maintain her two girls. On that document plaintiff is entitled to Rs. 72 a year cash payable on *Mitti Magh Shudhi* 15 and one *khandi* for 4 maunds of *juar*. It is contended that the case should be remanded to enable the defendant to establish that circumstances have now so changed that the maintenance as settled by the *kararnama* is now excessive and plaintiff should be satisfied with a smaller allowance., But this question raises matters both of fact and law and if the defendant wished to raise it he should have done so distinctly in the First Court. It is too late for him to raise it as a defence now. Every decree for maintenance is liable to change if the parties by a suit or otherwise bring to the notice of the Court that circumstances exist justifying either a reduction or a raising of the maintenance allowance. But for the past years, and, as at present held, for the future, the plaintiff is entitled to what she claims. But she has been allowed four years' maintenance. That is wrong . For the maintenance for the year 1915 is clearly time-barred and I must reduce the decree by the amount of one year's maintenance, namely, by Rs. 360.

It is contended for the appellant that in place of money claimed for the *juar* the *juar* itself should have been decreed. On the other hand, for the plaintiff it is argued that she had to borrow *juar* for her maintenance when the price of that commodity was very high and it is but fair that she should be given the money value of that grain. O. XX, r. 10, Civil Procedure Code, lays down that, when a suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had. But the rule does not state that, in a case of this nature, the Court must invariably decree the article claimed. In cases of most articles it is a question of delivery of the article or as an alternative its value in money. But where we are dealing with grain no specific grain is claimed and I do not think it necessarily follows that a decree must specify that the grain which should have been delivered but which was not delivered must be delivered and only on failure of delivery should a cash payment be enforced. There is much force in the plaintiff's contention that to froce her to accept grain at the present rate when it is cheap is to give the defendant an undue advantage while making her suffer a loss; for she had had to borrow grain at a high rate for her own maintenance, grain which is yet to be repaid in money. I, therefore, decline to direct that the arrears of maintenance should

be in grain and money and uphold the lower Court's decision that money alone should be made payable.

With the exception of reducing the claim by Rs. 360 I confirm the decision come to by the Trial Court. The appellant will get his costs on that sum by which he has succeeded in reducing the decree of the First Court and he will pay the respondent's costs on that portion of his claim which has been disallowed by this Court. The decree will be a charge on the property specfied by the Trial Judge.

W. C. A. *Order accordingly.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 11 OF 1922.

Jan. 8, 1923.

Present:- Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

HAWAL RAI AND OTHERS- PLAINTIFFS—APPELLANTS

versus

HAR PRASAD RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901)—Ejectment—Private partition—One co-sharer in exclusive possession of a holding—Tenant-at-will assigning his rights to another co-sharer—Second co-sharer, if can be ejected.

Where the tenant-at-will of a certain holding which by a private partition among the co-sharers has been assigned exclusively to one co-sharer, transfers his rights to another co-sharer of the *mahal*, who cultivates the land himself, the former co-sharer is entitled to eject the latter who will not be allowed to plead that as a co-sharer of the *mahal*, the land in suit is his *khudkasht*.

Letters Patent Appeal from a judgment of Mr. Justice Stuart, dated the 13th January 1922, reversing that of the District Judge, Ghazipur.

Dr. *M. L. Agarwalla*, for the Appellants.

Messrs. *J. M. Banerji* and *Haribans Sahai*, for the Respondents.

JUDGMENT.- One Ram Naresh was the occupancy tenant of a certain holding. He mortgaged the same with possession to one Dukhit Misir, at a time when such mortgages were not forbidden by law. Dukhit accordingly entered into possession of the holding lawfully with the status of mortgagee. Ram Naresh died in the year 1913. Dukhit remained for a time in possession as a tenant-at-will. His rights as mortgagee had been determined, because Ram Naresh had left no heir entitled to succeed to the tenancy. Dukhit has let into possession Har Prasad Rai and others who are co-sharers in the village, and we may take it as found that he has let them into possession in return for a money payment made in recognition of his rights as mortgagee. The plaintiffs came into Court alleging that they were the sole proprietors of the land which formed the occupancy holding of Ram Naresh. They claimed that Dukhit was their tenant-at-will, and that they were entitled to eject him under the ordinary procedure prescribed by the Local Tenancy Act, No. II of 1901. Along with Dukhit they claimed to eject Har Prasad Rai and others, who have been described as persons let into possession by Dukhit. In reply to the suit Dukhit said that he was no longer in possession, and had no longer any concern with the land; that he had been paid off by Har Prasad Rai and others, and that the plaintiffs might settle accounts with them. Har Prasad and others pleaded that they were not merely co-sharers in the village, but co-sharers along with the plaintiffs in the proprietary rights over the particular land in suit. They claimed, therefore, that, having induced Dukhit, no matter by what means, to surrender the land into their possession and occupation, they became entitled to hold the same as their *khudkasht*. In any event, they contended that the plaintiffs had no right to sue them for an ejectment in a Rent Court. The Assistant Collector who tried the case seems to have gone very carefully into the evidence and to have framed proper issues. There has been some controversy before us whether, on the pleadings of the two parties, section 199 of the Tenancy Act did or did not apply; if it did apply, then the question of proprietary title was tried by the Assistant Collector, and there has been no contravention of the provisions of that section. The conclusion arrived at by the Assistant Collector was that, although according

to the village records both the plaintiffs and the contesting defendants, Har Prasad Rai and others, held proprietary rights in respect of the land in suit, nevertheless there had been a private partition amongst the co-sharers, not carried out through the agency of a Revenue Court, and not recognised in the revenue papers, according to which private partition the plots of land in suit constituting the occupancy holding of Ram Naresh had been assigned wholly to the plaintiffs. On this finding principally, the Assistant Collector decreed the suit for ejectment. There was an appeal by Har Prasad Rai and his co-defendants to the Court of the District Judge. The District Judge, affirming the findings of the Assistant Collector, dismissed the appeal. On a second appeal being brought to this Court a learned Judge of this Court has reversed the findings of both the Courts below, and has dismissed the suit. We are not quite clear as to the attitude of the learned Judge of this Court with regard to the finding of the lower Appellate Court on the question of the separate title of the plaintiffs. He treats that finding as amounting to no more than this, that there had been an arrangement for convenience of collection amongst the various co-sharers of the *mahal*, by which the right to collect rent from Ram Naresh had been assigned to the plaintiffs alone. He clearly intends to hold that such an arrangement would not amount to a partition of the land amongst the various co-sharers, or to a surrender on the part of Har Prasad and others of their interests in the proprietary rights over the land in suit, in return for a similar surrender on the part of the plaintiffs of their interests in the proprietary rights over other lands forming part of the same *mahal*.

We do not think, however, that the finding of the learned District Judge can be interpreted in the way in which it has been in this Court. The finding itself is embodied in the words:—"I hold that under a private partition the plaintiffs-respondents are the proprietors in exclusive possession of Plot No. 879 and that they are entitled to eject the defendants-appellants." Moreover, this finding is to be read in connection with the judgment as a whole, and also with the judgment of the Assistant Collector which was then under appeal. We think that both the Trial Court and the lower Appellate Court intended to find and did find, that there had been a private partition of the *mahal*, by virtue of which the land in suit had been assigned exclusively to the plaintiffs.

It will hardly be contested that the co-sharers in a *mahal* have a right to effect a partition by private arrangement amongst themselves, and that it may be the most convenient method of effecting such a partition to assign the entire holding of a particular tenant to a particular group of co-sharers. The only difference between a partition effected by private arrangement and one properly carried out under the orders of the Court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village records which are at variance with the actual facts. We cannot, however, in this case allow the clear finding of the lower Appellate Court in favour of the plaintiffs on this question of partition to be disregarded.

The other point taken by the learned Judge of this Court is that, in any event, the defendants, Har Prasad Rai and others, are not tenants of the plaintiffs, and he seems to think that there was something dishonest in the procedure adopted by the plaintiffs in bringing the present suit, as a suit for ejectment of tenants, in the Rent Court, instead of proceeding against Har Prasad Rai and others as rival claimants to the proprietary rights by a corresponding suit instituted in a Court of civil jurisdiction.

It seems to us at least doubtful whether, in the events, of the plaintiffs having adopted the course suggested by the learned Judge of this Court, Har Prasad Rai and his co-defendants would not at once have taken shelter behind Dukhit and set up the plea that unless and until Dukhit's tenancy were extinguished no suit for ejectment would lie elsewhere than in the Rent Court. At any rate, the position of the plaintiffs is, in our opinion, clear and maintainable on the facts alleged by them and found in their favour. Apart from the provisions of section 34 of the Tenancy Act,

when once the Court has found in favour of the exclusively proprietary title of the plaintiffs, there remains the fact, alleged in the pleadings and not seriously controverted, that Har Prasad Rai and his co-defendants were let into possession by Dukkit. Either they are transferees of whatever rights Dukhit possessed under his mortgage, in which case they are just as much the tenants-at-will of the plaintiffs as Dukhit himself was, or they are in the position of sub-tenants who have paid Dukhit a premium instead of an annual rent. This has been made still clearer by pleadings entered by Har Prasad Rai and his co-defendants in the 3rd paragraph of their written statement. We think the learned Judge of this Court was wrong and that he should not have interfered with the decision of the lower Appellate Court. We set aside the decree of this Court and restore that of the lower Appellate Court allowing the plaintiffs their costs of both hearings in this Court, including fees on the higher scale.

M. A. A. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2707 OF 1922.
March 19, 1923
Present:— Mr. Justice Abdul Raoof.
KARIM BAKHSH— PLAINTIFF— APPELLANT
versus
GAUHAR ALI AND ANOTHER— DEFENDANTS— RESPONDENTS.

Possessory title, suit based on—Trespasser, position of.

A person in possession of property on being dispossessed by another person without any better title is entitled to sue for recovery of possession on his possessory title alone. [p. 838, col. 2.]

Wali Ahmad Khan v. *Ajudhia Kandu*, 13 A. 537; A. W. N. (1891) 196; 7 Ind. Dec. (N. S.) 340 and *Abdul Hamid* v. *Sarbuland Khan*, 78 P. R. 1902; 137 P. L. R. 1902, relied on.

Second appeal from a decree of the Senior Subordinate Judge, Amritsar, dated the 5th October 1922, reversing that of the Munsif, First Class, Amritsar, dated the 17th June 1922.

Sheikh *Niaz Ali*, for the Appellant.

Sheikh *Muhammad Munir*, for the Respondents.

JUDGMENT.— This second appeal must succeed. The following facts will disclose the nature of the dispute between the parties:—

Karim Baksh appellant was dispossessed from the house in dispute in 1918. On the 14th of June 1918 he brought a suit for possession under section 9 of the Specific Relief Act. The suit was decreed and the decree-holder obtained possession on the 3rd of January 1919. Thereupon the defeated defendants, Gauhar Ali and Ghulam Hussain, on the 9th of January 1919, instituted a declaratory suit and during the pendency of the suit they succeeded in getting restitution of possession over the house pending the litigation. The declaratory suit was, however, dismissed on the 31st March 1919 by the Trial Court. Eventually, the matter came up before the High Court in appeal and was decided against the defendants on the 10th of January 1920. The declaratory suit having finally failed, Karim Bakhsh again applied to the Executing Court for possession being delivered to him in execution of the decree. On examining the execution record, which has come up here, it appears that possession was again given to Karim Bakhsh, decree-holder, on the 24th of April 1919. On the 24th of April 1919 a receipt was filed by the decree-holder acknowledging that he had been placed in possession. In the meantime, an appeal had been preferred by the respondents in the declaratory suit and they again had applied to the Appellate Court for an order staying execution of the decree of Karim Bakhsh and withholding the delivery of possession to him. The Executing Court refused to dispossess the decree-holder and to place the judgment-debtor in possession pending the appeal. The execution of the decree as to costs was stayed. It has become necessary to state these facts because the learned Counsel for the defendant before me took up the position that the plaintiff decree-holder had never been put up into possession of the house in execution of his decree. It is, however, clear

from the execution record that the decree-holder had got possession in execution of the decree. In spite of all this, the defendants Gaffar Ali and Ghulam Hussain again dispossessed the plaintiff Karim Bakhsh sometime in November 1921. The plaintiff, therefore, had again to sue for possession. He instituted the present suit on the 21st of March 1922. The suit was originally brought upon an alleged title of ownership. The plaintiff amended his plaint and converted the suit into one for possession as a mortgagee. The lower Court granted him a decree. I find in the judgment of the Trial Court the following observations:—

"The defendants had no better title and possession is evidence of some title, under the circumstances, of the plaintiff."

From this it appears that the Trial Court held that the plaintiff was entitled to a decree for possession on possessory title. The decree of the Trial Court has been set aside by the lower Appellate Court on the ground that the plaintiff having failed to establish the alleged mortgage his suit ought to have been dismissed. The lower Appellate Court has, therefore, set aside the decree and has dismissed the suit.

The plaintiff has come up in second appeal to this Court and it has been contended on his behalf by his learned Vakil that he was entitled to a decree for possession against the defendants who were mere trespassers. The position taken up by the learned Vakil is fully supported by authorities. It was decided in the case of *Abdul Hamid* v. *Sarbuland Khan* (1) "where a plaintiff has been forcibly dispossessed of immoveable property by a person having no title, he can sue for possession simply on the strength of the possession which he had before he was dispossessed, provided he sues within the twelve years' period allowed by Art. 142 of the Limitation Act." A similar view was taken by the majority of the Judges of a Full Bench of the Allahabad High Court in the case of *Wali Ahmad Khan* v. *Ajudhia Kandu* (2) in which Sir John Edge, Chief Justice, relying on the cases of *Davison* v. *Gent* (3) and *Asher* v. *Whitlock* (4), held that a person in possession of property on being dispossessed by another person without any better title is entitled to sue for recovery of possession on his possessory title alone. This case clearly comes within the rules laid down in the above authorities.

I accordingly accept the appeal and, setting aside the decree of the lower Appellate Court, restore that of the Trial Court with costs.

Z. K. *Appeal accepted.*

(1) 78 P. R. 1902; 137 P. L. R. 1902.
(2) 13 A. 537; A. W. N. (1891) 196; 7 Ind. Dec. (N. S.) 340.
(3) (1857) 26 L. J. Ex. 122; 1 H. & N. 744; 3 Jur. (N. S.) 342; 5 W. R. 229; 156 E. R. 1400; 28 L. T. (O. S.) 201; 108 R. R. 804.
(4) (1865) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W. R. 26; 148 E. R. 598.

MADRAS HIGH COURT.

CIVIL SUIT NO. 234 OF 1921.
April 18, 1922.
Present:— Mr. Justice Kumaraswamy Sastriar.

A. D. NARAYANA SAH—PLAINTIFF
versus
BALAGURUSWAMY NADAR AND OTHERS —DEFENDANTS.

Transfer of Property Act (*IV of* 1882), *s.* 8—*Execution sale of Distillery buildings— Vats, copper pipes and copper stills if pass under sale—Fixtures, test of—English Law, applicability of.*

Certain properties were proclaimed for sale in execution of a money-decree and were described in the sale proclamation as "Distillery Buildings, Door No. 3, Brighton Road Barracks, Peramboor, bearing Re-Survey Number, etc." The buildings were originally used as a distillery but sometime before the sale no business had been carried on there:

Held, that what was sold was only the building and nothing more, and that the pipes, stills and the vats therein and used in the distillery business did not pass to the purchaser. [p. 839, col. 2.]

In cases of sales of premises in which business is carried on, and not of the business as a going concern or the premises together with the fixtures or machinery, *prima facie* all that the purchaser is entitled to are the buildings. [p. 839, col. 2.]

The technical English Law of Fixtures is not applicable to India. [p. 839, col. 2.]

Mofiz Sheikh v. *Rasik Lal Ghosh*, 6 Ind. Cas. 796; 37 C. 815; 14 C. W. N. 952; 12 C. L. J. 246, followed.

NARAYANA SAH *v.* BALAGURUSWAMY NADAR.

In the case of houses, the primary consideration in determining whether the items claimed are fixtures under section 8 of the Transfer of Property Act should be, whether the articles are provided for the permanent use of the house, and whether they can be said to be articles which are necessary or which are provided for the more beneficial enjoyment of the property; machinery brought into the house for the purpose of carrying on business cannot be included in the term fixtures. [p. 840, col. 1.]

Hobson v. *Gorringe*, (1897) 1 Ch. 182; 66 L. J. Ch. 114; 75 L. T. 610; 45 W. R. 356, *Reynolds* v. *Ashby*, (1904) A. C. 466; 73 L. J. K. B. 946; 91 L. T. 607; 53 W. R. 129; 20 T. L. R. 766, *Monti* v. *Barnes*, (1901) 1 K. B. 205; 70 L. J. K. B. 225; 83 L. T. 619; 49 W. R. 147; 17 T. L. R. 88 and *Holland* v. *Hodgson*, (1872) 7 C. P. 328 at p. 334; 41 L. J. C. P. 146; 26 L. T. 709; 20 W. R. 990, considered.

Mr. *R. N. Aiyengar* instructed by Messrs. *King* and *Patridge*, for the Receiver.

Mr. *P. Venkatramana Rao*, for the Auction-purchaser.

JUDGMENT.—This is an application by the Receivers for an order that they may be permitted to remove from the Vyasarpady Buildings, copper stills, vats, copper pipes and other old furniture and documents and papers belonging to the Nadars' estate and now lying in the Vyasarpady Distillery Buildings which were sold in auction on the 21st of December 1922 in execution of the decree in he suit.

The plaintiff in this suit, A. D. Narayana Sah obtained a simple money-decree against the defendants to whose estate the petitioners, Messrs. Fraser and Ross, have been appointed Receivers. The decree was for over Rs. 2,69,000 and in execution the property known as the Distillery Buildings at Vyasarpady was attached and sold. What was sold was only the Distillery Buildings and the proclamation describes the property to be sold as follows: "Distillery Buildings, Door No. 3, Brighton Road Barracks, Peramboor, Madras, bearing Re-Survey Number, etc." These buildings were originally used as a distillery by the Nadars but sometime before the sale the business ceased to be carried on there. One of the stills had been removed by the Nadars themselves and the property which the Receivers want to remove consist of pipes, stills and a number of vats. The application of the Receivers is opposed on the ground that what they want to remove are fixtures which in law go with the property and which have passed to the auction-purchaser. The contention for the Receivers is that, what was sold was only the building and nothing more and that, apart from any question of law about fixtures, they are entitled to remove whatever was put in there for the purpose of the business by the Nadars. It is also contended that the Law of Fixtures does not apply to India and that, even if it did, the articles sought to be removed are not fixtures which in law could pass to the purchaser.

I am of opinion that both these contentions are sound. So far as the purchase is concerned, it seems to me to be clear that what was sold was only the Distillery Buildings. In cases where business is carried on in the premises and the sale is only of the premises and not of the business as a going concern, or the premises together with the fixtures or machinery, *prima facie* all that the purchaser is entitled to are the buildings. It can hardly be the intention of the parties when they sell the building alone without reference to the machinery or the business that the purchaser should get the valuable machinery in the buildings by calling them fixtures and by claiming to get them under that head. Even assuming that the plaintiff is entitled to all the fixtures properly so called, I think it is clear from the evidence of Mr. Barker, who was examined as an expert in this case, that the vats and the pipes cannot be fixtures in any sense of the term. As regards the copper stills, they are 8 feet in horizontal diameter and 7 feet in vertical diameter. They are placed upon two iron rails and they can be removed by pulling down the brick and mud wall which is put upon one side for the purpose of keeping them in position. As pointed out in *Mofiz Sheikh* v. *Rasik Lal Ghosh* (1), the technical English Law of Fixtures is not applicable to India. The provisions as to fixtures are contained

(1) 6 Ind. Cas. 796; 37 C. 815; 14 C. W. N. 952; 12 C. L. J. 246.

in the Transfer of Property Act. Section 8 of the Transfer of Property Act runs as follows:—"Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. * * * "

And where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith. Section 3, clause 25, of the General Clauses Act defines "immoveable property" as including land; benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth. It seems to me that, in cases of houses, the primary consideration in determining whether the items claimed are fixtures under section 8 of the Transfer of Property Act should be whether the articles are provided for the permanent use of the house, and whether they can be said to be articles which are necessary or which are provided for the more beneficial enjoyment of the property and I do not think that under that term machinery brought into the house for the purpose of carrying on businsss can be included. One important test in these cases is, with what intention were the articles put into the house? Were they put in for the more beneficial enjoyment of the house or with the object of improving the value of the house by making it more artistic or were they put in with a collateral purpose?

Numerous cases were referred to by Mr. Venkatramana Rao in the course of his able argument but I do not think that the facts of the present case would render those cases applicable. *Hobson* v. *Gorringe* (2) was a case where the deed of transfer conveyed the land in question "together with the saw mill, engine-house, ware-houses and other buildings erected thereon and the fixed machinery and fixtures" to secure a loan and the contest was between the mortgagee on the one hand and the vendors of an engine fixed to the freehold which was sold on the hire purchase system. In the present case the sale proclamation is clear and only sells the Distillery Buildings, no reference being made to any machinery in the premises. *Reynolds* v. *Ashby* (3) is similarly a case of conflict between the owner of a machinery sold on the hire-purchase system and the mortgagee who had taken possession. Lord Lindley in giving judgment observed . "My Lords, I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute." *Monti* v. *Barnes* (4) was a case where the mortgagor subsequent to the mortgage removed the fixed grates from various rooms and substituted for them "dog-grates", which were of considerable weight and it was held that, having regard to all the circumstances of the case, the true inference was that the "dog-grates" were substituted with the object of improving the inheritance and that they were, therefore, fixtures which passed to the mortgagee. A. L. Smith, M. R. referred with approval to the observations of Blackburn, J., in *Holland* v. *Hodgson* (5) where the learned Judge observes: "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicat-

(2) (1897) 1 Ch. 182; 66 L. J. Ch. 114; 75 L. T. 610; 45 W. R. 356.

(3) (1904) A. C. 466; 73 L. J. K. B. 946; 91 L. T. 607; 53 W. R. 129; 20 T. L. R. 766.

(4) (1901) 1 K. B. 205; 70 L. J. K. B. 225; 83 L. T. 619; 49 W. R. 147; 17 T. L. R. 88.

(5) (1872) 7 C. P. 328 at p. 334; 41 L. J. C. P. 146; 26 L. T. 709; 20 W. R. 990.

ing the intention, *viz.*, the degree of annexation and the object of the annexation." The Master of the Rolls was of opinion that. "the question which has to be considered in such a case is whether, having regard to the character..and the circumstances of the particular case, the article in question was intended to be annexed to the inheritance or to continue a mere chattel, and not to become part of the freehold."

Applying these tests, it seems to me to be clear that the object of the Nadars in placing what are known as fixtures in the building was simply to carry on the business of distillery there. It will be a dangerous doctrine to hold in this country that plant and machinery brought into a building for the purpose of trade being carried on whether by the owner or by the mortgagee were so annexed to the building as to make them pass for fixtures merely because the building is sold either by the owner or by the Court in execution.

I direct that the Receivers do remove the articles referred to in the Judge's summons. As regards costs, I direct that the Receivers' taxed costs as between Attorney and client do come out of the estate and that the purchaser do bear his own costs. Certified. I fix the fee of expert at Rs. 150.

V. N. V. *Order accordingly.*

W. C. A.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 793 OF 1921.

August 15, 1923.

Present :—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

RAM LAL MANDER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KULDIP NARAYAN TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 87, 167—Landlord and tenant—Abandonment of holding, what amounts to—Usufructuary mortgage by tenant, effect of—Annulment of incumbrance—Procedure.

There may be an abandonment of a holding apart from the provisions of section 87 of the Bengal Tenancy Act, but in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein, as, for example, by a sale of the whole property, or that he has abandoned the right to re-take possession in future or has either left the village without the intention of returning or done some other act which would clearly indicate that he no longer retained the *spes recuperandi*. [p. 844, col. 1.]

The mere fact that he has mortgaged the entire holding under a usufructuary mortgage and has given possession to the mortgagee continuing himself to reside in the same village, affords in itself no evidence from which it can be inferred that he has entirely abandoned his rights in the property and has no intention of ever redeeming the mortgage and re-taking possession. [p. 844, col. 1.]

Samujan Roy v. *Munshi Mahaton*, 4 C. W. N. 493, *Monohar Pal* v. *Ananta Moyee Dasya*, 20 Ind. Cas. 198; 17 C. W. N. 802, distinguished.

The mere sale of a holding in execution of a rent-decree does not in itself, without further steps being taken by the purchaser, annul any incumbrance which there may be existing on the holding. [p. 842, col. 2.]

Appeal from a decision of the District Judge, Bhagalpore, dated the 2nd December 1920, affirming that of the Subordinate Judge, Bhagalpore, dated the 10th September 1919.

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

Mr. *J. Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from a decision of the District Judge of Bhagalpore, reversing a decision of the Subordinate Judge. The plaintiffs in the suit were the mortgagees by a usufructuary mortgage executed in their favour by the recorded tenants of the landlord of two holdings measuring, respectively, 55 *bighas* 1 *cottah* and 4 *bighas*, which they acquired under an instrument granted by the tenants on the 11th December 1916. At or about the time that this mortgage was executed the landlords sued the recorded tenants for rent in respect of the two holdings in question, and obtained decrees against them. In pursuance of those decrees the properties were put up for sale and sold one on the 26th March 1917 and the other on the following day.

The sales were in due course confirmed. The plaintiffs as mortgagees of a non-transferable occupancy holding when they applied to deposit the decretal amount to save the sale were not permitted to do so. The tenants subsequently applied under O. XXI, r. 90 of the Civil Procedure Code to set aside the auction-sale but that application was rejected and on the 15th December 1917 the landlords got delivery of possession and forcibly dispossessed the plaintiffs. The present suit was instituted by the plaintiffs in September 1918 just after they had been dispossessed claiming certain declarations as to the validity of their usufructuary mortgage, as to the collusive nature of the rent suit, as to the illegality of their dispossession by the landlords and seeking for recovery of *khas* possession of the land. The case made by the plaintiffs in their plaint was that from the date of the mortgage up to the time of their dispossession they had been in possession of the whole of these two holdings; that the landlord defendants having brought the property to sale with power to annul incumbrances had failed within the time prescribed by section 167 of the Bengal Tenancy Act, to take any steps to annul their incumbrance and, therefore, that they were not entitled at the date when the plaintiffs were dispossessed to dispossess them, nor to treat the incumbrances as if they had never in fact existed. The case made by the landlords defendants was, in the first place, that there had been no valid mortgage at all; that the mortgagees had never been in possession and that in fact the incumbrance created by their mortgage, if it were a valid mortgage, had been annulled, and that the procedure provided in section 167 of the Bengal Tenancy Act had been complied with. It was their case that they had no knowledge of the plaintiffs' incumbrance until within one year of the time when they applied to the Collector or, as was the fact in this case, to the Deputy Collector to annul the incumbrance.

The Trial Court found all the issues in favour of the plaintiffs and granted them a decree for possession holding that their incumbrance had never been properly annulled, that it still subsisted, and that the landlords were not entitled forcibly to eject them after the sale in execution of their decree without first having complied with the provisions of section 167 of the Act. There can be no doubt that the mere sale of property in execution of a rent-decree does not in itself, without further steps being taken by the purchaser, annul any incumbrance there may be existing on the property sold.

The landlords appealed from the decision of the Subordinate Judge to the District Judge. The learned District Judge arrived at the conclusion that the plaintiffs had in fact been in possession of the whole of the property in dispute until they were dispossessed by the landlords. He further found that the mortgage was a *bona fide* mortgage and that the tenants had delivered up the entire possession of the property to their mortgagees. Further, that they had paid no rent for the three years prior to the rent suit which was brought just at about the time the mortgage was granted and that they had paid no rent since. He considered that these facts in themselves were sufficient to constitute an abandonment of the holding by the tenants and that in such circumstances it was not necessary for the landlords to proceed either under the provisions of section 87 of the Bengal Tenancy Act which refers to voluntary abandonment by the tenant, or to follow the procedure laid down under section 167 which relates to annulment of incumbrances. He considered that section 87 of the Bengal Tenancy Act was not exhaustive and that if there was in fact an abandonment of the property to the landlord, apart altogether from section 87, the landlords were *ipso facto* on such abandonment entitled to re-enter upon the property and to eject any transferee or mortgagee who had taken his interest from the tenants in the case of a non-transferable holding.

From that decision the plaintiffs have appealed. The only question for consideration in this appeal is whether or not upon the facts found by the learned District Judge he was entitled to arrive at the conclusion that there was an

abandonment. In other words, could he properly says that, where the tenant of a non-transferable occupancy holding has mortgaged his holding under a usufructuary mortgage and has put the mortgagee in possession and thereafter ceased to pay his rent although he has not left his residence in the village, that the tenant has abandoned his holding. In support of this proposition the case of *Samujan Roy* v. *Munshi Mahaton* (1) was relied upon. That, however, was a case where the *raiyat* had sold his non-transferable holding and was no longer in possession of the same and paid no rent and, in such circumstances, it was found that he had in fact abandoned the holding to his landlord. There is, however, to my mind a great distinction between the case of an out and out sale where the tenant purports to transfer all the interest he has and the case of a usufructuary mortgage where the tenant at all events retains the equity of redemption and may within a short period of the execution of the mortgage recover the property back by payment of the sum advanced. The case of *Monohar Pal* v. *Ananta Moyee Dasya* (2) decided by the Calcutta High Court was also relied upon by the respondents in support of the learned District Judge's decision. The facts of that case were certainly more similar to the facts found in the present case. That was an appeal from an appellate decree. The question was, whether the lower Appellate Court was entitled, upon the facts proved before it, to arrive at the conclusion that the tenant had in fact abandoned his holding. The facts proved were that a usufructuary mortgage had been granted by the tenants for a certain number of years. The mortgagees had continued in possession of the land through their *burgadar* even after the expiry of the term and the *raiyat* had left the village and no longer lived there and had in fact cut off all connection with the holding. The Judge of the First Appellate Court upon these findings arrived at the conclusion that there had been an abandonment and the High Court in second appeal refused to disturb that finding. It was pointed out in that case that section 87 of the Bengal Tenancy Act was not exhaustive as to the rights of the landlord in the case of abandonment; that it only provided for the rights of the landlord under the particular circumstances referred to in that section but that if, in fact, there was an absolute abandonment of the holding apart altogether from that section then, no doubt, the landlord was entitled to re-enter and annul incumbrances such as that granted in the case. The Court pointed out that the question for determination was largely and principally a question of fact and one on which the opinion of the lower Appellate Court must carry considerable weight when the matter comes before a higher tribunal on second appeal, and as there was a definite finding that the tenant no longer lived in the village and further, that he has not got any connection with the *jote* in suit which meant in the opinion of the Court, that his interest in the *jote* had ceased, the Court came to the conclusion that they could not disturb the finding of fact. It seems to me that in the present case the facts are entirely different. The tenant it is true, has granted a usufructuary mortgage but he has not parted with his entire interest in the property and there is abundant authority for saying that the mere fact that he has granted a usufructuary mortgage over the whole property does not in itself entitle the landlords to re-enter. He has not in this case left the village or abandoned his residence. He still resides there and although he has not paid the rent, it does not seem to me that the facts established in this case are sufficient to entitle the Court to arrive at the conclusion that, as a matter of law, there has been an abandonment of the holding. The learned District Judge in dealing with the facts after pointing out that it was the plaintiffs' case on the evidence that the tenants, even after the mortgage, still continued to cultivate a portion of the land and that it was the defendants' case upon their plead

(1) 4 C. W. N. 493.
(2) 20 Ind. Cas. 198; 17 C. W. N. 802.

ings and their evidence that the tenants had all along been in possession and the mortgagees never had been in possession, nevertheless arrived at a finding of fact that the mortgagees had been in possession of the whole property from the time of their mortgage and that no portion of it had been cultivated by any of the tenants. I am not sure how far he was entitled to arrive at a conclusion of fact which was not the case made in the evidence either by the plaintiffs or by the defendants and his findings on that question are not definite, although I have no doubt he intended to arrive at the conclusion that the whole of the property was cultivated by the mortgagees after the execution of the mortgage-bond. He gave reasons for supposing that this was probably the truth of the matter. It is, however, not necessary to consider that question further because, in my opinion, there was no evidence upon which he could properly come to the conclusion that there had been an abandonment in this case. I agree that, apart from section 87 of the Bengal Tenancy Act, there may be an abandonment of a holding, but I consider that in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein, as, for example, by a sale of the whole property or that he has abandoned the right to re-take possession in future or has either left the village without any intention of returning or done some other act which would clearly indicate that he no longer retained the *spes recuperandi*. In the present case the fact that he has mortgaged the property under a usufructuray mortgage and had given entire possession to the mortgagees continuing himself to remain in the same village to my mind affords in itself no evidence from which it can be inferred that he had entirely abandoned his rights in the property and had no intention of ever redeeming the mortgage and re-taking possession. The result, therefore, is that the learned District Judge's finding on this point cannot, in my opinion, stand.

The learned District Judge having decided the case in favour of the defendants upon the point which I have just mentioned did not proceed to consider the question of fact raised by Issue No. 12, namely, whether the incumbrance had been duly annulled. It was the defendants' case that the provisions of section 167 of the Act had been complied with. Whether they had, or had not, depended upon questions of fact. These facts were not considered by the learned District Judge. It will be necessary, therefore, before this case can be finally disposed of, that a finding should be arrived at upon that question. The result will be that the decree of the learned District Judge dismissing the suit will be set aside and the case will be remanded to him to try that part of Issue No. 12 upon the facts, which relates to the question of whether the incumbrance had been duly annulled or not. There may have been other issues which were material to the decision of the case which were not considered by the learned District Judge but they have not been brought to our attention. If there are any such issues, then the parties will be entitled to raise them before the learned District Judge on remand. We think that the plaintiffs are entitled to the costs of the appeal to this Court. The costs of the Trial Court and of the appeal to the District Judge will abide the ultimate result of the suit.

Mullick, J.—I agree.

Z. K. *Case remanded.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 746 OF 1922.

January 8, 1923.

Present:—Mr. Justice Campbell.

FAQIR MUHAMMAD KHAN AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

PIRDAD KHAN—JUDGMENT-DEBTOR—VENDEE AND OTHERS—JUDGMENT-DEBTORS—VENDORS—RESPONDENTS.

Execution of decree—Duty of Court—Pre-emp-

FAQIR MUHAMMAD KHAN v. PIRDAD KHAN.

tion decree—Transfer to stranger—Pre-emptor, whether can execute decree.

The Court to which application is made for execution of a decree is bound by the terms of the decree and has no power to go behind those terms or to enter into questions beyond the scope of the decree. [p. 845, col. 2.]

The holder of a decree enforcing a right of pre-emption, who subsequently to the date of the decree sells the property to a stranger, does not by such conduct debar himself from obtaining possession of the property in execution of the decree. In praying for execution of the decree he is merely obeying its terms, and, the only right of the vendee judgment-debtor is to receive the purchase-money before handing over possession to the decree-holder. [p. 845, col. 2.]

Ram Sahai v. *Gaya*, 7 A. 107; A. W. N. (1884) 224; 4 Ind. Dec. (N. S.) 305, relied on.

Mehr Khan v. *Ghulam Rasul*, 64 Ind. Cas. 191; 2 L. 282; 3 L. L. J. 553; (1922) A. I. R. (L.) 300, distinguished.

Miscellaneous second appeal from the order of the District Judge, Jullundur, dated the 19th December 1921, reversing that of the Munsif, First Class, with Special Powers, at Jullundur, dated the 1st October 1921.

Mr. *Abdul Ghani*, for the Appellants.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—Gul Muhammad Khan and Faqir Muhammad Khan obtained a decree for possession by pre-emption of certain land subject to the condition of their paying into Court within a certain time the price fixed by the decree. They made payment by due date. Thereafter, one Ghulam Muhammad applied for execution of the decree by delivery to him of possession of the land decreed on the allegation that the decree had been sold to him.

Gul Muhammad Khan and Faqir Muhammad Khan appeared in Court and stated that they had sold the decree to Ghulam Muhammad and that they possessed no rights in the land. The Court refused the application holding that the decree was not transferable and this order was upheld on appeal and is now final.

The present second appeal arises out of a subsequent application by Gul Muhammad Khan and Faqir Muhammad Khan for delivery of possession to them. The application was allowed by the First Court, but that order has been reversed on appeal by the District Judge on two grounds. The first was that the previous order in Ghulam Muhammad's application was correct and in accordance with a decision by this Court reported as *Mehr Khan* v. *Ghulam Rasul* (1) which laid it down that a decree for pre-emption is not capable of transfer so as to enable the transferee to obtain possession of the pre-emption property in execution, and that to allow the original decree-holders now to execute the decree would enable them to hand over the property to Ghulam Muhammad and avoid a second suit for pre-emption against him. The second ground was that at the time of the present application Gul Muhammad Khan was an undischarged insolvent and neither he nor Faqir Muhammad Khan had applied for execution for the benefit of all the decree-holders within the meaning of O. XXI, r. 1, Civil Procedure Code.

The decision on the first point, in my opinion, was erroneous. It was laid down in *Ram Sahai* v. *Gaya* (2) that the holder of a decree enforcing a right of pre-emption, who subsequently to the date of the decree sells the property to a stranger does not by such conduct debar himself from obtaining possession of the property in execution of the decree. It is not worthy that in this case the alleged sale was transacted after the title to the pre-empted property had vested in the original decree-holders by reason of their payment into Court of the purchase-money, and thus the case is distinguishable from that dealt with in *Mehr Khan* v. *Ghulam Rasul* (1). But whatever the subsequent effect of the transaction between the decree-holders and Ghulam Muhammad may be, the Court to which application for execution of a decree is made is bound by its terms as are the parties to it, and has no power to go behind it or to enter into questions beyond its scope. This was explained in *Ram Sahai* v. *Gaya* (2), where it was pointed out also that the pre-emptor decree-holder, as here, in praying for execution of decree was merely obeying its terms and that the only rights of the vendee judgment-debtor were to receive the purchase-money before handing over possession to the decree-holder.

(1) 64 Ind. Cas. 191; 2 L. 282; 3 L. L. J. 553 (1922) A. I. R. (L.) 300.

(2) 7 A. 107; A. W. N. (1884) 224; 4 Ind. Dec. (N. S.) 305.

The same principles apply to the second ground on which the learned District Judge has dismissed the application. The judgment-debtors have not raised the objection of Gul Muhammad Khan's insolvency in the capacity of his creditors and O. XXII, r. 12 specifically excepts proceedings in execution from the operation of rule 8 of the same Order under which a defendant may apply for the dismissal of a suit on the ground of the plaintiff's insolvency. The Executing Court has to take the decree as it stands and to enforce its provisions. The Receiver of the Insolvency Court is the party to object to the decretal land being handed over to the insolvent defendant, who is bound under penalties by the Insolvency Law to make it available for the liquidation of his debts as soon as he receives it, and there is no reason why the judgment-debtor should be allowed to retain possession of the land to his own advantage and to the prejudice of the insolvent's creditors. It may be noticed in this particular case that Gul Muhammad Khan secured his discharge during the pendency of the present second appeal.

For these reasons, I accept the appeal with costs, set aside the order of the lower Appellate Court and restore that of the First Court.

Z. K. & W. C. A.

Appeal accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1512 OF 1921.

August 6, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

RAMSUNDER KUER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SATRUHAN PRASAD CHAUDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow — Power of alienation—Legal necessity—Contribution towards expenses of Sradh *of near relation of husband—Second Appeal—Findings of Appellate Court, when can be questioned.*

A contribution by a Hindu widow towards the expenses of the *sradh* of a near relation of her husband half of whose property was in her possession, her obligation to contribute half the expenses being admitted by one of the next reversioners constitutes a legal necessity. [p 847, col. 1.]

Unless it can be shown that the findings of an Appellate Court are wrong in law or there is no evidence to support them, such findings cannot be interfered with in second appeal. [p. 847, col. 2.]

Appeal from a decision of the District Judge, Darbhanga, dated the 27th April 1921, affirming that of the Additional Sub-Judge, Darbhanga, dated the 7th December 1920.

Messrs. *L. N. Singh* and *L. K. Jha*, for the Appellants.

Mr. *Murari Prasad*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from a decision of the District Judge of Darbhanga affirming a decision of the Additional Subordinate Judge.

The appellants, as the next reversionary heirs of Jaikaran Kuer after the death of his mother Makunda Kuer, instituted the suit out of which this appeal arises claiming a declaration that a *kobala* executed by Makunda Kuer on the 12th July 1919 in favour of the defendant No. 1 was not justified by legal necessity and that the alienation is inoperative and not binding upon the appellants.

The Trial Court and the lower Appellate Court dismissed the claim upon the ground that the alienation was justified by legal necessity. The plaintiffs have appealed,

When Makunda Kuer succeeded by inheritance to her son's estate she found herself involved in litigation in which it was necessary to defend her title to the estate against claims by the father of some of the present plaintiffs. Partition proceedings were also started in which she was involved and there can be no doubt that there must have been a serious drain upon the income arising from the estate. She borrowed money from time to time in comparatively small sums giving bonds bearing interest. In 1919, in order to clear herself of debt, the interest on which was running on, Makunda Kuer sold 13 *bighas* of the property for a sum of Rs. 2,300, the amount of the debts then due. This is the transaction which has been challenged. The objects

for which these debts had been incurred were, with one exception, admittedly objects for which the property in the hands of Makanda Kuer might legitimately be alienated if her resources from income were insufficient for the purpose. They were, speaking generally, the marriage and *gauna* expenses of her daughter, litigation in connection with the property, decrees obtained against the property, Government revenue, some debts of her late husband and a small sum for her own maintenance when, owing to drought, the crops failed.

The only item which has been challenged was a contribution to the expenses of the *sradh* of Gobind Bati whose husband was a near relation of the *Musammat's* husband and half of whose property was in her possession whilst her obligation to contribute half the expenses was admitted by the plaintiff No. 1. The District Judge found that, in such circumstances, the necessity was proved and I agree with him.

The main contention, however, which was urged in this appeal was that the learned District Judge had not come to any specific finding as to how much it was reasonable in the circumstances to spend upon the objects for which the sums were borrowed, and that he has not found expressly that the expenses could not have been paid from income. In so far as the expenses for paying off decrees obtained or for Government revenue is concerned, the question of amount can hardly arise. With regard to the marriage expenses and the *sradh* and the expenses of litigation and maintenace I find no suggestion in either of the judgments that these were attacked as unreasonable in amount, and on looking at the items I confess the amounts expended do not appear to have been excessive. For example, Rs. 250 were borrowed for expenses in connection with the partition suit and the District Judge says that it was not alleged that this was not necessary for such a suit. Rupees 100 were borrowed for maintenance, Rs. 200 for the *sradh* of Gobind Bati and the other items certainly do not appear to be excessive. The learned District Judge, however, dealt with the point which was urged before him that the widow had an income from the property sufficient to defray all these expenses without borrowing. He found that she had to incur extraordinary expenses for litigation and that drought and flood further depleted her resources and he rejected the plaintiff's evidence on this point. He then states "Believing, therefore, the defendants' witnesses I hold that the lady was under the necessity of borrowing money from time to time for the purposes set forth above. I accordingly hold that defendant-No. 1 has satisfactorily proved that each item which went towards the consideration of the sale-deed was a legal necessity and as such this sale-deed is binding upon the reversioners."

The learned District Judge had the evidence of both sides before him, an advantage which we in second appeal do not possess. We are bound by his findings unless it be shown that he went wrong in law or that there was no evidence to support the findings. His findings in this respect were clear and definite and it has not been shown that there was no evidence to support them. Nor do I think it has been shown that the learned Judge misapplied the law. The appeal accordingly fails and is dismissed with costs to the respondents who have appeared. There will be one set of costs only.

Mullick, J.—I agree.

P. D. & W. C. A. *Appeal dismissed.*

FAIZ MUHAMMAD *v.* MUHAMMAD ISMAIL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1136 OF 1922.

December 14, 1922.

Present:—Mr. Justice LeRossignol.

FAIZ MUHAMMAD—PLAINTIFF—APPELLANT

versus

MUHAMMAD ISMAIL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale in recognition of superior right of pre-emption, whether subject to pre-emption.

Pre-emption can be enforced without the intervention of the Courts.

When a vendee in recognition of a pre-emptor's right conveys his bargain to the latter, he is not really effecting a fresh sale, but is merely substituting the pre-emptor for himself as vendee, and such a re-sale or re-conveyance gives rise to no right to pre-empt.

Second appeal from a decree of the District Judge, Amritsar, dated the 1st February 1922, affirming that of the Munsif, First Class, Ajnala, District Amritsar, dated the 29th April 1921.

Mr. *Ghulam Rasul*, for the Appellant.

Mr. *P. N. Rozdon*, for the Respondents.

JUDGMENT.—The facts in this case are without doubt. On 17th July 1918 Rur Singh sold the land in suit to Muhammad Ismail for Rs. 100, Bur Singh, brother of Rur Singh, demanded to pre-empt and on 15th July 1919 Muhammad Ismail re-transferred the land to Bur Singh, recognising his right to pre-empt.

This suit was instituted by the son of Muhammad Ismail with the prayer that he shall be allowed to pre-empt on the re-sale by his father.

The question for decision is whether a re-sale under such circumstances gives rise to a right to pre-empt.

Pre-emption can be enforced without the intervention of the Courts when a vendee in recognition of a pre-emptor's right, conveys his bargain to the pre-emptor, he is not really effecting a fresh sale, but is merely substituting the pre-emptor for himself as vendee. Bur Singh's right arises out of the prior sale by Rur Singh, whilst plaintiff's right arises out of a re-sale forced upon plaintiff's father by a superior title.

KUPPUSAMY CHETTY *v.* SINGARAVELU CHETTY.

In the circumstances of this case, the re-sale on reconveyance gives rise to no right to pre-empt.

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 54 OF 1920.

March 21, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Ramesam.

M. KUPPUSAMY CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. SINGARAVELU CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of defendant—Appplication to bring legal representatives on record, by whom to be made—Withdrawal of suit—Costs.

Under O. XXII, r. 4 of the Civil Procedure Code on the death of a defendant, the application to bring his legal representatives on the record is not confined to one made by the plaintiff only. The legal representatives of the deceased defendant are entitled on their application to be brought on the record and, if the plaintiff desires to withdraw the suit as against the defendant, to get the costs of the suit. [p. 849, col. 1.]

Appeal from the judgment and decree of Mr. Justice Phillips, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 603 of 1918.

Mr. *T. Ethiraya Mudaliar*, for the Appellants.

Messrs. *T. Narasimha Aiyangar* and *Rangasmami Aiyangar*, for the Respondent.

JUDGMENT.

Sachwabe, C. J.—The question is raised as to the liability for costs to the 8th defendant. His position is this. He is the legal personal representative of the 7th defendant who

had been brought into the suit by the plaintiff. He defended the suit up to the third or fourth day of hearing and then died. After his death, the plaintiff announced his intention of withdrawing his suit against the deceased person and then claimed that the legal personal representive of that deceased person had no right to be brought upon the record and, when brought upon the record, had no right to receive his costs. The first statement rather startled me, and on looking into the matter, I do not think there is anything in it at all. Under O. XXII, r. 1 the death of a defendant does not cause the suit to abate if the right to sue survives, and under r. 4 when a defendant dies, the Court, "on an application made in that behalf," shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. It is argued that that means that the application should be made by the plaintiff and that the deceased defendant's representative could not apply. I see no reason at all for confining that section to an application made by the plaintiff; for to do so would be gross injustice to the estate of the defendant who has been wrongly brought before the Court and who, having incurred, by reason of his having been so brought before the Court, a heavy expenditure, dies. It is holding that his estate is to be deprived of the indemnity for his expenditure, which would be given to him by law, if he survived, because the plaintiff does not choose to add his legal representative as a defendant to the suit. That would be gross injustice and I see no reason at all for implying any such provision in r. 4 which says definitely "on an application made in that behalf" without confining it to an application by one or other of the parties. The 8th defendant, having been properly joined as a defendant, has quite properly, in my judgment, asked the Court for his costs and the Court was perfectly right in giving his costs. He must also have his costs in this appeal estimated on the Pleader's fee.

Ramesam, J.—I agree.

V. N. V. *Appeal dismissed.*

Z. K.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 271 OF 1923.

May 22, 1923.

Present:—MR. Justice Martineau.

THE FIRM PRITHI SINGH-JAMAYAT RAI—PLAINTIFFS—APPELLANTS

versus

THE FIRM HARSUKH DAS-JHOG MAL, —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 —Principal and agent—Suit by principal to recover money due—Place of suing.

In the absence of an agreement to the contrary, or of special circumstances showing a different intention, a principal cannot, where his agent carries on business elsewhere, call upon him to render an account at his own place of business, on the ground that the money or goods were sent to the agent from such place. [p. 850, col. 1.]

Muhammad Shaffi v. *Karamat Ali*, 76 P. R. 1896, followed.

Defendants, who carried on business in Bombay, and who acted as Commission Agents of the plaintiffs, carrying on business at Delhi, used to send goods to the plaintiffs and the latter used to send money to the defendants. Plaintiffs instituted a suit at Delhi to recover from the defendants a sum of money which they alleged was due to them on the accounts;

Held, that, in the absence of any evidence that the money was payable by the defendants at Delhi, the Delhi Court had no jurisdiction to entertain the suit. [p. 850, col. 1.]

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Delhi, dated the 28th December 1922.

Mr. *Sundar Das*, for the Appellants.

Lala *Tirath Ram*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Subordinate Judge of Delhi returning a plaint, the learned Judge holding that the Delhi Court have no jurisdiction to try the case.

The defendants, who carry on business in Bombay, used to send goods to the plaintiffs, who deal in gold and silver in Delhi, and the latter used to send money to the defendants. The plaintiffs sue for the amount which they allege to be due to them, with interest.

It is alleged by the plaintiffs that the defendants' *Munim*, Prag Das, came to Delhi and that they entered into the contract with him there. There is only some oral evidence of an ordinary nature in support of this allegation, and I agree with

In the matter of THE ARBITRATION ACT.

the lower Court in rejecting it. As observed by the learned Subordinate Judge, it is improbable that the defendants, who have extensive business dealings, with their head office at Bikanir and branches at Bombay, Calcutta, Madras, and Kot Kapura, would have sent a man to Delhi to solicit work.

The contract not being shown to have been made in Delhi, the question that remains for consideration is where any money that may be due from the defendants under the contract would be payable. Now the plaintiffs have admitted that the defendants were their Commission Agents, and the lower Court has followed *Muhammad Shaffi* v. *Karamat Ali* (1) in which it was held that, in the absence of an agreement to the contrary, or of special circumstances showing a different intention, the principal cannot, where the agent carries on business elsewhere, call upon him to render an account at his own place of business, on the ground that the money or goods were sent to the agent from such place. That decision has been followed in later rulings referred to by the learned Subordinate Judge, and it is in point here.

Counsel for the appellant argues that, as the defendants sent goods to the plaintiffs at Delhi, a presumption arises that the money due from them to the plaintiffs would be payable at Delhi, but no such presumption would in my opinion arise. The postal charges for goods sent by the defendants were paid by the plaintiffs, as the latter have admitted, and under section 91 of the Contract Act the delivery of the goods by the defendants to the Post Office or to the Railway in Bombay for transmission to the plaintiffs would be a delivery to the plaintiffs.

The plaintiffs have not been able to show that any money that may be due to them from the defendants is payable at Delhi, and it must, therefore, be held, in accordance with the authorities followed by the lower Court, that the suit is triable at Bombay and not at Delhi.

I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 76 P. R. 1896.

MADRAS HIGH COURT.

April 5, 1922.

Present:— Mr. Justice Kumaraswamy Sastriar.

In the matter of THE ARBITRATION ACT

AND

In the matter of THE REFERENCE TO ARBITRATION BY MESSRS. M. NARASIMHALU CHETTY & CO., AND P. S. SUBRAMANIA IYER.*

Arbitration Act (IX of 1899), ss. 11, 14— Arbitration and award—Receipt of fees by arbitrators from parties prior to inquiry—Performance of ministerial acts by arbitrator in absence of one party—Misconduct—Statement of arbitrator as to what took place before him, whether conclusive.

Where parties are at variance as to what took place during the course of an inquiry before arbitrators, the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of inquiry, unless there is very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence. [p. 853, col. 1.]

The statement of a Judge holding an inquiry as to what took place before him is almost conclusive as regards those facts and there is no reason why, as regards a statement before arbitrators appointed by the parties themselves, there should be any less rigid standard applied when dealing with questions of fact, asserted by one side and denied by the other. [p. 853, col. 1.]

A party to an inquiry before an arbitrator cannot challenge it on the ground that opportunity was not given to him to call witnesses when he himself did not court opportunity by asking the arbitrators to call witnesses or adjourn the inquiry, for the examination of witnesses. [p. 853, col. 2.]

Where a lawful and reasonable fee has been agreed by the parties to be paid to an arbitrator, he is not guilty of misconduct in getting payment of such fee before the commencement of the inquiry. [p. 854, col. 2].

Where an act judicial in character is to be performed, the arbitrators are bound by the same rules as bind the Courts and are not entitled to decide or give their award in the absence of one or more of the parties to the arbitration without notice to them. (p. 854, col. 2.]

But where the act done is not of a judicial nature but merely ministerial in its character, it is competent to one or all of the arbitrators to have it performed in the absence of one or more of the parties. [p. 854, col. 2.]

Anderson v. *Wallace*, (1835) 3 Cl. & F. 26; 6 E. R. 1347; *Manindra Nath* v. *Mohanunda Roy*, 13 Ind. Cas. 161; 15 C. L. J. 360, followed.

Harvey v. *Shelton*, (1844) 7 Beav. 455; 13 L. J. Ch. 466; 49 E. R. 1141; 64 R. R. 116; *Dobson* v. *Groves*, (1844) 6 Q. B. 637; 115 E. R. 239; 14 L. J. Q. B. 17; 9 Jur. 80; 66 R. R. 509 *Ganes Narain Singh* v. *Malida Koer*, 10 Ind. Cas. 450; 13 C. L. J. 399; *Curseiji Jehangir Khambatta* v.

In the matter of THE ARBITRATION ACT.

Crowder, 18 B. 299; 9 Ind. Dec. (N. S.) 707, referred to.

Where before the commencement of an arbitration inquiry, the arbitrators recorded statements of the case of, and received documents from, each of the parties to the inquiry in the absence of the other:

Held, that the acts were purely ministerial and not judicial in their character and the award was not liable to be vitiated thereby. [p. 855, col. 1.]

Mr. *V. V. Srinivasa Aiyangar*, for the Petitioners.

Mr. *T. L Venkatarama Aiyar*, for the Counter-Petitioners.

JUDGMENT.—This is an application by one of the parties to a reference to arbitration to set aside the award which was passed by the arbitrators in pursuance of the submission. The petitioner entered into certain contracts with the counter-petitioner who was acting as agent of an English Firm, *viz*, Messrs. Johnstone Kelly and Macdona. Disputes arose between the parties as regards four indents and after some preliminary correspondence between the parties the matter in different was referred to the arbitration of Mr. Bradshaw of Messrs. Tetley and Whitley and Mr. Jackson of Messrs. Beardsell & Co., under the terms of the arbitration clause in the indents. The case for the petitioner is that the arbitrators acted improperly and he states:

(1) that one of them, Mr. Bradshaw, who was appointed at the instance of the petitioner insisted on payment to him of Rs. 400-0-0 as fees for the arbitration which sum he paid, (2) that the arbitrators gave notice on the 10th January 1922 fixing 15th January 1922 for the enquiry and calling upon the parties to be present and produce their evidence before them; that on that date he presented himself before the arbitrators at the appointed time and place and they asked him to hand over copies of correspondence, samples, etc., which he did and they asked him what his case was and he explained his case to them; that sometime afterwards the counter-petitioner sent in his chit and the arbitrators asked him to wait and after hearing what the petitioner had to say, they asked him to go out and sent for the counter-petitioner; that he does not know what took place between the arbitrators and the counter-petitioner, and that there was no enquiry held by the arbitrators and, in any case, there was no enquiry in the presence of both parties, (3) that the arbitrators subsequently went to the Bank to see the goods and when going asked the petitioner if he wished to follow them to the Bank and whether he had not sufficient confidence in them and he thought that if he accompanied them to the Bank, it might be suggested that he had no confidence and, therefore, he did not insist on following them to the Bank, (4) that nothing further took place till 27th January 1922 when he received by post a letter purporting to be signed by Mr. Jackson, one of the arbitrators, enclosing a copy of the award; that he had considerable evidence to adduce regarding the matters in difference between the parties and expected that in due course the arbitrators would fix another date after examining the goods in the Bank and hold enquiry for adducing evidence on his behalf and for meeting the case of the opposite side and that no such opportunity was given to him, (5) that as the result of the arbitration, the arbitrators found in his favour as regards the three minor contracts but that as regards the important contract relating to 20 cases of crimps, they held that he was bound to take the goods on an allowance of 25 per cent. being given while even before the arbitration the counter-petitioner had agreed to give a discount of 35 per cent., and (6) that the award is invalid because there was no proper enquiry by the arbitrators because the arbitrators misconducted themselves by receiving fees before hand and by not enquiring into the case of the parties in the presence of each other, because there was misconduct and irregularity on the part of the arbitrators in that no opportunity was given to the petitioner to place his evidence before them and to put forward his case after inspection of the goods in the Bank, because no notice of the making or signing of the award was given as required by law, and because the award was also opposed to natural justice and equity.

The counter-petitioner files a counter-affidavit in which he states that on the date fixed for hearing he came a little late; that the petitioner having come

In the matter of THE ARBITRATION ACT.

earlier was called by the arbitrators to state his case and file the evidence in support of it, that he appeared while this was going on and sent his card and he was asked to wait and told that he would be sent for; that the petitioner came out and he was asked to appear and when he went in he was asked to state his case and file documents, that after some consultation the arbitrators sent for both parties and after stating the points of difference between them asked them what they had to say in support of their respective cases; that the enquiry then went on in the presence of each other and when it was concluded the arbitrators told them that they had finished the case and it only remained to compare the goods with the samples and that they would go to the Bank for the purpose, and that Mr. Bradshaw turned to the petitioner and asked whether he wished to accompany them to the Bank and the petitioner said he had sufficient confidence in them whereupon they said they would inspect the goods and pronounce the award. The counter-petitioner denies the various charges against the arbitrators as not being true. He states that it was not true that the enquiry was not held in the presence of the parties and what was really done was preliminary work before the parties were called in and he also says that if there was any irregularity the petitioner did not take the objection in time and must be deemed to have waived it. As regards the complaint of the petitioner that he was not given an opportunity to place his case before the arbitrators, he says that all the correspondence and samples were filed by the petitioner and he never said that there were other documents to file or witnesses to examine; that the arbitrators said they had finished the case and no suggestion was made that any further enquiry was to be held. As regards the allowance which he had offered to the petitioner of 35 per cent., he states that the consideration for that was the acceptance of all the contracts whereas the arbitrators directed the cancellation of three out of four contracts and gave allowance only as regards one contract. According to the counter-petitioner there was a full enquiry by the arbitrators which took place from 9-45 A. M., to about 12-30 noon. Both the arbitrators have filed an affidavit in which they set out what took place before them. They state that the petitioner came in first on the appointed day of hearing and they asked him to state his case and file any statement that he might like to file and he then filed a statement and also filed all the documents and samples in his possession; that the counter-petitioner was sent for and asked to file his documents and samples which he did and that after perusing the statements and the correspondence they commenced the hearing of the case which was done in the presence of both the parties. They then state that they took the evidence of both the parties; that they confronted the petitioner with the documents which were filed in the case, and that he made certain admissions and that there were also other questions on which they examined both the parties. They state that after they heard all that the parties had to say and after reading all the correspondence, they told the parties they had done with the case and proceeded to examine the goods in the Bank; that the petitioner agreed to their examining the goods and he never told them that he had any further evidence to let in or ever complained about the procedure adopted, and that after comparing the shipment samples with the original they came to the conclusion that as regards one contract the differences in quality, colour, finish and design were not substantial enough to have the contract cancelled and compensation would be sufficient relief, but that as regards the other three contracts, the differences were substantial and so they cancelled them. They state that the case was fully and properly heard by them and there could be no objection to that enquiry.

It seems to me that, having regard to the fact that the allegations before me consist of (1) the allegations of the petitioner as regards certain irregularities which, he says, took place and (2) the allegations of the counter-petitioner that everything was regular and proper, I should act upon the

evidence of the two arbitrators, Messrs. Bradshaw and Jackson. So far as it appears, they had no interest in the matter in dispute, and they belong to firms which have been doing large business in piece-goods. Nothing is suggested as regards their competency to try the matters in dispute. In cases where the parties are at variance on the question as to what took place before the arbitrators, it seem to me that the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of the enquiry, unless there is very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence. The statement of a Judge holding an enquiry as to what took place before him is treated almost as conclusive as regards those facts, and I do not see why, as regards a statement before arbitrators appointed by the parties themselves, there should be any less rigid standard applied when dealing with questions of fact as to facts which are asserted by one side and denied by the other. Adopting, therefore, this criterion as regards the finding of facts, it seems to me that I must accept the statement made by the arbitrators in their affidavit and the statement made by the counter-petitioner in so far as his statement tallies with that of the arbitrators. On these facts it seems to me that the only points on which there can be any question as regards setting aside the award are (1) whether the taking of fee by both arbitrators before the enquiry commenced would vitiate the award, and (2) whether the fact that the statements were recorded in the absence of the parties during what may be called spade work, before the enquiry, was such as would bring the case within the rulings cited by Mr. V. V. Srinivasa Aiyangar and thus vitiate the award as being the result of proceedings taken in the absence of the parties. Before proceeding to discuss these two points, I may state that, on the facts, I am not satisfied that there was any imperfect enquiry or that there was any ground for holding that the arbitrators acted in a manner which was not correct. There is nothing to show that the petitioner ever told the arbitrators that he had any witness to examine or any further documents to file. It is admitted that the arbitrators required him to be present at the enquiry with all his documents and with his witnesses, and, that being so, if he had any further witnesses to examine, it was his duty to have told the arbitrators that he wanted to examine witnesses and to ask for an adjournment or to ask that the witnesses, if present, be called and examined. On the contrary, the arbitrators distinctly state that when they closed the enquiry they told the parties that the enquiry was closed and they would inspect the goods and pass the award. In these circumstances, whatever might have been in the mind of the petitioner, it seems that he cannot challenge the enquiry on the ground that opportunity was not given to him to call witnesses when he himself did not court opportunity by asking the arbitrators to call witnesses or adjourn the enquiry, so far as regards the statement that the petitioner had no opportunity to examine witnesses. As regards the petitioners not proceeding to the Bank when the arbitrators went there to inspect the goods, I am not satisfied that the arbitrators did anything which would have justified the petitioner in coming to the conclusion that he need not go to the Bank along with the arbitrators. The arbitrators do not say that they suggested to him that it might be left to them to inspect the goods in his absence or that anything was done by them which would lead the petitioner to believe that if he did accompany them to the Bank he would be prejudicing his case by leading the arbitrators to suppose that he had no confidence in them. It is highly improbable that the arbitrators would have made any such suggestion, especially when the counter-petitioner went with them to the Bank. I am not, therefore, in a position on the evidence to hold that any such statement was made to the petitioner which prevented his going along with the arbitrators to the Bank.

Turning now to the two legal objections on which it may be possible to set aside

the award, I think that, as regards remuneration, there is nothing illegal or improper in what the arbitrators did. It is not suggested in this case, as it was in the cases cited before me, that such demand was exorbitant or improper or that there was anything in the conduct of the arbitrators in the making of the demand which would have led the parties to suppose that the arbitrators were doing something which the parties would not have done but for the demand. It is admitted that each party had agreed to pay a fee of Rs. 400-0-0 to the arbitrators for their trouble. I think that few merchants in Madras would waste their time in arbitration unless it was worth their while to do so, so that in the present case the mere fact that Rs. 400-0-0 was fixed as payable by each party is no ground for holding that there was anything improper. Neither party demurred to make payment and it is not suggested that payment was made in such circumstances as would indicate that, if payment was not made, the consequences would be against the party that refused payment. I am referred to section 11 of the Arbitration Act but there is nothing there which precludes the arbitrarors from either fixing the fees or receiving the fees beforehand. All that the section says is that in case the award is given the arbitrators shall state in the award what amount is payable to them for their fees. That assumes that they were not paid beforehand, and, to hold that the arbitrators are bound to conduct the arbitration on the off chance of their being paid or not at the end of the enquiry would be going beyound the provisions of section 11. Reference was made to Russell on Arbitration, page 204, and to *In re Enoch and Zaretsky & Co.* (1)

That was a case where there was some improper conduct on the part of arbitrators. There the umpire made a demand which the Judge thought unreasonable and the party himself repudiated it as unreasonable. It is far from establishing the proposition that in case of a lawful and reasonable fee agreed to be paid by the parties, the arbitrator is guilty of misconduct if he takes his fee in advance. In the absence of any decision, I am not prepared to hold that, in this country at least, the arbitrators would be guilty of misconduct in getting payment of a reasonable fee beforehand and thus avoid the alternative, if they are not paid, of suing the parties in Court, because there is no other remedy open to the arbitrators.

The next objection is that, on the facts and the statement of the arbitrators, a certain portion of the work was done in the absence of each of the parties. If that portion of the work which was done was judicial in its character, there can be no doubt that the authorities cited show that the award is liable to be set aside. The cases referred to by Mr. V. V. Srinivasa Aiyangar, namely, *Harvey* v. *Shelton* (2) *Dobson* v. *Groves* (3), *Ganes Narain Singh* v. *Malida Koer* (4), *Cursetji Jehangir Khambatta* v. *Crowder* (5) no doubt lay down the rule that, where an act judicial in its character is to be performed, the arbitrators are bound by the same rules as bind the Courts, and that the arbitrators are not entitled to decide or to give their award in the absence of one or more of the parties to the arbitration and without notice to them. But there are also cases which hold that, where the act done is not of a judicial nature but merely ministerial in its character, it is competent to one of the arbitrators or all the arbitrators to have those acts performed in the absence of one or more of the parties. I need only refer to *Anderson* v. *Wallace* (6) and *Manindra Nath* v. *Mohanunda Roy* (7). In the present case what happened was, that both the parties did not turn

(1) (1910) 1 K. B. 327; 79 L. J. K. B. 363; 101 L. T. 801

(2) (1844) 7 Beav. 455; 13 L. J. Ch. 466; 49 E. R. 1141; 64 R. R. 116.
(3) (1844) 6 Q. B. 657; 115 E. R. 239 14 L. J. Q. B. 17; 9 Jur. 86; 66 R. R. 509.
(4) 10 Ind. Cas. 450; 13 C. L. J. 399.
(5) 18 B. 299; 9 Ind. Dec. (N. S.) 707.
(6) (1835) 3 Cl. & F. 26; 6 E. R. 1347.
(7) 13 Ind. Cas. 161 15 C. L. J. 360

up together, the petitioner turned up and the arbitrators asked him to state his case and file his document and he gave a written statement stating what his case was and filed such documents as he had in his possession. While he was doing this the counter-petitioner turned up and the arbitrators sent for him, asked the petitioner to remain outside, and took from the counter-petitioner a written statement setting out his case and received his exhibits. Then the arbitrators state that after having gone through these statements and exhibits they called in both the parties and began the inquiry. It seems to me that what the arbitrators did in this case was what Courts do, namely, receiving statements and documents, before the enqiry commences. These acts are purely ministerial in their character and it is not suggested that before the filing of written statements or documents in Court the Registrar is bound to call the other party and do it in his presence. What really took place after this was the commencement of the judicial proceedings before the arbitrators and, so far as the affidavit of the arbitrators goes, when that act was done both the parties were present. I am, therefore not prepared to hold on the facts of this case that the award is liable to be vitiated because there was a judicial act done by the arbitrators in the absence of the party. This disposes of the two main objections taken by Mr. V. V. Srinivasa Aiyangar on the facts as appear from the affidavits of the arbitrators.

The question of waiver has been raised by the counter-petitioner which I do not think it necessary to discuss at present. I have no doubt that it is open to the parties to waive any irregularities which may have taken place in the conduct of the enquiry so long as those irregularities are not fundamental and do not involve any prejudice or hardship to the party. The question as to whether there is sufficient reason in this case to warrant my holding that there was a waiver does not arise on the facts found by me. I find that there was no irregularity in the conduct of the proceedings before the arbitrators.

The result will be that the application is dismissed with costs of the arbitrators and costs of the counter-petitioner (two sets).

V. N. V. *Application dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1569 OF 1922.

May 9, 1923.

Present:—Mr. Justice Moti Sagar.

Musammat JIWAN—PLAINTIFF—APPELLANT

versus

WADHAWA—DEFENDANT—RESPONDENT.

Custom—Succession—Daughter v. Collaterals of 6th degree—Kalwan Jats of Mauza *Wazirpur, Tahsil Raya, Sialkot District.*

Among Kalwan Jats of *Mouza* Wazirpur in the Raya Tahsil of the Sialkot District, a daughter excludes collaterals in the 6th degree from succession to the ancestral property of her father. [p. 855, col. 2.]

Second appeal from a decree of the District Judge, Sialkot, dated the 13th February 1922, reversing that of the Subordinate Judge, Second Class, Sialkot, dated the 25th April 1921.

Lala *Gobind Ram Khanna*, for the Appellant.

JUDGMENT.—The parties to this case are Kalwan Jats of *Mauza* Wazirpur, in the Raya Tahsil of the Sialkot District. The land in suit consists of a half share of 50 *kanals* 17 *marlas* originally owned by one Surjan, who died some years ago, leaving him surviving a widow *Musammat* Gulab Devi. *Musammat* Gulab Devi died some four years ago before the institution of the suit and after her death the land was forcibly taken possession of by some persons who set up a mortgage in their favour by the original proprietor. On the 10th of July 1917 one Wadhawa brought a suit for possession of this land alleging that he was a collateral of Surjan, related to him in the 6th degree, and that he was entitled

to succeed in preference to the defendants whose possession it was alleged was unlawful. Subsequently, the plaintiff *Musammat* Jiwan applied to be made a party alleging herself to be the daughter of Surjan and entitled to succeed to his property on the death of his widow, *Musammat* Gulab Devi, in preference to the defendant Wadhawa. On the 5th of October 1920 she instituted a separate suit on her own account for possession of this land, alleging that, in the presence of a daughter, a collateral of the 6th degree had no right to succeed. The Trial Court found in favour of the plaintiff, *Musammat* Jiwan, and decreed the suit. On appeal the learned District Judge came to a contrary finding and held that, according to the custom obtaining among the parties, a daughter was not an heir and that she was excluded by collaterals however remote they may be. He further held that the *onus* of proving that the daughter was entitled to succeed in preference to collaterals was upon the plaintiff and that she had not discharged this *onus*. In this view of the case the plaintiffs' suit was entirely dismissed. The plaintiff has now come up in second appeal to this Court after obtaining a certificate from the District Judge under section 41 (3) Punjab Courts Act.

The sole question for determination is whether, according to the custom obtaining among the parties, daughters are excluded by collaterals of the 6th degree. On this question I have no hesitation in holding that the defendants on whom the *onus* lay has entirely failed to discharge it. A large number of witnesses were produced by him in support of his contention but their evidence is worthless and does not in any way improve his case. Some of the witnesses have of course stated that daughters are excluded by collaterals and have also cited some instances but no mutation entries have been produced in support of their statements, and, in the absence of any documentary evidence, I am unable to hold that the instances have been proved. A large number of witnesses have given evidence to the effect that daughters are excluded by collaterals of the 3rd or 4th degree. This evidence can obviously be of no assistance to the defendant, inasmuch as the dispute in the present case is not between a daughter and a collateral of the 3rd or 4th degree but between a daughter and a remote collateral of the 6th degree.

In my opinion, the evidence produced is wholly insufficient to discharge the burden which lay upon the defendant, and I accordingly hold that the defendant has no right to succeed in preference to the plaintiff, the daughter of the deceased.

The result is that the appeal is accepted and the plaintiff's suit decreed with costs throughout.

Appeal accepted.

Z. K.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 172 AND 219 OF 1922.

July 30, 1923.

Present:—MR. Justice Das.

CIVIL REVISION NO. 172 OF 1922.

RAM KISHUN SINGH AND OTHERS—PETITIONERS

versus

DAMODAR PRASAD AND OTHERS—OPPOSITE PARTY.

CIVIL REVISION NO. 219 OF 1923.

BAIJNATH JHA—PETITIONER

versus

DAMODAR PRASAD AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, rr. 100, 101—Execution of decree—Dispossession by decree-holder—Possession on one's own account—Person in joint possession—Benami, question of, whether can be gone into—Revision—Decision basis of jurisdiction.

It cannot be said that a person who is in joint possession of land with a judgment-debtor is not in possession on his own account, within the meaning of r 101 of O. XXI of the Civil Procedure Code. [p. 857, col. 1.]

Cooverji Hirji v. *Dewsey Bhoja*, 17 B. 718; 9 Ind. Dec. (N S.) 471, dissented from.

Radha Gobinda Missir v *Raghunath Missir*, 20 Ind. Cas. 253; 18 C. W. N. 695; 18 C. L. J. 138, relied on.

In dealing with an application under r. 100 of O. XXI of the Civil Procedure Code, the Court is not entitled to go into the question of *benami* in order to determine whether the applicant was in possession of the disputed property in his own right. [p. 857, col. 2.]

RAM KISHUN SINGH v. DAMODAR PRASAD.

Where the decision of a Court is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it comes within the purview of section 115 of the Civil Procedure Code. [p. 857, col. 2.]

Dhanwanti Kuer v. *Sheo Shankar Lal*, 51 Ind. Cas. 873; 4 P. L. J. 340; (1921) Pat. 364, followed.

Where by a misconstruction of the provision of law the Court held that the petitioner was not entitled to maintain an application under O. XXI, r. 100 of the Civil Procedure Code:

Held, that the order was one declining jurisdiction and was, therefore, open to revision under section 115 of the Code. [p. 858, col. 1.]

Revision from a decision of the Additional Subordinate Judge, Monghyr, dated the 18th April 1923.

Messrs. *A. B. Mukharji* and *Shiveswar Dayal*, for the Petitioner.

Mr. *S. N. Bose*, for the Opposite Party.

JUDGMENT.—The facts are stated in the order passed by the Court below and it is unnecessary to recapitulate them. The learned Subordinate Judge has found that the applicants in Civil Revision No. 172 of 1923 being joint with their respective father and uncle, who were the judgment-debtors in the mortgage-suit, cannot be said to have been in possession of the disputed lands or portion thereof on their own account within the meaning of O. XXI, r. 101 of the Code, and the learned Subordinate Judge relies upon the case of *Cooverji Hirji* v. *Dewsey Bhoja* (1). The learned Subordinate Judge has also found that the applicant in Civil Revision No. 209 of 1923 is the *farjidar* of Kali Prashad, another of the judgment-debtors in the mortgage action, and that he cannot be said to be in possession of the disputed lands on his own account. In this view the learned Subordinate Judge has dismissed their applications under O. XXI, r. 100.

I will first consider the case of Ramkishun and Sital Prashad, the applicants in Civil Revision No. 172 of 1923. The case *Cooverji Hirji* v. *Dewsey Bhoja* (1) was considered by the Calcutta High Court in the case of *Radha Gobinda Missir* v. *Raghunath Missir* (2). Their Lordships of the the Calcutta High Court did not agree with the view of the Bombay High Court in so far as that Court laid dawn that a person who is in joint possession is not in possession on his own account. I entirely agree with the view which has been taken by the Calcutta High Court in the case to which I have referred. It must follow, therefore, that the applicants were in possession on their own account and were entitled to maintain an application under O. XXI, r. 100 of the Code.

The question raised in Civil Revision No. 219 of 1923 is, whether the learned Subordinate Judge was entitled to consider the question of *benami* in an application under O. XXI, r. 100. It has been held in a series of cases that in a claim case arising under O. XXI, r. 58, the Court is not entitled to go into a question of *benami*. The finding of the learned Subordinate Judge in this case that the applicant was the *benamidar* of Kali Prashad is based on reasons which are entirely speculative. In my opinion the learned Subordinate Judge was not entitled to go into a question of *benami* in order to determine whether the applicant was in possession of the disputed property in his own right.

It was contented before us that the learned Subordinate Judge had complete jurisdiction to decide the cases in the way in which he has done and that we ought not to interfere with his decision in revision under section 115 of the Code of Civil Procedure. It has, however, been held by this Court that where the decision of the Court is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers it at once comes within the purview of section 115 of the Code. See *Dhanwanti Kuer* v. *Sheo Shankar Lall* (3). The learned Subordinate Judge held by a misconstruction of the provisions of law that the petitioners were not entitled to maintain an application under O. XXI, r. 100 of the Code. The decision of the learned Subordinate Judge is the very basis and foundation

(1) 17 B 718; 9 Ind. Dec. (N. S.) 471

(2) 20 Ind. Cas. 253; 18 C. W. N. 695 18 C. L. J. 138.

(3) 51 Ind. Cas. 873; 4 P. L. J. 340; (1921) Pat. 364

of jurisdiction. In my opinion it is open to us under section 115 of the Code to say that he declined a jurisdiction which was vested in him by law by misconstructing the provisions of the Code.

I would accordingly set aside the orders passed by the Court below and allow the applications which were made by these petitioners to the Court below. There will be no order for costs.

Z. K. *Application allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 11 OF 1923.

May 4, 1923.

Present:—Mr. Justice Campbell.

GANGA RAM—PLAINTIFF—PETITIONER

versus

NATHA RAM AND ANOTHER—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 144, 151—Restoration, power of, extent of—Receiver, appointment of—Dismissal of suit—Court, power of, to pass necessary orders.

The power of a Court to grant restitution is not confined to cases covered by the provisions of section 144 of the Civil Procedure Code, but, under that section, read with section 151, of the Code it may be extended to other cases.

A Court which appoints a Receiver has authority to pass orders necessary for winding-up his charge, even after the dismissal of the suit.

Administrator-General of Bengal v. *Prem Lall Mullick*, 22 C. 1011 at p. 1012; 22 I. A. 203; 5 M. L. J. 157; 6 Sar. P. C. J. 660; 11 Ind. Dec. (N. S.) 672 (P. C.), relied on.

Petition for revision of the order of the Subordinate Judge, Second Class, Lahore, dated the 10th November 1922.

Lala *Daulat Ram*, for the Petitioner.

Mr. *Harcharan Das Kumar*, for the Respondents.

JUDGMENT.—The facts of the case are these:—

Ganga Ram, one of the partners in a Cotton Factory, sued for dissolution and rendition of accounts against the other partners. In November 1919 a preliminary decree was passed and a Receiver was appointed, Lala Darshni Dial, Pleader, Chunian. He, by permission of the Court, leased the Factory by auction and the successful bidder was Ganga Ram himself for Rs. 4,325, for one year. The conditions of sale were that one-fourth of the rent should be paid at the end of the sale and the remaining three-fourths at the time of transfer of possession which was to be not later than the 4th September 1921.

On the 8th December 1921 the Court sanctioned the lease to Ganga Ram and directed the Receiver to deposit in Court the whole of the lease money. This the Receiver did not do.

On the 25th May 1922 the whole suit was dismissed on a finding that it had abated.

On the 17th August 1922 Natha Ram and Dial Chand, two of the defendants, applied for an order to the Receiver to deposit the lease money in Court. Notice was issued to the Receiver and to Ganga Ram who appeared on the 10th November 1922 when the Court passed the order of which revision is sought.

This order shows that Ganga Ram alleged (1) that he had restored possession of the Factory to the partners who represent 14-16ths share, (2) that he had paid 1-4th of the rent to the Receiver at the time of the sale, *viz.*, Rs. 1,081-4-0, (3) that he had paid Rs. 1,231-2-9 to the partners owning 12-16ths of the Factory and (4) that he had spent the remaining Rs. 2,012-9-3 on repairs to the machinery. The Court ordered him to deliver possession to the applicants as well as to the other partners and to deposit in Court the 3-4ths of the rent which he had not paid to the Receiver. It was remarked that he could claim for anything spent on repairs by a separate suit.

It is contended now by Ganga Ram that this order was passed without jurisdiction and that it was illegal in so far as it directed refund of the amount spent on repairs and of Rs. 1,231-2-9 paid to the partners of 12-16ths share.

As regards the latter point it would seem that there was no necessity for directing Rs. 1,231-2-9 to be paid again, since, even if a substantial fraction of the rent is to be deducted for the Receiver's charges, the share of the partners owning three-fourths is not likely to be less than

Rs. 1,231-2-9. The Court might well reconsider this matter. According to the terms on which the lease was sold the lessee was not entitled to deduct anything out of the rent towards repairs. He was to take over the machinery as it was and was to hand it back in the same state.

The learned Counsel for the respondents informs me that his clients have obtained joint possession of the Factory with the other partners and so this part of the order is now of no practical importance.

On the question whether the lower Court had jurisdiction in the circumstances to pass an order directing Ganga Ram to pay the three-fourths of the rent which according to his agreement he should have paid when he took possession. I have heard a good deal of argument much of which is not relevant to the point. On behalf of Ganga Ram it is contended that when the suit was dismissed the Court became *functus officio* and could not pass any subsequent order about the subject-matter of the suit. It has, however, been laid down, *e. g.*, in the Privy Council ruling *Administrator-General of Bengal* v. *Prem Lall Mullick* (1), cited by the lower Court, that a Court which appointed a Receiver has authority to pass the orders necessary for winding up his charge even though the suit is no longer pending, and it has also been ruled, although in situations which are not precisely similar, that the power of a Court to grant restitution is not confined to cases covered by the provisions of section 144, but, under that section, read with section 151, may be extended to other cases. Here the order dismissing the suit reversed the preliminary decree and also rendered it necessary that the position previous to the appointment of the Receiver should be restored. Ganga Ram undoubtedly had the exclusive use of the Factory for at least a year and, as matters turned out, was not entitled to the exclusive enjoyment of the proceeds. In default of authority that the order passed by the Court below was beyond the scope of section 151 I am not prepared to interfere.

(1) 22 C. 1011 at p. 1012; 22 I. A. 203; 5 M. L. J. 157; 6 Sar. P. C. J. 660; 11 Ind. Dec. (N.s.) 672 (P. C.).

The petition fails and is dismissed with costs.

Z. K. *Petition dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 128 OF 1922.

July 27, 1923.

Present:—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.

MR. KENNETH ARTHUR HILL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RANJAN BARDHAN AND OTHERS—DEFENDANTS AND UPENDRA NARAIN TEWARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XXXIX, r. 1—Injunction*, ad interim—*Prima facie case—Balance of convenience—Adjournment—Counsel, duty of, to argue.*

Where a plaintiff asks the Court to grant an *ad interim* injunction against the defendant during the hearing of the suit, he must show that *prima facie* he is entitled to succeed in his claim on the merits. The Court should in such a case see as well on which side lies the balance of convenience. Where the defendant has spent a large sum of money which would be wasted if the injunction is granted and the defendant is a man of means and any damage likely to be done by him can be recovered from him if the plaintiff succeeds in his claim the balance of convenience is against the grant of the injunction. [p. 860, col. 2.]

Obiter dictum :—The adjournment of a case fixed for arguments from date to date does not relieve the Pleader from the duty of being prepared to argue his client's case when he is asked to do so on any of the dates fixed for hearing.

Appeal from an order of the Subordinate Judge at Jamtara, dated the 11th April 1922.

Messrs. *S. C. Mitter* and *S. S. Bose*, for the Appellants.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Respondents.

JUDGMENT.

Mullick, J.—The proprietors of *Mauza* Jorekuri in the Sub-Division of Jamtara gave a *Mukarrari* Settlement of that *Mauza* to Kulanada Tewari and others between the years 1868 and 1874 who in their turn gave a mining lease in or about October 1913 to one Mr. Cornish. The plaintiffs in the present suit derive title from Mr. Cornish by two transfers dated the 27th March 1915 and 1st November 1915. The contesting defendant, who is defendant No. 13, claims

title from the *patnidars*, to the mineral rights by various transfers between the years 1899 and 1920. The present suit was lodged on the 3rd September 1921 in respect of an area of 65 *bighas* on the allegation that the defendant has begun to work coal upon 26 *bighas* of the land leased to the plaintiffs. The plaintiffs ask for a declaration of title in respect of the whole 65 *bighas* and recovery of possession in respect of the 26 *bighas* and for permanent injunction restraining the defendant from working coal upon the entire area of 65 *bighas*. During the hearing of the suit they also asked for an *ad interim* injunction.

It appears from the order-sheet of the Subordinate Judge that on the 17th December 1921 he passed an order stating that he would hear arguments as to the prayer for an injunction on the 24th January 1922. On this latter date the Subordinate Judge being absent the case was postponed by his locum-tenens till the 22nd March 1922. On that date a *pro forma* defendant being dead time was given to amend the plaint and to issue summons on his heirs and the case was adjourned to the 11th April 1922. On the 11th April 1922 the parties were complete and the Subordinate Judge called upon the Pleader of the plaintiffs to make their submissions for an *ad interim* injunction. The Pleader replied that he had not come prepared and he asked for another date which the Court refused. The Court thereupon made an order refusing temporary injunction on the ground that it was advisable that the question should be thrashed out in the case itself and that it would be better not to issue a temporary injunction in the preliminary stage of the trial.

The present appeal has been preferred against the Subordinate Judge's order.

Now, I am unable to understand why the Pleader of the plaintiffs could not argue the case on the 11th April. The 24th January had been fixed for arguments and the fact that the case was adjourned to the 2nd March and again from the 2nd March to the 11th April did not relieve the Pleader from the duty of being prepared to argue his client's case. It was wholly unreasonable to expect that the Court would fix another date for the argument of this small question. Therefore, although the reason given by the learned Subordinate Judge for dismissing the application may be open to question, I do not think that, in the circumstances, he was wrong in refusing any further adjournment and in dismissing the application upon the materials before him. Now, from the materials which are upon the record and which have been placed before us, it does not appear that any *prima facie* case was made out before the Subordinate Judge establishing the title of the plaintiffs to the sub-soil rights. A mere allegation that the *mukarrarıdar* had sub-soil rights will not do in view of the fact that the defendant expressly denies that the *mukarrari* lease carried with it sub-soil rights as well. It is said that the lease was in the possession of the *mukarrarıdar*. That may be so, but having come to press an application for *ad interim* injunction it was the duty of the plaintiffs to place materials before the Court upon which such an injunction could be granted. Then, it appears that the defendant has already spent a large sum of money in sinking shafts and in building cooly lines on the lands surrounding the 26 *bighas* now in dispute and that upon the 26 *bighas* he has sunk a shaft which has cost a certain amount of money. The question is whether the stopping of all work in connection with this shaft will injure the progress of the work which has already been done in the surrounding lands and whether the cost already incurred in sinking the shaft will be more or less thrown away if the work is now stopped. On the whole, the balance of convenience seems to lie in favour of the defendant, for the defendant is a substantial man and any damage that may be done through the surface and the underground will, in the event of the plaintiffs succeeding in their suit, be recoverable from the defendant. In my opinion, on the materials before the Court, the temporary injunction should be refused.

The oder of the Subordinate Judge, therefore, is affirmed and the appeal is dismissed with costs.

Bucknill, J.—I agree.

N. H. *Appeal dismissed.*

DAULAT RAM *v.* DEOKI NANDAN.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 1396 OF 1922.

May 28, 1923.

Presen :—Mr. Justice Moti Sagar.

DAULAT RAM AND ANOTHER—APPELLANTS

versus

DEOKI NANDAN, OFFICIAL RECEIVER, AND OTHERS—RESPONDENTS.

In the matter of the insolvency of

SAUNDHA AND ALI MUHAMMAD, INSOLVENTS.

Provincial Insolvency Act (V of 1920), s. 54—Fraudulent preference, what amounts to.

In order to hold that a transfer by a debtor in favour of a creditor constitutes a fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act, the Court must be satisfied that the dominant or substantial motive of the debtor in making the transfer was to prefer the particular creditor and not to secure some advantage for himself. [p. 862, col. 1.]

Sharp v. *Jackson*, (1899) A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Manson 264 and *In re Rai Mohan Shaw*, 53 Ind. Cas. 175. relied on.

A debtor approached one of his creditors for a fresh loan which he required for business purposes. The creditor refused to advance the loan unless his previous debt was also secured. The debtor then agreed to grant him a mortgage of certain property to secure the previous debt and the fresh advance :

Held, that the mortgage did not constitute a fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act. [p. 863, col. 1.]

Miscellaneous first appeal from an order of the District Judge, Karnal, dated the 12th May 1922.

Mr. *Manohar Lal*, for the Appellants.

Mr. *Shamair Chand* and Lala *Gobind Ram Khanna*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the District Judge of Karnal in the exercise of his insolvency jurisdiction, annulling a certain mortgage made by one Saundha, insolvent, in favour of one Daulat Ram, a creditor, and holding that the mortgage was void and inoperative as against the other creditors under section 54 of the Provincial Insolvency Act (V of 1920). It appears that Saundha was in very embarrased circumstances in the beginning of 1921 and was unable to meet his liabilities as they fell due. On the 10th of February 1920 he executed a deed of mortgage in respect of the property in dispute in favour of Daulat Ram, creditor, for a sum of Rs. 5,000. The deed purported to secure an antecedent debt of Rs. 3,200 and a new advance of the balance Rs. 1,800. It also provided for interest at the rate of twelve annas per cent. per mensem. The details of the consideration as recited in the mortgage-deed were as follows:—

		Rs.
1.	Paid before the Sub-Registrar	1,700
2.	Registration expenses	100
3.	Due on a *hundi* dated 18th March 1919 ..	400
4.	Due on a *hundi* dated 18th September 1919 ..	200
5.	Due on a *hundi* dated 15th October 1919 ..	300
6.	Due on a *hundi* dated 15th January 1920 ..	500
7.	Due on a *hundi* dated 15th February 1920 ..	400
8.	Due on a *hundi* dated 7th March 1920 ..	1,000
9.	Due on account of interest on *hundis* ..	400
	Total	5,000

On the 18th of April 1921 Saundha filed an application asking to be adjudicated an insolvent, and he was adjudicated as such by the orders of the learned District Judge of Karnal on the 6th of December 1921. A Receiver was appointed and he took charge of all the properties of the insolvent. The creditors filed certain objections to the effect that the debt alleged to be due to Daulat Ram was fictitious and that the mortgage executed by Saundha in his favour was void under section 54 of the Provincial Insolvency Act. The Receiver was asked to make a report, who held an inquiry into the genuineness of these debts and found that the debts were proved and that the mortgage in favour of Daulat Ram was not fictitious. He accordingly entered the name of Daulat Ram in the list of the secured creditors for Rs. 5,375; Rs. 5,000 principal *plus* Rs. 375 interest. No appeal was preferred against this decision by the creditors as required by section 68 of the Provincial Insolvency Act, but an application was made by them to the Court in which the very same objections were repeated, and it was prayed that the Court itself should hold an inquiry. The learned District Judge framed the following two issues:—

1. Whether the debt was fictitious ?

2. Whether the mortgage was fraudulent and void under section 54 of the Provincial Insolvency Act?

Evidence was recorded on both these issues, and the finding of the learned District Judge was that the debts were genuine, but that the transfer was void for fraudulent preference.

Mr. Manohar Lal for the appellants has attacked this finding as being based on an erroneous view of the law, and it has been contended by him that, upon the true view of the facts, it cannot be upheld. His contention is that before a transfer can be avoided under section 54, it must be definitely proved that in making the transfer in favour of a creditor the debtor acted with the view of giving that creditor a preference over his other creditors, and that the *onus* of proving that such fraud was intended is upon the creditor who alleges it or who impugns the transfer. This contention, in my opinion, is well-founded and must be given effect to. There is ample authority for holding that, to constitute a fraudulent preference within the meaning of section 54, the Court must be satisfied that the dominant or substantial motive was to prefer the creditor and was not to obtain some advantage to the debtor. In Halsbury's Laws of England, Volume II, page, 282, the law on the subject is thus laid down:—

"In order that a transaction may be set aside as a fraudulent preference it is necessary to prove that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors. This need not be the primary result aimed at; it is sufficient that it should be the object aimed at in bringing about the primary result. If the transaction can properly be referred to some other motive than that of giving the creditor paid a preference over the other creditors, the payment is not fraudulent and void, for it is from the intention on the part of the debtor to act in fraud of the law, that is, to prevent the distribution of the bankrupt's property rateably among all his creditors, that the invalidity of the transaction arises."

Again, at page 285, it is stated that "in every case the state of mind of the debtor is the paramount consideration. The intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns; if that intention be shown not to have existed, it is of no importance that the creditor had knowledge of the debtor's insolvency or that the debt was not due, nor for this purpose is it true that the debtor must be taken to have intended the natural consequences of his act." This is in accordance with what was laid down in the case of *Sharp* v. *Jackson* (1) where it was observed by Lord Esher* that, "the question depends not on the mere fact that there has been a preference but also on the state of mind of the person who made it, and that it is not sufficient to say that, the natural consequence of the act being to prefer, the intention to prefer follows." In *In re Rai Mohan Shaw* (2) it was held by Mr. Justice Rankin that, "if the debtor's real object was to procure a further advance for himself, or to satisfy the demands, or escape the pressure of the creditor, or if he had both these objects as the main-spring of his action, then the transaction is not fraudulent preference."

The law on the object being as stated above, the question for consideration is, whether in the present case the mortgage was made with the dominant view of preferring the respondent and was thus void under section 54 of the Provincial Insolvency Act. There is not a particle of evidence on the record to show that the mortgage was made with any such view or that the suggestion of making the mortgage emanated from the debtor. On the contrary, the evidence shows that the debtor was in need of money, that he went to Daulat Ram, mortgagee, and asked him to advance a sum of Rs.1,800 who told him that he would not make the advance until his previous debt was secured and unless sufficient security was given for the new advance which he desired him to make. The debtor agreed to the suggestion and probably in an endeavour

(1) (1899) A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Manson 264.

(2) 53 Ind. Cas. 175.

* *See* (1897) 2 Q. B. 19—[*Ed.*]

to keep his business afloat as long as possible he granted the mortgage. These circumstances clearly show that the real intention of the debtor was not to prefer one creditor to other creditors, but to gain a substantial advantage for himself. I am satisfied that the transfer was not fraudulent within the meaning of section 54 of the Provincial Insolvency Act, and that it must be upheld. It has, however, been argued on behalf of the respondent that the existence of the debts has not been fully established and that the finding of the learned Judge of the Court below on this point is erroneous. With this contention I am unable to agree. The previous *hundis* have been produced and the last balance proved by the scribe, Suraj Mal. The advance of Rs. 1,800 at the time of the mortgage and the *hundi* of the 7th of March 1920 for Rs. 1,000 were not contested in the Court below, and it is not competent to the respondent to question these two items in this Court. The debts in question have, in my opinion, been fully proved, and I do not see any force in the contention that they were not due.

Mr. Monohar Lal's next contention is that under section 54 of the Provincial Insolvency Act it was only the Receiver who could avoid the mortgage and no other person. In view of my finding, however, on the first question that the mortgage was valid, it is unnecessary to give a finding on this question.

I accept the appeal, set aside the order of the Court below and upheld the mortgage.

Z. K. *Appeal accepted.*

PATNA HIGH COURT.

CIVIL REVISION NO. 228 OF 1923.*
August 13, 1923.
Present:—Mr. Justice Kulwant Sahay.
Kumar RAMANAND SINHA AND ANOTHER—PETITIONERS
versus
BAJIT JHA AND ANOTHER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92, O. XXII, r. 4—Execution of decree—Sale, application to set aside—Death of decree-holder—Notice to legal representatives, whether necessary.

Although the provisions of the Civil Procedure Code relating to substitution on the death of a party are not applicable to execution proceedings, an execution-sale cannot be set aside unless notice of the application has been given to all persons affected thereby, as required by the proviso to clause (2) of r. 92 of O. XXI of the Code; [p. 865, col. 1.]

During the pendency of an application by a judgment-debtor to set aside an execution sale one of the decree-holder auction-purchasers died and his legal representatives were not properly substituted in his place and no notice was served upon them. Eventually the sale was set aside:

Held, that, in the present case, no notice having been given to the legal representatives of the deceased decree-holder auction-purchaser, the order setting aside the sale was liable to be set aside. [p. 865, col. 1.]

Jogendra Chandra Ray v. *Shyam Das*, 1 Ind. Cas. 168; 9 C. L. J. 271; 36 C. 543; *Jagat Tarini Dasi* v. *Rakhal Chandra Tewary*, 3 Ind. Cas. 324; 10 C. L. J. 396; 14 C. W. N. 752, distinguished.

Appeal from an order of the Additional Subordinate Judge, Bhagalpore, dated the 28th February 1923, setting aside an order of the Munsif, Madhipura, dated the 13th December 1922.

Mr. *Jagannath Prasad*, for the Petitioners.

JUDGMENT.—This is an application in revision by the decree-holders auction-purchasers inviting this Court to revise the order of the Additional Subordinate Judge of Bhagalpore whereby he set aside the order of the Munsif of Madhipura and set aside the auction-sale. The facts are shortly these: Raja Kalanand Sinha and Raja Kirtyanand Sinha of Baneli obtained a rent-decree against the opposite party on the 14th January 1916. On the 1st June 1918 application was made for execution of this decree and after service of the usual notices the holding was sold on the 5th September 1918 and purchased by the decree-holders themselves. The sale was confirmed on the 21st November 1918, and on the 13th November 1920 about two years after the confirmation of the sale an application was made by the judgment-debtors for setting aside the sale under the provisions of O. XXI, r 90 of the Code of Civil Procedure. The Munsif dismissed the application by his order dated the 4th August 1921 apparently on the ground that the application was barred by limitation without

deciding the case on merits. The judgment-debtors went in appeal against this order to the District Judge who set aside the order of the Munsif and remanded the case for trial on merits. Before the case was heard on remand, one of the decree-holders Raja Kalanand Sinha died on the 22nd September 1922. Thereupon on the 7th November 1922 the judgment-debtors filed an application for substitution of his two sons Kumar Ramanand Sinha and Kumar Krishnanand Sinha as his heirs. Kumar Krishnanand Sinha was a minor and is still a minor. No notice appears to have been served upon the two sons of Raja Kalanand Sinha and no guardian was appointed for the minor son Kumar Krishnanand Sinha. Notice appears to have been served on Awadh Bihari Sinha who was the manager under a power-of-attorney executed in his favour by the late decree-holder, Raja Kalanand Sinha. At the time of the hearing objection was taken by the other decree-holder, Raja Kirtyanand Sinha, that the application for setting aside the sale could not proceed in the absence of the heirs of the other decree-holder, Raja Kalanand Sinha, and that no notice had been properly served on the heirs and no guardian had been appointed for the minor heir. The learned Munsif gave effect to this objection and, although he found upon the merits that the sale ought to be set aside on account of irregularities in the conduct of the sale and inadequacy of price caused thereby, yet he rejected the application on the ground that the heirs of Raja Kalanand Sinha had not been regularly brought on the record and had not been served with notices.

Against this order the judgment-debtors went on appeal to the District Judge. The appeal was ultimately heard by the learned Additional Subordinate Judge, and he held that the provisions in the Code of Civil Procedure as to substitution did not apply to execution proceedings and that, at any rate, service upon Awadh Bihari Sinha, the manager of the late Raja Kalanand Sinha, was a good service upon his heirs. He accordingly set aside the order of the Munsif and allowed the application of the judgment-debtors and set aside the sale.

The decree-holders have applied to this Court for revision of this order of the learned Additional Subordinate Judge. The first point taken by the learned Vakil for the petitioners is, that the learned Subordinate Judge has acted illegally in the exercise of his jurisdiction inasmuch as he has made an order setting aside a sale without giving notice to all persons affected by his order. This objection is, in my opinion, well founded and ought to prevail.

The learned Additional Subordinate Judge relies on the cases of *Jogendra Chandra Roy* v. *Syam Das* (1) and *Jagat Tarini Dasi* v. *Rakhal Chandra Tewary* (2).

Those two cases have no bearing on the facts of the present case. In the case of *Jogendra Chandra Roy* v. *Syam Das* (1) the appeal related to an order rejecting the objections of the judgment-debtor to the execution proceedings under section 244 of the Code of 1882. The point that was raised before their Lordships in that appeal was that upon the death of one of the judgment-creditors an application for substitution ought to have been made to the Original Side of the High Court of Calcutta which had passed the decree and that, in the absence of an order from that Court, the District Court to which the decree has been transferred for execution had no authority to proceed with the execution at the instance of the other judgment-creditors, one of whom had obtained by survivorship the interest of the deceased creditor. Their Lordships held that on an examination of the provisions of the Code it was obvious that there was no foundation for this contention. They held that the Code of Civil Procedure did not expressly provide for an application for substitution under the circumstances of that case. Their Lordships observed that there was no provision which rendered necessary the actual substitution of the name of the legal representative for the validity of the proceedings in execution. Section 232 of the Code of 1882 merely required that

(1) 1 Ind. Cas. 168; 9 C. L. J. 271; 36 C. 543.
(2) 3 Ind. Cas. 324; 10 C. L. J. 396; 14 C. W. N. 732.

the legal representative should apply for execution of the decree and that his name should be brought on the record. This provision was substantially complied with in that case.

The facts of the present case are quite diffirent. Here we are dealing with an application by the judgment-debtor for setting aside a sale under O. XXI, r, 90 and under O. XXI, r. 92, clause (2), it is provided that no order shall be made setting aside a sale unless notice of the application has been given to all persons affected thereby. There can be no doubt that the heirs of Raja Kalanand Sinha are affected by the order setting aside the sale and under the express provision of the proviso to clause (2) of r. 92, O. XXI, no order setting aside the sale can be made in their absence.

Similarly, the case of *Jagat Tarini Dasi* v. *Rakhal Chandra Tewary* (2) has no application to the facts of the present case.

Therefore, the order setting aside the sale in the absence of the heirs of Raja Kalanand Sinha must be set aside.

The next point urged by the learned Vakil on behalf of the petitioners is that the learned Additional Subordinate Judge was wrong in holding that service of notice on the manager Awadh Bihari Sinha was a good service as against the heirs of the deceased decree-holder. The learned Subordinate Judge has for this purpose relied on the provisions of O. V, r. 14 of the Code of Civil Procedure. This rule provides that, where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property. It has been argued that this rule has absolutely no application to the facts of the present case. In the first place, the present proceeding is not a suit to obtain relief respecting, or compensation for wrong to, immoveable property; in the second place, it has not been shown that no service could be effected on the defendant in person or that the defendant had no agent empowered to accept the service, and, in the third place, it has not been shown that Awadh Bihari upon whom the service is said to have been made was an agent of the defendant in charge of the property. He was the manager of the late decree-holder and there is nothing to show that Awadh Bihari Sinha was an acredited manager of the heirs of Raja Kalanand Sinha. I am, therefore, of opinion that the learned Additional Subordinate Judge was wrong in holding that the service upon Awadh Bihari Sinha was a good service so far as the heirs of Kalanand Sinha are concerned. Moreover, the learned Subordinate Judge has overlooked the fact that one of the heirs, Kumar Krishnanand Sinhai, still a minor and that no guardian was appointed for him. Even if the service be held to be a good service so far as Kumar Krishnanand Sinha is concerned, his position is the same as if he was not joined in the application inasmuch as no guardian was appointed to act for him in the present proceeding. On these grounds the order of the learned Subordinate Judge must be set aside.

The question then is as to whether the order of the learned Munsif should be confirmed. In my opinion, having regard to the findings of the learned Munsif that the sale was bad on account of irregularities in the execution proceeding and inadequacy of price, the case should go back to the Munsif for disposal according to law after appointing a guardian for Kumar Krishnanand Sinha and serving the proper notices on the heirs of Raja Kalanand Sinha.

There will be no order for costs.

Z. K. *Case sent back.*

PRITAM SINGH v. SOBHA SINGH.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2560 OF 1919.

November 23, 1922.

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

PRITAM SINGH—DEFENDANT—APPELLANT

versus

SOBHA SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVI, r. 1—Witnesses, summoning of—Court, duty of.

Under O. XVI, r. 1 of the Civil Procedure Code a party has an absolute right to summon witnesses and, so long as he pays the necessary expenses, to insist that their attendance shall be enforced. It does not matter that a party had himself originally undertaken to bring the witnesses and has failed to do so, nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal of the suit. The Court may in either of those cases refuse to adjourn the hearing for the attendance of the witnesses, but it has no power to refuse to issue summonses. The only case in which the Court has power to refuse to issue summonses is, where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue the summons. [p. 867, col. 2; p. 868, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Amritsar, dated the 3rd September 1919.

Lala *Faqir Chand*, for the Appellant.

Mr. *L. Saunders*, for the Respondent.

ORDER.—This and the connected Appeal No. 2648 of 1919 arise out of a suit instituted on the 19th November 1917 to enforce a bond dated the 10th January 1914 executed by defendant No. 1. Defendant No. 2 who is a minor and a brother of defendant No. 1 was joined as defendant on the ground that he was a member of a joint Hindu family, and as such liable for the payment of the bond in question. The consideration for the bond was alleged in the plaint to have been previous debts due on certain *hundis* drawn from time to time by defendant No. 1 in favour of the plaintiff, and the suit was for the recovery of Rs. 6,750 principal and interest, after giving credit for Rs. 1,550 alleged to have been received by the plaintiff prior to the institution of the suit. The defendant admitted the execution of the bond and of the *hundis* in lieu of which the bond was admittedly made; but denied the receipt of the consideration on the *hundis*, and contended that they were merely accommodation *hundis* not intended to create any liability on the part of the defendant but drawn for the purpose of enabling plaintiff to raise money thereon for his own personal benefit. Defendant No. 2 denied that he was a member of a joint Hindu family or that he was in any way liable for the *hundis* or the bond in suit. The following issues were framed by the Court below:—

1. Whether the bond in dispute was for consideration and on account of mine *hundis* in favour of plaintiff?

2. If *hundis* were the basis of consideration, were those *hundis* only accommodation *hundis* and without consideration?

3. Is defendant No. 2 also liable?

The learned Senior Subordinate Judge found infavour of the plaintiff on the first two issues, and held that the defendant had failed to establish his plea that the *hundis* were without consideration. As to the third issue the finding was that defendant No 2 was not a member of a joint Hindu family, and consequently not liable for the plaintiff's claim. A fourth issue relating to the liability of defendant No. 1 to pay interest was also framed when the evidence of the parties had practically been concluded, and found against the plaintiff. The result of these findings was, that a decree for Rs. 5,250 only, being the principal amount due on the bond, was passed in favour of the plaintiff, and his suit against defendant No. 2 was dismissed in its entirety with costs.

Two appeals have been preferred against this decree to this Court, one by defendant No. 1 in which the finding of the Senior Subordinate Judge that the *hundis* were for consideration and not merely accommodation *hundis* as alleged by the defendant is impugned, and the other by the plaintiff in which it is urged that the Court below has erred in not allowing interest and in saddling plaintiff with the costs of defendant No. 2.

Mr. Fakir Chand who has addressed us at considerable length on behalf of the defendant-appellant has frankly admitted that, on the record as it stands, he is unable to challenge the correctness of the find

ing arrived at by the Court below that the *hundis* were for consideration, and that they were not accommodation *hundis*, but he strenuously argues that the learned Senior Subordinate Judge has committed a serious error of law in dispensing with the attendance of certain witnesses whose evidence was very material for the purposes of his case, and who, if they had been allowed to be produced, would have proved to demonstration that the *hundis* in question were without consideration, and that when they were drawn it was never intended that the defendant would be liable thereon.

A further contention as to the frame of the suit is also raised, and it is contended that the suit as laid is not maintainable, and that it should have been instituted against the firm of Jamiat Singh-Pritam Singh in which the plaintiff himself was also a partner. This is, however, an entirely new contention which was never raised in the Court below, and may necessitate the taking of further evidence. There was no issue on the point, and the attention of the lower Court was never drawn to the fact that an issue in respect thereof was necessary and should be framed. Indeed, the grounds of appeal to this Court do not contain any allegation that the suit against defendant No. 1 alone did not lie, and that the liability, if at all, rested with the firm of Jamiat Singh Pritam Singh. On the other hand, from the written statement filed in the Court below and the grounds of appeal taken in this Court, it is clear that the sole point on which the parties went to trial was whether the *hundis* were or were not accommodation *hundis* drawn for the sole benefit of the plaintiff. In these circumstances, we cannot allow the defendant to make out a new case at the last stage simply because in the written statement there is a vague reference to the *hundis* being drawn by the firm of Jamiat Singh-Pritam Singh.

As to the question that the Senior Subordinate Judge was in error in not giving defendant a full opportunity for the production of his witnesses, it appears that on the 23rd and 24th October 1918 the defendant examined a large number of witnesses on his behalf but was unable to close his case as some of his witnesses, though served for those dates, had not attended on account of their illness. The case was accordingly postponed to 23rd November 1918. On the 23rd November the parties put in a joint application stating that the case was likely to be compromised, and that a further adjournment should be granted in the case. The case was adjourned on this application to 16th December 1918. On the 16th December the Senior Sub-Judge was on leave, and the case had to be adjourned again for the 15th January 1919. On this date the defendant examined seven more witnesses, and prayed for a further adjournment on the ground that two of his witnesses who had been served had not attended, while two others whom he had summoned through Court had not been served. The Court disallowed any further adjournment for the production of these witnesses, and closed the case. It is the propriety of this order which is impugned by Mr. Faqir Chand, and it is contended that, under the circumstances detailed above, the Court was not justified in closing the case and in proceeding to judgment until these witnesses had been re-summoned and examined on behalf of his client.

In our opinion the contention is well founded and must prevail, and the case must go back for this additional evidence to be taken though we are very doubtful if any useful purpose will be served by this additional evidence coming on the record. Under O. XVI, r. 1, a party has, in our opinion, an absolute right to summon witnesses, and, so long as he pays the necessary expenses, to insist that their attendance shall be enforced. It has been held in a large number of cases enumerated at page 503 of Mulla's Civil Procedure Code that, "It does not matter that a party has himself originally undertaken to bring the witnesses and has failed to do so, nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal of the suit. The Court may in either of these cases refuse to adjourn the hearing for the attendance of the witnesses, but it has no power to refuse to issue summonses." The only case in which the Court has power to

refuse to issue summonses is where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue summons.

In the case before us diet money and other expenses of the witnesses had probably been paid in time. Summonses had really been allowed to be issued, and two of the witnesses had indeed been served but failed to put in appearance, while the other two were not served apparently through no fault of the defendant. In these circumstances, the Court had no justification whatever to close the defendant's case and the proper course for it to adopt was to proceed under O. XVI, r. 10, so far as the two witnesses who had been served and had not attended were concerned, and to issue fresh summonses for the attendance of the other two who had not been served.

The order of the learned Senior Subordinate Judge refusing to enforce the attendance of the four witnesses in question is clearly wrong, and we accordingly remand the case to him under O. XLI, r. 28, and direct that he shall record the evidence of these witnesses, and having taken their evidence return it to this Court within three months.

Case remanded.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 104 OF 1923.

September 18, 1923.

Present :—Mr. Dalal, J. C.

BHAGWAN DUT AND ANOTHER—APPLICANTS

versus

BRIJ BHUKHAN AND ANOTHER—OPPOSITE PARTY.

U. P. Land Revenue Act (III of 1901), s. 111 (1) (c), (3)—Partition proceedings—Objection to title of applicant—Assistant Collector, order of—Appeal to Civil Court.

Where an objection regarding title is filed in a partition proceeding, three courses only open to an Assistant Collector, (1) to decline to grant the application for partition until the question is determined by a competent Court, (2) to require any party to the case to institute a suit in the Civil Court, or (3) to proceed to inquire into the merits of the objection. If the Assistant Collector follows neither of the first two courses he must be taken to have followed the third course under section 111 (1) (*c*) of the U. P. Land Revenue Act and as such his order is appealable to the Civil Court under clause (3) of the section. The defective and perfunctory nature of the inquiry cannot take the matter out of the jurisdiction of the Civil Appellate Court. [p. 869, col. 2.]

Application against an order of the District Judge, Gonda, dated the 3rd January 1923.

Mr. *M. Wasim*, for the Applicant.

Mr. *Wasi Hasam*, for the Opposite Party.

JUDGMENT.—One of the applicants, Bhagwan Dut, applied to the Assistant Collector for partition under section 107 of the Land Revenue Act. Brij Bhukhan and Badri were opposite parties and made parties defendants to the application as they were co-sharers in the *Mahal*. On 9th February 1922 Brij Bhukhan and Badri put in an objection that, out of the share claimed by the applicants for partition, a certain share really belonged to them and not to the applicant Bhagwan Dut and another party to the application Dudh Nath. The hearing of the objection was adjourned on 10th February and on 28th February the Assistant Collector recorded the statement of the objector. On that date he dismissed the objection after making the following observation: "The objector admitted before me the above statement that the mutation was made over a year ago, then said, he did not know, again said, he came to know of the mutation three months ago. A perusal of the copy of the *khewat* filed by the applicant which is on the file shows that mutation was effected by order of the 28th September 1920. This objection apparently is simply to delay the partition proceedings. If the applicant wants to fight out a regular suit in the Civil Court he is at liberty to do so. Until the entries in the *khewat* are changed by order of a competent Court the partition proceedings should continue. The objector had plenty of time

to file a suit, but he did not do so. The objection is rejected." The objector went in appeal to the Civil Court, treating the order of the Assistant Collector as an order under section 111 (3) of the Land Revenue Act. The learned District Judge was of opinion, as any other Court would have been, that the enquiry made by the Assistant Collector was unsatisfactory and directed the Assistant Collector to remit a finding after proper inquiry. I am told such a finding has now been remitted and the appeal is pending in the Court of the District Judge. The order of the District Judge was passed under O. XLI, r. 25 from which no appeal lay to this Court, so the applicants were entitled to apply in revision under section 115 of the Code of Civil Procedure.

It is argued here that the District Court had no jurisdiction because the Assistant Collector had not proceeded under section 111 (*c*) when he dismissed the objection. I have considered the arguments of the applicant's learned Counsel, but have come to the conclusion that the Assistant Collector did take proceedings under section 111 (*c*). The case is similar to the one reported as *Guthal Chaudhri* v. *Jogi Chaudhri* (1) which was a Bench decision. What happened there may be summed up in the words of the learned Judge who delivered the judgment: "Upon the respondent applying for partition the present appellants filed an objection laying claim to an 8-pie share out of the 5-anna 4-pie share which the respondent had sought to convert into a separate *mahal*. The Assistant Collector who was entrusted with the partition proceedings upon receiving this objection passed upon it an order of a singular nature. He in that order set out that in his opinion this objection does not relate to a question of proprietary title, but is really meant to defeat partition and after making this declaration about the nature of the objection he directed that the objection and other partition papers be forwarded to the Collector." On these facts the learned Judges came to the conclusion that the order must be taken to be a rejection of the objection raised by the appellants, and so it was a decree passed upon the objection before the Assistant Collector and as such open to appeal to the District Judge. This appears to me to be a reasonable view to take of the defective proceedings of the Assistant Collector in the present case. When such an objection is filed there are only three courses open to the Assistant Collector to decline to grant the application for partition until the question in dispute has been determined by a competent Court, to require any party to the case to institute a suit in the Civil Court or to proceed to inquire into the merits of the objection. It is clear that the Assistant Collector went on with the partition proceeding, so he could not have dismissed the application for partition nor did he require any party to institute a suit in the Civil Court. He could have only adopted the third course open to him and proceeded to inquire into the merits of the objection. The defective and perfunctory nature of the inquiry cannot take the matter out of the jurisdiction of the Civil Appellate Court. The appellant's learned Counsel referred to the case reported as *Mohammad Shahamat Khan* v. *Azizunnissa* (2), but in that case the Assistant Collector had given an opinion that the matter in dispute as to title had already been determined by a Court of competent jurisdiction. This was the reason for the distinction between that reported case and the case reported as *Thakur Baldeo Bakhsh* v. *Thakur Balbhadr Singh* (3). The working of mind of the First Court is not direct but some of the reasons in its order quoted above are those against the objector's title. Those reasons are that the name of the applicant for partition was entered in the *khewat*, that the objection of the defendant was only aimed at delaying partition proceedings, and that the objector had let long and valuable time pass by without suing in the Civil Court. Unless the First Court had some intention of holding that the objector had no title

(1) 3 A. L. J. 617; 4 W. N. (1906) 239.

(2) 7 O. C. 161.

(3) 6 O. C. 372.

to the property claimed by him no cause would arise for his underlining these facts.

As a Court of first appeal I would have considered it the better course to remand the suit under O. XLI, r. 23, but at the present stage of the proceedings I do not think it desirable to make any alteration in the order passed by the District Judge.

I dismiss this application with costs.

Application dismissed.

M. D. J. & N. H.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 2004 OF 1922.
(CIVIL MISCELLANEOUS NO. 540 OF 1922.)
February 20, 1923.

Present:—Mr. Justice Martineau.

HIRA SINGH—DECREE-HOLDER—APPELLANT

versus

MADHO, MINOR, THROUGH HUSSAIN KHAN—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Decree satisfied by temporary alienation of judgment-dbtor's land — Executing Court, power of, to modify terms of alienation.

A money-decree was fully satisfied by the grant of a lease for 20 years to the decree-holder of some land belonging to the judgment-debtor and the case was sent to the record-room. Some years afterwards, the Executing Court, on the application of the judgment-debtor, cancelled the remaining portion of the lease and directed that possession of the land be restored to the judgment-debtor on his paying to the decree-holder a certain sum of money which was found on calculation to be due to the decree-holder;

Held, that the Executing Court had become *functus officio* as soon as the decree was fully satisfied by the grant of the lease, and was not, therefore, competent subsequently to reduce the term of the lease which had been given in full satisfaction of the decree.

Madho Prasad v. *Mahtab Chand*, 8 Ind. Cas. 410, relied on.

Miscellaneous second appeal from an order of the District Judge, Amritsar, dated the 19th July 1922, affirming that of the Munsif, First Class, Amritsar, dated the 31st May 1922.

Lala *Guran Ditta*, for the Appellant.

JUDGMENT.—A money-decree was satisfied in 1912 by a temporary alienation to the decree-holder of some land belonging to the judgment-debtor. A *rubakar* dated the 19th June 1912 from the Court to the Settlement Officer shows that the Court approved of the proposal of the *Tahsildar* for giving the land on lease to the decree-holder for 20 years. The decree-holder was accordingly put in possession and on the 2nd October 1912 the Court ordered that the case should be sent to the record-room, the decree having been fully satisfied.

The Executing Court has now, on the application of the judgment-debtor, ordered that the lease be cancelled, and the possession of the land restored to the judgment-debtor on his paying Rs. 433-6-0 which is the balance found, on calculation, to be due to the decree-holder. That order has been upheld by the District Judge, and the plaintiff has filed a second appeal, contending that when the decree had been fully satisfied by the leasing of the land for 20 years to the decree-holder the Executing Court became *functus officio* and was not competent to order that the land should be given back to the judgment-debtor before the expiry of the period of the lease. This contention is, in my opinion, correct. Counsel for the appellant has cited *Madho Prasad* v. *Mahtab Chand* (1) in which it was held that where a portion of the property given on lease in execution of the decree of a Civil Court had passed out of the possession of the lessee, the Executing Court having become *functus officio* when the lease was given, had no jurisdiction to authorize the grant of a fresh lease or to extend the term of the original lease. Similarly, in the present case it must be held that the Court was not competent to reduce the term of the lease which was given in full satisfaction of the decree, in 1912.

I accordingly accept this appeal, set aside the orders of the Courts below, and dismiss the judgment-debtor's application. The respondent will pay the appellant's costs throughout.

Z. K.

Appeal accepted.

(1) 8 Ind. Cas. 410.

KULDIP SAHAY *v.* HARIHAR PRASAD JHA.

PATNA HIGH COURT.

STAMP REFFRENCE.

SECOND CIVIL APPEAL No. OF 1923.

August 14, 1923.

Present:—Justice Sir Jwala Prasad, KT.

KULDIP SAHAY AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARIHAR PRASAD JHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7 (iv) (f)—Suit for accounts—Appeal by defendant—Valuation of appeal.

In an appeal against a preliminary decree for accounts where the defendant-appellant does not deny his liability to render accounts but wants certain restrictions to be placed upon the power of the plaintiff to take accounts from him, he is free to put his own valuation on the memorandum of appeal and is not bound by the valuation of the plaintiff in the plaint, particularly when it is difficult to assess the relief sought by the defendant-appellant in appeal. [p. 872, col. 2.]

Messrs. *Shiva Saran Lal, Shiveshwar Dayal, Raghunandan Prasad* and *Aditya Narain Lall*, for the Appellants.

JUDGMENT.—This is a reference to me as a Taxing Judge under the Court-Fees Act.

The point raised is not free from difficulty and I was inclined to refer it to a larger Bench. I, however, understand from the decision of the learned Chief Justice, dated the 9th February 1918, following the case *Khachera* v. *Kharag Singh* (1), and also ascertained from the learned Chief Justice that there is no power to refer. Therefore, I must deal with the question myself.

The question for determination is, what Court-fee is payable upon the memorandum of appeal filed by the defendant. The reliefs in the plaint were for possession and accounts. The Trial Court dismissed the suit for cancellation of the lease and recovery of *khas* possession, but it decreed the suit for accounts for 1322 and 1323. In its judgment the Court observed that the plaintiffs were not entitled to control or criticise the accounts. Against the decree the plaintiffs appealed to the Court below. The lower Appellate Court *modified* the decree of the Trial Court by giving to the plaintiffs a right to examine and criticise the accounts. The defendants have appealed to this Court against this part of the decree of the Court below.

The plaintiffs valued the relief as to accounts at Rs. 1,159-9-6. This was the valuation also put in the memorandum of appeal filed by the plaintiffs in the Court below. The plaintiffs paid a Court-fee of Rs. 85 in both the Courts below.

The defendants in the appeal in this Court paid a Court-fee of Rs. 10 only. Upon the objection by the Stamp Reporter it is now conceded by the appellants that they have to pay an *ad valorem* Court-fee, but they want to amend the valuation of the appeal by fixing Rs. 200 instead of Rs. 1,159 odd, the valuation given in the plaint and in the memorandum of appeal filed in the Court below by the plaintiffs. The question is whether the appellants can be allowed to put their own valuation upon the relief sought in the memorandam of appeal.

The appellants rely upon section 7, clause (iv), sub-clause (*f*) of the Court-Fees Act which says "In suits for accounts" the amount of fee payable is "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal," and "in all such suits the plaintiff shall state the amount at which he values the relief sought."

I have carefully considered the report of the Stamp Reporter and that of the Taxing Officer and the authorities referred to.

Barring the decisions upon suits for mesne profits and accounts based on partnership, etc., two cases appear to be nearer the case in hand: *Srinivasacharlu* v. *Perindevamma* (2), *Kanhaiya Lal* v. *Seth Ram Sarup* (3). The former is a Full Bench decision of the Madras High Court. In that case the plaintiff had obtained a preliminary decree for account. The defendant appealed against that decree and it was held that the defendant was bound by the valuation in the plaint and was not

(1) 7 Ind. Cas. 315; 7 A. L. J. 842; 33 A. 20;

(2) 33 Ind. Cas. 602; 39 M. 725; 30 M. L. J. 402.

(3) 66 Ind. Cas. 841; 44 A. 542; 20 A. L. J. 416; 4 U. P. L. R. (A.) 99; (1922) A. I. R. (A.) 228.

at liberty to make a fresh valuation for the purpose of his appeal. No reason has been assigned in that case, and in fact the judgment does not discuss the point. Wallis, C. J., merely says—"We are not prepared to differ from the decisions in *Samiya Mavali* v. *Minammal* (4) and *Banwari Lal* v. *Sheo Sankar Misser* (5)." The former is a case of a suit brought for declaring a sale-deed invalid on certain grounds stated by the plaintiff. The value of the suit was Rs. 2,000, the amount mentioned in the deed. The plaintiff obtained a decree and the defendants preferred a second appeal to the High Court. There the value of the relief was well known and, therefore, the defendant was not allowed to modify the value given in the plaint. The latter is a case of recovery of possession with mesne profits. The plaintiff obtained a decree for possession and for mesne profits claimed anterior to the suit. The defendant in these circumstances was not allowed to modify the valuation given by the plaintiff. These cases have no application to the present one.

In the Allahabad High Court Mr. Justice Piggott, in the case of *Kanhaiya Lal* v. *Seth Ram Sarup* (3) considered the aforesaid decision of the Madras High Court and in a very elaborate judgment allowed the defendant in an appeal against a preliminary decree to put his own valuation on the memorandum of appeal, holding that he was not bound by the valuation of the plaintiff in his plaint.

The two decisions are not necessarily contradictory. The Madras High Court decision is against a preliminary decree for accounts. In the Allahabad case the defendant did not deny his liability but took exception only to the form of the decree and contended that it ought to have contained a specification of the period for which liability to render accounts should extend and an adjudication upon the question which the defendant had raised as to the period of limitation applicable to a portion of the plaintiff's claim.

(4) 23 M. 490; 10 M. L. J. 340; 8 Ind. Dec. (N. S.) 744.
(5) 1 Ind. Cas. 678; 13 C. W. N. 815.

In the present case the defendant does not dispute the liability to render accounts, but he wants certain restrictions to be placed upon the right of the plaintiff to take accounts from him. It is difficult to assess the relief sought by him in the appeal. His relief in the appeal is not the same as that of the plaintiff in the plaint. The plaintiff's relief was a simple one for accounts and he must have known the value of that relief and, therefore, he was bound to mention it in his plaint for the purpose of levying Court-fee. The defendant's relief, on the other hand, is such as is not capable of a correct estimate. He is not bound by the valuation put by the plaintiff in his plaint. He is, therefore, at liberty to fix his own valuation.

The provision in the Court-Fees Act referred to above, [section 7, clause iv (*f*)], leaves the appellants free to value the relief sought in the appeal and he is bound to pay Court-fees according to the amount at which he values the relief sought. The principle that a party will not be allowed to value his relief arbitrarily does not arise in the present case in view of the very nature of the relief sought in the appeal by the defendant.

Therefore, I hold that the defendant-appellant is entitled to value the relief at Rs. 200 which he seeks to do and the Court-fee payable will be on that valuation.

M. D. J. & N. H. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL, NO. 276 OF 1922
May 16, 1923.
Present—MR. Justice Daniels.
SHEO DAN SINGH—PLAINTIFF—APPELLANT
versus
HABIB ULLAH KHAN—DEFENDANT—RESPONDENT.

Hindu Law—Alienation—Ancestral property—Money payable by successful pre-emptor, whether antecedent debt—Legal necessity—Re-purchase o

SHEO DAN SINGH *v.* HABIB ULLAH KHAN.

property sold by separated brother—Transaction by manager ratified by son—Estoppel.

Money payable by a successful plaintiff in a pre-emption suit is not an antecedent debt for the purpose of supporting an alienation of the family property.

Chatarbhuj v. *Gobind Ram*, 74 Ind. Cas. 571; 21 A. L. J. 348; 45 A. 407, followed.

The re-purchase of property sold by a separated brother is not a purpose which constitutes legal necessity under Hindu Law.

A transaction by a manager of a Hindu family can be ratified by his son so as to estop the latter from afterwards disputing it.

Narayana Aiyar v. *Ram Aiyar*, 20 Ind. Cas. 625; 38 M. 396; (1913) M. W. N. 588; 14 M. L. T. 89; 25 M. L. J. 219, followed.

If the person entitled to avoid sale of property leads the purchaser to believe that the title is good, the purchaser is certainly prejudiced if the party making representation is allowed to resile from it and to attack the purchaser's title after an interval of several years.

Where, therefore, in a mutation proceeding a person stated that he had no objection to the vendee's name being entered in the records against the property sold by his father;

Held, that the person was estopped from challenging the sale.

Second appeal against a decree of the Second Additional District Judge, Gorakhpur, dated the 25th of November 1921.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—This was a suit by the plaintiff-appellant to recover possession of property alienated by his father Jeoraj Singh under two sale-deeds in the years 1913 and 1916, respectively, on the ground that these were transfers without legal necessity. The suit has been decreed as regards the property covered by the first sale-deed and this property is not now in dispute. It has been dismissed as regards the property covered by the second sale-deed and as to this the plaintiff appeals. The dispute relates to one single item but this item is by far the largest item out of the sale consideration. The sale-deed in question was for a sum of Rs. 9,565. Out of this Rs. 1,562-14-0 was set off against the amount of a previous bond executed by Jeoraj Singh on 29th July 1913. The principal amount in this bond had been Rs. 930 and with interest it had amounted up to Rs. 1,562-14-0 at the time of sale. The main item in this bond of Rs. 930 was a sum of Rs. 800 which Jeoraj Singh had to pay in satisfaction of a pre-emption decree which he had obtained for certain property. It has been recently held by a Bench of this Court, overruling a previous decision to the contrary, that money payable by the successful plaintiff in a pre-emption suit is not antecedent debt for the purpose of supporting an alienation of the family property, [*Chatarbhuj* v. *Gobind Ram* (1)]. It does not follow from this that the payment of a pre-emption decree might not be binding on the family on the ground of legal necessity or benefit to the estate. The difficulty in this case is that, both the Courts have found that this particular transaction was not a prudent transaction for Jeoraj Singh to have entered into; in fact, the Trial Court described it as having brought the ruin of the family. The lower Appellate Court says that the transaction was one which could not be financially successful. The learned Judge, however, seems to think that there was a sort of pious duty on Jeoraj Singh to re-acquire this property because it originally belonged to two of his separate brothers. The re-purchase of property sold by a separated brother is not, however, a purpose which constitutes legal necessity under Hindu Law. The decree, therefore, cannot be supported on this ground.

The second ground on which the learned Judge has dismissed the suit as regards this sale-deed is, that the transaction was subsequently ratified by the present plaintiff Sheodan Singh. Mutation was applied for on this sale-deed and Sheodan Singh was examined as a witness. He had objected regarding certain other property as to which mutation was sought. With regard to the property covered by this sale-deed he said explicitly he had no objection to mutation being made and further on in his statement he said that he had no objection whatever regarding the and of this sale-deed.

It is not denied by the appellant that a transaction by the manager can be ratified by the son so as to estop the latter from afterwards disputing it.

(1) 74 Ind. Cas. 571; 21 A. L. J. 348; 45 A. 407.

Narayana Aiyar v. *Ram Aiyar* (2) is a case in point and Trevelyan's Hindu Law, Second Edition, pages 306 and 486, has also been referred to. The appellant's contention is that the plaintiff's representation did not amount to acquiescence in the transaction or create any estoppel against him. The Trial Court took the view that all that the plaintiff did was to consent to mutation of names and that he did not say in terms that he accepted the sale. This is a very narrow view to take. When the plaintiff stated not only that he had no objection to mutation but that he had no objection as regards the property covered by this sale-deed, the purchaser would naturally understand him to mean that he accepted the transaction as binding upon him. In all probability the plaintiff at that time did so accept it. Having regard to the strong feeling which exists in Indian families against losing property which had once belonged to the family, the probability is that the father and son were alike desirous to recover the property for which they had got a pre-emption decree. But, however that may be, I have no doubt that the learned Judge was right in holding that this was a clear representation by the plaintiff that he accepted the sale-deed as a valid transaction binding on him. It is urged that the defendant was not prejudiced by the representation. With this I cannot agree. If the defendant had not been led to believe that the plaintiff accepted the sale as a good sale he might have taken steps to give up the property and get back his purchase-money and so have saved the expenses and worry of the present litigation, which has lasted for over three years. If the person entitled to avoid sale of property leads the purchaser to believe that his title is good, the purchaser is certainly prejudiced if the party making the representation is allowed to resile from it and to attack the purchaser's title after an interval of several years. I, therefore, agree with the Court below that the plaintiff is estopped from disputing the defendant's title under this sale-deed. I accordingly dismiss the appeal with costs including fees in this Court on the higher scale.

K. S. D. & M. A. A. *Appeal dismissed.*

(2) 20 Ind. Cas. 625; 38 M. 396; (1913) M. W. N. 588; 14 M. L. T. 89; 25 M. L. J. 219.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 485 OF 1922.
August 11, 1923.
Present:—Mr. Hallifix, A. J. C.
KARU—PLAINTIFF—APPELLANT
versus
PANDIA—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—Civil Procedure Code (Act V of 1908), Sch. III, r. 11—Leases pendente lite, *validity of—Test.*

Under section 52 of the Transfer of Property Act and rule 11 of the Third Schedule to the Civil Procedure Code leases *pendente lite* cannot be avoided if the granting of them was an ordinary and reasonable incident of *interim* beneficial enjoyment, *i.e.*, if it can be shown that they are of such a nature that the lessor would have granted them even if he had known that he was to continue indefinitely as the owner of the property. [p. 875, col. 1.]

Sri Gajapati Radhikapatla Mahadevi Garu v. *Sri Gajapati Radhamani Mahadevi Garu*, 7 M. 96; 2 Ind. Dec. (N. S.) 652, followed.

Appeal from the decree of the District Judge, Bhandara, in Civil Appeal No. 9 of 1922, dated the 12th August 1922.

Messrs. *N. G. Bose* and *P. A. Pandit*, for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The plaintiff in this suit seeks to avoid two occupancy tenancies created in his village of Khutsaori by a previous *Lambardar* Surjilal on the 2nd of February 1917 and the 2nd of March 1918. The village had been attached under a money-decree and was in the hands of the Collector for sale and there was also a mortgage suit pending in respect of it on both these dates. An eight-anna share of the village, which included the four-anna share belonging to Surjilal, was sold by the Collector under the money-decree on the 20th of August 1917, that is to say, after the creation of the first of these two tenancies and before the creation of the second and purchased by Bakaram, brother of the plaintiff. On a final decree for sale passed on the 14th

of December 1918 in the mortgage suit a twelve-anna share, which also included Surjilal's four-anna share, was sold on the 15th of January 1920 and purchased by the plaintiff Karu. The plaintiff's contention is that both leases are void because they were granted during the pendency of the mortgage suit and also while the property was under attachment and in the hands of the Collector, and that the second is further void because on the date on which it was granted Surjilal had ceased to be a co-sharer in the village and, therefore, had also ceased to be *Lambardar*, although his name was not actually removed till the 8th of March 1920.

(2) In regard to the plea based on section 52 of the Transfer of Property Act and rule 11 of the Third Schedule of the Civil Procedure Code the law is perfectly clear; the leases cannot be avoided if the granting of them was, in the words used in *Sri Gajapati Radhikapatta Mahadevi Garu* v. *Sri Gajapati Radhamani Mahadevi Garu* (1), an "ordinary and reasonable incident of *interim* beneficial enjoyment," that is to say, if it can be shown that they are of such a nature that the lessor would have granted them even if he had known that he was to continue indefinitely as the owner of the property. That the leases were not of that nature has been only formally but never seriously asserted by the plaintiff. The fields leased were waste land and the new tenant was the *kotwar* of the village, a person not connected in any way except his office with the *malguzar*.

(3) The other plea, that the second tenancy is also void because on the date on which it was created Surjilal was not an owner at all but merely a trespasser, has to be decided on the same issue of fact, as was very clearly laid down by the Calcutta High Court in *Binad Lal Pakrashi* v. *Kalu Pramanik* (2) and also *Peary Mohan Mondal* v. *Radhika Mohan Hazra* (3), *Jonab Ali* v. *Rakibuddin* (4) and *Krishna Nath* v. *Muhammad Wafiz* (5). Another matter which would defeat this plea is that, even on the date on which the second tenancy was created, Surjilal was still the agent of the proprietary body of which at least one of his brothers was still a member. The appeal is dismissed and the appellant must pay all the costs.

Appeal dismissed.

G. R. D.

(1) 7 M. 96; 2 Ind. Dec. (N. S.) 652.
(2) 20 C. 708; 10 Ind. Dec. (N. S.) 477.
(3) 8 C. W. N. 315.
(4) 9 C. W. N. 571; 1 C. L. J. 303.
(5) 31 Ind. Cas. 789; 21 C. W. N. 93; 23 C. L. J. 563.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 6 OF 1923,
September 12, 1923.

Present:—Mr. Dalal, J. C.

PARMESHUR LAL—DEFENDANT—APPELLANT

versus

Musammat RUKMIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Oudh Rent Act (*XXII of* 1886), *s.* 127—*Trespasser—Ejectment—Jurisdiction of Revenue Courts.*

Section 127 of the Oudh Rent Act was enacted to provide for the case of a trespasser and to prevent such a case going out of the jurisdiction of the Revenue Courts. Under clause (2) of section 127 a Court is bound to pass a decree for ejectment, if such an application is made by the plaintiff when the Court passes a decree for arrears of rent against the trespasser.

Appeal against the judgment and decree of the District Judge, Fyzabad, dated 11th November 1922, upholding that of the Assistant Collector, 1st Class, Sultanpur, dated the 19th June 1922.

Dr. *J. N. Misra*, for the Appellant.

Rai *N. N. Ghoshal* Bahadur, for the Respondents.

JUDGMENT.—The plaintiff sued the defendant for recovery of rent and ejectment under section 127 of the Oudh Rent Act, and the suit for both reliefs was decreed, first by the Assistant Collector and then in appeal by the learned District Judge of Fyzabad. This is a second appeal by the defendant.

The plaintiffs are themselves under-proprietors of the plot in suit and the

defendant is entered in the village record as a tenant without settlement of rent. The argument in this Court was that the case of the defendant is not covered by section 127, Oudh Rent Act. It was first argued that he holds as a *muafidar* (a grantee). The only evidence in support of this claim is a copy of the plaint dated 22nd December 1913, filed by the plaintiffs to get rent assessed on the plot in suit under section 107 (A). In that suit it was held by the Assistant Collector that the provisions of section 107 (A) apply only to the proprietor of a *mahal* or a part of a *mahal*, and not to the plaintiffs who are only under-proprietors of a definite area of land. This description of the defendant's holding as *"Muafi bila lagan"* was used by the plaintiff to convey the idea of non-payment of rent and was not an admission of a grant which did not exist. There can be no adverse possession by non-payment of rent, because the plaintiff is under-proprietor, who has been paying the revenue, and the defendant cultivator had never set up any adverse title prior to 1913, the date of the litigation already referred to. The position taken up by the defendant's Counsel was that the defendant was either a trespasser in which case the plaintiffs ought to go to a Civil Court, or a tenant whose rent may be assessed under section 32 (B). Section 127 was enacted to provide for the case of a trespasser and to prevent such a case going out of the jurisdiction of the Revenue Courts. It appears that the defendant is willing enough now to pay rent and escape ejectment. His present condition is, however, due to his contumacy in holding land without payment of rent and deserves no sympathy, though after holding for a number of years he is being turned out of the land. I see no reason to disagree with the findings of the two lower Courts that the defendant is a person who is retaining possession of the land without being entitled to such possession. He comes within the provisions of section 127 of the Oudh Rent Act. Under clause (2) of that section a Court is bound to pass a decree for ejectment if such an application is made by the plaintiff when the Court passes a decree for arrears of rent.

As regards ground No. 5 the Court of first instance had jurisdiction. As I have pointed out, the cases of a trespasser can also be treated under section 127 in the Revenue Court.

The plea of *res judicata* was not argued before me.

I dismiss this appeal with costs.

M. D. J. & N. H. *Appeal dismissed.*

MADRAS HIGH COURT

CIVIL REVISION PETITION NO. 584 OF 1923.

August 10, 1923.

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

PREMCHAND INDOJI—2ND COUNTER-PETITIONER—PETITIONER

versus

SOLETI GOPALAPPA—PETITIONER—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 3—Creditor's petition—Transfer by District Court to Sub-Court—Jurisdiction.

Under section 3 of the Provincial Insolvency Act the District Court is the only Court having jurisdiction to deal with creditors' petitions, in the absence of any Notification of the Local Government investing Subordinate Courts with jurisdiction over this class of cases. An order, therefore, of the District Court transferring such a petition to a Sub-Court for disposal is *ultra vires.*

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 Subordinate Judge of Bellary, in I. A. No. 85 (a) of 1920 in I. A. No. 290 of 1918 in I. P. No. 9 of 1914, on the file of the District Court of Bellary.

Mr. *T. M. Krishnaswamy Ayyar*, for the Petitioner.

Mr. *L. A. Govindaraghava Ayyar*, for the Respondent.

JUDGMENT.—Under section 3 of the Provincial Insolvency Act, the District Court is the only Court having jurisdiction

to deal with creditors' petitions, in the absence of any Notification of the Local Government investing Subordinate Courts with jurisdiction over this class of cases. The District Judge's order transferring the petition to the Sub-Court for disposal was, therefore, *ultra vires*. We set it aside together with the Sub-Judge's order and direct the District Judge to take the case on his file and dispose of it according to law.

As the objection to jurisdiction was not pressed till the want of jurisdiction was noticed by this Bench and as this petition was put in 2¾ years after the date of the order, while excusing the delay on account of the petitioner having through incorrect advice mistaken his remedy, we direct that each party bear his own costs in this petition.

V. N. V. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2221 OF 1922.
March 9, 1923.
Present:—Mr. Justice Abdul Raoof.
RAHMAT ALI—PLAINTIFF—APPELLANT
versus
SHADI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgagees—Subsequent mortgagee, whether can question prior mortgage.

It is not open to a subsequent mortgagee who takes his mortgage with notice of a prior mortgage to question the prior mortgage on the ground that certain terms contained in it operate as a clog on the equity of redemption. [p. 878, col. 2.]

Aziz Khan v. *Duni Chand*, 20 Ind. Cas. 812; 305 P. L. R. 1913; 195 P. W. R. 1913, followed.

Second appeal from a decree of the District Judge, Gurdaspur at Dalhousie, dated the 21st June 1922, reversing that of the Munsif, First Class, Batala, dated the 14th June 1921.

Lala *Faqir Chand*, for the Appellant.

Bakhshi *Sohan Lal*, R. B., for the Respondent.

JUDGMENT.—This second appeal has arisen out of a declaratory suit under the following circumstances:—One Allah Ditta mortgaged house No. 38 to Rahmat Ali on the 17th of April 1916 for a period of five years with possession. The house was already under mortgage to other mortgagees who were in possession thereof. The mortgagor undertook to redeem the previous mortgages and to place it in possession of Rahmat Ali after doing so. Until delivery of possession, interest was to run at the rate of Rs. 2-2-0 per cent. per mensem with six monthly rests. On the 31st of July 1916 Allah Ditta mortgaged the same house to one Gangu Mal, the father of Ralia Ram and Shadi Ram, for Rs. 500. On the 10th of November 1919 Ralia Ram and Shadi Ram obtained a decree for sale against the mortgagor Allah Ditta alone without impleading Rahmat Ali. In execution of their decree Ralia Ram and Shadi Ram attached the house and applied for its sale. Thereupon Rahmat Ali and Ata Muhammad objected to the attachment and the latter pleaded that he was in possession of the house under a previous mortgage. The Court allowed the objection so far as to order the sale of the house subject to the lien of the objectors, but held that the term of five years before which the redemption was not to take place under the terms of the mortgage of the 17th of April 1916 was not to be binding on the execution purchaser. Rahmat Ali thereupon brought the present suit for a declaration that all the conditions entered in the mortgage in his favour including the term of five years should be declared to be binding on the would-be execution-purchaser. In this suit Allah Ditta, the mortgagor, and Ralia Ram and Shadi Ram, the decree-holders, were impleaded as defendants. Allah Ditta admitted the claim, while Ralia Ram, though admitting the notice of Rahmat Ali's previous mortgage, resisted the suit pleading that the term of five years being onerous should not be held to be binding on him or the would-be execution-purchaser. The main ground urged by him was that the term of five years operated as a clog upon the equity of redemption and should not be enforced. The Trial Court decreed the suit, but the lower Appellate Court, after referring

to a number of previous mortgages in favour of Gauhar Ali and Ata Muhammad, brothers of the plaintiff Rahmat Ali, held that the bargain obtained by Rahmat Ali was an unconscionable bargain and the conditions as to payment of interest before actual delivery of possession to the plaintiff under his mortgage dated the 17th of April 1916 and as to delivery of possession after redeeming the previous mortgage operated as a clog on the equity of redemption and dismissed the suit. Hence this second appeal.

Without going into the various transactions of mortgage which have been discussed in detail in the judgment of the lower Appellate Court the appeal can be decided upon a very simple point. It is contended by Mr. Faqir Chand, the learned Vakil for the appellant, that Ralia Ram and Shadi Ram being subsequent mortgagees with notice of the previous mortgage in favour of the plaintiff are not entitled to resist the suit upon the ground that the conditions entered in the plaintiff's mortgage operated as a clog and should not be enforced. In my opinion there is force in this contention. Allah Ditta, the mortgagor, himself could not have avoided the contract on the mere ground that it embodied an unconscionable ground without proving that the transaction had been brought about by undue influence of which there is not an iota of evidence in this case. Much less is it open to a subsequent mortgagee who with his eyes open takes a second mortgage in the hope of redeeming the previous mortgage on easier terms. In the case of *Aziz Khan* v. *Dum Chand* (1) a Division Bench of the Punjab Chief Court, while dealing with a similar question, made the following pertinent observation:—

"It is exceedingly doubtful whether after acquiring a mortgage which on the face of it and as it stood at the time of their purchase, contained terms which might make redemption practically valueless to them, they can be permitted to set up, as their vendor might have done, a claim that the bargain was brought about by the exercise of undue influence."

(1) 20 Ind. Cas. 812; 305 P. L. R. 1913; 195 P. W. R. 1913.

The plaintiffs in the reported case were the purchasers of the equity of redemption and in a suit for redemption objected to certain terms of the mortgage on the ground that they were onerous and amounted to an unconscionable bargain. The learned Judges observed that the plaintiffs were to be looked upon as speculators as they were not the original mortgagors but had bought the equity of redemption on the chance of getting redemption on easy terms. In this case also the position of Ralia Ram and Shadi Ram cannot be said to be a bit better than that of a speculator. Without going into the various matters discussed by the learned Judge of the Court below I hold that the subsequent mortgagees have no *locus standi* to question the mortgage in favour of the plaintiff on the ground that the conditions objected to operate as a clog on the equity of redemption.

I accept the appeal and setting aside the decree of the lower Appellate Court, restore that of the Court of first instance with costs in all Courts.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 74-B OF 1922.

July 13, 1923.

Present:—Mr. Kotval, A. J. C.

GOPAL GANESH—DEFENDANT—APPLICANT

versus

WALABHDAS SANTUKIRAM—PLAINTIFF—NON-APPLICANT.

Limitation Act (IX of 1908), s. 5—Ignorance of rule of practice—Extension of time.

Ignorance of a rule of practice of which sufficient notice has been given is no excuse for extension of time under section 5 of the Limitation Act.

Revision of an order of the District Judge, Amraoti, dated the 27th January 1922, in Miscellaneous Civil Appeal No. 33 of 1921.

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

Mr. *P. C. Dutt*, for the Non-Applicant.

ORDER.—A preliminary objection is raised that the application for revision is delayed and should not be admitted. The application is too late by 22 days. The only excuse is that the applicant did not know of the change in the period for filing it. The change was ordered in April 1921 and was given ample publicity before it was brought into force on the 1st October 1921. The order sought to be revised was passed on the 27th January 1922 and the present application was made on the 19th April 1922.

There was thus ample time for the applicant to become aware of the change. Ignorance of a rule of practice of which sufficient notice has been given is no excuse. The application is dismissed. No order as to costs.

G. R. D. *Application dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 669 OF 1922.

June 29, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

SAGARMAL MARWARI—
APPELLANT
versus
LACHMISARAN MISIR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 156—Civil Procedure Code (Act V of 1908), O. XX, rr. 1, 7—Judgment signed but not pronounced till later date—Limitation, operation of.

Although under Art. 156 of the Limitation Act the period of limitation for an appeal begins from the date of the decree or order appealed from, where a judgment is signed but not pronounced till a later date, limitation begins to run from the date of the pronouncement of the judgment, as, in view of the provisions of O XX, r. 7, of the Civil Procedure Code, whatever might be the date upon the face of the decree, it must be considered as dated on the date of the pronouncement of the judgment.

The day on which judgment is pronounced within the meaning of O. XX, r. 7 of the Civil Procedure Code is the day on which it is pronounced in open Court in accordance with O. XX, r. 1 of the Code.

Messrs. *Susil Madhab Mullick* and *Norendra Nath Sen*, for the Appellant.

Mr. *Satya Saran Bose*, for the Respondent.

JUDGMENT.

Miller, C. J.—This is a question of limitation. This case was heard before the learned District Judge of Bhagalpur on the 9th January 1922. On the 8th Januray after the hearing the learned Judge left Bhagalpur for Dumka to hold Sessions there. On the 17th January he appears to have written a judgment and signed it but this was not communicated to anybody and certainly not delivered in open Court as provided by O. XX, r. 1. On the 4th February he returned to Bhagalpur and on the 10th February a decree was prepared after the signatures of the Pleaders on each side had been taken. Nobody apparently knew anything about the judgment having been written or signed by the learned Judge until the 10th February and in fact, as the learned District Judge himself says, there was no delivery of judgment in Bhagalpur before that date; nor does it appear that there was any delivery of judgment anywhere else. The appeal in this case was filed on the 18th May and the question arises whether that was within the 90 days prescribed by Art. 156 of the Limitation Act for an appeal to the High Court. The rules provide in terms that judgment shall be pronounced in open Court either immediately after the case has been heard or on some future date of which due notice shall be given to the parties or their Pleaders. It is contended by the respondents that the judgment having been written by the learned Judge and signed on the 17th January, although it was not pronounced on that date, the limitation period runs from that day. I am entirely unable to accept this view. There was in fact no judgment delivered until it was pronounced in open Court according to the rules. The decree was prepared on the 10th Febuary and I understand it was dated the 17th January, the day upon which the judgment was written and signed by the learned Judge although not communicated to anybody. Under the Limitation Act the period of limitation begins from the date of the decree or order appealed from and under O. XX, r. 7, the decree shall bear date the day on which the judgment was pronounced,

ALI AHMAD *v.* ABDUL GHANI.

Therefore, even if the decree was dated the 17th January that date in fact was altogether wrong because at that time no judgment had been pronounced at all and whatever the date may be upon the face of the decree it ought to be dated the 10th February when the judgment was pronounced. In these circumstances, it seems to me quite clear that the period of limitation begins from the 10th February. The appeal in fact was filed more than 90 days after the 10th February but it appears from the report of the learned District Judge that an application for copies of the judgment and decree was made on the 30th January although at that time judgment had not been pronounced and no decree was drawn up, and on the 21st February, the copies were supplied. Therefore, the time occupied in obtaining copies of the judgment and decree between the 30th January and the 21st February, ought to be deducted, but as the limitation period did not begin to run until the 10th February the period between the 10th and 21st February may be deducted in this case. It would follow, therefore, deducting these days, that the appeal was entered in time. For the purposes of limitation, it seems to me that it is impossibe to hold, having regard to the Statutes, to which I have referred, that the date of the judgment should be any other than that upon which judgment is pronounced in Court when the parties know the effect of that judgment and whether it would be necessary for them to appeal or not. There may be cases, I can conceive, where the judgment has not been properly pronounced in open Court, when, for example, a Judge dies after having written and signed his judgment or there may be other cases in which the failure to pronounce judgment in open Court may be a mere irregularity which, under the provisions of the Code, is not fatal to the validity of the judgment. In the present case, however, it seems to me impossible to hold that the period of limitation could begin before in fact the parties were aware by the pronouncement of judgment in open Court, what the judgment in fact was. We are told that in many cases it is not the practice to pronounce judgment in open Court. If that is so, I can only say that it is a direct breach of the practice laid down in O. XX, r. 1, and in all cases, in my opinion, that rule ought to be complied with. The appellant is entitled to his costs of this application which has been strenuously opposed by the respondents.

Mullick, J.—I agree.

N. H. *Application granted.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 331 OF 1922.

December 18, 1922.

Present:—Mr. Justice LeRossignol.

ALI AHMAD—DEFENDANT—PETITIONER

versus

ABDUL GHANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 14—Plaint signed on instructions from plaintiff, validity of.

Where a plaint is signed by a third person on instructions from and on behalf of the real and ostensible plaintiff, it must be regarded as having been signed by a person duly authorised within the meaning of O. VI, r. 14 of the Civil Procedure Code.

Petition under section 44 of Act IX of 1919, Punjab Courts Act, for revision of the order of the Munsif, First Class, Batala, District Gurdaspur, dated the 28th March 1922.

Mr. *Ghulam Rasul*, for the Petitioner.

Chaudhri *Zafrullah Khan*, for the Respondents.

JUDGMENT.—I am asked to take action on the revision side because the Court below has allowed the plaintiff to sign the plaint long after presentation.

The decision does not affect the merits except in the matter of limitation but as it is quite clear that the plaint was signed by a third person on instructions from the real and ostensible plaintiff I am not prepared to hold that the plaint was not signed by a duly authorized person, though his authority may have been objectionable from the point of view of the fisc.

Dismissed with costs.

Z. K. *Petition dismissed.*

ROSA MARIA BAI *v.* JACOB SOUZA

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 34 OF 1922.

November 7, 1922.

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

ROSA MARIA BAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JACOB SOUZA—PLAINTIFF—RESPONDENT.

Will—Circumstances of suspicion—Duty of Court—Onus of proof.

Circumstances of suspicion regarding the alleged execution of a Will demand the vigilant care and circumspection of a Court in investigating the case and examining the evidence in support of the Will. Such evidence must remove the suspicion and establish affirmatively to the satisfaction of the Court that the Will put forward was the Will of the testator. [p. 883, col. 1.]

Where the instrument of a Will is inofficious, *i.e.*, not consonant to the testator's natural affections and moral duties, stringent proof of its execution is demanded. [p. 883, col. 2.]

Jagrani Koer v. *Durga Parshad*, 22 Ind. Cas. 103; 36 A. 93; 16 O. C. 386; 12 A. L. J. 125; 26 M. L. J. 153; 15 M. L. T. 125; (1914) M. W. N. 137; 19 C. L. J. 165; 18 C. W. N. 521; 16 Bom. L. R. 141; 1 O. L. J. 57; 41 I. A. 76 (P. C.), Williams on Executors, 1921, Volume I, page 50, relied on.

There is no inflexible rule as regards the nature of the evidence required in any particular circumstances, but the evidence in favour of a Will propounded after a long lapse of time must extend to clear proof of execution. [p. 884, col. 1.]

Gnanamuthu v. *Vanakoilpillai Natan*, 17 M. 379; 6 Ind. Dec. (N. S.) 263, referred to.

Appeal against a decree of the District Court, South Kanara, in Original Suit No. 4 of 1921.

Mr. *B. Sitaram Rao*, for the Appellants.

Mr. *K. Ramanatha Shenai*, for the Respondent.

JUDGMENT.

Spencer, J.—I have come to the same conclusion as my learned brother that Letters of Administration should not have been granted on the Will propounded by the plaintiff.

The delay of 20 years in presenting the Will for Probate has not been sufficiently explained. It is said to have been handed over by the testator to his brother's son, the sole legatee. He died in 1902 or 1903 without taking any action.

It is not clear in whose custody the Will has been since, but his son, who has been granted Letters of Administration by the District Judge on the present application, says that he only came to know of the existence of the Will three or four years ago.

He adds that some documents were with his mother; but she has not been examined as a witness to prove proper custody since 1899, when Exhibit D purports to have been prepared.

I regard it as one suspicious circumstance that this Will should have first seen the light of day 20 years after Francis Padivala's death on the occasion when the persons who would be entitled to his property, if he died intestate, are suing to redeem a mortgage executed by him which the legatee was instructed in the Will to discharge. Another suspicious circumstance is that of the only two persons who have come forward at this juncture to vouch for the genuineness of the Will one is a witness, who, having access to the Burial Registers of the Parish, is in a position to make the date of the Will accord with the known facts as to the deceased's death, and the other is that witness's first cousin; a third is that when Letters of Administration of the deceased's estate were applied for by a creditor 22 years ago the statement in Exhibit II that the deceased had died intestate was allowed to go unchallenged by the executor and the legatee; and a fourth that they both allowed the testator's disinherited widow and children to take possession of his moveable property and cattle and to discharge his debts without protest.

The individuality of the testator's "*shri kaza*" or mark on Exhibit A has not been established. The mark of the executant on Exhibit B looks as if it might have been written by the writer of that document. That on Exhibit A is in the same ink and style as the signature of the witness P. W. No. 2.

ROSA MARIA BAI v. JACOB SOUZA.

As the plaintiff has failed to disperse the doubts that naturally arise as to the authenticity of this unregistered Will, the appeal is allowed, the grant of Letters is revoked and the suit is dismissed with costs here and in the District Court.

Venkatasubba Rao, J.—The question to be decided is, has the execution of the Will by the testator been proved? The Will is dated the 7th September 1899 and the application for Probate was made in 1920. The testator did not sign his name but made a mark. Of the three attesting witnesses two subscribed the Will with their marks, and the other wrote his name. There is an endorsement at the foot of the Will indicating who the writer of it was. The testator died 22 days after the date of the alleged Will, leaving a widow, two sons and one daughter. The sons were of the ages of 20 and 14 or thereabouts, and the daughter was of the age of about nine. The Will makes no reference to the testator's wife and children and contains no provision in their favour. Almost the whole of the property was bequeathed to the testator's brother's son Rosario Padivala, and the latter's brother-in-law was appointed executor. Of the three attesting witnesses, the two who subscribed on the Will their marks are said to have died some years ago, though no evidence has been given as to when they died. The other attesting witness and the scribe have been examined in support of the Will. The party propounding the Will is the son of the legatee, Rosario Padivala abovementioned who died about 20 years ago, or about three years after the death of the testator. It is in evidence that the executor died in 1918 or 1919.

The grant of Probate is opposed by the widow and the surviving son. They contend that there are several suspicious circumstances and that the evidence in support of the Will is not sufficient to remove the suspicion and to satisfy the Court that the Will was in fact executed by the testator.

The proof of execution consists of the evidence of the writer of the Will and of the surviving attesting witness. The testator was living at Permanki and it is admitted that both these witnesses were living at Mangalore, a place 12 miles from the village where the testator was living. Both of them are related to the testator, but no importance can be attached to this fact as they are also related to the person who is benefited by the Will, and to the present applicant who is the latter's son. The evidence does not indicate that they were either intimate with the testator or that they enjoyed his confidence in any degree and there is no explanation as to why they were called from a distant place to assist the testator in the making of his Will. The writer, while stating that the testator was ill for about a year before his death adds that he visited the testator on the single occasion when the Will was made. The other witness admits that he did not even attend the testator's funeral and that, during the testator's life time, he went to his house only once, that is, a year after the testator's daughter was born, and that a year after his death he went there again. His evidence leaves the impression that this witness went to the testator's house during his life time only on two occasions, one of them being the date of the making of the Will. It is also admitted that there were persons near the testator's residence who could have been asked to be present, and it is noteworthy that the Potail of the village was living within half a mile and that the Potail also happened to be the testator's landlord. No evidence was forthcoming as regards the circumstances in which the Will was made or any discussion respecting the dispositions, or any draft prepared under instructions from the testator. This is the only direct evidence to prove the execution of the Will. There is no conflict of testimony and the case has to be decided mainly with reference to probabilities. The learned District Judge pronounced in favour of the Will and I should have been less ready to differ from him if the question turned on whether the balance of evidence was in favour of the Will or against the Will. And I may also add that the two witnesses who deposed in regard to the execution of the Will also spoke to ill-feeling

between the testator and his wife, to which I shall presently advert, and the learned District Judge did not consider them worthy of belief respecting the alleged misunderstanding and it is clear that the District Judge has not based his conclusion on his estimate of the worth of the evidence of thsee two witnesses.

The circumstances being such as to excite the suspicion of the Court, can it be said that the evidence in support of of the instrument removes the suspicion and establishes affirmatively to the satisfaction of the Court that the Will put forward was the Will of the testator? It has been repeatedly held that, circumstances of suspicion demand the vigilant care and circumspection of the Court in investigating the case and examining the evidence in support of the Will.

In the first place, the guarantee afforded by the testator's signature appearing on the document does not exist. The testator is said to have made a mark which is letter "Sree" of the Canarese Alphabet. This mark can be easily imitated and no admitted marks have been put in evidence for the purpose of comparison. I am not to be understood to say that if any such marks had been produced they would be of material assistance to the Court or probably affect its judgment.

An explanation has been offered for the fact that the testator disinherited his wife and children. Evidence was given to prove that they were not living with him; that the wife had filed a criminal complaint against the husband for assault some years previous to his death, and that consequent estrangement accounted for their separate living, but this evidence is vague and discrepant. These allegations have been denied by the son, the widow and two friends of the testator. The learned District Judge remarks: "There is oral evidence on both sides as to whether the defendants were living with Francis Padivala (testator) or not. It is slightly more weighty for the defence and probabilities are in favour of the defence." This seems a just criticism of the evidence. The District Judge proceeds to say: "If that version is accepted, then the Will must be false." That is to say, the learned Judge is fully alive to the fact that the provisions of the Will were unnatural and were only consistent with the hypothesis that there was a serious misunderstanding between the testator and his wife and children. The District Judge also was inclined to the view that on this point the evidence and the probabilities were in favour of the defence. The only conclusion consistent with the learned Judge's reasoning would be that the Will was not proved. I would like to say another word on this aspect of the case. Granting that the institution of a criminal complaint by the wife against the husband has been proved, this may account for there being no provision in favour of the wife. No motive has, however, been suggested in regrard to the act of the testator so far as his children were concerned. Where the instrument is inofficious, *i.e.*, not consonant to the testator's natural affections and moral duties, stringent proof is demanded (See Williams on Executors, Edition 1921, Vol. I, page 250) *Jagrani Koer* v. *Durga Prashad* (1).

The next circumstance of suspicion is the very long delay in applying for Probate. The testator's property was under mortgage at the date of the Will, and the legatee was directed to pay the amount due to the mortgagee and redeem the properties. The legatee, however, took no steps in this direction. The defendants filed a suit for redemption about 1918, and it is said that, at the instance of the mortgagee, the applicant put forward this Will. So far as the mortgage was concerned, if he proved a title to the properties in a third party the redemption suit was liable to be dismissed. Whether the mortgagee was responsible for the application for Probate or not, it is clear that until this suit was filed the Will was not brought to the notice of the heirs of the testator. The applicant first filed an application in 1919, withdrew it and filed the present application in 1920. There is scarcely any explanation for this extraordinary delay. A witness has de-

(1) 22 Ind. Cas. 103; 36 A. 93; 16 O. C. 386; 12 A. L. J. 125; 26 M. L. J. 153; 15 M. L. T. 123; (1914) M. W. N. 137; 19 C. L. J. 165; 18 C. W. N. 521; 16 Bom. L. R. 141; 1 O. L. J. 57; 41 I. A. 76 (P. C.).

posed that the executor was short of money, and did not, therefore, obtain Probate. The reason given is incredible, because on the plaintiff's side there is also evidence to the effect that the net value of the property about the time of the testator's death, was only Rs. 60 odd, and it is common knowledge that the amount required for obtaining a Probate in respect of an estate of so little value would be almost trifling. Even if this excuse should be considered sufficient for the non-obtaining of the Probate, it seems strange that those who were directly affected by it were not even informed of it or of its contents during this long period of time. The legatee and his representatives acted just as if no such Will had been left. Some moveables and cattle belonging to the testator were disposed of by the testator's widow and children without objection. A creditor to whom the testator owed rent applied, about a year after the testator's death, for Letters of Administration in respect of his estate on the basis of intestacy. An order was passed directing grant to the creditor and it may be presumed that the application was duly published before the order was made. The creditor, however, did not actually obtain the grant because the testator's widow paid up the amount due. We thus see that such assets as existed were taken possession of by the heirs and the only subsisting unsecured debt was also discharged by them. Not only was the conduct of the widow and the children consistent with the absence of a Will but the conduct, though negative in its character on the part of the legatee and the executor, lends great support in the case of the defendants. Muthuswamy Aiyar, J., observes in *Gnanamuthu* v. *Vanakoilpillai Nadan* (2), that it is usual to demand an explanation where there is unreasonable delay in applying for Probate. There is no inflexible rule as regards the nature of the evidence required in any particular circumstances, but the evidence in favour of a Will, propounded after a long lapse of time, must extend to clear proof of execution. This very case tests the truth of the proposition. If this Will had been set up soon after the testator's death, it would have been more easy to the heirs to rebut the evidence regarding the alleged ill-feeling between the husband and the wife They might then show by evidence easily procurable that the writer and the attestators could not have and did not, in fact, come to the house of the testator. The widow and her son have deposed that the writer and the testator were on bad terms. How can an allegation like this be proved or disproved at this distance of time? It is said that the two attesting witnesses who subscribed their marks on the Will are dead. On the point where they died there is no evidence. The opponents may well allege that these persons were not alive even at the date of the Will. But owing to the lapse of time there are matters on which no satisfactory evidence can be given. By his unreasonable delay, the applicant places the caveator under great disadvantage and it is but just that very stringent proof should be demanded in support of the instrument put forward.

The question then arises, has the applicant removed the suspicion which naturally attaches to a Will produced in these circumstances? I am clearly of the opinion he has not. The witnesses whom he has examined in support of the Will are persons of no particular credit and the explanation offered in regard to the various suspicious circumstances is far from convincing.

The learned District Judge relies on these circumstances. Firstly, that a draft petition for Probate bearing the date 1899 was produced, which, it was alleged, was prepared at the instance of either the legatee or the executor but was not filed in Court on the ground of expense. A Pleader who was examined for the plaintiff has deposed that the draft is in his handwriting. The Will was not shown to him in the witness-box and identified by him. He, however, deposed that he saw "the Will" and in the circumstances he must have meant that he saw "a Will". This evidence does not carry the matter very far. Even assuming that this particular Will was then in contemplation of the parties, no inference in favour of its genuineness can be drawn. It is quite possible that the person or persons concerned dropped the application for valid reasons and if a spurious

(2) 17 M. 379; 6 Ind. Dec. (N. S.) 269.

Will had been intended to be put forward it is not unlikely that the attempt was abandoned because they thought better of it. It is indeed very difficult to accept this circumstance as affirmative proof of the execution of the Will. Secondly, it is said that the applicant produced in Court the documents, which the District Judge was satisfied belonged to the testator. The title-deeds of all the properties were with the mortgagee and the recital in Exhibit III, one of the two deeds of mortgage executed by the testator in favour of the mortgagee, runs thus. "As I have given you the *mulgeni* and other original documents already along with the mortgage-deed, I have this day further delivered the property to you." The documents produced in Court have not been shown to be so utterly unconnected with the properties mortgaged that they could not be among the documents handed to the mortgagee. If these documents were, as a matter of fact, in the possession of the mortgagee the probabilities are that the applicant obtained them from the mortgagee, who, as already observed, has been charged by the defendants with having instigated the filing of the application for Probate. In any event, the legatee and his son, the applicant, being the relations of the testator, no inference in their favour can be drawn from the mere possession of some documents belonging to the testator. It is not suggested that these documents evidence or create any valuable rights and the possession of them confers, from a pecuniary point of view, no advantage.

Thirdly, the District Judge seems to think that as the legatee did not attempt to redeem the mortgage earlier, there was no need on his part to have applied for Probate. This reason is hardly convincing. If the Will was true, those that had a claim upon the testator were completely disinherited, and the entire property devolved upon the legatee, and he would not have allowed a valuable document to remain unknown, and it is, on the other hand, extremely probable that he would have taken the earliest opportunity to assert his rights under it.

In the result, I am of the opinion, that the applicant has failed to discharge the onus that lies heavily upon him and that the appeal must be allowed. The suit is dismissed with costs here and in the District Court.

V. N. V. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2822 OF 1922.
June 16, 1923.
Present:—Mr. Justice Moti Sagar.
RAM CHAND—DEFENDANT—APPELLANT
versus
KAURA AND ANOTHER—PLAINTIFFS AND ALLAH BAKHSH—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 14—Punjab Redemption of Mortgages Act (II of 1913), ss. 9, 12—Application for redemption, dismissal of—Suit for redemption—Limitation.

An application by a mortgagor to redeem a mortgage under the provisions of the Punjab Redemption of Mortgages Act was dismissed by the Collector on the ground that the mortgagor had lost his right to redeem by the efflux of time. The mortgagor then instituted a regular suit in the Civil Court for redemption of the mortgage:

Held, that the suit was practically one under section 12 of the Act to set aside the order of the Collector and fell within the purview of Art. 14 of Schedule I to the Limitation Act. [p. 887, col. 2.]

Second appeal from a decree of the District Judge, Mianwali, dated the 8th August 1922, affirming that of the Munsif, First Class, Bhakkar, District Mianwali, dated the 21st March 1922.

Lala *Jagan Nath*, for the Appellant.

Lala *Har Gopal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of certain lands attached to Mehngawala well in *Mauza* Bhakkar in the Mianwali District. The property in suit consists of two plots of land, one mortgaged in 1827 by means of a written document but alleged to have been subsequently redeemed and re-mortgaged orally in 1878, and the other said to have been mortgaged in the year 1903. There is no dispute now in respect of the mortgage of 12 *kanals*, 6 *marlas* of land made

in 1903, and it is admitted before me that the suit for redemption, so far as this later mortgage is concerned, is within time. The dispute only relates to the first mortgage of 1827, and the contention of the defendants is that the suit with regard to the redemption of this mortgage is barred by limitation. It is contended that the mortgage is more than 60 years old and that the plaintiff has no subsisting rights of redemption in respect of the land covered by this mortgage. The entries in the Settlement Records of 1878 on which reliance is placed by the plaintiff, it is urged, do not mean that the original mortgage of 1827 came to an end and that a new contract creating a fresh mortgage was substituted in its place in 1878. It is stated that the original mortgage remained intact, but that at about the time of the Settlement only certain modifications were introduced in its terms which did not, however, in any way affect the existence of the previous contract itself. It is further contended that in 1918 the predecessor-in-title of the present plaintiff made an application to the Collector for the redemption of this mortgage under the Redemption of Mortgages Act (II of 1913), but that this application was dismissed on the ground that the mortgage was more than 60 years old, and that the claim as to its redemption was barred by limitation. It is urged that as no suit was brought by the predecessor-in-title of the plaintiff within one year from the date of that order to establish his rights in respect of the mortgage, the present suit is barred under Art. 14 of the Indian Limitation Act. Both the Courts below have found in favour of the plaintiff and have decreed the suit in its entirety with costs in both Courts against the defendants. The latter have now come up in second appeal to this Court through Mr. Jagan Nath, and I have heard Mr. Hargopal on behalf of the respondents.

Mr. Jagan Nath's first contention is that the finding of the learned Judge of the Court below on the question of limitation is erroneous, and that the Settlement entries of 1870 have been entirely misinterpreted by him. In my opinion this contention has no force and must be overruled. It has not been shown in what way the entries have been misinterpreted, and a reference to those entries clearly shows that the mortgage of 1878 was an entirely new transaction and not a mere continuation of the previous mortgage of 1827 with certain terms here and there modified. I see no reason to differ from the opinion of the learned District Judge on this point and hold that the suit in respect of this mortgage is within time. I am also of opinion that the finding of the learned District Judge that the previous mortgage of 1827 did not remain subsisting and that a fresh mortgage was created some time between 1861 and 1870 is clearly a finding of fact which cannot be disturbed in second appeal.

The next question to be considered is, what is the effect of the proceedings taken under the Redemption of Mortgages Act in 1913 on this suit? It appears that on the 11th of July 1913 Allah Bakhsh, the predecessor-in-title of the present plaintiff, made an application under Act II of 1913 to the Collector claiming redemption of the land in suit on payment of Rs. 45. Notice was issued to the mortgagees to show cause why redemption should not be effected, and on their objecting that the mortgage was made more than 86 years ago and that the applicant did not possess any subsisting rights of redemption therein, an inquiry was ordered into the age of the mortgage in dispute. The Collector eventually came to the conclusion that the mortgage was made in *Sambat* 1884 and that, therefore, the claim as to its redemption was barred by limitation. He accordingly dismissed the petition and directed the applicant to seek his remedy in a Civil Court, if so advised. This application was presumably rejected under section 9 of Act II of 1913. Now, section 12 of that Act lays down that "any party aggrieved by an order made under sections 6, 7, 8, 9, 10 or 11 of this Act may institute a suit to establish his rights in respect of the mortgage, but, subject to the result of such suit, if any, the order shall be conclusive." This section embodies a rule of law similar to that which is contained in r. 63 of O. XXI of the Civil Procedure Code. Under r. 63 of O. XXI of the Civil Proce-

dure Code the person who is aggrieved by an order passed against him is entitled to bring a declaratory suit to establish the rights which he claims to the property in dispute within one year from the date of such order, and if no such suit is brought within the period prescribed by law, the order of the Court allowing or disallowing the objection becomes conclusive. In the present case no suit was brought by the mortgagor or his representative-in-interest within one year from the date of the adverse order passed against him, and it is, consequently, contended that this suit, which is practically one for setting aside that order, is barred under Art. 14 of the Indian Limitation Act. Articles 11, 11A, 12 and 13 of the Indian Limitation Act provide a period of limitation for suits of a specific nature brought under the Code of Civil Procedure, and Art. 14 is a general residuary Article intended to provide a period of limitation for all suits which do not fall within the purview of any of those Articles. The present suit is clearly one for setting aside an order of the Collector passed in his official capacity for which no express provision is made in the Indian Limitation Act, and I do not see how it can be argued that the suit is outside the scope of Art. 14. The learned District Judge is of opinion that as no period of limitation for a suit of this nature is fixed in section 12 of the Redemption of Mortgages Act, Art. 14 does not apply. I am unable to agree with this view. Section 12 of the Redemption of Mortgages Act merely points out the results which would ensue if the procedure laid down in that section is not followed. In order to ascertain the period of limitation for such a suit it is necessary that reference should be made to the provisions of the Indian Limitation Act, and the only Article in that Act under which the suit could fall is Art. 14 which provides a period of one year's limitation from the date the order complained against is passed.

Next, it is argued that it is not a suit for setting aside the order passed by the Collector but a suit for redemption, pure and simple, and that, therefore, Art. 14 has no application to such a suit. I do not think that there is any force in this contention. Before redemption of the mortgage in suit can be effected it is necessary that the order passed by the Collector in 1913 should be set aside, and the plaintiff cannot evade the provisions of Art. 14 by merely saying that he does not expressly ask for the setting aside of the order. The Collector, after due enquiry, decided against the claim of the plaintiffs' predecessor-in-title and the plaintiff is, by reason of the latter, being a party to the proceedings before the Collector, bound by the order, and it is necessary for him under section 12 of Act. II of 1913 to get rid of that order before he can establish his right to redeem the property.

Lastly, it is argued that proceedings under Act II of 1913 are summary in their nature and that the Act is not intended to curtail the period of limitation for a suit for redemption which a litigant ordinarily possesses under the Indian Limitation Act; no doubt, this is so, but this argument entirely loses sight of section 12 of the Act under which the order is likely to become conclusive, if not duly contested by means of a suit. In my opinion the order of the learned District Judge is wrong, and the suit is clearly barred by Art. 14 of the Indian Limitation Act so far as the earlier mortgage of 1827 is concerned.

The result is, that I accept the appeal and, in modification of the order of the lower Appellate Court, grant plaintiff a decree for possession by redemption of 12 *kanals* 6 *marlas* of land incorporated in mutation No. 1509, dated the 31st of August 1903, on payment of Rs. 48 only. The rest of the plaintiffs' claim shall stand dismissed. Parties shall bear their own costs throughout.

Appeal accepted.

Z. K.

FAQIR CHAND *v.* BAIJ NATH.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 124 OF 1923.

September 18, 1923.

Present:—Mr. DALAL, J. C.

FAQIR CHAND—PLAINTIFF—APPLICANT

versus

BAIJ NATH AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 74—Bond—Enhanced interest on default—Stipulation, whether penal.

Where a bond provides for the payment of a certain sum with interest at a particular rate, and stipulates that on breach of such payment interest at a higher rate will be payable, the stipulation regarding such increased interest is by way of penalty within the meaning of section 74 of the Contract Act.

Revision against a decree of the Munsif, Fatehpur, Bara Banki, dated the 19th March 1923.

Mr. *M. P. Asthana*, for the Applicant.

Mr. *Moti Lal Saksena*, for the Opposite Party.

JUDGMENT.—I see no reason to interfere with the order passed by the Court of Small Causes. The bond in favour of the plaintiffs stipulated that a certain sum was to be paid by the defendant within two months and in default of payment within the time limited interest was to run at Rs. 3-2-0 per cent. per mensem from the date of the execution of the bond. The lower Court held the stipulation for the payment of interest to be penal and directed interest to be calculated at the rate of 6 per cent. per annum from the date of the bond. It is argued here that under the Explanation to section 74 of the Contract Act a stipulation for increased interest from the date of default may be a stipulation by way of penalty, and as the present is not the case of increased interest there was no stipulation of a penalty. The present case, however, requires no explanation at all. The opening words of section 74 are "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, that amount will be by way of penalty." Here the contract was for the payment of a certain sum and on breach of such payment a sum, that is interest at a certain rate was named to penalize the breach. Clearly the stipulation regarding interest in the bond was by way of penalty.

I shall not interfere with the discretion exercised by the lower Court. The application is dismissed with costs.

W. C. A. *Application dismissed.*

BRITO *v.* BRITO.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 423 OF 1922.

July 18, 1923.

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

JOHN JOSEPH BRITO—DEFENDANT—PETITIONER

versus

MRS. S. S. BRITO—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 151—Application under s. 151—Inherent powers of Court—Existence of circumstances to justify review—Interference in revision—High Court, discretion of.

Where a Subordinate Judge entertained an application under section 151, Civil Procedure Code, and set aside a prior order of dismissal of suit and where the order on the said petition might have been passed on review of the prior order if the Judge had exercised his power under the Chapter on review, the High Court will not in revision under section 115 of the Civil Procedure Code interfere with the order under section 151, especially if it is substantially just.

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 Subordinate Judge, South Canara, in I. A. No. 565 of 1921, in O. S. No. 55 of 1920.

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

Mr. *B. Sitaram Rao*, for the Respondent.

JUDGMENT.—This is a petition under section 115, Code of Civil Procedure. Whether or not the Subordinate Judge was acting quite regularly in entertaining this petition under section 151, we find there is the authority of this Court for considering that he might have reviewed his decree in the suit under O. XLVII,

Code of Civil Procedure [see *Alamelu Ammal* v. *Rama Iyer* (1)], and if he had acted in the exercise of his power under that Chapter of the Code, he might have passed a similar order to that now sought to be revised. As the Judge made a regular enquiry before passing his order setting aside his previous order dismissing the suit, and as he found as the result of that enquiry that the defendant fraudulently and through undue influence caused the plaintiff to sign the compromise petition and to present it in Court, and seeing that the merits of the whole case will be thoroughly enquired into at the trial of the suit, there are no good reasons for our exercising our revisional powers in favour of the petitioner when the order is substantially just, See *Narayanasami* v. *Natesa* (2).

The civil revision petition is dismissed with costs.

V. N. V. *Petition dismissed.*

(1) 70 Ind. Cas. 425; 43 M. L. J. 290; 31 M. L. T. 132; (1922) M. W. N. 495; 16 L. W. 440; (1922) A. I. R. (M.) 446.
(2) 16 M. 424; 5 Ind. Dec. (N. S.) 1002.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 14-B OF 1921.
August 24, 1922.
Present:—Mr. Prideaux A. J. C.

DINKAR RAO AND OTHERS—PLAINTIFFS—APPELLANTS
versus
AYUB AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (d)—Conveyance—Vendee's duty—Vendee receiving rents and profits—Vendee's duty to pay interest on unpaid purchase-money.

It is the duty of the vendee to prepare a conveyance and submit it to the vendor. [p. 891, col. 2.]

When a vendee is in actual possession or receipt of the rents and profits, he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for execution of the deed of sale. [p. 891, cols. 1 & 2.]

Appeal from the decree of the Second Additional District Judge, Akola, dated 18th December 1920, in Civil Suit No. 11 of 1920.

Mr *A. V. Khare*, for the Appellants.

Messrs. *G. L. Sulhedar* and *M. Y. Sharif*, for the Respondents.

JUDGMENT.—Uttamrao, the father of the plaintiff No. 1 Dinkar Rao, entered into an agreement with the defendant No. 1 Ayub Karim to erect and work a Ginning Factory in Survey No. 12 of Tajnapeth, Akola. The partners commenced to work in October 1913, each having an eight-annas share in the business, but Uttamrao's share was the joint family property of himself and the other plaintiffs. The field Survey No. 12 belonged to the family. After Uttamrao's death the plaintiffs brought a suit against Ayub Karim, Suit No. 96 of 1917 on the file of the Third Sub-Judge, Akola, for the dissolution of partnership and rendition of accounts. They also brought another suit against Ayub Karim Suit No. 97 of 1917 in the same Court for possession and rent of field Survey No. 12. Both the suits were compromised between the parties and the terms of the compromise were embodied in a joint application which they presented in Court on the 28th April 1917. That compromise Exhibit P. 1 stated:—

"(1) Survey No. 12 of Tajnapeth, Akola, on which the Factory in dispute stands should remain in the occupation of the defendant till the expiry of the terms of the lease deed executed for the purpose and in accordance with the terms mentioned therein.

"(2) The defendant should pay to all the plaintiffs Rs. 13,000 in full satisfaction of the partnership account of the Ayub Karim Ginning Factory partnership concern, which is the subject-matter of the big partition Suit No. 26 of 1909 in the Court of the First Additional District Judge, Akola. By paying this sum of Rs. 13,000 the defendant is to become the full owner of the Factory concern and the plaintiffs are to execute a sale-deed to the defendant to evidence this conveyance of their interest in this Factory. This sum of Rs. 13,000 is to include the rent for Survey No. 12 up to *Diwali* of 1917. The defendant Ayub Karim is responsible to

obtain the consent and signature of the other set of plaintiffs, *viz.*, Rustom Rao's sons Trivikram and Jagdesh and his wife Approbai who is now the guardian and next friend of the sons of Rustom Rao. The undersigned Dinkar Rao is to obtain consent and signatures of the late Uttamrao's sons *viz*; Bishwas Rao and Ramrao, minor, by next friend Dinkar Rao. The defendant Ayub Karim is to place the sum of Rs. 13,000 in cash with the firm of Ramdhan-Binjraj trading in Akola at 8 per cent. per mensem. This Ramdhan-Binjraj is liable to pay up this amount to the First Additional District Judge, Akola at any time at the orders of the latter Court or hold the same further according to the directions of the Court. The defendant Ayub Karim agrees to cause this Ramdhan-Binjraj to execute a writing in favour of the plaintiffs to undertake to hold the money as described above. This sale-deed is liable to be executed at the costs of Ayub Karim under the agreement described above within fifteen days from to-day at Akola. All the same the defendant is to deposit Rs. 13,000 only to-day with Ramdhan-Binjraj who will execute a writing undertaking to pay to the plaintiff or to the Court of the First Additional District Judge this sum of Rs. 13,000 with interest at 8 per cent. per mensem from to-day, the sum itself being payable after the execution of the proposed sale-deed of the Factory by the plaintiff as settled above."

On the day the compromise was filed Ramdhan put in an agreement undertaking to pay the money with interest. The suits were decided in terms of the compromise. Then the plaintiffs bring the present suit to compel the defendant to fulfil the compromise arrived at in the former suits. Ths plaintiffs pray that a sale-deed be prepared under the terms of the compromise, signatures of the plaintiffs obtained thereon and handed over to the defendant No. 1, and that he may be ordered to pay Rs. 15,337-15-0 to the plaintiffs with further interest and also costs. If this is not possible then the account of the Ayub Karim Ginning Factory be taken and plaintiffs be paid Rs. 10,000 on account of half the profits, or he may be ordered to pay this amount for all the profits in the Court of the First Additional District Judge, Akola, towards the proceedings of the final decree in Suit No. 26 of 1909. The case proceeded *ex parte* against defendant No. 2 Ramdhan, but Ayub Karim who is willing to accept the sale-deed from the plaintiffs and to pay Rs. 13,000 in accordance with the terms of the compromise, denies his liability to pay any interest on the sum of Rs. 13,000 or the costs of the suit. He further admitted that plaintiff had given him a draft of the sale-deed, but as it contained unnecessary and vexatious matter he disapproved of it. He had given several drafts to Dinkar Rao but the latter refused to execute the sale-deed in accordance with his draft. Each throws the blame of not fulfilling the compromise on to the other. The case was tried on the following issues:—

(1) When did the plaintiffs first give a proper draft of the sale-deed to the defendant No. 1 and was no sale-deed executed in accordance with it because of the defendant's default?

(2) When did the defendant No. 1 first give a proper draft of the sale-deed to the plaintiffs and was no sale-deed executed in accordance with that draft because of the plaintiffs' default?

(3) Did the plaintiff No. 1 Dinkar Rao tell defendant No. 1 that he would execute the sale-deed after the decision of the Suit No. 26 of 1909 of the First Additional District Judge's Court, if so, how does this fact affect the claim?

(4) Whether the plaintiffs are entitled to recover interest on Rs. 13,000 subsequent to 28th October 1917 till the date of the suit?

(5) What relief are plaintiffs entitled to and which party is responsible for the costs of the suit?

The lower Court finds that defendant No. 1's failure to get the sale-deed executed even if a proper draft was given to him before 8th October 1917 was justified. The plaintiff's draft given just before the institution of the suit contained unnecessary matter and the recitals did not justify the terms of the compromise. The defendant was right in refusing to execute the sale-deed

containing these terms. Defendant's own draft given to the plaintiffs was also found to offend. It was further found that the defendant No. 1 did not give any proper draft of the sale-deed to the plaintiffs and there was no default of the plaintiffs in executing the sale-deed according to any proper draft of the defendant. But as defendant's letter or notice given to the plaintiffs on 18th October 1917 clearly gives the plaintiffs notice that, if they delay the execution of the sale-deed, it would be at their risk and they would not be entitled to any interest on the sum of Rs. 13,000. The Judge thinks the plaintiffs more guilty and more responsible for the delay than the defendants. The plaintiffs were found to have led no evidence whatsoever to prove their allegation as regards the liability of defendant No. 2 Ramdhan. As the case was heard *ex parte* against Ramdhan plaintiffs were found bound to prove their allegations. A decree was passed directing the plaintiffs to execute the sale-deed of the property in favour of the defendant No. 1 within two months from the date of the decree in accordance with a draft to be filed by any of the parties and approved of by the Court. The sale-deed being executed be registered and then defendant No. 1 will deposit Rs. 13,000 in the Court of the First Additional District Judge, Akola, for the benefit of the plaintiff in the suit. In default of such payment, plaintiff shall be at liberty to recover the said amount by execution proceedings. Costs were directed to be borne as incurred, and it was directed that if the plaintiffs fail to execute the sale-deed as directed the suit will stand dismissed. Against that decision the present appeal has been filed.

It is here contended that it was the defendant's duty to give the draft of the sale-deed to the plaintiffs and, it is argued, the purchaser is responsible in respect of interest on unpaid purchase-money and the unsuccessful party in respect of the costs of the action. Dart on the Law of Vendors and Purchasers, Volume I, page 652, is quoted to show that when a purchaser is in actual possession or receipt of the rents and profits, as in the present case, Ayub Karim was of the Factory, he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for completion; and it is argued that even if the plaintiff is to blame for the delay, still he is entitled to interest as the other party was in possession of the property. It is further contended that, in any case, it was the defendant's business to propose a proper draft of the sale-deed and submit it to the plaintiffs under section 55 (*d*) of the Transfer of Property Act, it being the duty of the purchaser to prepare such conveyance. When the compromise was submitted it did not bear the signatures of all the parties and the consent of the Court had to be obtained to the compromise. There seems to have been delay on both sides, but it was clearly the defendant's duty to prepare a conveyance and submit it to the plaintiffs. There is practically no evidence on the record, except Ayub Karim's own statement and certain Pleaders notices and letters which have not been proved. But defendant has admitted the genuineness and validity of all the documents filed by the plaintiffs except the postal acknowledgments, notice to Ramdhan dated 26th April 1920 and a wire dated 28th April 1920 sent to Aproopbai. There is a notice dated 18th October 1917 from the defendant's Pleader, the genuineness of which is not disputed and in which it is stated that the plaintiffs have been called upon to execute a sale-deed and if not done they would not be entitled to any interest. This was ten days after the day of the compromise. The answer apparently is Exhibit P--7 in which the plaintiffs complained of the defendants trying to lengthen out matters and they seem by that notice to be genuinely anxious to get the matter concluded. Another notice, Exhibit P-15, was given by the plaintiffs giving full details of what occurred from the plaintiffs' point of view.

Looking to the fact that it was the defendant's business to prepare the draft and submit it to the plaintiffs and to Dinkar Roa's statement, it appears to me

that the defendant Ayub Karim is to blame for the delay, but the compromise itself says that the sum of Rs. 13,000 was payable after the execution of the sale-deed by Ramdhan-Binjraj together with interest at 8 per cent. per mensem and, that being so, the question is if the plaintiffs can claim interest from the defendant. It lay on them to establish Ramdhan-Binjraj's undertaking to pay as the case proceeded *ex parte* against him. There is no sufficient evidence on the record to establish the written undertaking given in by Ramdhan for plaintiffs apparently did not properly attempt to prove the case against Ramdhan. We know from the records of the compromise case what Ramdhan's undertaking was, and in the interests of justice it seems to me necessary to give appellants another chance of doing so. I remand the case for this purpose. Parties will be given an opportunity of calling evidence, a finding will be come to and the record returned by the 16th February 1922 on which date the case will be heard. I will determine how costs go on this remand on return of the record.

S. D. *Cases remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 479 OF 1923.

June 6, 1923.

Present:—MR. Justice Moti Sagar.

Musammat BEGUM BIBI AND OTHERS —DEFENDANTS—APPELLANTS

versus

RAHMAT KHAN—PLAINTIFF—RESPONDENT.

Majority Act (IX of 1875), s. 2—Muhammadan Law—Marriage — Majority, age of—Right to contract marriage.

The Muhammadan Law of marriage, dower and divorce is not affected by the provisions of the Majority Act as to the age of majority. Minority, under the Munhammadan Law, terminates on completion of the fifteenth year, and every Muhammadan of sound mind who has attained puberty may validly enter into a contract of marriage, even if he or she is a minor under the provisions of the Majority Act. [p. 893, col. 1.]

Second appeal from the decree of the Additional District Judge, Gujranwala, dated the 15th December 1922, reversing that of the Munsif, First Class, Gujrat, dated the 30th November 1921.

Dr. *Shuja-ud-Din*, for the Appellants.

Mr. *Abdul Ghani*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for restitution of conjugal rights brought by one Rahmat Khan, a Head Constable of Police, against *Musammat* Begam Bibi, daughter of one Hayat, who is also a defendant in the case. The other three defendants were the mother and certain other relations and an injunction was prayed for against them and the father Hayat on the allegation that they were restraining the girl from returning to her husband. The suit was resisted on the ground that *Musammat* Begum Bibi was not the wife of the plaintiff and that she had been forced to affix her thumb impression on the marriage register without any *nikah* being performed between the parties. The Trial Court found in favour of the defendant and dismissed the plaintiff's suit. On appeal the learned District Judge came to a contrary conclusion and held that a marriage between defendant No. 1 and the plaintiff had been fully established. The suit for restitution of conjugal rights was accordingly decreed, and an injunction was granted in favour of the plaintiff against defendants Nos. 2 to 5 restraining them from preventing defendant No. 1 from returning to her husband.

Against this decision a second appeal has been preferred to this Court by the defendants and it has been contended on their behalf that the finding of the Court below on the question of the factum and validity of marriage is erroneous and should be set aside. In my opinion this contention has no force and must be overruled. The learned District Judge after a full consideration of the evidence has found, and it has not been disputed before me in this Court, that at the time when the marriage is alleged to have taken place the girl had reached the age of puberty and was *sui juris* under the Muhammadan Law. The learned District Judge has also referred to certain circumstances

in his judgment which in his opinion, unmistakably point to the fact that the girl eloped with Rahmat Khan of her own free will and that she was a consenting party to the marriage which she subsequently contracted with him. Her allegation that she was forced to put her thumb impression in the *Nikah* Register has not been believed, and it has further been held that the evidence as to her previous marriage with one Allah Dad was false. These findings are clearly findings of facts and cannot be questioned in second appeal.

It has been contended by Mr. Shujaud-din that the girl at the time of her alleged marriage was a minor and that, therefore, her marriage with the plaintiff Rahmat Khan, even if it did take place, was not a valid marriage in the eye of the law. This argument entirely loses sight of the fact that the Majority Act, IX of 1875, which regulates the age of majority in India does not apply to matters relating to marriage, dower and divorce, and that the Muhammadan Law of marriage is left entirely untouched by the provisions of this Act. Minority under the Muhammadan Law terminates on completion of the fifteenth year and there can be no manner of doubt that every Muhammadan of sound mind who has attained puberty may enter into a contract of marriage even if he or she is a minor under the provisions of the Indian Majority Act. I do not see any force in this contention and must, therefore, overrule it.

There is, however, no justification for a decree for injunction being passed against appellants Nos. 2 to 5. There was no issue on the question as to whether these defendants were restraining defendant No. 1 from returning to her husband, nor was there any evidence produced in support of this allegation. I do not think that, in the absence of any evidence, the Court was justified in passing a decree for injunction against appellants Nos. 2 to 5. I accordingly accept the appeal in so far as that the decree for injunction granted to the plaintiff against appellants Nos. 2 to 5 should be set aside, but the decree for restitution of conjugal rights against defendant No. 1 should stand. Parties shall bear their own costs throughout.

Z. K. *Appeal partly accepted.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 310 OF 1921.

January 9, 1923.

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

RAGHUNATH GOVIND MAYEKAR—DEFENDANT No. 1—APPELLANT

versus

GANGARAM YESU MAYEKAR—PLAINTIFF—DECREE-HOLDER—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 16—Transferee of decree—Application for execution—Judgment-debtor, whether can plead satisfaction—Procedure.

Whether attachment proceedings are already commenced at the instance of a decree-holder or not, an assignee or transferee of the decree cannot continue any proceedings previously commenced, nor can he institute any fresh proceedings for the execution of the decree unless he makes an application under O. XXI, r. 16 of the Civil Procedure Code to the Court which passed the decree. Such an application is made to the Court as a Court which passed the decree and not as a Court which is executing the decree; and it is open to the judgment-debtor to plead that the claim has already been satisfied, even although the formalities prescribed by O. XXI, r. 2, sub-rules (1), (2) of the Code have not been followed. [p. 894, col. 2.]

Bayyana Ramayya v. *Nidamarthi Krishnamurthi*, 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133 and *Ponnuswami Nadar* v. *Letchmanan Chettiar*, 12 Ind. Cas. 657; 35 M. 659; 10 M. L. T. 442; (1911) 2 M. W. N. 568; 22 M. L. J. 170, followed.

Application praying for reversal of the order passed by the Second Class Subordinate Judge at Malwan, in *Darkhast* No. 94 of 1921.

Mr. *K. N. Koyaji*, for the Applicant.

Mr. *A. G. Desai*, for the Opponent.

JUDGMENT.

Macleod, C. J.—One Vithal Hari Kochrekar obtained a money-decree against the present petitioner in Suit No. 84 of 1918 in the Court of the Subordinate Judge at

Malwan on the 22nd March 1918. The petitioner alleges that he paid the whole amount of the decree to the plaintiff on the 28th October 1918 in full satisfaction; that the decree-holder recorded the payment on his copy of the decree, but the satisfaction of the decree was not certified to the Court, as it should have been, under O. XXI, r. 2 of the Civil Procedure Code. It would appear that thereafter the decree-holder made an application for execution. Before the application was dealt with by the Court, the decree-holder transferred the decree to the present opponent on the 18th May 1921. The opponent then applied for execution of the decree.

The Court, on the hearing of the application, raised three issues, (1) can the alleged satisfaction which was not certified to the Court be recognized in execution? (2) If so, is the said satisfaction proved? (3) Is the assignment relied on by Gangaram proved?

The findings of the Court on these issues were (1) in the negative; (2) unnecessary and (3) in the affirmative. Accordingly, the Court directed a warrant to issue against the judgment-debtor under O. XXI, rr. 30 and 43 of the Code.

The petitioner has applied to this Court under section 115 of the Code to revise that order. It seems to me quite clear that the lower Court had failed entirely to recognize what is the proper procedure to be followed in the case of an application being made to the Court by the transferee of a decree. Whether attachment proceedings are already commenced at the instance of the decree-holder or not, the assignee or transferee of the decree cannot continue any proceedings previously commenced, nor can he institute any fresh proceedings for the execution of the decree, unless he makes an application under O. XXI, r. 16 to the Court which passed the decree. That application will be heard by the Court not as a Court executing the decree, but as a Court which passed the decree, and it seems clear to me that, until an order is made by the Court which passed the decree, execution may proceed at the instance of the transferee, it is not open to the transferee to execute the decree, nor is there any Court which is executing the decree. That this must be the right view can be shown by the instance of a Court after having passed a decree transferring it to another Court for execution. In such a case the application under O. XXI, r. 16 must be made to the Court which passed the decree, and the Court then is certainly not the Court executing the decree. The provisions then of O. XXI, r. 2, sub-rule (3), would not be applicable as that only enacts that a payment or adjustment which has not been certified or recorded as aforesaid, should not be recognised by any Court executing the decree. That sub-rule lays down an exception to the ordinary law that a party against whom a claim is made, may plead as a defence that the claim has been satisfied.

In my opinion, therefore, when an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree-holder under O. XXI, r. 16, the application is made to the Court as a Court which passed the decree, and not as a Court which is executing the decree; and it is open to the judgment-debtor to plead that the claim has already been satisfied even although the formalities prescribed by O. XXI, r. 2, sub-rules (1) and (2), have not been followed.

There is authority for this opinion in the decisions of the Madras High Court in *Ponnusawmi Nadar* v. *Letchmanan Chettiar* (1) and in *Bayyana Ramayya* v. *Nadamarthi Krishnamurthi* (2).

In the first case *A* held a decree against *C*. It was arranged between *C* and *B* that *B* should advance the decretal amount to *C* as a loan and that an assignment of the decree should be obtained in the name of *B* for the benefit of *C*. The decree was accordingly assigned to *B* who applied for execution. *C* set up the above arrangement as a bar to execution. *B* contended that such arrangement amounted to an adjustment of the decree and not being certified to the Court it could not be given effect to under O. XXI, r. 2 of the Civil Procedure Code. There was a difference

(1) 12 Ind. Cas. 657; 35 M. 659; 10 M. L. T. 442; (1911) 2 M. W. N. 568; 22 M. L. J. 170.
(2) 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133.

RAGHUNATH *v.* GANGARAM.

of opinion. Mr. Justice Abdur Rahim holding that the arrangement amounted to an adjustment of the decree, and not being certified, could not be pleaded as a bar to execution, Mr. Justice Sundara Ayyar holding that O. XXI, r. 2, did not make an uncertified adjustment invalid but merely forbade effect being given to such an adjustment when it was set up as a defence to the execution of a decree by one entitled to do so. The section did not disentitle the judgment-debtor to prove facts which show that the applicant was not the real transferee, even if the facts he relied upon showed that the decree had been adjusted.

The facts in the second case were very similar. The learned Judge, following the opinion of Mr. Justice Sundara Ayyar in the previous case, held that O. XXI, r. 2, sub-rule (3) of the Civil Procedure Code did not debar the judgment-debtor from proving facts which showed that the transferee of the decree applying for execution was merely a *benamidar* of another judgment-debtor, even if the facts on which he relied showed that there had been a payment which had not been certified, and when the transferee was found to be such a *benamidar*, the Court was bound by O. XXI, r. 16 to refuse execution in his favour.

It seems to me, therefore, that the ordinary law applies when an application is made under O. XXI, r. 16. The judgment-debtor asserting that he has paid the decretal amount even although it has not been certified, is entitled to prove it. It cannot be suggested that the judgment-debtor is not entitled to pay the decretal amount to the creditor, nor can such a payment be treated as a nullity because it is not certified. Therefore, if the decretal amount is, as a matter of fact, paid, then the decree in the eye of law becomes satisfied and any attempt to execute it on a demand for payment made is unconscionable conduct on the part of the decree-holder. It is true that the decree-holder may be allowed, under O. XXI, r. 2, sub-rule (3), to take advantage of the fact that the payment was not certified, to contend that it cannot be recognised by the Court executing the decree. But the fact remains, assuming that the payment has been made, that the decree has been satisfied and there is nothing to transfer, so that when a transferee comes to the Court which passed the decree and asks the Court to recognise him as a decree-holder, it is open to the judgment-debtor to say, "I have satisfied the debt which was merged in the decree." In my opinion, therefore, the Rule must be made absolute, the order made by the lower Court set aside and the case remanded to that Court to be tried on the footing that notice under O. XXI, r. 16 has been issued and is being heard, and that on the hearing of that notice, it will be open to the judgment-debtor to prove that he satisfied the decree. All costs will be costs in the notice under O. XXI, r. 16. Both parties to be allowed to adduce evidence.

Crump, J.—The question which arises in the present matter is, whether, where the assignee of a decree applies to execute the decree, the Court which has to consider such application is precluded from considering any objection to the validity of the assignment, if such objection involves proof of facts showing that there had been a payment or adjustment of the decree.

Now, under O. XXI, r. 16, where the transferee of a decree applies for execution, it is necessary that notice of such application shall be given to the transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections (if any) to its execution. The first paragraph of that rule clearly lays down that the application for execution must be made to the Court which passed the decree, and it is plain enough that the Court which passed the decree is not necessarily the Court executing the decree. The Court which passed the decree may have transferred it for execution to another Court, and had the Legislature intended to indicate the Court which executed the decree for the purposes of O. XXI, r. 16, no doubt it would have used apt words for that purpose.

Therefore, so far as the wording of the section goes, there seems no reason for extending to the consideration of an application under O. XXI, r. 16 the bar introduced by the third paragraph of O. XXI, r 2. In that paragraph the words used are "the Court executing the decree,"

and, in my opinion, that restriction should be confined strictly to those cases where it really applies. It seems to me that where a Court has to deal with an application on the notice under O. XXI, r. 16, the question which arises is a preliminary question, that is to say, whether the person who comes forward as assignee is or is not entitled to execute the decree, and until that question has been disposed of, no question of execution can arise, and, therefore, there is no Court at that stage which can be termed "the Court executing the decree." If that is the correct view, and it finds support from the decisions which my Lord the Chief Justice has discussed, it follows that the Court which has to deal with objections to the validity of an assignment is not precluded from considering those objections which are only excluded from the consideration of the Court executing the decree. It follows, therefore, that if satisfaction anterior to the date of the assignment is made out, the Court could consider that matter before allowing the assignee or so-called assignee to proceed with execution, and it seems to me abundantly clear that if the decree has, as a matter of fact, been satisfied before the date of the assignment, there is nothing which can compel the Court which passed the decree to allow the alleged assignee to proceed with execution. Indeed, it would be wrong to allow anything of the kind to be done. Therefore, in the present case the point which has not been determined must, in my opinion, be determined, that is to say, whether the decree was, as a matter of fact, discharged before the date of the assignment on which the opponent applying for leave to execute bases his title. I agree, therefore, with the order proposed.

S. R. P. & N, H. *Rule made absolute.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1999 OF 1920.

June 5, 1923.

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

NUR AHMAD KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE MUNICIPAL COMMITTEE, AMRITSAR, THROUGH ITS SECRETARY—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 56 (4), 131—Well, private, used by public—Dedication to public—Presumption—Well, whether vests in Municipal Committee—Well in dangerous condition—Procedure.

In India, ordinarily, the owners of wells do not prohibit the public from using them. It is considered to be a meritorious act to allow the public to take water even from private wells. So the mere fact that the public have been allowed to take water from a private well for a number of years cannot necessarily lead to the conclusion that the well was dedicated to the public. [p. 898, col. 1.]

A private well does not vest in the Municipal Committee merely because of long user by the public and section 56 (*b*) of the Punjab Municipal Act has no application to such a well. [p. 898, col. 1.]

If a private well appears to a Municipal Committee to be injurious to health or offensive to the neighbourhood, it has ample power under section 131 of the Punjab Municipal Act by notice to require the owner to cleanse, repair, cover, fill up or drain it off. [p. 898, col. 1.]

Second appeal from a decree of the District Judge, Amritsar, dated the 16th June 1920, affirming that of the Munsif, First Class, Amritsar, dated the 2nd November 1919.

Messrs. *Aziz Ahmad, Abdul Rashid* and *D. R. Sawhney*, for the Appellants.

Lala *Hargopal*, for the Respondent.

JUDGMENT.—This was a suit for a perpetual injunction in respect of a well No. 734 situated within the Municipal limits of Amritsar. The plaintiffs claimed to be its owners and complained that the Municipal Committee had wrongfully filled it up. The relief claimed was for a mandatory injunction directing the defendant to restore the well to its former condition. The defendant denied the plaintiffs' title and asked for the dismissal of the suit on the ground that the plaintiffs were out of possession and were not entitled to maintain the suit. It was further pleaded that as the well

was in a very bad and dangerous condition, the defendant had filled it up for the benefit of the public and the neighbouring proprietors. Durga Prasad, Munsif, First Class, dismissed the suit by his judgment dated the 4th October 1918 on the preliminary ground that the plaintiffs having failed to prove their present possession were not entitled to maintain it.

On appeal by the plaintiffs the case was remanded by Mr. A. Campbell, Additional Judge, by his order dated the 1st of March 1920 under O. XLI, r. 23, Civil Procedure Code, for trial on the merits. The case again came for decision before Durga Prasad, Munsif, First Class, who recorded the following finding on the question of title:—

"The defendant in written pleas has not stated that the well was sunk by the Committee or by the general public but it is given in the pleas that the well is a public one, which means that the well once belonged to the plaintiffs and now by some reasons it has become a public well on which the Committee had a full control. The well is situate in front of the plaintiffs' house as I have seen twice on the spot and the whole site near the well belongs to the plaintiffs. From these facts I find that the well belonged to the plaintiffs as it was purchased by their father along with the house in front of which the well is situate."

The learned Munsif, however, further found that by long user by the public the well had become a public one and that, therefore, the Municipal Committee, under section 56 (*b*) of the Municipal Act, 1911, had the power to fill it up. The suit was accordingly dismissed.

On appeal the decree dismissing the suit has been upheld by the lower Appellate Court. Hence the plaintiffs have come up in second appeal to this Court.

It has been contended on their behalf that, on the facts found, the conclusion that the well is a *waqf* property and thus comes within the description of a public well is not justified. The lower Appellate Court has recorded the following findings of fact:—

(1) that the plaintiffs were the original owners of the well;

(2) that, admittedly, there was no express dedication;

(3) that the well was recorded as *waqf* in the Municipal Register of 1890 without any objection being raised by the owner;

(4) that the well has for a long time been used by the public without any interruption on the part of the owner though no exact period has been given by the witnesses, and

(5) that the plaintiffs had been spending money on its repair.

Upon the findings, the lower Appellate Court arrived at the following conclusion.—

"It seems to be probable that, at least since 1890, the public have been using the well without any hindrance and this, I think, is *prima facie* sufficient to show an intention on the part of the owner to dedicate the well to the use of the public. If this dedication can be inferred, then the public has a right to use the well and it appears to me that the well is a public one within the meaning of section 56, clauses (*a*) (*b*) of the Municipal Act."

The conclusion at which the learned Judge has arrived is mainly based upon two facts, namely, (1) that the well was recorded as *waqf* in the Municipal Register in 1890 without any objection on the part of the owner, and (2) that it has been used by the public since 1890 without any objection on the part of the owner.

It is not shown that the owner had any notice of the entry in the register. The register in which the entry has been made was kept by the defendant. At the most, the entry may be treated as an admission of the defendant that the well was *waqf*. The evidence as to the entry of the well as *waqf* property in the Register of the Municipal Committee, in our judgment, cannot be used as a piece of evidence against the plaintiffs in this case. The learned Munsif found upon evidence that up till 1880 the plaintiffs or their predecessors-in-title were in possession of the well as owners. The user by the public is said to have commenced from 1890. In our opinion this was not suffi-

cient to raise the presumption that the owners had dedicated the well to the public. In this country ordinarily the owners of wells do not prohibit public from using them. It is considered to be a meritorious act to allow the public to take water even from private wells. We are, therefore, clearly of opinion that the mere fact that the public has been allowed to take water from the well since 1890 cannot necessarily lead to the conclusion that the well was dedicated to the public. We have looked at the plan of the well which shows that there are buildings belonging to the plaintiffs on the east and south of the well and that there is an enclosure with walls on three sides within which the well is situated. It is open towards the public road. The learned Munsif has also found that "the well is situate in front of the plaintiffs' house as I have seen twice on the spot and the whole site near the well belongs to the plaintiffs". Under these circumstances, we cannot uphold the finding of the lower Appellate Court on this point. The Committee had no power to act in the manner it did. In our opinion section 56 (*b*) of the Municipal Act has no application to the facts of this case and the well did not vest in the Committee. If the well appeared to the Committee to be injurious to health or offensive to the neighbourhood it had ample power under section 131 of the Act by notice to require the owner to cleanse, repair, cover, or fill up or drain it off. This was not done by the Committee.

We accordingly accept the appeal and setting aside the decrees of the Courts below grant the plaintiffs a mandatory injunction directing the Municipal Committee to restore the well to its original condition with costs in all Courts. If the Municipal Committee fails to do this within a reasonable time, the plaintiffs may themselves restore the well and recover the costs from it.

Z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1731 OF 1921.

May 14, 1923.

Present:—Mr. Justice Ryves and Mr. Justice Daniels.

BHAGELU—PLAINTIFF—APPELLANT

versus

Musammat DHARMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (2)—Guardian ad litem—Appointment, how long continues—Appeal, whether can be filed by any other person.

Where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole of the *lis* or until it is revoked by Court; and the guardian so appointed is the only person who can file an appeal on behalf of the minor. An appeal filed by any other person is invalid.

Shambhu v. *Kanhaya*, 75 Ind. Cas. 457, 44 A. 619; 20 A. L. J. 599; (1922) A. I. R. (A.) 332, followed.

Bawan Das v. *Bishnath*, A. W. N. (1899) 203, referred to.

Second appeal from the decree of the Additional Subordinate Judge, Basti, dated the 30th May 1921.

Messrs. *Jang Bahadur Lal* and *S. P. Sinha*, for the Appellant.

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

JUDGMENT.—The facts out of which this appeal arises are as follows:—Bhagelu brought a suit against *Musammat* Dharma for restitution of conjugal rights and, as *Musammat* Dharma was a minor, her uncle Sampat was made guardian *ad litem*. The Trial Court decreed the suit. An appeal was filed in the lower Appellate Court on behalf of the minor by the minor's father Manbodh. There had been no order removing Sampat from guardianship. The lower Appellate Court commented on the fact that, although Sampat had been appointed guardian *ad litem* in the lower Court, the appeal had been filed through Manbodh. In the result, the Court allowed the appeal and dismissed the suit.

On appeal before us it has been urged that there was no valid appeal before the lower Appellate Court and our attention was called to the recent decision of a Bench of this Court in *Shambhu* v. *Kanhaya* (1) which is exactly in

(1) 75 Ind. Cas. 457; 44 A. 619; 20 A. L. J. 599; (1922) A. I. R. (A.) 332.

point. It was there held that, where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole of the *lis* or until it is revoked by Court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. That decision follows several other decisions of this Court which are mentioned in the course of the judgment and also a Madras case. It seems to us that we are bound to follow this course of decisions. It may be that the defendant has a remedy open to him as suggested in the case of *Bawan Das* v. *Bishnath* (2). We allow the appeal, following the decisions of this Court, and setting aside the decree of the Court below restore that of the First Court. We make no order as to costs.

M. A. A. & N. H. *Appeal allowed.*

(2) A. W. N. (1899) 203.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 227 OF 1922.
September 21, 1923.

Present:—MR. Prideaux, A. J. C.

GOVINDRAO—DEFENDANT NO. 1—APPELLANT

versus

RUKHMANAND AND ANOTHER—PLAINTIFF—DEFENDANT NO. 2—RESPONDENTS.

Mortgage—Prior and puisne mortgagees—Foreclosure by prior mortgagee—Puisne mortgagee not impleaded—Right to redeem prior mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.

In a suit by a pusine mortgagee the prior mortgagee was impleaded as a defendant but was discharged as he pleaded paramount title. The puisne mortgagee purchased the mortgaged property in execution of the final decree on 15th November 1916. The prior mortgagee sued on his mortgage without making the puisne mortgagee a party and obtained a final decree on 12th October 1916 and possession on 17th October 1916. The puisne mortgagee sued to redeem the prior mortgagee who in his turn claimed to redeem the former as he had foreclosed the equity of redemption;

Held, that the prior mortgagee could not be allowed to redeem as he would thus get an advantage of his own breach of the law in not impleading the puisne mortgagee as a party to his suit. [p. 900, col. 1.]

Hassanbhai v. *Umaji*, 28 B 153; 5 Bom. L. R. 892, not followed.

Appeal from the decree of the District Judge, Wardha, dated 21st February 1922, in Civil Appeal No. 68 of 1921.

Messrs. *M. B. Kinkhede*, R. B., and *M. R. Bobde*, for the Appellant.

Mr *D. N. Khare*, R. B., for Respondent No. 1.

JUDGMENT.—The following dates are important in the case. The field in suit was mortgaged to the present appellant on 30th July 1910 and then to the respondent-plaintiff on 26th February 1913. The plaintiff filed a suit, No. 76 of 1914, and impleaded the prior mortgagee as a party. He was discharged on 7th August 1914 pleading his paramount lien. A preliminary decree was passed on 5th October 1915 and a final decree on 25th February 1916 and plaintiff purchased the field in auction on 15th November 1916. The prior mortgagee sued in Suit No. 86 of 1916 not making, as he should have done, the puisne mortgagee a party to it. He got a final decree on 12th October 1916 and took possession on 17th October 1916, *i.e.*, before the auction of the subsequent mortgagee's suit. The present case of the subsequent mortgagee is to redeem the prior mortgagee. His claim has been allowed and the only point pressed in this appeal is that the prior mortgagee has the superior right to redeem as he has foreclosed. The question for consideration is, whether the prior mortgagee who has foreclosed the equity of redemption of the mortgagor and taken possession can insist upon his being maintained in possession by offering to redeem (the subsequent mortgagee?) whose title to possession came into existence subsequent to the foreclosure. The question is, whether the prior or the subsequent mortgagee has the right to redeem.

It is argued that, under O. XXXIV, r. 1, Civil Procedure Code, a prior mortgagee is not a person who can be said to be interested in the suit of the subsequent mortgagee. That is, he is not a necessary party the reason being that what is mortgaged to the subsequent mortgagee is merely the right of redemption; in fact an encum-

brance on the equity of redemption. The presence of the prior mortgagee in Court is not necessary to work out the rights of the subsequent mortgagee. If, however, that person impleads a prior mortgagee and he fails to set up his prior lien there are cases which hold that he cannot do so again. In the present case, when joined in the plaintiff's suit, the defendant did set up his prior mortgage and was discharged from the suit on that ground.

It is contended that there has been no adjudication between the two mortgagees and the appellant's rights under the prior mortgage remained intact, or, in other words, the puisne mortgagee works out his right against the mortgagor subject to the prior mortgagee's rights whatever they be. So, if the prior mortgagee brings a suit and obtains foreclosure therein, he can claim to redeem the subsequent mortgagee as the interest of the mortgagor becomes transferred to the prior mortgagee.

On 12th October 1916 the present appellant held the lien in two capacities: one that of a prior mortgagee and the second as the holder of the mortgagor's equity of redemption subject to the encumbrance of the subsequent mortgagor. On 15th November 1916 the equity of redemption as regards the second mortgage was put to auction and purchased by the puisne mortgagee but there was nothing for him to sell or get, as all interest had passed on 12th October 1916 to the prior mortgagee. So nothing was bought or sold. The right of possession is a right incidental to the right to property and in this case would not by his auction-sale pass to the puisne mortgagee. The person who has a prior title would be the prior owner and as such has the right to redeem the plaintiff's mortgage. The appellant, in his capacity of prior mortgagee, had the option to state that he was willing to be redeemed by the puisne mortgagee or to state, *qua* representative of the mortgagor, that he would permit the puisne mortgagee to redeem him. Having the election, he makes it and offers the latter of the two alternatives to the plaintiff. It is admitted that he will have to pay the decretal amount as fixed by the decree on the second mortgage following the case of *Het Ram* v. *Shadi Ram* (1).

Great stress was laid in argument on the decision in *Hassanbhai* v. *Umaji* (2) and in *Parasram Singh* v. *Pandohi* (3), in which the Bombay case is followed. Against these cases have been quoted *Ram Narain Sahoo* v. *Bandi Pershad* (4), *Raghoba Sakharam* v. *Madho Rao Bapuji* (5) and *Sonba* v. *Lahanoo* (6).

The case in *Hassanbhai* v. *Umaji* (2) unquestionably favours the position contended for by the appellant. But it seems to me that in the present case appellant cannot be permitted to gain a position which he would not have gained except by a breach of the law. He was bound to make the puisne mortgagee a party to his mortgage suit. If he had done so, the present plaintiff could have redeemed or, if he had failed to do so, could in turn have been redeemed. It is by not making the plaintiff a party to that suit that the present appellant, having obtained prior possession, is in a position to say, "as I have executed my mortgage decree and hold possession, I must be allowed to redeem the puisne mortgagee." It seems to me that the equities forbid the appellant being allowed to take advantage of his own wrong and that the decisions of the Courts below in the case are correct. No dispute is raised as to the correctness of the price of redemption. The result is that this appeal fails and is dismissed with costs.

G. R. D. & N. H. *Appeal dismissed.*

(1) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72; 45 I. A. 130 (P. C.).
(2) 28 B. 153; 5 Bom. L. R. 892.
(3) 67 Ind. Cas. 533; 20 A. L. J. 401; (1922) A. I. R. (A.) 135; 44 A. 462; 1 U. P. L. R. (A.) 145.
(4) 31 C. 737.
(5) 15 C. P. L. R. 26
(6) 15 C. P. L. R. 188

KAVERIBAI AMMAL *v.* B. MEHTA & SONS.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 41 OF 1923.

April 24, 1923.

Present:—Sir Walter Schwabe, KT., Chief Justice, and MR. Justice Coleridge.

KAVERIBAI AMMAL, AGENT S. L. NARAYANA RAO—PLAINTIFF—APPELLANT

versus

B. MEHTA & SONS—DEFENDANTS—RESPONDENTS.

Letters Patent (Mad.), c. 15—Refusal to alter terms of sale proclamation—Refusal to extend time of Court sale—Order, whether "judgment" and appealable.

An order by a Single Judge on the Original Side of the Madras High Court refusing to alter the terms of a sale proclamation by raising the upset price and dividing the property into lots is purely one of discretion and of merely interlocutory nature. It is not a "judgment" within the meaning of clause 15 of the Letters Patent and is not appealable.

An order refusing to postpone a Court sale or to extend the time allowed to raise money by mortgage or private sale of the properties which are the subject of Court sale is also interlocutory and is not appealable.

Tuljaram Row v. *Alagappa Chettiar*, 8 Ind. Cas. 340; 55 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1, relied on.

Sivagami Achi v. *Subrahmania Ayyar*, 27 M. 259; 14 M. L. J. 57, doubted.

Letters Patent Appeal from the order of Mr. Justice Kumaraswami Sastri, dated 3rd April 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 321 of 1922.

Messrs. *L. S. Veeraraghava Aiyar* and *A. Ramakrishna Ayyar*, for the Appellant.

Mr. *T. Ethiraja Mudaliar*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—This is an interlocutory appeal from an order of Kumaraswamy Sastri, J., sitting on the Original Side refusing the application by Judge's summons to alter the price fixed as the upset price in the proclamation of sale, to alter the mode of selling a certain part of the property into a sale in convenient lots instead of a sale as a whole, and to postpone the date of the sale.

The suit was a mortgage suit. The preliminary decree gave what seems to be a short time of three months for redeeming. That time having elapsed, no application having been made for extension of the time and no appeal having been taken from the preliminary decree, a final decree was passed ordering a sale. The Court then directed the sale on a certain day and in the ordinary way, under O. XXI, r 66, caused a proclamation to be drawn up. Thereafter this summons was taken out and the learned Judge having dismissed it, this appeal is brought to this Court; and the question is whether such an appeal lies.

Under the Code of Civil Procedure then in existence, which is in many ways similar on this matter to the present Code, a Full Bench of this Court, in *Sivagami Achi* v. *Subrahmania Ayyar* (1), held that the Court in exercising its powers settling the terms of the sale proclamation acts ministerially and not judicially, and that, therefore, no appeal lies. I think it is true to say that, for the purpose of that decision, it was not necessary so to hold; but, however that may be, that is a finding of a Full Bench. Speaking for myself, I have very great doubts as to whether it is a correct finding or not, but it is a finding by which we are bound, provided there is nothing in the alteration in the Code to make it no longer applicable. On that, an interesting argument has been addressed to us and I should myself desire to refer that question to a Full Bench, if I considered it necessary to follow that case in order to decide the point before us, but I do not think it is. The question to be determined here must turn on the proper interpretation of clause 15 of the Letters Patent which says: "We further ordain that an appeal shall lie from the judgment (not being an order of a certain kind) of one Judge of this Court." There is no doubt that those words give a right to appeal in respect of many kinds of orders, and the law, so far as this Court is concerned, is to be found in the Full Bench decision in *Tuljaram Row* v. *Alagappa Chettiar* (2), where a very large number of instances were given of orders, which were appealable and one or two instances were given of orders which were not appealable and the Court came to the conclusion that the

(1) 27 M. 259; 14 M. L. J. 57 (F. B.).
(2) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

kind of order that was not appealable was an order which was described as merely interlocutory. In my judgment, the order in this case was merely interlocutory. It does not finally dispose of the rights of the parties at all. I should add that, in so far as it is not an application to extend the time for the purpose of allowing the amount of the decree to be raised by mortgage or by private sale of such property, the Court of first instance by reason of the terms of O. XXI, r. 83 (3) was expressly forbidden to make such order, and on that ground the Court had no power to make such order and no appeal can lie from its refusal to do so. So far as the question of granting further time is concerned, the power of the Court below to do so must be sought under O. XXI, r. 69 which says that the Court, in its discretion, may adjourn a sale to a specified day, and, in my view, the order in the exercise of that discretion is an order of a merely interlocutory nature. I think the same applies to the question here whether there should be an alteration of the terms of the sale proclamation by raising the upset price, and dividing the property into lots. The matter is so purely one of discretion of the lower Court not affecting the final rights of the parties at all, that it ought to be treated as merely interlocutory.

On these grounds, the preliminary point succeeds and this appeal must be dismissed with costs.

Coleridge, J.—I agree. I should like to add that, in my opinion, *Sivagami Achi* v. *Subrahmania Ayyar* (1) needs to be reconsidered by a Full Bench as, in my opinion, the alteration of the Code was deliberate and was intended to take away the ministerial functions that were alleged to be vested in the Court and distinctly made it a judicial function from which an appeal will lie.

V. N. V. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 191 OF 1922.
August 9, 1923.

Present:—Mr. Baker, Offg. J. C.

BHAVARAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NATHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Will, construction of—**Malik** *and* **Kabiz,** *meaning of*—*Legatee next heir*—*Intention to convey absolute estate*—*Presumption.*

The expressions "*malik*" and "*kabiz*" used in a Will convey an absolute ownership to the legatee.

Harilal Pranlal v. *Bai Rewa*, 21 B. 376; 11 Ind. Dec. (N. S.) 253 and *Motilal Mithalal* v. *Advocate-General of Bombay*, 11 Ind. Cas. 547; 35 B. 279; 13 Bom. L. R. 471, relied on.

The fact that an only daughter of a Hindu testator who, in the absence of a Will, would have had the estate for life, has been bequeathed the estate should be taken into consideration in estimating the intention of the testator. In such a case the inference is that an absolute estate was intended to be conveyed.

Fateh Chand v. *Rup Chand*, 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182; 43 I. A. 183 (P. C.) and *Surajmani* v. *Rabi Nath Ojha*, 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.), distinguished.

Appeal from the decree of the District Judge, Saugor, in Civil Appeal No. 102 of 1921, dated the 21st January 1922.

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

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—The only question in this case is, as to the interpretation of the Will made by Hari Singh in favour of his daughter, Binia Bai, the question being whether it conveys an absolute estate or not. It is to be observed that in any case Binia Bai, the only daughter, would have the estate for her life, and this must be taken into consideration in estimating the intention of the testator, and to a certain extent differentiates the case from those quoted by the learned Pleader, for the appellant, *viz.*, *Harilal Pranlal* v. *Bai Rewa* (1) and *Motilal Mithalal* v. *Advocate-General of Bombay* (2). The expressions used in

(1) 21 B. 376; 11 Ind. Dec. (N. S.) 253.
(2) 11 Ind. Cas. 547; 35 B. 279; 13 Bom. L. R. 471.

the Will are *"malik"* and *"kabiz."* These have been interpreted by the Privy Council to convey absolute ownership. The latest case on the point is *Fateh Chand* v. *Rup Chand* (3), in which *Surajmani* v. *Rabi Nath Ojha* (4) is followed, and the words *"malik"* and *"kabiz"* are held to unquestionably carry the signification of a full ownership in the property; so also in *Thakur Parshad* v. *Jamna Kunwar* (5), it is held that unless there is something in the context qualifying it the word *malik* used in a Will it bears its technical meaning, and when a testator bequeathed his property to his mother and wife who were to be *"malik aur kabiz"* it was held that the ladies obtained an absolute interest.

In these circumstances, I am of opinion, that the view of the lower Appellate Court is right. The appeal fails and is dismissed with costs.

Appeal dismissed.

G. R. D & N. H.

(3) 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 182; 43 I. A. 183 (P. C.).

(4) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.).

(5) 2 Ind. Cas. 474; 31 A. 308; 6 A. L. J. 420.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1173 OF 1921.

June 29, 1923.

Present:—Mr. Justice Abdul Raoof.

KIDAR NATH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

WAZIR CHAND AND OTHERS—DEFENDANTS—RESPONDENTS

Construction of document—Charitable trust—Hindu Law—Trustee, failure to appoint, effect of.

Under the Hindu Law a trust cannot fail for want of the appointment of trustees and the Court will appoint a manager on the failure to appoint of those entitled to appoint him. [p. 905, col. 2.]

Vidya Varuthi Thirtha Swamigal v. *Balusami Ayyar*, 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), referred to.

A deed of partition contained the following clause:—

"One house (*shiwala*) with shops under it and Rs. 10,000 (ten thousand rupees), out of the whole heritage of the deceased, have been set apart for charitable purposes as *wakf* property. The said Rs. 10,000 is to be spent as follows;—

		Rs.
(*a*)	for a *sada barat* ..	8,000
(*b*)	for the construction of a *shiwala*	1,000
(*c*)	for the expenses in connection with the *sati* of the family..	1,000
	Total ..	10,000"

Held, (1) that the intention of the executants of the deed was to create a public and charitable endowment in respect of the immoveable property and the cash; [p. 906, col. 1.]

Jugalkishore v. *Lakshmandas Raghunathdas*, 23 B. 659; 1 Bom. L. R. 118; 12 Ind. Dec. (N. S.) 440, referred to.

(2) that the intention was that the cash should not be consumed, but that the income or interest only should be spent on maintaining the *wakf*. [p. 906, col. 1.]

Second appeal from a decree of the District Judge, Karnal, dated the 21st of January 1922, affirming that of the Senior Subordinate Judge, Karnal, dated the 17th October 1914.

Mr. *Shamair Chand*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit for rendition of accounts, removal of the defendants from the office of trustees and appointment of new trustees. The Trial Court dismissed the suit and the Appellate Court upheld the decree of the Trial Court. Hence this second appeal was filed by the plaintiffs.

On the appeal being taken up for decision a preliminary objection was raised on behalf of the respondents on the ground that it must be taken to have abated on the following facts:—The judgment under appeal was given on the 21st of January 1922. The appeal was filed on the 19th of April 1922. On the 6th of July 1922 an application was made to remove from the Memorandum of Appeal the name of one Ram Richpal and substitute the names of Prem Nath and Hukam Chand, as Ram Richhpal had died before the presenta-

tion of appeal and his name had wrongly been continued on the record. This application was admittedly made after the period of limitation provided by the law for the presentation of appeals had expired. It, however, appears that, in spite of the fact that Ram Richhpal had died before the decision of the lower Appellate Court, his name by an oversight was retained in the decree of the lower Appellate Court. Mr. Shamair Chand has contended that he and his clerk were misled by the entry in the decree of the lower Appellate Court, that the retention of the name of the deceased was not intentional, that having regard to this circumstance the mistake should be overlooked and the time for appeal against the heirs of Ram Richhpal should be extended under section 5 of the Indian Limitation Act. In my opinion the mistake appears to be a *bona fide* one. I, therefore, extend the period of limitation under section 5 of the Limitation Act and overrule the preliminary objection.

As regards the merits of the case the following facts must be taken into consideration in order to decide the question raised in this second appeal. One *Musammat* Dhako died in 1875 leaving considerable property, both moveable and immoveable—a dispute arose between the reversioner as to succession. On the 21st of August 1875 a deed of partition was executed by which the ancestors of the plaintiffs Nos. 1 and 2 and those of the defendants divided the property. By that deed a *shiwala* with certain shops and Rs. 10,000 were set apart for charitable purposes. The clause relating to the charity is set out in the judgment of the lower Appellate Court as follows.—

"Rs. 10,000 (ten thousand rupees) cash and a house, (*shiwala*) with shops as a joint property, detailed below, have been set apart for charitable purposes with our consent. We, co-sharers, have no claim to the said cash and house and shops. A *sada barat* (perpetual giving of alms) will continue to exist. Hence we have written these few words in the form of a deed of partition so that it may serve as an authority:—

"One house (*shiwala*) with shops under it and Rs. 10,000 (ten thousand rupees), out of the whole heritage of the deceased, have been set apart for charitable purposes as *wakf* property. The said Rs. 10,000 is to be spent as follows:—

	Rs.
(*a*) for a *sada barat* ..	8,000
(*b*) for the construction of a *shiwala* ..	1,000
(*c*) for the expenses in connection with the *sati* of the family ..	1,000
Total ..	10,000"

The suit was instituted by six persons, namely, (1) Shiba Mal, son of Ajudhia Parshad, (2) Kidar Nath, son of Ram Parshad, (these two plaintiffs are members of the family. (3) Naubat Rai, son of Hanam Das, (4) Rahtu Mal Gupta, son of Ram Saran Das, (5) Gopi Nath, son of Richha Mal, and (6) Mangat Ram, *lambardar*, son of Data Ram. These are outsiders and are said to be *Arya Samajists*, The defendants against whom the suit is brought are the children or grand-children of the members of the family who were parties to the partition-deed. It is alleged in the plaint that Sant Lal, Gowardhan Das and Bishan Das were appointed as trustees of the *wakf* property. The suit was instituted so far back as the 14th of January 1914, after obtaining the necessary sanction under section 92 of the Code of Civil Procedure. The material issue which arose for decision on the pleadings of the parties was whether the ancestors of plaintiffs Nos. 1 and 2 had endowed the property in suit for a public charitable purpose and thus had created a public trust by means of the partition-deed of 1875. Mr. Ali Hussain, the learned Senior Subordinate Judge, after considering the evidence and circumstances of the case, came to the conclusion that the trust was not for a public and charitable purpose, and that the plaintiffs were not entitled to maintain the suit, and dismissed it by his judgment dated the 17th of October 1914.

KIDAR NATH v. WAZIR CHAND.

An appeal was preferred against his decision which was accepted and an order was made by Mr. Bishambar Dayal on the 19th of July 1915 remanding the case under O. XLI, r. 23 of the Code of Civil Procedure for trial *de novo*. This order of remand was set aside by a Division Bench of this Court on the 17th of May 1921, and the case was sent back to the Appellate Court for disposal. The learned Judge of the Court below has upheld the decree passed by Mr. Ali Hussain.

Ostensibly the only ground upon which the learned Judge has upheld the decree of the Trial Court is that as no trustees were appointed under the deed there was no trust at all. The following passage in the judgment speaks for itself:—

"He also urged that there was no trust at all, with this I agree. The essential idea of a trust is that certain persons hold property to or for the use of others (including charitable and religious purposes); and the creation of a trust involves the appointment of trustees. The deed in question appoints no trustees and creates no trust. It incidentally declares the charitable intentions of the owners of joint property who were dividing it among themselves. If they had not carried out these intentions nobody—no outsider at any rate—could have compelled them to do so, and the fact that their intentions were carried out for some years wholly or in part is irrelevant."

Evidently the learned Judge has imported the notions of the English Law into his judgment. The rule of the Hindu Law is thus stated by Mr. Gour in section 225 of his Hindu Code:—

"225. (1) The founder is entitled to provide for the management of any endowment created by him.

'(2) He may nominate a *shebait* and provide for his successor and effect will be given to his wishes if not inconsistent with the general law.

"(3) where the founder makes an endowment without providing for its management, the right of management vests in the founder and his heirs.

"(4) The right of the founder to provide for the management devolves upon his heirs on his death.

"(5) The Court may appoint a manager in the last resort."

A trust, according to the Hindu Law, cannot fail for want of the appointment of trustees and the Court will appoint a manager on the failure of those entitled to appoint him, see page 923, paragraph 2111 of the same Code,

In the case of *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1) at page 839* their Lordships observed: "It would in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Muhammadan Laws were to be construed with the light of legal conception borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia*." The learned Judge of the Court below was, therefore, wrong in holding that there was no endownment in this case because no trustees had been appointed. The question whether an endowment for a public and charitable purpose was made depends upon the true construction of the clause in the deed referred to in the beginning of this judgment. The *shiwala* is situated outside the family house and is open to the public who resort to it for worship. Thus there can be no doubt that the intention of the dedicators was to endow it to the public. The trust is created for three purposes, namely:—

(*a*) for a *sada barat*;

(*b*) for the construction of a *shiwala*, and

(*c*) for the expenses in connection with the *sati* of the family.

Out of these the last purpose only may be stated to be of a private character. In the case of *Jugalkishore* v. *Lakshmandas Raghunathdas* (2) the facts were as follows:—

"A Hindu built a temple in honour of the deity Shiri Pandurang, to which were

(1) 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P.C.) 62; 15 L. W. 781 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

(2) 2 B. 659; 1 Bom. L. R. 118; 12 Ind. Dec. (N. S.) 440.

*Page of 44 M.—[*Ed.*]

attached a *dharmsala* and a *sadawart* for feeding travellers and giving alms to the poor. In the maintenance of the temple and the charities connected with it, he dedicated certain property by a deed of gift, under which he constituted himself a trustee for life and appointed a *panch* to act as his successors in the trust. During his lifetime he managed the temple as provided in the deed. On his death in 1867 the *panch* did not take charge, but his son (the defendant) assumed the management. The temple was open to the Hindu community."

And the learned Judges held that, "Having regard to the fact that a certain number of the public had always used the temple, that there was attached to it a *dharmsala*, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadawart*, the intention of the founder was to devote the property to public, religious and charitable purposes." In the deed in the present case it is provided that a *sadawart* (perpetual giving of alms) will continue to exist (*sadawart jari rahega*). The intention to create a perpetual charity is clear from this expression. In the detail of the property endowed it is stated that one house with shops under it and Rs. 10,000 out of the whole heritage of the deceased have been set apart for charitable purposes as *wakf* property (*ek makan shiwala mai dukanata zerin aur mublugh das hazar rupae wakf dharmada*).

Now the expression "*wakf*" is a well-known technical expression conveying the idea of tying up the property in perpetuity and the word *dharmada*, denotes charity. Thus there can be no doubt as to the intention of the creators of the endowment that they intended that the Rs. 10,000 were to be so employed as to feed the poor in connection with the *shiwala* for ever. Therefore, there is an irresistible conclusion that the Rs. 10,000 were not to be consumed but their income or interest only was to be spent in maintaining the *wakf*. It is not contended for the respondents that the maintenance of a temple and of a *sadawart* are not charities of a public nature. All that is contended for is that the intention of the creators of the trust was not to create a trust of a public and religious character. This contention cannot be sustained on the true construction of the deed.

I must, therefore, accept this appeal and set aside the decision of the lower Appellate Court. As the decision of the learned Judge of the Court below upon a preliminary point is set aside, the case must be remanded for trial on the merits under O. XLI, r. 23, Civil Procedure Code. Costs will abide the result.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 4-B OF 1922
June 18, 1923.

Present:—Mr. Kotval, A. J. C.

HARNARAYAN JODHRAJ—DEFENDANT—APPELLANT

versus

RADHAKISAN CHANDRABHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 30—Wagering contract—Test—Pacca Adatia *and constituent—Principal and agent.*

If parties to a contract of sale and purchase of goods do not intend to make an actual transfer of goods but merely to pay and receive money according as the market price varies one way or another from the contract price of given dates, the transaction is a wagering contract. [p. 907, col. 2.]

Relationship between *Pacca Adatias* and their constituents is not one of principal and agent but of principal and principal and damages sustained by the former as a result of wagering contracts are not recoverable from the latter. [p. 908, col. 2.]

Appeal from the decree of the Second Additional District Judge Amraoti, dated 21st November 1921, in Civil Suit No. 8 of 1921.

Messrs. *V. R. Pandit*, R. P., and *M. B. Marathe*, for the Appellant.

Sir *B. K. Bose*, Messrs. *V. Bose* and *P. N. Rudra*, for the Respondents.

HARNARYAN JODHRAJ *v.* RADHAKISAN CHANDRABHAN.

JUDGMENT.—The defendant, Harnarayan Jodhraj, a Marwari resident of Nagpur, employed the firm of Mojiram Sunderlal at Amraoti owned by Radha Kisan and Gopi Kisan sons of Chandrabhan Marwari as his *pacca adatias* for the sale transactions tabulated below—

Serial No.	Goods.	Quantity.	Rate.	Date of sale.	Date of delivery.	Rate on date of delivery.
			Rs. a. p.			
1	Cotton seed.	100 Kh.	18 14 0	22-10-17	25-1-18	Rs, 33.
2	,,	,,	18 14 0	22-10-17	25-1-18	,,
3	,,	,,	19 0 0	22-10-17	25-1-18	,,
4	,,	,,	22 0 0	6-11-17	25-1-18	,,
5	,,	,,	22 0 0	6-11-17	25-1-18	,,
6	,,	,,	23 11 0	10-11-17	25-1-18	,,
7	,,	,,	23 11 0	10-11-17	25-1-18	,,

The plaintiffs state that the loss on account of the above transactions was Rs. 8,623-6-0. They also state that there was a loss of Rs. 541-10-6 on account of certain transactions in respect of ginned cotton entered into on the 25th October 1917. After giving credit for profits on other cotton transactions they claim a balance of Rs. 6,447-3-3 which includes commission and interest.

The defendant's pleadings and the issues which are material to the decision of this appeal are as follows:—The defendant admitted all the transactions set forth above except the two transactions of the 10th November 1917 but pleaded that they were wagering contracts being merely bargains for differences. He alleged that even if they were genuine the plaintiff did not tender the price and demand delivery and were, therefore, not entitled to damages. The issues are:—

"1 Whether plaintiffs agreed on 10th November 1917 to sell 100 *khandis* of *sarki* at Rs. 23-11-0 through one Ramgopal and again 100 *khandis* through one Bansidhar *lalal* as alleged ?

7. Whether regarding the 200 *khandis sarki*, defendant authorised plaintiffs on 10th November 1917 as alleged ?

"2. Whether the transactions between the parties were merely bargains for paying and receiving differences and are, therefore, wagering contracts which are void in law, or whether they were genuine transactions in which the parties intended actual delivery of goods ?

"3. Whether plaintiffs ever demanded delivery of the goods in question from defendant ?"

On Issues Nos. 1 and 7 the lower Court found that the plaintiffs did sell 200 *khandis* on the 10th November 1917 but not with the consent or authority of the defendant. On Issue No. 2 the lower Court held that the cotton transactions were wagering contracts but the cotton seed ones were not. It further held that, even if all the transactions were wagering, the plaintiffs as agents were entitled to recover what they had paid on the contracts on behalf of the defendants and their brokerage. On Issue No. 3 the lower Court found that the plaintiff did demand delivery at the time fixed for delivery by them to third parties. The plaintiffs' claim was partially decreed. The defendant has appealed and the plaintiffs have filed a cross-objection.

The appeal urges that the lower Court should have held that,—

(*a*) the cotton seed transactions were wagering contracts (grounds Nos. 1,2,5 and 6);

(*b*) no demand for delivery was made (ground No. 3); and

(*c*) plaintiffs had not made payments to third persons for losses on account of the transactions in question (ground No. 4).

As regards the point (*a*) I am of opinion that the cotton seed transactions were all wagering contracts. The parties did not intend to make an actual transfer of the goods but merely to pay and receive money according as the market price varied one way or another from the contract price of the given dates. The transactions were in lots of one hundred *khandis* each. The cotton seed was deliverable on one and the same date not only in the case

of the contracts in dispute but apparently of all plaintiffs' contracts in Amraoti. The rate on the day of delivery was not to be the actual market-rate but a rate settled by *panchas*, that is, by the persons with whom contracts were made. All *adatlas* were bound by this rate The object of fixing such a rate is to avoid possible excessive loss and probable ruin to some of the gamblers. Not a *khandi* of the seed sold was actually delivered.

The plaintiffs rely on Exhibit P-1. It is said that this letter implies that the plaintiffs had asked for delivery. I do not think there is any clear implication of demand from this letter. The defendant refused to settle the *saoda* then but said that he would pay the differences in January according to the general settlement in Amraoti and that if all in Amraoti made deliveries he would also deliver the goods. It seems from Exhibit P-2 that there was a demand for delivery of the cotton-seed shortly before the 17th January 1918 but I think it was not a genuine demand but only an attempt to give a colouring of genuineness to the transactions when the plaintiffs must have thought that they were certain to result in their favour. The defendant's reply shows that he considered the demand for delivery a thing not contemplated by the contract. The defendant had entered into other transactions admittedly wagering with the plaintiffs and these were entered in the same *khata* with the transactions in suit. Plaintiff No. 1, as P.W. No. 1, admits that the contract with the defendant was not for actual delivery of goods, that is *hazar* goods. He admits that "in no case of transactions made by me as *adtiya* for goods deliverable from 15th to 25th January, were any goods actually delivered. All agreed to settle profits or losses at Rs. 33 per *khandi*."

Rupees 33 was the rate settled by the *panchas* though the rate of *sarki* in the market was Rs. 34 to Rs. 35 per *khandi* on the date fixed for delivery. According to P. W. No. 2 it is customary in Amraoti that all *sattas* should be made through *adatias*. I believe the statement of defendant as D. W. No. 1 that he never intended to deliver the *sarki* but only meant to pay differences and that that was the understanding between him and the plaintiffs. I hold that the *sarki* contracts between the parties were wagering.

It is contended that the plaintiffs being merely agents if they paid up losses on defendant's behalf they are entitled to recover the amount paid from the defendant. Relationship, however, between *pacca adatias* and their constituents is not one of principal and agent but of principal and principal (*vide* Second Appeal No. 65-B of 1915 and First Appeal No. 53-B of 1916). The plaintiffs, therefore, are not entitled to recover anything from the defendant. On the finding that the transactions between the parties were wagering, the plaintiffs claim must fail. The appeal succeeds and the cross-objection, which is in respect of the transactions of the 10th November 1917, fails. The plaintiffs will pay the defendant's costs throughout.

G. R. D. & N. H. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 489 OF 1921.

May 9, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Harrison and Mr. Justice Moti Sagar.

THE NOTIFIED AREA COMMITTEE, UNA, THROUGH ITS SECRETARY—DEFENDANT—PETITIONER

versus

AMAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Municipal Act (III of 1911), ss. 61 (B), 242 (1) (a)—Notified area—Local Government, power of, to impose taxes, extent of.

The Local Government has no power under section 242 (1) (*a*) of the Punjab Municipal Act to impose in a Notified Area those taxes, which a Municipal Committee can only impose with the previous sanction of the Governor-General in Council, and its powers are restricted to the imposition of the taxes detailed in section 61 (*B*) of the Act, for which only the previous sanction of the Local Government is required. [p. 909, col. 1.]

Petition for revision of the decree of the Munsif, with powers of a Judge Small Cause Court, Una, District Hoshiarpur, dated the 12th March 1921.

Lala *Madan Gopal* for Lala *Faqir Chand*, for the Petitioners.

Lala *Jagan Nath*, for the Respondents.

ORDER.

Harrison, J.—The question referred for decision is whether the Local Government has power, under section 242 (1) (*a*) of the Punjab Municipal Act, to impose in a Notified Area those taxes, which a Municipal Committee can only impose with the previous sanction of the Governor-General in Council, or whether its powers are restricted to the imposition of the taxes detailed in section 61 (*B*) of the Act, for which only the previous sanction of the Local Government is required. It is contended that, inasmuch as section 242 is silent as to the question of sanction the Local Government has under the Act taken upon itself the right reserved to the Governor-General in Council under section 61, that the fact that the section does not recite the substitution of the Local Government for the Governor-General in Council in so many words is immaterial inasmuch as the Act was assented to, and that if the only possible construction of the words used be that the necessity of obtaining the previous sanction of the Governor-General in Council does not exist in Notified Areas that meaning must be given effect to. It appears to me that there is no force whatever in this argument and that the confusion, if any, is due to the failure to realise that the procedure in introducing taxation in Municipalities falls under two distinct heads or rather is divided into two consecutive chapters. In the first place, the sanction of the necessary authority has to be obtained and, until this has been done, the Municipal Committe does not function as an authority imposing taxation. It doubtless has to correspond with the sanctioning authority and to observe certain necessary preliminaries with a view to obtaining the sanction. When and if the sanction is obtained then, and not before, has a Municipal Committee any power to act under section 61. It then imposes the tax. In Notified Areas this latter action is performed by the Local Government and not by any Committee, but the fact that the Local Government is substituted for the Committee in no way alters the procedure. The material with which the imposing authority deals is the contemplated tax, as sanctioned, and the authorisation of the Local Government in section 242 to perform the functions of the Committee in this respect is clearly limited to the same field. It imposes what has been sanctioned. The fact that in a certain large class of taxes the Local Governent is itself the sanctioning authority does not affect the position. It can of course, at the same time, sanction and impose a tax, or it can even take for granted its own sanction, but the taxes, for the imposition of which the sanction of the Governor-General in Council is an indispensable preliminary condition, is still sacred, and until and unless that sanction has been obtained, the Local Government is powerless. The answer, therefore, to the question is that the powers conferred by section 242 are limited to the imposition of taxes described in section 61 (*B*).

Broadway, J.—I agree in the proposed answer to the Reference.

Moti Sagar, J.—I concur.

Z. K. *Answered accordingly.*

PATNA HIGH COURT.

APPLICATION IN THE MATTER OF MISCELLANEOUS APPEAL NO. 244 OF 1922.

July 30, 1923.

Present:—Mr. Justice Das and Mr. Justice Macpherson.

Thakurani PHULWATI KUMARI—PETITIONER

versus

Maharaj Kumar Rao MAHESHWARI PROSAD SINGH AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 5—Abatement, setting aside of—Sufficient ground—Appellant, duty of.

It is obligatory on an appellant to keep himself informed of any devolution of interest that may take place by reason of the death of any of the respondents and it is not sufficient for setting aside an abatement merely to say that the applicant had no knowledge of the death of the respondent till many months after such death. Abatement of appeal gives a very important right to the persons against whom the appeal abates and it is not without suff cient reason that the Court should set aside an abatement.

Application.

FIAZ AHMAD SHAH v. CHURCH MISSIONARY TRUST ASSOCIATION, LONDON.

ORDER.—This is an application for setting aside an abatement. It appears that respondent No. 6 died sometime in August 1922 and the application for abatement was not made till the 1st March 1923. The petitioner states that she had no knowledge of the death of the respondent till the 20th December 1922, that is to say, till the notices of the appeal were issued on the respondent and the peon went out to serve the notices.

Under a very loose practice which has grown up in this Court no care whatever is taken to specify the grounds on which an application for setting aside an abatement is made. The Code makes it obligatory on an appellant to keep himself informed of any devolution of interest that may take place by reason of the death of any of the respondents, and it is, in my opinion, not sufficient merely to say that the applicant had no knowledge of the death of the respondent till many months after such death. It must be remembered that the abatement of an appeal gives a very important right to the person or his heirs against whom the appeal abates and it is not without sufficient reason that the Court should set aside an abatement. So far as I am concerned, I shall require very strong grounds to induce me to set aside an abatement and shall pay not the slightest attention to a mere assertion that the applicant had no knowledge of the death of the respondent unless some reasons are assigned why the applicant did not keep himself informed of the death of the respondent.

So far as this application is concerned, it is not opposed and it appears that an applicant is a *pardanashin* lady. We allow the application and set aside the abatement in this case, but we must make it perfectly clear to the profession that we shall not entertain any application for setting aside an abatement unless good grounds are shown in support of such an application.

P. D. *Application allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 301 OF 1919.

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

FIAZ AHMAD SHAH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

THE CHURCH MISSIONARY TRUST ASSOCIATION, LONDON, THROUGH S. D. HINDE, PRINCIPAL, MISSION SCHOOL, MULTAN—VENDOR AND OTHERS—VENDEES—DEFENDANTS —RESPONDENTS.

Pre-emption—Custom—Outgrowth of mohalla *or suburb, rule applicable to*—Mohalla *Hussain Agahi, Multan City.*

There is no authority for the proposition that an accretion to or an outgrowth of an old sub-division of a town within the limits of the town is to be regarded as a new sub-division of it [p. 912, col. 1.]

Allah Ditta v. *Muhammad Nazir* 7 Ind Cas. 716, 84 P. L. R. 1910; 102 P. W. R. 1910, *Imperial Oil Soap and General Mills Co., Limited, Delhi* v. *Misbah-ud-din* 61 Ind. Cas. 325, 2 L. 83, distinguished.

It cannot be argued that a sub-division of a town cannot expand where its old boundary and the land adjoining it are divided by a steep declivity. An outgrowth or expansion can take place on adjoining land whether it be on the same level as the old town or on a lower or higher level as in the case of hilly places. [p. 912, col. 1.]

The custom of pre-emption prevails in Mohalla Hussain Agahi of Multan City. [p. 912, col 1.]

First appeal from a decree of the Senior Subordinate Judge, Multan, dated the 16th December 1918.

Mr. *Abdul Rashid*, for the Appellants.

Bakhshi *Tek Chand* and Lala *Har Gopal*, for the Respondents.

JUDGMENT.—The plot of land which is the subject of this pre-emption suit is situated in that low lying northern outskirt of the City of Multan which extends between two of its gates, the Lohari and Daulat Gates, and is hemmed in on the north by the Circular Road. The City proper to the south of this tract and the Fort to the north beyond the road are on much higher levels. The whole of this low expanse was originally vacant and was known as *nazul* property belonging to Government. Portions of it were from time to time leased, sold or gifted by Government for building purposes and it was in about 1873 that two large plots from it were gifted to the Church Missionary Society, and that body founded

therein a school. Later on, in about 1915, the school was removed therefrom and the Society divided the land into small plots and offered the same for sale by public auction. Four of these plots were purchased by defendants Nos. 2 to 4, and it is only one of these four that the plaintiff's claim to pre-empt on the ground that it adjoins their land. The defence was that the custom of pre-emption did not obtain in this new suburb of the City which constituted a sub-division by itself and was known by the name *bithar* (low land). The plaintiffs contended, on the other hand, that the so-called *bithar* formed part of the sub-division Husain Agahi and was included in it. It was common ground in the Court below that the custom of pre-emption was in force in Husain Agahi and that being the position taken up by the parties, the decision of the case depended upon the answer to the question whether the land in dispute was within Husain Agahi or beyond it. The lower Court arrived at the conclusion that it was situated in *bithar* which was a separate sub-division and not a part of Husain Agahi and that no right of pre-emption was proved to exist in *bithar*. The suit was accordingly dismissed and the plaintiffs have come to this Court in first appeal.

Counsel for the defendants-respondents wanted to argue before us that the custom of pre-emption was not proved to obtain even in Husain Agahi, but we did not allow him to do so because, as stated in the judgment of the Court below, the existence of the custom in Husain Agahi was not denied by the defendants in that Court. Therefore, the only question before us is whether the part called *bithar* as an outgrowth of land included in the sub-division Husain Agahi or is a separate sub-division by itself. There is ample documentary evidence on the record showing that the lands and houses in *bithar* are generally described as situated in Husain Agahi.

In the first place, in the notice of sale of plots issued by the local Agent of the Church Missionary Society the land was stated to be "situated at Husain Agahi."

Secondly, in the very deed by which the defendants purchased the four plots the land was stated to be situated in Husain Agahi. Similarly, in all other deeds of sale executed by the Agent of the Missionary Society the plots sold were stated to be situated in Husain Agahi.

Thirdly, the defendant Budhu Ram himself in the agreement dated the 15th September 1915 executed by him relating to a plot of *nazul* land, which is to the north-east of the land in dispute, described it as situated in Husain Agahi.

Fourthly, there is the statement of the defendants' own witness Mr. M. N. Bannerji, Pleader, Multan, whose house is built on *nazul* land between Daulat and Lohari Gates, that he describes his house as situated in Husain Agahi.

Fifthly, there is the evidence of defendants' own witness, Bihari Lal, Sub-Overseer, Municipal Committee, Multan, who produced the Survey Map of Multan City, prepared in 1901, and the field book relating thereto, and stated, by a reference to these documents, that as against the survey stations 99, 5 R, 29 and 2 M. marked in the map, the entry in the field book is "in Husain Agahi." A glance at the map shows that the line connecting these four stations is just on the northern boundary of the entire land containing the Mission School building. This makes it clear that in 1901 this land was considered to be a part of *Mohalla* Husain Agahi. (See copy of this map Exhibit D-13, filed by the defendants).

Sixthly, there is the evidence afforded by the record of a pre-emption suit brought in 1910 by Jhandu, (P. W. No. 8), for possession a house situated in this *bithar* land. It was stated in the plaint that the house was in Husain Agahi and that the custom of pre-emption obtained in Husain Agahi in respect of houses. This house is marked as No. 1 in the plan, Exhibit P-16, and the plaint is printed at page 151 of the copy book The case ended in a compromise which is printed at page 49. In this compromise the house stated to be "situate at *bithar* near Duselra Husain Agahi, Multan." The Dusehra ground is to the north of this house and it appears that this ground is known as Dusehra Husain

in suit estimated its value at Rs. 12,000 and this valuation was accepted by the plaintiffs, but the lower Court increased it to Rs. 13,000. We are of opinion that according to the rates found by the Commissioner and referred to by the Court below the value could not be less than Rs. 13,000. We, therefore, accept the appeal and, reversing the judgment and decree of the Court below, grant the plaintiffs a decree for possession of the land on payment in the Court below of Rs. 13,000 less costs in both Courts, on or before the 10th of August next. In default the suit will stand dismissed with costs throughout.

Z. K.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 792 OF 1923.

July 23, 1923.

Present :—Mr. Justice Lumsden.

RAM SARAN DAS—DEFENDANT—APPELLANT

versus

HARPHUL AND OTHERS—PLAINTIFFS

CHUNI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Ancestral property—Burden of proof—Village deserted and re-occupied, effect of.

A party asserting that land in dispute is ancestral must prove the fact, and conjectures cannot be accepted as substitutes for proof.

Atar Singh v. *Thakar Singh*, 6 Ind. Cas. 721, 42 P. R. 1910, 12 C. W. N. 1049, 35 C. 1039, 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R 1908; 4 M. L. T. 207, 10 Bom. L. R. 790 (P. C.), followed.

The history of a village showed that in 1840 all the proprietors, including the common ancestor of the parties to the dispute, left the village and took up their residence elsewhere. For a period of 25 years the village site was deserted and the fields untilled. Thereafter, certain of the descendants of the previous proprietors, including the son of the common ancestor of the parties, returned to the village and commenced cultivation;

Held, that the land occupied by each descendant on return to the village must be treated as his self-acquisition and could not be regarded as the property of his ancestor who abandoned the village, even though the descendant actually resumed possession of the same land as was held by the ancestor.

Manohar v. *Nanhi*, 66 Ind. Cas. 399; 2 L. 366; (1922) A. I. R. (L.) 320, followed.

Second appeal from a decree of the District Judge, Delhi, dated the 17th January 1923, affirming that of the Munsif, First Class, Jhajjar, District Rohtak, dated the 28th March 1922.

Mr. *Shamair Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The parties to this suit out of which the present appeal arises are *Brahmins* of village Chandpur in the Jhajjar Tahsil of the Rohtak District. They are members of an agricultural tribe and it is admitted that they follow custom. There is no dispute as to natural relationship, and the only question for determination in this appeal is, whether the land in respect of which the plaintiffs seek a declaration is ancestral *qua* them. Such a question is one of fact, but the appeal has been admitted on the ground that the finding arrived at by the lower Court was not based on any evidence, but was a mere conjecture. In *Atar Singh* v. *Thakar Singh* (1) their Lordships of the Privy Council laid down that the party asserting the land to be ancestral must prove the fact, it not being possible to accept mere conjectures as substitutes for proof.

I have no hesitation in coming to the conclusion that in this case the property has not been shown to be ancestral. The history of the village shows that in 1840 all the proprietors, including Nathu Ram, the common ancestor of the parties, left the village and took up their residence elsewhere. For a period of 25 years the village site was *be chiragh* and the fields untilled. Thereafter, certain of the descendants of the previous proprietors, including the son of Nathu Ram, returned to the village and commenced cultivation. It does not appear to me to be possible to distinguish this case from that reported as *Manohar* v. *Nanhi* (2) where it was

(1) 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.).

(2) 66 Ind. Cas. 399, 2 L. 366; (1922) A. I. R. (L.) 320,

in suit estimated its value at Rs. 12,000 and this valuation was accepted by the plaintiffs, but the lower Court increased it to Rs. 13,000. We are of opinion that according to the rates found by the Commissioner and referred to by the Court below the value could not be less than Rs. 13,000. We, therefore, accept the appeal and, reversing the judgment and decree of the Court below, grant the plaintiffs a decree for possession of the land on payment in the Court below of Rs. 13,000 less costs in both Courts, on or before the 10th of August next. In default the suit will stand dismissed with costs throughout.

Z. K.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 792 OF 1923.

July 23, 1923.

Present:—Mr. Justice Lumsden.

RAM SARAN DAS—DEFENDANT—APPELLANT

versus

HARPHUL AND OTHERS—PLAINTIFFS

CHUNI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Ancestral property—Burden of proof—Village deserted and re-occupied, effect of.

A party asserting that land in dispute is ancestral must prove the fact, and conjectures cannot be accepted as substitutes for proof.

Atar Singh v. *Thakar Singh*, 6 Ind. Cas. 721, 42 P. R. 1910, 12 C. W. N. 1049, 35 C. 1039, 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R 1908; 4 M. L. T. 207, 10 Bom. L. R. 790 (P. C.), followed.

The history of a village showed that in 1840 all the proprietors, including the common ancestor of the parties to the dispute, left the village and took up their residence elsewhere. For a period of 25 years the village site was deserted and the fields untilled. Thereafter, certain of the descendants of the previous proprietors, including the son of the common ancestor of the parties, returned to the village and commenced cultivation;

Held, that the land occupied by each descendant on return to the village must be treated as his self-acquisition and could not be regarded as the property of his ancestor who abandoned the village, even though the descendant actually resumed possession of the same land as was held by the ancestor.

Manohar v. *Nanhi*, 66 Ind. Cas. 399; 2 L. 366; (1922) A. I. R. (L.) 320, followed.

Second appeal from a decree of the District Judge, Delhi, dated the 17th January 1923, affirming that of the Munsif, First Class, Jhajjar, District Rohtak, dated the 28th March 1922.

Mr. *Shamair Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The parties to this suit out of which the present appeal arises are *Brahmins* of village Chandpur in the Jhajjar Tahsil of the Rohtak District. They are members of an agricultural tribe and it is admitted that they follow custom. There is no dispute as to natural relationship, and the only question for determination in this appeal is, whether the land in respect of which the plaintiffs seek a declaration is ancestral *qua* them. Such a question is one of fact, but the appeal has been admitted on the ground that the finding arrived at by the lower Court was not based on any evidence, but was a mere conjecture. In *Atar Singh* v. *Thakar Singh* (1) their Lordships of the Privy Council laid down that the party asserting the land to be ancestral must prove the fact, it not being possible to accept mere conjectures as substitutes for proof.

I have no hesitation in coming to the conclusion that in this case the property has not been shown to be ancestral. The history of the village shows that in 1840 all the proprietors, including Nathu Ram, the common ancestor of the parties, left the village and took up their residence elsewhere. For a period of 25 years the village site was *be chiragh* and the fields untilled. Thereafter, certain of the descendants of the previous proprietors, including the son of Nathu Ram, returned to the village and commenced cultivation. It does not appear to me to be possible to distinguish this case from that reported as *Manohar* v. *Nanhi* (2) where it was

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(2) 66 Ind. Cas. 399; 2 L. 366; (1922) A. I. R. (L.) 320.

held in similar circumstances that the land must be regarded as the self-acquired property of the persons who returned to the village 25 years after its desertion. There is nothing in this case to show that Kewal Ram actually resumed possession of the same land as had been held by his father Nathu Ram, but even if it could be assumed that he did, the possession was nonetheless a re-acquisition, and the land was divested of its ancestral character. As Kewal Ram is not a common ancestor it follows that the plaintiffs cannot challenge an alienation made in respect of it.

An attempt has been made to distinguish the authority quoted on two grounds (*a*) that in this case the proprietors left the village because of famine, and (*b*) that they retained throughout the period of 25 years, the animus of returning. Neither of these distinctions are of substance. It is not stated why, in the case quoted, the proprietors deserted their village, but it may be assumed that it was for some similar reason, while it can hardly be believed in the absence of any proof that famine conditions subsisted for a period of 25 years. There is nothing to support the theory in this case any more than in the authority referred to that the proprietors intended to return sooner or later.

It follows that as the plaintiffs have no *locus standi* to challenge the alienation in question the appeal must be accepted, and plaintiffs' suit dismissed with costs throughout.

Z. K. & N. H.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 17 OF 1922.

July 12, 1923.

Present:—Mr. Hallifax, A. J. C.

SAKHARAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAMCHANDRA—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 219—Communal land—Trespasser—Suit for ejectment—Civil Court, jurisdiction of—Powers of Deputy Commissioner.

A Civil Court has jurisdiction to try a suit by a *malguzar* to eject a trespasser from land set apart by an entry in the Administration Paper of the village for the communal purpose of a cattle stand, upon a portion of which he alleges the trespasser has encroached by the erection of a building. The Deputy Commissioner cannot determine the right to exclude a trespasser from a communal land permanently under section 219 of the C. P. Land Revenue Act. He can eject him summarily. The jurisdiction of the Civil Court to determine such a right has been expressly saved under the section.

Appeal from an order of the Additional District Judge, Bhandara, dated the 24th June 1922, in Civil Appeal No. 11 of 1922.

Mr. *P. S. Deva*, for the Appellants.

Mr. *D. P. Tiwari*, for the Respondent.

JUDGMENT.—The suit is brought by a *malguzar* to eject the defendants from land set apart by an entry in the Administration Paper of his village for the communal purpose of a cattle stand, upon a portion of which he alleges they have encroached by the erection of a building on it. The defendants raised the objection that the jurisdiction of the Civil Court was barred by section 220 of the Land Revenue Act, 1917, because the Deputy Commissioner was empowered by section 219 of the same Act to dispose of the matter in dispute. This plea prevailed in the first Court and the suit was dismissed, but in appeal the dismissal was set aside and the suit was remanded for trial on its merits.

2. The defendants have appealed against the order of remand, but a mere perusal of section 219, on which they rely, establishes that the appeal has no susbtance. The right to exclude a trespasser on communal land permanently, which is in question here, is not a matter which the Deputy

Commissioner can determine under that section; he can only eject him summarily, and the section itself expressly saves the jurisdiction of the Civil Court to decide the question of the right of permanent exclusion.

3. The plea seems to have been taken, as is so often done, merely because it was seen to be a possible plea in the case, without any consideration of the advantage the defendants might derive from its success. If it succeeded, the plaintiff would merely have to make an application to the Deputy Commissioner under section 219, wherein his chances of success or failure would be exactly the same as in the present suit and the proceedings would probably be shorter and simpler and less costly; indeed, it is somewhat surprising that he did not choose that alternative of the two allowed him.

4. The learned Pleader for the defendants admits that if the defendant succeeded before the Deputy Commissioner the plaintiff could still file this same suit over again, and the defendants would be exactly where they were. He explains, however, that before the Deputy Commissioner the defendants would have the advantage of being able to ask that the land on which they have built should be included in the *abadi* under section 71, and clause (*d*) of section 106 of the Land Revenue Act. Assuming that section 46 of the same Act and the opposition of the *malguzar* do not doom any such application to failure, there seems to be no reason why the defendants should not make it while this suit is in progress; an order making the plot in dispute a part of the *abadi* would defeat the plaintiff's claim as completely in the Civil Court as before the Deputy Commissioner.

5. But it is quite clear that, if the plaintiff chooses to bring this suit in a Civil Court, instead of seeking the simpler remedy provided for him by the Land Revenue Act, he is entitled to do so and the Civil Court has jurisdiction to try the suit. The appeal will accordingly be dismissed. The appellants must pay all the costs incurred by their respondent in this Court.

Appeal dismissed.

G. R. D.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL NO. 151 OF 1922.

April 3, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

PIARA SINGH—PLAINTIFF—APPELLANT

versus

MULA MAL—VENDEE, AND OTHERS—VENDORS—DEFENDANTS—RESPONDENTS.

Indian Soldiers Litigation Act (IX of 1918), s. 11, meaning and applicability of—Plaintiff who has ceased to be Indian Soldier, whether can take advantage of provision—Intention of Legislature—Interpretation of Statutes.

If the language of a Statute is clear and unambiguous the Court must give effect to it and has no right to extend its operation in order to carry out the real or supposed intention of the Legislature. [p. 916, col. 1.]

The Legislature in enacting the Indian Soldiers Litigation Act intended to provide for the special protection in respect of civil and revenue litigation of Indian Soldiers serving under War conditions and contemplated that a person's right to have recourse to a Court of Law should not be adversely affected by reason of his serving as a soldier under War conditions. It was consequently provided that the period of such service should be excluded from the period of limitation prescribed for the suit, appeal or application which he might bring before a Court of Law and it was intended that the period of limitation should not run against him during the time he was serving under War conditions. [p. 916, col. 1.]

The language of section 11 of the Indian Soldiers Litigation Act, however, embraces only those cases in which the plaintiff *is* an Indian Soldier at the time of the institution of the suit, and the mere fact that he was a soldier for some time during the period of limitation prescribed for the suit does not benefit him if he has ceased to be a soldier on the date of the institution of the suit. [p. 917, col. 1.]

Letters Patent Appeal against the judgment and decree of Mr. Justice Martineau, passed in Civil Appeal No. 2629 of 1921, dated the 6th June 1922, reversing that of the District Judge, Sialkot, dated the 11th August 1921.

Dr. *G. C. Narang* and Mr. *Anant Ram*, for the Appellant.

Mr. *D. R Sawhney*, for the Respondents.

JUDGMENT.—This appeal arises out of an action brought in December 1920, for the pre-emption of a plot of land sold in 1918. It is admitted that the suit is barred by limitation unless the plaintiff satisfies the requirements of section 11 of the Indian Soldiers' Litigation Act, IX of 1918. Now, the aforesaid section provides that in com-

puting the period of limitation prescribed for any suit, appeal or application, to any Court in which the plaintiff-appellant or applicant is an Indian solider, the time during which such soldier has been serving under War conditions, since the 4th of August 1914, shall be excluded. The plaintiff had undoubtedly served as a soldier under War conditions for sometime before the institution of the suit, but he was demobilised in March 1920, and it is admitted that he was no longer a soldier when he brought the present action.

The learned Judge in Chambers has held that, as the plaintiff was not a soldier on the date of the institution of the suit, he could not avail himself of the benefit of the said section. There can be no doubt that the Legislature in enacting this law intended to provide for the special protection, in respect of Civil and revenue litigation, of Indian soldiers serving under War conditions and contemplated that a person's right to have recourse to a Court of Law should not be adversely affected by reason of his serving as a soldier under War conditions. It was consequently provided that the period of such service should be excluded from the period of limitation prescribed for the suit, appeal or application which he might bring before a Court of Law. It was clearly intended that the period of limitation should not run against him during the time he was serving under War conditions.

If this was the object of the Legislature, there is no cogent reason why a person who has earned the concession indicated above should lose it simply because he has ceased to be a soldier at the time he invokes the aid of the Court. It is, however, manifest that if the language of a Statute is clear and unambiguous, the Court must give effect to it and has no right to extend its operation in order to carry out the real or supposed intention of the Legislature.

"When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vattel, to interpret what has no need of interpretation. *Absoluta sententia expositore non indiget.* Such language best declares, without more, the intention of the lawgiver, and is decisive of it. The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It matters not, in such a case, what the consequences may be. Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by a Legislature, it must be enforced, even though it be absurd or mischievous. The underlying principle being that the meaning and intention of a Statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the Court as to what is just or expedient. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words." (Maxwell on the Interpretation of Statutes, Sixth Edition, pages 5 to 8). The same author sums up the position in the following words:—

"In short, when the words admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature, and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views, is, in truth, not to construe the Act but to alter it. But the business of the interpreter is not to improve the Statute it is to expound it. The question for him is not what the Legislature meant, but what its language means, *i.e.*, what the Act has said that it meant. To give a construction contrary to, or different from, that which the words import, or can possibly import, is not to interpret law, but to make it,

l Judges are to remember that their ce is *jus dicere*, not *jus dare*."

Now, the language of the section embraces y those cases in which the plaintiff is In ian soldier at the time of the institun of the suit, and it appears that the re fact that he was a soldier for some ne during the period of limitation preibed for the suit does not benefit him if has ceased to be a soldier on the date of titution of the suit. The learned Counsel the plaintiff asks us to place a beneficial nstruction upon the section, but no rule interpretation can be invoked for the rpose if including cases plainly omitted m the natural meaning of the words. pointed out by Maxwell at page 26: "A e not provided for in a Statute is not be dealt with merely because there ms no good reason why it should have en omitted, and the omission appears sequently to have been unintentional." may be a *casus omissus*, but it is viously for the Legislature, and not for the urt, to remedy the defect.

We are constrained to hold that the intiff's case does not come within section of the Indian Soldiers Litigation Act. e appeal, therefore, fails and is dismissed with costs.

z. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 220 OF 1922.

August 30, 1923.

Present:—Mr. Prideaux, A. J. C.

KISENLAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HENDBA AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 45—Joint promise to pay—Suit by one promisee for share, whether—Consolidation of suits by different plaintiffs—Powers of Court—Civil Procedure Code (Act V of 1908), s. 151.

Under section 45 of the Contract Act in regard to a promise to pay made to two or more persons jointly, proceedings to enforce the claim must be taken by all promisees and a suit for his share of the amount brought by one of several promisees is liable to be dismissed. [p. 918, col. 2; p. 919, col. 1.]

Under section 151 of the Civil Procedure Code a Court has inherent power to consolidate suits, and it should adopt this procedure where suits are brought by different plaintiffs for the recovery of debts which formed originally one whole, but were split up subsequently on account of the dissolution of the firm to which they were due. [p. 919, col. 1.]

Appeal from a decree of the District Judge, Wardha, dated the 10th February 1922, in Civil Appeal No. 154 of 1921.

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

Mr. *P. C. Dutt*, for the Respondents.

JUDGMENT.—This judgment also disposes of Second Appeals Nos. 221 and 222 of 1922. There was a firm called Meghraj-Mansukhdas with which the first defendant Chendba is said to have had dealings and to whom he owed money. That firm divided into three separate firms and each firm represented by the owner, a former partner in Meghraj-Mansukhdas, has filed a separate suit to recover one-third of the money due to the firm of Meghraj-Mansukhdas by Chendba.

A preliminary objection was raised that the suit was not maintainable because all three as representing the old firm of Meghraj-Mansukhdas now dissolved should have sued in one suit for the money due by the defendant if any. Defendant relied on section 45 of the Contract Act and O. II, r. 2 of the Civil Procedure Code.

The Trial Court in an interesting judgment held that the partnership though dissolved continued for the purposes of winding-up its affairs and as none of the partners are dead one suit must be brought for the whole of the amount which the partners claimed jointly and each partner cannot maintain a separate suit for the shares said to have come to him in the original firm. I may add that each plaintiff made his former two partners co-defendants in the suits.

On appeal the District Judge, Wardha has upheld the finding of the Trial Court and dismissed the three appeals. It was urged in that Court that the plaintiffs should have been given an opportunity

to amalgamate all the suits but the Judge refused it stating:—

"In the first place, I do not see how claims by independent plaintiffs can be amalgamated. In the next place, I see no reason to think that the omission was due to inadvertence. The plaintiffs must have known that the ordinary procedure for recovery of a debt is for the creditors to join in filing a suit. They took the curious course which they did take at their own risk. I must refuse to allow amalgamation."

This plea of amalgamation was apparently never raised in the Trial Court.

As regards another plea raised in the lower Appellate Court, the Judge writes:—

"The last plea is rather ingenious. It is suggested that the three plaintiffs jointly might be allowed to press one of the claims. In each suit the names of the three plaintiffs appear one as plaintiff and two as defendants. But the subject-matter of the suit is a sum in which it is still asserted that only one plaintiff has an interest. It is too late to change the subject-matter of the suit and allow the three plaintiffs to sue for one-third share of the joint debt; this third being made up of three equal sums from the share of the three plaintiffs. It seems clear that in the particular circumstances of the case it would not have been proper to make the defendants plaintiffs, as it was all along stated that the defendants were entitled to no share of the sum claimed by the plaintiff. But, as a matter of fact, no such application was made to the first Court. Such an application involved the dismissal of the other suits and these suits were being passed. Even now the appellants do not clearly state that they desire the dismissal of two of the suits and will not file an appeal with regard to these appeals. I, therefore, reject the application made at a very late stage and with apparent reservations."

It is here pressed that there is no section in the Civil Procedure Code to compel persons to sue jointly for a debt due at one time to more than one person. Reliance is placed on O. I, rule 9, Civil Procedure Code, and it is urged that no suit can be defeated by reason of misjoinder or non-joinder of parties. *Nagorao* v. *Nago* (1), *Bhag Mal-Saddu Ram* v. *Walla* (2) are is quoted as authority for showing that a partner of a firm dissolved can still sue for his individual share of a debt. The facts in the Punjab case were very different to those in the present case: there one person recovered by a decree one-fifth of the debt and his remaining partners were then allowed to sue for four-fifths share of the debt. In the present case it is fairly apparent that the defendants have deliberately split up the debt and brought three separate suits to harass the defendant; the fact that the three suits were filed on the same date and by the same Pleader points strongly to this being the truth.

It is argued that section 45 of the Contract Act does not prevent the suits being brought in their present form and section 37 of the Transfer of Property Act and *Sambhusa* v. *Gopal* (3), *Sanwale Singh* v. *Ganeshi Lal* (4) and *Ganeshi Lal* v. *Charan Singh* (5) are quoted. The last two cases refer to mortgage suits and do not seem applicable here. *Shamsundar* v. *Kunjoban* (6) a case of joint damage and *Harihar Pershad* v. *Bholi Pershad* (7) are said to support the appellants' argument.

It is further contended that under the analogy of section 7 of the Limitation Act the three suits have been rightly brought and it is pressed that in any case amalgamation or consolidation of the three suits should be allowed under the principle enunciated in *Kali Charan Dutt* v. *Manodabala Dasi* [*Surja Kumar Mondal*] (8).

I am very clearly of opinion that under section 45 of the Contract Act in regard to a promise made to two or more persons jointly proceedings to enforce the claim must be taken by all promisees and that a suit brought by one of several

(1) 24 Ind. Cas. 831; 10 N. L. R. 72.
(2) 53 Ind. Cas. 416; 128 P. R. 1919; 54 P. L. R. 1920.
(3) 1 N. L. R. 24.
(4) 20 Ind. Cas. 41; 35 A. 441; 11 A. L. J. 600.
(5) 19 Ind. Cas. 614; 35 A. 247; 11 A. L. J. 280.
(6) 13 C. P. L. R. 130.
(7) 6 C. L. J. 383.
(8) 15 Ind. Cas. 897; 17 C. W. N. 520; 16 C. L. J. 591.

joint creditors or partners is liable to be dismissed. The preliminary objection raised in all three cases has been rightly sustained.

But the further question arises whether the lower Appellate Court should not have allowed the plaintiff to consolidate the suits and to try the whole matter as one suit. That the Court had the power under section 151 of the Civil Procedure Code is apparent and I think that procedure should be followed in the present case. I allow the appeals to that extent and direct that the Trial Court do consolidate the three suits and then try them. That Court must be careful to allow only one set of costs. As the two appeals are entirely due to the method in which the three plaintiffs attempted to collect their one-third share of the debt said to be due by the defendant, I direct that the costs in the lower Appellate Court and in this Court be borne by the three plaintiffs. They will pay their own and Chendba defendant's costs in both these Courts. Costs in the Trial Court will abide the result.

G. R. D. & N. H. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 3061 OF 1922.

May 7, 1923.

Present :—Mr. Justice Campbell.

SUNKA AND ANOTHER—DEFENDANTS —APPELLANTS

versus

JHARU—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11, O. XXXIV, rr. 7, 8—Redemption suit—Preliminary decree—Failure of plaintiff to pay decretal amount, effect of—Second suit for redemption, maintainability of—*Resjudicata.

Where a plaintiff obtains a decree for redemption of a mortgage by payment into Court of a certain sum within a certain time and then takes no steps towards making such payment and the period fixed elapses without any payment being made, a second suit to redeem on payment of the self-same sum is not barred by the rule of *res judicata*. [p. 920, col. 1.]

Shibbu Mul v. *Patra Sing*, 86 P. R. 1877, *Dhanpat Mal* v. *Jhaggar Singh*, 93 P. R. 1908; 164 P. L. R. 1908; 133 P. W. R. 1908 (F. B.), followed.

A preliminary decree in a redemption suit provided that if the plaintiff failed to pay the amount mentioned in the decree within the time limited "he shall be debarred from all right to redeem the property." Nothing further was done under the decree either by the plaintiff or by the defendant:

Held, that a second suit by the plaintiff to redeem the property was not barred by *res judicata* by virtue merely of the clause in the previous decree having the right of redemption, as there was no final determination in that suit of the issue whether the plaintiff's failure to pay the redemption price within the period fixed by the Court would terminate the relation of mortgagor and mortgagee and further as such an adjudication was not necessary for the decision of the suit. [p. 920, cols. 1 & 2.]

A preliminary decree in a redemption suit ought not to direct more than that if the plaintiff makes a default, the mortgagee should have a right to ask for a final decree for foreclosure or sale as provided by r. 8 of O. XXXIV of the Civil Procedure Code. [p. 921, col. 1.]

Case-law discussed.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 12th August 1922, affirming, except as to costs, that of the Additional Munsif, First Class, Kangra at Dharmsala, dated the 26th June 1922.

Lala *Mehr Chand Mahajan*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—On the 9th April 1890, Shibbu and others mortgaged 32 *kanals* 19 *marlas* of land with possession to Phati and Jai Gopal. There was a subsequent advance made on the same security on the 24th August 1899 and in 1914 the representatives of the mortgagor sued for redemption and obtained a preliminary decree by which it was ordered that if the plaintiffs paid into Court the sum of Rs. 489 on or before the 2nd of January 1910, the defendants "shall deliver up to the plaintiffs or to any such person as they may appoint, all documents in their possession or power relating to the land in suit and shall, if so required, re-transfer the property to the plaintiffs free from mortgage and from all incumbrances and shall put the plaintiffs into possession of the property, and further that if the payment of Rs. 489 be not made on or before the day aforesaid the plaintiffs shall be debarred from all right to redeem the property."

On this decree no action was taken by either party. The plaintiffs made no payment and the defendants made no application for a final decree.

SUNKA *v.* JHARU.

On the 6th May 1922, Jharu, one of the plaintiffs in the previous suit, sued again for possession of the same land by redemption on payment of Rs. 489. He was met with a plea that his second suit did not lie but both the Trial Court and the learned District Judge to whom the point was taken on appeal have held that the second suit was competent and the plaintiff was granted a decree.

The defendants have come to this Court on second appeal urging that the first decree debarred the plaintiff from maintaining a second suit.

The Courts below pointed out that the condition attached to the former decree that the plaintiff on failure to pay the mortgage price by the day fixed should be debarred from redeeming was illegal and it is certainly not in accordance with what is laid down in O. XXXIV, rr. 7 and 9 of the Code of Civil Procedure. The mortgage was a usufructuary mortgage and the proper order to pass was that, in default of payment by the mortgagor on or before the due date, the mortgaged property should be sold. It is contended nevertheless for the appellant that the decree, right or wrong, was not appealed from and, therefore, is a final adjudication in the right of the plaintiffs to redeem.

It was ruled in *Shibbu Mul* v. *Patra Sing* (1) and a Full Bench in *Dhanpat Mal* v. *Jhaggar Singh* (2) affirmed the principle laid down as stating correctly the law to be followed in this Province, that when a plaintiff has obtained a decree for redemption of mortgage by payment into Court of a certain sum within a certain time and when no steps have been taken by the plaintiff towards making such payment and the period fixed elapses without any payment being made, still a second suit to redeem on payment of the self-same sum is not barred by the rule of *res judicata*. We have here, however, an additional finding in the first suit that failure to make payment shall debar the plaintiff from all right to redeem in future.

The appellants rely strongly on two rulings. The first *Lachman Singh* v. *Madsudan* (3) where it was held that an order declaring that the plaintiff's right to redeem shall be extinguished upon non-payment, within the time limited by a decree for redemption, of the amount found due is not a proper order when the mortgage sought to be redeemed is a usufructuary mortgage but that, nevertheless, where such an order has been made and the decretal amount has not been paid within the time limited and the decree has been allowed to become final, the plaintiff cannot thereafter bring a second suit for redemption. The other case is *Kushaba Ramji Thoke* v. *Budhaji Sakaram* (4) and was to the same effect. Both cases, however, dealt with previous decrees passed not under O. XXXIV of the Code of Civil Procedure but under section 92 of the Transfer of Property Act before the present Code of Civil Procedure was enacted, and the Bombay case makes it clear that the Judges were not prepared to hold that a decree passed under section 92 is precisely the same as a preliminary decree passed under O. XXXIV, r. 7.

In *Ramji Bapuji Patil* v. *Pandharinath Ravji* (5) the majority of a Full Bench decided that a mortgagor who had brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee had applied to be made absolute, can, after the execution of that decree is time-barred, bring a fresh suit for redemption. This was also a case of a previous decree under section 92 of the Transfer of Property Act, and was distinguished on its own facts in *Kushaba Ramji Thoke* v. *Budhaji Sakaram* (4) because the decree was one directing that on failure to pay the redemption money by a certain date the defendant should recover the amount by sale of the property. The minority Judge, Mr. Justice Shah, who was hostile to a second suit and who was one of the Bench which afterwards decided *Kushaba Ramji Thoke* v. *Budhaji Sakaram* (4) was careful in his

(1) 86 P. R. 1877.

(2) 93 P. R. 1908; 164 P. L. R. 1908; 133 P. W. R. 1908 (F. B.).

(3) 29 A. 481; 4 A. L. J. 447; A. W. N. (1907) 137.

(4) 64 Ind. Cas. 1004; 46 B. 348; 23 Bom. L. R 1176; (1922) A. I. R. (B.) 127.

(5) 49 Ind. Cas. 894; 43 B. 334; 21 Bom. L. R. 56. (F. B.)

dissenting judgment to point out that, when a preliminary decree is passed under O. XXXIV, r. 7, the situation is not the same as when a decree is passed under section 92 of the Transfer of Property Act, and to say that the question whether a second redemption suit can be brought where the party has already obtained a preliminary decree and there has been no final decree, did not arise in the case under discussion.

For the respondents a third Bombay case has been cited, *Rama Tulsa* v. *Bhagchand Motiram* (6). That dealt with a suit for sale under a mortgage-decree in which the defendant was given six months' time to pay the decretal-debt and in default the plaintiff was to recover the decretal-debt by sale of the mortgaged property. It was held that, when the defendant had failed to pay within six months and the mortgagee had failed to apply for a decree absolute, the relationship of mortgagor and mortgagee was not put an end to and that there was nothing to prevent the mortgagor from filing another suit for redemption. In that case the previous decree had also been passed before the enactment of the present Code of Civil Procedure and all these cases merely serve to show that there has been divergence of opinion in the Bombay High Court on the question whether a second suit for redemption can be brought when the first suit was decreed before the present Code of Civil Procedure came into force.

It seems to me that in a case of the nature of that under consideration the right of redemption could not be extinguished by the preliminary decree and could only be extinguished by a final decree. It was pointed out by Sir Norman Macleod, C. J., in *Kushaba Ramji Thoke* v. *Budhaji Sakaram* (4) that there is a certain amount of inconsistency between rr. 7 and 8 of O. XXXIV and that, properly speaking, a preliminary decree ought not to direct more than that, if the plaintiff makes a default, the mortgagee should have a right to ask for a final decree for foreclosure or sale as provided for by r. 8. Thus the Munsif who passed the preliminary decree of the 30th June 1915 which is alleged to bar the present suit, by his use of the word 'preliminary' should be regarded as having given the defendants in that suit merely a right to come into Court later and ask for a final decree that the plaintiff is no longer entitled to redeem and that the mortgage has come to an end.

The real test lies in the terms of section 11 of the Code. Was there in the 1914 suit any hearing or final determination of an issue whether the plaintiffs failure to pay the redemption price within a period fixed by the Court terminated the relationship of mortgagor and mortgagee? It does not appear from the Munsif's judgment that this was "alleged by one party and either denied or admitted expressly or impliedly by the other." In fact, the plaintiff, had he advanced such a plea, would have been met by the obvious retort that there was nothing in law to support it. Again, it was in no way necessary for the passing of a preliminary decree that such a question should be adjudicated upon. What actually happened is clear. After deciding that there was a mortgage in favour of the defendants and determining the amount of the charge the Munsif was intelligent enough to know that the correct form of decree to be passed would be found in O. XXXIV, and he was zealous enough to look up the text of that order, but then he either misread or misunderstood it.

Having regard to what was laid down by the Full Bench in *Dhanpat Mal* v. *Jhaggar Singh* (2) and to the actual terms of O. XXXIV, rr. 7 and 8, I hold that the question of the plaintiff's right to redeem the property now in suit was not finally decided by the previous decree of 30th June 1915. I affirm the decision of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

Z. K. & N. H.

(6) 27 Ind. Cas. 249; 39 B. 41; 16 Bom. L. R. 607.

MAN SINGH *v.* RAM NATH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 384 OF 1922.

June 28, 1923.

Present:—Mr. Justice Piggott.

MAN SINGH—DEFENDANT—APPELLANT

versus

RAM NATH—PLAINTIFF—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 20, 96, 120—*Agra Tenancy Act* (*II of* 1901), *s.* 142—*Suit for compensation for seizure of crops under decree ultimately set aside—Limitation—Civil Courts, jurisdiction of.*

A distraint effected under the Agra Tenancy Act is a seizure of moveable property under legal process. [p. 923, col. 2.]

M. brought a suit against *R.* for arrears of rent under the Agra Tenancy Act claiming that the latter was his tenant in respect of certain land. The Trial Court dismissed the suit but it was decreed by the first Appellate Court; *R.* preferred a second appeal which was decided in his favour, but in the meanwhile *M.* had levied rent from *R.* by means of the process of distraint provided by the Tenancy Act. Sometime afterwards, *R.* brought a suit against *M.* claiming the amount of the payment levied from him by the latter together with interest;

Held, (1) that assuming the suit to be cognizable by a Civil Court, it was governed by Art 29 of the Limitation Act and not by Art. 96 or Art. 120 of the Act; [p. 923, col. 1.]

(2) that the seizure of the crops by *M.* was under a legal process and was wrongful even though *M.* had at the time a decree of a Court in favour of his title; [p. 923, col. 1.]

(3) that the proper course for *R.* was to have proceeded under section 144 of the Civil Procedure Code;

(4) *Obiter*—that the suit was not cognizable by a Civil Court as it was in substance a suit for compensation for wrongful restraint for which provision was made in section 142 of the Agra Tenancy Act. [p. 924, col. 2.]

Article 120 of the First Schedule to the Limitation Act should never be invoked if there is any other Article in the Schedule which upon reasonable interpretation of its language covers the particular suit with which the Court is dealing. [p. 924, col. 1.]

Second appeal from the decision of the District Judge, Meerut, dated the 8th February 1922.

JUDGMENT.—The defendant to the present suit had brought a suit against the present plaintiff for arrears of rent under the Tenancy Act, claiming that the latter was his tenant in respect of certain land. The Trial Court dismissed that suit, but it was decreed by the District Judge on first appeal on the 18th of July 1916. Against that decree Ram Nath, the present plaintiff, appealed to this Court. Unfortunately, his appeal was not disposed of until the 19th of December 1918, when the decision of the District Judge was reversed and the decree of the Trial Court dismissing the suit was restored. There was an appeal against this decision under the Letters Patent, but that appeal failed. In the interval between the 18th of July 1916 and the 19th of December 1918, the present defendant, Man Singh, had taken advantage of the position which he occupied as holding a decree for rent passed by the District Judge, to realise the rent of the same land from Ram Nath, for each of three successive years, by means of the process of distraint provided by section 119 and the following sections of the Local Tenancy Act (No. II of 1901). In each case, as soon as the standing crops were distrained by Man Singh under his alleged proprietary right, Ram Nath paid up the arrears of rent on account of which the distraint had been effected. The dates of payment are given as the 13th of December 1916, the 18th of January 1918 and the 3rd of January 1919. When the decree of the District Judge was reversed on appeal it does not seem to have occurred to Ram Nath to consider whether relief in respect of the payments thus obtained from him on the strength of the erroneous decree of the District Judge, could not be obtained by means of a claim for damages or compensation, preferred to the Court of first instance, under section 144 of the Code of Civil Procedure. At any rate, that point has not been raised in the present litigation and is not before me for consideration. Ram Nath waited until the 12th of July 1921, when he instituted the present suit, claiming a total sum of Rs. 550 on account of the payments which he had made in consequence of the three distraints levied by Man Singh, together with interests by way of damages. In defence Man Singh pleaded that the suit as brought was not cognisable by the Civil Court, and that, in any event, the claim was barred by limitation. Both these pleas have been repelled by both the Courts below and both are raised before me in second appeal. I think it will simplify the decision of this appeal if I deal first

with the question of limitation. Assuming for the present, that this was a suit the cognizance of which by the Court in which it was instituted was barred, neither by the second clause of section 144 of the Code of Civil Procedure, nor by section 167 of the Tenancy Act (Local Act No. II of 1901), the question is, what Article of the First Schedule to the Indian Limitation Act is to be considered applicable to the plaintiff's cause of action. In the Courts below Art. 96 of the Schedule seems to have been suggested on the plaintiff's behalf. That Article is, in my opinion, inapplicable. The plaintiff did not make these payments under any mistake. He knew that Man Singh was not really his landlord in respect of the land the produce of which had been taken in distraint. His position was that there had been an erroneous decision by the District Judge, affirming in favour of Man Singh a right which the latter did not possess, and that he himself was prosecuting an appeal against that erroneous decision. I find myself quite unable to formulate the mistake on the ground of which it is suggested that Ram Nath made these payments. The plaintiff, however, is on safer ground when he falls back on Art. 120 of the Schedule and challenges the defendant to suggest some other Article as applicable to the present suit. Obviously, unless some other Article can be found, the plaintiff is entitled to avail himself of Article 120. It cannot be denied that he had a cause of action against Man Singh on account of these payments, whatever controversy there may be on the question whether he has availed himself of his proper remedy in law. If, therefore, no other Article of the Schedule can be suggested, the suit must be referred to Art. 120 and is within time. The defendant has suggested Art. 29 of the aforesaid Schedule, and this seems to me the Article which obviously applies to the case. Its provisions can only be avoided on one of the two contentions; either (*a*) that Man Singh's seizure of the growing crops on Ram Nath's land was not wrongful at the time when it took place; or (*b*) that it was not a seizure effected under legal process. In my opinion the seizure was undoubtedly wrongful. It has now been determined between the parties that Man Singh was not the landholder, nor was Ram Nath his tenant in respect of the land on which the crops distrained upon were growing. Man Singh had no right to distrain those crops on a claim for arrears of rent which were not in fact due to him. His seizure was none the less wrongful because it was done on the strength of an erroneous judicial decision in his favour which has since been reversed in appeal. The lower Appellate Court has avoided the applicability of this Article by saying that a distraint under the Local Tenancy Act is not a seizure of property under legal process. The right of distraint is a special right conferred upon landholders in this Province by the provisions of the Tenancy Act. The right has to be exercised in accordance with law, and a landholder who deviates from the provisions which regulate the whole process of distraint is liable to have to defend a suit for compensation under the first clause of section 146 of the Tenancy Act. A notice has to be served on the tenant through the Court and, under certain circumstances, assistance may be obtained from an officer deputed by the Court in making the distraint. We do not know in the present case if such assistance was invoked by Man Singh on any one of the three occasions which have given the plaintiff his cause of action for the present suit; but the point does not appear material. In my opinion a distraint effected under the Local Tenancy Act, (No. II of 1901), is a seizure of moveable property under legal process, because it is done under the special provisions of the Local Act and subject to the due observance of the procedure therein laid down. Unfortunately this finding of mine on the question of limitation is in itself fatal to the plaintiff's suit. I do not deny the force of the contention that Ram Nath was put in a difficulty by reason of the long interval of time which elapsed before the erroneous decision given against him by the District Judge in the suit for arrears of rent was set right by this Court on second appeal. Nevertheless, it seems to me that, if he had any faith in the justice of his cause or in the legal

acumen of this Court he could have protected himself in a variety of ways. In any event, it was incumbent on him to consider carefully the limitation period applicable to any suit which he might think of bringing. There was no reason why he should not, after this Court's decision of December the 19th, 1918, have taken prompt action, at any rate with regard to the distraint levied upon him in the first month of that same year. Nor do I altogether understand why, in any possible view of the case, he submitted to the distraint levied a year later. Presumably, before he made this payment on the 3rd of January 1919, he knew of the decision in his favour pronounced by this Cour 15 days earlier. Whatever may be said about his failure to contest the other two distraints, he would have been on strong ground if he had adopted the remedy provided for him by the Tenancy Act itself in respect of the last of the three distraints. As regards the first distraint, in connection with which he made his payment of the 13th of December 1916, it would have been possible for Ram Nath to have brought a suit for the recovery of that money within 12 months of the distraint, or of the payment, and to have asked the Trial Court to suspend the decision of that suit until the determination of the appeal then pending in this Court. Whatever sympthy I may feel for the plaintiff in this suit, I cannot stretch the provisions of the Indian Limitation Act in his favour when they seem to me to be clearly against him. Article 120 of the First Schedule to the said Act should never be invoked if there is any other Article in the Schedule which, upon a reasonable interpretation of its language, seems to cover the particular suit with which the Court is dealing, and, in my opinion, Art. 29 obviously covers the present suit supposing it to be one cognizable at all by the Court in which it was instituted.

This brings me to the other point raised by the appellant on which I do not propose to say much, because the result of the appeal is determined by the finding which I have already recorded. In my opinion, however, my decision on the question of limitation involves a finding against the plaintiff on the question of jurisdiction also. If the Article to which I have referred, No. 29 of the First Schedule to the Indian Limitation Act, really covers the present case, then the suit now before me is essentially one for which provision is made within the four corners of the Tenancy Act itself. I have no doubt that the Legislature intended Chapter IX of the Tenancy Act, sections 119 to 149 inclusive, to deal exhaustively with all disputes which could possibly arise by reason of the exercise of the power of distraint, by any person claiming to be a landholder against any person whom he alleged to be his tenant and from whom he alleged an arrears of rent to be due. I have no doubt that the framers of the Tenancy Act did not contemplate the entertainment by any Court other than a Revenue Court of a suit like the present, which is in substance a suit for compensation for wrongful distraint. Courts other than Revenue Courts are debarred from taking cognizance of any dispute or matter in respect of which a suit or application under the Tenancy Act itself could have been made. Now, it is not denied, and cannot be denied for a moment, that section 142 of the Tenancy Act provides a remedy for any person whose crops have been distrained upon by any person claiming to be his landholder and entitled to an arrear of rent, if the owner of the said crops, either denies the title of the distrainer or denies that the arrear of rent in respect of which the distraint has been effected is actually due. On each of the three occasions which are alleged to have given Ram Nath his cause of action for the present suit, his crops had been distrained upon by a person whose title as landholder he denied, and on account of an alleged arrear of rent for which Ram Nath said that he was in no way liable. The case as put to me in argument on behalf of Ram Nath is not that he could not have instituted a suit to contest each one of these distraints, but that he could not have done so with any hope of success, so long as the District Judge's decision of the 18th of July 1916 remained in force and the error committed by the District Judge had not been set right by this Court in

second appeal. I am afraid there is no question, in the provisions of the law which I am bound to administer, as to the hopes of success or certainty of failure with which suits to contest a distraint might or might not have been instituted. The question I have to consider is whether, on the state of facts and of law which Ram Nath has all along asserted, and which he has successfully asserted on final appeal to this Court, it was or was not open to him to contest each of these distraints by a suit brought under section 142 of the Local Tenancy Act. There is even something to be said against the argument that such suits were certain to fail. After all, in the original suit for arrears of rent the decision of the Trial Court, presumably the Court of the Assistant Collector, had been in his favour. He could have pointed out that an appeal was pending against the decision of the District Judge, which, therefore, could not have the effect of *res judicata*, and he might have asked for a fair re-consideration of his case on the merits. In the worst event, he could have asked the Court to release his crops upon security, under the appropriate provisions of the Tenancy Act, and to postpone the further hearing of the suit brought to contest the distraint until the determination of the second appeal pending in this Court. I cannot help thinking, moreover, that if a suit had been filed to contest the first distraint, and even a short adjournment obtained from the Assistant Collector's Court, an attempt might have been made, with fair chances of success, to obtain from this Court a special order expediting the hearing of the appeal against the decision of the District Judge.

For these reasons I am satisfied that this appeal must succeed. The defendant Man Singh has, in my opinion, an adequate answer in law to the claim now made upon him. There are no equities in his favour, and I do not propose to allow him any portion of his costs. As an honest man he ought to have refunded the money. He has taken refuge behind the Statute of Limitation and has taken advantage of the fact that the plaintiff has been badly advised in the means by which he has sought to enforce his right. My order, therefore, is, that I set aside the decrees of both the Courts below and dismiss the suit, leaving the parties to bear their own costs throughout.

Decree set aside.

N. H.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 475 OF 1922.

September 21, 1923.

Present:—Mr. Hallifax, A. J. C.

ABDUL AZIZ KHAN—APPELLANT

versus

BHAIRODAN—RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 203 (5) (8), scope of—Abadi *site*—*Express or implied contract between proprietor and holder, effect of*—*Absence of express contract*—*Implied contract, presumption of*—Wajib-ul-arz *or custom, whether excepted.*

Nothing in section 203 of the C. P. Land Revenue Act would affect the terms of an express as well as an implied contract between the proprietor and holder of an *abadi* site. [p. 927, col. 1.]

Where there is no express contract between the proprietor and the holder of an *abadi* site an implied contract has to be presumed from the existence of a custom. [p. 926, col. 1.]

Section 203 of the C. P. Land Revenue Act does not override the provisions of a *wajib-ul-arz* or any existing custom. [p. 926, col. 1.]

Section 203 (5) of the C. P. Land Revenue Act speaks only of the classes of persons who hold sites in the *abadi* and not of the capacity in which they hold them and still less of the capacity in which they originally acquired them. [p. 926, col. 2.]

Appeal from a decree of the District Judge, Bhandara, in Civil Appeal No. 45 of 1922.

Messrs. *V. Bose* and *P. N. Rudra*, for the Appellant.

Messrs. *G. L. Subhedar* and *K. K. Gandhe*, for the Respondent.

JUDGMENT.—The dispute in this case is over the possession of a house and compound in the *abadi* of the town of Balaghat, which was formerly called Burha, between the *malguzars* and the transferee of a person who owned the house and held the land from the *malguzars*. The house and the right to occupy the land were sold to the plaintiffs on behalf of a temple of which they are trustees, on the 12th of January 1919 for Rs. 1,500 by Chhote Lal and the other grandsons of the original occupant Dheklu Dhimar. The property is at present under attachment by an order passed

under section 146 of the Criminal Procedure Code.

(2) Dhekla Dhimar had a house on this site before the Settlement of 1865. He was not then a tenant of agricultural land in the village, but became one later, probably about 1880. It has been found that before he acquired a tenancy he supported himself by fishing and a petty retail grain business. It is very improbable that he lived in the village of Burha as it then was without also "ordinarily working therein as an agricultural labourer," but there is no advertence to this in the judgment of the lower Appellate Court. At the Settlement of 1895-96 the whole *abadi* was recorded as *Nazul* or *Mukiyat Sarkar*, but this was later found to be a mistake and it was corrected at the Settlement of 1914-15, when the land was again recorded as *abadi malguzari*.

(3). It has been held in the lower Appellate Court that Dhekla originally got possession of the site as a non-agriculturist, and, therefore, even after he became a tenant he, as also his heirs after him, continued in possession as a non-agriculturist and not as one of the classes of persons mentioned in section 203 (*i*) of the Land Revenue Act, 1917, and further that a custom has been proved to exist whereby the holders of such *abadi* sites can transfer them without the permission of the *malguzar*.

(4). It is clear, and it is hardly denied, that both decisions are wrong. Except in the fifth, sixth and seventh of its nine sub-sections, section 203 of the Land Revenue Act, 1917, merely states the existing law; it makes no change in it. It was suggested that it overrode the provisions of the *wajib-ul-arz* or any existing established custom. Sub-section (8), however, prevents that as, in any case, where there was no express contract, an implied contract would undoubtedly have to be presumed from the existence of the custom.

(5) There is, however, no evidence whatever in this case on which the finding of the existence of the custom could legally be based. Most of the instances are cases occurring between 1895 and 1915, when the land was wrongly supposed not to belong to the *malguzar* at all. Not one of the few others goes back beyond 1880, and in most of them the *malguzar* is stated to have given his consent it is said that he went about with the Deputy Commissioner asking people to take up sites and build houses on them and charged them nothing. In no case prior to 1895 is anything more than acquiescence even alleged.

(6) The finding that the transferors held the site in 1919 not as tenants of agricultural land in the village, but as non-agriculturists because their grandfather had originally acquired it in that capacity and had ceased to be a non-agriculturist only forty years before is manifestly impossible. The question arises only because the Financial Commissioner has, since the decision of the appeal in the District Judge's Court, issued notifications in respect of this *abadi* under sub-sections (5) and (6) of section 203 which have retrospective effect. (No. 2228 and No. 1354 of 29th August 1922).

(7) Now, even if Dhekla was not an agricultural labourer in addition to being a fisherman and petty grain seller, and even if it could be supposed that after he became a tenant of agricultural land the implied contract between him and the *malguzar* by which he held the site of the house was not altered into a new one to the effect that he was to hold the land on the same terms as other tenants, it is to be observed that sub-section (5) of section 203 speaks only of the classes of persons who hold sites in the *abadi*, not of the capacity in which they hold them and still less of the capacity in which they originally acquired them. It is beyond doubt that in 1919 the plaintiff's transferors were included in the classes specified in sub-section (1) of section 203, so that they did not acquire any right to transfer it by virtue of the notification issued under sub-section (5) The *malguzars* are, therefore, entitled to resume possession of the site and the suit of the transferees for a declaration that they were entitled to have possession of it ought to have been dismissed.

(8). It has been suggested that now that a declaration has been made under sub-section (5) of section 203, sub-section (7) entitles every holder of a site in the *abadi* to transfer it on payment of *nazrana*, whether he is in one class of holders or the

other. The wording of sub-section (7) can hardly be called happy, as sub-section (5) applies to every *abadi* though a notification under it is issued only in regard to some. The real meaning of that particular phrase is, however, clear but not the real meaning of the whole sub-section. From the words it seems equally possible to hold that the transfers mentioned in it are transfers by anybody in a village in respect of which a declaration has been made under sub-section (5) or that they are transfers only by the persons of the class mentioned in sub-section (5), that is, other than those specified in sub-section (1). An excursion into the dangerous ground of the probable intentions of the Legislature takes us little further.

(9). But the question does not really arise. Sub-section (8) enacts that nothing in the section is to affect the terms of any contract between the proprietor and the holder of a site in any *abadi*. This necessarily refers to implied as well as express contracts and it has already been said that Dheklu and his heirs made by implication a contract with the *malguzar* that they were to hold the site on the same terms as those on which all other tenants in the village held theirs. Those terms are too well known to require further statement. The appeal must, therefore, succeed and the decree of the lower Appellate Court must be set aside. In lieu thereof a decree will issue dismissing the plaintiff's suit and ordering that they shall all bear the costs of both parties in all three Courts.

G. R. D. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 3008 OF 1922.

June 7, 1923.

Present :—Mr. Justice Harrison.

POKHAR DAS—JUDGMENT-DEBTOR—APPELLANT

versus

RADHA KISHEN—DECREE-HOLDER—RESPONDENT.

Arbitration Act (IX of 1899), s. 15—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Award filed in Court—Execution of award—Limitation—Article applicable.

When an award becomes enforceable as if it were a decree of Court under section 15 of the Arbitration Act, all the actions of the successful party in enforcing his rights under the award become amenable to the provisions of the Civil Procedure Code and the Limitation Act which govern the execution of decrees.

An application for execution of such an award is, therefore, governed by Art. 182 of Schedule I to the Limitation Act.

Miscellaneous second appeal from an order of the District Judge, Amritsar, dated the 15th May 1922, affirming that of the Subordinate Judge, First Class, Amritsar, dated the 18th January 1922.

Mr. *Abdu Rashid*, for Mr. *Jai Gopal Sethi*, for the Appellant.

Mr. *Dev Raj Sawhney*, for the Respondent.

JUDGMENT.—In this appeal two points were raised, but only one has been argued and this is, whether the application for execution is within time or not. An award under Act IX of 1889 was duly filed in the Court of the Judicial Commissioner of Sind in the year 1911, and under section 15 became enforceable as if it were a decree of the Court.

The present application is dated the 16th November 1921 and it is not denied that it is within time if Art. 182 applies, that is to say, if there have been steps in execution in the interval, and three years had not elapsed from the date of the last step-in-aid of execution. Counsel contends that the limitation is governed by Art. 181 as, although the award is enforceable as if it were a decree, it is not a decree. He quotes the Bombay ruling *Gajjar* v. *Lalubhai* (1) to the effect that no appeal can be lodged from such an award and contends that the words "enforceable as if it were a decree" do not cover and include the right to make an application in execution periodically until twelve years have elapsed. There is, in my opinion, no force in this contention. The fact that the award is enforceable as a decree of Court makes all the actions of the successful party in enforcing his rights under the award amenable to the provisions of the Civil Procedure Code, and the Limitation Act which govern the execution of decrees.

The application is clearly within time, and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 8 Ind. Cas. 179; 35 B. 196; 12 Bom. L. R. 860.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 286 OF 1923.

July 2, 1923.

Present:— Mr. Justice Lumsden.

RAGHBIR SINGH—PLAINTIFF—PETITIONER

versus

SINGH RAM—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35—Suit to recover value of silver misappropriated by defendant, whether cognisable by Small Cause Court.

Plaintiff sued to recover from defendant a certain sum with interes. being the value of some silver made over by him to the defendant for conversion into ornaments and misappropriated by the latter. Plaintiff had prosecuted the defendant under section 406 of the Penal Code and had obtained a conviction, which had, however, been set aside on appeal;

Held, that the suit fell within the scope of Art. 35 of Schedule II to the Provincial Small Cause Courts Act, and was not cognisable by a Small Cause Court.

Cherakuddin v. *Ram Siraman*, 62 Ind. Cas. 432; 48 C. 879; 25 C. W. N. 256, *Nabi Bakhsh* v. *Muhammad Ali*, 67 Ind. Cas. 305; 3 L. L. J. 380 and *Sughra* v. *Ram Lal Misra*, 59 Ind. Cas. 593; 23 O. C. 352, relied on.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Sonepat, District Rohtak, dated the 8th January 1923.

Mr. *Shamair Chand*, for the Petitioner.

JUDGMENT.—Plaintiff sued to recover Rs. 60-9-9 with interest being the value of certain silver made over by him to the defendant for conversion into ornaments and misappropriated by the latter. It appears that plaintiff brought a criminal case under section 406, Indian Penal Code, and obtained a conviction in the Trial Court which was set aside on appeal. The present suit was tried as a Small Cause Court case and was dismissed with costs.

It is urged on revision that the Small Cause Court had no jurisdiction to entertain the suit in view of the provisions of Art. 35 clause (ii) of the Second Schedule to the Provincial Small Cause Courts Act. The defendant is not represented but I have little hesitation in holding that this objection must be sustained. The clause in question was added by the amending Act of 1914 and appears to be fully applicable to the present case even though the claim was restricted to the value of the silver and did not include any prayer for damages. *Cherakuddin* v. *Ram Siraman* (1), *Nabi Bakhsh* v. *Muhammad Ali* (2) and *Sughra* v. *Ram Lal Misra* (3) are analogous cases and all these authorities support the petitioner.

I hold, therefore, that the Small Cause Court had no jurisdiction to hear the case. The order passed is *ultra vires* and must consequently be set aside and the claim tried in a Court of competent jurisdiction. The application is accepted, but in the circumstances I make no order as to costs.

Z. K. *Application accepted.*

(1) 62 Ind. Cas. 432; 48 C. 879; 25 C. W. N. 256.

(2) 67 Ind. Cas. 305; 3 L. L. J. 380.

(3) 59 Ind. Cas. 593; 23 O. C. 352.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 29 OF 1922.

August 10, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

DHANRAJ AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FIRM SANEHI RAM-PANNA LAL—PLAINTIFFS—RESPONDENTS.

Vendor and purchaser—Principal and agent—Property in possession of seller or agent—Delay in taking delivery—Seller or agent's power to sell—Notice to purchaser or principal—Contract Act IX of 1872), s. 107—Appeal, second—Finding not based on any evidence, whether binding

Plaintiffs who carried on business at *P.* as commission agents, purchased certain goods from the defendants, who carried on business at *S.* As the defendants did not want immediate delivery, the goods remained in the plaintiffs' godowns for about 6 months when the plaintiffs wrote to the defendants asking for instructions as to the despatch of the goods, saying that if they did not receive a reply immediately they would despatch the goods to *S.* The defendants who up to that time had not received the account for the goods wrote back a letter the material part of which was as follows:—

"I wrote you to get the account adjusted. I will send all the dues on hearing from you. What you write now is not acceptable to me. O, brother, no fall in the market is yet in sight within 5 or 7 days. It is not proper to bring one under clutches in this way. I am ready to give you damages nor do I propose to cause loss to you. If I would have got the goods here, I would not have suffered loss. Considering this you will get the account adjusted."

"At the time of this letter the market price of the goods in question at all events at *P* had fallen below the prices current at the date of purchase. About a fortnight after the receipt of the defendants' letter the plaintiffs without any intimation to the defendants sold the goods at *P*. and brought a suit to recover the difference between the sum realized and the purchase price :—

Held, (1) that if the plaintiffs were to be regarded as sellers they were governed by section 107 of the Contract Act and were not entitled to sell the goods without giving notice that unless the defendants took delivery they would sell the goods for what they would fetch ; [p. 930, col. 1.]

(2) that if the plaintiffs were to be regarded as the agents of the defendants their business was to hold the goods at the disposal of their principals and unless they had express authority to sell them, they were not entitled to sell them without either requesting payment or asking the defendants to take delivery and giving notice that in the event of their failure to do so they would sell the goods for their account; [p. 930, col. 1.]

(3) that there was nothing in the letter of the defendants which could possibly be interpreted as an authority to the plaintiffs to sell. The letter really appealed to the generosity of the plaintiffs not to enforce their right of despatching the goods immediately, but to wait and possibly to wait a little longer for payment and the mere fact that the defendants said that they were willing to bear the loss or suffer any damage that may arise could not mean anything more than that the loss was theirs and did not really concern the plaintiffs; [p. 931, col. 1.]

(4) that, therefore, the plaintiffs could not recover anything from the defendants and that their suit must fail. [p. 931, col. 1.]

Although the findings of fact of a first Appellate Court are not open to question in second appeal it is always open to the second Appellate Court to consider whether there is in fact any evidence to support the findings. [p 930, col. 2.]

Letters Patent Appeal.

Mr. *P. Dayal*, for Mr. *R. T. N. Sahai*, for the Appellants.

Mr. *Janak Kishore*, for the Respondents.

JUDGMENT.

Miller, C. J.—The plaintiffs, who carry on business at Patna as commission agents, purchased in 1916 certain goods for the defendants, who carry on business at Srimangal. In due course the plaintiffs rendered an account for the unpaid balance of their charges amounting, together with interest, to Rs. 839-9-9. The defendants challenged the propriety of one item in the account of amounting to Rs. 383-2-6 being Rs. 867-8-9, the purchase price of chillies paid for the defendants after crediting them with Rs. 484-6-3 the proceeds of the sale of the same. The chillies were purchased in May 1916 for the defendants' account but as the defendants apparently did not want immediate delivery, the goods remained in the plaintiffs' godown until November. On November 26th the plaintiffs wrote to the defendants asking for instructions as to the despatch of the chillies saying: "I wrote to you to have the same despatched but you do not write to me about the despatch. Please write immediately on receipt of this letter. Otherwise I would despatch them to Srimangal. You should at once send *hundi* and things without delay" On the 30th November, in reply, the defendants, who up to that time had not received the account for the goods, wrote a letter the material part of which was as follows:—"On the day I returned back I wrote you to get the account adjusted. I will send all the dues on hearing from you. What you write now is not acceptable to me. O brother no fall in the market is yet in sight within five or seven days. It is not proper to bring one under clutches in this way. You ought not to have written such a letter to me and expressed your mind. I am ready to give you damages nor do I propose to cause loss to you. You did not get anything from a certain person and you could not do anything. I am ready to pay you damages and still you are hostile to me. If I would have got the chillies here I would not have suffered loss. Considering this you will get the account adjusted." There can be no doubt that at that time the market-value of chillies, at all events in Patna, had fallen below the prices current at the date of the purchase. The plaintiffs did not reply to this letter and it may be observed that in the letter of the 26th November which they had written they had stated that if they did not receive an immediate reply to their letter they would despatch the chillies to Srimangal. About a fortnight after the defendant's letter was received, the plaintiffs without giving any intimation sold the chillies for a sum of Rs. 484-6-3 and they claim that they are entitled to the difference between the sum so realised and the purchase price. The plaintiffs were the defendants' agents and clearly to my mind had no authority to sell without instructions. They would have

been entitled to despatch the goods or if the defendants failed to take delivery they would have been within their rights in selling the goods after giving notice that they would do so if delivery was refused but no such notice was given. Whether one regards them as sellers or whether one regards them as agents it seems to me that the plaintiffs had no authority to sell the goods without instructions from the defendants or without giving notice that unless the defendants took delivery they would sell the goods for what they would fetch. If they are to be regarded as sellers then, clearly, they are governed by section 107 of the Indian Contract Act which provides that "where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, re-sell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit which may occur on such re-sale." It is quite clear, I think, from the facts of this case that the defendants did not refuse to take delivery of the goods. All that they were asking was that delivery should be held over a little longer and there is nothing at all in the evidence which has been suggested to us to point to the fact that they ever actually refused to take delivery of the goods.

If, on the other hand, the plaintiffs are to be regarded as agents it seems to me that their business was to hold the goods at the disposal of their principals and unless they had express authority to sell them they were not entitled to sell them without either requesting payment or asking the defendants to take delivery and giving notice that in the event of their failure to do so they would sell the goods for their account. On the first January the defendants telegraphed to the plaintiff to deliver the chillies to them at Srimangal but by that time they had already been sold by the plaintiffs as stated. The plaintiffs contended that the letter of the 30th November was an authority to them to sell and that they were justified in the circumstances in so doing. It is not suggested that any other authority beyond the letter in question was given to them.

The Trial Court considered that the letter did not give any authority to the plaintiffs to sell the chillies and disallowed this part of the plaintiff's claim giving them a decree with costs for the balance.

The Subordinate Judge on appeal took a different view. He considered that the defendants having intimated that they were prepared to be debited with any loss justified the plaintiffs in disposing of the goods.

On second appeal by the defendants to this Court the case came before a Single Judge who considered that he was not entitled to question the findings of fact of the lower Appellate Court or to consider whether the document relied upon by the Subordinate Judge was properly interpreted by him. He accordingly dismissed the appeal.

From that decision the present appeal has been preferred by the defendants under the Letters Patent. Although the findings of fact of the first Appellate Court are not open to question in second appeal it is always open to the second Appellate Court to consider whether there is in fact any evidence to support the findings. In the present case the only evidence adduced in support of the findings is the letter of the 30th November. That letter, as well as the plaintiffs' letter of the 26th November, to which it is a reply have been placed before us and it is contended that they afford no evidence to support the findings of the Subordinate Judge. The learned Judge of this Court in second appeal declined to consider the case from this point of view. With great respect, I think he ought to have done so and determined for himself, not whether the lower Appellate Court's view of the evidence was right or wrong but, whether there was any evidence which supported his finding. We have considered the letter of the 30th November which is the only evidence put forward in support of that finding and indeed the only evidence upon which the finding was based and it seems to me that it is impossible to read into it any authority to the plaintiffs to sell the chillies. I have already set out the material parts of the letter and it is not necessary to refer to it

again, but I think it is quite impossible to find throughout that letter anything which would possibly be interpreted as an authority to the plaintiffs to sell. It appears to be the letter of a person who was appealing rather to the generosity of the plaintiffs not to enforce their rights of despatching the goods immediately but to wait, and possibly to wait a little longer for payment, and the mere fact that they say that they are quite willing to bear the loss or suffer any damage that may arise cannot mean more than that the loss was theirs and does not really concern the plaintiffs. In these circumstances, it seems to me that there was no authority given in that letter at all to sell and, therefore, that being the case, there was no evidence at all in this case which would support the findings of the learned Subordinate Judge.

It was contended that section 53 of the Contract Act was applicable to this case and that under that section the plaintiffs had in fact been prevented from performing their part of the agreement and that they were, therefore, entitled to avoid the contract and to sue the defendant for any damages which they might suffer. From first to last, throughout this case there is nothing to show that the plaintiffs ever purported to rescind the contract. Their duty was to hold the goods for the disposal of the defendants and if they intended not to hold them any longer then, obviously, to my mind their plain duty was to intimate to the defendants that unless they took immediate delivery they would dispose of the goods by sale and recoup themselves for their loss. Had they done so, clearly, they would have been entitled to ask the defendants to pay the balance between the price fetched and the price paid for the goods originally, but not having done so it seems to me they acted without authority and they cannot, in the circumstances, having failed to deliver the goods, ask the defendants to pay the cost. In my opinion this appeal should be allowed the decision of this Court and of the Subordinate Judge should be set aside and the decision of the Trial Court restored. The defendants are entitled to their costs throughout except the costs in the Trial Court which will be paid by them as directed by the Munsif.

Mullick, J.— agree.

N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 549 OF 1922.
July 3, 1923.

Present:—Mr. Justice Kanhaiya Lal.

GAYA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SURAJBALI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage-deed—Mortgage by conditional sale—Deed of further charge or mashrat-ul-rehan—Consolidation—Redemption—Evidence Act (I of 1872), s. 90—Transfer of Property Act (IV of 1882), s. 59—Hypothecation deed executed before Transfer of Property Act—Signature of executant, absence of—Presumption of genuineness.

A person mortgaged his property by way of conditional sale later on, he borrowed some more money from his mortgagee and executed a deed which recited the earlier mortgage by conditional sale and stated that a further loan was taken from the mortgagee which was to be included in the money due on the earlier mortgage and re-paid with it It also contained a covenant that, until the money due on the latter deed was paid, the mortgagor would not be entitled to redeem the mortgage by conditional sale or to transfer any portion of the mortgaged property. The deed was described as a deed of further charge (*dastawez tamassuk mashrat-ul-rehan*):

Held, that the amount due on the deed of further charge was to be consolidated with that due on the mortgage by conditional sale. [p. 932, col. 2.]

Ranjit Khan v. *Rimdhan Singh*, 2 Ind. Cas. 859; 31 A. 42; 6 A. L. J. 954 and *Har Pershad* v. *Ram Chander*, 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A.) 139; 44 A. 37; (1922) A. I. R. (A.) 174, followed.

Baldeo Rai v. *Murli Rai*, 16 Ind. Cas. 638; 10 A. L. J. 120 and *Kesar Kunwar* v. *Kashi Ram*, 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 880, distinguished.

A Court may presume the genuineness of a document more than 30 years old, which was executed before the Transfer of Property Act came into force, and which was properly registered by the executant, even if it is not signed by the executant personally nor bears his mark. [p. 932, col. 2.]

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 5th of January 1922.

Mr. *H. Mushtaq Ahmad*, for the Appellants.

Mr. *Mukhtar Ahmad*, for the Respondents.

CHANDRABHAGA *v.* GANESH KESHEO.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage by conditional sale effected by Ram Dayal Singh and others in favour of Sukhai Singh and Gopal Singh on the 12th of January 1862. The suit was resisted by the defendant No. 1 who claimed in addition the money due on what he described as two other deeds of further charge. One of them was disallowed by the Court of first instance but allowed by the lower Appellate Court, and it forms the subject-matter of the present appeal. The latter deed recited the earlier mortgage by conditional sale and stated that a further loan of Rs. 400 was taken from the mortgagees, which was to be included in the money due on the earlier mortgage and re-paid with it. It also contained a covenant that until the money due on the latter deed was paid, the mortgagors could not be entitled to redeem the mortgage by conditional sale or to transfer any portion of the mortgaged property elsewhere, the deed was described as a deed of further charge (*dastawaz tamassuk mashrat-ul-rehan*). The language of the document, taken as a whole, clearly shows that the parties intended that the money due on the subsequent transaction, represented by the above deed of further charge, was to be consolidated with that due on the earlier mortgage by conditional sale, and that the said mortgage by conditional sale was not to be redeemed till the money due on the deed of further charge was paid. In fact, the mortgagors had agreed not to transfer the property elsewhere till the money due on the deed of further charge was re-paid. The terms of the documents correspond very nearly with the terms of the documents which formed the subject of consideration in *Ranjit Khan* v. *Ramdhan Singh* (1) and *Har Pershad* v. *Ram Chander* (2). The learned Counsel for the appellants has referred to the decisions in *Baldeo Rai* v. *Murli Rai* (3) and *Kesar Kunwar* v. *Kashi Ram* (4). But the terms of the documents considered in those cases were in no sense identical with those which form the subject of consideration in the present appeal. In the former case there was no indication afforded by the deed of the creation of any further charge and all that it provided was that the money due on the later transaction was to be paid first, that is to say, before that due on the earlier deed was paid. In the latter case the contract of consolidation was not explicit as in the present instance, and the document was not described as a deed of further charge.

It is also urged that the lower Appellate Court was not justified in presuming the genuineness of the deed of further charge in question inasmuch as the deed did not purport to have been signed by the executants personally or to bear their marks. The deed was, however, executed on the 12th of January 1862 before the Transfer of Property Act of 1882 had come into force, and it was usual at that time that the signatures of the executants and all such attesting witnesses, as were illiterate were made by the scribe at their instance or request and they were treated as signatures made by an authorised agent and as effectual as the signatures or marks of the executants themselves. The document was duly registered by the executants and over thirty years old; and there is no reason to think that it was otherwise than genuine. The appeal is, therefore, dismissed with costs.

N. A. A. *Appeal dismissed.*

(1) 2 Ind. Cas. 859; 31 A. 482; 6 A. L. J. 654.
(2) 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A.) 15; 44 A. 37; (1922) A. I. R. (A.) 174.
(3) 16 Ind. Cas. 638; 10 A. L. J. 120.
(4) 30 Ind. Cas. 777; 37 A. 634; 13 A. L. J. 889.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 32-B OF 1921.
September 5, 1923.
Present:—Mr Kotval, A. J. C.

CHANDRABHAGA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
GANESH KESHEO—DEFENDANT—RESPONDENT.*

Berar Inam *Rules of* 1859—*Deshpandia allowance, whether* inam—*Succession*—"*Direct lineal heirs*" *in r.* 5, *meaning of.*

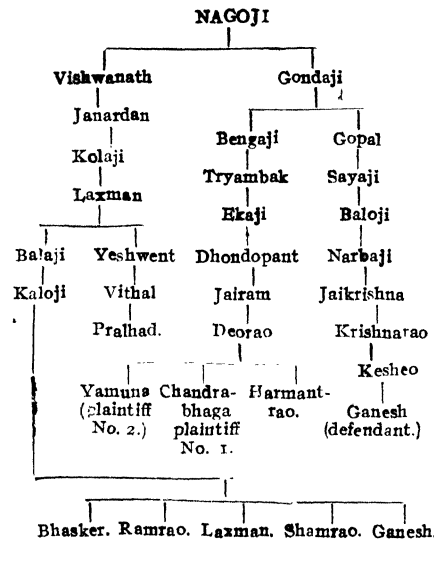
Deshapande allowance in Berar is an *inam* and is governed by the Berar Inam Rules of 1859. The *inam* falls under class (4) (first) and is dealt with

by r. 6 of the Rules. [p. 933, col. 2; p. 934, col. 1.]
The words "direct lineal heirs" in r. 5 of the Berar Inam Rules refer to the heirs of the person mentioned just before in the same clause, that is, the first grantee under the British rule and not to any future incumbent who has not been mentioned anywhere in the clause. [p. 934, col. 1.]

Appeal from a decree of the Additional District Judge, Amraoti, dated the 13th October 1920, in Civil Appeal No. 18 of 1920.

Mr. *G. G. Hatvalne*, for the Appellants.
Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for recovery of a share of a Deshpande allowance which is paid by the Government to the defendant Ganesh as the respresentative of the family of Watandar Deshpandias of Morsi Pergana. Admittedly, the allowance was divisible amongst four branches of the family. These branches and the relationship of the parties are shown in the following genealogical table:—



Defendant Ganesh, Hanmantrao and Pralhad represented three branches and the five sons of Kaloji the fourth. Hanmantrao's sisters claimed to succeed to his share. They sued for the share of the allowance for the year preceding and the year succeeding Hanmantrao's death. The defendant's pleading is not very clear but it appears to amount to this, that the allowance being a grant to the Deshpande family the plaintiffs who had by marriage ceased to belong to the family had no right to share in it in succession to Hanmantrao. I do not refer to the other pleas which are now not material. The Trial Court had framed the following two issues on the above pleas:—

"1. Whether the Watan in suit can go to plaintiffs by succession or not?
2. Have plaintiffs no cause of action for the Lawajma of 1918-19?"

The Trial Court holding that according to the Bombay School of Hindu Law the sister is recognised as a *Gotroja Sapinda* and an heir and that succession to the allowance was governed by the ordinary Hindu Law decreed the plaintiffs' claim. The lower Appellate Court held that the allowance was governed by rule VI of the Inam Rules, and that under that rule the plaintiffs were not entitled to succeed since they were not direct lineal heirs of the last holder Hanmantrao. This decision is the result of its holding that the lineal heirs referred to in that rule are the lineal heirs of the last holder and not of the first granted under British rule. The plaintiffs appeal.

The first question to be decided is, whether Deshpande allowance is an *inam* and governed by the Berar Inam Rules of 1859. This question has been very fully dealt with by the Financial Commissioner in ruling No. 1 in section VI, serial No. 4 of the Berar Revenue Manual, Volume II, page 277. I agree with the Financial Commissioner's decision and his reasons therefor, which need not be repeated here. I am referred to section V, serial No. 4, paragraph 3, which says:—

"It is to be noted that the directions concerning the emoluments of Deshmukhs and Deshpandias in the Inam Rule 6 (2)

refer only to "*inams*" by which the Inams Rules mean land grants. The restrictions on the succession to Deshmukh and Deshpandia Inams contained in Inam Rule VI, read with Inam Rule V, do not, therefore, apply to the succession to these cash *rusums*, the succession to which is regulated by the personal law of the Watan family. * * *"

This statement is only a part of executive instructions and interprets the law in a particular manner but has not the force of law like the Inam Rules. No reasons are given in support of the interpretation and it ignores the previous ruling of the Financial Commissioner. I hold that the allowance is an Inam and governed by the *Inam* Rules.

The next question is, whether the plaintiffs are entitled to the allowance after Hanumantrao's death. The *inam* falls under class 4 (first) and is dealt with by rule 6. Rule VI (2) lays down that it shall be disposed of according to clause 2 of rule V. The part now material of rule V is as follows:—

"If the present incumbent is a descendant of the original grantee, the *inam* will be continued to him hereditarily, subject to the following conditions:—first, successions limited to direct lineal heirs and undivided brothers."

The question is, which is the person whose direct lineal heirs are referred to in the first sub-clause? Whether the first grantee under the British rule. The words "direct lineal heirs" must be taken to refer to the heir of the person mentioned just before in the same clause and that is the present incumbent or the incumbent when the rules were made to whom the *inam* is directed to be continued hereditarily. The expression cannot be held to refer to any future incumbent who has not been mentioned anywhere in the clause. The objection urged against this interpretation is that if the first grantee under the British rule dies without lineal heirs and is succeeded by his undivided brother, when the latter dies his lineal heirs would not succeed because they are not the lineal heirs of the first grantee. It is said that this could not have been contemplated. There is no grave reason why this could not have been contemplated, but the fact that the obvious interpretation of the language of the rule leads to a result which seems somewhat anomalous does not justify a different and less obvious interpretation. It is also to be noted, as remarked by the Financial Commissioner in ruling No. 2 in section VI, serial No. 3, that unless the expression "direct lineal heirs" refers to the heirs of the first grantee under British rule the expression "undivided brothers" would be meaningless. I am of opinion that the lineal heirs referred to in rule V clause 2 (first) are the lineal heirs of the first grantee under British rule.

Whether the plaintiffs are entitled to succeed to the *inam* depends on the question whether they are the direct lineal heirs of such a grantee. In the first Court the trial proceeded on the assumption that succession to the allowance was governed by the ordinary Hindu Law and it was, therefore, not ascertained who was the first grantee under British rule, and there is nothing on the record to show who such grantee was. I, therefore, remand the case to the lower Appellate Court for findings as to who was the first grantee of the allowance from the British Government and as to whether the plaintiffs are his lineal heirs. The lower Appellate Court will take further pleadings and allow evidence to be given either before itself or in the Trial Court. The findings will be remitted to this Court as early as may be.

G. R. D. *Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1620 OF 1920.
April 21, 1923.
Present:—Mr. Justice Harrison and Mr. Justice Zafar Ali.

GURBAKHSH SINGH—
PLAINTIFF—APPELLANT
versus
BHAGWAN SINGH—DEFENDANT—
RESPONDENT

Limitation Act (IX of 1908) Sch. I, Art. 123, applicability of—Suit against co-legatee for share of estate—Limitation.

GURBAKHSH SINGH *v.* BHAGWAN SINGH.

A suit by a legatee to recover a share of the estate of the deceased bequeated to him from a co-legatee who is in possession of that share is governed by Art. 123 of Schedule I to the Limitation Act. [p. 936, col. 1.]

Maung Tun Tha v. *Ma Thit*, 38 Ind. Cas. 809; 44 C. 379; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 26 C. L. J. 169; 9 L. B. R. 56; 10 Bur. L. T. 138; 44 I. A. 42 (P. C.), *Zemindar of Bhadrachalam & Palavancha* v. *Venkatadri Appa Rao*, 70 Ind. Cas. 689; 43 M. L. J. 486; (1922) M. W. N. 532; 16 L. W. 369; (1922) A. I. R. (M) 457; 46 M. 190, relied on.

Second appeal from a decree of the District Judge, Amritsar, dated the 4th June 1920, affirming that of the Subordinate Judge, Second Class, Amritsar, dated the 13th February 1920.

Mr. *Sagar Chand* and Lala *Jagan Nath*, for the Appellant.

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

JUDGMENT.—One Hazura Singh died in 1910 leaving four sons. He is said to have disinherited two by a Will and to have left to the remaining two the whole of his property, which he asserted in the document to be self-acquired. The two legatees lived at peace with each other until recently and now, in the year 1919, Gurbakhsh Singh brings a suit against his elder brother Bhagwan Singh for his share in the estate, which he says Bhagwan Singh has appropriated in its entirety. It has been held by both the lower Courts that the suit is barred by limitation, that Art. 123 does not apply, and that under Art. 120 also the suit is barred. On second appeal it is contended that, even if Art. 120 applies, six years have not elapsed since a demand was made by the plaintiff and, therefore, the suit is within time and further that Art. 123 does apply and govern the case. So far as Art. 120 is concerned, the plaint does not disclose the date of any demand but merely states vaguely that a demand was made. Counsel for the appellant contends that, under these circumstances, it is for the defendant to prove the negative that no demand was made within six years and that it is unnecessary for him in his plaint even to state that he has a cause of action within limitation. For this view he can adduce no authority and we find that, as the plaint does not disclose a demand within six years, even if Art. 120 did govern the case the suit would be clearly barred by time.

As to Art. 123, the real question is the applicability of *Maung Tun Tha* v. *Ma Thit* (1) and whether the view taken by the Full Bench of the Madras High Court in XLIII Madras Law Journal *Zemindar of Bhadrachalam & Palavancha* v. *Venkatadri Appa Rao* (2)] more especially at page 500* is to prevail as against many previous rulings. Article 123 says that a suit for a legacy or for a share of a residue bequeathed by a testator may be brought within 12 years and it has been held hitherto that the suit must be against a person who lawfully represents the estate of the deceased and that it does not govern a case against an executor *de son tort*. The Privy Council ruling *Maung Tun Tha* v. *Ma Thit* (1) doubtless dealt with a case in which the parties were Buddhists and a question of Buddhist custom was involved. It is quite clear, however, that the suit was against an executor *de son tort* and their Lordships observed at page 387† that proof of the custom having failed the plaintiff was entitled to bring his suit to assert "a right which he was at liberty to assert within any period that was not outside the period fixed by Art. 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate." The fact that in the present case there was a Will does not affect the position, for the Article applies equally to the case of an intestate's estate and to one in which the deceased has left a Will. Counsel contends that where two men are nominated as beneficiaries under a Will they are not legatees and the estate conferred upon them is not a legacy, but he cannot explain what they are if not legatees. Before the Madras High Court the question was argued at considerable length and it was held that Art. 123

(1) 38 Ind. Cas. 809; 44 C. 379; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 26 C. L. J. 169; 9 L. B. R. 56; 10 Bur. L. T. 138; 44 I. A. 42 (P. C.).

(2) 70 Ind. Cas. 689; 43 M. L. J. 486; (1922) M. W. N. 532; 16 L. W. 369; (1922) A. I. R. (M.) 457; 46 M. 190.

*Page of 43 M. L. J.—[*Ed.*]

†Page of 44 C.—[*Ed.*]

applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased and that it, therefore, applies to suits for legacies against an executor *de son tort*. Here the defendant was certainly entitled under the Will to a portion of the estate, but he is nonetheless an executor *de son tort* and, as explained by the Chief Justice of Madras, at page 500* of the ruling, "an executor *de son tort* takes all the liabilities of an executor, and it would be a curious thing if claims to legacies against an executor were not barred until the lapse of 12 years but claims against executors *de son tort* were barred in a shorter period. That this Article applies to persons other than the executors in possession of an estate has been decided in several cases." The Privy Council ruling is then referred to and it is explained that what was there decided was that Art. 123 applies to a claim to a share of an estate against co-heirs in possession. We accept this view as obviously correct and indeed we are unable to understand how the Privy Council ruling admits of any other interpretation. We find that the suit was instituted within time. We accept the appeal and remand the case for decision on the merits. Costs will follow the event.

Z. K.

Appeal accepted.

*Page of 43 M. L. J.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 284 OF 1922.
September 5, 1923.

Present:—MR. WAZIR HASAN, A. J. C.

SHAMS-UD-DIN KHAN—DEFENDANT—APPELLANT

versus

Agha Siyid FATEH SHAH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 99, O. I, r. 10—Suit instituted in name of wrong plaintiff—Mistake, how rectified—Evidence Act (I of 1872), s. 110—Rent suit—Question of lessor's title, whether relevant—Ostensible lessee merely trustee—Title of lessor, whether can be questioned—Transfer of Property Act (IV of 1882), s. 106—Contract to contrary, whether valid—Nazul land, lease of—Rules of Government, rule 1820, interpretation of.

Where a plaint purports to be filed by a Municipal Board with the addition of the name of the Chairman as plaintiff, the error is not one of substance but merely of form and may be corrected under the provisions of O. I, r. 10, Civil Procedure Code, if the objection is taken in the Trial Court. [p. 937, cols. 1 & 2.]

Under section 99 of the Civil Procedure Code, this defect cannot be made the ground of any interference with the decree passed by the Court. [p. 937, col. 2.]

In a suit between a lessor and lessee, the latter cannot be permitted to deny the title of the former. [p. 937, col. 2.]

The question of the lessor's title is foreign to a suit for rent or in ejectment against the lessee and this is equally true in a case where the ostensible lessee is merely a trustee and liable to render account to the *cestui que trust*. [p. 937, col. 2.]

Bilas Kunwar v. *Desraj Ranjit Singh*, 30 Ind. Cas. 290; 37 A. 557; 10 C. W. N. 1207; 20 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.), followed.

The terms of section 106 of the Transfer of Property Act are 'subject to any contract to the contrary' and a notice of ejectment complying with the terms of the contract is valid though it may offend against the terms of the aforesaid section. [p. 938, col. 1.]

Rule 1820 of Rules of Government regarding management of *Nazul* property by Municipal Boards lays down that when a terminable lease is given it shall not ordinarily be for a period shorter than 30 years. The use of the word 'ordinarily' necessarily implies exceptions and it is discretionary with Municipal Boards to give a lease for a shorter period. [p. 938, col. 1.]

Appeal against a decree of the Third Additional District Judge, Sitapur, dated the 27th May 1922, upholding that of the Munsif, Sitapur, dated the 24th March 1922.

MR. *Ishri Prasad*, for the Appellant.

MR. *Mahesh Prasad* for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was brought against the defendant-appellant for possession of plot No. 1274, measuring 3 *biswas* 9 *biswansis* 6 *kadhwansis* situate within the Municipal limits of Sitapur. On the 22nd November 1904 the defendant-appellant's father, Fakhar-ud-din, took the land in suit on a lease from the Municipal Board of Sitapur. The contract between the parties in respect of this land lease is evidenced by an instrument dated the 22 November 1904 executed by Fakharuddin in favour of the Municipal Board. The lessee was to put up a shop

made of tiles (*khaprel*). The rent fixed was Rs. 24 a year payable on the first of every month with an instalment of Rs. 2. One of the conditions of the lease was that the Board shall have power to determine the lease by serving a notice of one month within which the lessee was to remove his materials and to vacate the land; in the event of the lessee not complying with the notice, the Municipal Board had a right to remove the construction themselves. It appears that the Municipal Board served a notice on the defendant on the 27th July 1921, asking him to remove his construction on the plot in suit and to vacate the land within one month from the date of the receipt of the notice. The defendant did not comply with the notice. The suit was consequently lodged as stated before. The Courts below have decreed the suit.

The first objection taken in this Court to the validity of the suit is, that it was not in a proper form. This objection is based on the ground that the Chairman of the Municipal Board of Sitapur appears as a plaintiff in the body of the plaint and is mentioned by his name. It is argued that, in virtue of the provisions of section 6 of the U. P. Municipal Act, 1916, the Municipal Board is a corporate body and as such it is vested with the capacity of suing and being sued in its corporate name and consequently the suit in the name of the Chairman of the Board was incompetent. The premises are correct but the conclusion drawn is not strictly accurate. It is true that the name of the gentleman, who happened to be the Chairman of the Board on the date of the institution of this suit, was mentioned in the heading of the plaint as the plaintiff but he was clearly described therein as the Chairman of the Municipal Board of Sitapur. There can be no doubt that the plaint was presented with the intention of showing that it was the Municipal Board which was suing. At the worst, it is a case where a suit has been instituted in the name of the wrong person as the plaintiff and the error could have been easily corrected under the provisions of r. 10 of O. I of the Code of Civil Procedure if the defendant-appellant had taken the objection in the Courts below which he has now urged as to the form of the suit. It is admitted that it is for the first time in this Court that this defect is being relied upon as justifying the dismissal of the suit altogether. I have already said, that the defect is not one of substance but merely of form.

Under section 99 of the Code of Civil Procedure this defect cannot be made the ground of any interference with the decrees which the Courts below have passed in this case.

It is next urged that the plot in suit being *nazul* property the title to it is vested in the Secretary of State for India in Council and, therefore, the Municipal Board has no title to bring this suit in ejectment. This contention must be overruled. This is a case between lessor and lessee where the lessee has refused to vacate the lease-hold property in spite of a proper notice to quit. The lessee cannot be permitted to deny the title of the lessor, in this case the Municipal Board of Sitapur. Under a certain Notification issued by the Government of the United Provinces this property has been entrusted to the management and control of the Municipal Board of Sitapur but that is a matter with which we are not concerned in this case. The question of the lessor's title is foreign to the suit for rent or in ejectment against the lessee and this is equally true in a case where the ostensible lessee is merely a trustee and liable to account to the *cestui que trust*. It is admitted that the defendant-appellant's father, through whom the appellant derives his title to the occupation of the plot in suit, was let into possession by the Municipal Board of Sitapur. It is also not denied that since he was so let into possesion the rent reserved by the lease has been paid by him to the Municipal Board. He received notice to quit but has never given up possession. On the other hand, his learned Pleader now denied the title of the lessor. In the circumstances, the principle of section 116 of the Indian Evidence Act applies. In the case of *Bilas Kunwar* v. *Desraj*

Ranjit Singh (1) Sir George Farwell, in delivering the judgment of His Majesty's Privy Council, said:—"Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well-established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord." This contention must also be overruled.

It was further argued that, in view of rule 1820 of the Rules of the Government in relation to the management of the *nazul* property entrusted to the charge of the Municipal Board, there cannot be a lease in respect of such property for a period shorter than thirty years. The lease in question should, therefore, be construed to be for that period. This argument again has no substance whatsoever. The rule referred to only says that, when a terminable lease is given, it shall not ordinarily be for a shorter period than thirty years. The use of the word 'ordinarily' necessarily implies exceptions and in the case before me the Municipal Board in its discretion did not consider it proper to give a lease for a period longer than what is stated in the lease itself. The argument, therefore, fails.

Lastly, it was argued that, having regard to the terms of section 106 of the Transfer or Property Act, the notice to quit, which was served on the appellant on the 27th July 1921, was not a valid notice. But the terms of section 106 are subject to any contract to the contrary and in the case before me there is a contract to the contrary embodied in the instrument of the 22nd November 1904. The notice served on the appellant is quite within the terms of the contract and does not in any manner violate them. This argument also fails.

The appeal is dismissed with costs.

G. H. & K. S. D.

Appeal dismissed.

(1) 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 3 A. L. J. 961; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1292 OF 1921.

April 25, 1923.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

BASHU RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PIARA CHAND—DEFENDANT—RESPONDENT.

Punjab Courts Act (VI of 1918), s. 41 (3)—Appeal, second—Question of custom—Application for certificate—Order directing grant of certificate—Certificate, separate, whether necessary—Custom v. *personal law—Adoption—Uncle's daughter's son—*Rai Brahmans *of Mohra Bhattan, Tahsil and District Rawalpindi.*

Where the order of a District Judge directing the grant of a certificate under section 41 (3) of the Punjab Courts Act, read with the application for the grant of the certificate, contains all the particulars required by the section, the omission to draw up a formal certificate is immaterial. [p. 939, col. 1.]

Rai Brahmans of Mauza Mohra Bhattan, Tahsil and District Rawalpindi, are governed by Hindu Law in matters of adoption, and the adoption of an uncle's daughter's son is recognised among them as valid. [p. 940, cols. 1 & 2.]

Daswandi v. *Mahant Krishen Dev*, 9 Ind. Cas. 841; 34 P. R. 1911; 109 P. L. R. 1911; 119 P. W. R. 1911, *Lachman Das* v. *Pahla Mal*, 59 P. R. 1908; 121 P. W. R. 1908, referred to.

The strict Hindu Law of adoption is often modified by custom in the Punjab. [p. 940, col. 2.]

Second appeal from a decree of the District Judge, Rawalpindi, dated the 1st April 1921, affirming that of the Senior Subordinate Judge, Rawalpindi, dated the 30th July 1920.

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

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The plaintiffs sue for a declaration that they are the owners of the lands and houses left by their brother Sant Ram, who died in 1917. The defendant, who is Sant Ram's uncle's daughter's son, and also Sant Ram's wife's brother's son, claims title to the property on the ground that Sant Ram adopted him and made a Will in his favour. The suit has been dismissed, the Courts below having concurred in finding that the parties are governed by Hindu Law and that the adoption and the Will have been proved and are valid. The plaintiffs have preferred a second appeal, in which the main contention is that the parties are governed by custom,

BHASU RAM v. PIARA CHAND.

A preliminary objection is taken on behalf of the respondent that there is no proper certificate from the District Judge as required by section 41 (3) of the Punjab Courts Act. It is true that there is no certificate apart from the order of the District Judge granting one, but the appellants have filed a copy of that order which is in the following terms:—

"I have held that parties are bound by Hindu Law. Petitioner's contention is that they are bound by custom. The evidence is conflicting and difficult. The question affects a whole village and is thus important. I accordingly grant a certificate under section 41 of the Punjab Courts Act".

We think that this order itself amounts to a certificate and as, when read with the application on which it was passed, it is found to contain all the particulars required by section 41 of the Act we hold that the requirements of the section have been satisfied and we overrule the objection.

The property in suit is situate in the villages of Mohra Bhattan and Mangot in the Rawalpindi Tahsil of the Rawalpindi District. Sant Ram was a *Rai Brahman* or *Bhat* of Mohra Bhattan, and the village was named after the *Bhats* who inhabited it. The material facts are given in the following passage from the judgment of the learned District Judge:—

"Both the villages in question, Mohra Bhattan and Mangot, are populated in the main by *Rai Brahmans*. There are about 140 houses in both the villages and there are less than six houses belonging to other persons. There are two *dhoks*, however, in the village, Dhok Sayadan seems to contain two houses of *Sayads* and *Dhok* Hashu contains four houses of occupancy tenants. These *Sayads* are owners by purchase in the village. There are a few barbers, a *Jhiwar*, and a *Sunar*, whose presence there may only be temporary. Of both the villages the *Lambardars* are *Brahmans*. There is also evidence to show that there are only 40 to 50 ploughs in those villages though the families number 140. In spite of this, it would seem that numerous *Brahmans* do plough the land themselves, though there are some who use tenants. Further, there are 88 people out of the villages, who are in service in the Police, Army, etc. Then, there are others who are shop-keepers, *Granthis*, tonga drivers, and pony hirers, etc. It is also in evidence that some of the poorer numbers still take *dirt* and perform priestly functions, though this has become less common than formerly. Even plaintiffs' own witness (P. W. No. 5) further admits that some still wear the sacred thread."

It is, as the learned District Judge observes, difficult to say whether the principal means of livelihood of the *Rai Brahmans* is agriculture or service, since so many are in outside employ and engaged in other occupations. The proprietary body is also no longer homogeneous, as persons of different tribes such as *Sayads*, *Ghakhars*, *Khatris*, *Mohyals*, etc., have become owners by purchase. Still the majority of the proprietors are *Rai Brahmans*, and the learned District Judge seems to be right in saying that they form a fairly compact village community and that their basic occupation is agriculture, and that thus the onus, which originally rested on the plaintiffs, is shifted to the defendant to prove that they are governed by Hindu Law. He has, however, held that the onus has been discharged by proof of the fact that there have been numerous uncontested alienations in the village as well as many adoptions, and by proof of certain instances in which daughters have succeeded to property in the presence of collaterals.

There have been 44 sales in the villlage, of which 21 were in favour of a *Khatri* and many others in favour of persons of various castes besides *Brahmans*, and 15 gifts. None of these alienations have been contested. The learned District Judge has mentioned a case in which Mr. Stephens decided in 1903 that the parties followed custom, but that case is not in point as it related to another village and the parties to it were *Mahal Brahmans* and not *Rai Brahmans*. There have also been many adoptions of sons or grandsons of daughters or sisters. One of these was contested by the plaintiff's family and the suit failed.

Besides the alienations, there are two instances mentioned by D. W. Nos. 7 and 18 in which daughters have succeeded in

preference to collaterals. Only two instances to the contrary have been cited and both are capable of explanation. One Chet Ram was succeeded by his collaterals, but the land was very small in area and it was in mortgage with Gurdit Singh (D. W. No. 11) at the time of Chet Ram's death, so that the daughters may not have thought it worth while to claim it. Moreover, the mutation took place only in 1917, so that the succession may yet be contested. The other instance is that of the succession to the property left by one Bharo, and the explanation of her daughter not succeeding is given by the latter's husband D. W No. 11, who says that there was only a small quantity of land and that the collaterals were his sister's sons.

None of the authorities cited before us appear to be on all fours with the present case. *Devi Ditta Singh* v. *Dropti* (1) on which Counsel for the appellants relies, does not help him, as no evidence was given in that case to rebut the presumption which it was held arose in favour of the parties following custom. In *Daswandi* v. *Mahant Krishen Dev* (2) although many alienations were shown to have taken place, only one of them was a permanent transfer to a non *Brahman*, and the power of alienation was restricted by the provisions of the *wajib-ul-arz*.

There is one case, not cited before us, which in some respects resembles the present one, namely, *Lachman Das* v. *Pahla Mal* (3) a case relating to *Brahmans* of Gopalpur in the Amritsar District. Those *Brahmans* formed, as in the present case, a compact village community and they followed agriculture, although they were not wholly dependent upon it and followed other professions also. But in a previous case a daughter's son had been allowed to succeed as it was found to be proved that daughters excluded collaterals, and as the evidence adduced in the case before the Chief Court did not lead to a different conclusion the findings of the lower Courts that the plaintiffs' family were governed by Hindu Law as regards alienation of ancestral property were affirmed.

We think that in the present case the learned District Judge is right in finding that the defendant has succeeded in discharging the onus of proving that Sant Ram was governed by Hindu Law.

As regards the validity of the defendant's adoption, although under the strict Hindu Law the adoption of a person standing to his adoptive father in the relation in which the defendant stood to Sant Ram would not be permissible, it must be borne in mind that that law is in practice often modified by custom, and we find in the present case sufficient evidence that it has been so modified in respect of adoptions, sisters and daughter's sons and grandsons having, as already remarked, been adopted in several instances and no such adoptions having ever been declared invalid.

The appeal consequently fails and we dismiss it with costs.

Z. K.

Appeal dismissed.

(1) 2 Ind. Cas. 940; 56 P. R. 1909; 96 P. W. R. 1909; 129 P. L. R. 1909.
(2) 9 Ind. Cas. 841; 34 P. R. 1911; 109 P. L. R. 1911; 119 P. W. R. 1911.
(3) 59 P. R. 1908; 121 P. W. R 1908

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1604 OF 1922.
January 19, 1923.
Present:—MR. Justice Campbell.
Musammat CHET KAUR, THROUGH HER *Mukhtar-i-Am*—DEFENDANT—APPELLANT
versus
GURMUKH SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Privity of contract—Money left in hands of purchaser for payment to mortgagee, whether attachable as belonging to latter.

One Harnam Singh mortgaged a house to Hira Singh for Rs. 700 and subsequently sold the house to one *G* out of the sale price Rs. 700 were left with *G* for payment to Hira Singh. *G* then sold the house to defendant, and again out of the sale price a sum was left with the defendant for payment to Hira Singh. The latter

realised the mortgage-money direct from Harnam Singh. Subsequently, he obtained a money-decree against Harnam Singh and in execution of that decree brought to sale the sum left in deposit with the defendant for payment to himself. The deposit was purchased by plaintiff who now sued to recover the amount:

Held (1) that Harnam Singh having paid off Hira Singh could claim to step into his shoes;

(2) but that Hira Singh not having been a party to the contract between *G* and the defendant could not enforce that contract and consequently there was no sum in the hands of the defendant attachable as belonging to Hira Singh or Harnam Singh, and the plaintiff's suit was, therefore, liable to be dismissed

Second appeal from a decree of the District Judge, Amritsar, dated the 15th May 1922, reversing that of the Munsif, First Class, Amritsar, dated the 23rd December 1921.

Mr. *K. J. Rustomji*, for the Appellant.

Mr. *Dev Raj Sawhney*, for the Respondents

JUDGMENT.—The facts of this case are as follows:—

Harnam Singh mortgaged, on a date unknown, a house to Hira Singh for Rs 700.

On 12th March 1917 Harnam Singh sold the same house to Ghulam Jilani for Rs. 1,700 and Rs. 700 were retained by Ghulam Jilani for payment to the mortgagee Hira Singh.

On 24th November 1919 Ghulam Jilani sold the house to *Musammat* Chet Kaur for Rs. 2,700. The sale-deed recited that Hira Singh had a charge on the house and that Rs. 1,000 were left in deposit with the vendee for payment to Hira Singh or his legal representative. Harnam Singh's name is not mentioned.

On 13th April 1918 Hira Singh sued Harnam Singh on a bond and got a decree on 7th May 1918 for Rs. 115 and costs.

Before suing out execution of this decree Hira Singh, according to his own statement in the present suit, realised from Harnam Singh the mortgage charge of Rs. 700 on the house above-mentioned by bringing to sale another house. The truth of this statement is not challenged in the appeal before me which is to be described presently.

In his application for execution of his decree for Rs. 115 against Harnam Singh Hira Singh stated that a sum of Rs. 700 belonging to Harnam Singh was in the hands of *Musammat* Chet Kaur and he asked for this to be attached. It was attached accordingly and was brought to auction-sale. At the sale an objection was notified by *Musammat* Chet Kaur that she held no sum of Rs. 700 belonging to Harnam Singh. The money attached was purchased by Gurmukh Singh for Rs. 230.

Gurmukh Singh then instituted the suit from which the present second appeal has arisen against *Musammat* Chet Kaur for recovery of Rs. 700. Hira Singh and Harnam Singh were joined as defendants. The cause of action was his auction-purchase.

The Trial Court dismissed the suit, holding that, in the circumstances described above, *Musammat* Chet Kaur was not in possession of any money belonging to Harnam Singh with whom she had no contract. On appeal by Gurmukh Singh the District Judge gave him a decree for Rs. 700 "the amount lying in deposit with *Musammat* Chet Kaur." The learned District Judge apparently accepted as true the statement above described of Hira Singh and his declaration that he had no claim on the Rs. 700 lying with *Musammat* Chet Kaur and held that, in those circumstances, Gurmukh Singh, the auction-purchaser in execution proceedings, could recover from *Musammat* Chet Kaur.

The latter has preferred a second appeal. Her real grievance seems to be that she cannot get possession of the house, which, according to the evidence in suit, has remained in the possession of Hira Singh as mortgagor and which Hira Singh says has been handed back by him to Harnam Singh. Apparently, she would be quite willing to pay the money if she could get the house. Her answer to the suit, however, that she possessed no money recoverable from her by Harnam Singh is effective.

The argument that Harnam Singh stepped into the shoes of Hira Singh as holder of the charge on the house mentioned in the sale-deed of Ghulam Jilani to *Musammat* Chet Kaur is not contested. It is conceded that, having paid off Hira Singh, he may claim to have done so. But it is pointed out for the appellant that Hira Singh was not a party to the contract between Ghulam Jilani and *Musammat* Chet Kaur

and could not intervene in it or bring a suit upon it. This contention is correct and is supported by a number of authorities, *e. g.*, *Jamna Das* v. *Ram Autar Pande* (1), *Jamna Das* v. *Ram Autar Pande* (2); *Mangal Sen* v. *Muhammad Hussain* (3) *Mannath Veettil Itti Panku Menon* v. *Dharman Achan* (4) and *Iswaram Pillai* v. *Taregan* (5),

The last named case distinguishes and explains *Deb Narain Dutt* v. *Ram Sadhan Mandal* (6) relied upon by the other side which is also distinguished in a later judgment of the same Court *Kherode Behari* v. *Raja Narendra Lal Khan* (7) and is clearly distinguishable on its facts from the present case. This being so, *Musammat* Chet Kaur held no money attachable as belonging to Harnam Singh or as being property over which he had a disposing power exercisable for his own benefit.

I accept the appeal, set aside the decree of the lower Appellate Court and restore the order of the Trial Court dismissing the suit, with costs throughout.

Z. K.

Appeal accepted.

(1) 13 Ind. Cas. 304; 34 A. 63; 16 C. W. N 97; 11 M L. T. 6; 9 A. L. J. 37; (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) 2 Ind. Cas. 460; 31 A. 352; 6 A. L. J. 427.
(3) 27 Ind. Cas. 737; 37 A. 115; 13 A. L. J. 73.
(4) 43 Ind. Cas. 625; 41 M. 488; 22 M. L. T. 543; (1918) M. W. N. 98; 34 M. L. J. 193; 8 L. W. 118.
(5) 23 Ind. Cas. 951; 38 M. 753; 26 M. L. J. 127.
(6) 2 Ind. Cas. 630; 41 C. 137; 17 C. W. N. 1143; 18 C. L. J. 603.
(7) 55 Ind. Cas. 310; 23 C. W. N. 453.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1044 OF 1921.

August 14, 1923.

Present :—Justice Sir Jwala Prasad, KT., and MR. Justice Ross.

BIRINCHI SINGH—PLAINTIFF—APPELLANT

versus

SARODA PRASAD MUKHERJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgages—Decree on subsequent mortgage—Sale in execution—Auction-purchaser, whether entitled to recover possession—Prior mortgagee, rights of.

One *R* mortgaged his property to *S* on the 14th December 1902. In 1912 *R* sold a portion of the property to *S* for Rs. 400 found due on the mortgage. His right under the mortgage of 1902 was kept alive. Meanwhile, on the 20th July 1907, *R* had mortgaged his entire property to *C* who obtained a mortgage-decree and put the property to sale when the plaintiff purchased it. Plaintiff could not, however, obtain possession on account of an objection by *S* and instituted the present suit for recovery of possession:

Held, (1) that *S* being in possession of the property as owner his right of redemption was not lost in spite of the purchase made by the plaintiff in execution of mortgage-decree of *C*; [p. 944, col. 2]

(2) but that *S* had only a right of redemption and could not resist the possession of the plaintiff unless he redeemed the property. [p. 944, col. 2]

Parasram Singh v. *Pandohi*, 67 Ind. Cas. 533; 20 A. L. J. 401; (1922) A. I R. (A.) 135; 44 A. 452; 4 U P. L. R (A.) 145, followed.

Ganpat Lal v. *Bindbasini Prashad Narayan Singh*, 56 Ind. Cas. 274; 24 C. W. N. 954; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 47 I. A. 91; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 28 M. L. T. 330; 47 C. 924 (P. C.), referred to.

Appeal from a decision of the District Judge, Bhagalpur, dated the 2nd March 1921, confirming that of the Munsif, Bhagalpur, dated the 28th January 1920.

Mr. *L. K. Jha*, for the Appellant.

Messrs. *N. C. Sinha*, *N. C. Roy* and *S. C. Mojumdar*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—The plaintiff is the appellant in this case. He brought an action to recover possession of the property in dispute on the strength of his purchase at an auction-sale in 1917.

One Ramlal Misser had 10 *kathas* of land within the Municipality of Bhagalpur. He and his sons are defendants second party in this case. He mortgaged the property to Sarado Prasad, the defendant first party, on the 8th January 1900. This

mortgage was satisfied and we are no longer concerned with it.

Ramlal mortgaged the said property again to Sarado Prasad on the 14th December 1902. In 1912 Ramlal sold four *kathas* out of the aforesaid 10 *kathas* to Sarado Prasad for Rs. 400 which was found due to him upon his mortgage-bond. In the sale-deed his right under the mortgage of the 14th December 1902 was kept alive and was not extinguished. In the meantime, on the 20th June 1907, Ramlal mortgaded his entire 10 *kathas* to Chunilal Marwari and Chunilal obtained a mortgage-decree and put the property to sale. The plaintiff Birinchi Singh purchased this property at the auction-sale held in execution of the aforesaid mortgage. He, therefore, could not obtain possession of the property on account of an objection having been raised by Sarado Prasad. He, therefore, instituted the present suit for recovery of possession.

His contention now is that he has a right to redeem the mortgage of Sarado Prasad dated the 14th December 1902. The Courts below have held that Chunilal knew of the mortgage of Sarado Prasad dated the 14th December 1902 inasmuch as he was a party to the suit on the mortgage of Sarado Prasad for the enforcement of his mortgage of the 8th June 1907, and in that suit it was stated that Sarado Prasad had a second mortgage of the 14th December 1902. Sarado Prasad should, therefore, have been made a party in the mortgage suit brought by Chunilal. His rights, therefore, under the mortgage of the 14th December 1902 were not affected. He occupied two positions, first, that of a mortgagee under his mortgage of the 14th December 1902 which was prior to the mortgage of Chunilal in the enforcement of which the plaintiff purchased the property in question, and, secondly, he was purchaser of the 4 *kathas* out of the 10 *kathas* under his *kabala* of 1912. His right to redeem the mortgage of Chunilal with respect to the 4 *kathas* purchased by him was, therefore, not extinguished. Chunilal had made Ramlal a party to his suit, but Ramlal had lost all interest in the 4 *kathas* inasmuch as he had disposed of it in favour of Sarado Prasad. With respect to 4 *kathas*, therefore, Sarado Prasad was the owner thereof at the time when the mortgage suit of Chunilal was brought. He was, therefore, interested in the redemption of Chunilal's mortgage and, not having been made a party, no opportunity was given to him to redeem. This view is supported by the cases of *Hassanbhai* v. *Umaji* (1), *Umes Chunder Sircar* v. *Zahur Fatima* (2), *Het Ram* v. *Shadi Ram* (3), and *Parasram Singh* v. *Pandohi* (4). The last mentioned case is the latest case on the subject being of February 1922.

Mr. Jha on behalf of the appellant relies on the Privy Council decision of the case of *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh* (5). Upon this decision he contends that the right of redemption, if any, possessed by Sarado Prasad, defendant first party, was extinguished after the sale of the property in execution of which the plaintiff had purchased it. In that case the mortgage-decree was obtained on foot of a mortgage executed by the father of a joint Mitakshara family not having made his sons as parties. The mortgage-debt was admitted to be for family necessity and in fact the sons never disputed their liability either under the mortgage or the decree.

The question, therefore, for determination in that case was whether the interest of the sons in the family property passed by the sale in execution of the mortgage-decree obtained against the father alone. In the circumstances of that case referred to above it was held that the sale of the property passed the interest of the sons also. That case was decided upon the principle of representation and it was upon that principle held that the son's right of redemption was extinguished with

(1) 28 B. 153; 5 Bom. L. R. 892.
(2) 18 C. 164; 17 I. A. 201 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. S.) 110 (P. C.).
(3) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72; 45 I. A. 130 (P. C.).
(4) 67 Ind. Cas. 533; 20 A. L. J. 401; (1922) A. I. R. (A) 135; 44 A. 462; 4 U. P. L. R. (A) 145.
(5) 56 Ind. Cas. 274; 24 C. W. N. 954; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 47 I. A. 91; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 28 M. L. T. 330; 47 C. 924 (P. C.).

the extinction of the father's right and that, unless the sale was set aside upon fresh grounds, the sons could not resist the possession of the purchaser in execution of the mortgage-decree.

Now, in the present case Sarado Prasad, defendant first party, is an out and out purchaser of the interest of Ramlal in the 4 *kathas* of the land in dispute. Sarado Prasad, therefore, could not represent him in the mortgage-suit brought by Chunilal. There was no question of representation and Sarado Prasad was, therefore, entitled to be made a party and thus to be given an opportunity to redeem the mortgage of Chunilal.

The sale in the present case has not the effect of extinguishing the right of redemption of Sarado Prasad. His mortgage of 1902 must remain alive until it is redeemed, for once a mortgage always a mortgage.

In the case cited above, *Parasram Singh* v. *Pandohi* (4), it is said that "all that the plaintiffs (as in the present case) are entitled to is to get back their mortgage-money. After all, they are merely mortgagees and as such are liable to be redeemed by the owner of the property, that is, the mortgagor or whoever represents him. In this case the prior mortgagees, the defendants, having acquired the equity of redemption, stand in the shoes of the mortgagor and are the owners of the property."

This observation exactly applies to the present case where Sarado Prasad, being the prior mortgagee, purchased privately the equity of redemption of Ramlal with respect to 4 *kathas* of the land in dispute and became the owner thereof.

Dr. Rasbehari Ghosh, in his book on the the Law of Mortgage, at page 625, quotes from Jones in support of the proposition that it is obligatory on the part of the mortgagee to implead all persons interested in the equity of redemption in a suit based on his mortgage. The important passage in the quotation from Jones is as follows:—

"The sale vests the estate in the purchaser subject to redemption by the person interested in it who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He can not have the sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption."

This is a complete answer to the contention of Mr. Jha that the auction-sale in favour of the plaintiff vested the property in him freed from the mortgage in question and that Sarado Prasad ought to have brought a suit against the plaintiff and to have the sale set aside. Sarado Prasad need not have done any of these things. He is in possession of the property as owner thereof and his right of redemption is not lost and in spite of the purchase made by the plaintiff in execution of the mortgage-decree of Chunilal the right of redemption of Sarado Prasad is not lost. I, however, agree with Mr. Jha that Sarado Prasad has only a right of redemption and cannot resist the possession of the plaintiff unless he redeems the property. Therefore, in the present case it is necessary to declare that the plaintiff will be entitled to get possession of the property unless the defendant first party redeems the plaintiff's mortgage within three months of the date that the amount due to the plaintiff on his mortgage in respect of the 4 *kathas* which was purchased by the defendant first party under his private *kabala* is ascertained in the Court below. It must be mentioned that the defendant first party's prior mortgage of 1902 subsists only as a lien over the 4 *kathas* and with respect to the 6 *kathas* it has absolutely no effect, and that the defendant first party has no right to redeem the entire mortgage of the plaintiff so as to be subrogated to his position as mortgagee of the 10 *kathas*. The defendant first party's right is confined only to 4 *kathas* both as prior mortgagee under his mortgage of 1902 and as purchaser under the private *kabala*, and he has, therefore, to redeem a proportionate share of the mortgage-money due for the 4 *kathas*. He will, therefore, remain in possession of 4 *kathas* the remaining 6 *kathas* being in the possession of the plaintiff.

With these remarks the appeal is dismissed and the case will be sent back to the Munsif in order that he may determine

the amount due to the plaintiff which the defendant first party has to pay in order to redeem his mortgage.

In the circumstances of the case, each party will bear his own costs.

Ross, J.—I agree.

E. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 1961 OF 1922.

May 8, 1923.

Present:—Mr. Justice Moti Sagar.

MUHAMMAD ABDULLA - JUDGMENT-DEBTOR—APPELLANT

versus

JIWAN MAL—DECREE-HOLDER - RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—Attachment—Gratuity paid by University, whether attachable—Gratuity in consideration of past services, whether debt.

Section 60 (*g*) of the Civil Procedure Code does not exempt private pensions or pensions payable by a body other than Government from attachment. A pension or gratuity payable by a University does not, therefore, fall within the purview of the section.

Janki Das v. *E. I. Ry. Company*, 6 A. 634; A. W. N. (1884) 210; 4 Ind. Dec. (N. S.) 247, distinguished.

Bhoyrub Chunder Roy v. *Madhub Chunder Sen*, 6 C. L. R. 19, referred to.

The Syndicate of the Punjab University recommended a gratuity to be paid to the judgment-debtor in consideration of past services which the latter had rendered to the University, but before the gratuity could be paid to him it was attached by the decree-holder in execution of his decree against the judgment-debtor;

Held, (1) that the gratuity not being a pension granted by Government was not exempt from attachment under section 60 (*g*) of the Civil Procedure Code;

(2) that the gratuity constituted a debt payable by the University to the judgment-debtor and was, therefore, liable to attachment under section 60 of the Code.

Miscellaneous second appeal from an order of the District Judge, Lahore, dated the 27th April 1922, affirming that of the Senior Subordinate Judge, Lahore, dated the 12th July 1921.

Lala *L. C. Mehra*, for the Appellant.

Lala *Durga Das*, for the Respondent.

JUDGMENT.—On the 14th of December 1920 the respondent Jiwan Mal obtained a money-decree against the appellant for Rs. 4,177 from the Court of the Senior Subordinate Judge at Lahore. In execution of this decree he attached a certain gratuity which the appellant was entitled to receive from the Senate of the Punjab University. On the 6th of May 1921 a cheque was received by the Executing Court from the office of the University and made over to the decree-holder on the same day. On the 9th of May 1921 the judgment-debtor filed an objection that the gratuity was not liable to attachment under section 60 (*g*) of the Civil Procedure Code and that the money should not be paid to the decree-holder. The cheque, however, had already been paid and the money realised by the decree-holder. Both the Courts below have concurrently found that section 60 (*g*) had no application, and that the exemption contained therein related to gratuities payable to Government servants only. The objection filed by the judgment-debtor has accordingly been disallowed, and he has now come up in second appeal to this Court.

Two points have been urged before me by Mr. L. C. Mehra who has appeared on behalf of the appellant. Firstly, it is contended that the gratuity payable by a University to its servants is in the nature of a Government pension and consequently exempt from attachment under section 60 (*g*) of the Civil Procedure Code. With this contention I am unable to agree. Section 60 (*g*) provides that stipends and gratuities allowed to pensioners of the Government, or payable out of any Service Family Pension Fund notified in the *Gazette of India* by the Governor-General in Council in this behalf, and political pensions, shall not be liable to attachment or sale in execution of a decree. This does not exempt private pensions or pensions payable by a body other than Government from attachment, and no authority has been cited before me in support of the contention that a pension or a gratuity payable by a University is a pension or gratuity falling within the purview of section 60 (*g*) of the Civil Procedure Code,

Jankl Das v. *E. I. Ry. Company* (1), cited by the appellant's Counsel does not in any way help him. In that case a certain amount of bonus had been recommended by the Traffic Manager for a servant in the employment of the East India Railway Company in consideration of long and good services. The recommendation was sanctioned and the amount of the bonus was received by the District Pay Master. Before payment could be made the money was attached in execution of a decree. It was held that the money was not liable to attachment in execution of the decree, inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the date of the passing of the Transfer of Property Act, and that, as it was not evidenced by a registered instrument, it could only be affected by actual delivery which had not been made in that case. It is clear that this judgment can have no bearing whatever on the present case. There was no decision in that case on the question whether a bonus payable to a servent of the Railway Company was or was not exempt from attachment under section 266 of the Civil Procedure Code of 1882. The next case cited was *Bhoyrub Chunder Roy* v. *Madhub Chunder Sen* (2). That case, instead of supporting the appellant, clearly supports the respondent in his contention that a private pension is attachable in execution of a decree.

Next, it is contended that the gratuity in question had not become due and payable when the attachment was effected and was consequently not a debt or property belonging to the judgment-debtor. This objection was not taken by the judgment-debtor in the written objection filed by him in the Court of first instance, and he was not, therefore, entitled to take it in his grounds of appeal to the lower Appellate Court. Further, in the lower Appellate Court also he appears to have dropped this contention as there is no adjudication of the point in the judgment passed by that Court. Mr. L. C. Mehra, however, urges that the point was distinctly raised and argued by him before the lower Appellate Court and that he is not responsible if that Court has failed to give a decision thereon. He has filed no affidavit in support of this allegation, and I am unable to hold, in the absence of any such affidavit, that the point was argued and left undecided by the learned Judge of the Court below. In any case, I am of opinion that there is no substance in this contention. The gratuity, which had been recommended by the Syndicate of the Punjab University to be paid to the appellant, was in consideration of past services which the latter had rendered to the University, and constituted a debt which could be attached under section 60 of the Civil Procedure Code. I do not see any force in this appeal and dismiss it with costs throughout.

Z. K.

Appeal dismissed.

(1) 6 A. 634; A. W. N. (1884) 210; 4 Ind. Dec. (N. S.) 247.

(2) 6 C. L. R. 19.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 1 OF 1923.

August 14, 1923.

Present:—Justice Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

AJTI CHAUDHURI—APPELLANT

versus

JANAK LAL CHAUDHURI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Mortgage decree—Appeal by one defendant—Power of Appeal Court to set aside entire decree—Letters Patent of Patna High Court—Remand by Single Judge of High Court for re-trial, whether judgment—Hindu Law—Legal necessity—Proof, nature of.

An Appellate Court has power under O. XLI, r. 33, to set aside a mortgage decree in its entirety although only one of the defendants has appealed. [p. 949, col. 2.]

AJTI CHAUDHURI *v.* JANAK LAL CHAUDHURI.

Where a Single Judge of the Patna High Court sets aside the decision of the lower Appellate Court and orders a re-trial by that Court that decision amounts to a judgment within the Letters Patent and an appeal lies to a Division Bench therefrom. [p. 950, col. 1.]

In the case of a mortgage by a Hindu charging the family property, where the question of legal necessity arises it is not sufficient only to prove the occasion upon which the money was borrowed but also that there was real necessity to borrow money at that time and evidence ought to be given to show that the borrower had not sufficient funds for the purpose just then. [p. 948, col. 2.]

Letters Patent Appeal against a decision of Mr. Justice Adami, dated the 7th December 1922.

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

Mr. *A. B. Mukherji*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal under the Letters Patent on behalf of the defendant No. 2 in the suit from a decision of Mr. Justice Adami, dated the 7th December 1922.

The suit out of which the appeal arises was instituted by the plaintiffs on the 7th August 1919 to enforce payment of a mortgage-bond by sale of the security granted under the bond. The bond was executed on the 3rd July 1911 by *Musammat* Ruko Chaudhurain, widow of Uchit Chaudhuri, on behalf of herself and her two sons, Ajti Chaudhuri, who is the defendant No. 2, and Backkan Chaudhuri, who is the deceased husband of the defendant No. 3. It was clear that the defendant No. 3, as the widow of Backkan Chaudhuri, had no interest in the property on his death, the family being joint and she ought not to have been added as party. This was so decided by the Trial Court and no question now arises upon that point. The bond was executed to secure a loan granted to *Musammat* Ruko Chaudhurain said to have been taken for the purposes of the marriage of her daughter Adaya, since deceased. The *Musammat* did not appear in the suit and filed no written statement. The defendants Nos. 2 and 3, that is, her son and daughter-in-law, did appear and by their written statements contested the validity of the bond, alleged that it was without consideration and that there was no necessity for taking the loan mentioned therein and they had not been benefitted by it. They further contended in their written statement that the produce and income of the lands in possession of their mother was quite sufficient for her maintenance and necessary expenses of herself and the other defendants and, such being the case, the taking of the loan by their mother was entirely without necessity.

The learned Munsif before whom the case came for trial found that the payment of consideration had been proved. He further found that the money was used for the payment of the marriage expenses of the first defendant's deceased daughter, and on these findings he considered that the necessity for the loan had been made out. He did not in terms consider whether the first defendant had any necessity to borrow; that is to say, whether the state of her finances was such that she was unable to find the sum of Rs. 200 which were necessary for the purposes of the marriage of her daughter.

From that decision there was an appeal by the defendant No. 2, Ajti Chaudhuri. The learned District Judge who heard the appeal considered that, even on the evidence of the plaintiff's witnesses, it had not been made out to his satisfaction that the consideration for the bond, that is to say, the previous loans, had in fact passed. He considered the surrounding circumstances and the probablities of the case and arrived at the conclusion, based partly upon the probabilities and partly upon the evidence of the plaintiff's witnesses themselves, that this sum of Rs. 200 had never in fact been advanced to the widow. He considered the evidence as to the passing of consideration most unsatisfactory and unreliable and, although the defendant No. 1 did not herself give evidence, which in his opinion raised a presumption in the plaintiff's favour, he considered that the circumstances which he had already mentioned, namely, the unreliability of the evidence of the plaintiffs and the probabilites of the case, were more than sufficient to outweigh any presumption arising from the failure of the defendant No. 1 to give evidence. He accordingly held that no consideration for the bond passed. He further proceeded to consider whether in fact

there was any necessity for the loan and, dealing with this question, he arrived at the conclusion that the defendant No. 1 upon the death of her husband having come into 12 *bighas* of land and having a very small family to maintain it was very unlikely that she would not have funds in her hands sufficient to pay for the marriage of any daughter, supposing that she had any daughter about to be married. It ought to be mentioned that one of the issues in the case was, whether in fact there was any daughter of this lady of the name of Adaya who had been married upon the occasion when the loan was taken. The learned District Judge having arrived at the conclusion that no consideration passed and that it had not been shown that this lady was actually in need of money for the marriage, apparently did not considerr it necessary to determine the question whether in fact she had this daughter Adaya or not. He dealt with the case upon the supposition that such a daughter did exist and finally he arrived at the conclusion that there was no necessity for any loan. He further points out, which was the fact, that the evidence upon the plaintiffs' side did not show that the plaintiffs made any enquiry as to necessity. He accordingly allowed the appeal and dismissed the plaintiffs' suit with costs.

From that decision a second appeal was preferred to this Court. The learned Judge was not satisfied with the manner in which the District Judge in first appeal had arrived at his conclusions of fact. He considered that, on the question of consideration, the production of the bond and the failure of the widow to appear and give evidence in the suit was sufficient to prove the passing of consideration, and that the onus was thereupon shifted to the contesting defendants to disprove execution and payment of the money advanced. He considered that the learned District Judge had wrongly placed the onus in this respect. In dealing with the question of legal necessity, he referred to the fact that the learned District Judge had not found as a fact whether the widow had a daughter Adaya or not, and that he ought to have determined this question but having failed to do so he considered that the Munsif's findings upon that point must stand. He then says: "There being a daughter I think I must hold that the expenses of the marriage of the daughter would be a legal necessity" and adds that the lower Appellate Court had decided the question of necessity merely on inferences and probabilities and he did not consider that its findings as to necessity could be held to be proper findings of fact. For these reasons he set aside the decision of the District Judge and sent back the case for re-hearing by him.

From that decision the defendant No. 2 has appealed. There can be no doubt that this Court in second appeal is bound by the findings of fact of the lower Appellate Court and ought not lightly to disturb those findings of fact unless it is shown either that the learned Judge has gone wrong on some question of law, or that there is no evidence to support the findings. It is unnecessary in this appeal to consider whether the decision of the learned Judge of this Court was right in so far as it determined that the Subordinate Judge had not dealt properly with the question of passing of consideration, but I think, with great respect to the learned Judge of this Court, that he failed to appreciate exactly what it is necessary to prove in order to establish what is known as legal necessity. The learned District Judge based his decision partly upon the ground that no necessity for the loan had been made out and, therefore, that the mortgage of the family property was not binding upon that property The reason which induced him to arrive at this conclusion was that, even if the marriage of a daughter might be regarded as an occasion upon which the manager or other person in charge of family property might be entitled to charge the property for the purpose of raising money to provide for the marriage, still, the plaintiffs in a suit based upon a mortgage charging the family property for such a purpose must prove not only the occasion upon which the money was borrowed but also that there was a real necessity to borrow money at that time and that some evidence at all events ought to be given to show that the borrower was not in sufficient funds to perform the

marriage or other necessary ceremony in the family. It appears from the evidence in this case that there was an entire failure on the part of the plaintiffs either to prove that the widow was not possessed of sufficient funds to pay for the marriage of her daughter or that the plaintiffs, when the loan was advanced, made any enquiries as to that necessity. We have asked the learned Vakil for the respondents to point out to us from the evidence, if he can, any passage in which it was alleged that the widow was really in need of funds for the purposes for which the money was borrowed. He was unable to do so, but could merely point to passages in which it was said that the money was borrowed for the marriage. In my opinion the decision of the District Judge was based upon a proper appreciation of the evidence which it is necessary in such cases to prove and his decision on this point appears to me clearly to have been justified by a consideration of the evidence before him. With great respect to the learned Judge of this Court he appears not to have dealt with the question of whether or not the widow was in fact in funds for the purpose for which the money was borrowed. He appears to have considered that, if the money was borrowed for the expenses of the marriage ceremony that in itself was quite sufficient to justify the loan without any proof that there was in fact necessity for borrowing money for that purpose. It follows, therefore, that the decision of the learned Judge of this Court cannot be supported and must be set aside and the decision of the learned, District Judge restored.

* * *

It was contended that, as the defedant No. 1 did not appear, the decree of the Munsif ought to be allowed to stand as against her. No claim for a personal decree against that defendant upon the covenant to re-pay the money was made and in fact no such decree could have been granted because the due date of the bond was the 1st May 1912 and when the present suit was instituted in 1919 any personal claim against the executant of the bond for the recovery of the money was barred by limitation. Further, it is quite clear that if the family property is not bound by a mortgage of this sort there can be no decree against the undivided share in that property belonging to one or other of the executants of the bond who might be liable thereunder. In the present case it has not been shown that the widow had any interest in the property at all beyond possibly some right to maintenance. The property is really that of her sons and they being minors she was acting on their behalf. The only question for decision in such circumstances was, whether the bond was valid on the ground that there was legal necessity or benefit to the estate by reason of the loan.

I ought to add that, although the defendant No. 1 did not appeal from the decision of the Munsif, the defendant No. 2 did so appeal and in my opinion the District Judge was quite competent under the provisions of O. XLI, r. 33 to set aside the whole decree although the defendant No. 1 had not appealed. The decree was a mortgage decree against the property and as such a decree could not stand, the Court had power to set it aside entirely. Moreover, it is not shown that the defendant No. 1 had any interest in the property at all and, therefore, the effect of setting aside this decree will in no way prejudice her interests.

It was also contended during the course of the argument that no appeal lay from the order of Mr. Justice Adami sending back the case for re-hearing to the Court of the District Judge, and the case of *Raghunandan Singh* v. *Jadunandan Singh* (1) was relied upon for this proposition. That case, however, is clearly distinguishable from the present. In that case the order of remand which was made was an order made by a Subordinate Court. The appeal in the present case is from a judgment of a Single Judge of this Court and under the Letters Patent there is an apeal to a Division Bench from a judgment of a Single Judge of this Court. The question had to be considered by a Bench over which I presided in the case of *Munshi Lal* v. *Mahanth Ramasis Puri* (2). The

(1) 43 Ind. Cas. 959; 3 P. L. J. 253; 4 P. L. W. 450.

(2) 65 Ind. Cas. 175; 1 Pat. 246. 3 P. L. T. 343; (1922) A. I. R. (Pat.) 384.

decision we arrived at in that case was that, where the Judge of this Court without setting aside the decision of the lower Appellate Court merely remands the case for the finding of an issue with directions to return that finding before finally disposing of the appeal that is not a judgment within the meaning of the Letters Patent, but where the Judge of this Court sets aside the decision of the lower Appellate Court and orders a re-trial by that Court that decision amounts to a judgment within the Letters Patent, and in such cases an appeal is permissible from the decision. The present case is governed by the case of *Munshi Lal* v. *Mahanth Ramasis Puri* (2) and an appeal, therefore, lies.

The result is, that this appeal must be allowed and the judgment of the District Judge restored. With regard to the costs of the suit and the subsequent appeals the defendants Nos. 2 and 3 are entitled to their costs of the suit. The defendant No. 2 is entitled to his costs of the appeal to the Subordinate Judge and of the appeal to this Court and of the present appeal under the Letters Patent.

Mullick, J.– I agree.

Appeal allowed.

P. D. & M. D. J.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 2025 OF 1919.

April 17, 1923.

Present:– Mr. Justice Campbell and Mr. Justice Moti Sagar.

BULAQI MAL AND ANOTHER—PLAINTIFFS AND MIRAN BAKHSH– DEFENDANT –APPELLANTS

versus

ABDUL RAHIM—DEFENDANT—RESPONDENT.

***Negotiable Instruments Act** (XXVI of 1881), s. 9—Holder in due course, who is—Pro-note payable on demand, negotiation of—Civil Procedure Code (Act V of 1908), O. I, r. 1, whether applicable to appeals—Appeal, joint, when may be preferred.*

To constitute a person a holder in due course three things are necessary, (1) that the holder of the promissory-note must be a holder for consideration, (2) that it must have been transferred to him before the amount mentioned in it became payable, and (3) that the transferee must be a transferee in good faith, and that he should not have any reason to believe that there was any defect in the title of the transferor. [p. 951, col. 2.]

Where a promissory-note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. [p. 952, col. 2.]

D. N. Shah & Co. v. *Bengal National Bank, Ltd.*, 60 Ind. Cas. 940; 47 C. 861; 33 C. L. J. 541, relied on.

The rule laid down in O. I, r. 1 of the Civil Procedure Code is intended to enable persons aggrieved by the same act or having the same right to relief to join in one suit instead of bringing separate suits, and is also applicable to appeals. [p. 951, col. 2.]

Plaintiff sued defendants Nos. 1 and 2 for the recovery of a certain amount due on a pro-note of which he claimed to be the holder in due course and which defendant No. 1 had executed in favour of defendant No. 2 and which the latter had transferred to the plaintiff. The suit was dismissed as against defendant No. 1 but was decreed against defendant No. 2. Plaintiff and defendant No. 2 filed a joint appeal claiming that the suit should be decreed against defendant No. 1 also:

Held, that, having regard to the provisions of O. I, r. 1 of the Civil Procedure Code, it was open to the plaintiff and defendant No. 2 to prefer a joint appeal against defendant No. 1 for the same relief, inasmuch as it involved a common question, *viz.*, whether defendant No. 1 could or could not be held liable for the plaintiff's claim. [p. 951, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Lahore, dated the 23rd June 1919.

Lala *Tirath Ram*, for the Appellants.

Mr. *Feroz-ud-Din Ahmad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to recover money due on a promissory-note executed on the 12th of February 1917 by defendant No. 1 in favour of defendant No. 2 and transferred by the latter to the plaintiff by indorsement, dated the 26th of June 1918. Defendant No. 1 admitted the execution of the pro-note but denied receipt of the consideration, and pleaded, further, that the plaintiff was not a holder in due course and that the transfer in his favour was collusive and also without consideration. Defendant No. 2 admitted the claim

id did not make any defence to the uit. The following issues were framed:—

(1) Is the plaintiff not the holder in ue course of the pro-note in suit?

(2) If issue No. 1 is found in favour of he plaintiff, can defendant No. 1 deny the alidity of the pro-note and receipt of he consideration having regard to the rovisions of section 120 of the Negotiable nstruments Act

(3) If Issue No. 2 is found in favour of efendant No. 1, was the pro-note executed without consideration?

(4) If issues Nos. 2 and 3 are found in avour of defendant No. 1, to what relief the plaintiff entitled and against hom?

The Senior Subordinate Judge found nat the plaintiff was not a holder in due ourse within the meaning of section 9 of ne Negotiable Instruments Act, and, nerefore, dismissed the suit as against efendant No. 1. He further held that it ad not been proved that defendant No. 2 ad paid any consideration to defendant o. 1, but decreed the claim in full as gainst the former on the ground that he ad admitted the receipt of the considera-on and had not contested the plaintiff's aim.

The plaintiff and defendant No. 2 have ow preferred a joint appeal to this Court ga nst this decree, and it has been con-ended on their behalf that the suit ou'd also have been decreed against efendant No. 1 who was the original aker of the note.

A preliminary objection has been raised nat a joint appeal is not maintainable, nasmuch as the interests of the plaintiff 're not identical with those of defendant lo. 2, and that if both of them are ggrieved by this decree, they should file parate appeals on separate Court-fees. n our opinion there is no force in this bjection. A reference to O. I, r. 1, the Civil Procedure Code makes it ear that all persons may be joined in ne suit as plaintiffs in whom any right relief in respect of or arising out of e same act or transaction is alleged to ist, whether jointly, severally or in the ternative, where, if such persons brought parate suits, any common question of w or fact would arise. The same rule applies to appeals also, and the common question which the Courts would be called upon to determine if separate appeals were filed would be whether defendant No. 1 can or cannot be held liable for the plaintiff's claim. The rule is intended to enable persons aggrieved by the same act or having the same right to relief to join in one suit instead of bringing separate suits. We do not, therefore, think that there is any legal bar to the plaintiff and defendant No. 2 joining together as appellants and preferring a joint appeal in this Court and we must overrule the objection.

The main question for determination is, whether the plaintiff is a holder in due course so as to enable him to maintain this suit as against defendant No. 1 who says he has received no consideration from defendant No. 2 for the pro-note in question. A "holder in due course" has been defined in section 9 of the Negotiable Instruments Act as follows:—

"'Holder in due course' means any person who for consideration became the possessor of a Promissory-note, Bill of Exchange or Cheque if payable to bearer or the payee or indorsee thereof, if payable to, or to the order of, a payee, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title."

It will be observed from this definition that to constitute a person a holder in due course three things are necessary, (1) that the holder of the promissory-note must be a holder for consideration; (2) that it must have been transferred to him before the amount mentioned in it became payable, and (3) that the transferee must be a transferee in good faith, and that he should not have any reason to believe that there was any defect in the title of the transferor. The learned Senior Subordinate Judge has held that the plaintiff was not a holder in due course inasmuch as the promissory-note had not been indorsed in his favour before it become payable. In his opinion a note payable on demand is a present debt and is due and payable at once without demand, and as in the

present case the note was a note payable on demand, he holds that it became payable as soon as it was executed and that no demand was necessary. For the appellants it is contended that a promissary-note payable on demand does not become payable until a demand is actually made, and that as in this case, there is no evidence to show that the transfer was made after the demand, it is a perfectly valid transfer and not open to objection on the part of defendant No. 1. With this contention we are unable to agree. There is no doubt that for the purpose of limitation a promissory-note payable on demand would be a present debt payable without demand, that the liability of the maker would accrue from the date of the note itself and that the Statute of Limitation would begin to run in his favour from the date of the note. But we do not think that these principles have any application to a case under section 9 of the Negotiable Instruments Act. The rule has been laid down in the case of *D. N. Shah & Co.* v. *Bengal National Bank, Ltd.* (1) as follows:—"The true rule applicable is that, where a promissory-note payable on demand is negotiated, it is not deemed to be over due, for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue". We are in full agreement with this view and are of opinion that the ground on which the learned Senior Subordinate Judge has held that the plaintiff was not a holder in due course cannot be sustained.

The important point to consider is, whether the plaintiff paid any consideration for this pro-note to defendant No. 2. It is alleged by the plaintiff that he paid Rs. 5,000 in cash to the defendant, Miran Bakhsh, when the transfer was made in his (plaintiff's) favour, but he is unable to say whether the payment was made in currency-notes or in silver. It seems to us hardly likely that if the plaintiff had made any payment, he would forget how the payment was effected; and would not be able to state whether the payment was in currency-notes or in silver. It is also clear from the evidence that the plaintiff, Bulaki Mal, who is a well known money-lender, knew the parties before the transaction was effected, and there can be no doubt that he must also have known the circumstances under which the pro-note was originally executed. It is in evidence that Abdul Rahim, defendant No. 1, had executed a deed of mortgage in favour of one Rai Bahadur Amar Nath, that the latter brought a criminal case of cheating against Abdul Rahim in the Court of the District Magistrate of Lahore, and that, in order to escape conviction, he prevailed upon Miran Bakhsh, defendant No. 2, to execute a surety-deed in favour of the complainant Rai Bahadur Amar Nath and to make a promise that he would pay off the mortgage within a week from the date of the surety-deed. It is alleged by defendant No. 1 that he executed this pro-note in favour of defendant No. 2 to secure him for the payment which the latter had promised to make to the mortgagee Rai Bahadur Amar Nath but that, as Miran Bakhsh failed to carry out his promise and to pay off Amar Nath, the pro-note remained altogether ineffectual. There is evidence on the record to show that the plaintiff was cognisant of all these facts, and, in these circumstances, it is impossible to believe that the plaintiff would pay a large sum of Rs. 5,000 to the defendant Miran Bakhsh when he knew that the latter had actually paid nothing to the maker of the promissory-note. Further, it is admitted that the defendant Miran Bakhsh owed a sum of about Rs. 6,000 already to the plaintiff when the indorsement in his favour was made and that this money had been borrowed on the security of a house mortgaged in favour of the plaintiff. It seems to us most unlikely that the plaintiff would advance a further sum of Rs. 5,000 to the defendant Miran Bakhsh on practically no security whatever when even the previous debt was outstanding. It is also significant that the plaintiff has not produced any books of account in support of his claim, and we cannot for a moment believe that the plaintiff would not pro-

(1) 60 Ind. Cas. 940; 47 C. 861; 33 C. L. J. 541.

duce his books or fail to make any entries therein if the advance had actually been made. We cannot also lose sight of the fact that the plaintiff Bulaki Mal has got a decree against Miran Bakhsh, defendant No. 2, who is said to be a man of property and from whom he can easily recover his decretal amount. Why he should be anxious to get a decree against defendant No. 1 also (unless it be in the interests of Miran Bakhsh, defendant No. 2), has not been explained, and it seems to us, in these circumstances, that there is considerable force in the argument of the learned Counsel for the respondent that the interests of the plaintiff and Miran Bakhsh, defendant No. 2, are identical and that they are acting in collusion with one another. For the appellants reliance has been placed on section 118 of the Negotiable Instruments Act, and it is contended that, though there is very little direct evidence on the record as regards payment, it should be presumed that the transfer was for consideration and that the plaintiff was a holder in due course. There is no doubt that the general presumption is in favour of the plaintiff, but the presumption is always a rebuttable presumption, and the circumstances to which we have already alluded are sufficient, in our opinion, to shift the *onus* on to the plaintiff to prove that he was a holder for consideration. With the exception of the statement of the plaintiff and defendant No. 2, there is no evidence on the record in support of this payment which we consider wholly insufficient and we must accordingly hold that payment of the consideration has not been established, and that the plaintiff is not a holder in due course within the meaning of section 9 of the Negotiable Instruments Act.

Next, section 43 is relied on, and it is contended that the plaintiff is entitled to succeed even if he is not a holder in due course. It is clear, however, that section 43 cannot be of any assistance to the plaintiff unless he is a holder for consideration. On this question we have already found in the negative and this contention also must, therefore, be overruled. In our opinion the plaintiff's suit has been rightly dismissed as against defendant No. 1, and we do not see any reason to interfere with the judgment of the Court below.

The result is, that the appeal fails and is dismissed with costs. The lower Court, while dismissing the suit, did not allow any costs to defendant No. 1. The latter has filed cross-objections with regard to costs. In our opinion there was no reason why costs should not have been allowed, especially when the learned Senior Subordinate Judge found that defendant No. 2 had not paid any consideration to defendant No. 1 for the pro-note in suit. We allow the cross-objections and direct that defendant No. 1 should get his costs in the lower Court as well.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 818 OF 1923.

June 14, 1923.

Present:—Mr. Justice Kanhaiya Lal.

BHAGWAN DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUKHDEO KORIE AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 123, 127—Hindu joint family—Separation—Joint-debt realized after separation—Suit for share by separated member—Limitation applicable—Art. 127, applicability of.

A suit by a separated member of a joint Hindu family against the other members of the family to recover his share of money due on certain bonds which remained the joint property of the parties, but the money due on which was realised after separation to the exclusion of the plaintiff is, as to limitation, governed by Art. 62 of Schedule I to the Limitation Act.

Amina Bibi v. *Najmunnissa Bibi*, 27 Ind. Cas. 712; 37 A. 233; 13 A. L. J. 255 and *Abdul Gaffar* v. *Nur Jahan Begum*, 29 Ind. Cas. 347; 37 A. 434; 13 A. L. J. 686, followed.

Umardaraz Ali Khan v. *Wilayat Ali Khan* 19 A. 169; A. W. N. (1897) 34; 9 Ind. Dec. (N. S.) 111 and *Mahomed Riasat Ali* v. *Hasin Banu*, 21

BHAGWAN DAS *v.* SUKHDEO KORIE.

C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique & Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737 (P. C.), distinguished.

Art. 127 of Sch. I to the Limitation Act presupposes the continuation of a joint family and of the joint family property till the date of suit and an exclusion from the enjoyment of such joint property of one party by another. It does not apply to a case where a family has separated and divided its property prior to the suit.

Second appeal against a decree of the Subordinate Judge, Jaunpore, dated the 24th of February 1923.

Mr. *Bhagwati Shanker*, for the Appellants.

JUDGMENT.—This was a suit by the plaintiffs-appellants for the recovery of money due on account of their share in four bonds which the defendants are stated to have realised from their common debtors. It appears that if the parties formed a joint family at the time when the loans in question were advanced to those persons. They separated seven years ago; but the bonds evidencing the loans in question remained the joint property of the parties. Subsequent to the separation, the defendants are said to have realised the money due on the said bonds to the exclusion of the plaintiffs. The defence was that one of the bonds had fallen to the share of the defendants by partition and that the money due on another bond which was joint was realised by both the parties jointly. It was also alleged that the remaining two bonds were obtained by the defendants after partition and were their exclusive property. The Court of first instance decreed the claim, holding that all the four bonds were obtained when the family was joint, that they remained the joint property of the parties after they had separated seven years prior to the suit, and that the defendants were liable to pay the plaintiffs their share of the said bonds which they had realised. The lower Appellate Court, however, came to the conclusion in respect of one of the bonds that its money was realised by defendants about five years prior to the suit; and, applying Article 62 of the Indian Limitation Act (IX of 1908), it held that the claim of the plaintiffs in regard to their share of the money due on that bond was barred by limitation. In applying that Article it followed the decisions of this Court in *Amina Bibi* v. *Najmunnissa Bibi* (1) and *Abdul Gaffar* v. *Nur Jahan Begum* (2). The learned Counsel for the plaintiffs-appellants relies on the decision in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (3) but, as explained in the decisions first cited, the main question for determination in the last mentioned case was, whether Article 123 or Article 120 was applicable to the case. Article 62 was not considered because, both under Article 62 and Article 120, the claim was in that case beyond time. It is also contended that Article 127 of the Indian Limitation Act would in any case apply; but that Article does not apply where a family has, as in this case, separated and divided its property prior to the suit. That Article pre-supposes the continuation of the joint family and of the joint family property till the date of the suit and an exclusion from the enjoyment of such joint family property of one party by another. The decision in *Mahomed Riasat Ali* v. *Hasin Banu* (4) is also inapplicable, because that was a suit by one heir against another heir for the recovery of property which the other had appropriated. It was also contended that by virtue of a decision of a *panchayat* the money realised by the defendants was allowed to remain with them as a deposit and that the plaintiffs had no knowledge before that *panchayat* was held as to whether the defendants had realised the same, but the story of the *panchayat* was disbelieved by the lower Appellate Court. There was no fraud specifically pleaded or alleged. The appeal is, therefore, rejected.

M. D. J. *Appeal dismissed.*

(1) 27 Ind. Cas. 712; 37 A. 233; 13 A. L. J. 255.
(2) 29 Ind. Cas. 347; 37 A. 434; 13 A. L. J. 686.
(3) 19 A. 169; A. W. N. (1897) 34; 9 Ind. Dec. (N. S.) 111.
(4) 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique & Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737 (P. C.).

RAMNANDAN SAHAY *v.* JAOGOVIND PANDEY.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 39 OF 1920.

June 12, 1923.

Present:—Justice Sir Jwala Prasad, Kt., and Mr. Justice Ross.

RAMNANDAN SAHAY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAOGOVIND PANDEY AND OTHERS—DEFENDANTS—AND BINDESARI PRASAD SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 74—Quinquennial reports, whether public documents—Entry in Thak *or Revenue Survey—Title, evidence of—Abandonment—Submerged land—Non-payment of rent—Remission of revenue—Intention to abandon.*

The Quinquennial Register prepared under the directions of the Board of Revenue under Regulation 48 of 1793 is a public document and is admissible in evidence as such. [p. 961, col. 1.]

Sreemutty Codoy Monee Debee v. *Bishonath Dutt*, 7 W. R. 14, followed.

An entry in a Thak and Revenue Survey map cannot be taken as evidence of title. [p. 962, col. 2.]

Moizuddi Biswas v. *Ishan Chandra Das Sarkar*, 7 Ind. Cas. 849; 13 C. L. J. 293; 15 C. W. N. 706, *Syama Sunderi Dassya* v. *Jogobundhu Sootar*, 16 C. 186, 8 Ind. Dec. (N. S.) 124, *Syam Lal Sahu* v. *Luchman Chowdhry*, 15 C. 353; 7 Ind. Dec. (N. S.) 819, *Nobo Coomar Dass* v. *Gobind Chunder Roy*, 9 C. L. R. 305 and *Jagadindra Nath Roy* v. *Secretary of State for India*, 30 C. 291; 30 I. A. 44; 7 C. W. N. 193; 5 Bom. L. R. 1 (P. C.), referred to.

Mere non-payment of rent or claiming or accepting remission of revenue for submerged land is not in itself proof of abandonment and, until it can be established that the holder of the tenure has abandoned his right to the submerged land, it remains intact. The question is one of intention to be determined by the circumstances of each case. [p. 975, col. 1.]

Mazhar Rai v. *Ramgal Singh*, 18 A. 290; A. W. N. (1896) 56; 8 Ind. Dec. (N. S.) 899, *Arun Chandra Singh* v. *Kamini Kumar*, 22 Ind. Cas. 317; 19 C. L. J. 272; 18 C. W. N. 369; (1914) M. W. N. 175; 15 M. L. T. 182; 26 M. L. J. 251; 12 A. L. J. 243; 16 Bom. L. R. 323; 41 C. 683; 41 I. A. 32 (P. C.), followed.

Nogendar Chunder Ghose v. *Mahomed Esoff*, 10 B. L. R. 406; 18 W. R. 113, 3 Sar. P. C. J. 151 (P. C.), *Lopez* v. *Muddun Mohun Thakoor*, 14 W. R. 11; 5 B. L. R. 521; 13 M. I. A. 467; 20 E. R. 625; 2 Suth P. C. J. 336; 2 Sar. P. C. J. 594 (P. C.), distinguished.

If the circumstances indicate that in taking abatement of revenue for submerged land there was an intention to abandon the land, then, after re-appearance, the person who took the abatement cannot claim the land as he has already lost all right thereto. [p. 967, col. 2.]

Appeal from a decision of the Additional Sub-Judge, Saran, dated the 20th September 1919.

Messrs. *S. Sultan Ahmad, Jagannath Prasad, D. C. Varma* and *Sambhu Saran*, for the Appellants.

Messrs. *Syed Hasan Imam, Umesh Chandra Ghosh, B. N. Mitter, Satyendranath Banerji*, and *Purnendu Kumar Mukharji*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—The plaintiffs are the appellants. The plaintiff No. 1 and the predecessors of the plaintiffs Nos. 2 to 11 purchased at a revenue sale the *ijmali Khata* of *mahal* named Raipatti, *Tauzi* No. 3142, on the 6th January 1883. *Khata* No. 1 of that *Tauzi* was purchased at a revenue sale by one Balbhadra Sahay on 10th January 1901. He sold a part of it on the 21st December 1901 to plaintiffs Nos. 12 to 14, and the remainder on the 2nd February 1902 to plaintiff No. 15.

Thus, the plaintiffs are now the owners of the entire *Mahal* Raipatti bearing *Tauzi* No. 3142. The serial number of this *Mahal* was 82 in the register of 1249. It was subsequently altered to No. 114 and then to No. 2007 (*Tauzi*) and now it bears *Tauzi* No. 3142.

Close to this, there is another *Mahal* of the same name Raipatti the serial number whereof was 84 in the register of 1249 which was altered to No. 116 and then to No. 2009 (*Tauzi*) and now it bears *Tauzi* No. 3143. This was purchased in 1899 at a revenue sale by defendants Nos. 2 to 3 in the *farzi* name of their servant Gopal Das from whom they obtained a *ladavi* deed (Exhibit 49) and then sold it to defendant No. 1 Jai Gobind Pandey, brother of defendant No. 6, who is the servant and *gomashta* of defendants Nos. 2 to 3. Defendants Nos. 1 and 6 are members of a joint family and are joint in mess and business. Defendants Nos. 4 and 5 are the *thicadars* of the said *Mahal*. The two *Mahals* Raipatti bearing *Tauzi* Nos. 3142 and 3143 are situate in Pargana Kasmar, District Saran.

The dispute in this case concerns a block of land shown and designated as *Mouza* "Babhangawan" in the *Thak* and the

Revenue Survey maps of 1843-44, bearing No. 53, covering an area of 771 acres 2 roods 37 poles defined by boundaries noted therein. Contiguous to the south east of "Babhangawan" are the lands shown in the *Thak* and the Revenue maps of 1843-44 in No. 179 under the name of *Mouza* "Kedarpura Bhabhangawan", with an area of 267 acres 1 rood 3 poles.

The plaintiffs' case is that the aforesaid two *Thak* and Survey Maps of 1843-44 represent, respectively, the lands of *Mouzas* "Babhangawan" and "Kedarpura Babhangawan" which are distinct and separate from each other; the former appertains to the plaintiff's *Mahal* Raipatti bearing *Tauzi* No. 3142, and the latter to *mahal* Raipatti *Tauzi* No. 3143, belonging to the defendants; that the lands in dispute knows as "Babhangawan" were settled with the predecessor-in-interest of the plaintiffs as part and parcel of their *mahal* Raipatti bearing *Tauzi* No. 3142 and have been all along in their possession until recently when, after their re-appearance from the river Ganges, the defendants illegally began to interfere with their possession which led to criminal cases between the parties in 1908-09 (*vide* Exhibits 67, 80 and 82) in which the defendants were worsted, but, ultimately, they caused a proceeding under section 145 of the Code of Criminal Procedure to be instituted in the Court of the Magistrate with the result that the Magistrate in a summary way by his order of the 23rd December 1913 declared the posssession of the defendants over 1047 *bighas* of land of *Mouza* "Babhangawan" as appertaining to the defendants' *Tauzi* No. 3143, and, emboldened by this order, the defendants dispossessed the plaintiffs of the remaining lands of *Mouza* "Babhangawan" on the 10th January 1914; that the defendants have no title or possession over the lands in suit and had never possesssion of the same before the order of the Criminal Court, nor does the land in dispute, called *Mauza* "Babhangawan," appertain to the defendants' *Tauzi* No. 3143. On these allegations the plaintiffs commenced their action by filing a plaint on the 21st December 1914 in the Court of the Subordinate Judge of Saran, for recovery of possession of the disputed lands with mesne profits, after a declaration of their title thereto.

The defendants, other than the proprietors of *Tauzi* No. 3143, were impleaded in the cause because they were parties in the proceedings under section 145 of the Criminal Procedure Code. Defendant No. 224 is said to be the *jarzidar* of plaintiff No. 1 and his name stands in the Land Registration Office. The defendant No. 1 as proprietor of *Tauzi* No. 3143 is the chief contending defendant. His defence in short is, that the disputed lands appertain to *Mahal* Raipatti bearing *Tauzi* No. 3143 belonging to the defendants; that it never appertained to plaintiffs' *Tauzi* No. 3142; that the defendants are in possession of the lands in dispute as appertaining to their *Tauzi* as recognised and declared by the proceedeing under section 145 and that the plaintiffs have neither any title nor possession of the same, and that the suit is, therefore, liable to be dismissed. It is not necessary at this stage to give the detailed allegations of the defendants upon which the defendants base their claim. They will have to be referred to in the course of the judgment hereafter.

The defendants took other pleas which will appear from the issues framed by the Court below, which are as follows:—

Issues Nos. 1 and 5 relating to the frame and maintainability of the suit; the jurisdiction of the Court to try; the valuation and cause of action were found in favour of the plaintiffs and do not arise in this appeal. The remaining issues are as follows:—

"Is the suit barred by general and special Law of Limitation?" (Issue No. 4)

"Have the plaintiffs any title to disputed land?" (Issue No. 6).

"Whether the disputed property, namely, the lands measuring 771 *bighas* 2 roods 37 poles named as village Babhangawan appertain to plaintiffs' *Mahal* Raipatti, *Tauzi* No. 3142, or *mahal* Raipatti *Tauzi* No. 3143?" (Issue No. 7).

"Are the plaintiffs entitled to get possession of the land in suit?" (Issue No. 8).

"To what relief are the plaintiffs entitled?" (Issue Do. 9).

The learned Subrodinate Judge decided

these issues against the plaintiffs, and dismissed their suit, except with respect to 33 *bighas* 3 *kathas*. As regards 33 *bighas* 3 *kathas*, he held that the plaintiffs had proved their title and were in possession of the same as declared under section 145 of the Code of Criminal Procedure and the defendants did not dispute the plaintiffs' title or possession. He directed this to be noted in the decree The plaintiffs have come to this Court in appeal and submit that the decision of the Court below is wrong and untenable.

The appeal is resisted by the respondent, who was contesting defendant in the Court below. Mr. Sultan Ahmed has argued the case on behalf of the appellants, and Mr. Hasan Imam on behalf of the respondents.

The first and foremost question that arises for determination is as to which of the two *Tauzi* Nos. 3142 and 3143 the lands in suit appertain (Issue No. 7). These lands have been depicted in the Revenue Survey Map No. 53 of 1843-44 where in they have been designated as *Mauza* "Babhangawan."

The plaintiffs' case is, that the entire *Mauza* "Babhangawan" was exclusively settled by Government with Ghinnu Singh, admittedly their predecessor-interest, at the time of the Decennial Settlement of 1197 (1790 A. D.) which subsequently became permanent, and that *Mauza* "Kedarpura" which is contiguous to it on the south-west and is a distinct and separate village and settled with Parbhu Singh, admittedly the predecessors-in-interest of the defendants. The defendants, on the other hand, state that "Babhangawan and Kedarpura" are not two separate *Mauzas* but are one and the same though called differently, sometimes as "Babhangawan" sometimes as "Kedarpura Babhagawan" and sometimes as "Babhangawan Kedarpura", the lands whereof bearing the Khatri area of 3488 *bighas* 15 *kathas* along with many other *Mauzas* were at the Decennial Settlement of 1197 settled with Parbhu Singh and Ghinnu Singh in the proportion of two-thirds and one-third respectively, that is, 2321 *bighas* odd with Parbhu Singh and 1161 *bighas* with Ghinnu Singh. Ghinnu Singh was to pay proportionate Government revenue of Rs. 561 odd for the lands of the *Mauza* settled with him and Parbhu Singh was to pay Rs. 1,151 for the land settled with him, and that in the year 1207 Fasli (1800), with the exception of a few *bighas*, all the lands of the *Mauza* fell into the river Ganges and on the application of Ghinnu Singh an Amin was deputed by the Collector to ascertain the quantity of the lands washed away by the Ganges; that the *amin* reported that out of an area of 2321 *bighas*, which was comprised in Parbhu Singh's portion of the *Mauza*, only 75 *bighas* 2 *kathas* were left and of Ghinnu Singh's share, which originally contained 1161 *bighas* only 33 *bighas* 3 *kathas*, were forthcoming, the remaining lands of both the shares having been washed away, that as a result of this enquiry the revenue payable by Ghinnu Singh was reduced with the sanction of the Governor-General in Council to the extent of Rs. 347 odd, thus leaving the reduced *jama* of Rs. 213 odd for the *Mauza*, but that the revenue payable by Parbhu Singh was not at all reduced and when the lands of the *Mauza* re-appeared the defendants took possession of the same and are continuously in possession since then and that the plaintiffs have never been in possession of any land in excess of 33 *bighas* 3 *kathas* which was found in the possession of Ghinnu Singh after the diluvion of the lands of the *Mauza* in 1800 when the Decennial Settlement expired and the Permanent Settlement came into operation, that if, as alleged by the plaintiffs, the Revenue Survery of 1843 has measured the lands in Suit No. 771 acres 2 roods 37 poles as situated in *Mauza* "Babhangawan" appertaining to *Tauzi* No. 3142 and 267 acres 1 rood 2 poles as situated in a separate *Mauza* "Babhangawan Kedarpura" or "Kedarpura Babhangawan" the Revenue Survey measurements and map are wrong inasmuch as there were no two *Mauzas*, nor that any portion of the land separately appertained to the two *tauzis* and the said measurements and maps are not binding upon the defendants.

The learned Subordinate Judge has held that "Babhangawan" and "Kedarpura" are two distinct and separate *Mauzas* within specified boundaries as alleged by the plaintiffs. In this view he is

supported by the overwhelming documentary evidence filed in the case. A copy of the register (called Sch sale or thirty years register) (Exhibit Z-75) prepared in 1224 (1816) purports to contain statement of facts relating to the Settlement of the *Mauzas* in the *Mahal* for 30 years from 1168-1197 *Fasli* (1761-1790), that is, from before the grant of the Dewani of Bengal, Bihar and Orissa to the East India Company in 1765 and the assumption of the administration of revenue by the said Company. It shows that "Kedarpura" and "Babhangawan" are two distinct and separate *Mauzas* and has entered them separately: "Kedarpura" as being one *Mauza* and "Babhangawan" as being another *Mauza*. The remark column against both the villages shows that in the Decennial Settlement of 1197 the village of "Babhangawan" was settled along with "Kedarpura" for ten years with Parbhu Singh and Ghinnu Singh in separate shares. The description in the *kabuliyat* of Parbhu Singh (Exhibit L-1) is "Babhangawan Kedarpura"—annual *jama* Rs. 1,151; and in the *kabuliyat* of Ghinnu Singh (Exhibit L-2) the description is "Kedarpura Babhangawan"—annual *jama* Rs. 561-1-2. Reading these descriptions with the aforesaid Register it would appear that both the *Mauzas* were settled with Parbhu Singh and Ghinnu Singh in separate shares. The applications of Parbhu Singh for reduction of revenue on account of diluvion (Exhibits 70 and 71) of 2nd December 1799 and 30th November 1800, the *jamabandi* filed by Ghinnu Singh (Exhibit 137) for 1800-01, the separate Tirijs filed in 1207 by Parbhu Singh and Ghinnu Singh (Exhibits 72 and P), the reports of Lachman Singh Kanungo of the years 1817, 1819-20 and 1822 (Exhibits N-2, 75 and M-1), who was directed to find out the diluviated area of the two *Mouzas*, the report of the Board of Revenue of 5th March 1824 upon the application of Banwari (Exhibit 81), the Quinquennial Register of 1790 to 1838 (Exhibit U), the petition (Exhibit Z-132) of Hinglaj Singh, purchaser of a portion of *Tauzi* No. 3142, dated 29th January 1841 the Collectorate Settlement Registers of 1249 (1841 to 1842) (Exhibits T-1 and 13) with respect to the two *mahals* clearly show that "Babhangawan" and "Kedarpura" were two separate *Mauzas* and that both the *Mauzas* were comprised in the Settlement with Parbhu Singh and Ghinnu Singh. The *Thakbust* which preceded the Scientific Revenue Survey has delineated the boundaries of the two *Mauzas* separately describing one as "Babhangawan" and the other as "Kedarpura Babhangawan" (Exhibits 79 and S respectively). The *Thakbast* was prepared on 5th January 1843 with due publicity and contains the signature of the proprietors of the *Mauzas* concerned and of the neighbouring *Mouzas* (*Vide* Exhibits R and Q). The Professional and the Scientific Survey measured the two villages separately and prepared two separate maps. The map of "Babhangawan" (Exhibit 5) bears No. 53 and that of "Kedarpura" bears No. 179 (Exhibit 33). The word 'Babhangawan" is affixed in this map to the word "Kedarpura," probably with a view to distinguish it from other villages of the same name and is merely descriptive. It has shown separate areas as appertaining to the two *Mauzas* 771 acres 2 roods 37 poles being of "Babhangawan" and 267 acres 1 rood 3 poles being that of "Kedarpura Babhangawan". The Survey Maps bear date May 1843. The Survey Maps are conclusive as to their being two separate *Mauzas* within separate defined boundaries.

Exhibit O, dated the 31st March 1844, which gives the *kefiat* or history of the diluviated lands, treats "Babhangawan" and "Kedarpura" as two distinct *Mauzas* so do the *Mauzawar*, *Mahalwar* and the general registers of the Collectorate (Exhibits 14 to 18 and 63-A to 64-D) and the Land Registration Registers. The parties also seem to treat them as two distinct *Mauzas*: *vide* application for registration (Exhibit Z-70), dated 17th April, 1879, filed by the Manager, Court of Wards on behalf of some minor proprietors of *Tauzi* No. 3142. The demarcation proceedings (Exhibits Z-141 and Z-142) show that village "Babhangawan" contains two *Tauzi* Nos. 3142 and 3143. The report of the Demarcation Deputy Collector (Exhibit Z-98) of 1897 recognizes them as being two separate *Mauzas*. Third parties also seem to treat them as two separate *Mauzas* *vide* the *zarpeshgi* deeds (Exhibit Z 81)

whereby one *kita* is given in *zarpeshgi* in *Mauza* "Babhangawan" and another *Kita* in *Mauza* "Kedarpura". The Diara Gengetic Survey of 1863-64 and the Typographical Survey of 1898-99 support the view that these are two distinct *Mauzas*.

Thus, it is manifest that from the earliest time, that is, from before the Permanent Settlement up to the present moment the Decennial and the Permanent Settlement, the Government Surveys referred to above and the Government records have all along treated them as two distinct *Mauzas* and so also the parties and the public. Therefore, it must be held that "Babhangawan" and "Kedarpura" are two distinct *Mauzas* as depicted and defined in the Revenue Survey maps of 1843-44 though they may have been differently called sometimes as "Babhangawan", sometimes "Babhangawan Kedarpura" and sometimes as "Kedarpura Babhangawan." Such prefixes and affixes are often adopted in order to fully describe and distinguish the *Mauzas* concerned.

The next question for determination is, with whom and how these lands were settled. It appears that Pargana Kasmar in which the big *Mahal* Raipatti, which at the time of the Decennial Settlement was split up into two *mahals* bearing the same name was originally attached to *Zillah Tirhut* and was transferred to the District of Saran in 1201 (1794 A. D.).

The *Panjsalah* Register containing the names of transferred villages shows "Babhangawan Kedarpura" in the *Mahal* of Ghinnu Singh as well as that of Parbhu Singh.

The thirty years' register gives the earliest history of the Settlement of *Mauzas* "Babhangawan" and "Kedarpura" from 1168 to 1197 (1761-1790). This document shows that the *Kitabi* of *Khialis* area of the two *Mauzas* was 3,488 *bighas* 14½ *kathas* and the then area (called in the register "present area") approximately amounted to 3488 *bighas* 15½ *kathas*. This area is mentioned against Kedarpura, and as to Babhangawan it is noted that it is included in the above area; that in the Decennial Settlement of 1197 (1790) the village of "Babhagawan" was settled along with "Kedarpura" for ten years with Parbhu Singh and Ghinnu Singh is separate shares and that their names stand recorded as proprietors with respective shares.

The *kabuliyat* (Exhibit L-1) executed by Parbhu Singh at the time of the Decennial Settlement of 1790 shows that "Babhangawan Kedarpura" was settled with him at an annual *jama* of Rs. 1,151 along with several other villages mentioned therein. The *kabuliyat* executed by Ghinnu Singh (Exhibit L-2) shows that "Kedarpura-Babhangawan" was settled with him at an annual *jama* of Rs. 561-1-2 along with other villages. The Settlement was for ten years from 1197 to 1206 *Fasli*. The *kabuliyats*, however, do not specify the quantity of lands settled with Parbhu Singh and Ghinnu Singh. In the petition for reduction of rent on account of diluvion, dated the 30th November 1801, Parbhu Singh stated that he had two-thirds share in the two *Mauzas* "Kedarpura" and "Babhangawan". In the *jamabandi* filed by Ghinnu Singh for 1800-01 (Exhibit Z-137) he stated, that the area of Babhangawan Kedarpura recorded in the register of 1197 as settled with him was 1163 *bighas*. This area will be almost one-third of the entire Kitabi area of the two *Mauzas*, *i.e.*, 3488 *bighas* shown in the 30 years' register (Exhibit Z-75) as having been settled with Parbhu Singh and Ghinnu Singh. The application filed by Ghinnu Singh for reduction of rent is not on the record, but from the reports of Lachman Singh Kannongo, it is obvious that such an application was filed by him. Dealing with these applications of Prabhu Singh and Ghinnu Singh for reduction of revenue on account of diluvion of the lands of the two *Mauzas*, Lachman Singh in his reports of 1817, 1819-20 and 1822 (Exhibits N-2, 75 and N-1 respectively) states that Parbhu Singh and Ghinnu Singh had shares in the lands of the aforesaid two *Mauzas* in the proportion of two-thirds and one-third. Banwari Singh, son of Ghinnu Singh, in his petition to the Board of Revenue, dated the 20th February 1824 (*Vide* Exhibit M-1) also stated that he had "a third share of the aforesaid villages Kedarpura and Babhangawan" and the remaining two-thirds belonged to Parbhu Singh and others, and accordingly he prayed for Settlement of one-third of the accreted

lands with him on payment of Government revenue. The Collector in his report of 22nd April 1824 (Exhibit M-2) mentions that one-third of the *Mauzas* Kedarpura and Babhangawan was settled with Ghinnu Singh and two-thirds with Parbhu Singh.

The petition (Exhibit Z-132) of Hinglaj Singh, one of the proprietors of *Tauzi* No. 3142, states that the proprietors of that *Tauzi* had one-third share in *Mauza* Babhangawan Kedarpura. The Settlement Register of 1249 (1841-43) (Exhibit 13) with respect to *Mahal* Raipatti of Ghinnu Singh shows that Babhangawan Kedarpura appertaining to his *Mahal* had an area of 1161 *bighas* 8 *kathas* with a *jama* of Rs. 1,901-12-0 as fixed in 1208 after reduction.

The Settlement Register (Exhibit T-1) of 1249 (1841-42) of *Mahal* Raipatti of Prabhu Singh shows that the area of Babhangawan Kedarpura settled with him was 2320 *bighas* 5 *kathas* 10 *dhurs* at an annual *jama* of Rs. 1,151 as fixed in 1205 *Fasli*.

The *rubkar* is of 1864 (Exhibits Z-159 and Z-160) say that Babhangawan and Kedarpura belong to one and the same person.

The Collector in his order, dated the 4th August 1897, in connection with the demarcation of Kedarpura and Babhangawan states upon the report of the Kanungo that village Babhangawan is contained in two *Tauzi* Nos. 3142 and 3143 and that there are two sets of proprietors. The several demarcation proceedings from 1896 to 1901, though they respect to a very small quantity of land which had just come out of water near the border of Madhupur, show that the proprietors of *Tauzi* No. 3143 had also possession of villane Babhangawan.

The aforesaid history of the Settlement of the two *Mauzas* shows that although the area was not specified in the *kabuliyats* of Parbhu Singh and Ghinnu Singh (Exhibits L-1 and L-2) at the time of the Decennial Settlement, the land of the two *Mouzas* amounting to 3488 *bighas* was settled with them in the proportion of two-thirds and one-third and with proportionate Government revenue, that is, the area settled with Parbhu Singh was 2,321 *bighas* at an annual revenue of Rs. 1,151 and that settled with Ghinnu Singh 1,161 *bighas* at an annual revenue of Rs. 561 and that the lands of the two *Mauzas* fell in both the *Mahals* called Raipatti settled separately with Parbhu Singh and Ghinnu Singh. This has been the case of both the parties over since the Decennial and the Permanent Settlements of the *Mahal* with them. In the written statement this is practically admitted by the defendant and Mr. Hasan Imam has conceded that whether the villages were one or two and whether they were called Babhangawan or Kedarpura or Babhangawan Kedarpura, the lands were settled with Parbhu Singh and Ghinnu Singh in the aforesaid proportion. The Government records and reports also support this view. Ghinnu Singh's son Banwari Singh himself admitted that he had only one third share in the two *Mauzas*. The plaintiffs claim, therefore, that the entire *Mauza* "Babhangawan" covering the lands in dispute 771 acres odd as shown in the Revenue Survey map was exclusively settled with Ghinnu Singh is not borne out by the evidence in the case.

In support of their claim the plaintiffs rely principally upon the *Mahalwar* and the *Mauzawar* Registers read with the Revenue Survey map No. 53 of *Mauza* "Babhangawan." In order to appreciate this argument it is necessary to find out as to how the plaintiffs seek to connect *Mauza* "Babhagawan" as shown in the Revenue Survey map with their *Tauzi* No. 3142 and *Mauza* "Kedarpura" with the defendant's *Tauzi* No. 3143.

These *Mahals* were for the first time numbered in the Settlement Register prepared in 1841-42 (Exhibits 13 and T-1). Number 82 was allotted to *Mahal* Raipatti settled with Ghinnu Singh and No. 84 to Mahal Raipatti settled with Parbhu Singh. The entry in the register mentions the *Mauza* described therein as "Babhangawan-Kedarpura" as having been allotted to both the prorietors Parbhu Singh and Ghinnu Singh. Out of the Kitabi area of the *Mauza*, 2,320 *bighas* 5 *khatas* 10 *dhurs* was allotted to Parbhu Singh with the annual *jama* of Rs. 1,150 as originally settled with him. The *jama* of the entire *Mahal* was increased by Rs. 51-9-5 for the additional lands of Kasimpur settled with him in 1205. 1161 *bighas*

8 *khatas* were allotted to Ghinnu Singh in the same *Mauzas* "Babhangawan Kedarpura." The *jama* originally fixed was reduced to Rs. 1,901-12-0 in the year 1208 *Fasli* on account of diluvion. This register was prepared just before the Revenue Survey of 1843-44 took place. In serial No. 21 of *Mauzawar* registers (Exhibits 16 and 63-B) in *mahal* No. 114 *Mauza* "Babhangawan-Kedarpura" is shown as having an area of 771 acres 2 roods 37 poles as found by survey measurement and shown in Revenue Survey map No. 53. In serial No. 22 of the *Mauzawar* registers in *Mahal* No. 116 *Mauza* "Babhangawan-Keadarpura" is shown as having an area of 267 acres 1 rood 3 poles as found by survey measurement and shown in Revenue Survey map No. 179 (by mistake put down 79). These registers do not show the names of the proprietors. The mutation registers (Exhibits. Z-157 and 157-A) from 1845-46 to 1849-50, however, show the names of the proprietors Ghinnu Singh and his co-sharers recorded with respect to *Mahal* Raipatti No. 3195 and those of the heirs of Parbhu Singh in *Mahal* Raipatti No. 3197; so also the general registers 64-A and 64-D prepared under sections 6 and 7 and 14 and 15 respectively of Act VII of 1876. These numbers are shown in the *Mahalwar* Registers (Exhibits 14 and 17) as corresponding to Nos. 114 and 116 respectively: No. 3195-114 as being the number of the *Mahal* Raipatti belonging to Ghinnu Singh and No. 3197-116 as being the number of the *Mahal* Raipati belonging to Parbhu Singh. The present *Tauzi* numbers of the *Mahals* are also given in this register, namely, Nos. 3142 corresponding to No. 3195-114 as the number of the *Mahal* belonging to Ghinnu Singh, *Tauzi* No. 3143 corresponding to No. 3196 and 116 as the number of the *Mahal* belonging to Parbhu Singh. "Babhangawan-Kedarpura" with an area of 771 acres 2 roods 37 poles has been shown in this Register as appertaining to *Tauzi* No. 3142 and "Babhangawa-Kedarpura" having an area of 267 acres 1 rood 3 poles as appertaining to *Mahal* No. 3143 of Parbhu Singh. Thus, the plaintiffs say that they have connected the area in dispute with *Mauza* "Babhangawan" as shown in Revenue Survey map No. 53 and that this appertains to their *Mahal* bearing *Tauzi* No. 3142, and that the defendants have got only an area of 267 acres 1 rood 3 poles as shewn in the Revenue Survey map No. 179 and designated as "Kedarpura" appertaining to their *Mahal* No. 3143. The plaintiffs' case is, therefore, based upon these registers, particularly the *Mahalwar* Register. Some of these registers, such as the mutation registers, are no doubt public documents prepared by the Collector in his official capacity in order to contain information with respect to the revenue paying lands and the names of the proprietors thereof and the changes and transfers that took place from time to time with respect to them. They used to be first prepared under the provisions of Regulation 48 of 1793 (*vide* section 16) and are now kept under Act VII of 1876. The entries in these registers are receivable in evidence *quantum valebat* for what they are worth. They are, however, not conclusive and may be shown to be inaccurate. Apart from the reports of Lachhman Singh Kanungo and the Collector in connection with the abatement of revenue on account of the diluvion of the lands of the two *Mauzas*, and the *kefiyat* of the diluviated lands of 1844 (Exhibit O), the Quinquennial Register of 1700—1838 and of 1834—1838 (Exhibits U and Z-140) show that the lands in both the *Mauzas* "Babhangawan-Kedarpura" were settled with Parbhu Singh and Ghinnu Singh, the predecessor-in-interest of the plaintiffs and the defendants, with specified areas and revenue, and do not show that all the lands of Babhangawan were exclusively settled with Ghinnu Singh. These Quinquennial Registers were prepared under the direction of the Board of Revenue under Regulation 48 of 1793. They are called Quinquennial as they were originally required to be prepared every five years. The words "every five years" which occurred in section 2 of the Regulation have been repealed, but the name of the register still continues. The register is a public document and admissible in evidence as such: *Sreemutty Oodoy Monee Debee* v. *Bishonath Dutt* (1). The entries in these registers support the

(1) 7 W. R. 14.

case of the defendants that both the *Mauzas* were settled with the proprietors of the two *Tauzis* bearing Nos. 3142 and 3143. The Settlement Registers, which are also public documents prepared in 1841-42 (Exhibits 13 and T-1) which give the *Mauzas*, their areas and the *jama* settled with Ghinnu Singh and Parbhu Singh, show that the lands of both the *Mauzas* "Babhangawan-Kedarpura" were settled with both of them. These are the registers previous to the Revenue Survey of 1843-44. The registers prepared subsequent to the Revenue Survey and relied upon by the plaintiffs also show both the *Mauzas* "Babhangawan-Kedarpura" as appertaining to the *Mahals* of both the proprietors Ghinnu Singh and Parbhu Singh. So far they are in agreement; but how the area of 771 acres 2 roods 37 poles, which corresponds only with one *Mauza* called Babhangawan in the Revenue Survey map, came to be recorded as appertaining to the *Mahal* of Ghinnu Singh and 267 acres 1 rood 3 poles, which corresponds only with one *Mauza* called "Kedarpura-Babhangawan" in the Revenue Survey map, to the *Mahal* of Parbhu Singh is a mystery. The *Mauzawar* Registers do not contain the names of the proprietors but only the serial numbers of the *Mauzas* in the register and the numbers of the two *Mahals*. The *Mahalwar* and the Mutation Registers, no doubt, contain the names of the proprietors. The subsequent treatment by the Revenue Authorities as well as the parties as already shown indicates the state of affairs that existed prior to the Revenue Survey continued. Therefore, if there is any conflict between the registers prepared after the Revenue Survey and those prepared before that, the latter must be accepted. The plaintiffs base their title upon the original settlement of the *Mahal* Babhangawan exclusively with them as shown in the Revenue Survey. The *onus* to prove that the entire *Mauza* was settled with them is upon the plaintiffs. The *Thak* and the Revenue Survey do not help them. In the first place, they do not show the names of the proprietors of *Mauza* Babhangawan and Kedarpura. They simply demarcate the boundaries of the two *Mauzas* and ascertain the areas comprised therein. Even if they had shown the plaintiffs to be the proprietors of these *Mauzas* they would have exceeded their scope and would not have been taken as evidence of title. In the case of *Moizuddi Biswas* v. *Ishan Chandra Das Sarkar* (2), it was held that an entry in a *Thakbust* map is not sufficient to enable a Court of fact to hold that the disputed lands were really included in an estate at the time of the Permanent Settlement. They may be good evidence as to what the boundary of a particular plot was at the time of the Permanent Settlement per Sir Comer Petheram, C. J., in the case of *Syama Sunderi Dassya* v. *Jogobundhu Sootar* (3): though at one time even this was doubted: *Mohesh Chunder Sen* v. *Juggut Chunder Sen* (4). The true scope of a *Thak* and a Survey map was defined in the case of *Syam Lal Sahu* v. *Luchman Chowdhury* (5). In case of *Nobo Coomar Dass* v. *Gobind Chunder Roy* (6), Field, J., pointed out that no general rule can be laid down as to the weight to be assigned to a Survey map as a piece of evidence. That learned Judge, whose knowledge of the revenue laws and regulations is beyond any question, says that a Revenue Servey in this Province was not made under any authority of any enactment of Legislature. It was a purely executive act. At the same time, the authority of the Revenue Survey has been recognized by the Legislature and is referred to in Act IX of 1847. The Survey Operations were required to be conducted with due publicity and co-operation of the parties interested in the measurement and their signatures and objections were obtained in writing. A Survey map is, therefore, good evidence of possession according to the boundary demarcated thereon and which may be taken to have been admitted by those concerned and in each case it must be decided upon the circumstances whether it raises a reasonable presumption of title. This was the view expressed in the earlier case of *Kalee Chunder Sein* v. *Adoo Shaikh* (7), and the view has now been confirmed

(2) 7 Ind. Cas. 849; 13 C. L. J. 293; 15 C. W. N. 706.
(3) 16 C. 186; 8 Ind. Dec. (N. S.) 124.
(4) 5 C. 212; 4 Ind. Jur. 624; 2 Ind. Dec. (N. S.) 745.
(5) 15 C. 353; 7 Ind. Dec. (N. S.) 819.
(6) 9 C. L. R. 305.
(7) 9 W. R. 602.

by their Lordships of the Judicial Committee in *Jagadindra Nath Roy* v. *Secretary of State for India* (8), where Lord Rindslay held that the Revenue Survey maps are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may properly be judicially received as correct when made. The accuracy of the Revenue Survey maps is not disputed in the present case. It is not disputed that these maps have correctly demarcated the boundaries of "Babhangawan" and "Kedarpura." They are further supported by the maps prepared subsequently at the Gangetic Diaria Survey of 1863-64 and the Typographical Survey of 1898-99, and the boundaries found during the Revenue Survey may be presumed to have continued. It may also be clearly presumed that these were the boundaries which existed at the time of the Permanent Settlement but they do not go further and do not show that the lands measured and included in *Mauza* "Babhangawan" were settled at the time of the Permanent Settlement with Ghinnu Singh or Parbhu Singh. This has to be proved by evidence *aliunde*. The *onus* of proving that the lands shown in the Survey map as "Babhangawan" were included in the Permanent Settlement of 1793, is, as observed by Lord Rindslay in the aforesaid case upon the plaintiffs, who affirm that such was the case. The plaintiffs have failed to prove that the entire *Mauza* "Babhangawan" was included in the Permanent Settlement made with them. The thirty years register shows, as observed above, that they were two separate and distinct *Mauzas*, having jointly the *Kitabi* area of 3488 *bighas* odd. The Decennial Settlement *Kabuliat* of the plaintiffs (Exhibit L-2) does not show that the entire *Mauza* "Babhangawan" was settled with Ghinnu Singh, the plaintiffs' predecessor-in-interest. It shows that "Kedarpura-Babhangawan," and not solely "Babhangawan" was settled with Ghinnu Singh. Parbhu Singh's *kabuliyat* (Exhibit L-1) does not show that "Kedarpura" alone was settled with him, but "Babhangawan-Kedarpura." In the light of the evidence in the case these entries in the aforesaid *kabuliyats* "Kedarpura-Babhangawan" and "Babhangawan-Kedarpura" mean that lands in both the *Mauzas* were settled with Ghinnu Singh and Parbhu Singh. The evidence in the case already discussed points to the fact, as stated in the earliest register which sets forth the state of affairs from 1861-1890, that the lands of the two *Mauzas* were settled in separate shares and those shares were two-thirds to Parbhu Singh and one-third to Ghinnu Singh. Ghinnu Singh had, as admitted by himself in the *jamabandi* filed by him and the petition filed by his son Banwari Singh, only one-third of the entire area, namely, 1,161 *bighas* were settled with him. Parbhu Singh, on the other hand, had about 2,321 *bighas* odd, that is, about two-thirds of the entire area. The *jama* payable by Ghinnu Singh and Parbhu Singh Rs. 56-1-2 and Rs 1,151 respectively also point to nearly the same proportion. The Revenue Survey has found the area of "Babhangawan" to be 771 acres odd and of "Kedarpura" to be 267 acres odd. If "Babhangawan" was settled entirely wth Ghinnu Singh and "Kedarpura" with Parbhu Singh, as alleged by the plaintiffs, Ghinnu Singh would then have an area of 771 acres odd and Parbhu Singh an area of 267 *bighas* odd as shown in the Revenue Survey maps of "Babhangawan" and "Kedarpura" respectively; in other words, the share of Ghinnu Singh will be two-thirds and Parbhu Singh one-third, the area of the two *Mauzas* taken together, that is, in inverse order of the proportion of the area which was originally settled with them.

On behalf of the plaintiffs it has been urged that the *Kitabi* or *Khaiyali* area mentioned in the earliest register (Exhibit Z-75) was a myth and that the settlement was not according to the area but was according to the produce of the land. In other words, the contention is that, although the *jamas* settled with Ghinnu Singh and Prabhu Singh as stated above are nearly in the proportion of one-third and two-thirds, the area in the settlement of Ghinnu Singh must have been in the inverse proportion according to the produce of the land allotted to him. It is true that, originally, during the Muhammadan period the Settlement was made according

(8) 30 C. 291; 30 I. A. 44; 7 C. W. N. 193; 5 Bom. L. R. 1 (P. C.).

to the produce of the land and Sher Shah (1540-1545 A. D) fixed the share of the State at one-fourth of the produce. As he did not live long he could not carry out his plans into general effect and whatever he left undone was, however, effectually performed under the auspices of the Emperor Akbar (latter half of the 16th Century) by Raja Todarmal. The first step taken towards an accurate assessment was to make the measurement of the land and in order to do this one uniform standard was substituted for the various measurements used throughout the country which was 3,600 square yards for a *bigha*, the English statute acre being 4,840 square yards. The register prepared in the time of Hosiar Jang showed the *Kitabi* area which was ascertained by measurement during the time of Raja Todarmal and this area came to be known as the *Kitabi* area, that is, literally the area recorded in the register and was accepted for the settlement of revenue when the East India Company took the Grant of the Provinces of Bengal, Bihar and Orissa. The areas of the *Mauzas* were found in the old Muhammadan registers called *Daftar Purana*. They were collected and compiled under the orders and superintendence of Mr. Dain in 1817 (*vide* Exhibit 99 para 10pn 3). The Settlements made during the time of the East India Company were based upon the *Kitabi* area found in the old Muhammadan records and such Settlements were made originally for short periods, in order to ascertain the actual produce of the lands and the burden of revenue that they were capable of bearing. After full investigation the information was set forth in the thirty years' register which gives an account of the Settlement previous to and after the assumption of the administration by the East India Company. On the basis of the information entered in the said register, the Decennial Settlement was made which was intended to be made permanent upon receipt of the orders of the Court of Directors. Therefore, although the produce of the lands was the basis of the Settlement the area of the *rakba* could not be lost sight of in order to make the Settlement equitable both for the Government and the *zemindars*. The area, therefore, recorded in the said register as *Khiyali* or *Kitabi* area cannot be said to be wholly without any basis. In that very register while showing the *Kitabi* area the then called the present area which was slightly in modification of the *Kitabi* area, was also mentioned. Therefore, the area was taken into consideration at the time of the Settlement and was always so treated in dealing with Settlement of the two *Mauzas*, and the proportion of two-thirds and one-third was maintained throughout by the Government Officers and was accepted by the parties themselves. Therefore, the plaintiffs have failed to show that they are entitled to the entire area measured and shown in the Revenue Survey as appertaining to *Mauza* Babhangawan. They have failed to show that the entire *Mauza* was settled with them at the time of the Decennial or the Permanent Settlement. The learned Subordinate Judge is, therefore, right in holding that only one-third of the areas of the two *Mauzas* "Babhangawan" and "Kedarpura" was settled with the plaintiffs. He has, therefore, very rightly dismissed his claim as to the entire *Mauza* "Babhangawan" which covers the land in dispute. The plaintiffs, however, have proved that at the time of the Decennial Settlement one-third of the area of *Mauza* "Babhangawan" was settled with them.

Mr. Hasan Imam, however, contends that, after the Decennial Settlement, the lands of the two *Mauzas* "Babhangawan" and "Kedarpura" settled with Paibhu Singh and Ghinnu Singh began to diluviate and by the time the ten years expired all the lands of the two *Mauzas* had diluviated, leaving only 33 *bighas* 3 *kathas* out of the land settled with Ghinnu Singh and 75 *bighas* 2 *kathas* out of the lands settled with Paibhu Singh out of water, and Ghinnu Singh took remission of revenue but Paibhu Singh did not, and when the lands began to re-appear Paibhu Singh and his heirs took possession of the same and in the year 1819 when all the lands of both the villages re-appeared they took possession of the entire lands. Ghinnu Singh and his heirs were never in possession of the lands after re-appearance and their various attempts to take Settlements of the lands from Government failed. Therefore, says Mr. Hasan Imam, Ghinnu Singh and his heirs lost all title to the lands in dispute. He also

contends that Ghinnu Singh having taken abatement of revenue on account of diluvion the Settlement with him at the time of the Permanent Settlement in 1207 was only with respect to 33 *bighas* 3 *kathas* which remained in his possession after diluvion as stated above and the Decennial Settlement of the land in excess of the said area was superseded by the Permanent Settlement. Consequently, he argues that the lands in dispute which are the lands with respect to which the abatement of revenue was allowed to Ghinnu Singh cannot be said to be the land included in the Permanent Settlement of Ghinnu Singh. It is true, that Ghinnu Singh obtained remission of revenue, as stated above, in the year 1207. The *jamabandi* filed by Ghinnu Singh in 1207 for the year 1800-01 shows a decrease of 1,129 *bighas* 17 *kathas* of land settled with him in "Babhangawan" and "Kedarpura" with respect to which he claimed an abatement of revenue of Rs. 519-2-5, the area above water in the said villages being only 33 *bighas* 3 *kathas*. His application for abatement is not filed but is referred to in the report of Lachhman Singh Kanungo. Parbhu Singh also applied for abatement of revenue (Exhibit Z 70-71) but no abatement was allowed to him because, as reported by Lachhman Singh, there appeared sufficient increase of land according to the average *jamabandi* in the villages in his possession. It also appears from the reports of Lachhman Singh Kanungo (Exhibits N-2, N-1, and 75 and the note made in the Quinquennial Register of 1790 to 1838 (Exhibit U) that the lands of the Taluqa were measured under the orders of the Board of Revenue in 1208 *Fasli* in order to prepare an account of the diluviated lands and that the *jama* of the entire *mahal* of Ghinnu Singh of Rs. 2,405 originally fixed at the Decennial Settlement was reduced under the orders of the Governor-General in Council, dated the 6th March 1801, to Rs. 1,901. The *jama* of Rs. 561 odd of *Mauza* "Kedarpura-Babhangawan" was reduced by Rs. 347 from Rs. 561 to Rs. 213. The Tirijs, *jamabandis* (Exhibits P and 72) signed by Ghinun Singh and Parbhu Singh show the areas of the lands in the two *Mauzas* as detailed above after diluvion, in their respective possession. Lachhman Singh Kanungo reported (Exhibit N-2), dated 1817, that 1,000 *bighas* of the lands of the two *Mauzas* had re-appeared and that Kanhaiya Singh and others heirs of Parbhu Singh, had taken possession of the same and Ghinnu Singh wanted to take Settlement according to his share of one-third. In 1822 he reported that 2,000 *bighas* had come out and that they were fit for Settlement but that Parbhu Singh had taken possession of the same. Banwari Singh on 20th February 1824 filed a petition to the Board of Revenue which was forwarded to the Collector by his letter (Exhibit M-1) dated 5th March 1824 stating that he was entitled to Settlement of one-third of the aforesaid alluviated lands on payment of the revenue that may be assessed upon them. In reply to the Board's letter the Collector submitted his report (Exhibit M-2) dated 22nd April 1824 ,supporting the statement of Lachhman Singh as to the lands having been diluviated and being in possession of Parbhu Singh. He, however, reported that there was delay in his disposing of the matter, inasmuch as it required investigation into it which he was required to do under the orders of the Board of Revenue, dated 8th July 1822, under Regulation II of 1819 and that if the petitioner was dispossessed by the heirs of Parbhu Singh and wanted immediate redress he could go to the *Zilah* Court but until his investigation was brought to a determination it was not possible for him to afford any redress to the petitioner. There is nothing on the record to show what happened afterwards, whether the petitioner Banwari Singh did go to the Civil Court or not If he did go, what was the result. It is also not known what was the final report of the Collector after the investigation referred to in his letter. The Collector's letter is dated 22nd April 1825 and the *Tirij* of the diluviated lands is dated September 1830. (Exhibits P and 72).

Ghinnu Singh seems to have repeated his prayer in his application of the 3rd December 1830. Mr. Dharikshan Singh, Deputy Magistrate, in his judgment in the case under section 145 of the Code of Criminal Procedure (Exhibit Z-99) dealing with this question states: "A document of 1839 has been produced by the second party (the

plaintiffs) from which it appears that under the direction of the Board of Revenue the revenue fixed in 1197 *Fasli* on Ghinnu Singh's share (Rs. 2,405 odd) was to be restored." This document has not been produced before us. It, however, appears that Ghinnu Singh and his heirs continued to pay the revenue as was assessed in 1208 after the diluvion of the land of the *Mauza*, *vide* Exhibit 13, Settlement Register of 1841-42. On the other hand, the revenue fixed for the lands settled with Parbhu Singh was not reduced and the reason of this is given in the report of Lachhman Singh as well as in the Quinquennial Register (Exhibit U). It appears from those documents that, between the years 1197 to 1201, Parbhu Singh took into his possession the diluviated lands of *Mauza* Peerbahani Chak and thus he was in possession of lands which did not decrease the *jamabandi* income of the lands in his possession in spite of the diluvion of the lands of *Mauza* "Babhangawan" "Kedarpura," and, therefore, the original revenue of his *mahal* of Rs. 6,953-2 was not reduced. In 1205 he took Settlement of lands in Qasimpur upon which a *jama* of Rs. 51-9-5 was assessed. Accordingly, the Settlement Register (Exhibit T-1) 1841-42 shows that the *jama* of Rs. 7,004-11-5 was fixed in 1205 for the *Mahal* Raipatti, *Tauzi* No. 3143 including Qasimpur. Therefore, no additional *jama* was assessed upon the lands in possession of Parbhu Singh after the diluvion of the lands of Babhangawan and Kedarpura as reported by Lachhman Singh. No additional revenue was paid by Ghinnu Singh also. Mr. Hasan Imam says that the additional lands of "Babhangawan" and "Kedarpura" of about 2,000 *bighas* which were taken possession by Parbhu Singh's heirs were all the lands of those *Mauzas* and, consequently, Parbhu Singh was in possession of all those lands to the exclusion of Ghinnu Singh's heirs, and the original Kital area settled with him being 2,321 *bighas* odd he is not in possession of any land in excess of that area and, therefore, the lands in question must be deemed to have been included in the Settlement originally made with him; but if these lands covered the entire area of Babhangawan and Kedarpura Parbhu Singh's heirs had no right to exclude Ghinnu Singh's heirs from one-third of the said area inasmuch as one-third of the entire area was settled with Ghinnu Singh at the time of the Decennial Settlement. A reference has been made to a report, dated 1819-20 (Exhibit 75) to show that the 2,000 *bighas* taken possession of by Parbhu Singh's heir covered the entire lands of Babhangawan and Kedarpura barring the lands of 75 *bighas* odd and 33 *bighas* odd which had not diluviated before 1201 and continued to be in possession of Parbhu Singh. This argument is based upon the boundaries of 2,000 *bighas* (in particular the northern boundary) of the diluviated lands given in the said report (Exhibit U) which mentions Akhilpur and *Mauza* Khas as being to the north of the newly formed lands. The map showing the measurements and situation of the said 2,000 *bighas* has not been produced. We have looked into the maps carefully of the Revenue Survey of *Mauza* Babhangawan Kedarpura and the adjoining villages, particularly the southern villages. The northern boundary given in the *katfiyat* does not necessarily cover all the lands of Babhangawan and Kedarpura. The area 2,000 *bighas* in question is far in excess of the area of Babhangawan and Kedarpura found by the Revenue Survey measurement. Therefore, the aforesaid area must include the land of other *Mauzas*, probably to the south of Kedarpura. If so, it is not possible to say how far these lands extended to the south. Therefore, no certain inference can be drawn from the area or the boundary given in the report (Exhibit U) and it cannot with certainty be said that the diluviated lands necessarily covered the lands in dispute. Therefore, the defendants cannot derive any benefit from the fact they were in possession of 2,000 *bighas* of the alluviated lands in 1822. The lands of the *Mauzas* are subject to the action of river Ganges. In fact, the whole tract of lands in the neighbourhood has been subject to the fitful course of the river, particularly the lands to the south of Bhabhangawan and Kedarpura which are described as Chaks or Churs, terms that apply generally to *diara* lands. The lands of the villages in question had all diluviated between 1201 to 1207 just after the Decennial Settlement. Some lands began to appear in 1215 and the alluvion continued

up to 1220 when large quantities of land re-appeared. Nothing is known as to the condition of the lands up to 1840 when the *Thak* and the Revenue Survey took place. There is, however, a note to the effect that it relates to the newly accreted lands of the said *Mauzas*. The Settlement Register (Exhibit 13) of 1240 *Fasli* (1841-42) does not show any decrease in the area settled with Ghinnu Singh on account of the diluvion though it shows the decrease in the annual *jama* payable. The area there recorded is 1161 *bighas* 8 *kathas*, that is, nearly one-third of the entire area of the two *Mauzas*

The question then is whether Ghinnu Singh's taking remission of the revenue amounts to an abandonment of the lands by him. No authority exactly applicable to the present case has been cited There are some cases relating to the effect of submersion of *raiyati* lands and non-payment of rent but none with respect to the effect of remission of revenue payable to Government. In *Hemnath Dutt* v. *Ashgur Sindar* (9), the view was expressed that the taking of remission of rent after submersion with respect to the diluviated lands constitute abandonment of the holding and the tenant will not be entitled to the lands on re-formation in suit; so also in *Saligram Singh* v. *Puluk Pandey* (10). This was a decision based under section 6 of Act VIII of 1869 which requires that a *raiyat* could retain the right of occupancy only so long as he paid rent. As to what would be the effect of abatement of rent in such circumstances under the Bengal Tenancy Act was left open. The view, however, was not accepted by the Privy Council in *Arun Chandra Singh* v. *Kamini Kumar* (11), which also was a case under the Bengal Act VIII of 1869. There it was held that the abatement in itself of rent will not entail forfeiture of the tenancy. To the same effect was the decision of the Allahabad High Court in *Mazhar Rai* v. *Ramgat Singh* (12). Therefore, so far as the tenancy land is concerned, the taking of abatemet of rent will not necessarily cause an abandonment of the lands. As to the effect of obtaining abatement of revenue there is no clear decision. On the principle enunciated in the above cases and analogy, the abatement of revenue will not cause forfeiture of the lands. The observation in the case of *Lopez* v. *Muddun Mohun Thakoor* (13) may be disitinguished on the ground that, as a matter of fact, in that case there was a continued payment of rent during the submertion and hence there was no forfeiture of the lands Similarly in *Nogender Chunder Ghose* v. *Mahomed Esoff* (14), it was not thought necessary to decide the question inasmuch as there was no abatement of revenue. These cases, however, lay down that the question depends upon the intention of the parties. If the circumstances indicate that, in taking abatement of the revenue, there was an intention to abandon the land, then, after re-appearance, the person who took the abatement cannot claim the land as he had already lost all right thereto. Therefore, it is to be judged in the circumstances of this case whether the plaintiffs by taking abatement of the revenue intended to abandon it. The applications of the Ghinnu Singh's heirs after re-appearance claiming one-third share in the lands as a matter of right or payment of revenue clearly indicate that there was no intention to abandon the holding, nor is there any thing on the part of the Government to indicate that the land with respect to which the abatement was allowed was treated as abandoned. The Settlement Register (Exhibit 13) already referred to, as well as other registers, continued to record the area originally settled with Ghinnu Singh as the area appertaining to the Mahal Tauzi No. 3142. When the lands re-appeared and the report was made by Lachhman Singh Kanungo in the year 1817-24 the Government did not take steps to settle the lands and assess revenue thereon.

(9) 4 C. 894; 2 Shome L. R. 142; 2 Ind. Dec. (N. S.) 566.

(10) 6 C. L. J. 149.

(11) 22 Ind. Cas. 317; 19 C. L. J. 272; 18 C. W. N. 369; (1914) M. W. N. 175; 15 M. L. T. 182 6 M. L. J. 251; 12 A. L. J. 243; 16 Bom. L. R. 231; 41 C. 683; 41 I. A. 32 (P. C.).

(12) 18 A. 290; A. W. N. (1896) 56; 8 Ind. Dec. (N. S.) 899.

(13) 14 W. R. 11; 5 B. L. R. 521; 13 M. I. A. 467; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 R. R. 625 (P. C.).

(14) 10 B. L. R. 406; 18 W. R. 113; 3 Sar. P. C. J. 151 (P. C.).

About that time Regulation II of 1819 relating to resumption and assessment of revenue on excess lands not already settled came into operation; yet no action was taken to resume or assess the additional lands reported by Lachhman Singh. No action up till now has been taken by Government under Act IX of 1847, even after the Revenue Survey of 1843, or after the Diara Survey of 1863-64, to assess the revenue over the lands and to treat them as lands in addition to what was originally settled. It is now a settled law that Act IX of 1847 will only apply to lands which were not covered by the original Decennial and Permanent Settlements *vide Secretary of State for India in Council* v. *Fahamidannissa Begum* (15). If these lands were not included in the Permanent Settlement as is contended for by Mr. Hasan Imam, certainly Government would have taken action to treat them as additional lands liable to be settled anew. The Government did not do so. Therefore, they were treated as lands covered by the original Settlement, and hence the remission did not cause any abandonment in itself and consequently did not entail forfeiture of the lands if they were originally included in the Settlement of Ghinnu Singh. It is, however, said that the Decennial Settlement of 1793 was superseded after ten years by the Permanent Settlement, and soon after the expiry of the Decennial Settlement the remission was allowed, and only 33 *bighas* odd were treated as part of the lands settled with Ghinnu Singh in 1801.

The Decennial Settlement became *ipso facto* permanent after the expiry of the term in 1206 (1799). Sections 1 and 2 of Regulation I of 1793 declared that the Settlements made in 1790 became permanent by themselves without any further confirmation. Therefore, the Permanent Settlement does not date from the expiry of the Decennial Settlement in 1799, but from the time when the Decennial Settlement was made in 1790. The abatement was, therefore, made after the Permanent Settlement had been concluded. The abatement was, as a matter of fact, allowed in 1208 (1901). Two years after the expiry of the Decennial Settlement in 1206 (1799), the abatement was allowed under the Regulations with respect to the *jama* settled by the Permanent Settlement after measurement under the authority of the Board of Revenue and the Governor-General in Council. The Regulations do not say that the abatement will necessarily cause the abandonment of the land. Therefore, the abatement in the present case did not entail forfeiture of the lands settled originally with Ghinnu Singh, and the plaintiffs' title to the lands subsisted all along.

The question then arises whether their title was extinguished by loss of the possession over the lands in suit. The question of adverse possession has not been raised in this case and from the nature of the lands it is not possible to hold that the defendants were in possession of the identical lands for a continuous period of 12 years at any time when the lands were above water. The evidence of possession offered by the defendants has been disbelieved by the Court below. The demarcation proceedings of 1796-1901 indicate that very small quantity of lands, almost negligible, had come out of water and both parties were asserting their right to the lands in question. If the defendants were trespassers to the extent of one-third of the lands of the village they must prove their possession openly and exclusively and adversely to the knowledge of the plaintiffs with respect to the particular lands in question in order to acquire right by prescription. This has not been attempted to be done in this case nor is this a case of adverse possession. The entire lands of the *Mauzas* were again under water from 1892 to 1909 and small quantities of lands began to appear in 1909, about 100 *bighas*, with some negligible quantity in 1906 with respect to which the demarcation proceedings took place. But from 1909 the parties are fighting for possession and ultimately there were proceedings under section 145 of the Criminal Procedure Code. Therefore, nobody can be said to be in peaceful possession of the lands so as to acquire title by prescription as against the rightful owner. On the other hand, the plaintiffs have given evidence in the case of exercising their right of possession over such

(15) 17 I. A. 40; 17 C. 590; 5 Sar. P. C. J. 391; 8 Ind. Dec. (N. S.) 933 (P. C.).

portions of the lands as come out of water. Their evidence, though it may not be sufficient for the purpose of giving them a prescriptive right, is sufficient for the purpose of preserving their right based upon their undoubted title. It is not possible to disbelieve all the evidence of possession given by the plaintiffs in the case though it may admit of some criticism. There are rent-decrees of Courts (Exhibits 25 to 32) the villages papers, etc. Considering all this evidence it cannot be said that they have not exercised right of possession which the peculiar nature of the lands in this particular case admit of. They have, therefore, subsisting right and this is sufficient for them to claim recovery of the land in question based on title. The appeal before us was argued entirely upon the footing that the case depends entirely upon title, and not on prescription, and if the plaintiffs proved the title they are entitled to succeed. This is also the view of the Court below. In the very beginning of its judgment, while discussing Issues Nos. 6 and 7, the Court below says, that "the plaintiffs will succeed if they prove title to the lands in dispute and they will fail on their failure to prove the title." The plaintiffs have, no doubt, failed to prove title to the entire *Mauza* Babhangawan but they have succeeded in proving their title to the one-third land of the said *mauza*.

Therefore, the decree of the Court below must be vacated. In lieu thereof a decree should be passed in favour of the plaintiffs declaring their title with respect to one-third of 771 acres 1 rood 37 poles shown in the Revenue Survey as *Mauza* "Babhangawan" barring 33 *bighas* 3 *kathas* with respect to what the Court has already given the plaintiffs a decree. The plaintiffs will be awarded possession over the aforesaid area (771 acres 2 rood 37 poles minus 33 *bighas* 3 *kathas*) with mesne profits to be determined by the lower Court from 1320 until delivery of possession of three years from this date, whichever is earlier. There will be no mesne profits with respect to 33 *bighas* 3 *kathas* which have already been declared by the Court below to be in their possession.

As the plaintiffs have succeeded to one-third of their claim, they are entitled to costs in proportion to the claim decreed throughout. The appeal and the suit are accordingly decreed to the extent indicated above.

Ross, J.—The plaintiffs are the owners of an estate, *Mahal* Raipatti, bearing *Tauzi* No. 3142 in the District of Saran, and the principal defendant is the owner of the adjoining estate, also called *Mahal* Raipatti, bearing *Tauzi* No. 3143. In the former estate there are two *khatas*, the *ijmali khata* and Khata No. 1. In 1883 the former was sold for arrears of Government revenue and was purchased by five persons whose successors-in-interests are plaintiffs Nos. 1 to 11. The Khata No. 1 was also sold for arrears of Government revenue and eventually came to the persons represented by plaintiffs Nos. 12 to 15 by private purchase from the auction-purchaser. Defendant No. 1 purchased the estate bearing *Tauzi* No. 3143 privately from defendants Nos. 2 and 3, who, through their *farzidar* Gopal Das, had purchased it at a sale for arrears of Government revenue. Defendants Nos. 4 and 5 represent the lessee of the property defendants Nos. 6 to 9 belong to the family of defendant No. 1 and the remaining defendants are *kastkars* and tenants, except defendant No. 24, a *farzidar* of one of the plaintiffs, Bhagwat Singh.

The subject-matter of this litigation is 771 acres 2 roods 37 poles of land, being *Mauza* Babhangawan in *Mahal* Raipatti. The plaintiffs allege that the original number of their *mahal* was 82 and this subsequently became 114, 2007 and lastly 3142. The corresponding numbers of the defendants' estate were 84, 116, 2009 and 3143. In 1843 the two *mahals* were first measured systematically in the Revenue Survey. *Mauza* Babhangawan is situated within the plaintiffs' *Mahal* Raipatti and bears No. 53 of the Revenue Survey and another village Kedarpura Babhangawan, the Revenue Survey number of which is 179 and the area 267 acres 1 rood and 3 poles is situated in the defendants' *mahals*. These are two distinct *Mauzas*. The land being situated near the river Ganges is subject to diluvion and alluvion and on its last re-appearance from the river there was criminal litigation over it. Eventually, in a proceeding under section 145 of the Criminal Procedure Code,

possession was awarded to the defendants. The plaintiffs, therefore, seek a declaration of their title to this village and possession and mesne profits.

The defendant No. 1 is the contesting defendant. In the written statement it is alleged that, at the time of the Permanent Settlement of 1793, the entire *Mahal* Raipatti under two *Tauzi* numbers, namely, Nos. 3143 and 142 was settled with Parbhu Singh and Ghinnu Singh in the proportion of Nos. 2 to 1, the *sadar jama* payable by the former being Rs. 6,953 and that payable by the latter Rs. 2,405. One of the villages comprised in the *mahal* was Babhangawan Kedarpura and this village was settled with these two persons in the same proportion, the *sadr jama* of Parbhu Singh being Rs. 1,151 and that of Ghinnu Singh Rs. 561. The village was known indifferently as Babhangawan Kedarpura or Kedarpura Babhangawan or Babhangawan only. The area was 3482 *bighas* of which 2321 *bighas* went to Parbhu Singh and 1161 *bighas* to Ghinnu Singh. In the year 1800 the village was washed away. A measurement was made and it was found that 75 *bighas* remained in Parbhu Singh's share and 33 *bighas* and 3 *kathas* in Ghinnu Singh's. The *sadr jama* of the former was not reduced but a reduction of Rs. 347 was made in Ghinnu Singh's assessment. Since then Government Revenue on 33 *bighas* 3 *kathas* only has been paid and the plaintiffs are not entitled to more land than this. It is further pleaded that the Revenue Survey map of 1843 and the Gangetic Diara Survey map of 1864 were wrongly prepared and that the possession of the plaintiffs and their predecessors had never been according to these maps and that there is no separate village Kedarpura.

The principal issues in the case and the only issues debated in appeal are issues Nos. 6 and 7. No. 6. "Have the plaintiffs any title to the disputed land?" and No. 7, "Whether the disputed property, namely, the lands measuring 771 acres 2 roods 37 poles named as village Babhangawan appertain to the plaintiffs' *Mahal* Raipatti, *Tauzi* No. 3142 or to *Mahal* Raipatti, Tauzi No. 3143?" The learned Subordinate Judge decided these issues against the plaintiffs and they have, therefore, brought this appeal.

It will be convenient, in the first place, to state briefly the principal dates connected with the diluvion and alluvion of the lands in suit. From Exhibits 71, 72 and N (2) it appears that in 1794 diluvion began and by 1801 or 1802 it was complete except for 75 *bighas* 2 *kathas* in the share of Parbhu Singh and 33 *bighas* 3 *kathas* in the share of Ghinnu Singh. From Exhibit N (1) it appears that alluvion began in 1808. By 1817 there were 1000 *bighas* of cultivable land (Exhibit N (2) and by 1819 2000 *bighas* had appeared. From the *Thak* and Revenue Survey maps of 1843 it will be seen that all the land was above water at that time. Diluvion seems to have begun again about 1887, as appears from the evidence of defence witness Chhabila Pandey, and was complete before 1896 when re-formation began. By 1903 about 55 *bighas* of cultivable land and by 1912, 932 *bighas* had appeared (Exhibits 37 (A) and 37 (B).

The evidence may be conveniently considered in four parts—(1) down to the Parmanent Settlement; (2) from 1801 to 1842 (3) the Revenue Survey maps of 1843 and the Collector's Registers connected therewith; and (4) the documents of subsequent years.

(1) The history of this property begins with Exhibit Z (75) a thirty years *khatian* from 1761 to 1790 which was prepared in the year 1817. It appears from this document that the *Taluka* was originally called Taluka Jungle Singh. In this *Taluka* were three villages Raipatti, Kedarpura and Babhangawan. The recorded area of Kedarpura was 3488 *bighas* 14½ *kathas*. The area of Babhangawan is recorded as included in Kedarpura and the *sadr jama* of both villages is included in that of the *Taluka*. The *sadr jama* in 1789 was Rs. 9,798. In 1790, when the Decennial Settlement was made, separate *jamas* are recorded for Raipatti Rs. 933-2-0 and for Kedarpura Rs. 1,712-1-6; while, against Babhangawan, is the note "with Kedarpura and Parbhu Singh." It appears, further, from this document that in 1776 the estate was in charge of Parbhu Singh and Shewan Singh and that at the time of the Decennial Settlement of 1790 it was settled with Parbhu Singh and Ghinnu Singh separately according to their shares. Next come

the *Kabuliyats* of 1790 by which Parbhu Singh and Ghinnu Singh took Settlement of *Mahal* Raipatti (Exhibits L (1) and L (2)). In Parbhu Singh's *Kabuliyat* executed on the 16th December 1790 occurs, among sixteen villages, the name of Babhan gawan Kedarpura with a *sadr jama* of Rs. 1,151 while in the *Kabuliyat* of Ghinnu Singh "respecting the share of Shewan Singh" executed on the 24th December 1790 appears, among eight villages, the name of Kedrarpura Babhangawan the *sadr jama* of which is ascertained from other evidence to be Rs. 561-1-10 (Exhibit O).

Exhibit Y (137) is a *jamabandi* for 1800 to 1801 submitted by Ghinnu Singh. This shows the area of Babhangawan Kedarpura, as recorded in the register of 1790, to be 1163 *bighas* of which only 33 *bighas* 3 *kathas* were in existence in the year 1800. The *jama* is said to have fallen from Rs. 561-1-2 to 519-2-5. On the 2nd of December 1799 Parbhu Singh also applied for reduction of his assessment (Exhibit 70) and he renewed his application in 1801 (Exhibit 71). Exhibit 72 is a document of 1830 which contains the measurements of *Mauza*, Raipatti and other *Mauzas* constituting the Taluka of Chaudhury Parbhu Singh and the Taluka of Ghinnu Singh in 1800. This is an extremely important document and it shows that in Parbhu Singh's estate there were 75 *bighas* and 2 *kathas* made up of 44 *bighas* 16 *kathas* in Babhangawan and 30 *bighas* and 6 *kathas* in Kedarpura, while, in Ghinnu Singh's estate, there were 33 *bighas* 3 *kathas* made up of 18 *bighas* in Babhangawan and 15 *bighas* 3 *kathas* in Kedarpura. This document shows not only the lands that remained after diluvion but also the fact that lands situated in each of the villages appertained to the estates of both Parbhu Singh and Ghinnu Singh. The Quinquennial Register from 1790 to 1848 (Exhibit U) shows that the Government revenue assessed on Ghinnu Singh's estate, which is there shown as bearing No. 82, was reduced from Rs. 2,405-1-2 to Rs. 1,901-12-1. It further shows that in 1801 under the orders of the Governor-General in Council and the authorities of the Board, dated the 6th March 1801, this remission was made and the doal of the *Mahal* after deducting *Sikka* Rs. 503-5-9 from what was settled in 1790 on account of diluvion, was written in the name of Ghinnu Singh. The register also shows the estate of Parbhu Singh as bearing No. 84 but the revenue settled in 1790 remained unchanged in his case. The same facts appear in Exhibit O, a *Kaifiat* of the diluviated lands, dated the 31st March 1844, with the additional fact that an Amin was sent in 1800 to measure the diluviated lands, after which the revenue of Ghinnu Singh's estate was reduced by Rs. 347-2-9 in the case of Babhangawan Kedarpura and another doal at a reduced *jama* was taken from him in 1801. It is further stated in this document that the *jama* of Parbhu Singh was slightly reduced on account of diluvion, but this statement is not supported by the other evidence in the case which is to the effect that his application for reduction was refused.

(2) Exhibit N (2) is a report of Lachhman Singh Kanungo, made in 1817 stating that Babhangawan Kedarpura had the reformed and that about 1000 *bighas* of land as pointed out by Ghinnu Singh was cultivable and fit for settlement by the Government, but it was in the occupation of the heirs of Parbhu Singh. Exhibit Z (140) is a further report made in 1819 which states that about 2000 *bighas* of land had reformed in Kedarpura and Babhangawan and that the proceeds thereof were appropriated by the heirs of Parbhu Singh; that offers of Rs. 2,000 were being made for this land and the accreted land of Kasimpur This 2000 *bighas* appears also in Exhibit 75, a report of alluviated lands made in 1819-1820. It is said in this document that two-thirds belong to the heirs of Parbhu Singh and one-third to Banwari Singh, heir of Ghinnu Singh, but that the heirs of Parbhu Singh are in possession of the entirety. One of the difficulties in the case is to reconcile the *Kitabi* area of Babhangawan Kedarpura, 3488 *bighas*, with the area found at the Revenue Survey which is 771 plus 267 acres. A suggestion made by the learned Counsel for the plaintiffs in connection with Exhibit 75 is that the 2000 *bighas* therein shown against Kedarpura Babhangawan is the total of the areas of Kashchak, Harshamchak, Bishunpur, Birbhanchak, Jafarpur Nisf, Kedarpura and the

southern strip of Babhangawan. On this theory, these areas have been entered twice over in the report under different names. The large area may possibly be explained as including Kasimpur (625 *bighas*), Birbhanchak (181 *bighas*) Harshampur (204 *bighas*) and Bisnunpur Arjun (500 *bighas*) all of which were under water at the time of Decennial Settlement. These areas added to the 2,000 *bighas* of Babhangawan Kedarpura would make up approximately the original Kitabi area. This, however, is a matter of speculation. In 1822 the Kanungo submitted a further report (Exhibit N) in which he said that Banwari Singh was present to execute a *Kabuliyat* recording doal at the original *jama* for the alluviated land which was still to be settled. No steps were apparently taken on the Kanungo's report and in 1824 Banwari Singh presented a petition to the Government in which he alleged that one-third share in Kedarpura and Babhangawan was his property inherited from his father. With regard to the diluvion he says that 99 *bighas* of land remained in Babhangawan and 45 *bighas* in Kedarpura of which 15 *bighas* in Kedarpura were settled in his name and 30 *bighas* in the name of heirs of Parbhu Singh. He goes on to say that various applications were made for Settlement of the alluviated land and he renewed his application to the Government praying for *patta* for one-third on receipt of payment of the Government revenue which might be settled there on. This petition was sent by the Board of Revenue to the Collector for report. He reported the facts about the reduction of Ghinnu Singh's assessment on account of diluvion and denied that any application for Settlement had been made by Banwari Singh. The Collector's opinion was that if Banwari Singh asserted that the heirs of Parbhu Singh had dispossessed him he should go to the Civil Court. Again, in 1830 (Exhibit 72) the Kanungo suggested that one-third of the land in Kedarpura and Babhangawan should be attached and made over to Banwari Singh so that he might pay the Government revenue Rs. 500 which had been remitted when the diluvion took place. But no action seems to have been taken either by the Government to settle the alluviated land or by Banwari Singh to assert his title in the Civil Court. In Exhibit Z (139) a *rubakari* of the Collector made in a partition case in 1840, the statement is repeated that "after the deduction of Rs. 503-5-9 from the *jama* of Ghinnu Singh a doal showing the rent from 1800 in respect of the balance of the *jama* amounting to Rs. 1,901-12-1 was filed on behalf of the *malik*." Exhibit Z (135) is a report of an Amin who, in connection with certain partition proceedings had been deputed to measure Babhangawan and Kedarpura in 1841. The measurement which he proposed to make was resisted by the servants of Hingu Raj Singh, the purchaser at auction-sale of the interest of Banwari Singh. These persons stated that the lands of *Mauza* Babhangawan and Kedarpura, which formed the share of Kanhaya Singh, Chakurdhari Singh and Utim Narain Singh and the share of Ghinnu Singh sold at auction, belonging to their master, had been joint and had not been partitioned and that their master ought to get 5 annas 1 pice and odd out of the *Mauza* as his purchased share and, therefore, the entire *Mauza* should be measured and one-third share separated out. This the Kanungo refused to do and he refers to the evidence given before him by the tenants of the village that the doal of the *Taluka* Raipatti belonging to Kanhya Singh and others had been separated from that of the *Taluka* belonging to Ghinnu Singh since 1790 when the land was settled and that the former share had no connection with the latter and that a piece of *kasht* land measuring 29 *bighas* 12 *kathas* 10 *dhurs*, the subject matter of the auction-sale, had for long (that is since 1790) been in possession of Ghinnu Singh. The Kanungo pointed out that the doals of the two *Talukas* were separate and the lands were also separate and that as he had been deputed to measure the *Taluka*; belonging to Ghinnu Singh only he could not agree with the proposal that he should measure the entire village. Exhibits T (1) and 13 are extracts from the Settlement Register of 1841-1842. These show one of the villages of *Mahal* No. 84 to be Babhangawan Kedarpura with a *Kitabi* area of 2,320 *bighas* 5 *kathas* and 10 *dhurs* and a *jama* of Rs. 1,151 which is said to have been sanctioned in 1205 (1798). This is the estate belonging to the defendant.

It also shows as *Mahal* No. 82, Babhangawan Kedarpura, whose recorded area is still given as 1,161 *bighas* 8 *kathas*. The *jama* is not shown against this village, but it is stated that the *jama* of the *mahal* was fixed as sanctioned in 1208 (1801). This concludes the evidence relating to the period from 1801 to 1842.

(3) The *Thak* map of Kedarpura is Exhibit 79 and that of Babhangawan is Exhibit S. These maps are dated, respectively, the 3rd and 5th of January 1843. Exhibit S shows that the demarcation of the boundary of the *diara* lands of Babhangawan was made, as pointed out by Utim Rai and Patori Pande, cultivators of the said village in the presence of the holders of the surrounding land. There are two signatures of "share-holding proprietors of Babhangawan," namely, Lachmi Narain and Gobind Singh. Lachmi Narain is a nephew of Parbhu Singh and Gobind Singh was a purchaser of interests in certain villages in *Mahal* Raipatti *Tauzi* No. 3142 but not in *Mauza* Babhangawan of that *mahal* (see Exhibits Z (130) Z (130) and Z (132). The inference to be drawn from this fact is that the *Thak* of Babhangawan included lands which were outside the holding of the owners of *Tauzi* No. 3142. The Revenue Survey maps follow and they show the areas of the two villages Babhangawan and Kedarpura Babhangawan as 771 acres 2 roods and 37 poles and 267 acres 1 rood and 3 poles respectively. The learned Counsel for the plaintiffs relies upon these maps and the learned Counsel for the defence has no criticism to offer on them. He also accepts them as correct. With these maps are connected the Collector's registers (Exhibits 16, 18, 14, 17, 63A, 63B, 64B and 64E) Exhibits 16 and 18 are *Mauzawar* Registers. Exhibit 16 shows Babhangawan Kedarpura with an area of 771 acres 2 roods and 37 poles recorded in statement No. 53 of the book of the Survey Office, that is, the Revenue Survey map of Babhangawan. The name of the *mahal* as given is Raipatti and its number is 114. Exhibit 18 is the succeeding entry in the *Mauzawar* register. The name of the *Mauza* is the same, Babhangawan Kedarpura, the area in this case 267 acres 1 rood and 3 poles, is recorded in statement No. 179 of the Book of the Survey Office, that is, the Revenue Survey map of Kedarpura Babhangawan. The number of the *Mahal* is No. 116. The *Mahalwar* Registers Exhibits 14 and 17 are in agreement with the *Mauzawar* Register. They further show that in the locality the lands of Babhangawan and Kedarpura are separate. Exhibits 63-A and 63-B re-produce the extracts already given in Exhibits 16 and 18. It is an unexplained fact that, whereas in the case of other villages which are common to both the estates, the *Mauzawar* Register gives both *Mahal* Nos. 114 and 116 against the names of the villages, in the case of Babhangawan Kedarpura, No. 116 only is given against the area 267 acres and the No. 114 only against the area of 771 acres. Exhibits 64-B and 64-E are also extracts from the *Mauzawar* Register which add nothing further. It is on these registers, together with the Revenue Survey map, that the plaintiffs' claim to the whole of *Mauza* Babhangawan principally depends.

(4) The evidence of the last period is of less importance. There are mutation registers, as, for example, Exhibit Z (157). These, generally speaking, are of no importance. One interesting fact is to be found from Exhibit Z (157), namely, that the right, title and interest of Banwari Singh in Babhangawan Kedarpura was sold in 1839 for Rs. 500, while in 1842 the right, title and interest of Kanhaya Singh and Utim Narain Singh in Babhangawan Kedarpura fetched Rs. 2,000. Exhibit Z (70) an application for mutation of names made in 1877 in respect of *Tauzi* No. 2007, that is the plaintiffs' estate, shows that the area of 8 annas share in Babhangawan Kedarpura was 16 *bighas* 1 *katha* and 1 *dhur*. This looks like a reproduction of the area originally settled after the first diluvion and it cannot be attributed to a further diluvion as that did not begin until 1887. The same area appears in Exhibit Z (68) a *wasil baki* paper, the date of which is not given but which was filed before the 30th June 1885. Learned Counsel for the plaintiffs suggests that the area given in Exhibit 70 was given under a misapprehension by the Manager of the Court of Wards who made the application for mutation. That no strong inference can be drawn from it is clear from

the fact that in Exhibit 36, an application for partition made in 1880, the area of Babhangawan Kedarpura is shown as 663 *bighas* 13 *kathas* 6½ *dhurs*. Exhibit C is a lease of the 8-annas share of Babhangawan in *Tauzi* No. 3142 and other villages, executed on the 27th January 1898. The annual gross *jama* of the share in Babhangawan is there recorded as Rs 52-9-3. The Road Cess Returns filed on behalf of both parties do not seem to me to yeild any inference, Exhibit Z (71) the return of *Tauzi* No. 3142 shows the area of Babhangawan as 16 *bighas* 12 *kathas* and 12½ *dhurs* but this may have been after the second diluvion had taken place. Similarly, nothing can be inferred from the defendants' Road-Cess Returns. In 1896 an application was made for the demarcation of Babhangawan in *Tauzi* No. 3142 a portion of which had re-appeared after diluvion. Exhibit Z (129) is a report of the Kanungo in this case. He says that village Babhangawan comprises two *Tauzi* numbers and there are two sets of proprietors both of whom have applied for demarcation. The Deputy Collector in his report to the Collector refers to the *Mahalwar* Registers and to the Revenue Survey maps and says that it would appear that Babhangawan, although shown in the *Mahalwar* Register as appertaining to *Tauzi* No. 3142, has apparently been demarcated as appertaining to *Tauzi* No. 3143 without any objection and the proceedings have been confirmed without any objection from the proprietors of the adjacent estates.

The other documents are not of much importance. There are some rent decrees filed by the plaintiffs but as the areas included in these decrees amount to less than 331 *bighas* they are not inconsistent with the case of the defence. There are also a number of *zarpeshgi* leases from 1877 to 1891 filed by the defence. These are all produced for the same purpose, namely, to show that they deal with lands described as lying in *Mauza* Babhangawan within the defendants' *Tauzi* No. 2009 or 3143 as the case may be. This completes the principal documentary evidence. The oral evidence is of little importance. On the plaintiffs' side it is directed to prove that they have been in possession within 12 years of the date of suit. The only comment that the learned Counsel for the defendants had to make on this evidence was that, even if possession was proved, it would be of no assistance to the plaintiffs if their title was not established. Neither party has pleaded title by adverse possession, the case of the defendants' being that they hold by superior title, namely, Settlement from the Government. In paragraph 15 of the written statement it is said that the defendants are entitled to retain possession of the same quantity and the same land that had been settled with Parbhu Singh; the land in dispute forms part of the land settled and owned in *Mauza* Babhangawan, Tauzi No. 3143.

The main contention on this evidence by the respondents is, that the Permanent Settlement with Ghunnu Singh was made in 1801 and was in respect of only 33 *bighas* 3 *kathas* in Babhangawan Kedarpura. Learned Counsel argues that Regulation I of 1793 did not of its own force convert the Decennial into a Permanent Settlement and that the Regulation must be read with Regulation VIII of 1793 one of the provisions of which relates to reduction in assessment. He contends that the Settlement with Ghunnu Singh made in 1790 became parmanent subject to any alteration made by reduction in the assessment and as the *jama* was finally settled at a reduced rate in respect of reduced area in 1208 (1801) it must be taken that this was the Settlement which was made parmanent. But the learned Counsel for the appellants points out that the Decennial Settlement expired in 1206 and that the diluvion took place after this and that the Settlement became permanent at least from 1207, whereas, the reduction in the assessment did not take place until 1208, that is, after the Settlement became permanent. This contention is sound as far as it goes. But in my opinion the effect of Regulation I of 1793 was to convert the then Current Decennial Settlement into a Permanent Settlement subject to the possibility of reduction in the assessment. The question still remains as to what the effect of the remission of revenue was. The law on the subject is contained in *Mazhar Rai* v. *Ramgat Singh* (12) and *Arun Chandra Singh* v. *Kamini Kumar* (11), which establish this, that mere non-payment of rent

or claiming or accepting remission of rent is not in itself proof of abandonment and that, until it can be established that the holder of the tenure has abandoned his right to the submerged lands, it remains intact. The question is one of intention to be determined by the circumstances of each case. Now, in the present case the Government does not claim the land as having been abandoned, nor does the defendant claim that the land was abandoned by Ghinnu Singh and settled with him. Therefore, it is reasonably certain that there is no case of abandonment arising in the circumstances of the present suit. Moreover, I consider it fairly clear from the terms of the various reports of Lachhman Singh Kanungo and from the petition of Banwari Singh that, so far as Ghinnu Singh and his immediate successor were concerned, there was no intention to abandon the land; but, on the contrary, an assertion of a continuing title to one-third of the village. Nor did the Government ever treat the land as abandoned. It was never settled with any one else. In Exhibit 13 the area of the plaintiffs' estate in Babhangawan Kedarpura is still shown as 1,161 *bighas* although the *jama* is said to have been settled in 1208 that is, the reduced *jama*. And all the Government Registers which have been referred to above show that not only one-third but the entirety of Babhangawan was treated as the plaintiffs' estate. It is clear, therefore, on the documents, that the plaintiffs have title to one-third of Babhangawan. But their claim to the whole village cannot succeed. None of the earlier documents supports it; on the contrary, they contradict it. They show clearly (*a*) that Ghinnu Singh had land not exclusively in Babhangawan but in Babhangawan and Kedarpura; (*b*) that Parbhu Singh had land not exclusively in Kedarpura but in Kedarpura and Babhangawan, and (*c*) that the shares of Ghinnu Singh and Parbhu Singh in the lands of both villages were one-third and two-thirds. The present litigation is confined to Babhangawan alone and, therefore, no question of the plaintiffs' right in Kedarpura arises. But the claim to the whole of Babhangawan rests ultimately on the *Mauzawar* Registers alone. These are wholly unexplained. They are inconsistent with all the earlier history and evidence in the case and cannot be accepted as good evidence of plaintiffs' title to the entirety of Babhangawan.

One more argument on behalf of the plaintiffs-appellants remains to be considered. Reference was made to the case of *Khemesh Chandra Rakshit* v. *Abdul Hamid* (16), and it was contended that, no matter to whom the land in suit belonged, the estate defaulted and the plaintiffs purchased it and became the Settlement-holders from the Government in respect of that property. The plaintiffs, it is argued, are not the successors-in-interest of the defaulting proprietors but the purchasers of the estate shown in the Collector's Register. A sufficient answer to this argument is to be found in the fact that plaintiffs Nos. 1 to 11 purchased the *ijmali* account subject to encumbrances and that the other plaintiffs purchased Khata No. 1 also subject to enumbrances. What passed to the purchaser was not the estate but the right, title and interest of the defaulting proprietors. The plaintiffs' title, therefore, cannot be improved by the fact that they purchased at revenue-sale.

The result is that the appeal will be decreed in part in the terms proposed by my learned brother.

K. S. D. *Appeal partly allowed.*

(16) 29 Ind. Cas. 350; 43 C. 461; 19 C. W. N 782.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1243 OF 1921.

July 31, 1923.

Present:—Mr. Justice Das and Mr. Justice Ross.

Musammat PHUL KUER—DEFENDANT—APPELLANT

versus

RAMBHANJAN SINGH—PLAINTIFF AND *Musammat* DHAKO KOER AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (1) (g)—Vendor of lease-hold—Liability to pay rent up to date of sale.

PHUL KUER *v.* RAMBHANJAN SINGH.

A vendor of lease-hold property is bound under section 55 (1) (*g*) of the Transfer of Property Act to pay the rent accrued due up to the date of sale where the rent became due during the tenancy of the vendor or of a person through whom he claimed otherwise than by purchase.

Appeal from a decision of the Subordinate Judge, Gaya, dated the 21st June 1921, reversing that of the Munsif, Aurangabad dated the 30th September 1920.

Mr. *L. N. Singh*, for the Appellant.

Mr. *Brij Keshore Prasad*, for the Respondents.

JUDGMENT.

Ross, J.—This is an appeal by defendant No. 1 against the decree of the Subordinate Judge of Gaya reversing the decision of the Munsif of Aurangabad and decreeing the plaintiff's suit.

Rani Chandradeo Kuar was the proprietor of *Mauza* Kesour, she leased the property in *zurpeshgi* to Lohari Mal who died leaving a widow, *Musammat* Dhako Kuar defendant No. 2, a daughter *Musammat* Phul Kuar, defendant No. 1, and two sons Chuni Lal and Muni Lal, defendants Nos. 3 and 4. Dhako Kuar made a gift of 8-annas share in the *zarpeshgi* lease to defendant No. 1 and of other 8-annas share to defendants Nos. 3 and 4 at some time not specified. On the 7th December 1916, corresponding to *Aghan* 1324, defendant No. 1 sold her 8-annas interest to the plaintiff. Thereafter, Rani Chandradeo Kuar brought a suit for arrears of rent for the years 1322 and 1323, impleading as defendant only *Musammat* Dhako Kuar. There was an attachment before judgment of the landlord's portion of the standing crop and in order to release the crop from attachment the plaintiff paid Rs. 511-4-6 to the Rani on the 23rd January 1917. The present suit was brought against the defendant No. 1 for the recovery of this sum with interest. The Munsif dismissed the suit on this ground among others that there was no allegation in the plaint and no evidence on the plaintiff's side, that the defendant No. 1 was in possession of the lease-hold in the years 1322 and 1323 for the rent of which the suit was brought by Rani Chandradeo Kuar. His decision was reversed by the learned Subordinate Judge, and the only ground taken in second appeal is that, in the absence of any allegation or proof that defendant No. 1 was in possession of the lease-hold in 1322, and 1323 and, therefore, liable for the rent of these years, the plaintiff was not entitled to recover from her.

The learned Subordinate Judge has relied upon the provisions of section 55 (1) (*g*) of the Transfer of Property Act which requires the seller to pay all public charges and rent accrued due in respect of the property up to the date of sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing. He infers from this provision that defendant No. 1 was bound to pay the arrears of rent due up to the end of 1323 irrespective of the period of her actual possession. This provision of the Transfer of Property Act implies a covenant against incumbrances and the question for decision is, whether the covenant extends only to such incumbrances as have been created by the vendor or to all incumbrances on the property at the time of sale. It is only on the later interpretation that the plaintiff can succeed, because there is nothing to show how long the defendant No. 1 was the owner of the property or how much rent, if any, accrued due during the period of her ownership.

The defendant No. 1 obtained the property by gift from her mother Dhako, who in turn inherited it from her husband Lahori Mal. The rent certainly accrued due during the tenancy of one or other of these persons. The incumbrance, therefore, was created either by the plaintiff's vendor or by a person through whom she claimed otherwise than by purchase. Even if the covenant against incumbrances implied by section 55 (1) (*g*) of the Transfer of Property Act were limited to the usual conveyancing covenant implied in the Conveyancing Act (44 & 45 Vict. Ch. I). Section 7 (1) and the actual words of the section seem to be wider than this—it must, in any view, cover this charge for rent. The decision of the learned Subordinate Judge is, therefore, correct and the appeal must be dismissed with costs.

Das, J.—I agree.

P. D. & N. H. *Appeal dismissed.*

JOSYULA RAMACHANDRA RAO *In the matter of.*

MADRAS HIGH COURT.

July 24, 1923

Present:—Sir Walter Schwabe, KT., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Krishnan.

In the matter of MR. JOSYULA RAMACHANDRA RAO, SECOND GRADE PLEADER, RAMAGHANDRAPUR.

Legal Practitioners Act (XVIII of 1879), s. 13—Pleader instigating people not to pay taxes and avoid Courts—Misconduct—Disciplinary jurisdiction, exercise of.

A legal practitioner who instigates people not to pay taxes to the Government and to eschew the established Courts of the land is not, so long as he continues to profess and preach those views, a fit person to be entrusted with a part of the administration of justice in the Courts and his conduct is such as calls upon the High Court in the exercise of its disciplinary powers to take action against him under section 13 of the Legal Practitioners Act.

Per *Coutts Trotter, J.*—The last thing the Courts should consider themselves concerned with in the ordinary way is what the political opinions of anybody are, whether they are members of the legal or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, a Pleader who comes to ask for the issue or renewal of a *sanad*, is applying to be treated as a part of the machinery for the maintenance of law and order in the body politic and to take an active part in administering for the other objects of the Crown the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position while at the same time he is saying that law and order should be disobeyed, that taxes are not to be paid and that public offices are to be abandoned in order to paralyse the very life of the body politic. [p. 978, col. 1.]

The District Judge of Godavari having brought to the notice of the High Court in his letter, dated 1st January 1923, that Mr. Josyula Ramachandra Rao, Second Grade Pleader, Ramachandrapur, was committed to prison by the Deputy Magistrate of Peddapur to undergo rigorous imprisonment for a period of one year, in Miscellaneous Case No. 2 of 1922 on his file, for default in complying with an order by the Deputy Magistrate under section 108 *(a)* of the Code of Criminal Procedure the High Court has directed issue of notice to the Pleader under section 13 *(f)* of the Legal Practitioners Act to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court.

The Advocate-General, for the Crown.

Mr. *T. R. Ramachandra Iyer*, for the Vakils Association.

JUDGMENT.

Schwabe, C. J.—In this case a Second Grade Pleader, Josyula Ramachandra Rao, has applied for a renewal of his certificate. The facts stated to us by the District Judge are, that he was convicted for refusing to give security he having been called upon to do so by reason of two speeches said to have been delivered by him in the Godavari District at meetings held about the 5th of April 1921 and on the 28th of January 1922. The effect of these speeches, as proved in evidence—shorthand notes being produced by the Police Officials who heard them—was instigating the people, among other things, not to pay taxes, and in one case not to pay taxes till there had been a meeting of the Congress, the decision of which the respondent apparently advised should guide the population as to whether they should or should not pay taxes to the recognised authorities. It was also alleged that he stated that he objected to the English Courts and the methods of English Courts and recommended the people to eschew those Courts or to go to the Courts set up or to be set up by the said Congress.

It is quite clear that, so long as a man professes views of that kind, and advises the people to act in that way, he is not a fit person to be entrusted with a part of the administration of justice in the existing Courts of this country, and I am quite clear that the making of these speeches is such conduct as calls upon the Court in the exercise of its disciplinary powers to take action.

Mr. Ramachandra Rao comes up before us and puts in a statement denying the accuracy of the reports of the speeches. His denial, however, does not go very far, nor do I think that we can disregard the evidence that was given and accepted in the Court before which the matter came. He expresses no regret for the tone of his speeches and he does not say that he has seen the error of his ways, or that he promises in future, if permitted to practise in the Courts, to conduct himself as a loyal adherent of the Government respon-

sible for those Courts or anything of that kind; and we can only say that, as long as his attitude remains as it is, we cannot permit a *sanad* to be issued to him. It will be open to him on some future occasion, if he is so minded, to attempt to satisfy the Court of a genuine change in the attitude that he has at present adopted and to ask the Court to take a different view hereafter. Of course, nothing that we can say now will in any way fetter the Court which is to deal with such an application if and when it is made.

Coutts Trotter, J.—I am of the same opinion. I want to make it as clear as I can that, speaking for myself, the last thing that I think that we should consider ourselves concerned with in the ordinary way is what the political opinions of anybody are, whether they are members of the legal or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, an applicant, who comes to ask for the issue or renewal of a *sanad*, is applying to be treated as a part of the machinery for the maintenance of law and order in the body politic and to take an active part in administering for the other subjects of the Crown the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position while at the same time he is saying that law and order should be disobeyed, that taxes are not to be paid and that public offices are to be abandoned in order to paralyse the very life of the body politic. I feel assured that this Court could not, without stultifying itself, issue a certificate to a man who with the same breath that he is asking for it cuts himself off and announces his intention to do his best to cut off others from the life of the State.

Krishnan, J.—I entirely agree with the judgments that have been just delivered by the learned Chief Justice and my learned brother Coutts Trotter. I think it is perfectly clear that, so long as the applicant is in the frame of mind which is evidenced by his two speeches Exhibits A and B, it is not possible to give him a *sanad* to practise in Courts. When he changes that frame of mind effectively and makes it clear to this Court that he has done so in a manner which we could rely upon it would be then time to consider whether his *sanad* should be renewed. For the present I agree that our order should be that his *sanad* should not be renewed.

V. N. V. *Sanad refused.*
N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 66 OF 1923.
September 5, 1923.
Present:—Mr. Dalal, J. C.
HAIDER KHAN AND OTHERS—ACCUSED—APPLICANTS
versus
EMPEROR, THROUGH ALAM ALI—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Further enquiry—No fresh material—Magistrate, power of.

A Magistrate has jurisdiction to order a further enquiry under section 437, Criminal Procedure Code, upon the same materials which were before the subordinate Magistrate who tried the case in the first instance.

Queen-Empress v. *Chotu*, 9 A. 52 at p. 59; A. W. N. (1887) 281; 5 Ind. Dec. (N.S.) 465 (F. B.), applied.
Hari Dass Sanyal v. *Sartulla*, 15 C. 608; 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 989 (F. B.) and *Queen-Empress* v. *Balasinnatambi*, 14 M. 334; 1 M. L. J. 343, 2 Weir 557; 5 Ind. Dec. (N. S.) 234 (F. B.), relied upon.

Application against the order of the Deputy Commissioner Sultanpur, dated the 23rd May 1923, reversing that of the Magistrate 1st Class of Sultanpur, dated 4th April 1923.

Mr. *Haider Husain*, for the Applicants.
Mr. *Wasi Hasan*, for Alam Ali.
The Government Pleader, for the Crown.

JUDGMENT.—This is an application in revision from an order passed by the learned District Magistrate of Sultanpur, under section 437 of the Criminal Procedure Code, directing a Subordinate Magistrate to hold further inquiry into the case of the applicants who were discharged by that Magistrate. The applicants Haider Khan, Ali Husain and Zahur-ud-din, were tried on charges under sections 471 and 193, Indian Penal Code, for offences committed in a Revenue Court. Sanction had been given by the Revenue Court for their prosecution. Zahur-ud-

din was owner of two plots of land which he first mortgaged to Wahid Ali and then sold to Ali Husain. Wahid Ali was redeemed by Ali Husain. The complainant Alam Ali pre-empted the sale. The case for the prosecution was that, in order to defeat the pre-emption decree, the three accused persons entered into a conspiracy and Ali Husain leased the plots to Haider Khan. The lease was alleged to be a forgery perpetrated by means of ante-dating the document. It is argued here that the learned District Magistrate did not make a proper use of his discretion in ordering further inquiry. Reference was made to the pronouncement of a Full Bench of the Allahabad High Court in *Queen-Empress* v. *Chotu* (1) that Magistrates should use the powers conferred by section 437 sparingly and with great caution and circumspection, specially in cases where questions involved are mere matters of fact. The learned Counsel argued further that the same consideration should apply as would apply in reference to appeals to this Court from acquittals. Applying these principles, I am of opinion that the learned Magistrate has given sufficient reasons for passing the order which he did. It was held by a Full Bench of the Calcutta High Court in *Hari Dass Sanyal* v. *Saritulla* (2) that a Magistrate has jurisdiction to order a further inquiry upon the same materials which were before the Subordinate Magistrate. This view was followed by a Full Bench of the Madras High Court in *Queen-Empress* v. *Balasinnatambi* (3). In the present case the learned Magistrate has given seven reasons why he considered the inquiry made by the Subordinate Magistrate to be unsatisfactory. The Trial Court has omitted to consider these points and the lower Court was justified in coming to the conclusion that the discharge was improper in consequence. The lower Court has also suggested the directions in which further inquiry is desirable. I am satisfied that the reasons given by the lower Court for further inquiry are valid and refuse to consider the facts of the case at this stage of the proceedings.

I dismiss the application and direct that if any stay order has been issued to the Subordinate Court it shall be withdrawn.

M. D. J. *Application dismissed.*

(1) 9 A. 52 at p. 59; A. W. N. (1873) 281; 5 Ind. Dec. (N. S.) 465 (F. B.).
(2) 15 C. 608; 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 989 (F. B.).
(3) 14 M. 334; 1 M. L. J. 343; 2 Weir 557; 5 Ind. Dec. (N. S.) 234 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 145 OF 1923.
July 13, 1923.
Present:—Mr. Prideaux, A. J. C.
SHAMRAO AND ANOTHER—APPLICANTS
versus
EMPEROR—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 106, 107, 406—Order under section 106—Order under s. 107—Appeal.

Orders under section 106, Criminal Procedure Code, directing security for good behaviour to be given can be appealed from under section 406 of the Code, but no appeal lies in proceedings instituted under section 107 for keeping the peace read with section 118 of the Criminal Procedure Code.

Revision against an order of the District Magistrate, Wardha, in Criminal Case No. 25 of 1923, dated the 7th May 1923.

Mr. *J. K. R. Cama*, K. B., for the Applicants.

ORDER.—The two applicants, Shamrao and Pandurang, have been bound over by the Sub-Divisional Magistrate, Wardha, under section 107, Criminal Procedure Code, to keep the peace for a period of one year and have been ordered to execute a bond each for Rs. 250. The applicants hold a small share in *Mouza* Agargaon. One *Musammat* Kantikabai, the mother in-law of one Gulabrao, holds a 9-annas 6-pies proprietary share in the village. Gulabrao acts as agent of the lady and

manages her estate and is the *lambardar gumashta* and *mukaddam* of the village. The Magistrate finds that there is bitter enmity between the two applicants and Gulabrao. There are two factions in the village and the applicants are trying to collect a share in the cowdung on the village Gothan and also to take metal from a stone quarry in a field belonging to the whole proprietary body. Gulabrao objects and the Magistrate thinks that the disputes between the parties are likely to cause a breach of the peace. He has, therefore, passed the order mentioned at the commencement of this order.

After that order was passed, an appeal was admitted in the Court of the District Magistrate, Wardha, and against the District Magistrate's order refusing to interfere the applicants have filed this application for revision. I treat this application as one for revision of the Sub-Divisional Magistrate's order because, as I shall presently show, the order of the District Magistrate is *ultra vires*.

It is admitted in this Court that, on the evidence on record and the admissions of the two applicants, the Magistrate was justified in binding them over to keep the peace. What applicants really object to is that their opponents in a sister case have been discharged and what they want this Court to do is to cancel that order and bind their opponents also over to keep the peace. This obviously is impossible in the present case. It is not for me to suggest what remedy applicants have in the other case but there is no doubt the Magistrate's order as regards them is correct and I confirm it and dismiss this application for revision.

The Criminal Procedure Code makes a careful distinction between an order directing security to be given for keeping the peace and an order directing security to be given for good behaviour. Orders under the section directing security for good behaviour to be given can be appealed from under section 406, Criminal Procedure Code, while no appeal will lie in proceedings instituted under section 107 for keeping the peace read with section 118, Criminal Procedure Code. The District Magistrate should not, therefore, have entertained the appeal nor disposed of it.

G. R. D.

Application dismissed.

LAHORE HIGH COURT,

CRIMINAL APPEAL NO. 238 OF 1923.

June 5, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Fforde.

ALLU AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 537, scope and applicability of—Criminal trial—Procedure prescribed by Statute not followed—Cross-cases—Prosecution witnesses in each case treated as defence witnesses in the other, legality of—Consent of accused, effect of.

The consent of the accused or his Counsel cannot validate a course of procedure which the law does not authorise. [p. 982, col. 1.]

In all penal matters the utmost strictness as to procedure must be observed. Where the mode in which a criminal trial is to be conducted is regulated by Statute, a departure from the authorised procedure can itself only be sanctioned by a statutory provision. [p. 983, col. 1.]

Section 537 of the Criminal Procedure Code does not apply to an infringement of a statutory requirement. It only applies to errors, omissions, or irregularities of a formal and technical nature which may occur by accident or oversight, and does not cover a substantial departure from the mode of conducting criminal trials laid down by law. [p. 983, col. 1.]

Subrahmania Ayyar v. *King-Emperor*, 25 M. 61 at p. 90; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866, 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), followed.

In two cross-cases which arose out of the same occurrence and were being separately tried by a Sessions Judge, the evidence of the prosecution witnesses in each case, which included the depositions of the accused in the cross-case, was, at the request of the accused, treated as defence evidence in the cross-case;

Held, (1) that this mode of recording defence evidence was hopelessly and entirely illegal inasmuch as :—

(*a*) it resulted substantially in the accused in both cases being tried jointly, which was illegal;

(*b*) the evidence of each accused person as prosecution witness in the cross-case was treated as defence evidence in his own case

and the case of his co-accused, which was not permissible under the law, and

(c) as the evidence which was treated as defence evidence in each case had not been recorded in the presence of all the accused in that case; [p. 983, col. 1.]

(2) that the consent of the accused did not cure the illegality. [p. 983, col. 1.]

(3) that the case was not covered by the provisions of section 537 of the Criminal Procedure Code; [p. 983, col. 1.]

(4) that the trial must be set aside and new trials ordered. [p. 983, col. 2.]

Appeal from an order of the Sessions Judge, Montgomery, dated the 20th January 1923.

Mr. *Abdul Aziz* and Chaudri *Shahab-ud-Din*, for the Appellants.

Mr. *Des Raj Sawhney*, (Public Prosecutor), for the Respondent.

JUDGMENT.

Fforde, J.—Two sets of appeals are before us one on behalf of Allu and six other persons, and the other on behalf of three persons Saadullah, Agra and Ibrahim from the convictions and sentences of the Sessions Judge of Montgomery at Lahore under sections 302 and 147, Indian Penal Code, in cross-cases of riot.

We have been asked to hear the two sets of appeals together but at the opening of the case Counsel for both sets of appellants have raised the preliminary objection that the trials out of which these appeals have arisen have been conducted in a manner which is not in accordance with law. Before going into the merits of the case we, therefore, have to consider whether or not this objection is well founded and, if so, what course we should take in regard to the convictions and sentences of the Trial Court.

The facts of the case are briefly these:—

On the 16th July 1922 a serious fight took place between two parties of Muhammadan *Jats*, the Wahniwals and the Baghelas, resulting in the death of one person and injuries to several others. Of the Wahniwal faction seven persons, namely, Allu, Naman, Alia, Garu Farid Basra and Gahru, and of the Baghela faction four persons, namely, Hasta, Saadullah, Agra and Ibrahim have been brought to trial. With the exception of Hasta all have been convicted. Allu and Farid have been sentenced to death under section 302 of the Indian Penal Code and the remainder have been sentenced under section 147, Indian Penal Code, to two years' rigorous imprisonment each. The mode in which the trials were conducted was as follows:—

The trial of Allu's party before the Sessions Judge commenced on the 16th January 1923. Witnesses for the prosecution were examined on the 16th, 17th and 18th, two of these witnesses, namely, Agra and Hasta, being persons returned for trial in the cross-case.

On the 18th January, at the conclusion of the prosecution case, Alu was asked by the Sessions Judge whether he wished to produce any evidence in defence to which he replied:—

"I give up my defence witnesses in this case but I want the prosecution witnesses in the cross-case to be treated as defence witnesses in this case."

The same question was put to each of the remaining accused of the Allu faction and the reply to this question in each case was, "I say the same as Allu."

Counsel for the seven accused addressing the Court then said, "I close my case and do not call any defence witnesses in this case. But I would like the prosecution witnesses in the cross-case to be treated as defence witnesses in this case. I would also ask that the assessors should not give their opinion in this case until they have heard the cross-case."

Having arrived at this stage on the 18th January, the Sessions Judge then proceeded on the same day to take the evidence in the case of Hasta and others. As in the previous case witnesses for the prosecution only were called consisting of the seven already tried and some twelve others who were not among the accused of either party. These witnesses were all examined on the one day, *viz.*, the 18th January, and at the close of the evidence for the prosecution, the Sessions Judge asked Hasta if he had any defence witnesses. The answer was: "No except that I want the evidence of Waryam, Sadara and Brlanda, prosecution witnesses in the cross-case, to be treated as defence witnesses in this case." Each of the remaining three prisoners on being asked the same question replied: "No, I say the

same as Hasta". No statement was made by Counsel for the accused such as was made in the former case and the defence was tacitly closed. It is important to note that, of the three witnesses referred to by Hasta, only the first two had actually given evidence; the third Balanda not having been examined at all.

Nothing further in the way of examining witnesses or recording evidence was done in either of the cases but on the following day, the 19th January, speeches by Counsel for the prosecution and for the defence were delivered in both the cases. At the conclusion of the addresses by Counsel the assessors were asked by the Court to give their opinion as regards the innocence or guilt of all the accused and their opinion were recorded on the 19th. On the 20th January the judgment of the Court was delivered and sentences passed.

Now, it is quite obvious to any one with any practical knowledge of the mode in which a criminal trial should be conducted that the procedure adopted in these cases was a serious departure from the usual and proper course. The fact that prisoners and their Counsel have consented to this course being adopted cannot give it a legal sanction, for it is a well established principle of ciminal law that a prisoner can consent to nothing which is not authorised by law. Nor can the consent of Counsel for an accused person validate a course of procedure which the law does not authorize.

It is urged by Counsel for the Crown that, although the procedure adopted in these cases was irregular, such an irregularity is covered by section 537 (*a*) of the Code of Criminal Procedure, which provides that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code" unless such error, omission or irregularity has in fact occasioned or failure of justice. In my opinion this contention is not sustainable. This section only applies to errors, omissions or irregularities of a formal nature, and does not cover a substantial departure from the mode of conducting criminal trials laid down by law. This seems to be clear from the illustration given at the foot of the section, which shows the class of irregularity contemplated.

In my opinion the procedure adopted in the cases before us is wholly unauthorized by law in several particulars. In the first place, though the two sets of accused were intended to have been tried separately—as in law they were bound to be—the mode in which they were actually tried was in substance a joint trial. Only prosecution evidence appears on each record: speeches of Counsel were reserved till the close of both cases, the assessors were not asked to give their findings until both cases had been closed, and only one set of findings was recorded in respect of both and, finally, one composite judgment was delivered. In fact the first two paragraphs of the judgment show conclusively that the whole matter was in substance dealt with as a single trial.

A still graver objection to the mode in which these cases were dealt with by the Trial Court lies in the manner in which the Court dealt with the evidence for the defence. In the case of Allu and others, the Court acquiesced in the request by the prisoners on trial that witnesses who had not yet given evidence, but who were to be examined as witnesses for the prosecution in the cross-case, should be treated as witnesses for the defence in the case at hearing. If this request had in fact been given effect to, the result would have been that the evidence of each prisoner, and of each of his co-accused would have appeared subsequently on the record as evidence in his defence. In other words, each of a number of prisoners jointly tried would have been treated as a competent witness for his co-accused and also as a competent witness on his own behalf. Moreover, the only way in which the evidence could legally be given—assuming the witnesses to be competent—would be to put each witness in the box and examine him orally at the close of the prosecution case. This, needless to say, was not done. What was in fact done was

to take the written record of the prosecution evidence in Hasta's case and treat it without further formality as evidence for the defence in Allu's case after both cases had been concluded. In the case of Hasta and his co-accused, the matter was somewhat different. Here the accused asked that three specific persons, Waryam, Sadara and Balanda, who were described as prosecution witnesses in Allu's case, should be treated as defence witnesses for Hasta and his fellow prisoners. That is to say, the statements given in evidence by Waryam, Sadara and Balanda for the Crown at the prosecution of Allu and others, were without any further formality to be regarded as evidence duly recorded on behalf of Hasta and his co-accused, not only is such a method of recording evidence hopelessly and entirely illegal, but in fact it resulted in one witness for the defence in the Hasta case being omitted altogether, as Balanda did not appear as a witness at all at any stage of the proceedings.

A further objection to the method adopted for dealing with defence evidence, is this:—Such evidence, apart from all other infirmities, would be evidence given in the absence of the accused. This is in violation of the provisions of section 353 of the Criminal Procedure Code, and is, therefore, not only irregular but illegal.

It is unnecessary to multiply reasons why the various infringements of the law governing criminal trials which have occurred in these cases should not be countenanced.

In all penal matters the utmost strictness in procedure must be observed. Where the mode in which a criminal trial is to be conducted is, as it is in India, regulated by Statute, a departure from the authorized procedure can itself only be sanctioned by a statutory provision. There is no such sanction for any of the illegalities which have taken place in the course of the trial of these two cases. Section 537 of the Code of Criminal Procedure does not apply to an infringement of statutory requirement. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by Statute. To use the words of the Lord Chancellor in delivering the judgment of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (1); "These trials were prohibited in the mode in which they were conducted" and were, therefore, illegal.

For the reasons given above I am of opinion that these appeals must be accepted and that the conviction and sentences of the Court below should be set aside, and new trial ordered.

Broadway, J.—I concur in the proposed order. The appeals are accepted, the conviction and sentences are set aside and the cases are returned to the Court of Session to be re-tried in accordance with law.

Z. K. *Appeal accepted.*

(1) 25 M. 61 at p. 98; 11 M. L. J. 233; Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 78 OF 1923.

June 20, 1923.

Present:—Mr. Baker, Offg. J. C.

NANHA AND OTHERS—ACCUSED—APPLICANTS

versus

KANHAYALAL—COMPLAINANT—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 106—Conviction under s. 323—Order for security—"Involve," meaning of.

To justify an order for security under section 106, Criminal Procedure Code, there must be an express finding to the effect that the act involves a breach of the peace or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case. [p. 984, col. 1.]

The word "involve" in section 106 of the Code connotes the inclusion not only of a necessary but also of a probable feature, circumstance, antecedent condition or consequence. [p. 984, col. 2.]

Jib Lal Gir v. *Jogmohan Gir*, 26 C. 576; 13 Ind. Dec (N. S.) 970 and *Emperor* v. *Manik Rai*, 11 Ind. Cas. 589; 33 A. 771; 8 A. L. J. 925; 12 Cr. L. J. 405, followed.

BANSI *v.* LAKSHMI DAS.

Criminal Revision of an order of the First Class Magistrate, Saugor, in Criminal Case No. 74 of 1922, dated the 15th December 1922.

Mr. *G. L. Subhedar*, for the Applicants.

Mr. *G. P. Dick*, for the Crown.

ORDER.—In this case the applicants have been convicted under section 323, Indian Penal Code, and sentenced to a fine of Rs. 100 each and in default rigorous imprisonment for six months and in addition to execute bonds to keep the peace for one year. No arguments are raised against the conviction but it is contended that the sentences are too severe and that the order for security for keeping the peace, under section 106, Criminal Procedure Code, is illegal in the case of a conviction under section 323, Indian Penal Code.

So far as the sentences are concerned, the learned Magistrate has given his reasons, *viz.*, that the assault arose from a caste dispute which is still alive, and was a wanton one, for inflicting a heavy sentence, and I see no reason for interference in revision.

As regards the order for security under section 106, Criminal Procedure Code, the applicants rely on the case of *Queen* v. *Kunhiya* (1) in which it was held that security cannot be ordered when the conviction is only for grievous hurt. It has been held by the Calcutta High Court in *Jib Lal Gir* v. *Jogmohan Gir* (2), that to justify an order for security under section 106, Criminal Procedure Code, there must be an express finding to the effect that the act involved a breach of the peace or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case. That was a case under sections 143 and 379, Indian Penal Code.

In *Baidya Nath Majumdar* v. *Nibaran Chunder Gope* (3) it was held that where the offences of which a person is convicted do not in themselves, and apart from any other incidents, come within the terms of section 106 of the Criminal Procedure Code, it is incumbent upon the Magistrate to record a clear finding with respect to the facts which, in his opinion, make the provisions of that section applicable.

(1) 4 N. W. P. H. C. R. 154.
(2) 26 C. 576; 13 Ind. Dec. (N. S.) 970.
(3) 30 C. 93; 6 C. W. N. 471.

This case was dissented from by the Allahabad High Court in *Emperor* v. *Manik Rai* (4) in which it was held that the word 'involve' in section 106, Criminal Procedure Code, connotes the inclusion not only of a necessary but also of a probable feature, circumstance, antecedent condition or consequence. In the present case the complainant was assaulted by one of the accused at the instigation of the others in the street without his being given any provocation and I think the Magistrate was right in holding that their conduct was likely to cause a breach of the peace. I, therefore, dismiss the application.

G. R. D. *Application dismissed.*

(4) 11 Ind. Cas. 589; 33 A. 771; 8 A. L. J. 925; 12 Cr. L. J. 405.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPLICATION NO. 98 OF 1923.

June 7, 1923.

Present:—Mr. Justice Kanhaiya Lal.

BANSI AND OTHERS—APPLICANTS

versus

LAKSHMI DAS—OPPOSITE PARTY.

Workman's Breach of Contract Act (XIII of 1859 as amended by Act XII of 1920), s. 2, enquiry under—Transfer—Criminal Procedure Code (Act V of 1898), ss. 4, 6, 526.

An enquiry by a Magistrate under the Workman's Breach of Contract Act against a labourer is an enquiry by a Magistrate or a Criminal Court within the meaning of section 6 of the Criminal Procedure Code, and as such is subject to the operation of section 526 of that Code, even though the object of the enquiry is merely to issue coercive orders, and if necessary, to enforce the same by a sentence of imprisonment. [p. 985, col. 1.]

The definition of enquiry given in section 4 clause (*k*) of the Criminal Procedure Code is not exhaustive. Any enquiry by a Magistrate or a Criminal Court subordinate to the High Court can be the subject-matter of a transfer by the High Court. [p. 985, col. 1.]

Criminal application for transfer.

Mr. *A. P. Dube*, for the Applicants.

The Government Advocate, for the Crown.

JUDGMENT.—This is an application for the transfer of a proceeding pending against certain labourers under section 2 of the Workman's Breach of Contract

Act (XIII of 1859), as amended by Act XII of 1920. The employer is a resident of Moradabad and carries on a stone ballast business in Shankergarh in the District of Allahabad. He advanced money to certain labourers and employed them for the purpose of working at Shankergarh. His complaint was that after working for a little while they disappeared. That complaint is being enquired into by one of the Magistrates at Moradabad. The labourers are resident of Shankergarh and desire that the complaint should be enquired into in the District of Allahabad where the alleged breach of contract is said to have taken place. It is admitted that the advances were made at Shankergarh and that, if any breach of contract took place, it must have taken place at Shankergarh too. The witnesses are all said to belong to the same place. It is, therefore, conducive to the convenience of the parties, if the case is enquired into at Allahabad. It is urged on behalf of the employer that the Workman's Breach of Contract Act intends that such enquiry should be made at the place where the master or employer resides and carries on business. The Act does not, however, lay down the procedure which is to regulate such an enquiry. It is an enquiry by a Magistrate or a Criminal Court within the meaning of section 6 of the Code of Criminal Procedure, and, although the object of the enquiry is merely to issue coercive orders, and, if necessary, to enforce the same by a sentence of imprisonment, there is nothing to show that such an enquiry is excluded from the operation of section 526 of the Criminal Procedure Code. The definition of "enquiry" given in section 4, clause (*k*), which includes every enquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or a Court, is not exhaustive so as to exclude an enquiry under the Workman's Breach of Contract Act of the nature above referred to. Any enquiry by a Magistrate or a Criminal Court subordinate to this Court can, therefore, be transferred under section 526, Criminal Procedure Code, to any Criminal Court of equal or superior jurisdiction subordinate to its authority, if the requisite grounds set forth in the section are established. The balance of convenience is undoubtedly in favour of the transfer of the criminal proceeding from Moradabad to Allahabad. The application is, therefore, allowed and the proceeding transferred to the Court of the District Magistrate of Allahabad who can try the case himself or send it for trial to any Magistrate subordinate to him who may be competent to try the same.

Application allowed.

M. A. A. & N. H.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 170 OF 1922.

(CASE REFERRED NO. 16 OF 1922.)

October 13, 1922.

Present:—Mr. Justice Wallace.

MANIKONDA LINGAYYA AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 438—Criminal appeal—Memo. of appearance filed by Pleader—Vakalat—*Criminal Rules of Practice, r.* 141.

Where an appeal in a criminal case after being entertained by a proper Court is transferred to a Sub Divisional Magistrate for disposal and a memorandum of appearance is filed by Pleader for the conduct of the appeal, the Magistrate is not entitled to insist on the filing of a *Vakalat*.

In re Munirama Reddi, 1 Ind. Cas. 546; 5 M. L. T. 290; 9 Cr. L. J. 305, followed.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge, Nellore, in his letter dated the 11th February 1922.

Mr. *B. Samayya*, for the Petitioner.

The Public Prosecutor (Mr. *J. C. Adam*), for the Crown.

MAHLA RAM v. CROWN.

ORDER.—The refusal of the Sub-Divisional Magistrate to entertain the appeal unless a *vakalat* was filed, although a memo. of appearance was put in was clearly wrong [See *In re Munirama Reddi* (1)] and contrary to r. 141 of Criminal Rules of Practice. In any case, the appeal had been already entertained by a proper Court and was then transferred to him for disposal.

The order of the Sub-Divisional Magistrate is set aside. He is directed to admit and hear the appeal and dispose of it according to law.

V. N. V. *Order set aside.*
S. D.

(1) 1 Ind. Cas. 546; 5 M. L. T. 290; 9 Cr. L. J. 305.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 329 OF 1923.
May 5, 1923.
Present:—Mr. Justice Moti Sagar.
MAHLA RAM—CONVICT—APPELLANT
versus
CROWN—RESPONDENT.

Penal Code (Act XLV of 1860), s. 376—Rape—Consent—Complainant, uncorroborated testimony of, value of—Struggle, evidence of.

Where a person is charged with the offence of having committed rape, the question for determination is whether the woman was or was not a consenting party, and in this connection her testimony without any independent evidence in support thereof, that she was not a consenting party is insufficient for a conviction. The first and foremost circumstance that can be looked for in cases of this kind is the evidence of resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts.

Appeal from an order of the Magistrate, First Class, with section 30 powers, Lyallpur, dated the 19th February 1923, convicting the appellant.

Lala *Ram Chand Manchanda*, for the Appellant.

Sardar *Kharak Singh*, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an appeal from a conviction under section 376, Indian Penal Code. The appellant, Mahla Ram, has been found guilty of raping one *Musammat* Raj Bibi while travelling in the Railway compartment, and has been sentenced to five years' rigorous imprisonment including three months solitary confinement.

It is alleged that on the 21st December 1922 *Musammat* Raj Bibi was travelling from Lahore to Sillanwali. When the train reached Toba Tek Singh the other women who were travelling in the same compartment got down and the accused got into the same compartment when the train was in motion. When the train had left the station it is alleged that the accused caught hold of *Musammat* Raj Bibi, who was sitting close to the window, dragged her down the bench and tucking up her loin cloth forcibly raped her. When the train reached the next station at Dhabanwali the Guard, Bhagwan Singh, P. W. No 4, came out and hearing some cries went to the compartment in which the crime is alleged to have taken place. He found the woman lying on the bench and the accused picking up his loin cloth which was untied. The woman was weeping and abusing the accused. One Abdullah Khan, a Lambardar, P. W. No. 5, who was travelling in an adjoining carriage, also came out and stated that he had heard the woman screaming. The accused was at once arrested and handed over to the Police when the train arrived at Shorkot Station. He was challaned under section 376 of the Indian Penal Code and sentenced on conviction as above indicated.

The evidence in support of the prosecution story as set out above consists of the statements of Bhagwan Das, P. W. No. 4, Abdullah Khan, P. W. No. 5 and *Musammat* Raj Bibi herself who is said to have been raped. Bhagwan Das and Abdullah Khan are not eye-witnesses of the crime and their evidence is, therefore, not of very great importance. Abdullah Khan has testified only to the fact that he heard some cries from an adjoining carriage. Bhagwan Das has stated that when the train stopped at Dhabanwali Station he went to the compartment in which *Musammat* Raj Bibi was travelling and found her weeping and abusing the accused.

The accused admits that he had sexual intercourse with the woman but contends that he has not been guilty of any offence inasmuch as the intercourse was with the consent of the complainant herself. He has stated that he got into the compartment in which *Musammat* Raj Bibi was travelling in a hurry and that he did not notice that it was a female compartment. He has further stated that the woman asked him for some money which he at first refused, and that she then herself suggested to him that he could have sexual intercourse with her to which he consented and paid her two eight anna pieces in return. He has also stated that the woman had a boil on her breasts and that when he pressed them she screamed out in pain.

The accused has produced some witnesses in defence, some of whom have stated that when he was arrested he at once said that he had sexual intercourse with the woman with her consent and that he had paid her some money, while others have stated that the woman did not bear a good character, and that she had been living at Lyallpur in a *Chakla*. The sole question for determination in the case is, whether the accused had connection with the woman with or without her consent, for it is obvious that if it was with her consent no offence was committed, while, on the other hand, if it was without her consent he would be clearly guilty of rape under section 376, Indian Penal Code.

In my opinion the evidence on the record is most inconclusive and it is impossible to hold that the woman was not a consenting party. There is no independent evidence in support of the statement of the complainant and it would be most dangerous to base a conviction on her uncorroborated testimony alone. As observed by Dr. Gour in his well-known treatise on the Penal Law of India, the first and foremost circumstance that can be looked for in cases of this kind is the evidence of resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries or even injuries on her private parts. In the present case there is absolutely no evidence on the record of any struggle having taken place nor were marks of any injuries found on the person either of the complainant or of the accused. In these circumstances, I am unable to hold that the accused had connection with the woman without her consent.

I accordingly accept the appeal and acquit the accused.

Appeal accepted.

W. C. A. & N. H

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 1601 OF 1922.

July 26, 1923.

Present:—Mr. Justice Odgers.

DORAISWAMI UDAYAN—PRISONER—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial— Duty of prosecution to call witnesses.

In a criminal trial, the Public Prosecutor is not bound to call as witness for the Crown any person whose evidence in his opinion is unnecessary. [p. 990, col. 1.]

DORAISWAMI UDAYAN *v.* EMPEROR.

Queen-Empress v. *Durga*, 16 A. 84; A. W. N. (1894) 7; 8 Ind. Dec. (N. S.) 55 (F. B.), followed.

Emperor v. *Reed*, 69 Ind. Cas. 630; 49 C. 277; (1922) A. I. R. (C.) 461; 23 Cr. L. J. 742, referred to.

Dhunno Kazi v. *Empress*, 8 C. 121; 10 C. L. R. 151; 6 Ind. Jur. 251; 4 Ind. Dec. (N. S.) 77 and *Ram Ranjan Roy* v. *Emperor*, 27 Ind. Cas. 554; 42 C. 422; 19 C. W. N. 28; 16 Cr. L. J. 170, distinguished.

Appeal against an order of the Court of Session of the Coimbatore Division, in Case No. 63 of the Calendar for 1922.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.

JUDGMENT.—In this case one Doraiswami Udayan has been convicted of causing grievous hurt with a dangerous weapon to one Govindaswamy Udayan by cutting him on both hands and on the head with a sickle at Daharapuram on the 28th March 1922. A certain person named Thangaswami died in February 1922. The wounded man's grandfather and Thangaswami's mother's father were brothers. The accused is the mother's sister's son's son of Thangaswami. Thangaswami died leaving two widows called Parvathi Ammal and Chandrodaya Ammal. They had apparently, in accordance with the wishes of their husband, executed a release-deed, Exhibit M. in favour of Govindaswami by which they released to him certain properties of their deceased husband in which they had a widow's estate. They refused to register it and Govindasami had it compulsorily registered in the Dharampuram Sub-Registry on the 25th March 1922, three days before the occurrence in question. The reason for the unwillingness of the widows to register appears from Govindasami's deposition in the Court of the Stationary Sub-Magistrate of Dharapuram as due to the influence of Thangasami's mother, *i. e.*, the mother-in-law of the widows. She wished that Thangasami and his wife should adopt the accused Doraiswami. There is thus, to my mind, ample ground for ill-feeling between the accused and Govindaswami on account of the registration of this release-deed, Exhibit M. One point in the defence theory may be noticed for convenience here, and that is, that Govindaswami has concocted this case against his distant relative, the accused, in order that he might become an undesirable person for the widows to adopt. I think this is extremely far-fetched and I must say that it is entirely unconvincing in the circumstances of this case.

Coming to the evidence, it is undoubted that Govindaswami was wounded. (See the wound certificate, Exhibit A which shows severe injuries to both hands and also a severe wound on the head). Mr. L. A. Govindaraghava Aiyar for the defence drew my attention to injuries 2 to 6 which are abrasions, and he urged that these were unaccounted for by the evidence. But one medical man, P. W. No. 2, says that the abrasions could have been caused by a fall over a hard rough surface or by a fall followed by rolling down a flight of steps. There is no doubt that the wounded man ran away pursued after he received his wounds and fell down as one witness says on the steps of the canal. Beyond the evidence of Govindasami himself, we have the evidence of P. W. No. 6, a boy of 14, who in the early morning of the day in question was in the field going east to the river and saw the accused standing after he (the witness) had passed the thrashing floor of Thokkadavu. He heard Govindaswami cry that he was being cut by the accused. He ran west and passed beyond the Thokkadavu and found two other persons Pachaimuthu and Ramaswami standing in the channel. These persons are the father and uncle of the accused. He went further and found two other persons Kallamarappa and his son Periaswami. He then went to his father Periyanna where he slept in the thrashing floor and told him what had happened. He and two other persons, Karuppanna and Marudayappa Udayan ran back towards the scene. They found Govindaswami sitting on the steps of the channel, and hearing from Palanisawmi Pillai and Chinnu that the accused had

run into a sugarcane field, they surrounded it, dragged the accused out, and took him to the Police Station. The evidence of this witness is entirely borne out by his statement at the Police Station, Exhibit J (2), which was given at 6 A. M. on the day in question. This statement was attacked on the ground (among others) that it recites that there is dispute between Govindaswami and the accused about the land of Thangaswami, and that that is the reason for the assault. It is urged that this lad could not have known anything about the dispute. I do not consider this impossible. The dispute was probably very well known in the neighbourhood. The point that is emphasised about the evidence of this witness is that, when he was cross-examined, he said he was threatened by the Police, and that his statement in the lower Court was read out to him by the Sub-Inspector and he was told that he would escape only if he deposed as in it, that they told him to reply to all questions put by the Dorai and to say "I do not remember" to all questions put by the Aiyangar Vakil from Madras. The witness said: "I answered now to the Public Prosecutor what the Police taught me. It is not what I had seen with my own eyes. I know besides something which they had not told me." This is characterized by the learned Sessions Judge as pointing to a distinct attempt on the part of the defence to get at this witness. I am not prepared to go so far as that. But I think that the witness was probably a good deal frightened in cross-examination, and the Sessions Judge notes that he was crying all the time. Under the circumstances, considering especially that his statement is fully corroborated by Exhibit J (2), I am not disposed to attach any weight to this sort of partial admission which he has made in cross-examination. Another very serious circumstance against the accused is the dying declaration, Exhibit B, which implicates the accused and sets out the circumstances relating to the quarrel about the land of Thangaswami. Mr. L. A. Govindaragha Aiyar points out one or two differences beyond Exhibit B and Exhibit J (2). These, to my mind, are not material especially when it is remembered that the narrative in Exhibit B ends with the appearance of P. W. No. 6 on the scene of offence. Exhibit B is also attacked on the ground that Govindaswami could not have been in a sufficiently conscious state to know what he was doing when he gave it. The medical man, P. W. No. 2, has attested that the patient was quite conscious when his statement was made. Govindaswami as P. W. No. 7 said he was giddy and felt faint but was partly clear. He said that he was unable to sign Exhibit B, because he was faint and a far more probable explanation is that both hands were badly wounded. On a careful perusal of his evidence, I cannot say that there is any ground for saying that he did not know what he was doing when he made the statement, Exhibit B, or any part of it. P. Ws. Nos. 8 and 9 are, as far as one can see, quite independent persons. They speak to the presence of the accused standing east of Thokkadavu on the morning in question and hearing Govindaswami cry out. They saw P. W. No. 6 running, followed by P. W. No. 7, and the accused pursuing him behind. They also depose to the fact that the accused hid in the sugarcane field. The only point that can be urged against P. W. No. 8 was that he was convicted and sent to Jail for 15 days for stabbing his uncle "not being able to bear his blows." There must have been a good deal to be said for him in that case, as he had a very light sentence for stabbing. There is nothing, as far as I can see, against P. W. No. 9 whose name appears in Exhibit J (2). P. Ws. Nos. 10 and 11 are men who searched the sugarcane field. In this state of the evidence it is impossible for me to say that the accused is not guilty. A legal point, however, has been taken and that is this. Mr. Govindaraghava Aiyar points out that there are certain persons who, according to him, would have been available to give evidence about the occurrence, but were not called. The first two are Pachaimuthu and Ramaswami Udayan, the father and uncle of the accused. They, more or less, assisted the accused because when they ran up they caught hold of Govindaswami,

According to the Sub-Inspector of Police, P. W. No. 4, Govindaswami in his dying declaration mentioned the names of Thondi Goundan, Ayodya Udayan, Kalimuthu Udayan and Subramania Udayan. These were examined by the Police but they were not called. The learned Vakil cites in support of his argument two cases, *Dhunno Kazi* v. *Empress* (1) and *Ram Ranjan Roy* v. *Emperor* (2). In the former case it is laid down that all witnesses who prove their connection with the transaction, connected with the prosecution should be called. It will be noticed from the deposition of P. W. No. 7 that four persons ran up from the south after Govindaswami had turned to run to the north. They may or may not have seen some part of what occured. That is no ground for saying that these witnesses have proved their connection with the transaction in question, or that they may be able to give important information as to the subject of the charge. If such were proved, then the only thing, as laid down in the cases referred to, that can relieve the prosecution from calling the witnesses is the *bona fide* belief that such witnesses would not speak the truth. The second case is a case of murder and it was laid down that in a capital case the prosecution should place before the Court the testimony of all the available eye-witnesses though brought to the Court by the defence. Neither of these considerations apply here. On the other hand, the Full Bench of the Allahabad High Court has laid down in *Queen-Empress* v. *Durga* (3) that the Public Prosecutor is not bound to call as witnesses for the Crown any person whose evidence in his opinion is unnecessary. Compare also *Emperor* v. *Reed* (4). I do not think that the opinions stated in the Calcutta cases have any application to the present. It seems to me that the case is adequately proved against the accused by the prosecution evidence tendered. If the four persons above-named could in fact have spoken in favour of the accused, it is curious that they were not called, nor were their names mentioned as persons who knew anything about it by the accused either in his statement before the lower Court or in his appeal petition to this Court. He put in a written statement before the Sub-Magistrate in which he alleges ill-feeling on the part of Govindaswami on account of property and that he was himself dragged out of his house, beaten and produced before the Police. There is no mention of any person whatever to whom this state of things would be known or who would be likely to have said anything material to the record. The accused called no evidence. For these reasons the conviction must be confirmed. The accused has been sentenced to five years' rigorous imprisonment and was originally charged under section 307, but I think somewhat mercifully the conviction was reduced to one under section 326. There was a savage attack on a defenceless man and the wounds inflicted were of a very severe character. I am, therefore, not disposed to interfere with the sentence which will also be confirmed.

Conviction set aside.

V. N. V.

(1) 8 C. 121; 10 C. L. R 151; 6 Ind. Jur. 251; 4 Ind. Dec. (N. S.) 77.
(2) 27 Ind. Cas. 554; 42 C. 422; 19 C. W. N. 28; 16 Cr. L. J. 170.
(3) 16 A. 34; A. W. N. (1894) 71; 3 Ind. Dec. (N. S.) 55 (F. B.).
(4) 69 Ind. Cas. 630; 49 C. 277; (1922) A. I. R. (C.) 461; 23 Cr. L. J. 742.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 821 OF 1923.

June 19, 1923.

Present:—Mr. Justice Moti Sagar.

BHAGWAN DAS, GUARDIAN OF RADHA RAM, MINOR, AND OTHERS—ACCUSED —PETITIONERS

versus

MAULA DAD KHAN—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s.

BHAGWAN DAS *v.* MAULA DAD KHAN.

145, *proceedings under, object of—Breach of peace, apprehension of—Possession—Title, enquiry as to, whether relevant.*

The object of the provisions contained in section 145 of the Criminal Procedure Code is to bring to an end by a summary process disputes relating to land, which are in their nature likely, if not suppressed, to end in breaches of the peace. [p. 992, col. 1.]

The mere circumstance that the dispute is one of a religious nature is not sufficient to justify a Magistrate to take action under section 145 of the Criminal Procedure Code. There must be positive evidence on the record that a breach of the peace is likely to occur if proceedings under the section are not taken. [p. 992, col. 1.]

Section 145 of the Criminal Procedure Code is concerned solely with the fact of actual physical possession whether lawful or unlawful and questions as to title are quite irrelevant and entirely outside the scope of the section. [p. 992, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Magistrate, First Class, Muzaffargarh, dated the 26th February 1923.

Lala *Har Gopal*, for the Petitioners.

Sheikh *Niaz Ali*, for the Respondent.

JUDGMENT.—This is an application for revision of an order passed by a First Class, Magistrate at Muzaffargarh under sections 145 and 146 of the Criminal Procedure Code. The dispute relates to a plot of land measuring 25 *kanals*, 11 *marlas* in area and shown in the Settlement Record of 1880 as *ghair mumkin qabristan* and in possession of the Muhammadan community. The owners of this land as recorded in the Revenue papers were originally two Brahmins, Bhairon Lal, son of Udho Das, and Pokhar Das, son of Kanhiya Lal. Since 1880 a major portion of this land has been gradually brought under cultivation, so much so that in the year 1921, shortly before proceedings under section 145 were instituted, only 10 *kanals* 6 *marlas* remained uncultivated and was shown as *ghair mumkin qabristan*. On the 14th of November 1922 one Maula Dad filed a complaint against one Bhagwan Das and three others, alleging that they had desecrated certain tombs attached to the Shahidanwala graveyard with the intention of wounding the feelings of the Muhammadan Community and that they should be punished under section 297 of the Indian Penal Code. This complaint was made over to Sheikh Muhammad Murid Akbar, Magistrate, for disposal. On the 15th of November 1922 the learned Magistrate, without being moved by any member of the Muhammadan Community, attached the graveyard in question, and issued notices to the parties concerned requiring them to attend his Court on the 28th of November 1922 and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. In pursuance of this order written statements were put in by the parties, and it was stated by Maula Dad that the area of the Shahidanwala graveyard was about 25 *kanals* during the last three Settlements and that the accused had demolished the graves and had brought a large portion of that area under cultivation. The opposite party stated that the Muhammadans used to bury their dead with the permission of the proprietors and that the whole of the land claimed was never used as a graveyard. They further stated that a major portion of the area claimed by the first party was actually under cultivation and in possession of the second party and that there was no apprehension of a breach of the peace. It was consequently contended that section 145 of the Criminal Procedure Code had no application to this case. The learned Magistrate made over the case instituted under section 297 of the Indian Penal Code for inquiry to one Lala Gurditta Ram, Honorary Magistrate, and asked him also to submit a report on the question as to who was actually in possession of the land in dispute. Lala Gurditta Ram examined a very large number of witnesses in this case on both sides, and came to the conclusion that the Muhammadan Community was not in possession and that no case under section 297 had been established against the accused. The learned Magistrate, however, came to a different conclusion and held that, in view of the Settlement entries of 1880, it could not be definitely stated as to who was in actual possession of the subject of dispute, and he consequently attached the same under section 146 (1) of the Criminal Procedure Code.

BHAGWAN DAS v. MAULA DAD KHAN.

In my opinion the order of the learned Magistrate was wholly without jurisdiction and must be set aside. There was no satisfactory evidence on the record that there was an apprehension of a breach of the peace, and, in the absence of any such evidence, I do not think that proceedings should have been taken under sections 145 and 146 of the Criminal Procedure Code. The object of section 145 is to bring to an end by a summary process disputes relating to land, etc., which are in their nature likely, if not suppressed, to end in breaches of the peace. The learned Magistrate observes in his judgment that the affair had a tinge of religion and that, therefore, a breach of the peace was apprehended. I do not think that the mere circumstance that the dispute is one of a religious nature is sufficient to justify a Magistrate to take action under section 145. There must be positive evidence on the record that the breach of the peace is likely to occur if proceedings under this section are not taken. In the present case it appears that the land which in 1880 was shown as a part of the graveyard has been gradually brought under cultivation to the prejudice of the Muhammadan Community. No breach of the peace has occurred during the last 40 years, and it seems to me hardly likely that any such untoward results would now ensue if the property is not attached under section 146 of the Criminal Procedure Code. In fact, no apprehension of a breach of the peace was alleged by the complainant in his petition, and no application was made by any member of the Muhammadan Community for action being taken under this section. There are one or two witnesses to the effect that the Brahmin proprietors used to cut some reeds from this land and that this fact was resented by the Muhammadans, but I do not think that this alone was sufficient for the Magistrate to take action under section 146 of the Criminal Procedure Code.

The next question for consideration is as to who was in actual possession of the property when proceedings were taken under the section in question. There is a large volume of evidence on the record from which it appears that the Brahmin proprietors have been cultivating the land in question for a large number of years and that the Muhammadan Community has not been in possession. They may possibly have a right to possess this land, but a right to possess is quite different from actual physical possession, and I do not think that questions as to the rights of parties can legitimately be the subject of inquiry in proceedings under section 145 of the Criminal Procedure Code. This section is concerned solely with the fact of actual physical possession, whether lawful or unlawful, and questions as to rights are quite irrelevant and entirely outside the scope of this section. The learned Magistrate thinks that, because the Muhammadan Community have a right to possess this land, they must also be considered to be in possession. I am unable to agree with him in this view. The actual physical possession has been clearly proved to be with the petitioners, and they must remain in possession until evicted in due course of law by means of a civil suit.

I accept the revision and, setting aside the order of the learned Magistrate, direct that attachment should be removed and that possession should be restored to the proprietors.

Z. K. *Revision accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 92 OF 1923.

July 31, 1923.

Present:—Mr. Baker, Offg. J. C., and Mr. Hallifax, A. J. C.

ACHALSINGH—PLAINTIFF—APPLICANT

versus

D. B. SETH JIWANDAS—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIII, r. 1—Leave to sue as pauper, refusal of—Revision, whether lies—Contradiction between evidence and finding—Material irregularity—Valuation of pauper's property—Redemption suit by pauper—Equity of redemption, whether 'subject-matter' of suit.

A High Court has power under s. 115 of the Civil Procedure Code to revise an order refusing to grant permission to sue as a pauper. [p. 994, col. 1.]

Kapildeo Singh v. *Ramrikha Singh*, 8 Ind. Cas. 484; 33 A. 237; 7 A. L. J. 1191, *Mahadeo Sahai* v. *Secretary of State for India*, 65 Ind. Cas. 255, 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1, dissented from.

Buddhoo Lal v. *Mewa Ram*, 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558, *Chattarpal Singh* v. *Raja Ram*, 7 A. 661 p. 665; A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854, *Muhammad Husain* v. *Ajudhia Prasad*, 10 A. 407; A. W. N. (1888) 179; 6 Ind. Dec. (N. S.) 313, distinguished.

Debo Das v. *Mohunt Ram CharanDas*, 2 C. W. N. 474, *Gopal Chandra Neogy* v. *Bigoo Mistry*, 8 C. W. N. 70, relied upon.

A direct contradiction between the evidence and the finding of the Court is a material irregularity which would justify interference in revision. [p. 994, col. 2.]

Under O. XXXIII, r. 1 of the Civil Procedure Code the Court is concerned only with the value of the property in the alleged pauper's possession, not with his efforts to realize it; if the property could fetch more than a certain amount it does not matter in the least whether the alleged pauper tried to obtain it. [p. 994, col. 1.]

In a suit to redeem a mortgage of property of which the plaintiff is not in possession, the right to redeem which he asserts, is the subject-matter of the suit for the purposes of r. 1 of O. XXXIII of the Code and in deciding, whether he is entitled to sue as a pauper or not the value of that right must not be included in the means of which he is possessed. [p. 995, col. 2.]

Revision of an order of the District Judge, Hoshangabad, dated 9th February 1923, in Miscellaneous Judicial Case No. 20 of 1922.

Mr. *K. K. Gandhe*, for the Applicant.

Messrs. *M. Gupta*, *S. B. Gokhale*, *M. K. Golwalkar* and *V. Bose*, for the Non-Applicant.

JUDGMENT.—The applicant's petition for leave to sue as a pauper was rejected by the District Judge of Hoshangabad and he has applied here for revision of that order of rejection. In the plaint filed with his petition he alleged that he was the grandson of one Girwar Shah, who in 1885 had mortgaged a village to the defendant for Rs. 20,000 and that the defendant had ever since then been in possession of the village in lieu of interest according to the terms of the contract. He claimed, therefore, to redeem the village for Rs 20,000. The order on his petition for leave to sue as a pauper is short and may be quoted in full. It runs as follows: "Applicant himself admits he has not tried to raise money on the equity of redemption by mortgage or sale of all or any part of the equity of redemption. The mortgage is for Rs. 20,000 and there is evidence that the property is worth Rs. 40,000 which makes it clear that a considerable sum can be raised on the equity of redemption. In view of *Kapildeo Singh* v. *Ramrikha Singh* (1). I reject the application to sue *in forma pauperis*. Each party to bear its own costs. Pleader's fees allowed Rs. 15."

(2) It is contended in this Court on behalf of the proposed defendant that an application for revision of this order cannot lie under section 115 of the Civil Procedure Code, and reliance is placed on the statement of opinion by Walsh, J., in *Mahadeo Sahai* v. *Secretary of State for India* (2) that an order refusing permission to sue as a pauper could not be considered as a "case decided" within the meaning of the Full Bench decision in *Buddhoo Lal* v. *Mewa Ram* (3). The remark was entirely *obiter*, the application for revision being held to be unsustainable on the merits, and Mr. Justice Piggott in the same case refused to express any opinion on the question for that reason, though his judgment is not lacking in indications of an opinion, that the order was such as could be examined in revision under section 115. That is, in our opinion, also the effect of the decision of the majority of the Full Bench in *Buddhoo*

(1) 8 Ind. Cas. 484; 33 A. 237; 7 A. L. J. 1191.

(2) 65 Ind. Cas. 255; 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1.

(3) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558

Lal v. *Mewa Ram* (3), in which we respectfully concur, and the view taken consistently by the Allahabad High Court until Walsh, J., dissented from it in the case mentioned. It is expressed in *Chattarpal Singh* v. *Raja Ram* (4) and *Muhammad Husain* v. *Ajudhia Prasad* (5), and also by necessary implication in *Kapildeo Singh* v. *Ramrikha Singh* (1) cited by the learned District Judge in his order in this case. The Calcutta High Court has also admitted applications in revision against orders refusing permission to sue as a pauper in *Debo Das* v. *Mohunt Ram Charn Dass* (6) and *Gopal Chandra Neogy* v. *Bigoo Mistry* (7). We hold, therefore, that this Court has power under section 115 of the Civil Procedure Code to revise an order refusing to grant permission to sue as a pauper.

(3) It is further contended that section 115 of the Civil Procedure Code does not permit revision in the presen case because the lower Court had jurisdiction to decide whether permission to sue as a pauper should or should not be given, and in deciding that matter has not acted illegally or with material irregularity even if the decision be wrong in the opinion of this Court. It is admitted on all sides that the applicant has nothing in the world which could be sold or pledged beyond his rights in the property which he seeks to redeem and the learned District Judge appears to have rejected the application solely on the ground that no attempt has, in his opinion, been made to raise money on the equity of redemption of that property. Now, apart from the fact that the evidence proves beyond doubt that the applicant has tried to do this and has failed, a perusal of r. 1 of O. XXXIII shows very clearly that the Court is concerned only with the value of the property in the alleged pauper's possession, not with his efforts to realise it; if the property could fetch more than a certain amount it does not matter in the least whether the alleged pauper tried to obtain it or not.

(4) But from the finding stated we may perhaps infer another, in respect of the matter really in issue, to the effect that the equity of redemption could be sold for more than Rs. 675, the amount of the fee payable on the plaint proposed to be filed, if proper efforts had been made. This finding is as obviously wrong as the other, as there is perfectly credible evidence on the record, which has not been contradicted or discredited or even challenged in any way, showing beyond doubt that the applicant went to several people and tried to raise money on the security of his rights, and they all were and are still unwilling to lend him anything at all on them or to buy his claim or any part of it. It is, however, doubtful whether either of these findings could be disturbed under section 115 of the Civil Procedure Code, though we are inclined to the opinion that such a degree of direct contradiction between the evidence and the finding is material irregularity which would justify interference in revision.

(5) But there is a distinct illegality in the decision, in that the learned District Judge has included in the property of which he had to examine the value under r. 1 of O. XXXIII, to see whether that value exceeded Rs. 675 or not, certain property which that rule itself says shall be excluded; indeed, it is the only property for valuation and it is left out of account, as we are decidedly of opinion it must be, there is nothing left. The ruling which the learned District Judge has followed is that of the Allahabad High Court in *Kapildeo Singh* v. *Ramrikha Singh* (1) in which the Madras ruling now cited on behalf of the applicant, *Vendanta Desikacharyulu* v. *Perindevamma* (8) is mentioned.

(6) Neither of these judgments can be said to contain an examination of the question now before us. Indeed, in the Madras case that question apparently had not actually arisen at the stage which the case had reached, and a remark by the learned Judges that "it is not the intention of the law to compel persons seeking relief to mortgage their claims" cannot be called a decision on the question whether the property then under consideration was or was

(4) 7 A. 601 at p. 605; A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854.
(5) 10 A. 467; A. W. N. (1888) 179; 6 Ind. Dec. (N. S.) 313.
(6) 2 C. W. N. 474.
(7) 8 C. W. N. 70.
(8) 3 M. 249; Ind. Dec. (N. S.) 729.

not a part of the subject-matter of the suit. In the Allahabad case the application was for leave to sue for redemption as a pauper, as it is here, and Knox and Karamat Husain, JJ., said no more on the matter before us now than that they did "accept the contention that the petitioner in trying to raise money upon the equity of redemption would not in effect be mortgaging his claim." If that is an expression of the opinion that in a suit for redemption the equity of redemption is not a part of the subject-matter of the suit, we must respectfully dissent.

(7) The reasons for taking the contrary view, which to us seems almost self evident are well set out in the judgment in which Mr. Justice Plowden referred the case of *Harnam Singh* v. *Kirpa Ram* (9) to a Full Bench of the Chief Court of the Punjab and practically the same proposition seems to have been assumed as unquestionable by every body concerned in the Bombay High Court in *Fatmabai* v. *Dossabhoy Rustomji Umrigar* (10), the contest there being over a different matter.

(8) The different meanings in which the terms "property" and "subject-matter" occurring in r. 1 of O. XXXIII are commonly used give rise to some confusion of thought in this matter. It is apparently accepted as axiomatic that in a suit for possession of land by the owner against a treaspasser the subject-matter of that suit is the land for the purposes of the rules under discussion. But it is clear that the subject-matter is not the earth and stones lying in a particular place, but the plaintiff's right to possess that earth and those stones because he is the owner. In such a suit the plaintiff asks for the enforcement of his right to possess the land because he is the owner of it. Here also he asks for the enforcement of the same right for the same reason; the fact that he admits he will have to satisfy certain conditions and make certain payments before he can have that right enforced, does not make the right any less the subject-matter of the suit.

(9) It may be that all these considerations would not apply to the case of a plaintiff still in possession of the property he seeks to redeem, though that question is hardly likely to arise, as such a person would in all probability be possessed of other means sufficient to exclude him from the definition of a pauper. It is, however, not necessary and, therefore, would not be proper for us to decide that question in this case, but it is not impossible that some such matter underlay the Allahabad judgment that has been mentioned. But we are very distinctly of opinion that in a suit to redeem a mortgage of property of which the plaintiff is not in possession, the right to redeem which he asserts is the subject-matter of the suit for the purposes of of O. XXXIII of the Civil Procedure Code, and in deciding whether he is entitled to sue as a pauper or not the value of that right must not be included in the means of which he is possessed. The decision in the present case, therefore, is based solely on a fact which the law expressly orders to be excluded from consideration in this respect, and that is plainly an illegality. The order will accordingly be set aside, and the application to sue as a pauper will be granted. The opposite party will pay all the applicant's costs in both Courts. The Pleader's fee in this Court will be Rs. 30.

G. R. D. & N. H. *Application granted.*

(9) 1 P. R. 1887.

(10) 5 Ind. Cas. 688; 34 B. 638; 11 Bom. L. R. 102.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 1980 OF 1920.

June 12, 1923.

Present:—Mr. Justice Moti Sagar.

DARYAI SINGH AND ANOTHER, MINORS, THROUGH *Musammat* MAN KAUR—APPELLANTS

versus

KUNJ LAL AND OTHERS—CREDITORS, DEWAT RAM, RECEIVER, SHANKAR—INSOLVENT—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 53—Fraudulent transfer, setting aside of—Creditor, whether can take action—Limitation.

The language of section 53 of the Provincial Insolvency Act makes it incumbent on the

DARYAI SINGH *v.* KUNJ LAL.

Court to annul every transfer of property made by an insolvent if the transferor is adjudged insolvent within two years from the date of the transfer provided it comes to a finding that such transfer was not made in good faith and for valuable consideration. The section contemplates that action under it will be taken by the Receiver but it does not mean that even where the Receiver refuses or neglects to act no one else can set the proceedings under this section in motion. Whether the Court chooses to take action itself under the section or is moved by the Receiver or by a creditor it is not bound by any period of limitation and Art. 181 of Sch. I to the Limitation Act has no application to such a proceeding. [p. 997, col. 1.]

Pirthi Nath v. *Basheshar Nath*, 69 Ind. Cas. 403, followed.

Miscellaneous first appeal from the order of the District Judge, Hissar, dated the 26th April 1922.

Mr. *Shamair Chand*, for the Appellants.
Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The facts of the case out of which this appeal has arisen are shortly these.—On the 20th of April 1916 one Shankar applied to the District Judge of Hissar asking that he should be adjudicated an insolvent. On the 19th of August 1916 the Court made the order of adjudication. On the 13th of October 1921 one Kunj Lal, a creditor, applied under section 53 of the Insolvency Act (V of 1920), that a gift made by the insolvent on the 9th of January 1916 in favour of his sons and wife should be declared invalid and should be cancelled. This application was accepted by the learned District Judge and the gift in question was annulled. Against this decision an appeal has been preferred to this Court by the transferees through Mr. Shamair Chand, and I have heard Mr. Jagan Nath on behalf of the creditors.

Two contentions have been raised before me by Mr. Shamair Chand in this appeal. Firstly, it is contended that it was not competent to the creditors to make an application for setting aside the gift and that it was only the Receiver who could make such an application under section 53 of the Insolvency Act. The second contention is that the application was time-barred under Art. 181 of the Indian Limitation Act, inasmuch as it was made more than three years after the transfer or even the date on which the order of adjudication was made. In my opinion, there is no substance in any of these contentions, and they must be overruled. Section 53 of the Act provides that such transfers as are therein specified shall be voidable as against the Receiver and may be annulled by the Court. There is no doubt that this section contemplates that action will be taken by the Receiver, but I do not think that it means that even when the Receiver refuses or neglects to act, no one else can set the proceedings under this section in motion. The Receiver had taken no action for five years after the order of adjudication was made and, in these circumstances, the creditors were, in my opinion, justified in assuming that he declined to take action. It, however, appears to be altogether unnecessary to pursue this matter any further, as I find that there is an application on the record, dated the 9th of February 1922, by the Receiver also asking the Court to annul the transfer and to declare that it would be inoperative as against him. In *Pirthi Nath* v. *Basheshar Nath* (1) it has been held by a Bench of this Court that an Official Receiver can make an application requesting the Court to take action under this section at any time during the pendency of the insolvency proceedings, and that Art. 181 of the Indian Limitation Act is no bar to such an application.

Next, it is argued that the application of the creditor, dated the 13th of October 1921, was barred by limitation under Art. 181 of the Indian Limitation Act. It is contended that this Article is not limited to applications made under the Code of Civil Procedure and that it is a general residuary provision covering all applications which do not fall under any other Article in the Act. On the other hand, it is argued by Mr. Jagan Nath on behalf of the respondents that the Article is limited in its scope and that it is restricted to applications under the Code of Civil Procedure only. A large number of authorities have been cited on both sides, and I have been asked to refer this question to a Full Bench if I feel any doubts in the matter. The question

(1) 69 Ind. Cas. 403.

whether Art. 181 of the Indian Limitation Act is limited in its scope and is restricted to applications made under the Code of Civil Procedure, or whether it applies to applications made under local or special laws as well is not free from difficulty; but I do not think that this question really arises in this case and it, therefore, appears to me wholly unnecessary that the matter should be referred to a Full Bench. The case of *Pirthi Nath* v. *Bashesshar Nath* (1), which is the latest decision of this Court on this point and to which reference has already been made, practically concludes this question. In that case an application was made by the Official Receiver for the annulment of certain payments made more than three years prior to that date, and it was held that such an application was not governed by Art. 181 of the Indian Limitation Act and that the right to move in the matter accrued to the Receiver from day to day as long as the insolvency proceedings continued. The language of section 53 makes it incumbent on the Court to annul every transfer of property made by an insolvent if the transferor is adjudged an insolvent within two years after the date of the transfer, provided the Court comes to a finding that such transfer was not made in good faith and for valuable consideration. As held in *Pirthi Nath* v. *Basheshar Nath* (1), it does not appear from the wording of this section that if the Court chooses to take action itself, it is bound by any period of limitation. Therefore, the fact that it was in this case moved to take action by the creditor should not make any difference whatever.

Following the authority cited above, I am of opinion that "the Court can take action under section 53 at any time during the pendency of the proceedings when a transfer open to objection under the said section is brought to its notice." I accordingly hold that the application was not barred by time and that Art. 181 had no application to this case. I dismiss the appeal with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 760 OF 1921.

June 11, 1923.

Present:—Justice Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

MR. C. G. MACDONALD AND OTHERS —DEFENDANTS—APPELLANTS

versus

TEKNARAIN RAI AND OTHERS— PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 178, scope of—Suit by landlord against tenant—Dispute as to occupancy rights—Compromise by tenant giving up claim, validity of.

Where there is a *bona fide* dispute between a landlord and the tenant as to the latter's possession of occupancy rights in the land and a compromise decree is passed in the suit on the admission of the tenant that no such rights exist, the tenant cannot subsequently contend that he, having as a matter of fact acquired occupancy rights in the land at the date of the compromise, the decree was not binding on him. To such a case section 178 of the Bengal Tenancy Act has no application. The section would be applicable if the occupancy right of the tenant was recognised and then given up by him under the compromise

A compromise decree was passed in a suit brought by a landlord against the tenant in which there was a dispute about the existence of occupancy rights in the land in favour of the tenant. The compromise stated: "It has been settled between your petitioners, the plaintiff and the defendant, that a decree be passed in favour of the plaintiff in respect of the land in suit," and further, "that your petitioner, the defendant, has given up his claim to the *kashtkari* right in the land decreed:"

Held, that the compromise did not offend against the provisions of section 178 of the Bengal Tenancy Act.

Second appeal from a decision of the District Judge, Darbhanga, dated the 22nd December 1920, modifying that of the Sub-Judge, Darbhanga, dated the 31st May 1920.

Messrs. *P. K. Sen* and *A. N. Das*, for the Appellants.

Mr. *P. Dayal*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the defendants in the suit against a decision of the District Judge of Darbhanga, dated the 22nd December 1920.

The suit was instituted by the plaintiffs as proprietors of certain *mauzas* which had been held in lease for a term of years by the defendants who carried on the business of indigo manufacture upon the

leased property to recover back 43 *bighas* odd of land which had been in possession of the defendants as *ticcadars* under their lease. In the appeal before us the dispute only concerns an area of something over 20 *bighas* of land.

The case put forward by the defendants is that, although they held the land now in dispute under the *ticca* lease which expired in the year 1918, they had in fact acquired an occupancy right in that land before the lease began in the year 1901. The plaintiffs, on the other hand, relied upon a decree passed in Suit No. 37 of 1900 in which the very question was in issue as to whether the defendants had any *kashtkari* right in the land now in dispute and that suit, they say, was determined after compromise and by the decree it was found, as admitted in the compromise, that the defendants had no claim to *kashtkari* rights in the land. The decree arrived at after compromise in that suit and the *ticca* lease granted in 1901 were practically parts of the same arrangements which was then come to. The lease is dated the 29th May 1901 and no doubt before that lease was granted the terms of the compromise of the suit then pending had been arranged between the parties in the suit, the decree in the suit being dated the 5th June 1901. We have not had the lease placed in evidence before us but it is not disputed that by the terms of the lease the defendants undertook at the end of their term that is to say, in the year 1918, to deliver up possession of all the lands leased. By the terms of the compromise decree they gave up their claim to any *kashtkari* right they might have had or which they might have been able to establish in the lands now in dispute and the question which we have to determine in this appeal is, whether that decree must be taken as binding upon the parties to-day or whether the compromise which was the basis of the decree is bad as being in contravention of the provisions of section 178 of the Bengal Tenancy Act. That section provides that: "Nothing in any contract between a landlord and a tenant made before or after the passing of this Act shall take away an occupancy right in existence at the date of the contract." It is contended that at the date of the compromise the defendants had in fact acquired an occupancy right in the land in suit and, therefore, even if they had agreed to give up that occupancy right and take a fresh lease which covered not only the land in suit but also the whole village in which the land was situated as well as other villages, nevertheless that being an agreement taking away an occupancy right in existence it was not valid by reason of section 178 of the Bengal Tenancy Act and, therefore, could not be given effect to now. In so far as the *ticca* lease itself is concerned, I quite agree that any contract contained therein to give up an existing right of occupancy would not be binding upon the holder of the occupancy right, but very different considerations arise when one is dealing with the effect of a compromise arrived at in a suit the subject-matter of which is the very right to an occupancy holding at all. The compromise, or rather the effective part of it, is in these words:—"In the above case it has been agreed and settled between your petitioners, the plaintiffs and the defendants, that a decree be passed in favour of your petitioners, the plaintiffs, in respect of the land in suit." Then follow some terms acknowledging the receipt of mesne profits and then comes these important words: "That your petitioners, the defendants, have given up their claim to the *kashtkari* right in the lands decreed." Then follow certain terms as to granting a lease for 19 years of certain *mauzas* including that in which the lands in dispute in that action were situated. It is contended on behalf of the defendants that the real meaning of that clause which I have just referred to in the compromise was that the defendants gave up a right which they already had in the lands in suit; that is to say, that they gave up their *kashtkari* right and in return therefor they took a lease for 17 years of those lands and others on certain terms. If it can be made out that the compromise between the parties recognised the right of the defendants as *kashtkaridars* at that time and that the defendants undertook to give up that right in exchange for a lease of a different sort then, I think, the defendants

in that case would be entitled to succeed because such an agreement would, to my mind, be in direct conflict with the provisions of section 178 of the Bengal Tenancy Act, but I cannot read the compromise in that way. It must be remembered that one of the questions, if not the main question in the suit, which resulted in that compromise was, whether the plaintiffs in that suit were entitled to *khas* possession of the lands or whether the defendants had *kashtkari* rights in them, and that dispute was settled by the defendants giving up their claim to the *kashtkari* rights; that is to say, the defendants acknowledged that they had no claim at all to the *kashtkari* right. In other words, they submitted to a decree on behalf of the plaintiffs for possession on the ground that their *kashtkari* rights had not been established. The decree itself was passed in the terms of the compromise and I think it must be accepted that the dispute between the parties in that suit was determined by declaring in effect that the plaintiffs were entitled to recover possession of the land and that the defendants had no *kashtkari* right in it. This, to my mind, leads to an entirely different result from that which would have followed had the defendants in that suit agreed not to give up their claim to the *kashtkari* right but had agreed to abandon or to give up a *kashtkari* right which was admittedly in existence at that time. It is said that, if it can be shown at the present day that they had in fact such a *kashtkari* right when the compromise was entered into, then the compromise is one which was in contravention of section 178 because it in fact gave up a right to which the defendants were entitled. In my opinion, it is not open to the defendants now to question the validity of the decree which was arrived at at that time. The question in dispute at that time was clearly whether such a right existed or whether it did not and there was undoubtedly a *bona fide* dispute between the parties as to the existence of such a right and if by compromise the parties agreed that such a right did not exist and that agreement is enforced by the decree then it is not open any longer to either of the parties to question the finding or validity of that decree.

In the view I take of this case, it is unnecessary to consider whether what was done upon the occasion of the compromise was a surrender within section 86 of the Bengal Tenancy Act because whether it was a surrender or whether it was a settlement of a *bona fide* dispute as to the existence of the right in question in either case it would be equally binding upon the defendants. In my opinion this appeal fails and should be dismissed with costs.

Kulwant Sahay, J.—I agree.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 139-B OF 1922.

June 29, 1923.

Present:—Mr. Kotval, A. J. C.

SHANKARRAO—DEFENDANT—APPELLANT

versus

KHUSHALRAO—PLAINTIFF—RESPONDENT.

Inam *Rules*—Deshmuki Inam *in cash—Agreement to accept lesser amount, whether binding on heirs.*

An agreement by a person entitled to receive a share in a *Deshmukhi Lawajma* to accept a smaller share cannot bind his heirs and successors as he has no power to affect their interest.

Krishnaji v. *Manwar Ali*, 6 Ind Cas. 821; 6 N. L. R. 72 *Aman Ali* v. *Imambi*, 22 Ind. Cas. 89; 9 N. L. R. 188, distinguished.

A *Deshmukhi* cash *inam* does not fall under rule VI (2) so as to be governed by rule V (2) of the *Inam* Rules. All the same, the grant is a perpetual hereditary grant for the maintenance of the dignity of the members of the family and each person entitled for the time being to a share therein must be held to be holding that share for his life only. [p. 1000, col. 2.]

Appeal from the decree of the Second Additional District Judge, Amraoti, in Civil Appeal No. 138 of 1921, decided on the 15th November 1921.

Mr. *R. R. Jaiwant*, for the Appellant.

Messrs. *M. Gupta*, and *N. G. Bose*, R. B., for the Respondent.

JUDGMENT.—The plaintiff, whose father Chimnaji was admittedly an illegitimate issue, sued for recovery of a 1-5th

SHANKARRAO v. KHUSHALRAO.

share in *Deshmukhi Lawajma* from the defendant who is the registered recipient. The pleas in defence now material were that Chimnaji's father Raiban was a Kshatriya and, therefore, neither Chimnaji nor the plaintiff was entitled to succeed to his share in the *Lawajma*. An alternative plea was, that Chimnaji had in 1883 agreed to receive only a 1-10th share in the *Lawajma*. Neither of these pleas has succeeded in the lower Courts which have held that the plaintiff's family is Kunbi and, therefore, Sudra and Chimnaji was entitled to succeed to Raibhan and that the agreement does not bind the plaintiff as Chimnaji had only a life interest and could not by his agreement affect his successor's interest.

The agreement, Exhibit D-1, in spite of the fact that at the end it contained the recital that any dispute raised by the issue of both parties will not be maintainable under the agreement is, in my opinion, a personal agreement by Chimnaji and does not profess to bind his heirs' interest. Chimnaji who was illegitimate was apparently keen on establishing social recognition for himself even at a pecuniary sacrifice and appears to have agreed to accept a 1-10th in lieu of a 1-5th share which was declared by a judicial decision to be his as a consideration for certain *man* given to his father being continued to be given to him. The recital does not necessarily mean that the successors of Chimnaji and Tukaram will continue to receive and give only a 1-10th share. The clause may well refer to any dispute regarding the *man* to which each party to the agreement was personally entitled and its object may have been to secure that Tukaram's heirs, in case of his death, would continue to give Chimnaji the *man* stipulated for in the agreement. The document read as a whole appears to me to create only a personal obligation on the part of Chimnaji [to claim only a 1-10th share, but even if the agreement purported to bind Chimnaji's heirs it could not in law bind them as, in my opinion, Chimnaji had no power to affect his successors' interest. The rulings in *Krishnaji* v. *Manwar Ali* (1) and *Aman Ali* v. *Imambi* (2) referred to an *inam* governed by the special rules of devolution contained in rule V (2) of the *Inam* Rules. A *Deshmukhi* cash *inam* does not fall under rule VI (2) so as to be governed by rule V (2) but I think the reasoning in *Krishnaji* v. *Manwar Ali* (1) may be applied in this case. The grant is a perpetual hereditary grant for the maintenance of the dignity of the members of the family and each person entitled for the time being to a share must be held to be holding that share for his life only.

It is contended that Raibhan was a Kshatriya and that as Chimnaji was illegitimate he could not inherit the *Watan*. It is also said that, since a Hindu could not contract a legal marriage except in his own caste, and Chimnaji had no caste, the plaintiff his son was also illegitimate. It is on the authority of *Ravji* v. *Sakuji* (3) that it is contended that an illegitimate son cannot inherit a *Watan*. That ruling only says that an illegitimate son cannot inherit a *Watan* collaterally in preference to legitimate heirs. These points, however, are irrelevant in this case for Chimnaji though illegitimate obtained a decree for his share of the *Lawajma* as recited in Exhibit D-1; *vide* also Exhibits P-7 and P 8. It is argued that the decision cannot be used in the present case as binding on Tukaram as the plaintiff does not claim through Chimnaji but independently of him under the grant. But the plaintiff is claiming because he is Chimnaji's son. Chimnaji represented the share of the pension due to his branch though his personal interest was restricted, and I think the decision in Chimnaji's suit as to his right to a share is binding on the defendant. The appeal fails and is dismissed with costs.

G. R. D & N. H. *Appeal dismissed.*

(1) 6 Ind. Cas. 821; 6 N. L. R. 72.
(2) 22 Ind. Cas. 89; 9 N. L. R. 188.
(3) 5 Ind. Cas. 964; 34 B. 321; 12 Bom. L. R. 204.

FIRM PHAGGU MAL-MATA DIN *v.* BENARSI DAS.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 381 OF 1923.

May 25, 1923.

Present:—Mr. Justice Moti Sagar.

THE FIRM PHAGGU MAL-MATA DIN, THROUGH MAGHI RAM—JUDGMENT-DEBTORS—APPELLANTS

versus

BENARSI DAS—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XLI, r. 6 (2)—Execution of decree—Sale, application to stay—Appeal whether lies—Court, duty of.

An order refusing to stay a sale of immoveable property in execution of a decree during the pendency of an appeal, under the provisions of O. XLI, r. 6 (2) of the Civil Procedure Code, is appealable as a decree under section 47 of the Code.

Ram Nath Singh v. *Kamleshwar Prasad Singh*, 9 Ind. Cas. 323; 15 C. W. N. 432, distinguished.

Under O. XLI, r. 6 (2) of the Civil Procedure Code, the Court, in the case of an order for the sale of immoveable property in execution of a decree, is bound, where an appeal is pending from such decree, to stay the sale on the application of the judgment-debtor, on such terms as to giving security or otherwise as the Court thinks fit, until the appeal is disposed of.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Ambala, dated the 20th January 1923.

Lala *Jagan Nath*, for the Appellants.

Mr *Manohar Lal*, for the Respondent.

JUDGMENT.—The Senior Subordinate Judge of Ambala has refused to stay a sale of immoveable property in execution of a decree during the pendency of an appeal in this Court, under O. XLI, r. 6 of the Code of Civil Procedure, and the judgment-debtors have appealed.

It appears that the respondent, Rai Bahadur Benarsi Das, obtained a decree for Rs. 13,827-9-6 against the present appellants which was put into execution, and certain immoveable property belonging to the judgment-debtors was attached. The defendants-judgment-debtors preferred an appeal against this decree to this Court and along with the Memorandum of Appeal filed an application under O. XLI, r. 5, Civil Procedure Code, for the stay of execution proceedings. The application came up for hearing before the Chief Justice who rejected it on the 18th November 1922 and ordered that the judgment-debtors should apply to the Executing Court for the stay of sale after the property had been advertised for sale under O. XLI, r. 6 (2) of the Code of Civil Procedure. The property having been advertised for sale, the judgment-debtors put in an application for stay which was summarily rejected by the Senior Subordinate Judge by an order which was couched in the following terms:—

"The applicant is present. The proceedings as regards auction-sale cannot be stayed. The applicant can get an order for stay of the auction-sale from the High Court of Judicature at Lahore."

A preliminary objection is raised by Mr. Manohar Lal on behalf of the respondent that the order is not appealable. In my opinion there is no force in this preliminary objection, and it must be overruled. It was held by Scott-Smith, J., in Civil Appeal No. 687 of 1922 that an order refusing to stay a sale of immoveable property in execution of a decree during the pendency of an appeal in this Court under the provisions of O. XLI, r. 6 (2) of the Civil Procedure Code was appealable as a decree under section 47 of the Civil Procedure Code. No authority has been cited to the contrary, and *Ram Nath Singh* v. *Kamleshwar Prasad Singh* (1) on which reliance has been placed by the learned Counsel is not exactly in point. I see no reason to differ from the opinion of Mr. Justice Scott-Smith and I hold that the order is appealable.

On the merits, there can be no manner of doubt that the order is erroneous and must be set aside. Under O. XLI, r. 6 (2) the Court, in the case of an order for the sale of immoveable property in execution of a decree, is bound, where an appeal is pending from such decree, to stay the sale on the application of the judgment-debtor on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

I accept the appeal and setting aside the order remand the case to the Senior Subordinate Judge with a direction that

(1) 9 Ind. Cas. 323; 15 C. W. N. 432.

he should pass fresh orders in accordance with law. No order as to costs.

Z. K. *Appeal Accepted.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1274 OF 1921.
June 29, 1923.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Kulwant Sahay.

CHIKHURI RAM—PLAINTIFF—APPELLANT
versus
GOPAL NARAIN RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor, liability of—Debt incurred by father during minority of son—Hypothecation by minor on attaining majority of his own property for father's debt—Want of consideration—Necessity.

Where there is no previous contract by a minor at all but only by his father, the liability of the father can be no consideration for a fresh contract by the minor on attaining majority whereby he hypothecates his property to secure payment of a debt arising out of the said liability. Should it be proved that the liability was incurred for necessaries or benefit of the minor, or that at the time the hypothecation bond was entered into there was a genuine claim against the minor and a suit against him was threatened, then an adjustment of accounts whereby the creditor accepted a certain sum and his undertaking not to sue the minor for the sum due, might be a good consideration for the bond [p. 1004, col. 1.]

A liability under a contract which is void on the ground that one of the contracting parties is a minor is no consideration for a fresh contract made by the minor on attaining majority: [p. 1004, col. 1.]

Krishnan Chetty v. *Vellaichami Thevan*, 12 Ind. Cas. 568; 37 M. 38; 10 M. L. T. 385; (1911) 2 M. W. N. 461; 21 M. L. J. 1077 and *Narendra Lal Khan* v. *Hrishikesh Mukherjee*, 46 Ind. Cas. 765, followed.

Second appeal from a decision of the Subordinate Judge, Arrah, dated the 16th March 1921, reversing that of the Munsif, First Court, Buxar, dated the 29th November 1919.

Messrs. *N. N. Sen* and *S. M. Mullick*, for the Appellants.

Mr. *P. Dayal*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the plaintiff against a decision of the Subordinate Judge of Arrah reversing a decree of the Munsif of the First Court at Buxar.

The plaintiff, who is the appellant before us, entered into certain transactions with Tribeni Ram, the defendant No. 4 in the suit. The transactions in question were the ordinary transactions between a customer and a tradesman, the plaintiff being the tradesman. The goods were supplied, principally cloth, and a certain amount of money was lent to the defendant No. 4. At the time when these transactions took place the other defendants in the suit, namely, those numbered 1, 2 and 3, were minors although they were living together jointly at that time. The three defendants are all the sons of *Musammat* Sahodra Kuer. The defendant No. 1 Gopal Narain Ram is her son by her first husband, now deceased. The second and third defendants, Ram Narain Ram and Sheo Narain Ram, are also her sons by her second husband, who is Tribeni Ram, the defendant No. 4. In February 1916 it appears that there was an adjustment of the account existing between the plaintiffs and Tribeni Ram. The account was on *bahi khata* and a certain Pleader who had been employed both by the plaintiff and by Tribeni Ram was engaged to go through the account and make an adjustment. In the result, it was found that a sum of about Rs. 900 was due from Tribeni Ram. The plaintiff agreed to forego a sum of Rs. 300 reducing the amount due to Rs. 600 and the parties entered into a mortgage which is the subject of the present suit whereby a house belonging to the defendants Nos. 1, 2 and 3, the sons of *Musammat* Sahodra Kuer, was hypothecated to secure the debt due amounting to Rs. 600 under the *bahi khata* transaction. The mortgage was executed by Gopal Narain Ram who is said to have been of age at that date and by Tribeni Ram purporting to act as guardian of the other two defendants his sons who were still minors. The property mortgaged was not the property of Tribeni Ram at all but was the separate property of the three sons of Sahodra Kuer they having inherited it from her as part of their maternal grandfather's estate. The present suit was brought to enforce that mortgage against the first three de-

fendants. Although Tribeni Ram was made a defendant in the suit no relief is claimed against him presumably on the ground that he merely acted in the capacity of guardian of his sons, the second and third defendants.

The genuineness and validity of the bond was challenged by each of the defendants except Tribeni Ram who entered no defence at all. It was also pleaded that the defendants had not entered into any loan or cash transactions at all with the plaintiff or taken any things from his shop nor was there any reason for their doing so and they denied all liability under the mortgage-bond.

The learned Munsif before whom the case came for trial and before whom various issues were raised including an issue as to whether the mortgage-deed was genuine and for consideration found in favour of the plaintiff. He found that the goods had in fact been taken and the loans given to Tribeni Ram; that there had been an adjustment of account; that the bond in suit was genuine and for consideration and that the defendant No.1 had attained his majority at the date when the bond was executed. He did not deal in terms with the question of whether the transactions under which the goods were supplied and the money lent to Tribeni Ram were for the benefit of the minors.

When the case went on appeal to the Subordinate Judge he came to the conclusion that no consideration had been proved for the execution of the bond by or on behalf of the first three defendants. The *bahi khata* which showed the transactions which formed the considerations for the bond had not been produced in evidence and although it was true that at the time when the bond was entered into there was a sum of Rs. 600 due from Tribeni Ram it was nowhere shown that the goods supplied or the money lent had in any way been supplied or lent for the benefit of the minors and, in these circumstances, having found that all the first three defendants were minors at the date when the transactions took place he came to the conclusion that the bond was not binding upon them because the only consideration for executing the bond was the liability under the *bahi khata* which was not in any way binding upon the minors. He did not in terms differ from the learned Munsif in finding that the first defendant, Gopal Narain Ram, was of age in February 1916 when the bond was executed. He did, however, find that he was a minor at the date of the *bahi khata* transactions. He further came to the conslusion that it had not been proved that the bond was properly executed in the presence of two attesting witnesses. Upon this point I think the learned Subordinate Judge took a rather narrow view. One of the attesting witnesses was called and proved that the executants of the bond executed it in his presence and that he attested it, and the bond was produced and showed the signatures of the other attesting witnesses. The learned Subordinate Judge seems to have been under some confusion as to the exact effect of section 68 and the following sections of the Indian Evidence Act which require execution of a document of this nature to be proved by one of the attesting witnesses. He said that, as a mortgage-bond must be subscribed by two attesting witnesses under the provisions of section 59 of the Transfer of Property Act, and as in this case only one attesting witness had proved it, that proof was wholly insufficient. I am inclined to think that there was some confusion in the learned Judge's mind in finding that the requirements of the law had not been complied with in so far as proof of the execution of the bond was concerned. In the view I take of this case, however, it is unnecessary to consider whether the evidence of the attesting witness, who was called, when closely looked into was really sufficient to prove the due execution of the bond.

The plaintiff, in my opinion, must fail for this reason. It is nowhere shown that the goods supplied to Tribeni Ram or the loans taken by him were for the benefit of the other three defendants in the case who were minors at that time. They were not liable upon the *bahi khata* account. Had it been shown that the goods were purchased for their benefit or that the loans were taken for their benefit then it might be that they would have been liable as members of a joint family even though minors under the *bahi khata* ac-

GOPAL DAS *v.* BANMALI LAL.

count. In the present case there is an entire absence of evidence upon that most important question. It is contended, however, that the defendant No. 1, at all events, ought to be held liable upon the bond because at the time he executed it he was of age. Assuming, although it is not very clear from the learned Judge's judgment whether he considered that the defendant No. 1 was of age or not, but assuming that he was of age at that time, then it seems to me that, in so far as he was concerned, there was in fact no consideration for the bond. The consideration alleged is the liability under the previous *bahi khata* account. It is quite clear to my mind that in the absence of any evidence showing that the defendant No. 1 had any liability under that account it cannot be said that the liability which was really a liability of his father Tribeni Ram was any consideration for entering into the mortgage-bond of February 1916. It is well-established that a liability under a contract which is void on the ground that one of the contracting parties is a minor is no consideration for a fresh contract made by the minor on attaining majority. Several cases have been quoted in support of this proposition. I need only refer to *Krishnan Chetty* v. *Vellaichami Thevan* (1) and *Narendra Lal Khan* v. *Hrishikesh Mukherjee* (2). It would seem to follow, therefore, that where there is no previous contract by the minors at all but only by their father the liability of the father can be no consideration for fresh contract by the minor on attaining majority whereby he hyothecates his property to secure payment of a loan. Had it been shewn that at the time the bond was entered into there was a genuine claim against the minors and had a suit against them been threatened, then this adjustment of account whereby the plaintiff accepted a smaller sum than that which was due and his undertaking not to sue the minors for the sum due might possibly have been a good consideration for the bond, but nothing of the sort has been proved in this case and, in so far as anything can be gathered from the terms of the bond itself, it simply recites that there were dealings between Tribeni Ram and the plaintiff on *bahi khata* and that on adjustment an amount of Rs. 600 was found due. There is not a word in it to show that the defendant No. 1 ever admitted that he was in any way liable in respect of the goods supplied to his father. If in fact the goods supplied were necessaries and for the benefit of the minors, then it seems to me that the plaintiff has only himself to blame in failing in this case to bring sufficient proof before the Court of that fact. There is no proof at all as to what the goods supplied were, or the circumstances under which they were supplied, and there is certainly no proof to show that there would have been any valid claim against the estate of the minors in respect of the *bahi khata* account. In these circumstances, although I have no doubt that the transaction is quite genuine as between the plaintiff and Tribeni Ram, I regret that I must come to the same conclusion as that arrived at by the learned Subordinate Judge and dismiss this appeal with costs.

Kulwant Sahay, J.—I agree.

M. D. J. & N. H. *Appeal dismissed.*

(1) 12 Ind. Cas. 568; 37 M. 38; 10 M. L. T. 38; (1911) 2 M. W. N. 461; 21 M. L. J. 1077.
(2) 46 Ind. Cas. 765.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 90 OF 1921.

June 7, 1923.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

GOPAL DAS—PLAINTIFF—APPELLANT

versus

Goswami BANMALI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment—'Signing,' what amounts to.

Where the usual method of a *guru* or 'spiritual leader' in sending communications to his *chelas* or the disciples consists in superscribing the communications with the words "Sri Sri Hari Sarnam," and not in affixing his signatures, any communication drawn up in this form and in the hand-writing of the *guru* will be treated as

signed by him, although it does not bear his actual name; and any acknowledgment of liability signed in this manner and in his hand-writing will be valid for purpose of saving limitation within the meaning of section 19 of the Limitation Act. [p. 1000, col. 2.]

Gangadharrao v. *Venkatesh*, v. *Shidramapa Balapa Desai*, 18 B. 580; 9 Ind. Dec. (N. S.) 899, *Chidambaram Chetti* v. *Ramaswami Chettiar*, 26 Ind. Cas. 911; 27 M. L. J. 631 and *Sadasook Agarwalla* v. *Baikanta Nath Basunia*, 31 C. 1043; 9 C. W. N. 83, relied upon.

First appeal from the decision of the Additional Subordinate Judge, Benares, dated the 3rd January 1921.

JUDGMENT.—The suit out of which this appeal has sprung was brought by the plaintiff-appellant to recover a sum of Rs. 16,990 and certain ornaments alleged to be worth Rs. 8,000.

The two defendants to the suit are two brothers, Goswami Banmali or Banwari Lal and Goswami Damodar Lal. According to the allegations in the plaint these two defendants are members of a joint Hindu family, the second defendant being the managing member. The plaintiff alleged in his plaint that he was the spiritual disciple (*chela*) of the defendant No. 1 while his wife is the disciple of the second defendant. The case for the plaintiff was that at various times he had advanced sums of money to these defendants and in particular to the second defendant. He also alleged that on the occasion of a *gauna* ceremony he had lent certain valuable ornaments and utensils to the defendants which they had not returned.

The first defendant denied ever having received any money from the plaintiff. The second defendant, while admitting that there had been money dealings between himself and the plaintiff, did not admit that he had received from the plaintiff the sums which are specified in the plaint. He further denied that he had ever borrowed any ornaments or utensils from the plaintiff as alleged.

It is necessary to examine in some little detail the allegations in the plaint, for the important question which arises in the suit is the question of limitation.

The claim of the plaintiff may be divided into three parts. He first alleged in paragraph 3 of his plaint that, between the months of December 1908 and December 1911, he had lent to the defendants a sum of Rs. 4,112. His story was that he had, on the 16th December 1911, received part-payment to the extent of Rs. 1,112 and that, therefore, in respect of the dealings of this period there was due to him a sum of Rs. 3,000.

The plaintiff next alleged that, on the 14th and 15th December 1911 he had raised a sum of Rs. 8,000 by way of mortgage and had advanced this money to the defendant No. 2.

Lastly, with respect to the ornaments, the case for the plaintiff was that these had been lent to the defendants for a *gauna* ceremony in or about the month of February 1915.

This suit was not filed till the 29th October 1918 and on the allegations made in the earlier paragraphs in the plaint it is clear that the suit for recovery both of the money and the ornaments would have been time-barred. However, in paragraph 10 (A) of the plaint the plaintiff described certain documents upon which he relied for the purpose of showing that his claim was still within time.

The suit failed in the Court below. The learned Subordinate Judge appears not to have believed the plaintiff's story either as regards the advance of these monies or the loan of the ornaments. In any case, he was of opinion that the plaintiff had failed to prove by any satisfactory evidence that the claim, even if true, was still within limitation.

The plaintiff has now appealed, and the findings of the Court below on all the points found against the plaintiff have been attacked here.

We proceed to deal, in the first instance, with the claim relating to the sum of Rs. 3,000.

We have already mentioned that in the 3rd paragraph of the plaint it was stated that certain loans had been made to the defendants between the months December 1908 and December 1911.

The plaintiff alleged that he had no accounts to produce for the purpose of showing the various dates on which these advances had been made. In his evidence the plaintiff began by stating that the first sum of money which he advanced to the se-

cond defendant was sent in consequence of a letter, Exhibit 1, page 105, which bears a date corresponding to the 28th December 1908. That letter was written from Naudip or Nadia where the second defendant is alleged to have been residing at the time. The plaintiff's story is that he borrowed the sum of Rs. 1,000 from a banker in Benares and sent the money by a messenger to the second defendant.

The plaintiff proceeds to state that at subsequent times, although no dates were specified, he advanced sums of Rs. 800, Rs. 300 and Rs. 200 to the second defendant. He winds up his statements on this part of the case by saying that in the month of December 1911 an account was taken between the parties and a sum of Rs. 4,112 was found to be owing to the plaintiff.

It has been strongly pressed against the plaintiff that he has failed to produce his account-books in Court. The plaintiff's story is to the effect that, some time before these advances were made, he had given up keeping accounts, having separated from his brothers who were in business in Benares as money-lenders. We are not disposed to accept the statement of the plaintiff that no accounts were kept by him of the items advanced to the defendants, for there is evidence on the record which will indicate that, in spite of a separation between himself and his brothers, the plaintiff still carried on a money-lending business and, in such circumstances, it would be reasonable to expect that he kept some account of his money dealings. However, we have to deal with the case on the footing that no accounts have been produced and we have to see on what evidence the plaintiff relies for the purpose of showing that this money was advanced.

Four papers are relied on by the plaintiff for the purpose of showing that this money was due to him. In the first place, we have a document marked Exhibit 3 which is printed at page 121 of the record. This is a memorandum which is alleged to be in the handwriting of the second defendant.

We may pause here to mention one fact which is to be taken into consideration in dealing with the various documents upon which the plaintiff relies for the purpose of saving limitation. It is the fact that none of the letters or memoranda upon which reliance is placed by the plaintiff bear the signature of the second defendant, Damodar Lal, that is to say, in none of these documents can we find the name of Damodar Lal.

It is claimed, however, that in his correspondence with his disciples this defendant is not in the habit of signing his name. The regular method of correspondence, it is said, consists in superscribing all communications with the words "Sri Sri Hari Sarnam" and there is evidence to show that this is a customary mode in which *Gurus* or spiritual preceptors address communications to their disciples. The defendant himself when examined on this point admitted (see page 72 of the record) that when he writes to his *sewaks*, meaning his disciples, he is not in the habit of affixing his signature. Another witness on this point is Gokul Chand who also deposes to the same effect, saying that spiritual preceptors do not sign their names when addressing letters to their disciples. The reason given by the plaintiff for this practice is that it would be derogatory for a person holding a high position like a *guru* to subscribe his name in a letter underneath the name of his disciple.

We are satisfied that this is a usual practice in communications of this kind and we hold, therefore, that any communication which is drawn up in this form, although it does not bear the actual name of the defendant No. 2 must nevertheless be treated as being signed by him. The question whether words such as those we have referred to inserted at the top of letters or other communications, can be treated as signatures, has been dealt with in a case reported in *Gangadharrao Venkatesh* v. *Shidramapa Balapa Desai* (1) where it was held that the words "*guru samarth*" written at the top of a letter addressed by a preceptor to his pupil constituted a signature for the purposes of section 19 of the Limitation Act. We find, moreover, that a similar decision has been given in the Madras case which is to be found reported as *Chidambaram Chetti* v. *Ramaswami Chettiar* (2). We may also refer

(1) 18 B. 586; 9 Ind. Dec. (N. S.) 899.
(2) 26 Ind. Cas. 911; 27 M. L. J. 631.

in this connection to a somewhat similar case which is to be found in *Sadasook Agarwalla* v. *Barkanta Nath Basunia* (3).

It is clear on all hands that these letters which bear the superscription were addressed by the second defendant either to the plaintiff or to the plaintiff's wife and that it was understood and was meant to be understood that these were communications proceeding from the second defendant who was their spiritual leader.

We hold, therefore, that, so far as these letters and communications are concerned, any of them which are found to be in the handwriting of the second defendant and which bear this superscription must be treated as having been signed by the second defendant.

To return to Exhibit No. 3 this is a memorandum or slip which bears the heading "Sri Sri Hari Sarnam." According to the statement of the plaintiff this document is in the writing of defendant No. 2 although the latter has denied the fact.

For the purpose of proving an acknowledgment, however, it appears to us that this document is of no value whatever.

We have already mentioned the fact that on the 14th of December 1911 a mortgage was executed by the plaintiff in favour of one Makundi Lal for the purpose of borrowing a sum of Rs. 8,000.

In the endorsement made upon this mortgage at the time of registration particulars were entered regarding the mode in which money was paid: so many sovereigns, so many notes and so much cash. The slip, Exhibit 3, merely repeats the details of these various items and there is nothing in the document more than an acknowledgment by the second defendant that he had received a sum of Rs. 8,000 from the plaintiff in the various denominations of sovereigns, notes and cash.

There is nothing in this document whatever to show an acknowledgment of an existing liability for Rs. 3,000 on this date and, therefore, for the purpose of saving limitation in respect to the claim for Rs. 3,000 this document, as we have said, is of no avail. It may have some bearing upon the other question which we shall have to consider later on, namely, whether this sum of Rs. 8,000 borrowed on mortgage in December 1911 was, as a matter of fact, made over to the second defendant?

To continue, regarding the claim for Rs. 3,000 the next document upon which the plaintiff lays stress is a document, Exhibit 4, which is printed at page 123 of the record. This document bears date of the 14th December 1911 being the date upon which the mortgage was executed although at the bottom of the document there is another date, *Magh Badi* 10th *Sambat* 1968, which would correspond to the 13th January 1912.

According to the plaintiff's statement this document is in the writing of the defendant No. 2 and in connection with the claim for Rs. 3,000 he refers to one entry in this list which reads as follows:—

"Paid on account of Babuji's parole debt, Rs. 1,112

"(*babuji ke hath udhar ke chukai*)."

We are unable to spell out of this document any acknowledgment on the part of the second defendant (assuming that the document is in his handwriting) that on the date on which the memorandum was prepared he owed the plaintiff a sum of Rs. 3,000. The plaintiff tries to make this out by saying that an account having been taken between the parties a sum of Rs. 4,112 was found due to him and that after deduction of this payment of Rs. 1,112 there was left a balance of Rs. 3,000.

That, however, is not stated in the document itself. Further it is important to consider the language of the entry in the document in question. To us it appears as it did to the Subordinate Judge also, that the entry does not import that the sum of Rs. 1,112 was being paid on account of and in reduction of a debt of a larger amount. The word used in "*chukai*" which ordinarily signifies the complete satisfaction and discharge of a debt. In our opinion, therefore, the plaintiff can derive no assistance from the entry in this Exhibit 4 for the purpose of proving that this claim is within time.

We now come to another document which is marked Exhibit 12 and which is printed at page 103 of the record. This again bears the superscription Sri Sri Har

(3) 31 C. 1043; 9 C. W. N. 83.

Sarnam and it purports to have been prepared on a date corresponding to the 17th August 1912. This document is perhaps the most important document in the case in connection with the claim of the plaintiff for recovery of the sums of money set out in the plaint. The document contains an entry indicating that a sum of Rs. 3,000 was due to Gopal Das, the plaintiff, on account of a pre-existing debt.

The defendant denied that this document was in his handwriting.

We have, therefore, to address ourselves to the question as to whether it has been proved that this document, as a matter of fact, was written by the defendant No. 2. The story of the plaintiff regarding Exhibit 12 is this: At page 36 of the record Gopal Das states that the defendant wrote Exhibit 12 because he stood in need of more money after borrowing the sum of Rs. 8,000 which he took in the month of December 1911. Gopal Das states that in order to convince him that more money was required the second defendant prepared this document and made out a list of his debts. He proceeds to say that a few months after this document was handed to him the second defendant asked him to return this slip. The plaintiff told the defendant that he could not find it and so the defendant wrote out a second slip which is marked Exhibit 13 and which is printed at page 101 of the record. This, too, is said to be a statement of debts which were owing by the second defendant a statement which he prepared in order to persuade the plaintiff to borrow some more money for his benefit.

The genuineness of both these documents is most strongly denied on behalf of the defendants and we have been pressed here in appeal to consider the matter and to give more attention to it than it received at the hands of the learned Subordinate Judge. We have on the record a number of documents written in Hindi which are now either proved or admitted to be in the writing of the defendant No. 2. One test, therefore, which could have been applied for the purpose of determining whether these Exhibits 12 and 13 are genuine documents was comparison of the writing in them with the writing contained in documents which the defendant No. 1 is proved to have written.

We have done our best to assist Counsel in this matter and we have made a careful examination and comparison of the different writings. One difficulty in our way is that most of the letters which are on the record are written in a careful way and obviously with due deliberation whereas the slip Exhibit 12 appears to be a document which was drawn up more or less in a hurry and in a very brief form. There are certain abbreviations used in the entries which indicate that the memorandum was prepared in an off-hand manner. It is thus very difficult to institute any real comparison between the writings. Mr. Upadhya who has dealt with this part of the case on behalf of the appellants has drawn our attention to certain similarities in the formation of letters and in the general character of the writings. We must say that after giving this part of the case our best consideration we have not been able to satisfy ourselves that it is established that this document Exhibit 12 and the other document Exhibit 13 are in the writing of the defendant No. 2.

We have to notice here that there was a statement made by a witness named Gokul Chand to whom both these documents were shown. He professes to be familiar with the handwriting of the second defendant and he stated that he was able to recognize the writing in both Exhibits 12 and 13 as the writing of the second defendant. From certain questions put to this witness in cross-examination it seems that he and the second defendant have not been on good terms and we do not think it would be safe to rely on Gokul Chand's statement that these two documents are in the writing of Damodar Lal. Further we are bound to say that the story of the plaintiff in the witness-box as to how this document Exhibit 12 came into existence is not very convincing. It is difficult to understand why, if the defendant was anxious to have more money raised for his benefit, he should prepare this slip and make it over to the plaintiff and we are still more suspicious of the story told about the second document, Exhibit 13, which came into

existence in the manner we have already indicated.

Dr. Sen has argued before us that, in view of certain questions which were put to the plaintiff in cross-examination, the defendants really admitted that these documents were in the writing of Damodar Lal. The plaintiff was asked if it were not a fact that he had discovered these two documents in certain books of account belonging to the second defendant which had come into his possession at the time of the execution of a decree. He denied that this was the manner in which he had come to have these documents in his possession. We cannot agree that there is anything in these questions asked in cross-examination to justify our holding that the defendants have in any way admitted that these documents were, as a matter of fact, in their account-books and were found by the plaintiff in the manner suggested.

This brings us to the end of the case so far as it relates to the claim for Rs. 3,000. Our finding is that there is no proof of any acknowledgment which would save limitation as regards this claim for Rs. 3,000 so that, even if letters of later dates, of which there are many on the record, can be taken to contain any admission regarding a liability for the sum just mentioned they would be of no avail inasmuch as it cannot be shown that those admissions were made at a time while limitation was still running.

We agree, therefore, with the first Court that the plaintiff has failed to prove that his claim as regards this item is within time.

We come now to the claim in respect of the sum of Rs. 8,000. We have already adverted to the fact that this money was borrowed after the execution of a mortgage-deed in the month of December 1911. The document itself contains a recital to the effect that Gopal Das was borrowing this money for the purpose of advancing a loan to Damodar Lal and also to meet household expenses.

The words in the document are *"ba gharaz dene qarz apne guru Damodar Lal."*

There was a good deal of argument apparently in the Court below as to the interpretation of these words but we have no doubt whatever that what they mean is that Gopal Das was raising money on mortgage for the purpose of making a loan to Damodar Lal. Damodar Lal himself attested this document and there is evidence which shows, in our opinion, that he knew that the recital was in the document and in spite of his denial we do not believe him when he says that he got none of the money which was raised by this mortgage.

Letters which were proved to have been written by the second defendant show to us unmistakeably that Damodar Lal got at least a portion of this money advanced to him. We refer in particular to one letter, Exhibit 24, which is to be found at page 147 of the record. That letter was written on the 14th October 1915 and contains the following passage:

"As regards Makundi Lal's money also it is matter of days only when every account will be cleared by the grace of Sriji."

Reading this letter with other letters which were written at or about the same time there can, in our opinion, be no doubt whatever that Damodar Lal knew very well that he was liable to the plaintiff for the sum or a portion of the sum which had been borrowed on mortgage.

When the second defendant was in the witness-box he was called upon to explain these statements. The only answer that he could give was that he knew that the plaintiff had borrowed money on mortgage from Makundi Lal. He said that the plaintiff was pressing him for help to raise loan in order to pay off Makundi Lal and so he says that the statement regarding Makundi Lal's debt contained in the letter, Exhibit 24, relates to certain exertions which he was making for the purpose of enabling the plaintiff to raise a fresh loan to pay off Makundi Lal. We have no doubt whatever that that is a false statement and indeed it has been conceded before us that, in view of the evidence and particularly by the evidence in the letters, it is impossible to accept the story told by Damodar Lal in the witness-box.

The learned Subordinate Judge was of opinion that none of this money had come into the hands of the second defendant, but we do not agree with him.

However, the question still remains whether the plaintiff has been able to show

that his claim is within limitation for, unless it is so, our finding to the effect that the second defendant had this money or a portion of it will be of no assistance to the plaintiff.

We start with the fact that, according to the plaintiff's own case, this sum of Rs. 8,000 was advanced on the 14th December 1911. The suit was filed on the 29th October 1918.

We have already referred to the document, Exhibit 24, at page 147, and have held that it certainly contains an acknowledgment of liability on the part of Damodar Lal for the debt which was due by the plaintiff to Mukundi Lal.

The dated that letter, however, is the 14th October 1915 and this acknowledgment will, therefore, not save limitation.

We have, therefore, to consider the further question as to whether the plaintiff has been able to produce any further evidence for the purpose of showing that an acknowledgment of this liability was made at any time within three years commencing from the 14th December 1911.

Here, again, the plaintiff has to fall back upon two documents which have already been discussed by us, namely, Exhibit 12 and Exhibit 13. We have already dealt fully with the evidence regarding these documents and have discussed their history as given by the plaintiff in the witness-box. We have expressed our opinion that it is not proved that either of these documents is in the writing of the second defendant and so we need not dwell upon this matter any further. It is sufficient for us to say that we find that the plaintiff has failed to show that his claim regarding this sum of Rs. 8,000 was within limitation at the time the suit was filed.

We now come to the third part of the case, namely, that relating to the ornaments. What is the plaintiff's case in this respect? His story is that ornaments and utensils of an approximate value of Rs. 8,000 were lent to the defendants in the month of *Phagun Sambat* 1971, corresponding to the month of February 1915. The occasion of the lending of these ornaments was the *gauna* ceremony of the sons of the defendant. The story of the plaintiff was that these articles were taken on loan and that they were never returned. We have already mentioned that both the defendants denied ever having borrowed the articles in question.

The second defendant, who was the only one of the defendants who went into the witness-box, deposed that the story of the loan of the ornaments was not true.

In the course of the trial a small account book or *bahi* was produced containing the entries which are printed at page 70 of the record. This document is proved to be in the writing of the second defendant. The account-book was in possession of the plaintiff and was produced by him in Court. The defendant suggested in his cross-examination that the plaintiff had got possession of it by unlawful means.

There can be no doubt that this book contains a list of certain ornaments which were in the possession of the second defendant at the time when his son and his nephew were married.

The particular portion of the entry in this book upon which the plaintiff relies is the list which is written underneath the words '*bahuji kutaraf ki.*' The plaintiff's story is that the word *bahuji* refers to his, (the plaintiff's) wife. The defendant, on the other hand, denies this and says that the word *bahuji* refers to the wife of a brother of his named Sham Lal. We are bound to say at once that we do not believe this statement. We have no doubt whatever that on the occasion of the marriage of these two boys the defendant No. 2 did not borrow ornaments and utensils from the plaintiff.

That, however, does not by any means settle the case, for the plaintiff has admitted that after the marriage (*viah*) was over these ornaments or at any rate a number of them were returned. The case he makes out in his plaint is that they were lent out on a second occasion, that is to say, on the occasion of the *gauna* ceremony.

It must be confessed that the evidence of the plaintiff on this part of the case is by no means satisfactory and it is proved that he has made at various times conflicting statements. In the trial of the present case he certainly endeavoured to make out that the whole of the ornaments which were mentioned in the lists attached to the plaint were lent for the second time on the occasion of the *gauna* ceremony.

The plaintiff, however, was confronted with a certain statement which he made in the Criminal Court in the month of November 1916. We may mention here that, before the present suit was filed, two cases in the Criminal Court had been brought by Gopal Das against Damodar Lal. The statement to which we are about to refer was made in the course of the trial of one of them.

At page 165 of our record there is printed Exhibit J which is a certified copy of the deposition of Gopal Das in the Court of a First Class Magistrate. At page 166 he makes certain statements regarding the loan of ornaments to Damodar Lal. In his cross-examination he stated as follows:

"I lent him ornaments worth about Rs. 5,000.

'They are as follows:—

	Rs.
Bhuj set with diamonds worth ..	2,000
Buttons set with diamond worth ..	1,000
Chain set with emerald and rubies ..	2,000

When he was making this statement on the 17th November 1916 Damodar Lal at first stated that he had lent these ornaments four years previously. He then corrected himself and stated that the ornaments had been lent on two occasions. He said that they had at first been lent on the occasion of the marriage of the two boys, that they had been returned to him and that they were again lent on the occasion of the *gauna*.

It is obvious, therefore, that this statement does not fit in with the statement made by the plaintiff in the trial in this case. There he mentioned three items of ornaments only which had been lent and which had not been returned.

The value of those ornaments he gave as Rs. 5,000. Here he is referring to a larger list of ornaments the value of which he states to be Rs. 8,000.

We have satisfied ourselves by an examination of the evidence on the record that, although the claim of the plaintiff in respect of these ornaments is not established, he has nevertheless succeeded in showing that the ornaments to which we have just referred and which the witness mentioned in the course of his deposition in the Criminal Court were, as a matter of fact, lent to the defendant No. 2.

We have in this connection to refer to a letter which seems to us to really set the matter at rest. That letter is Exhibit 25, which is printed at page 155 of the record. We may say that there are one or two other letters referred to in which reference is made to certain ornaments but this letter which we are now discussing is the only one of which it can be said definitely, that it contains a reference to specific articles such as those which are mentioned by the plaintiff in his plaint.

We extract the following passage from this letter, Exhibit 25, which was sent on the 30th October 1915 by the second defendant to the plaintiff's wife:—

"The other ornaments are at Kashi which will be redeemed but the Delhi ornaments, namely, two armlets (*bhuj-do*) one chain and eight buttons are not traceable. So you can take the adequate amount in respect of the same."

This, in our opinion, is a distinct admission of liability on the part of the second defendant for the value of the ornaments so mentioned and we have no doubt whatever that to this extent the story of the plaintiff is true and that he lent to the defendants the two armlets, the chain and the eight buttons which are said to have been set with diamonds.

We wish to remark here that the translation of this letter, Exhibit 25, as it appears on the printed record, is altogether, misleading and erroneous and that it has been necessary for us to have the version corrected in order to enable us to decide the case properly.

We have it, therefore, that this document of 30th October 1915 contains an admission of liability in respect to these articles. The suit was brought on the 29th October 1918 which was within three years from the date of the acknowledgment. The only question that remains, therefore, is whether these articles were lent to the second defendant within three years of the 30th October 1915.

The story of the defendant regarding the marriage of his son and his nephew was to the following effect:—(see page 65) "The marriage of my nephew (brother's son) took place in the month of *Phagan*

Sambat 1968, and the marriage of my son took place in the month of *Chait Sambat* 1969. The *gauna* ceremony of both of them took place in the following winter, that is, within a year."

We gather from this statement of the defendant, therefore, that the *gauna* ceremony of these two boys took place between the month of October 1912 and the month of March 1913. The plaintiff, on the other hand, has assigned the month of February 1915 as the date of the *gauna*.

We are in this matter disposed to accept the evidence of the plaintiff in preference to that of the defendant but in any case it appears to us that the *gauna* ceremony must have taken place some time within three years preceding the 30th October 1915 the date on which this acknowledgment was given.

It need not be supposed that we are willing to attach much credit to the statement of Dimodar Lal. We have not the slightest doubt that he perjured himself freely in the witness-box. We have not the slightest doubt that these ornaments were borrowed and conclusive proof of this is to be found in the letter Exhibit 25.

It appears to us, therefore, that this portion of the claim, that is to say, the claim relating to the two armlets, the chain and the eight diamond buttons is within limitation, time being saved by the acknowledgment contained in the letter of 30th October 1915.

The statement of the plaintiff is, that these particular ornaments were worth the sum of Rs. 5,000 and there is nothing to contradict this. In the circumstances, we consider that the valuation which is put by the plaintiff on these articles ought to be accepted.

There are one or two other matters which perhaps call for some consideration but which really do not effect the decision of the case. The plaintiff alleged in his plaint that a payment by way of interest of a sum of Rs. 175 had been made to him in the month of June 1915 and he relied on that payment for the purpose of extending limitation.

We need only say regarding this part of the case that the plaintiff has failed to establish that any such payment was made to him by way of interest. What does appear from the evidence is that a certain sum of money was sent by the second defendant to the plaintiff's father-in-law for the purpose of discharging a certain debt. The father-in-law made over the money to the plaintiff who thereupon appropriated a sum of Rs. 175 and applied it in the discharge of a debt which was due from himself. There can be no possible plea that this payment was made by the defendant by way of interest.

Another plea was taken by the plaintiff for the purpose of extending limitation. He alleged that by arrangement with the defendant No. 2 he occupied a certain house of the defendants on the understanding that the rent was to be Rs. 10 a month and that this rent was to be applied in reduction of the interest owing on the debt due to the plaintiff by the defendant No. 2. This part of the case has also failed for we find no reliable evidence of any such agreement between the parties.

We now come to the end of the case, and our finding, therefore, is that the appeal ought to be allowed to the extent which we have already indicated. We, therefore, accept the appeal and, setting aside the decree of the Court below, direct that a decree be given to the plaintiff against both defendants for the return of the three ornaments which are specified in list B attached to the plaint; in case the ornaments are not returned the plaintiff will be entitled to a decree for Rs. 5,000 (rupees five thousand) with proportionate costs in the Court below and in this Court including fees on the higher scale. We fix a period of one month from the date of this Court's decree for the return of the ornaments to the plaintiff; in default of their return within the time allowed the plaintiff will be entitled to execute the decree for Rs. 5,000.

As regards the defendant's costs we think it right to say that, in view of his conduct, he is not entitled to any costs either here or in the Court below and we order accordingly.

We wish to note in conclusion that the task of trying this appeal has been rendered unusually difficult on account of the gross inaccuracy of the translations which appear in the printed book. This is a

matter which we propose to bring to the notice of the learned Chief Justice by means of a separate note.

M. A. A. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 333 OF 1922.

March 28, 1923.

Present :—Mr. Justice Moti Sagar.

Musammat AISHIA BI—PLAINTIFF—APPELLANT

versus

Musammat SUGHRA JAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Appeal—Judgment of Appellate Court, contents of—Reasons for judgment—Duty of Appellate Court.

The Judge of an Appellate Court should state his own reasons for the conclusion at which he has arrived and should not confine himself to approving the reasons of the Court of first instance. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law. [p. 1014, col. 1.]

First appeal from a decree of the District Judge, Delhi, dated the 2nd November 1921, confirming that of the Sub-Judge, Delhi, dated the 20th May 1919.

Mr. *Abdur Rashid*, for the Appellant.

Lala *Devi Das*, for the Respondents.

JUDGMENT.—The facts of the case giving rise to this second appeal are fully stated in the judgment of the learned District Judge dated the 27th May 1920 and need not be repeated here at length. Briefly stated, they are as follows:—

On the 31st October 1917 one *Musammat* Sughra Jan acting on her own behalf and on behalf of her minor daughter, *Musammat* Sardar Begam, sold one-fourth share of a house in Kishan Ganj at Delhi to one Abdul Razzak, her own father, for a sum of Rs. 500. This sale gave rise to two suits. One was a suit brought by *Musammat* Aishan Bi the present plaintiff, for pre-emption of the house sold by the mother for herself and for her minor daughter, while the other was a suit by *Musammat* Sardar Begam, the minor daughter of *Musammat* Sughra Jan, for a declaration that the sale by her mother did not affect the share of the plaintiff. *Musammat* Sardar Begam's case was decreed, and it was held that the sale was fictitious and that it was not binding against her rights. The other suit for pre-emption was dismissed, it having been found that the whole sale was a fictitious one. Against this decision in the pre-emption suit an appeal was preferred to the District Judge and it was contended that the suit ought to have been decreed, at least *qua* the share of *Musammat* Sughra Jan, the mother of the minor *Musammat* Sardar Begam, which was valid in every respect. The learned District Judge dismissed the appeal holding that the judgment of the First Court was not perverse, and that it should be maintained as it was based on evidence. A second appeal was preferred to the High Court against this decision, and the judgment of the learned District Judge was set aside by Mr. Justice Wilberforce on the 6th June 1921 on the ground that the said judgment was not in accordance with law. The case was accordingly remanded to the lower Appellate Court, and the learned District Judge was directed to record a proper judgment on the materials before him. The learned District Judge has now recorded a fresh decision and has again dismissed the plaintiff's suit. The plaintiff has again come up in second appeal to this Court. It appears that the learned District Judge has again failed to record a proper judgment and has not applied his mind to the case. His finding is to the following effect :—

"The lower Court's finding was emphatic. The Sub-Judge had no doubt that the sale was a sham one and after I had heard arguments when the appeal was before me last year and read the evidence referred to by the learned Pleaders, I inclined to the Sub-Judge's view."

"The Sub-Judge had before him the documentary evidence that money had

been paid before the Sub-Registrar and could appreciate the other circumstances in favour of the plaintiff and weigh them against the defendant's oral evidence. He was satisfied beyond doubt that the oral evidence was true. It must have been exceptionally convincing and an Appellate Court which does not hear the evidence is not so well-qualified to judge of its value."

"I cannot say that I am convinced that the lower Court's finding was wrong."

It appears from these observations that the learned Judge has mechanically adopted the view of the Court of first instance and has not given an independent finding of his own on the evidence produced by the parties in this case. There is abundant authority for holding that the Judge of an Appellate Court should state his own reasons for the case and should not confine himself to approving the reasons of the Court of first instance. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law and I am, therefore, compelled to remand the case again to the learned District Judge for a fresh decision of the appeal on the merits and to direct that he shall exercise his own discrimination in deciding the points in dispute instead of generally adopting the judgment of the Trial Court. Costs to be costs in the cause.

Z. K. *Case remanded.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 25 AND 32 OF 1922.

October 2, 1923.

Present:—Mr. Raymond, A. J. C. and Mr. Rupchand Billaram, A. J. C.

FIRST APPEAL NO. 25 OF 1922.

FIRM OF *Seth* VISHINDAS NIHAL CHAND—DEFENDANTS—APPELLANTS

versus

NAZARALI SAMJI—PLAINTIFF—RESPONDENT.

AND

FIRST APPEAL NO. 32 OF 1922.

NAZARALI SAMJI—PLAINTIFF—APPELLANT

versus

FIRM OF *Seth* VISHINDAS NIHAL CHAND—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, rr. 11, 12—Commissioner for taking accounts—Dispute as to whether certain contracts were authorised—Reference to Commissioner—Commissioner's report, value of.

The proceedings of a Commissioner appointed to take accounts are an inquiry for the information of the Court and when he finds a fact, his finding is not a decision upon it and his report can only be treated as evidence before the Trying Court. [p. 1015, col. 2.]

R. M. S. Chetty v. *Mahomed Essa Saheb*, 5 C. W. N. 692 at p. 707, followed.

The question whether a contract is authorised or not is not one that can be referred to a Commissioner for taking accounts under O. XXVI, r. 11 of the Civil Procedure Code. [p. 1015, col. 1.]

Appeal from the judgment and decree of Mr. Kennedy, A. J. C., in Suit No. 820 of 1919.

Mr. *Kimatrai Bhojraj*, for the firm of Vishindas Nihalchand.

Mr. *P. S. Shahani*, for Nazarali Samji.

JUDGMENT.—These two connected appeals arise out of a suit filed by the plaintiff Nazarali against the firm of Vishindas Nihalchand for an account of the business done by them through the defendants as his commission agents.

The defendants submitted an account of their dealings between the parties with their written statement and claimed that a sum of Rs. 1,561-8-6 was, on the contrary, due to them for which they claimed a decree but paid no Court-fee thereon.

The Court settled the following issues:—

1. When did the account end?
2. Can defendants claim any amount

from the plaintiff without payment of Court-fee?

3. On the accounts what is due from either party to the other?

4. General.

The plaintiff was not called upon to file objections to the account submitted by the defendants.

By consent of parties, Issues Nos. 1 and 3 were referred to the Court Commissioner, Issues Nos. 2 and 4 being reserved for arguments after the Commissioner's report was submitted. Before the Court Commissioner the plaintiff denied that he had authorized the contracts in respect of (*a*) the sale and purchase of 125 tons of wheat September 1916 *valda* (*b*) the purchase of 50 tons of barley July 1916 *vafda* and (*c*) the purchase of 75 bales cotton January 1917 *valda*. He accordingly objected to the debit entries of Rs. 1,857 for loss on wheat and Rs. 180 for loss on barley and claimed credit for Rs. 2,362-8-0 as profit on the uncovered contracts of sale of 75 bales of cotton. He also claimed credit for a small item of Rs. 50-0-0 alleged to have been short accounted for which has been disallowed and is not now in dispute.

The Court Commissioner found that both the sale and purchase contracts of wheat as also the contracts for purchase of 50 bales out of the 75 bales of cotton were unauthorized, that the contract of 50 tons barley was authorized. On an adjustment of the accounts in view of his findings he held that the plaintiff was entitled to a decree for Rs. 1,265-2-6 and interest thereon.

The learned Judicial Commissioner who heard the objections has confirmed the report of the Commissioner. Both parties have appealed.

The chief dispute between the parties was whether certain contracts were authorized or not.

This was a question for the Trying Court to decide and not a question which could be referred to a Commissioner for taking accounts under O. XXVI, r. 11, Civil Procedure Code. The defendants were at fault in not moving the Court to call upon the plaintiff to file objections to the account and to determine such of the objections as did not relate to the examination and adjustment of the account before referring the accounts to the Court Commissioner. The learned Judicial Commissioner who heard the objections to the Commissioner's report has rightly pointed out that, though the procedure which the parties have chosen to adopt has had the effect of making the Official Commissioner as a sort of Sub-Judge, the report of the Commissioner can only be treated as evidence before the Trying Court. In dealing with the merits of the objections to the Commissioner's report the learned Judicial Commissioner has, however, said that he must accept the report as it stands unless it is clearly shown by either of the objectors that the Official Commissioner has acted in some irregular manner or that his finding is in no way supportable by the evidence before him. To such a broad proposition I respectfully demur. As said by Hill Justice in *R. M. S. Chetty* v. *Mahomed Essa Saheb* (1) the proceedings of a Commissioner are an inquiry for the information of the Court and not a trial. If the Commissioner finds a fact, his finding is not a decision upon it.

To hold that the finding of a Commissioner on a question of fact decided by him must be accepted as it stands unless he is shown to have acted in an irregular manner, or that his findings are in no way supportable by evidence, would practically be giving more weight to his decision than to a judgment of the Court of the first instance, and treating the objections to a Commissioner's report on the same level as an opplication for revision or second appeal on findings of fact, and virtually to place the finding of fact of a Commissioner on the same footing as the verdict of a Jury. It has not been contended by the parties in the Court below or before us that the consent order had the effect of an agreement by the parties to decide all questions of fact between them, as in the case of *Watson* v. *Aga Mehedee Sherazee* (2) wherein a suit for an account the parties had expressly agreed that the cause should be referred to the Commissioner who on taking the account was to decide "all questions of fact, whether as to delivery of merchandise,

(1) 5 C. W. N. 692 at p. 707.

(2) 1 I. A. 349; 3 Sar. P. C. J. 384 (P. C.).

of the value of such merchandise delivered or otherwise with full power for the purposes of investigation and that if questions of law should arise and could not be settled or disposed of before the Commissioner, they were to be submitted to the Court," and where their Lordships held, that the reference to the Commissioner in that case was quite different from a reference under Art. 181 of the Code of Civil Procedure of 1859.

In dealing with the objections of the parties to the Commissioner's report we have, as a Court of Appeal, to deal with them on matters of fact and not only on questions of principle. I shall, therefore, deal with the objections on the merits.

[*Note*:—The rest of the judgment discusses facts and is, therefore, omitted.—*Ed.*]

P. B. A. *Order accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 130 OF 1921.

April 19, 1923.

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

GARUDAPPA PERIA THIRUVADI AYYANGAR AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

POOKUTTI JANAKI AND OTHERS—DEFENDANTS NOS. 1, 4 AND 5—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 101—Sale subject to mortgage—Another mortgage created by vendee—Subsequent sale by vendee to original mortgagee—Suit on mortgage executed by vendee—Priority—Charge—Dead mortgage, whether can be used as shield.

Property belonging to plaintiff, which was subject to a mortgage in favour of defendants Nos. 2 and 3 was sold to the first defendant; and the latter first mortgaged it to the plaintiff and later on sold it to defendants Nos. 2 and 3 who undertook in the sale-deed to pay the mortgage amount due to the plaintiff. In a suit by the plaintiff on his mortgages defendants Nos. 2 and 3 pleaded in respect of their own mortgage priority over the plaintiff's:

Held, (1) that the plaintiff was entitled to have the mortgaged property sold free of any claim by defendants Nos. 2 and 3 on their mortgage; [p. 1017, col. 2]

(2) that the covenant in favour of the first defendant could be enforced in the plaintiff's suit itself where all the parties were before the Court, and when first defendant asked the Court to enforce it without driving the parties to a separate suit. [p 1018, col. 1.]

Chinnabara Nadan v. *Muswaltai Muni Nagendrayyan*, 58 Ind. Cas. 813, 30 M. L. J. 445; (1920) M. W. N. 534; 12 L. W. 393; 28 M. L. T. 300, *Govindaswami Thevan* v. *Doraiswami Pillai*, 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390, relied on.

Jamna Das v. *Ram Autar Pande*, 13 Ind. Cas. 304; 34 A. 63; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (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.), distinguished.

Per *Krishnan, J.*—If a person buys property over which he has a mortgage himself and the mortgage in consequence becomes discharged by merger or by the terms of the sale he can nevertheless use that mortgage as a shield against any puisne incumbrancer who attempts to enforce his claim against the property, unless his intention to extinguish the mortgage is clear otherwise. That is the principle of section 101 of the Transfer of Property Act. The buyer cannot be credited with the intention of altogether extinguishing his mortgage for all purposes when it is found to be to his benefit to keep it alive, merely because in the deed of purchase a part of the purchase-money is treated as going in discharge of his mortgage. Whether the purchase is statedly of the whole property for a price made up of the price of the equity of redemption and of the mortgage amount or whether it is, statedly, of the equity of redemption only, the transaction is substantially the same; and as it is for his benefit to keep the first mortgage alive, one cannot necessarily assume the existence of an intention on his part to extinguish it, even in the former case. But where he expressly covenants to pay the mortgage amount of the puisne incumbrancer, the position becomes different, and he cannot afterwards deny his liability. [p. 1017, col. 1.]

Per *Venkatasubba Rao, J.*—An undertaking by a prior incumbrancer, who purchases the mortgaged property, to pay off a puisne incumbrancer, is inconsistent with an intention to keep alive his own mortgage in the sense that it is to prevail over the mortgage of the puisne incumbrancer. [p. 1019, col. 1.]

A mortgage which is dead in fact cannot be used as a shield against a subsequent incumbrance. Section 101 of the Transfer of Property Act only enacts that a mortgage which in fact exists must not in law be deemed to be extinguished by reason of the merger in the same individual of the two interests, the interest of the mortgagee and the interest of the owner of the equity of redemption. But a mortgage which has become extinguished cannot, on principle, be held to spring into existence to be enforced against the puisne incumbrancer. [p. 1020, col. 1.]

Govindaswami Thevan v. *Doraiswami Pillai*, 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390, referred to.

Second appeal against the decree of the Court of the Subordinate Judge,

Tuticorin, in Appeal Suit No. 12 of 1920, preferred against the decree of the District Munsif of Srivaikuntam in Original Suit No. 502 of 1918.

Mr. *M. Patanjali Sastri*, for the Appellants.

Mr. *K. R. Rangaswamy Aiyangar*, for the Respondent.

JUDGMENT.

Krishnan, J—My learned brother has set out the facts of the case in his judgment which he is about to deliver and they need not, therefore, be repeated. I agree with him that the second appeal fails but for reasons somewhat different from his.

It seems to me clear that if a person buys property over which he has a mortgage himself and the mortgage in consequence becomes discharged by merger or by the terms of the sale-deed, he can nevertheless, use that mortgage as a shield against any puisne incumbrancer who attempts to enforce his claim against the property, unless his intention to extinguish the mortgage is clear otherwise. That is the principle of section 101 of the Transfer of Property Act. The buyer cannot be credited with the intention of altogether extinguishing his mortgage for all purposes when it is found to be to his benefit to keep it alive, merely because in the deed of purchase a part of the purchase-money is treated as going in discharge of his mortgage. Whether the purchase is statedly of the whole property for a price made up of the price of the equity of redemption and of the mortgage amount or whether it is, statedly, of the equity of redemption, only, the transaction is substantially the same; and as it is for his benefit to keep the first mortgage alive we cannot necessarily assume the existence of an intention on his part to extinguish it, even in the former case. See the decision in *Chidambara Nadan* v. *Musuvathi Munu Nagendrayyan* (1). The puisne mortgagee loses nothing by the first mortgage being used as a shield as he bargained only for a right subject to the first mortgage and there is no reason why his right should be enlarged because the prior mortgagee purchases the property. In the present case, therefore, I should have been prepared to hold that defendants Nos. 2 and 3 had not lost their right to plead their first mortgage under Exhibit I as against the plaintiff but for the covenant in their deed of purchase, Exhibit III, whereby they expressly undertook to pay off the whole of the plaintiff's mortgage amount. That, I think, makes the difference in this case.

Having covenanted to pay the plaintiff's mortgage amount themselves it is not open to them to deny their liability. It was contended that plaintiff cannot take advantage of the covenant in Exhibit III as she was no party to it and reference was made to *Jamna Das* v. *Ram Autar Pande* (2), a decision of the Privy Council. This might be so; but the first defendant with whom the covenant was made and who is entitled to enforce it, is a party to this suit and has asked the Court to enforce it by making defendants Nos. 2 and 3 pay the plaintiff's mortgage amount themselves by sale of Item No. 1 free of incumbrances. I do not see why that claim should not be enforced in this suit. Defendants Nos. 2 and 3 have no answer to that claim. It was argued that first defendant should be left to sue for damages for breach of covenant if he suffers any injury by reason of defendants Nos. 2 and 3 not paying off the plaintiff's mortgage. He will, no doubt, have a right to sue for damages but that is not a reason why in this suit itself when the parties are all before us their rights should not be adjusted. There is no necessity to drive the first defendant to a separate suit for damages. I would, therefore, in enforcement of the covenant between the first defendant and defendants Nos. 2 and 3, direct that Item No. 1 be sold free of any claims by the latter under their mortgage; and for that reason I would support the decree of the lower Appellate Court.

4. A somewhat similar case arose in *Govindaswami Thevan* v. *Devaiswami Pillai* (3) where a person purchased property

(1) 58 Ind. Cas. 813; 39 M. L. J. 445; (1920) M. W. N. 534; 12 L. W. 393; 28 M. L. T. 300.

(2) 13 Ind. Cas. 304; 34 A. 63; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (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.).

(3) 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390.

subject to two mortgages and covenanted with the vendor that he would pay off both mortgages. He paid off the first mortgage but not the second. In a suit by the second mortgagee he pleaded the first mortgage he had paid off as a shield against the plaintiff but his plea was disallowed. The learned Judges have based their judgment on the view that as the first mortgage had been paid off in pursuance of a covenant to discharge it, it could not be treated as alive for any purpose or used as a shield. Whether this is the right view to take or not, I am inclined to think that the decision is clearly right though I should be inclined to put it on the ground above stated that the covenant by the vendee with the mortgagor-vendor to pay off the second mortgage could be enforced in the second mortgagee's suit, where all the parties are before the Court; and consequently the first mortgagee cannot be allowed to plead his mortgage as a shield.

For the above reasons, I agree that the second appeal should be dismissed with costs of the plaintiff.

Venkatasubba Rao, J.—I shall state very briefly the facts material for the decision of the question involved in this second appeal. The plaintiff was originally the owner of the suit item with which we are concerned. She executed a mortgage in favour of defendants Nos. 2 and 3, and it is evidenced by Exhibit I dated 10th July 1904. The plaintiff then sold the property to the first defendant by Exhibit II dated 8th August 1906 subject to the mortgage in favour of defendants Nos. 2 and 3. The effect of these two transactions may be shortly stated to be that the second and third defendants acquired a mortgage right in respect of the property of which the owner was the first defendant, and for the purpose of deciding the question at issue we must have regard to this result, and a separate consideration of each of these two transactions as distinct from and unconnected with the other is not called for. Then we come to the third transaction, namely, the creation of a mortgage in favour of the plaintiff by the first defendant, Exhibit C dated 16th August 1906. The suit out of which the second appeal has arisen was based upon this mortgage. Fourthly, the first defendant sold the property to the second defendant for the benefit of defendants Nos. 2 and 3 subject to the mortgage in favour of the plaintiff. This sale is evidenced by Exhibit III dated 23rd February 1914.

What is the net result of these transactions? We may start with the first defendant as the owner of the property. There is a first mortgage in favour of defendants Nos. 2 and 3. The first defendant then executed a second mortgage in favour of the plaintiff. Finally, the first defendant sold the property to defendants Nos 2 and 3 (I already stated that the sale in favour of the second defendant was for the benefit of defendants Nos. 2 and 3) subject to the mortgage in the plaintiff's favour.

The plaintiff instituted this suit on her mortgage. The second and third defendants pleaded in respect of their own mortgage priority over the mortgage of the plaintiff. The question to be decided is have they such priority?

Section 101 of the Transfer of Property Act runs as follows: "Where the owner of a charge or other encumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or encumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

According to this section, as the continuance of the encumbrance would be for the benefit of defendants Nos. 2 and 3, the mortgage in their favour would continue to subsist unless there is evidence of an intention to extinguish such mortgage. We must turn to Exhibit III, the deed of sale dated 23rd February 1914, to find out what the intention of the parties was. It recites that the consideration for the sale is Rs. 3,400 and that it is made up in the following manner:—(1) Rs. 1,500, retained with the purchaser (the second defendant or practically defendants Nos. 2 and 3) being the amount due to the plaintiff under the hypothecation bond dated 16th August 1906 (Exhibit C); (2) Rs. 800 the amount received in cash by the first defendant the

seller; and (3) Rs. 1,100 the amount agreed by this deed to be the equivalent of the mortgage dated 10th July 1904 (Exhibit I) in favour of defendants Nos. 2 and 3.

In the first place, it is to be observed that defendants Nos. 2 and 3 have undertaken by this document to pay the plaintiff Rs. 1,500 due in respect of her mortgage. Is this undertaking consistent with an intention to keep alive their own mortgage in the sense that it is to prevail over the mortgage of the plaintiff? I have no doubt that they are not entitled to enforce the mortgage in their favour as against the plaintiff. Let me take a very simple example. A property is mortgaged in favour of *A* to secure a sum of Rs. 100. *B*. takes a second mortgage over the same property for the sum of Rs. 200. *A* finally purchases the property subject to the two mortgages for Rs. 50. If *B* sues for the recovery of Rs. 200 and the property is found worth Rs. 300 or more, no question of priority arises, as the property is sufficient to discharge both the mortgages. But, if the property realises less than Rs. 300, the question becomes material. Is the mortgage in favour of *A* subsisting or is it extinguished? Ordinarily, he will be entitled to say that the mortgage in his favour is subsisting. (Section 101 of the Transfer of Property Act). If the property, for instance, realises only Rs. 100 *A* will be entitled to claim that sum in discharge of his own prior encumbrance. But, supposing that the sale-deed in favour of *A* contains a covenant by *A* to pay *B* the full amount of Rs. 200, how can then *A* say that he is still entitled to priority? It is that very right to priority that is destroyed by the covenant. It has been suggested that all that *A* undertakes is, that he renders himself liable to pay *B* Rs. 200 in the event of the security being found sufficient to pay both the mortgages. To me this argument seems absolutely untenable. As I already observed, if the security realises a sum sufficient to pay both the mortgages, *B* will be paid his Rs. 200, as a matter of course. Then, where is the need for a special covenant? The covenant becomes relevant only when the security is found insufficient.

The second and third defendants have undertaken to pay the plaintiff Rs. 1,500. The undertaking is absolute. They have not said that they will be liable to pay Rs. 1,500 only in the event of the security being found sufficient to pay off both the mortgages. The competition is only between the plaintiff on the one hand and the second and third defendants on the other. The second and third defendants entered into the covenant that, notwithstanding that the law favours them in this competition they will allow the plaintiff to take precedence of them. There is no third party involved. The contest is merely between the plaintiff on the one hand and the defendants Nos. 2 and 3 on the other. If the plaintiff is to have her entire Rs. 1,500, no question of priority can possibly arise. Defendants Nos. 2 and 3 having agreed to pay her that sum, they must be deemed to have clearly intended that the mortgage in their favour should be extinguished. Of the cases cited, the only case that has a bearing upon this question is *Govindaswami Thevan* v. *Doraiswami Pillai* (3), and the view that I have taken is consistent with the principle underlying this decision.

Apart from this, I am prepared to hold, on a construction of Exhibit III, that the prior mortgage in favour of defendants Nos. 2 and 3, Exhibit I, was agreed to be treated as discharged. If the prior mortgage is discharged by payment in full, no further question can arise. What difference does it make that the creditor has waived a portion of the amount due to him and has agreed to treat the mortgage in his favour as completely discharged? I am prepared to go even further. Suppose the purchaser, the prior mortgagee, agrees with the seller, the mortgagor, to forego the entire amount and treat the mortgage as discharged what difference does it make? Whether the mortgage is discharged by payment in full or by an agreement between the parties, the result is the same, and the mortgage becomes extinguished. When the mortgage is discharged or is extinguished no further question of subrogation can arise. In the course of the argument it was suggested by Mr. Seshagiri Sastri, the learned Vakil for defendants Nos. 2 and 3, that the agreement to discharge may be effective as between

the mortgagor and the mortgagee; but it can have no force as against the puisne encumbrancer. I fail to see how a mortgage dead in fact can be used as a shield against the subsequent encumbrancer. All that section 101 enacts is that a mortgage which in fact exists must not in law be deemed to be extinguished by reason of the merger in the same individual of the two interests, the interest of the mortgagee and the interest of the owner of the equity of redemption. To say that a mortgage which has become extinguished springs into existence to be enforced against the puisne encumbrancer is opposed to principle and there is nothing in the section, which lends support to such a view.

I find in the terms of the deed, Exhibit III, sufficient indication of a discharge of the prior mortgage in favour of defendants Nos. 2 and 3. The Rs. 1,100 the third item of the consideration, is described in the deed to be "the equivalent of" the mortgage dated 10th July 1904. If this rendering is correct there is a complete discharge. But, a rival translation was suggested, namely, that the *tamil* words only mean "on account of" and not "as an equivalent of." Even if this meaning be adopted, I am still of the opinion that the mortgage was treated as completely discharged. It is extremely improbable that, if the purchaser intended that his prior encumbrance should be kept alive to any extent, he would pay to the seller in cash Rs. 800. Any balance payable to the seller would have been set off against the amount due on the footing of the mortgage. As a matter of fact, there is no dispute that, to the extent of Rs. 1,100, at any rate, there was no actual payment but there was merely an adjustment. Then, again, it must be remembered that the sum of Rs. 1,100 represents the principal and the interest upon it at 27½ per cent. The rate of interest provided for in Exhibit I is 75 per cent. There is nothing unlikely in the second and third defendants having agreed to forego a portion of this exorbitant interest. The amount actually received by them included interest calculated, as pointed out, at 27½ per cent. a rate quite high. In the circumstances, I also hold on a construction of Exhibit III that the second and third defendants agreed to treat the mortgage, Exhibit I, in their favour as completely discharged.

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

V. N. V. *Appeal dismissed.*
N. H.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 808 OF 1922.

May 9, 1923.

Present:—MR. Justice Campbell.

THE FIRM MAGHI MAL-KHARAITI RAM—PLAINTIFFS—PETITIONERS

versus

THE FIRM GOPI RAM-RAM CHAND—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—Application to set aside ex parte decree—Error of law—Revision—High Court, power of, to interfere.

In an application to set aside an *ex parte* decree the burden of proving want of knowledge of the decree within thirty days of the application lies on the applicant, and where a District Judge on appeal against an order refusing to set aside an *ex parte* decree misunderstands and misapplies the law he commits a material irregularity in the exercise of his jurisdiction within the meaning of section 115 of the Civil Procedure Code, and his order is liable to be set aside on revision. [p. 1021, col. 1.]

Manohar Lal v. *Sadiqa Begam*, 37 Ind. Cas. 292; 101 . R. 1916; 202 P. W. R. 1916, *Fazal* v. *Hashmati*, 31 Ind. Cas 914; 40 P. R 1916; 133 P. W. R, 1916, *Sughru Mal-Harcharan Das* v. *Snam Lal-Gokal Chand*, 46 Ind. Cas. 777; 146 P. W. R. 1918, followed.

Petition for revision of the order of the Senior Subordinate Judge, Ferozepore, dated the 1st August 1922, reversing that of the Munsif, First Class, Zira, District Ferozepore, dated the 19th April 1922.

Lala *Faqir Chand*, for the Petitioners.

Lala *Gobind Ram Khanna*, for the Respondents.

JUDGMENT.—The preliminary objection is raised that there should be no interference in revision since an erroneous

order setting aside a decree *ex parte* can be attacked in appeal against any subsequent decree that might be passed. This objection is effectively disposed of by three rulings of the Punjab Chief Court, *Manohar Lal* v. *Sadiqa Begam* (1), *Fazal* v. *Hashmati* (2) and *Sughru Mal-Harcharan Das* v. *Sham Lal-Gokal Chand* (3).

In the first case a Division Bench ruled that in an application to have an *ex parte* decree set aside where the lower Court fails to determine an essential point of limitation the omission amounts to a material irregularity and a revision is competent.

In *Fazal* v. *Hashmati* (2) it was held by a Single Judge that an error made by a Court in setting aside an *ex parte* decree is not an error affecting the decision of the case within the meaning of section 105 of the Code of Civil Procedure.

In *Sughru Mal-Harcharan Das* v. *Sham Lal-Gokal Chand* (3) it was ruled, also by a Single Judge, that in an application to set aside an *ex parte* decree the burden of proving want of knowledge of the decree within 30 days of the application is on the applicant and where a District Judge on appeal against an order refusing to set aside an *ex parte* decree has misunderstood and misapplied the law he has committed a material irregularity in the exercise of his jurisdiction.

The history of the present case is as follows:—An *ex parte* decree was passed on the 30th of August 1921. The judgment-debtors, Gopi Ram-Ram Chand, applied on the 13th of February 1922 for an order setting aside the *ex parte* decree, alleging that they had become aware of the decree two or three days before the date of their application. The application was not supported by affidavit. Notice issued to the decree-holders who appeared on the 16th of March 1922 and the 31st of March 1922 was fixed for the evidence of the applicants. On the 31st of March 1922 the applicants' Counsel stated that he had no evidence to produce.

The First Court dismissed the application holding, *inter alia*, that it was barred by time. Appeal was made to the Senior Subordinate Judge who reversed the decision of the lower Court and set aside the *ex parte* decree. The learned Senior Subordinate Judge decided that the defendants had not been served with summons for the suit as required by law. He did not touch the question of whether the application to set aside the *ex parte* decree had been presented in time.

Obviously, he was wrong and, obviously, the defendants who made no affidavit and produced no evidence, have failed to discharge the onus which lay upon them of establishing that their application was within time. Furthermore, there is indication that they did have knowledge of the suit, if not of the decree On the 26th of August 1921 on the application of the plaintiffs a telegram was sent to the defendants directing them to appear in Court on the 30th of August. The fact of this telegram being sent and received was not denied by the defendant in his grounds of appeal to the lower Appellate Court. He mentioned it as having been sent and complained that the order contained in it was not warranted and was illegal.

I accept the petition, set aside the order of the lower Appellate Court and dismiss with costs throughout the petition for setting aside the *ex parte*.

Z. K.

Petition accepted.

(1) 37 Ind. Cas. 292; 101 P. R. 1916, 202 P. W. R. 1916.
(2) 31 Ind. Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916.
(3) 46 Ind. Cas. 777; 146 P. W. R. 1918.

JAGDIP PRASAD *v.* RAJO KUER.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES No. 193 OF 1920 AND 5 OF 1921.

April 17, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

No. 193 OF 1920.

JAGDIP PRASAD SAHI—DEFENDANT—APPELLANT.

versus

Musammat RAJO KUER AND ANOTHER—PLAINTIFFS—RESPONDENTS.

No. 5 OF 1921.

Musammat RAJO KUER—PLAINTIFF—APPELLANT

versus

JAGDIP PRASAD SAHI—DEFENDANT AND ANOTHER—PLAINTIFF—RESPONDENTS.

Principal and agent—Several principals—Agent, when can get valid discharge—Demand for accounts by principals individually—Refusal by agent—Limitation, commencement of—Contract Act (IX of 1872), s. 38, application of—Limitation Act (IX of 1908), Sch. I, Art. 89, application of.

An agent cannot get a valid discharge by accounting to one of several co-principals. Such a case is not covered by section 38 of the Contract Act. [p. 1023, cols. 1 & 2.]

Hatsall v. *Griffith*, (1834) 2 C. & M. 679; 149 E. R. 933; 4 Tyr. 487; 3 L. J. Ex. 191, referred to.

The limitation for a suit by several co-principals for accounts against the agent, where although each of the principals has severally called upon the agent to render account and been refused, the co-principals have never jointly called upon the agent to account to them, begins to run from the date of the termination of the agency and not from the date of the agent's refusal. Article 89 of Schedule I to the Limitation Act has no application to such a case [p. 1024, col. 2.]

Appeal from a decision of the Subordinate Judge of Muzaffarpur, dated the 15th July 1920.

Messrs. *Hassan Imam, N. C. Sinha* and Mr. *S. N. Ray*, for the Appellant.

Messers *Sultan Ahmad* and *Jal Gobind Prasad Sinha*, for the Respondents.

JUDGMENT.

Das, J.—These analogous appeals arise out of a suit instituted by *Musammat* Rajo Kuer and *Musammat* Shampati Kuer for account as against Jagdip Prasad Sahi.

On the 13th December 1912 the plaintiffs executed an *am-mukhtarnama* in favour of Jagdip Prasad Sahi. They stated in that document that it was necessary in order to preserve the property to appoint a competent and conscientious person to manage their estate and accordingly they appointed the defendant as their agent to look after their properties In the first paragraph they provided that the agent would pay Government Revenue and the rent payable to the superior landlords. In the second paragraph they provided that the agent should take proper steps for the collection of rent due to them. In the fifth paragraph they say as follows:

"He shall from time to time pay to us in equal halves year after year a certain sum for our personal expenses and house repairs, etc. He shall pay exclusively to me, *Musammat* Rajo Kuer, the entire income of the share of *Mauza* Pagra Mahisuri Jalkar Ghatam Nadi Bulan Prgana Sarisa, *Tauzi* No. 4377-16 *Thana* and Sub-Registry Dalsing Sarai, District Darbhanga. I, *Musammat* Shampati Kuer, neither have, nor can have, nor shall have anything to do with the income and share of the said *Mauza*."

In the ninth paragraph they provided that the agent shall receive as his remuneration five per cent. of the amount realised by him, "out of the income in cash or kind of our estate and out of the money payable to us by the debtor." This *mukhtarnama*, as I have said, was executed on the 13th December 1912. It is stated in the plaint that the plaintiff No. 1 terminated the agency on 5th February 1919 and that plaintiff No. 2 terminated the agency on the 19th January 1917. The defendant not having rendered any account to the plaintiffs the suit out of which these appeals arise was instituted on the 19th September 1919 for an account from the defendant. The learned Subordinate Judge has come to the conclusion that *Musammat* Rajo Kuer has discharged the defendant from accounting to her and that she is not entitled to an account from the defendant. *Musammat* Rajo Kuer being aggrieved by the decision of the learned Subordinate Judge has appealed to this Court and her appeal is Appeal No. 5 of 1921. So far as *Musammat* Shampati Kuer is concerned the learned Subordinate Judge has come to the conclusion that the defendant did not render any account to her and that she is entitled to an account from the defendant. The defendant appeal

from that portion of the judgment which is against him and his appeal is First Appeal No. 193 of 1920.

In my opinion the appeal of the defendant ought to be dismissed. Mr. Hassan Imam contended before us that the *mukhtarnama* in favour of the defendant was a joint *mukhtarnama* and that upon the finding of the learned Subordinate Judge that the defendant rendered an account to *Musammat* Rajo Kuer and that *Musammat* Rajo Kuer gave a complete discharge to the defendant, it must follow, so it was argued by Mr. Hassan Imam, that the liability of the defendant is at an end. The argument was developed to-day by Mr. Naresh Chandra Sinha who places considerable reliance upon section 38 of the Indian Contract Act. Section 38 of the Indian Contract Act provides that :—

"Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract" and it also provides that an offer to one of several joint promisees has the same legal consequences as an offer to all of them.

The question whether a discharge by one of two joint creditors operates as a complete discharge under section 38 of the Indian Contract Act has been debated in different Courts and there is a considerable divergence of opinion on this important topic. But it seems to me that the question which has been argued before us is not one under section 38 of the Indian Contract Act. I will assume for the purpose of this decision that one of two joint creditors can give a valid discharge to a debtor so as to completely bind the other joint creditor. But the liability of an agent to account is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent. Therefore, it seems to me that we have nothing whatever to do with section 38 of the Indian Contract Act.

So far as the liability of an agent to account to joint principals is concerned, the authorities are unanimous that an agent cannot get a discharge by accounting to only one of two co-principals. The position is put in this form in Halsbury's Laws of England: "Co-principals may jointly appoint an agent to act for them and in such case become jointly liable to him, and may jointly sue him. The agent is not bound to account separately to one of several co-principals and if he has done so is not thereby discharged from liability to the other or others unless the co-principals are also partners." (Vol. I, page 159, paragraph 347). At page 187 the proposition is put in this form—"Where the monies are received on behalf of joint principals, the agent is liable to account to them jointly, and is not discharged by payment to one or more of them only, unless by authority of all." Two cases are relied upon as authorities in support of the propositions which are laid down in the passages to which I have already referred. The first of these cases is the case of *Hatsall* v. *Griffith* (1). That was a case in which two persons, Brown and Prothero on their behalf and on behalf of Hatsall, the plaintiff, employed the defendant as an agent to sell a ship in which they were all interested. The defendant sold the ship and paid over to Brown and Prothero their proportionate share of the purchase-money; but he refused to make over the share of the plaintiff except on a joint receipt by all of them. His refusal to account to the plaintiff was upheld by the Court on the ground that he was not bound to account to only one of the co-principals. Baron Alderson put the point very clearly in these words.—"The want of the joint concurrence of the three appear to have been the ground of the defendant's refusal to pay." It follows from this decision that in order to give a discharge to an agent there must be a joint concurrence of all the principals and where such a joint concurrence is wanting there is in point of law no discharge at all. The other case is reported in *Lee* v. *Sankey* (2). In that case two trustees employed a firm of Solicitors to receive the proceeds of the testator's real estate. The Solicitors paid over the money to one only of such trustees without the receipt or authority of the other.

(1) (1834) 2 C. & M. 679; 149 E. R. 933; 4 Tyr. 487; 3 L. J. Ex. 191.
(2) (1873) 15 Eq. 204; 27 L. T. 809; 21 W. R. 286.

It was argued on behalf of the Solicitors that a discharge by one of the trustees operated as a complete discharge and was completely binding on the other trustees. The Court came to the conclusion that the receipt of one trustee was not a sufficient discharge to the Solicitors for the money which they had received by the authority of the two and that they were personally liable to make good the loss which had resulted to the trust estate. In my opinion these cases are conclusive on the point which has been argued before us. I must accordingly hold that the discharge by *Musammat* Rajo Kuer did not absolve the appellant from accounting to his principals jointly.

It was next argued that the suit is barred by limitation. The *Mukhtarnama*, as I have already stated, was executed on the 13th December 1912. Mr. Naresh Chandra Sinha argues before us that upon the evidence of *Musammat* Rajo Kuer there was a demand for account and a refusal to render account in January 1914 and that accordingly time began to run from January 1914. Mr. Naresh Chandra Sinha states before us that there is evidence on the record that each of the two ladies called upon the defendant to account each of them. But he concedes that there is no evidence whatever that the two ladies jointly called upon the defendant to account to them. In my opinion, upon the authorities which I have already discussed, the question of limitation must be answered in favour of the plaintiffs. It is sufficient to say that the defendant was not bound to account to the principals separately and that the principals acting separately could not have given a valid discharge to the defendant. Mr. Naresh Chandra Sinha puts his case on the terms of Art. 89 of the Limitation Act which provides that a principal has three years to bring a suit for account from the time when the account is, during the continuance of the agency, demanded and refused. Mr. Naresh Chandra Sinha argues that, it being admitted by *Musammat* Rajo Kuer that there was a demand for account and a refusal to render account in January 1914 the time, so far as she is concerned, began to run in January 1914, and that, so far as Shampati Kuer is concerned, time began to run at the end of each year when she is alleged to have made a demand for account, a demand which was not complied with by the defendant. The argument in my opinion is wholly inadmissible. The ladies could not have maintained separate suits, each on her own account. It may be that if *Musammt* Rajo Kuer were entitled to maintain a suit for account on her own behalf such a suit is barred by limitation. It may also be that if *Musammat* Shampati Kuer were entitled to maintain a suit for account on her own behalf that suit is barred by limitation. But we are not in this litigation concerned with any suit that might have been brought either by *Musammat* Rajo Kuer or by *Musammat* Shampati Kuer. This is a suit by *Musammat* Rajo Kuer and *Musammat* Shampati Kuer jointly and to such a suit it is clearly no answer to say that, so far as *Musammat* Rajo Kuer is concerned, if she had filed a suit on her own behalf, that suit would have been barred by limitation and that, so far as Shampati Kuer is concerned, if she had brought a suit on her own account, that suit would have been barred by limitation. This is a joint suit by the two ladies and there is no evidence that there was a joint demand for an account by the two ladies. In my opinion time began to run from the termination of the agency and it is conceded that time having begun to run from the termination of the agency the suit is well within time.

The last point which has been argued before us is that the agent should not be called upon to account for *ziraat* lands and *kasht* lands. Mr. Hassan Imam informed us yesterday that there was nothing in this point. But his learned junior has pressed this point before us with great vehemence. Having considered the point we are bound to agree with the view which was taken by Mr. Hassan Imam, namely, that there is nothing at all in this point. The learned Vakil argues that there is nothing at all in the *Mukhtarnama* which provides that the agent was to be in charge of *kasht* lands or *ziraat* lands. Conceding that there is nothing in the *Mukhtarnama* to support the contention of the plaintiffs, it is equally clear that there is nothing in the *mukhtarnama*

which supports the contention of the learned Vakil for the defendant that the agent was not to be put in charge of the *kashit* lands and *zirait* lands. As a matter of fact, there is indication in the *Mukhtarnama* that the agent was to be in charge of property yielding rent in kind and also that he was to be in possession of *kasht* lands. In the first paragraph of the *Mukhtarnama* it is provided that the agent should pay the rent of the *kasht* land in the possession of the plaintiffs to the landlord. It is argued that, although there was a duty upon him to pay the rent due to superior landlords, there was absolutely no duty on him to look after the *kasht* lands. It appears that the agent has in his account debited the plaintiffs with the rent which he has from time to time paid to the landlord but has not credited the plaintiffs with the profits of the *kasht* lands. In my opinion it is impossible to take the view that, although the agent was to pay the rent due to superior landlord he was to have nothing whatever to do with those lands. The ninth paragaraph of the *Mukhtarnama* provides in distinct terms that the agent should get as his remuneration for his work 5 per cent. of the amount realised by him out of the income in cash and kind. It is very ingeniously argued by the learned Vakil that the income in kind referred to in paragraph 9 is the income derivable from *bhauli* land and not from *kasht* land. I am unable to agree with this contention, especially as there is nothing in the *Mukhtarnama* to exclude the view that the agent was to be put in charge of all the properties that belonged to the plaintiffs. It is admitted by the learned Vakil that there are no documents in his favour. It is admitted by him that the evidence which has been adduced on behalf of the plaintiff does not support him. The learned Vakil has, however, referred us to a passage in the evidence of *Musammat* Shampati Kuer at page 34 of the paper-book. She distinctly states in that passage that since the appointment of Jagdip as the manager, Pandey who used to work as her *zirafia* has ceased to work as such. The whole of her evidence supports her case that the defendant was put in charge of *kasht* lands as well as *zirait* lands. It was then pressed before us that her previous deposition supports the case of the defendant that she had her own servants to look after the *zirait* land. Her previous deposition is Exhibit M. In the course of her evidence in a case between her and *Musammat* Rajo Kuer she stated as follows:—

"We are separate and some of lands are separate but this disputed land is joint since Chengan Sahi's death. Brahmdeo cuts crops and divides on my behalf and Maha Rudra looks after *Musammat* Rajo's affair. Jagdip was agent for both of us when the barley crop still lying in the field was cultivated and he cultivated it for both of us jointly."

In my opinion this evidence does not support the case of the defendant. She was undoubtedly right in so far as she stated that at the time when she was giving her evidence Brahmdeo was looking after her *zirait* lands and Maha Rudra was looking after her Rajo Kuer's land. But she stated very definitely that Jagdip was the agent for both when the barley crops were cultivated and that he cultivated them for both of them. Undoubtedly, since the termination of the agency of the defendant other arrangements have been made by these ladies. But it does not follow that, because other arrangements were made by the ladies in 1919, that is to say, at the time when *Musammat* Shampati Kuer was giving her evidence in the case that that arrangement was also in existence at the time when Jagdip was the agent of the ladies. In my opinion the decision of the learned Subordinate Judge, so far as *Musammat* Shampati Kuer is concerned, is right and must be upheld. I would accordingly dismiss First Appeal No. 193 of 1920 with costs.

I come now to *Musammat* Rajo Kuer's appeal and it seems to me that that appeal must be decided upon our view of law that an agent cannot discharge himself by accounting to only one of two co-principals. The finding of the learned Subordinate Judge is, not that the defendant did account to *Musammat* Rajo Kuer, but that *Musammat* Rajo Kuer in order to defeat the interest of *Musammat* Shampati Kuer in a threatened etigation between *Musammat* Rajo Kuer and Shampati

Kuer, entered into a conspiracy, for the finding of the learned Subordinate judge comes to that, with Jagdip Prasad by which she accepted the position that Jagdip had rendered account to her. These accounts upon which reliance is placed, are Exhibits B to B-3. The accounts are headed "Accounts of Receipts and Disburseme t of the estate of *Musammat* Rajo Kuer, Proprietores." There is no doubt whatever that a conspiracy was on foot in order to defeat the interest of *Musammat* Shampati Kuer and the question which we have now to consider is this whether the transaction between *Musammat* Rajo Kuer and Jagdip Prasad Sahi was such as now precludes *Musammat* Rajo Kuer from placing the true facts before the Court, and claiming an account from Jagdip Prasad Sahi. There are two questions involved in the argument a question of law and a question of fact. Now, the question of law which I have already discussed is a complete answer to the defence taken in this case. If it be the law that an agent cannot discharge himself by accounting to one of the co-principals, it must follow that the transaction between *Musammat* Rajo Kuer and Jagdip Prasad Sahi is wholly ineffectual so as to save the defendant from accounting to the plaintiffs as to the profits that came into his hands in the course of his agency. But, apart from any such question, it seems to me that, the truth being known to both the parties, there is no case of estoppel which would prevent *Musammat* Rajo Kuer from claiming account from Jagdip Prasad Sahi. Mr. Naresh Chandra Sinha concedes that this is not a case of estoppel at all. But his argument is that the question being one of discharge *Musammat* Raja Kuer was entitled to discharge Jagdip Prasad from accounting to her. But when we are considering whether *Musammat* Rajo Kuer can absolve Jagdip Prsad from accounting to her we are bound to consider the case made on this point by Jagdip Prasad. Now, his case is that he took the accounts to *Musammat* Rajo Kuer; that he explained them to *Musammat* Rajo Kuer; that *Musammat* Rajo Kuer accepted those accounts and admitted them to be correct and that *Musammat* Rajo Kuer in a *Mukhtarnama* which she subsequently executed in favour of Mala Rudra stated very definitely that Jagdip Prasad Sahi had explained all the accounts to her and that she had accepted those accounts as correct. If there be no estoppel *Musammat* Rajo Kuer is entitled to say that the statements which were made by her have no foundation in fact; and the decision of the learned Subordinate Judge supports the evidence of *Musammat* Rajo Kuer. But the learned Subordinate Judge has taken the view that having entered into a fraudulent conspiracy she ought not to be allowed to claim an account from Jagdip Prasad. I am unable to take this view. That conspiracy was not carried into effect and no equities have arisen which would induce us to hold that *Musammat* Rajo Kuer is not now entitled to put the true facts before the Court. If, indeed, the conspiracy had succeeded and *Musammat* Shampati Kuer had been defeated in her claim no doubt it would be impossible to hold that Rajo Kuer was entitled to claim an account against Jagdip. But, as I have said before, the conspiracy was not carried into effect and no equities have arisen which would prevent us from giving appropriate relief to the plaintiff. It is not the case of the defendant that *Musammat* Rajo Kuer gave him a complete discharge without taking any accounts from him. It would be impossible to support such a case, if such a case had been made, having regard to the fact that the dealings were between principal and agent, and that the principal was an illiterate *purdanashin* lady. The whole argument of Mr. Naresh Chandra Sinha is that *Musammat* Rajo Kuer was entitled to give a valid discharge to the agent without taking any accounts from him. It is sufficient to say that that is not the case of the defendant and that that case will not be supported in any Court of Law. The case of the defendant is, that he rendered an account to *Musammat* Rajo Kuer, and that *Musammat* Rajo Kuer gave him a discharge after accepting the accounts as correct. The learned Subordinate Judge has found that the the defendant did not render any accounts to *Musammat* Rajo Kuer and that the accounts, Exhibits B to B-3, are not correct. It is

conceded that there is no case of estoppel which would prevent *Musammat* Rajo Kuer from claiming an account now from the defendant. I hold that the plaintiffs are entitled to an account from the defendant. The appeal of *Musammat* Rajo Kuer must accordingly be allowed and she will be entitled to the general costs of the appeal, but not to a separate hearing fee.

The result is that the decree passed by the learned Subordinate Judge must be varied in accordance with the judgment; and the defendants must pay the costs of the suit to the plaintiffs.

Kulwant Sahay, J.—I agree.

N. H. *Appeal No.* 193 *dismissed.*
Appeal No. 5 *allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2061 OF 1917.
November 10, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Campbell.

WASAKHI RAM—DEFENDANT—APPELLANT
versus
HUSSAIN KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Admission, value of—Consideration—Undue influence—Burden of proof.

Plaintiff sued defendant to recover a sum of money on the ground that the money had been paid to the defendant by mistake. Defendant's admission in a previous suit that he had received the money from the plaintiff was proved against him. Defendant pleaded in the present suit that he had not received the money and that the receipt executed by him in favour of the plaintiff obtained from him under undue influence;

Held, that the effect of defendant's admission in the previous suit was that the burden of proving non-receipt of the money and undue influence was shifted on to him.

Second appeal from a decree of the District Judge, Gujranwala, dated the 16th July 1917, reversing that of the Subordinate Judge, First Class, Gujranwala, dated the 29th January 1917.

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

Mr. *Zafarullah Khan* and Dr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—Badar Din was indebted to a joint Hindu family of which three members were Ladha Mal, Ganga Singh and their nephew Wasakhi Ram. In 1906 the family was partitioned and the debt of Badar Din fell to the share of Ladha Mal and Ganga Singh. In 1912 the plaintiff executed two bonds in favour of these two persons. One of the bonds was transferred to another party, Sohna Mal, who brought a suit on it against the plaintiff in January 1914. The plaintiff's plea in the suit was that he had, on the 26th June 1913, paid Rs. 2,170 to Wasakhi Ram in discharge of the debt. Wasakhi Ram as a witness supported Badar Din and admitted that he had received the money and had given Badar Din a receipt which was produced. He further applied to be made a plaintiff in the suit since he was a member of the joint Hindu family, and the question whether he was so or not was put in issue and decided against him. The result of the suit was a decree against Badar Din.

The suit from which the present second appeal has resulted was brought by Badar Din against Wasakhi Ram for the recovery of Rs. 2,170 with interest. It was dismissed by the Trial Court but on appeal the learned District Judge gave the plaintiff a decree for Rs. 2,170 without interest, and against this decision a second appeal has been preferred.

The main question at issue was, whether Badar Din had paid Wasakhi Ram Rs. 2,170 on account of a debt due by him to Ladha Mal and Ganga Singh. The lower Court found that this sum was not proved to have passed. The learned District Judge held that Wasakhi Ram's admission in the previous suit having been proved against him the burden of proving want of consideration and also of proving undue influence in regard to the execution of the receipt (which he pleaded) fell upon him, and that since he had failed to discharge the burden he was liable to pay the plaintiff's claim.

We have heard Mr. Sheo Narain in support of the appeal but we have not considered it necessary to call upon Counsel for the respondent to reply. The main contention by the learned Advocate for the appellant is, that evidence has been overlooked by the lower Appellate Court. He admits that there was a clear admission

by the appellant in the previous suit, but he contends that the appellant as a defendant is now entitled to expose the real nature of the transaction between himself and the plaintiff and that evidence that no money passed and that the receipt was given simply in order to injure Ladha Mal and Ganga Singh has been disregarded.

That evidence is stated to be the depositions of Bhag Mal and of the plaintiff himself who was called as a witness by the defendant. Now, Bhag Mal's evidence is specifically referred in paragraph 4 of Badar Din's memorandum of appeal to the lower Appellate Court. He is mentioned by name in the lower Appellate Court's judgment, and the learned District Judge has recorded a definite finding that the defendant has wholly failed to establish undue influence. This is what Bhag Mal was called to establish and we have no reason for doubting that his evidence was read and considered by the learned District Judge before he came to the above finding.

In regard to the plaintiff, Mr Sheo Narain claims that an absurd story was elicited from him when he appeared in the witness-box, which showed clearly that no money could have been paid by him to Wasakhi Ram. The plaintiff's deposition is not mentioned at all by the learned District Judge but he states it as having been admitted before him that the non-passing of consideration was not proved, a matter which he made it clear had to be proved by the present appellant. This admission then, by the latter's Counsel rendered specific allusion to the plaintiff's evidence, the object of which was to prove that no consideration passed, unnecessary, and we do not think that any case has been made out for interference on second appeal on the ground of omission by the lower Appellate Court to read evidence.

The next and the only other point argued is that the payment of Rs. 2,170, if made, as alleged, by the plaintiff Badar Din, was not legally recoverable since it was not made by mistake or under coercion within the meaning of section 72 of the Indian Contract Act. This was not a point raised in the appellant's pleadings in the Trial Court. Mr. Sheo Narain contends that the plaint contained no allegation of payment by mistake and concedes that, if we hold that it did, his present objection raised in second appeal must fail. We have perused sections 4 and 5 of the plaint and, although the wording might have been more definite, we consider that there was in effect an assertion that the plaintiff had by mistake paid the money to the wrong member of the family to whom he believed himself to be indebted.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 890 OF 1920.
February 6, 1923.
Present:—MR. Justice Scott-Smith and Mr. Justice Fforde.

ALI AHMAD, MINOR, THROUGH AHMAD BAKHSH—PLAINTIFF—APPELLANT
versus
SAID MIAN—VENDEE AND ANOTHER VENDOR—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 2—Minor, suit instituted by, without next friend—Procedure—Practice.

O. XXXII, r. 2 of the Civil Procedure Code does not cover a case where a suit purports to have been instituted by a major, but it is discovered during the pendency of the suit that the plaintiff is a minor. The practice in such a case is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend.

Beni Ram Bhutt v. *Ram Lal Dhukri*, 13 C. 189 at p. 191; 6 Ind. Dec. (N. S.) 625, relied on.

Second appeal from an order of the District Judge, Gujranwala, dated the 23rd December 1919, affirming that of the Junior Subordinate Judge, Gujrat, dated the 9th October 1919.

MR. *Mukand Lal Puri*, for the Appellant.
MR. *Gobind Ram*, for the Respondents.

JUDGMENT.—This is a second appeal from the order of the Subordinate Judge rejecting the plaint on the ground that it was instituted by the minor without a

next friend. The suit was instituted on the 29th August 1919 and on the 9th October 1919, the date fixed for hearing, the defendant appeared and pleaded that the plaintiff could not sue as he had agreed to the transaction out of which the suit arose. He made no application under O. XXXII, r. 2 (1), Civil Procedure Code, that the plaint should be taken off the file. The Court itself noted that the plaintiff appeared to be under age and took his statement in which he admitted that he was 15 years of age. Upon this the Court rejected the plaint; and also pointed out that the plaintiff had not deposited one-fifth of the purchase-money as required by section 22 of the Punjab Pre-emption Act, I of 1913. This order was upheld on appeal by the District Judge and the plaintiff has filed a second appeal to this Court.

In our opinion the order rejecting the plaint is clearly erroneous. It is not an order contemplated by O. XXXII, r. 2, Civil Procedure Code, and, moreover, there was no application by the defendant to have the plaint taken off the file. It was pointed out in the case of *Beni Ram Bhutt* v. *Ram Lal Dhukri* (1) that a case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice must be considered to be in force. This practice was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. In the present case there is no ground at all for supposing that the plaintiff knowingly instituted the suit without a next friend with intention to deceive. Mr. Gobind Ram urges that on the 9th October 1919, the date on which the plaint was rejected, the suit, if then instituted, would have been barred by time. We have nothing to do with the question of limitation at present which can be decided by the Trial Court to which this case will be sent back.

We accept the appeal and, setting aside the order of the lower Appellate Court, remand the case to the Court of first instance for re-decision. The plaintiff should be given a reasonable time for remedying the defect in the plaint. Stamp in this Court and the lower Appellate Court will be refunded and other costs will be costs in the case.

Z. K. *Appeal accepted.*

(1) 13 C. 189 at p. 191; 6 Ind. Dec. (N. s.) 625.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 697 OF 1923.

July 2, 1923.

Present.—Mr. Justice Moti Sagar.

FATTU—JUDGMENT-DEBTOR—APPELLANT

versus

NANAK CHAND—DECREE-HOLDER—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Limitation Act (IX of 1908), s. 20—Execution of decree—Payment out of Court—Certification by decree-holder, form of—Limitation, extension of.

There is no particular form under O. XXI, r. 2 of the Civil Procedure Code in which a decree-holder must certify a payment made to him out of Court, nor is there anything prescribed in the rule as to the time within which and the manner in which the decree-holder must certify a payment. [p. 1030, col. 2.]

If the part payment of a decree amount is entered in an execution petition presented within three years from the date of such alleged payment, it amounts, if the fact of payment is proved, to certificate of payment under O. XXI, r. 2 of the Civil Procedure Code, and will operate to save limitation under section 20 of the Limitation Act. [p. 1030, col. 2.]

Miscellaneous second appeal from the order of the District Judge, Karnal, dated the 9th January 1923, reversing that of the Munsif, 1st Class, Sonepat, District Karnal, dated the 7th February 1922.

Mr. *Shamair Chand*, for the Appellant.

Lala *Rama Nand*, for the Respondents.

JUDGMENT.—This appeal arises out of execution proceedings and the facts are briefly these :—In 1904 the respondent Nanak Chand obtained a money-decree for Rs. 450 and costs against the present appellant Fattu. A compromise was arrived at between the parties in 1909 whereby a sum of Rs. 50 was paid down to the decree-holder and the balance was agreed to be

paid by half yearly instalments of Rs. 25 each. It was further stipulated that, if there was a default in payment of two consecutive instalments the whole of the decretal amount would become payable at once. In November 1917, the decree-holder made an application for the execution of his decree stating therein that he had realized Rs. 275 out of Court from the judgment-debtor. This application was dismissed for default. In July 1920, he made another application for execution in which he stated that Rs. 320 had been realised out of Court. This application was again dismissed by the Munsif on the ground that it was barred by limitation under the twelve years' rule. An appeal against this dismissal was filed in the Court of the learned District Judge and the order of the learned Munsif set aside and the case remanded to him for a decision on the other points arising therein. The application was again dismissed on the ground that as no application for execution had been made within three years from the date of the compromise, it was barred by limitation under the three years' rule. On appeal the learned District Judge, following *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata* (1), held that the certification of payment in the application for execution was sufficient compliance with the requirements of law as contained in O. XXI, r. 2 of the Civil Procedure Code and allowed execution to proceed.

Against this decision a second appeal has been preferred to this Court under section 47 of the Code of Civil Procedure, and two grounds have been urged by Mr. Shamair Chand on behalf of the appellant. Firstly, it is contended that as the application of 1917 was made more than three years after the date of the compromise, it did not help to save limitation. His second contention is, that the rule of law laid down in *Eusuffzeman Sarkar* v. *Sanchia Lal Nahata* (1) is erroneous and has not been followed in subsequent rulings of the same High Court. He, therefore, argues that as the payments were not properly certified, a mere statement in the application for execution that the decree-holder had realised so much was not sufficient and that his application for execution made in 1920 was clearly barred. Mr. Rama Nand for the respondent, on the other hand, contests both these propositions and says that his application was within time and that the payments made out of Court saved limitation. A large number of authorities have been cited on both sides by the learned Counsel in support of their respective contentions, and, after carefully going through those authorities, I am of opinion that the weight of authority is in favour of Mr. Rama Nand and that the learned District Judge was right in holding that the application for execution certifying the payments already made amounted to a certifying under O. XXI, r. 2 of the Civil Proedure Code, which the Court was bound to take notice of. The rule of the law deducible from the authorities cited at the Bar appears to be that, if the part payment of a decree amount is entered in an execution petition presented within three years from the date of such alleged payment it amounts, if the fact of payment is proved, to a certificate of payment under O. XXI, r. 2 of the Civil Procedure Code, and will operate to save limitation under section 20 of the Limitation Act. In the present case the payments were set forth in the execution petitions both of 1917 and 1920 which it is alleged were presented within three years from the dates of the alleged payments. There is no particular form under O. XXI, r. 2 of the Civil Procedure Code, in which a decree-holder must certify the payment to a Court, nor is there anything prescribed in the rule as to the time within which and the manner in which the decree-holder must certify the payment. I, therefore, see no reason why the statement made in the petitions should not be accepted as a certificate of payment under clause (1) of the rule. The fact of payment, however, is disputed by the judgment-debtor in this case, and, in these circumstances, it seems necessary that the Court should take evidence and come to a conclusion one way or the other whether payments

(1) 34 Ind. Cas. 606; 43 C. 207; 20 C. W. N. 272 23 C. L. J. 390.

had actually been made or not. If the fact of payment is proved and it is found that the payments were made within three years from the date of the present application, no question of limitation would arise and the application would be clearly within time. The order passed by the Court below remanding the case appears to be perfectly correct, and there are no grounds to interfere.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 25 OF 1922.

August 9, 1923.

Present:—Justice Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

MAHARAJ RAI—DEFENDANT—APPELLANT

versus.

Maharani JANKI KUER — PLAINTIFF —RESPONDENT.

Construction of document—Relinquishment by landlord of right to produce of trees of occupancy tenant—Relinquishment for life or in perpetuity—Grant without words of inheritance—Grant "for ever"—Presumption.

The proprietor of a Raj executed in 1858 a document in the nature of a *parwana* addressed to the managers of his estate which, after reciting that a certain occupancy tenant had done great good work, proceeded, "Hence because of that good work it is ordered that whatever trees have been planted by his (the occupancy tenant's) ancestor and also if he plants any, the share of the Raj in them is given up. Hence this *parwana* is written to all forbidding you in any way to interfere with the trees standing on the *nakdi* holding of the said occupancy tenant for ever." A descendant of the executant of the document brought in 1916 a suit against a descendant of the occupancy tenant for a half share in the trees standing upon the later's holding. There was no evidence to show that any claim had ever been made by the proprietor of the Raj to participate in the produce of the trees since the document was executed excepting once when by forcible means and under duress the tenant was obliged to disgorge a small sum of money:

Held, (1) that although the meaning of the document was not very clear, the intention of the executant was to relinquish the right to the trees both present and future as was borne out by the concluding words of the document which forbade his servants from interfering with the trees on the holding for ever;

(2) that this interpretation was in consonance with what had actually taken place since the execution of the document;

(3) that the absence of any words of inheritance in the document was of no significance, as it was not a grant of land to a grantee, the so-called grantee being already an occupancy holder of the land having a permanent interest in the land descendible to his heirs.

Even if a grant contains the word "always" or the words "for ever" or similar words, if the grant is clearly of a life-interest only, the mere use of such words will not have the effect of extending the grant beyond the lifetime of the grantee. [p. 1032, col. 2.]

Aziz-un-nissa v *Tassaduq Husain Khan*, 5 C. W. N. 569; 23 A. 324; 11 M. L. J. 160; 28 I. A 65; 3 Bom. L. R. 307; 8 Sar. P. C. J. 54 (P. C.), referred to.

Where there are no words of limitation in a grant then, even if there are no specific words of inheritance, it may still be a grant in perpetuity. [p. 1032, col. 2.]

Bhaiya Ardwan Singh v *Udey Pratab Singh*, 23 C. 838, 23 I. A. 64; 7 Sar. P. C. J. 24; 6 M. L. J. 79, 12 Ind. Dec. (N. S.) 557 (P. C.) and *Kooldeep Narain Singh* v. *The Government*, 14 M. I. A. 247; 11 B. L. R. 71; 2 Suth. P. C. J. 491, 2 Sar. P. C. J. 734; 20 E. R. 779, referred to.

Letters Patent Appeal from the judgment of a Single Judge of the High Court, dismissing an appeal from the District Judge, Muzaffarpur.

Messrs. *P. Dayal* and *B. Prasad*, for the Appellant.

Mr. *S. S. Ahmad*, for the Respondent.

JUDGMENT.

Miller, J.—This is an appeal under the Letters Patent from a decision of a Single Judge of this Court dismissing an appeal from the District Judge of Muzaffarpur which, in its turn, reversed decision of the Assistant Settlement Officer of Motihari.

The plaintiff, Maharani Janki Kuer, who is the proprietor of the Bettiah Raj at present under the managership of the Court of Wards, instituted the proceedings out of which this appeal arises claiming that a certain entry in the Record of Rights finally published in the year 1916 should be cancelled, and that her right to a half share in the trees upon the defendant's holding might be declared.

The Assistant Settlement Officer dismissed the claim which was brought under

section 106 of the Bengal Tenancy Act.

On appeal to the Special Judge he overruled that decision and found that the plaintiff was entitled to a half share in the trees on the defendant's holding in accordance with the custom prevailing in the Bettiah Raj.

That decision was affirmed by the learned Judge of this Court on second appeal.

The defendant has appealed. The only question for determination in this appeal is whether the first Appellate Court and the learned Judge of this Court were right in their construction of a grant made to the defendant's ancestor by the ancestor of the plaintiff in the year 1858. In that year owing to services performed to the then proprietor of the Bettiah Raj by Bhicha Rai, the then tenant of the holding in question, the proprietor of the Bettiah Ra gave up his right to the trees standing on the defendant's holding and the question for determination is, whether that relinquishment of the right of the Bettiah Raj was intended to be permanent or whether it was merely intended to operate during the lifetime of Bhicha Rai. The document in question is set out in the judgment of the learned Judge of this Court. It is in the nature of a *parwana* addressed to the *gomashtas, patwaris* and *zilladars* of village Chattia Tappa Sonswal. It recites that Bhicha Rai has done great good work and rendered great help in the boundary dispute with the Huthwa Raj, and then proceeds thus, according to the translation adopted by the learned Judge: "Hence, because of that good work it is ordered that whatever trees have been planted by his ancestor and also if he plants any, the share of the Raj in them is given up. Hence this *parwana* is written to all forbidding you in any way to interfere with the trees standing on the *nakdi* holdings of the said Bhicha Rai for ever." It is contended on behalf of the plaintiff, as was found by the Special Judge and by the learned Judge of this Court, that the words which I have referred to merely created a relinquishment of the plaintiff's right during the lifetime of Bhicha Rai. The defendant, on the other hand, who is the descendant in the third generation from Bhicha Rai contends that the relinquishment was absolute and permanent. He further contends that he and his ancestors have been in possession of the holding ever since the year 1858 when this document was executed and that, with the exception of one occasion when a sum of Rs. 400 odd was forcibly extracted from him by the proprietor of the Bettiah Raj, he has never paid any sum to the landlord in respect of his share of the trees. The plaintiff contends that we ought to deal with this document in the same way as if it were in fact a grant of land and as it contains no words of inheritance it was, therefore, never intended that the grant should extend over a longer period than the life of the grantee and that, notwithstanding the words at the end of the document, which restrained the plaintiff's servants from interfering with the trees on the defendant's holding for ever, still there being no words of inheritance in the document it cannot be treated as a grant for anything beyond the lifetime of the grantee. It is quite true that, even if a document should contain words such as these, that is to say, the word "always," or the words "for ever" or similar words, if the grant is clearly the grant of a life-interest only the mere use of such words will not have the effect of extending the grant beyond the lifetime of the grantee. That was the basis of the decision in the case of *Aziz-un-nissa* v. *Tassaduq Husain Khan* (1). On the other hand, there is also abundant authority for the proposition that if there are no words of limitation in a grant then, even if there are no specific words of inheritance, it may still be a grant in perpetuity. See *Bhaiya Ardawan Singh* v. *Udey Pratab Singh* (2), *Kooldeep Narain Singh* v. *The Government* (3).

It appears to me that we must approach this document with a view to ascertaining what was the exact intention of the grantor and one must not, I think, lay too much stress upon the use of any particular word without considering the context and the

(1) 5 C. W. N. 569; 23 A. 324; 11 M. L. J. 160; 28 I. A. 65; 3 Bom. L. R. 307; 8 Sar. P. C. J. 54 (P.C.).

(2) 23 C. 838; 23 I. A. 64; 7 Sar. P. C. J. 24; 6 M. L. J. 79; 12 Ind. Dec. (N. S.) 557 (P. C.).

(3) 14 M. I. A. 247; 11 B. L. R. 71; 2 Suth. P. C. J. 491; 2 Sar. P. C. J. 734; 20 E. R. 779.

other provisions in the document. The first observation I have to make is that this is not a grant of land to a grantee. The so-called grantee in this case was already the occupancy holder of the land in question and as such had a right, not only during his own lifetime, but a permament interest in the holding descendible to his heirs. According to the general law prevailing in this part of India the landlord would be entitled to the whole of the trees standing upon the holding, but by the custom of the Bettiah Raj the landlord is only entitled to a half share in the trees standing upon the holdings of his tenants, the tenant being entitled to the other half. Now this document to my mind clearly indicates that it was the intention of the landlord to give up his right, and indeed it is in terms a relinquishment of his right to his half share in the trees on the holding in question and it is a relinquishment in favour of the tenant. It is addressed to his *gomashtas*, *patwaris* and *zilladars* who would be the proper persons to protect the landlord's interests and see that they recovered anything that was due to him out of the property in question and it forbids them to interfere in any way with the trees standing on the holding of Bhicha Rai for ever. It seems to me, therefore, that the intention was that the landlord should give up his right to a half share in the trees and for that purpose he directs those who will be responsible for protecting his interests not in future to interfere in any way with the trees on that holding. I ought perhaps to point out that there is a passage in the document which comes immediately after the words "it is ordered that whatever trees have been planted by his ancestors" which has been rendered by the learned Judge "and also if he plants any." That may possibly be a proper translation of the words used but it is not necessarily so, and in fact the words actually used were somewhat obscure. The words in the vernacular are "*agar nasab kare*" which literally rendered into English mean "if should plant." There is no personal pronoun showing the person indicated who might plant. It may possibly refer to Bhicha Rai himself as it has been translated by the learned Judge. It may, on the other hand, have a general significance in which case the proper interpretation would be "if one should plant any" although the word "any" does not appear, and in such a case it would make the document apply not only to the trees which had been planted by the ancestors of Bhicha Rai but also to any trees which might be planted in the future. The meaning is not, as I have said, altogether clear but it evidently is intended to include something beyond the trees already planted on the land and to include trees which may be planted at some future time by somebody, and the conclusion which I have arrived at, giving the best judgment I am able to this somewhat obscure expression, is that the intention was that the landlord should relinquish his right to the trees both present and future, and this seems to me to be borne out by the concluding words of the document which forbid his servants from interfering in any way with the trees on that holding for ever. This interpretation also appears to me to be in consonance with what has actually taken place since the year 1858. There is no evidence in the case to show that any claim had ever been made by the landlord to participate in the produce of the trees ever since the document was executed with the one exception when by forcible means and under duress the tenant was obliged to disgorge a sum of something over Rs. 400. The conclusion I have arrived at is, that the learned Assistant Settlement Officer was right and that the Special Judge and the learned Judge of this Court on appeal were wrong in their interpretation of this document. I would allow this appeal with costs and dismiss the suit of the plaintiff.

Mullick, J.— I agree.

N. H. *Appeal dismissed.*

RURE KHAN v. GHULAM MUHAMMAD.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 3071 OF 1922.

April 20, 1923.

Present:—Mr. Justice Campbell.

RURE KHAN—DEFENDANT—APPELLANT

versus

GHULAM MUHAMMAD—PLAINTIFF—RESPONDENT.

Construction of document—Lease—Covenant to vacate on one week's notice—Refusal to vacate on notice—Damages, measure of.

Plaintiff granted defendant a lease of a house for eleven months on payment of a monthly rent, which provided that the defendant would vacate the house on one week's notice of ejectment:

Held, that the stipulation for the monthly payment of rent did not affect the plaintiff's right to serve a week's notice of ejectment on the defendant at any time, and that it was not necessary that the notice should terminate on the last day of a month. [p. 1034, col. 2.]

Where a tenant has held over wilfully and contumaciously, the Courts in India would properly award reasonable damages to the landlord and the amount of double the rent may be taken as a fitting standard of damages. [p. 1035, col. 1.]

Pirbhu Dial v. *Ram Chand*, 5 P. R. 1904; 42 P. L. R. 1904, followed.

Second appeal from the decree of the District Judge, Amritsar, dated the 2nd October 1922, modifying that of the Munsif, First Class, Amritsar, dated the 21st January 1922.

Mr. *B. D. Qureshi*, for the Appellant.

Sayad *Mohsin Shah*, for the Respondent.

JUDGMENT.—This second appeal is the result of a suit by the landlord of a house against a tenant for damages in the shape of enhanced rent on account of the tenant holding over.

The Trial Court decreed the claim in part, but on appeal by the plaintiff the learned District Judge decreed his whole claim of Rs. 55-6-0.

The question in second appeal turns upon the interpretation of the terms of the lease. Admittedly, a written lease was drawn up, but it is not forthcoming. The plaintiff stated that he had lost it. This explanation was accepted by both the Courts below and they admitted secondary evidence in the shape of an abstract given of the document in the register of the petition-writer who wrote it. In both Courts the defendant contested the admissibility of secondary evidence and asserted that the original deed had been withheld by the plaintiff purposely, but in second appeal this objection is not repeated, and the defendant's learned Counsel has argued from the copy of the petition-writer's entry.

According to that copy, the defendant was to be tenant for eleven months paying a monthly rent of Rs. 7-8-0, and if he failed to pay the rent month by month, he was liable to ejectment. The plaintiff was empowered at any time to give the defendant a week's notice to vacate the house and the defendant was to comply.

The tenancy commenced on the 8th August 1920 and on the 3rd June 1921 the plaintiff sent a notice to the defendant telling him to leave the house within a week or to pay double rent from the expiry of that week. The notice further stated that if the defendant did not vacate the house it would be assumed that he was prepared to pay double rent.

The defendant remained in possession up to the 10th or 12th of December 1921, but the present suit was brought on the 2nd of October 1921 for ejectment and double rent at Rs. 15 per mensem for the period of the defendant's occupation after the expiry of the week specified in the notice.

The first point in second appeal is that, because the rent was payable monthly, it was a monthly tenancy and the plaintiff could only give such notice of one week as would terminate on the last day of a month, that is to say, on the 7th of any Calendar month since the first month commenced on the 8th of August 1920. This is not what the abstract of the lease says. The tenancy was for 11 months and one week's notice could be given at any time. The stipulation for the monthly payment of rent has no effect upon the condition by which the plaintiff could serve the defendant with a week's notice at any time.

The second contention is, that there was no contract between the parties for the payment of double rent by the defendant in the event of his holding over after the receipt of notice, and that the finding of the lower Appellate

Court that double rent was a reasonable compensation was not based upon any evidence. It was ruled, however, in *Pirbhu Dial* v. *Ram Chand* (1) that, when a tenant has held over wilfully and contumaciously, the Courts in India would properly award reasonable damages and the penalty laid down in England by Statute of double the rent, may sometimes be taken as a fitting standard. The lower Appellate Court has found distinctly that the defendant held over wilfully and without good reason, and, in view of the above authority, it cannot be said to have acted contrary to law in adopting the double rent standard as the measure of compensation.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 5 P. R. 1904; 42 P. L. R. 1904.

SIND JUDICIAL COMMISSIONER'S COURT.

JUDICIAL MISCELLANEOUS NO. 551 OF 1922.

October 19, 1923.

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

MESSRS. FLEMING SHAW AND CO.—RESPONDENTS No. 1.

versus

MESSRS. MANGALCHAND DWARKADAS —RESPONDENTS No. 2.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 164—*Civil Procedure Code* (*Act V of* 1908), *s.* 141, *O. IX, r.* 13—*Proceedings other than suits*—*Limitation.*

Article 164 of the Limitation Act is not restricted to applications to set aside *ex parte* decrees passed in suits. It also applies to similar applications made in proceedings other than suits, *e.g.*, a petition to file an award under the Arbitration Act.

Application to set aside an *ex parte* order directing an award to stand filed under the Indian Arbitration Act, IX of 1899.

Mr. *Choithram Devanmal*, for the Respondents No. 1.

Mr. *P. S. Shahani*, for the Respondents No. 2.

ORDER.—On the 15th of January 1923 respondent No. 2 Dwarkadas Mangalchand was served personally with a notice issued by this Court to appear on the 18th January 1923, and to show cause why the award passed against the firm of Mangalchand-Dwarkadas, of which he is the managing proprietor, should not stand filed and be enforced as a decree under the provisions of the Indian Arbitration Act, IX of 1899. He failed to appear on that date and on the subsequent dates to which the case was adjourned. On the 6th of March 1923 the award was ordered to be filed in the absence of the respondent Dwarkadas. On the 21st of August 1923 Dwarkadas presented an application which purports to be dated the 20th July 1923, in which he applies to this Court under O. IX, r. 13, Civil Procedure Code, for setting aside the *ex parte* order passed against him and for permitting him to file objections to the award.

This application is out of time. As the respondent was personally served, it was his duty to apply to the Court for setting aside the *ex parte* order within thirty days of the 7th March 1923 when this Court passed an order that the award should stand filed. Article 164 of the Limitation Act is not necessarily restricted to applications to set aside a decree passed in a suit. It applies to applications made under O. IX, r. 13, Civil Procedure Code, read with section 141, Civil Procedure Code, in proceedings other than suits. The contention that as the third column of the Schedule of the Act provides for limitation to run from the date the summons is served, and that, therefore, Article 164 should be confined to decrees, did not find favour with Madras High Court in *Subbiah Naicker* v. *Ramanathan Chettiar* (1). In a later ruling *Periakaruppan Chetty* v. *Chidambara Tambiran* (2) the same Court proceeded on the assumption that Article 164

(1) 22 Ind. Cas. 899; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251; 37 M. 462.

(2) 33 Ind. Cas. 443; [3 L. W. 339] (1916) 2 M. W. N. 64.

applied to orders passed in execution proceedings.

Apart from the question of limitation, this application must fail on the merits. The applicant has not disclosed sufficient cause for his non-appearance on the date fixed for hearing of the objections. The ground for his non-appearance as disclosed in his application and the affidavit in support of it, is that he could not attend the Court on the 6th March 1923 owing to a fit of epilepsy. He was, however, required to attend not on the 6th of March 1923 but on the 18th January 1923. He failed to attend on that day, and there is no explanation why he was absent. There is nothing even to show that the respondent knew that the case had been adjourned to the 6th March 1923 or that he did attend on that day but was prevented on account of a fit of epilepsy from appearing in Court. This application has been made seven months after the date on which the applicant should have appeared in Court if he did at all intend to appear. During all the seven months he was not unable to find out what orders had been passed. This application has been made after the award has been transferred for execution to the Amritsar Court and the respondent's property attached, and probably with the object of delaying the sale of the attached property.

I dismiss the application with costs.

P. B. A. *Application dismissed.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 91 OF 1920.

August 3, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

NARSHING THAKUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

BISHUNPERGASH SINGH AND OTHERS—PLAINTIFFS, AND KAMAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Estates Partition Act (V of 1897), ss. 23, 25, application of—Partition proceedings—Suit objecting to partition, whether maintainable—Partition—Presumption.

Section 25 of the Estates Partition Act applies to suits by the class of persons referred to in section 23 of the Act, that is to say, persons claiming a right or title in or to a parent estate and not to suits by persons objecting to any partition at all. [p. 1038, col. 1.]

Previous partition may be presumed without the production of a formal partition-deed from the facts that the proprietors of the estate have been in separate possession of their *pattis* and have been separately collecting the rents throughout the areas allotted to them from different tenants for a very long time and there are a number of documents which apparently take it for granted that the different proprietors were in separate possession and held the different *pattis* in severalty as representing their respective interests in the estate. [p. 1039, col. 1.]

Letters Patent Appeal against the decision of Mr. Justice Jwala Prasad, in S. A. No. 338 of 1919, dated the 16th June 1922, reported as 74 Ind. Cas. 642, affirming a decision of the District Judge, Muzaffarpur, affirming that of the Munsif of that place, dated the 5th September 1917.

Messrs. *N. C. Sinha* and *S. N. Roy*, for the Appellants.

Mr. *A. B. Mukherj*, for Messrs. *Jalgobind Prasad* and *R. N. Prasad*, for the Respondent.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of the defendants under the Letters Patent from a decision of Mr. Justice Jawala Prasad, affirming a decision of the District Judge of Muzaffarpur, which in turn affirmed a decision of the Munsif.

The appellants, who are the defendants in the suit, and the respondents, who are the plaintiffs, were together the proprietors of *Mauza* Bhadai. In the year 1913 the defendants applied to the Collector for partition of the *mauza*. The plaintiffs raised objections under section 7 of the Estates Partition Act contending that the estate had already been partitioned by private arrangement formally made between the proprietors many years ago and that, consequently, the Collector was not competent to effect a partition again. This objection appears to have been heard by the Collector and dismissed on the 3rd February 1913. On the 5th September 1913 the plaintiffs instituted the present suit claiming a declaration that *Mauza* Bhadai

had already been formally partitioned among the proprietors with their consent; that they had been in separate possession thereof accordingly, and that the *mauza* could not in law be partitioned under Act V of 1897. They further asked for an injunction restraining the defendants from proceeding with the *batwara* before the Collector. The hearing has been delayed by the fact that the plaint was filed in the wrong Court originally and was not presented in the proper Court until 1916. Nothing, however, turns upon that in this appeal.

The main defence in the suit was that there had been no previous partition. It appears that a considerable volume of evidence was called on this subject and the Munsif came to a decision of fact that, in or about the year 1870, there had been a private partition and that since that date each of the proprietors had been in separate possession of the *patti* allotted to him on that occasion and collecting separately the rents from the different tenants throughout the area of which he was in possession. There was apparently no actual document showing the terms of the partition but upon the evidence produced, much of which was documentary, including the Record of Rights published 20 years ago, it appeared to the Munsif that the case was amply proved that there had been a partition in or before the year 1870 and that ever since then the parties had acted thereunder.

On appeal the learned District Judge took the same view and dismissed the appeal.

On second appeal to this Court Mr. Justice Jwala Prasad came to the conclusion that the question was one of fact and that the facts had been found by both the lower Courts and he saw no reason in law for disturbing those findings. He adds at the end of his judgment that it was faintly suggested that the suit, having been brought more than 4 months after the order of the Collector, made under section 29, declaring the estate to be under partition, was barred by limitation under section 25 of the Estates Partition Act. That section, in the opinion of the learned Judge, had no application to a suit of this nature, and having found that the proceedings adopted by the Collector under the Estates Partition Act were *ultra vires* he held that there was no bar to the present suit for a declaration and injunction. He accordingly dismissed the appeal with costs.

From that decision the present appeal has been brought before this Bench under the Letters Patent. The point which has been argued before us is a point which was not taken either in the Trial Court or before the learned District Judge on appeal, and it was only faintly argued before the learned Judge of this Court on second appeal. It has, however, been most strenuously argued before us to-day. The question arises in this way. Section 7, part of Chapter II of the Estates Partition Act, provides that 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 the Act except in certain cases which are not applicable here. Section 25 which is relied upon by the appellants forms part of Chapter IV. It provides that no suit instituted in a Civil Court, after the lapse of four months after the Collector has recorded a proceeding under section 29, by any person claiming any right or title in or to a parent estate, shall avail to affect or stay the progress of any proceedings which may have been taken under the Act for the partition of the estate. It was contended, in the first place, that section 25 was an absolute bar to the present suit. That contention, however, cannot possibly prevail. Assuming that section 25 has any application at all, the only affect of it would be a suit instituted in the Civil Court would have the effect of staying the progress of the proceedings before the Collector. There is nothing in the section which is a bar to a suit proceeding in the Civil Court. The main question, however, which was argued before us was whether section 25 had any application at all to a suit such as the present where the plaintiffs claim that under the provisions of section 7 of the Act the Collector had no power what-

ever to partition the lands in question. Having regard to the wording of section 25 which, I think, must be interpreted in the light of the preceding sections of Chapter IV, there is, I think, a great deal to be said for the view that section 25 has no application to a suit such as the present, but only applies to suits by the class of persons referred to in section 23, that is to say, persons claiming a right or title in or to a parent estate and not to suits by persons objecting to any partition at all. Chapter IV begins by stating how applications for partition shall be made and what they shall contain. Provision is then made for publishing Notifications inviting persons interested and claiming any proprietary right in the estate and objecting to the partition to come in and assert their claims and objections. Section 22 gives the Collector power to reject the application for partition, if he thinks fit, on considering any objection thereto. But by section 23, if the objection raises any question of right or title or of extent of interest as between any applicant and any other person claiming to be a proprietor of the parent estate, then the Collector may hold an enquiry and, if satisfied that the applicant is in possession of the interest claimed, he may either direct a partition of his interest or postpone proceedings for four months. The object of the postponement appears from section 24 which provides that at the expiration of four months the Collector shall resume the proceedings unless the objector or some other person has obtained an order from a Civil Court directing that such proceedings be stayed or shows that a suit has been instituted before a Civil Court to try some question of such a nature as to lead the Collector to think that proceedings should be stayed pending the trial of the suit. Then follows section 25 already referred to. It would appear, therefore, having regard to the sections which I have referred to, that there are strong grounds for holding that the words in section 25 which relate to suits by persons claiming any right or title in or to a parent estate refer back to the persons and the relief claimed mentioned in section 23 and that section 25 relates only to claims by such persons. In the present case the claim is not one of that nature. It is a claim by one of the proprietors claiming not a right or title in the parent estate but that there is in fact no parent estate because the estate had already been partitioned and, therefore, that the jurisdiction of the Collector to effect a partition no longer exists. This appears to be in accordance with the view of the Calcutta High Court which had to consider the question as it arose under the previous Partition Act, which for this purpose is practically similar, in the case of *Ananda Kishore Chowdhury* v. *Daiji Thakurani* (1). There is, however, a decision of this Court in *Badri Narain Singh* v. *Subhkaran Misser* (2) which, so far as one can gather from the somewhat meagre report of the case, appears to take the view that section 25 of the Act would be sufficient in a case like the present to prevent an injunction being granted staying the parties from proceeding with the partition. It is, however not necessary, in my opinion to decide this point because the facts necessary to establish the appellant's case have not been proved. Before they can establish their contetion that section 25 applies they must shew that the suit was not instituted within four months after the order was made by the Collector under section 29. In the present case, as the point was not taken in the Trial Court and as there was no issue framed about it, it is hardly surprising that the evidence upon this question is somewhat meagre. The only evidence we have is that on the 3rd February 1913 the plaintiff's objection under section 7 was dismissed by the Collector. Then we know that on the 5th June in the same year the present suit was instituted. There is, however, nothing on the record to show at what date, if at all, an order was passed by the Collector under section 29. We have been asked to assume that such an order would be passed immediately the plaintiff's objection under section 7 was rejected but that by no means follows. There may, for aught we know, in the partition proceedings have been objections by other persons and these clearly would have to be disposed of before any order could be passed

(1) 1 Ind. Cas. 549; 36 C. 726; 10 C. L. J. 189.
(2) 61 Ind. Cas. 905; 6 P. L. J. 41; 2 P. L. T. 130.

under section 29. In fact, there is no evidence at all as to when the order under section 29 was passed. It seems to me, therefore, that the defendants' objection fails *in limine* because they have not proved the facts upon which such objection could be established.

The only other point which was argued before us was that the findings of fact of the lower Appellate Court were not sufficient to justify the Court in arriving at the conclusion that there had been a previous partition. It is quite true that no formal document showing partition had been proved in the case, but I entirely agree with the learned District Judge in the view he took that the production of such a document is not necessary in order to establish a previous partition. Such a partition may well be presumed from the facts which are proved in the case and which show that from the year 1870 the proprietors of this estate have been in separate possession of their *pattis* and have been separately collecting the rents throughout the areas allotted to them from the different tenants, and there are a number of documents which apparently take it for granted that the different proprietors were in separate possession and holding different *pattis* in severalty as representing their respective interests in the estate. As stated by the learned District Judge, the separate *pattis* have been recognised for so long both by the *malaks* themselves and by the tenants that it seems almost certain that there was a partition and not merely a mutual arrangement to enjoy *ijmali* property in the most convenient way. The question was whether upon these findings the learned District Judge was entitled to presume a partition. In my opinion he was so entitled and the appellant's contention to the contrary fails. The result is that the appeal must be dismissed with costs.

Mullick, J.—I agree.

P. D. & M. D. J.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 21 OF 1922.

February 2, 1923.

Present:—Mr. Justice Campbell.

THE FIRM MUL CHAND-HUT CHAND, THROUGH RELU MAL—DECREE-HOLDER—PETITIONER

versus

THE FIRM GANDA MAL-RALLIA RAM, THROUGH SANT RAM, AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Order holding decree executable against person or property of judgment-debtor—Appeal, second, whether lies.

The order of an Appellate Court holding that a decree-holder can proceed against the property but not against the person of the judgment-debtor, conclusively determines the rights of the parties with regard to the personal liability of the judgment-debtor to satisfy the decree and falls under section 47 of the Civil Procedure Code. A second appeal is, therefore, competent against such an order.

Petition, under section 44 of Act IX of 1919, for revision of an order of the District Judge, Amritsar, dated the 1st August 1921, affirming that of the Subordinate Judge, Second Class, Amritsar, dated the 17th March 1921.

Mr. *Jai Gopal Sethi*, for the Petitioner.

Lala *Badri Das*, R. B., and Mr. *Nanak Chand*, for Mr. *Sundar Das*, for the Respondent.

JUDGMENT.—The preliminary objection is taken that no revision lies in this case since a second appeal would lie. The objection must be sustained.

The facts are these. In execution of a decree a warrant of arrest was issued against Sant Ram, one of the judgment-debtors. This warrant was not executed and was re-called. The judgment-debtor presented an application under section 47, Civil Procedure Code, that his person was not liable for the decree. The First Court held that the decree could not be executed at all against the judgment-debtors who are the firm Ganda Mal-Rallia Ram of which Sant Ram is one of the proprietors. The decree-holders appealed, stating their appeal to be under section 47. The lower Appellate Court held that the decree-holders could proceed against the property but not against the persons of the judgment-debtors.

There is no doubt that this order of the lower Appellate Court falls within the definition of a decree given in section 2

(2) of the Code of Civil Procedure. It conclusively determines the right of the parties with regard to one of the matters for determination under section 47, that is to say, the personal liability of the judgment-debtors to satisfy that decree

The learned Counsel for the petitioners has asked me to convert the revision into an appeal. One very strong reason stands in the way of my doing so, namely, that as an appeal the petition would be hopelessly out of time and, if it had been filed as a second appeal, there are no possible grounds on which time could have been extended. The lower Appellate Court sits at Amritsar. Its judgment was delivered on the 1st of August 1921. Three days only were spent in obtaining copies—the 1st to 3rd October—and the petition for revision was not presented to this Court until the 30th of November 1921. The only explanation forthcoming for the delay is that the petitioners were advised that a revision application was competent; but there was no reason why the revision application should not have been put in in October and they have shown no such diligence as to entitle them to what would be a very substantial concession at the expense of the other side.

The petition fails and is dismissed with costs.

Z. K. *Petition dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1673 OF 1919.

November 8, 1922.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

MUHAMMAD KHAN AND OTHERS—PLAINTIFFS—APPELLANTS,

versus

SULTAN AZAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 31 (2)—Evidence Act (I of 1872), s. 74—History of District attached to Settlement Record, whether part of Record of Rights—Public document—Proof—Certified copy.

The history of a District attached to a Settlement Record does not form part of the Record of Rights as it is not one of the documents specified in section 31 (2) of the Punjab Land Revenue Act. But it may be presumed that it was compiled by or by the direction of the Settlement Officer, and is, therefore, a public document within the meaning of section 74 of the Evidence Act, provable by the production of a certified copy.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 22nd May 1919, reversing that of the Junior Subordinate Judge First Class, Jhang, dated the 10th January 1919.

Mr. *Mukand Lal Puri*, for the Appellants.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The plaintiffs in this case sue for pre-emption in respect of a sale of land on the ground that they are owners in the village in which the land is situate. The question in dispute is whether the vendee is, as he alleges, a collateral of the vendors and has, therefore, a superior right of pre-emption. The Subordinate Judge gave judgment for the plaintiffs, but the District Judge on appeal has held that the vendee's relationship to the vendors has been proved and he has dismissed the suit.

His finding is based mainly on certified copies (Exhibit D-A. and D-B) of entries in a history of the Multan District which is attached to the Settlement Record and in second appeal it is contended that the copies are inadmissible in evidence, the history in question being neither a part of the Record of Rights nor a public document. We agree in thinking that the history does not form part of the Record of Rights, not being one of the documents specified in section 31 (2) of the Land Revenue Act. But we see no reason to doubt that the history, having been placed with the Settlement Record, must have been compiled by, or by the direction of the Settlement Officer, and that it is, therefore, a public document within the meaning of section 74 of the Evidence Act, and is provable by the production of a certified copy. There appears to be no force in the contention that Exhibits D-A and D-B are copies of a copy. We hold that they are relevant and that the decision of the lower Appellate

Court, being a finding of fact and based on legal evidence, cannot be contested in second appeal.

The appeal consequently fails and we dismiss it with costs.

Z. K.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 8 OF 1922.

October 2, 1923.

Present.—Mr. Raymond, A. J. C., and Mr. Rupchand Bilaram, A. J. C.

MESSRS. FORBES, FORBES CAMPBELL & CO. LTD.—APPELLANTS

versus

VERSIMAL DEWANMAL—RESPONDENTS.

Arbitration Act (IX of 1899), s. 19—Stay of suit—Duty of Court—Discretion how to be exercised—Onus—Refusal to stay suit—Civil Procedure Code (Act V of 1908), s. 115—Illegal assumption of revision—Jurisdiction—No other remedy open—Interpretation of s. 115.

In an application for the stay of a suit under section 19 of the Arbitration Act it is the *prima facie* duty of the Court to stay the suit and the *onus* is on the plaintiff to show why he should not be bound by his agreement to refer and that sufficient reason exists why the matter should not be so referred. The Court is vested with a discretion to stay or not to stay a suit but the discretion must be guided by judicial principles. [p. 1042, col. 2.]

Goverdhandas Vishindas v. *Ramchand Manjimal*, 47 Ind. Cas. 783; 12 S. L. R. 41, *Abdullah Haroon* v. *Messrs. E. D. Sassoon & Co.*, 56 Ind. Cas. 76; 13 S. L. R. 201, followed.

Section 115, Civil Procedure Code, applies to jurisdiction alone, the irregular 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. [p. 1043, col. 1.]

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.), followed.

Section 115, Civil Procedure Code, should receive a literal rather than a narrow interpretation especially when the applicant has no other remedy. [p. 1043, col. 2.]

Bai Atrani v. *Thakur Kunwar*, 33 Ind. C. 858; 40 B. 86; 17 Bom. L. R. 1097 and *Narandas* v. *Jassomal*, 65 Ind. Cas. 37; 15 S. L. R. 135, followed.

The lower Court refused to stay the suit under section 19 of the Arbitration Act on the sole ground that there was a breach of warranty on the part of one of the contracting parties and did not apply its mind to the question whether there was sufficient reason why it should not be referred in accordance with the submission;

Held, that the lower Court had illegally assumed jurisdiction, that there was an irregular exercise of it and that there was an erroneous conclusion of law. [p. 1043, col. 1.]

Appeal against the order of Mr. Aston, Additional Judicial Commissioner, Sind, in J. Misc. No. 507 of 1921, refusing to stay Suit No. 1215 of 1921 under section 19 of the Arbitration Act.

Mr. *Dipchand Chandumal*, for the Appellants.

Mr. *Naraindas Vishindas*, for the Respondents.

JUDGMENT.

Rupchand Bilaram, A. J. C.—Though no appeal lies in this case, as held by the recent Full Bench Judgment of this Court, it is argued that, in the circumstances of this case, we should exercise our revisional jurisdiction and set aside the order of the lower Court. Versimal Dewanmal had contracted to purchase from Forbes, Forbes and Co. 6 cases of cotton embroidery according to sample, under an indent which contained the usual arbitration clause. On the arrival of the goods the purchaser cancelled the contract, as the goods did not conform to the sample. Correspondence ensued between the parties and the sellers called upon the buyers to refer the dispute to arbitration in terms of the submission clause in the indent. The buyers suggested a survey, though by their letter of the 29th July 1921, they declined to be bound by the report of the surveyors. Two surveyors were accordingly appointed, one by either party. The report of the surveyors was that the goods were generally inferior in quality but that the buyer should pay for and take delivery of them in terms of the contract less an allowance of 20 per cent. on the invoice value. The sellers next called upon the buyers to take delivery of the goods in terms of the surveyors' report and threatened to sell them at his risk if delivery was not

FORBES, FORBES CAMPBELL & CO. LTD. *v.* VERSIMAL DEWANMAL.

taken within a specified time. The buyers thereupon filed a suit against the sellers for a declaration that the contract had been rightly cancelled and for an injunction restraining them from enforcing it. The sellers applied under section 19 of the Indian Arbitration Act for a stay of the suit. The learned Judge of the Court below rejected the application and the sellers, Forbes, Forbes and Co., apply to us in revision.

Clause 13 of the indent between the parties is as follows: 'Any dispute arising out of this agreement *whatever be its nature* shall unless amicably settled be referred to arbitration of two European merchants of Karachi, etc.' It is not disputed as it could not well be that the differences between the parties as regards the inferiority of the goods tendered is one that has arisen out of the agreement between the parties. The learned Additional Judicial Commissioner appears to have proceeded on the basis of the illegality of the order passed by the surveyors that the buyer was bound to take delivery of the goods with an allowance of 20 per cent. whereas in his view as the goods were not according to sample the buyer had the option of either accepting or refusing them. And the dismissal of the application under section 19 of the Indian Arbitration Act seems to be based on the ground that, as there was a breach of warranty on the part of the seller, the buyers were justified in refusing to accept delivery. In the first place, this reasoning is open to the obvious objection that the report of the surveyors was not binding on the parties and the buyer had made a clear stipulation that it would not be binding upon him, as a matter of fact the report of the surveyors would be merely evidence in the case as to the condition of the goods. Secondly, the report of the surveyors or the fact of the survey did not imply that the right to refer the disputes between the parties to arbitration had been relinquished, and the point for decision before the learned Judge was whether in terms of section 19 Indian Arbitration Act "there was no sufficient reason why the matter should not be referred in accordance with the submission" and to this point the learned Judge does not seem to have applied his mind. Whether the order of the surveyors was legal or illegal, the right to refer the disputes to arbitration still existed and the arbitrators were the proper tribunal to sit in adjudication upon them. The parties having agreed that any dispute, whatever be its nature, shall be referred to a domestic forum of their choice, then a *prima facie* duty is cast upon the Court to act upon such an agreement and the *onus* is on the plaintiff to show why he should not be bound by the agreement to refer to arbitration, and that sufficient reason exists why the matter should not be so referred. No doubt, the Court is vested with a discretion either to stay or not to stay a suit but the discretion must be guided by judicial principles. As said in the case of *Goverdhandas Vishindas* v. *Ramchand Manjimal* (1): "The Court should exercise its discretion in refusing to stay a suit in a sparing and cautious manner and should not do so unless it can be established that there is good ground for apprehending that there will be a failure of justice if the reference to arbitration is allowed to proceed." In *Abdullah Haroon* v. *Messrs. E. D. Sassoon & Co.* (2) it was held that in an application for stay it is the *prima facie* duty of the Court to stay the suit and the *onus* is on the plaintiff to show why he should not be bound by his agreement to refer.

Now, considering the language of section 19 of the Indian Arbitration Act, has it been established that there was sufficient reason why the matter should not be referred to arbitration in accordance with the agreement between the parties? The only reason advanced by the learned Judge is that as the surveyors found that the goods were inferior in quality, there was a breach of warranty, consequently the buyers were not bound by the arbitration clause. But the sellers do not admit that the goods are inferior in quality; they say that the 20 per cent. allowance was offered to the buyer in order to help the clearance and not on account of any inferiority. The dispute, therefore, as to the

(1) 47 Ind. Cas. 783; 12 S. L. R. 41.
(2) 56 Ind. Cas. 761; 13 S. L. R. 201.

quality of the goods between the seller and buyer strictly fell within the purview of the arbitration clause and it was for the arbitrators to determine whether the goods tendered were in accordance with the basis sample.

The question, however, remains whether we should interfere in our revisional jurisdiction with the order complained of. Section 115, Civil Procedure Code, is certainly not directed against erroneous conclusions of law or fact in which the question of jurisdiction is not involved. As observed by the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar* (3): 'The section applies to jurisdiction alone, the irregular 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.' Taking this as the standard for our interference in revision, I am of opinion that the learned Judge has illegally assumed jurisdiction by refusing to stay a suit on the sole ground that the surveyor's report reveals a breach of warranty on the part of one of the contracting parties. It is not merely an erroneous conclusion of law but it is an irregular exercise of jurisdiction to refuse to stay a suit on the ground mentioned. There is nothing in the order of the learned Judge which would point to sufficient reason having been shown why the matter should not be referred to arbitration unless it is implied in the concluding part of his order "that the allowance was offered as compensation for a breach which entitled the buyer to decline to accept delivery."

By the refusal to stay the suit the vendors are practically left without any remedy. In *Bat Atra i* v. *Thakur Kunwar* (4), it was observed by Batchelor, J., that "Inasmuch as section 115, Civil Procedure Code, is merely an empowering section granting certain jurisdiction to the High Court and as the use or exercise of that jurisdiction will, within the prescribed limits, be regulated by the discretion of the High Court, the section ought to receive rather a liberal than a narrow interpretation." In *Narainbdas* v. *Jassomal* (5) it was held that the powers of the High Court under section 115, Civil Procedure Code, should receive a liberal rather than a narrow interpretation when the applicant has no other remedy.

I would set aside the order of the lower Court and direct Suit No. 1215 of 1921 to be stayed.

In the circumstances of the case, I make no order as to costs.

Raymond, A. J. C.—I concur.

P. B. A. *Order set aside.*

S. D.

(5) 65 Ind. Cas. 371 15 S. L. R. 135.

(3) 40 Ind. Cas. 650; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 1917) M. W. N. 628; 40 M. 793; 6 L. W. 594; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

(4) 33 Ind. Cas. 358; 40 B. 86; 17 Bom. L. R. 997.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2436 OF 1918.

April 10, 1923.

Present—Mr. Justice Abdul Racof and Mr. Jusitce Fforde.

IBRAHIM—PLAINTIFF—APPELLANT

versus

JIWAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 53—Fraudulent transfer—Intention of transferee—Transfer in good faith and for consideration—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Title suit—Burden of proof.

The provision contained in section 53 of the Transfer of Property Act though not specifically applicable to the Punjab, is applicable in principle. [p. 1044, col. 2.]

Lakhmi Narain v. *Tara Singh*, 6 P. R. 1901; P. L. R. 1900 p. 513, *Champo* v. *Shankar Das*, 14 Ind. Cas. 232; 74 P. R. 1912; 165 P. L. R. 1912; 148 P. W. R. 1912, followed.

Where a transfer is attacked as having been made to defeat and delay creditors, it is the knowledge and intention of the transferee which is the determining factor as to the validity of the transfer. If the transferee buys in good faith and for valid consideration, his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying

his creditors. In each case it is a question of fact as to whether or not the transferee has bought in good faith and without knowledge of the transferor's object of selling. [p. 1045, col. 2.]

Bhagvant Appaji v. *Kedari Kashinath*, 25 B. 202; 2 Bom. L. R. 986, relied on.

A person who claims property which has been attached in pursuance of an execution decree, must in a suit brought under r. 63 of O. XXI of the Civil Procedure Code give *prima facie* evidence of the genuineness of the document of sale and once he has shown a *prima facie* title the onus is shifted to the judgment-creditor to prove that the transfer was fraudulent and unreal. [p. 1045, col. 1.]

Nannhi Jan v. *Bhuri*, 30 A. 321; 5 A. L. J. 601; A. W. N. (1908) 125, relied on.

Second appeal from a decree of the District Judge, Mianwali, dated the 26th June 1918, reversing that of the Munsif, First Class, Mianwali, dated the 28th April 1916.

Mr. *Ghulam Rasul* and Lala *Mul Chand*, R. S., for the Appellant.

Messrs. *Nanak Chand Chopra* and *B. A. Cooper*, for the Respondents.

JUDGMENT.—The circumstances out of which this appeal has arisen are briefly as follows:—

In April 1914 one Hakim sold 1245 *kanals*, 12 *marlas* of land to his son Ibrahim, the present appellant. In July 1914 Jiwan Das, Aya Ram and Handa Ram, certain creditors of Hakim, obtained a decree against him for payment of the sums due, and in execution of this decree they attached the land which had been sold. The vendee thereupon filed objections to the attachment, which were disallowed by the Executing Court. The vendee then brought the present suit for a declaration that the land in question was not liable to attachment and sale under the decree. In other words, he claimed that the property in the land duly passed to him by virtue of the sale to him by Hakim.

The execution creditors, on the other hand, contended that the sale was a fraudulent and colourable transaction intended to defeat the execution of the decree and, therefore, voidable at their option under section 53 of the Transfer of Property Act, 1882.

Counsel for the vendee, the appellant in the present appeal, urges, firstly, that the Transfer of Property Act does not apply to the Punjab, and, secondly, that even if it does, the transaction was a genuine one, made for valuable consideration and without knowledge on his part of any fraudulent intent on the part of the vendor, and, therefore, cannot be impeached. So far as the first contention is concerned, it is clearly unsustainable. It has been held in *Lakhmi Narain* v. *Tara Singh* (1) and in *Champo* v. *Shankar Das* (2) that the Act, though not specifically applied to the Punjab, is applicable in principle, and with this view we are in entire accord.

As to the second contention, the onus of proving the genuineness of the sale was placed by the Court of first instance upon the vendee, and on the trial of this issue the Court found in favour of the vendee, holding that the sale was made in good faith.

On appeal to the District Judge the latter was of opinion that the onus of proving that the sale was collusive and fictitious lay upon those who alleged fraud, that is, upon the present respondents and he found as a fact that the sale was not fraudulent or collusive, and he further held that the consideration was not inadequate.

On appeal to the High Court, Broadway, J., was of opinion that the onus of proving his title to the land lay in the first instance on the vendee, and he thereupon allowed the appeal, set aside the decree in favour of the present appellant, and remanded the case to the lower Appellate Court for a fresh decision on the merits, with a direction to the Court to deal with the case with due regard to the observations which he had made in regard to this question of onus.

On the matter again coming before the lower Appellate Court a different District Judge to the one who first heard the appeal was sitting, and he ordered that a commission be issued to have the land valued with a view to ascertaining the adequacy of the consideration for the sale.

When the matter once more came before him the learned District Judge held that the *bona fide* nature of the sale

(1) 6 P. R. 1901; P. L. R. 1900, p. 513.
(2) 14 Ind. Cas. 232; 74 P. R. 1912; 165 P. L. R. 1912; 148 P. W. R. 1912.

had not been established, and, accepting the appeal, he dismissed the suit.

It is true that the onus of proving title to the property sold lay in the first instance upon the vendee. This has been established by a number of decisions, amongst others the case of *Nannhi Jan* v. *Bhuri* (3) referred to by Broadway, J. But all that this case decided was that a person who claims land which has been attached in pursuance of an execution decree, must in a suit brought under section 283 of the Civil Procedure Code (corresponding to O. XXI, r. 63 of the present Code) give *prima facie* evidence of the genuineness of the document of sale. This onus, as Broadway, J., points out in his judgment, has been found by the Court of first instance, to have been satisfactorily discharged by the vendee in the present case. The claimant to the land having shown a *prima facie* title, the onus was then shifted to the execution creditors to prove that the transfer was fraudulent and unreal. This they failed to do, according to the finding of the lower Appellate Court when the case first came before it on appeal.

The matter at that time stood as follows:—The Court of the first instance had found that the transferee had established a *prima facie* claim to the land. On appeal the lower Appellate Court had found that the onus of proving fraud lay upon those who alleged it, and that not only had this onus not been discharged, but that in fact the sale was not fraudulent or collusive.

It appears to us that those findings of the lower Appellate Court as to the genuineness of the transfer were not open to challenge on second appeal. The onus of proof does not appear to us to have been wrongly placed in either Court, and even if it had been, as the issues were fully tried out, and no objection appears to have been raised by the defendants to the form of those issues, it is doubtful if the irregularity, if there were one, could be regarded as having in any way prejudiced them. As the matter now comes before us, however, we have to deal with a finding of the lower Appellate Court dismissing the suit on the grounds: (1) that "even if the transferee was unaware of the debts due by the transferor the creditors could object to the sale as made with a knowledge that it would delay or defeat their claim" Having arrived at this conclusion the learned District Judge forms the opinion that the *bona fide* nature of the claim had not been established.

We are unable to agree with the expression of law which is involved in this finding, and upon which the judgment of the lower Appellate Court is based.

It has been held in *Bhagwant Appaji* v. *Kedari Kashinath* (4), where the law on the subject was exhaustively reviewed, that a sale was valid although made with the object of defeating the anticipated attachment of a judgment-creditor. It is quite clear from this and many other decisions of the Courts in India since the passing of the Transfer of Property Act, that a transfer of property though made with the deliberate object of avoiding the payment of just debts, is not in itself a good ground for setting aside the transaction.

The knowledge and intention of the transferee are the determining factors in these cases. If the transferee buys in good faith and for valid consideration his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying his creditors. In each case it is a question of fact as to whether or not the transferee has bought in good faith and without knowledge of the transferor's object for selling. It is true that relationship of father and son, as vendor and purchaser respectively, is an important element to be considered. Such a relationship must necessarily throw a certain amount of suspicion upon a sale of this kind, but such suspicion can, of course, be dispelled by the presence of other circumstances, and of these the most important is the fact that a valid

(3) 30 A. 321; 5 A. L. J. 601; A. W. N. (1908) 125.

(4) 25 B. 202; 2 Bom. L. R. 986.

consideration has passed, and the transferee has gone into actual possession of the property. In the present case there has admittedly been valid consideration for the sale. It has not been found, nor, in our opinion, could it be found, that the consideration was grossly inadequate so as to raise a presumption of intent to defraud creditors within the meaning of the second part of section 53 of the Transfer of Property Act,

Moreover, it has been held by the Court of first instance, and the finding has not been dissented from by the lower Appellate Court, that the transferee has in fact purchaced in good faith. We hold, therefore, that, on the true construction of section 53 of the Transfer of Property Act as applied to the admitted facts of this case, the sale cannot be set aside in favour of the judgment-creditors.

We accordingly accept the appeal and reversing the finding of the lower Appellate Court restore that of the Court of first instance with costs throughout.

Z. K.

Appeal accepted.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1226 OF 1921.

August 8, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Babu KULDIP SAHAY AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu RAJKUMAR SINGH—PLAINTIFF AND GURSAHAY SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Estates Partition Act (V of 1897), ss. 7, 22, 23, 25, application of—Partition proceedings—Suit raising objection to proceedings, maintainability of.

The suit contemplated by section 25 of the Bengal Estates Partition Act is a suit raising a question referred to in section 23 of the Act and not a question under section 22 of the Act. Hence a suit which does not raise any question of right or title or of extent of interest of the plaintiff but raises an objection to the proceeding of the partition proceedings, before the Collector is not affected by section 25 of the Act. [p. 1047, col. 2.]

Badri Narain Singh v. *Subhkaran Misser*, 61 Ind. Cas. 90; 6 P. L. J. 41; 2 P. L. T. 130, **overruled.**

Appeal from a decision of the Officiating District Judge, Patna, dated the 6th June 1921 confirming the decision of the Subordinate Judge, Second Court, Patna, dated the 17th June 1920.

Mr. *P. N. Sinha*, for the Appellant.

Messrs. *L. N. Sinha* and *S. Dayal*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the defendants against the decree of the Officiating District Judge of Patna, confirming a decree of the Subordinate Judge and decreeing the plaintiff's suit for a declaration that certain partition proceedings commenced by the Collector on the application of the defendants were bad in law as opposed to the provisions of section 7 of the Estates Partition Act, and for an injunction restraining the defendants from proceeding with the partition proceedings before the Collector. The facts are shortly these: The plaintiffs and the defendants are co-sharer proprietors of Estate Lachmipur Tapey Mekra, Pargana Gayaspur, bearing *Touzi* No. 8267. On the 17th February 1917 the defendants filed an application before the Collector for partition of this estate under the Estates Partition Act and notices provided by section 21 of the Estates Partition Act were issued, whereupon the plaintiffs raised an objection to the partition on the ground that the estate had been previously partitioned and each co-sharer was in possession of separate lands held in severalty as representing his interest in the estate and, therefore, no partition could be made. This objection was disallowed by the Collector and on the 12th August 1917 the Collector recorded proceedings under section 29 of the Estates Partition Act. The plaintiffs preferred an appeal before the Commissioner who dismissed the appeal by his order dated the 22nd November 1917 and ordered the partition to proceed. The

plaintiffs thereupon brough the present suit for a declaration as stated above.

The defendants appeared and objected that, having regard to the provisions of section 25 of the Estates Partition Act, the present suit was not maintainable and they also alleged that there was no private partition as alleged by the plaintiffs and, therefore, there was no bar to the partition proceedings before the Collector. Both the Courts below have held that there was a private partition as contemplated by section 7 of the Estates Partition Act and that, therefore, the partition before the Collector could not proceed. They have also held that section 25 of the Estates Partition Act does not bar the present suit. The defendants prefer this second appeal and they contend that, having regard to the provisions of section 25 read with section 7, the suit was barred. Now, section 25 of the Estates Partition Act provides that no suit instituted in a Civil Court after the lapse of four months after the Collector has made a direction under clause (*a*) or clause (*b*) of section 23, or recorded a proceeding under section 29 by any person claiming any right or title in or to a parent estate, shall avail to affect or stay the progress of any proceedings which may have been taken under this Act for the partition of the estate. In order to understand the nature of the suit referred to in section 25 of the Estates Partition Act, it is necessary to refer to sections 22 and 23. After the notice is issued by the Collector under section 21, it is provided by section 22 that if any person claiming a proprietary right as provided in section 21 states an objection to the partition on or before the day specified in the Notification published under section 21, or at any subsequent time, if it shall then seem fit to the Collector to admit such objection and the Collector, on consideration of the objection, is of opinion that there is good and sufficient reason for rejecting the application, he may reject the same, and if he does so, shall record the grounds of such rejection. This section 22 contemplates an objection to the partition proceedings before the Collector on general grounds and one of those grounds may be the ground contemplated by section 7 of the Estates Partition Act. Then, section 23 says that if any such objection raises any question of right or title or of extent of interest as between any applicant and any other person claiming to be a proprietor of the parent estate and if it appears to the Collector that such question has not been already determined by a Court of competent jurisdiction, the Collector may hold such inquiry into the objection as he may deem necessary, and, if he be satisfied that the applicant is in possession of the extent of the interest for the separation of which he has applied, may, instead of rejecting the application as provided in section 22 (*a*), direct that the partition proceedings shall proceed for the purpose of forming and assigning to the applicant a separate estate in accordance with the extent of interest claimed by him in the parent estate, or (*b*) direct that such proceedings be postponed for four months.

Now the objection contemplated by section 23 relates to a question of right or title or extent of interest as between any applicant and any other person claiming to be a proprietor of the estate. Section 25 says that no suit instituted by any person claiming any right or title in or to a parent estate, shall avail to affect or stay the progress of any proceeding which may have been taken under this Act for the partition of the estate if such suit is brought after the lapse of four months after the Collector has made an order under section 23 or recorded a proceeding under section 29. To my mind the suit contemplated by section 25 is a suit raising a question referred to in section 23 of the Estates Partition Act and not a question under section 22 of the Act. I am, therefore, of opinion that the present suit which does not raise any question of right or title or of extent of interest of the plaintiffs but raises an objection to the proceeding of the partition proceedings before the Collector is not affected by section 25 of the Act. This question has been considered in a very recent judgment of the Hon'ble the Chief Justice in Letters Patent Appeal. No. 91 of 1920 [*Narsingh Thakur* v. *Bishunpergash Singh* (1)] which was delivered on the 3rd August

(1) 75 Ind. Cas. 1036; 4 P. L. T. 629.

1923 and the point has been elaborately discussed by his Lordship the Chief Justice and he has come to the conclusion that a suit like the one is not barred by section 25. The first objection taken by the learned Vakil for the appellants must, therefore, be overruled.

It has next been argued that there is no finding that there has been a previous private partition representing the interest of the different proprietors as contemplated by section 7 of the Estates Partition Act. The learned District Judge in his judgment expressly states that this point was taken before him on behalf of the defendants and he comes to the conclusion that the partition as proved by the plaintiffs in the present case is a partition as contemplated by section 7 of the Act. This finding is a finding of fact which is conclusive in second appeal. This objection, therefore, cannot be entertained.

The result is that this appeal must be dismissed with costs.

Das, J.—I agree. The decision of my Lord the Chief Justice in the case to which my learned brother has referred is so clear and convincing that I have come to the conclusion that the view presented by me in *Badri Narain Singh* v. *Subhkaran Misser* (2) can no longer be maintained. It is quite true that the qresti on was not argued in the form in which it has been argued before us to-day but it must be conceded that if, as I think, the point has been correctly decided by my Lord the Chief Justice in the case to which my learned brother has referred, the appeal in *Badri Narain Singh* v. *Subhkaran Misser* (1) should have succeeded and not failed.

P. D. & N. H. *Appeal dismissed.*

(2) 61 Ind. Cas. 90; 6 P. L. J. 41; 2 P. L. T. 130

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 630 OF 1919.

May 8, 1923.

Present:—Mr. Justice Moti Sagar and Mr. Justice Martineau.

NANAK CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

K. B. Mir MUHAMMAD KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage—Agreement to pay by instalments—Default—Limitation—Civil Procedure Code (Act V of 1908), s. 11, O. VII, r 6—Res judicata—Benamidar—Beneficial owner, whether affected—Pleading—Implied ground of exemption from, not specified in plaint, effect of—Admission of Counsel on point of law, whether binding on party.

A mortgage-deed provided for re-payment of the mortgage-money and interest by monthly instalments. It was also agreed that default in payment of each instalment should constitute a separate cause of action. Default having been made in payment of the instalments, the mortgagee sued to recover the amount of the instalments and interest:

Held, (1) that the suit was governed by Art. 132 of Schedule I to the Limitation Act and that limitation in respect of each instalment began to run from the date of default in respect of that instalment; [p 1052, col 2]

(2) that the mere forbearance of the mortgagee to sue for the recovery of the amount of the instalments in respect of which default had been made did not amount to waiver and did not stop limitation from running. [p 1052, col. 2.]

In a proceeding by or against a *benamidar* the person beneficially entitled is fully affected by the rules of *res judicata* [p 1051, col. 1]

Gur Narayan v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 46 C. 506; 17 A. L. J. 66, 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N 521, 1 U. P. L. R. (P. C.) 1, 12 Bur L. T. 122; 46 I. A 1 (P. C), relied on.

When a suit as laid in the plaint, is *prima facie* barred by limitation, the plaintiff must state in the plaint the ground upon which exemption from the Law of Limitation is claimed, and where no such ground is stated the plaintiff cannot be subsequently allowed to set up and prove such a ground [p. 1052, col 1,]

An admission made by a party's Counsel on a point of law is not binding on the party, and if the opposite party has not been prejudiced by such an admission, there is no provision of law to prevent the party on whose behalf the admission was made from taking the point in appeal. [p. 1050, col. 2.]

First Appeal from a decision of the Senior Sub-Judge, Simla, dated the 16th December 1918.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Badri Das*, R. B., and Mr. *Obedullah*, for the Respondents.

JUDGMENT.—This is an appeal from a decision of the Senior Sub-

Judge of Simla, dated the 16th December 1918, dismissing the plaintiff's suit for Rs. 12,500 principal and interest alleged to be due on a mortgage-deed dated the 7th of October 1899. The material facts are shortly these:—

One Mrs. Gomes owned, among other properties, a dwelling house at Simla known by the name of Ayrcliffe. By a Will dated the 15th of October 1879 she bequeathed a life-interest in this house to her husband Mr. Gomes and an absolute interest after his death to her sister Mrs. Elizabeth Moses. On the 4th of November 1887 Mrs. Moses made a Will under which she bequeathed the whole of her real and personal estate absolutely to her two daughters Charlotte Isabella Elliott and Mary Grace Eliott in equal shares. It appears that Mr. Jones, the husband of one of the daughters, was indebted to a large extent to the present plaintiffs who were pressing him for payment. In order to discharge this liability Mrs. Jones, his wife, executed on the 7th October 1899 a mortgage of her reversionary interest in Ayrcliffe estate for Rs. 4,000 in favour of the plaintiffs. The consideration for this mortgage was made up as stated by the plaintiffs in a prior litigation of the sum of Rs. 3,252-3 due from Mr. Jones on previous *bahi* accounts and a sum of Rs. 743-13 alleged to have been paid in cash on the date the mortgage-deed was executed. The mortgage carried interest at Rs. 18 per cent. per annum and it was stipulated that repayments would be made by monthly instalments of Rs. 20 *plus* interest with a further stipulation that the entire advance with interest would be re-paid within ten years from the date of the mortgage. On the 21st January 1916 Mrs. Jones sold to defendant No. 1, Mir Muhammad Khan, her reversionary interest in this property. On the 31st May 1918 the plaintiffs brought this suit for the recovery of Rs. 3,252-3 principal *minus* Rs. 40 alleged to have been re-paid by the defendant and Rs. 9,287-13 interest from 18th March 1902 to date of suit total Rs. 12,500 impleading both Mir Muhammad Khan and Mrs. Jones as defendants to the suit.

The defendants resisted the suit on a variety of grounds, but their main contentions were:—(1) that it was barred by limitation, (2) that the deed was executed under undue influence and, (3) that the mortgage was void for want of consideration. The plaintiff's case, on the other hand, was that the pleas as to the non-receipt of consideration and as to the exercise of undue influence were barred by the rule of *res judicata* inasmuch as it had been decided in a previous litigation between the same parties that the mortgage was good and valid to the extent of Rs. 3,252 which was exactly the amount claimed as principal in the present suit.

The Trial Court found that undue influence on the part of plaintiffs had not been established; that the principal sum claimed a sum of Rs. 1,672-3 only was within limitation, and that the pleas as to the non-receipt of consideration and the exercise of undue influence were not barred by *res judicata*. On the merits, the learned Senior Subordinate Judge found that it had not been proved that the mortgage was for consideration and as a result of this finding dismissed the plaintiff's suit in its entirety.

Against this decision the plaintiffs have preferred this first appeal to this Court through Bakhshi Tek Chand and we have heard Mr. Badri Das on behalf of the respondents.

The first contention raised by Bakhshi Tek Chand is, that the finding of the Court below on the question of *res judicata* is erroneous and that it should have been found that the pleas of the defendants with regard to the non-receipt of consideration and the exercise of undue influence were barred by section 11 of the Civil Procedure Code. In order to properly understand this contention it is necessary that a reference should be made to the history of the previous litigation between the parties. It appears that Mr. Jones dealt at the shop of the plaintiffs and also had money dealings with them. On the 17th October 1899 a sum of Rs. 3,252-3 was due on these accounts. On that day Rs. 747-13 are alleged to have been paid in cash and a mortgage-deed of her reversionary interest in Ayrcliffe estate executed by Mrs. Jones in favour of the plaintiffs. Interest on this mortgage was regularly paid for some time, but in May 1901 Mr. and Mrs. Jones executed a pro-note for Rs. 360 for six months arrears

of interest. Of this sum Rs. 240 were paid off leaving Rs. 120. Interest was then again paid regularly for some time and then a pro-note for Rs. 420 was executed, the consideration for which was made up as follows:—

Rs. 120 balance due on the pro-note of May 1901.

Rs. 300 for interest on the mortgage-deed for five months October, November and December 1901, and January and February 1902.

This pro-note was executed in favour of one Devi Saran, who is said to have been a *benamidar* for the plaintiffs. On the 7th November 1910, Devi Saran brought a suit against Mrs. Jones for Rs. 1,087-4-3 principal and interest on the basis of this pro-note. In that suit it was pleaded by the defendant that the pro-note was without consideration; that the whole transaction was vitiated by undue influence, and that the debtor Mr. Jones had been over-reached by the plaintiffs who had manipulated the accounts and had made overcharges and had charged exorbitant interest. It was found in that case by the Trial Court that the consideration given to Mr. Jones for the mortgage was considerably less than Rs. 4,000, that Mrs. Jones had received nothing and that she had been forced to execute the mortgage under duress and that, therefore, it was bad for want of valid consideration. It was further found that the pro-note itself was bad inasmuch as the consideration alleged therein was not due. On appeal the learned Divisional Judge concurred in the finding of the Trial Court and held that the plaintiff in that suit had failed to establish a valid mortgage in favour of the present plaintiffs. There was a second appeal from this decision to the Chief Court and it was held by the learned Judges in their order dated the 24th May 1915 that the finding of the Courts below on the question of the validity of the mortgage was erroneous, and that the onus of proving want of consideration lay on the mortgagor, which had not been fully discharged. They found that, except for the sum of Rs. 747-13, which did not appear to have passed, there was no reason to suppose that the mortgage was not for consideration. The mortgage was accordingly held good to the extent of Rs. 3,252-3. As to undue influence the finding was in favour of the present plaintiffs and it was held that no undue influence had been proved. The argument of Bakshi Tek Chand is, that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and that as the parties in the two suits are the same, the findings arrived at in the previous suit as to want of consideration and exercise of undue influence operate as *res judicata* in the present suit. Mr. Badri Das, on the other hand, points out that the plea of *res judicata* was given up by the appellants in the Court below, nor has it been taken by them in the grounds of appeal to this Court and he consequently argues that they should not be allowed to raise this point in arguments.

We do not think there is any force in this contention. The point had been distinctly raised by the plaintiffs in their pleadings and an issue framed thereon. The case was then adjourned to a particular date for the evidence of the parties. On that date the Counsel of the parties appeared and stated that they did not want to produce any evidence on this issue and on certain other issues with which we are not concerned in the present appeal. At the time of arguments in the lower Court, plaintiffs' Counsel stated that the points were not barred by the rule of *res judicata* by reason of the first judgment and asked the Court to re-decide the issues as to the passing of the consideration and as to the validity of the mortgage in question. We do not think that an admission made by the plaintiffs' Counsel on a point of law can in any way bind them and if the opposite party has not in any way been prejudiced by such an admission there is no provision of law under which the plaintiffs can be prevented from taking up this point in arguments with the persmission of the Court even if it has not been taken in the grounds of appeal. The defendants were given full opportunity to produce any evidence they liked upon this issue in the Court below and they not having availed themselves of this opportunity cannot now have any cause for grievance. In our opinion the point goes to the root of the case and we do not see any reason why the plaintiffs should not be allowed to take it up now in arguments.

The only points to be considered in this connection are (1) whether the parties in the previous case were the same as in the present case, and (2) whether the point was directly and substantially in issue in the previous case. On the first question we have no hesitation in holding that the parties in the two cases are the same, and that Devi Saran in whose name the pro-note for Rs. 420 was executed and who instituted the previous suit was a *benamidar* for the plaintiffs. Chaudri Mal, one of the plaintiffs, was examined as a witness in the previous case and stated that Devi Saran was due nothing, that it was his (Chaudri Mal's) money, and that the pro-note was written in his name because he (Chaudhri Mal) was going away and he (Devi Saran) could recover in his absence. The defendant Mrs. Jones did not deny this fact in the previous suit and it was all along taken for granted by every one that the real plaintiffs in the previous case were the present plaintiffs and not Devi Saran. The learned Judges of the Chief Court also observed in their judgment that they noted that he (Chaudhri Mal) was the real plaintiff though Devi Saran in whose favour the pro-note stood was the nominal plaintiff. In order to find out whether the pro-note was or was not for consideration, the Court went into the previous accounts of the present plaintiffs and held that the pro-note had been executed on account of certain monies due on the mortgage executed in favour of the plaintiffs by the defendant Mrs. Jones. There is nothing on the record to show that Devi Saran was in any way personally interested in the pro-note and we think that it has been sufficiently established that the real beneficiaries of the pro-note were the present plaintiffs who, for the purposes of section 11 of the Civil Procedure Code, must be held bound by the findings arrived at in the previous suit. It was held by their Lordships of the Privy Council in the case *Gur Narayan* v. *Sheo Lal Singh* (1), that in a proceeding by or against the *benamidar* the person beneficially entitled is fully affected by the rules of *res judicata*. If Devi Saran was a *benamidar* for the present plaintiffs in the previous case and the present plaintiffs are bound by any findings arrived at in that suit, there is no reason why the defendant Mrs. Jones, who was also a party to the previous suit, should not be held equally bound by those findings. We hold that the present plaintiffs were parties to the previous case and that there is no substance in the defendant's contention that as the previous suit on the pro-note could not be maintained in their own names, the findings arrived at in that suit are not binding upon the parties.

As to the second question there can be no doubt whatever that the question now at issue between the parties was directly and substantially in issue in the previous case. The pro-note was executed on account of interest due on the mortgage now in question and the suit on the pro-note could not have been decreed unless the mortgage was found to be a valid mortgage. In order to determine the validity of the consideration for the pro-note it was necessary for the Court in the previous suit to determine the validity of the mortgage. Both the Courts below dismissed the suit because they found that the mortgage was not valid. The Chief Court decreed the suit in part because it was found that the mortgage was valid to the extent of Rs. 3,252-3. It is, therefore, clear that the question of the validity of the mortgage was directly and substantially in issue in the previous case, and the finding that no undue influence had been established and that the consideration to the extent of Rs. 3,252-3 was proved operates as *res judicata* in the present suit. It is argued by Mr. Badri Das that the only point at issue in the previous case was whether the pro-note was or was not for valid consideration and that in order to determine this point it was not at all necessary to determine the question of the validity of the mortgage. We are unable to accede to this contention. Under the mortgage-deed Mrs. Jones had incurred no personal liability. Under the pro-note she had become personally liable for the payment of Rs. 420 and interest. The question before the Court was what was the consideration for the pro-note for which Mrs. Jones had become personally

(1) 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. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

liable. It was found that the consideration was the overdue interest on the mortgage-deed executed by Mrs. Jones which had not been paid by her in accordance with the terms of her contract. To find whether this was or was not a valid consideration for the pro-note it was absolutely necessary that a finding as to the validity of the mortgage on which the interest was claimed to be overdue should be arrived at. We, therefore, hold that the question of the validity of the mortgage was a question directly and substantially in issue between the parties in the previous case and that this question is now *res judicata* between them.

The next question for consideration is that of limitation. It is argued by Bakhshi Tek Chand that on the terms of the mortgage-deed the whole suit is within time and that in any case limitation is saved by certain acknowledements of liability made by the defendant Mrs. Jones in 1901 and 1904. Mr. Badri Das, on the other hand, contends that the suit as laid in the plaint was *prima facie* barred by limitation and that under O. VII, r. 6, Civil Procedure Code, the plaintiffs were bound to show in the plaint the ground upon which the exemption from the Law of Limitation was claimed. We think there is force in this contention. There is no reference in the plaint to the alleged acknowledements of liability by the defendant so as to make section 19 applicable to the case and we do not, therefore, think that the plaintiffs are entitled to rely upon a ground of exemption from the Law of Limitation which was not contained in the plaint. The covenant in the mortgage-deed as to re-payments was to the effect that the mortgage-money with interest would be paid by monthly instalments of not less than Rs. 20 *plus* interest, the first payment being made on the 1st day of November 1899 and on the first day of every succeeding month provided that the entire advance together with interest thereon would be fully liquidated within ten years from the date of the mortgage. It was also agreed that defaults in payments of monthly instalments and interest as agreed should constitute separate cause of action. The learned Senior Subordinate Judge has found that these monthly instalments fell due on the first of each month beginning from the 1st November 1899 and that as the suit was filed on the 31st May 1918 every instalment that fell due more than twelve years from that date was barred. In other words, his finding is that every instalment that had fallen due before the 31st May 1906 was barred by limitation. It is argued by Bakhshi Tek Chand that the terms of the mortgage-deed show that an option only was given to the mortgagor to pay up by instalments, and that it was not absolutely necessary for the mortgagee to have brought a suit for the recovery of each instalment within twelve years from the date of its default. In our opinion the view taken by the learned Senior Subordinate Judge upon this point is correct. By providing that default in the payment of each monthly instalment should constitute a separate cause of action the parties clearly intended that prompt payments should be made and that the period of limitation should run from the date of default unless the payee waived the benefit of the provision of prompt payment in case of default. In the present case there is no sufficient proof of of waiver. Except that the plaintiff did not sue there is nothing whatever in the present case which could be regarded as evidence of waiver. There is abundant authority for holding that mere forbearance to sue would not stop limitation from beginning to run. The case falls within the purview of Art. 132 of the Indian Limitation Act which provides twelve years' limitation from the time the money sued for became due. Applying this Article we hold that all the instalments prior to 31st May 1906 are time-barred and that of the principal sum claimed only Rs. 1,672-3 is within time as found by the Court below. The plaintiffs will be entitled to recover Rs. 1,672-3 principal with interest at the contract rate from the 31st May 1906 till realisation, to be realised from the sale of the mortgaged property. We accordingly accept the appeal, and setting aside the order of the Court below decree the plaintiffs' suit to the extent above indicated. The defendant shall also pay the costs of the plaintiffs in both Courts on the proportionate amount decreed.

Z. K. *Appeal accepted.*

BHAGWAN DAS *v.* MAHMUD BANO.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 168 OF 1923.

June 11, 1923.

Present:—Mr. Justice Kanhaiya Lal.

BHAGWAN DAS—DECREE-HOLDER—APPELLANT

versus

Musammat MAHMUD BANO—OBJECTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 58, 60, 63—Objection to attachment by trustee—Judgment-debtor author of trust—Trustee, whether representative of judgment-debtor—First Appellate Court entertaining appeal without jurisdiction—Second appeal, if maintainable—Appeal, second—Jurisdiction, question of, whether can be raised for first time.

In objecting to attachment of certain property in the execution of a decree under O. XXI, r. 58 of the Civil Procedure Code if the objector claims the property as a *mutwalli* of a trust, he does not do so as a representative of the judgment-debtor, even though the author of the trust may himself have been the judgment-debtor, except where such trust is created after the suit or the decree passed thereon. [p. 1053, col. 2; p. 1054, col. 1.]

Nath Mal Das v. *Lajammal Husain*, 7 A. 3; A. W. N. (1884) 216, 4 Ind. Dec. (N. S.) 204, *Ramanathan Chettiar* v. *Levvai Marakayar*, 23 M. 195, 10 M. L. J. 64, 8 Ind. Dec. (N. S.) 535 and *Kartick Chandra Ghosh* v. *Ashutosh Dhara*, 12 Ind. Cas. 103, 39 C. 298; 14 C. L. J. 425; 10 C. W. N. 20, followed.

Where a Court of first appeal entertains an appeal in a case in which no appeal lay to it, a second appeal would lie. [p. 1054, col. 2.]

Jwala Prasad v. *Sahig Ram*, 13 A. 575; A. W. N. (1891) 150; 7 Ind. Dec. (N. S.) 303, *Wilayat Husain* v. *Ram Lal*, 25 Ind. Cas. 643; 12 A. L. J. 1113 and *Banairam Mookerjee* v. *Purna Chandra Roy*, 43 Ind. Cas. 758; 45 C. 920; 27 C. L. J. 115, followed.

An appellant is not barred from raising the question of jurisdiction in second appeal, even if he did not raise it in the First Appellate Court. [p. 1054, col. 2.]

Execution second appeal against the decree of the District Judge, Bulandshahr, dated the 30th October 1922.

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

Mr. *N. C. Varsh*, for the Respondent.

JUDGMENT.—This appeal arises out of an execution proceeding instituted by the decree-holder appellant against *Musammat* Mahmud Bano, the widow and legal representative of the deceased judgment-debtor, for the realisation of the decretal money by the attachment and sale of certain property. In pursuance of his application three houses were attached as the property of the deceased judgment-debtor. *Musammat* Mahmud Bano filed an objection that she held the houses in question as a *mutwalli* under a deed of endowment executed by her and her husband on the 7th of May 1911. The Court of first instance treated the objection as one under section 47 of the Civil Procedure Code and, after examining the evidence adduced in the case, came to the conclusion that the deed of *wakf* in question had not been carried into effect and was not a genuine transaction. It further held that *Musammat* Mahmud Bano was not in possession of the houses in dispute as a *mutwalli* but she was in possession as the heir of her husband. From that decision there was an appeal to the District Judge, which was allowed without any question being raised or considered as to whether such an appeal was maintainable under section 47 of the Code of Civil Procedure.

It is urged here on behalf of the decree-holder appellant that no appeal lay to the District Judge because the capacity in which *Musammat* Mahmud Bano was claiming the release of the property in dispute from attachment was different from the capacity in which she had been impleaded as a party to the execution proceeding. Order XXI, r. 58 of the Code deals with objections which involve the determination of the question whether the property attached is liable to such attachment or not. A person who has been impleaded as a party to a decree or to an execution proceeding as the heir of a deceased debtor is a party to such decree or proceeding. If such a person claims to be in possession of the property attached not in his or her own right or in his or her right as a legal representative of the deceased judgment-debtor, but claims to be so in possession in his or her capacity as a *mutwalli* of an endowment, the objection can be considered under O. XXI, r. 60 of the Code, but, subject to the result of a suit under O. XXI, r. 63, the order passed thereon is conclusive. Section 47 contemplates questions relating to the execution, discharge or satisfaction of a decree between the parties to a suit or their representatives. A person who claims certain property as a *mutwalli* of a trust

is not a representative of a judgment-debtor, though the author of the trust may have been the judgment-debtor himself, except where such trust is created after the suit or the decree passed therein.

In *Nath Mal Das* v. *Tajammul Husain* (1) where a judgment-debtor upon the attachment of certain land in execution of a decree passed against him personally by the Revenue Court instituted a suit for a declaration and establishment of his right to such land, not as his own property but as *wakf*, of which he claimed to be *mutwalli* or trustee, it was held that, inasmuch as the plaintiff was not suing in his own right but in his capacity as custodian, trustee or manager of the *wakf* property, he must be deemed to fill a character separate from that in which the decree in question was passed against him and section 244 of the old Code of Civil Procedure was inapplicable.

In *Ramanathan Chettiar* v. *Levvai Marakayar* (2) it was similarly held that a person claiming certain property alleged to have been set apart for charitable purposes as a trustee puts forward a claim which cannot be determined in a subsequent proceeding because the Court has in such cases to look to the substance of the objection and not to the claim that is put forward by one person rather than another. A person claiming a property under a trust made by a third person is not a representative of a party to the suit any more than a person claiming the property as a personal property when the decree passed against him charges him with liability as a trustee or in a representative character. And it would make no difference if the trust was created by the judgment-debtor himself prior to the execution of the suit which result in such a decree.

In *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (3) an objection by a judgment-debtor or his representative to the attachment or sale of certain property on the ground that he held the same in trust for some third person or a charitable institution was similarly held to be excluded from the operation of section 244 of the old Code of Civil Procedure.

It is urged on behalf of judgment-debtor respondent that the real question for determination in the present case is, whether certain property forms a part of the assests of the deceased judgment-debtor. That is an aspect which presents itself in every case in which an objection to the attachment of any property, whether it is made by a third person or by the legal representative of the deceased debtor. The capacity in which the claimant seeks to have the attachment raised, however, determines the remedy, which is further open to him, if the objection is decided against him, or if the objector claims the said property as a trustee for a third person or a charitable institution, the claimant is not really a judgment-debtor or his legal representative but he represents such third person or charitable institution.

It is also urged that if no appeal lay to the Court below, no appeal would similarly lie here from the decree passed by that Court, but if the Court below assumed jurisdiction and passed a decree such a decree is as much open to a second appeal as a decree passed in a suit by a Court which has no jurisdiction to entertain that suit.

In *Jwala Prasad* v. *Salig Ram* (4) which was followed in *Walayat Husain* v. *Ram Lal* (5) it was held that where a Court of first appeal entertained an appeal in a case in which no appeal lay to that Court, a second appeal would lie to this Court from the order or decree passed in such an appeal.

In *Bandiram Mookerjee* v. *Purna Chandra Roy* (6) a similar view was taken. It is true that the decree-holder appellant raised no such objection in the lower Appellate Court, but where a question of jurisdiction is involved, he is not estopped from raising that objection here.

(1) 7 A. 36; A. W. N. (1884) 218; 4 Ind. Dec. (N. S.) 264.
(2) 23 M. 195; 10 M. L. J. 64; 8 Ind. Dec. (N. S.) 535 (F. B.).
(3) 12 Ind. Cas. 163; 39 C. 298; 14 C. L. J. 425; 16 C. W. N. 26.
(4) 13 A. 575; A. W. N. (1891) 158; 7 Ind. Dec. (N. S.) 363.
(5) 25 Ind. Cas. 643; 12 A. L. J. 1113.
(6) 43 Ind. Cas. 758; 45 C. 926; 27 C. L. J. 115.

ATA MUHAMMAD *v.* PIR KHAN.

The appeal is, therefore, allowed and the order of the lower Appellate Court is set aside and that of the Court of first instance restored with costs here and in the lower Appellate Court.

M. A. A. & N. H. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 481 OF 1923.

May 1, 1923.

Present:—Mr. Justice Campbell.

ATA MUHAMMAD—DEFENDANT—APPELLANT

versus

PIR KHAN—PLAINTIFF—RESPONDENT.

***Limitation Act** (IX of 1908), s. 12—Copies applied for on day of judgment—Appeal—Limitation, computation of.*

The day on which judgment is delivered must first be excluded in computing the period prescribed for filing an appeal and then the time requisite for obtaining the necessary copies must be excluded; that is to say, if copies are applied for on the day on which judgment is delivered, that day cannot be included in the period requisite for obtaining copies under section 12 of the Limitation Act.

Second appeal from a decree of the District Judge, Attock, at Campbellpur, dated the 20th November 1920, reversing that of the Munsif, First Class, Attock, dated the 4th April 1922.

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

Mr. *M. Sleem*, for the Respondent.

JUDGMENT.—This appeal and its companion case, Appeal No. 482 of 1923, are barred by limitation. The decrees appealed from were passed on the 20th of November 1922. Applications for copies of the judgments and decrees were made the same day and the copies were supplied on the 28th of November. The appeals were filed in this Court on the 27th of February 1922, that is to say, on the 91st day from the 29th November.

The learned Counsel for the appellants has attempted to argue that the appeals are within time by the following calculation:—

10 days in November;
31 days in December;
31 days in January;
27 days in February;

99 days=Total
—9 days spent in obtaining copies.

90 days=result.

This result is, however, fallacious since it depends upon the 20th of November being excluded twice once as the day on which judgment was pronounced and the second time as one of the days requisite for obtaining copies. It is clear from section 12 of the Limitation Act that the day on which judgment is pronounced has to be excluded first and then the time requisite for obtaining copies has to be excluded. The learned Advocate for the appellants on this being pointed out to him has conceded that the appeals are one day out of time but he has asked me for indulgence under section 5 of the Limitation Act on the ground that his client had difficulty in raising the money for Counsel's fee and that communication between his clients and himself was interrupted by heavy rain at the end of February. He has exhibited a letter purporting to be from one of the appellants in which these matters are mentioned. I cannot, however, admit that due diligence has been shown by the appellants. They had their copies ready on the 28th of November and there is nothing to show that they were diligent from that day onward in taking steps to institute their appeals. I dismiss with costs both appeals as time-barred.

Z. K. *Appeals dismissed.*

SINGH RAM *v.* BHAGWANA,

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2638 OF 1919.

January 29, 1923.

Present:—Mr. Justice LeRossignol and Mr. Justice Harrison.

SINGH RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHAGWANA, MINOR, PER GURDHAN, HIS FATHER, AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Consent of near reversioner—Remote reversioner, whether can challenge alienation.

A remote reversioner does not derive his right to challenge an alienation through a nearer reversioner, and when a nearer reversioner has placed himself in a position which disables him from challenging an unauthorised alienation, for instance, by acquiescing in or consenting to the alienation, it is open to a more remote reversioner to challenge it on his own account.

Second appeal from a decree of the District Judge, Gurgaon, at Hissar, dated the 25th November 1919, reversing that of the Munsif, First Class, Gurgaon, dated the 17th April 1919.

Mr. *N. C. Mehra*, for the Appellants.

Mr. *Beni Pershad Khosla*, for the Respondents.

JUDGMENT.—This was a suit by reversioners for a declaration that a gift of ancestral property by *Musammat* Dakhan to her illegitimate son Bhagwana should not affect the reversionary rights of the plaintiffs. The First Court granted the plaintiffs a decree, but the District Judge dismissed the suit on a ground not raised in the pleadings that the plaintiffs had been adopted into the family of *Musammat* Dakhan's late husband.

The plaintiffs have appealed to this Court, and on behalf of the respondents it is admitted that the ground on which the District Judge accepted the defendant's appeal was irrelevant. It is, however, contended that, inasmuch as a nearer reversioner Het Ram acquiesced in and accepted the gift made by *Musammat* Dakhan, that acceptance binds the plaintiffs to whom the reversion will open only on the extinction of Het Ram's line. This contention is opposed to all authority. The plaintiffs do not derive their rights through Het Ram, and when a nearer reversioner has placed himself in a position which disables him from challenging an unauthorised alienation, it is open to more remote reversioners to challenge it on their own account.

For these reasons we accept the appeal and restore the decree of the First Court with costs throughout in favour of the plaintiffs.

Z. K. *Appeal accepted.*

END OF VOLUME 75.

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GENERAL INDEX.

VOLUME 75—1923.

Abandonment—*Submerged land—Non-payment of rent—Remission of revenue—Intention to abandon.*

Mere non-payment of rent or claiming or accepting remission of revenue for submerged land is not in itself proof of abandonment and, until it can be established that the holder of the tenure has abandoned his right to the submerged land, it remains intact. The question is one of intention to be determined by the circumstances of each case.

Mazhar Rai v. *Ramgat Singh*, 18 A. 290; A. W. N. (1896) 56; 8 Ind. Dec. (N. S.) 899, *Arun Chandra Singh* v. *Kamini Kumar*, 22 Ind. Cas. 317; 19 C. L. J. 272; 18 C. W. N. 369; (1914) M. W. N. 175; 15 M. L. T. 182; 26 M. L. J. 251; 12 A. L. J. 243; 16 Bom. L. R. 323; 41 C. 683; 41 I. A. 32 (P. C.), followed.

Nogender Chunder Ghose v. *Mahomed Esoff*, 10 B. L. R. 406; 18 W. R. 113, 3 Sar. P. C. J. 151 (P. C.), *Lopez* v. *Muddun Mohun Thakoor*, 14 W. R. 11; 5 B. L. R. 521; 13 M. I. A. 467; 20 E. R. 625; 2 Suth P. C. J. 336; 2 Sar. P. C. J. 594 (P. C.), distinguished.

If the circumstances indicate that in taking abatement of revenue for submerged land there was an intention to abandon the land, then, after re-appearance, the person who took the abatement cannot claim the land as he has already lost all right thereto. **Pat.** RAMNANDAN SAHAY *v.* JAOGOVIND PANDEY, 2 Pat. 839 **955**

Acts—General.

Act 1839—XXXII. *See* INTEREST ACT.
—— 1856—XV. *See* HINDU WIDOW'S REMARRIAGE ACT.
—— 1859—XIII. *See* WORKMAN'S BREACH OF CONTRACT ACT.
—— 1860—XLV. *See* PENAL CODE.
—— 1866—XXI. *See* NATIVE CONVERTS MARRIAGE DISSOLUTION ACT.
—— 1867—III. *See* PUBLIC GAMBLING ACT.
—— 1869—IV. *See* DIVORCE ACT.
—— 1870—VII. *See* COURT FEES ACT
—— 1872—I. *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1875—IX. *See* MAJORITY ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1878—I. *See* OPIUM ACT.
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1887—VII. *See* SUITS VALUATION ACT.

Acts—General—concld.

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.
—— 1894—I *See* LAND ACQUISITION ACT.
—— 1897—VIII. *See* REFORMATORY SCHOOLS ACT.
—— 1898—V *See* CRIMINAL PROCEDURE CODE.
—— 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.
—— 1909—III. *See* PRESIDENCY TOWNS INSOLVENCY ACT.
—— 1910—IX. *See* ELECTRICITY ACT.
—— 1918—VII. *See* INCOME TAX ACT.
—— 1918—IX. *See* INDIAN SOLDIERS (LITIGATION) ACT.
—— 1918—X. *See* USURIOUS LOANS ACT.
—— 1920—V. *See* PROVINCIAL INSOLVENCY ACT.
—— 1922—XI. *See* INCOME TAX ACT.
—— 1923—XVIII. *See* CODE OF CRIMINAL PROCEDURE (AMENDMENT ACT.)

Acts—Bengal.

—— 1884—III. *See* BENGAL MUNICIPAL ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.
—— 1897—V. *See* BENGAL ESTATES PARTITION ACT.
—— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.
—— 1911—V. *See* CALCUTTA IMPROVEMENT ACT.
—— 1920—III. *See* CALCUTTA RENT ACT.
—— 1922—IV. *See* BENGAL COURT FEES (AMENDMENT) ACT.

Acts—Bombay.

—— 1863—VII.—*See* SUMMARY SETTLEMENTS ACT.

Acts—Burma.

—— 1898—XIII. *See* BURMA LAWS ACT.
—— 1899—I. *See* BURMA GAMBLING ACT.

Acts—C. P.

—— 1917—II. *See* C. P. LAND REVENUE ACT.

Acts—Madras:

Act 1873—III. *See* MADRAS CIVIL COURTS ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.
—— 1920—V. *See* MADRAS DISTRICT MUNICIPALITIES ACT.
—— 1920—XIV. *See* MADRAS LOCAL BOARDS ACT.
—— 1922—II. *See* MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT.

Acts—Punjab.

—— 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1905—II. *See* PUNJAB PRE-EMPTION ACT.
—— 1911—III. *See* PUNJAB MUNICIPAL ACT.
—— 1913—I. *See* PUNJAB PRE-EMPTION ACT.
—— 1913—II. *See* PUNJAB REDEMPTION OF MORTGAGES ACT.
—— 1918—VI. *See* PUNJAB COURTS ACT.

Acts—U. P.

—— 1869—I. *See* OUDH ESTATES ACT.
—— 1886—XII. *See* OUDH RENT ACT.
—— 1901—II *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.
—— 1906—II. *See* U. P. LOCAL AND RURAL POLICE RATES ACT.
—— 1912—IV. *See* U. P. COURT OF WARDS ACT.
—— 1914—I. *See* U. P. LOCAL RATES ACT
—— 1916—II. *See* U. P. MUNICIPALITIES ACT.

Regulations.

Reg. 1819—VIII. *See* BENGAL PUTNI TALUKS REGULATIONS.
—— 1825—XI. *See* BENGAL ALLUVION AND DILUVION REGULATION.

Statutes.

1915—(5 & 6 GEO. V, C. 61). *See* GOVERNMENT OF INDIA ACT.
1919—(9 & 10 GEO. V, C. 101). *See* GOVERNMENT OF INDIA ACT.

Admission, *value of—Consideration—Undue influence—Burden of proof.*

Plaintiff sued defendant to recover a sum of money on the ground that the money had been paid to the defendant by mistake. Defendant's admission in a previous suit that he had received the money from the plaintiff was proved against him. Defendant pleaded in the present suit that he had not received the money and that the receipt executed by him in favour of the plaintiff obtained from him under undue influence;

Held, that the effect of defendant's admission in the previous suit was that the burden of proving non-receipt of the money and undue influence was shifted on to him. **L** WASAKHI RAM *v.* HUSSAIN KHAN **1027**

Adverse possession—*Widow—Reversioners, adverse possession against, commencement of.*

Where during the lifetime of a widow a stranger is in possession of her estate such possession does not become adverse against her reversioners until after her death. **A** JAGANNATH SINGH *v.* SARDAR SINGH, (1923) A. I. R. (A.) 448 **614**

Agra Tenancy Act (II of 1901)—*Ejectment—Private partition—One co-sharer in exclusive possession of a holding—Tenant-at-will assigning his rights to another co-sharer—Second co-sharer, if can be ejected.*

Where the tenant-at-will of a certain holding which by a private partition among the co-sharers has been assigned exclusively to one co-sharer, transfers his rights to another co-sharer of the *mahal*, who cultivates the land himself, the former co-sharer is entitled to eject the latter who will not be allowed to plead that as a co-sharer of the *mahal*, the land in suit is his *khudkasht*. **A** HAWAL RAI *v.* HAR PRASAD RAI, (1924) A. I. R. (A.) 57 **835**

——— **ss. 57, 63**—*Hindu widow's estate, what is—Widow, alienation by—Suit by reversioner for ejectment, whether maintainable.*

A Hindu widow's estate is not a life-estate, nor is it an estate held in trust for reversioners. The widow represents the estate and has the power to make alienations subject to the right of the reversioner to have the alienations set aside if they are found to be either not for legal necessity or not for the benefit of the estate, until such alienations are set aside, they do not cease to be operative, and operate as a bar to a suit by a reversioner for the ejectment of the alienee. **A** KANDHIYA *v.* RAJ RUP KANWAR, (1923) A. I. R. (A.) 367 **681**

——— **s. 96**, *applicability of*—Thekadar, *status of—Suit by* thekadar *under section, whether maintainable.*

The provisions of section 96 of the Agra Tenancy Act are meant to apply only to a non-occupancy tenant of *an agricultural holding*, and not to a *thekadar* who is not such a tenant. A suit, therefore, by a *thekadar* under that section is not maintainable. **A** GIRJA NAND *v.* PARBHU NARAIN SINGH-KASHI NARESH, (1923) A. I. R. (A.) 398 **805**

——— **s. 160**, *suit under, by mortgagee in possession, whether maintainable.*

A suit under section 160 of the Agra Tenancy Act by a person who is recorded in the Revenue Papers as mortgagee is not maintainable, and an Appellate Court is not competent to go behind such an entry and to find that, although the plaintiff's name is a recorded, he is not actually in possession.

Durga Parshad v. *Hajari Singh*, 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025 and *Ahmad Said Khan* v. *Masi Udah Khan*, 13 Ind. Cas. 975; 34 A. 250; 9 A. L. J. 152, relied on. **A** IRSHAD MOHAMMAD KHAN *v.* JWALA PRASAD, (1923) A. I. R. (A.) 344 **663**

——— **s. 164**—*Suit by co-sharer for share of profits—Burden of proof.*

When in a suit against a *lambardar* for a share of the profits a co-sharer has given general evidence to show that rents are greatly in arrear; that the tenants are solvent, and that there are no special circumstances why the rents should not have been collected, the onus is on the *lambardar* to show that, for some reason not connected with his own negligence or misconduct, he was unable to collect the rents.

Agra Tenancy Act—concld.

Mithan Lal v. *Mizaji Lal*, 17 Ind. Cas. 914; 10 A. L. J. 529 and *Shiva Chander Singh* v. *Ram Chander Singh*, 30 Ind. Cas. 550; 37 A. 595; 13 A. L. J. 851, followed. **A** HIRIA *v.* RAM ADHIN SINGH. (1923) A I. R. (A.) 335 **553**

——— **s. 164**—*Suit by dispossessed mortgagee against mortgagor for profits, whether maintainable.*

A suit under section 164 of the Agra Tenancy Act by a dispossessed mortgagee against his mortgagor for profits is not maintainable.

Hanuman Din v. *Ram Bisal*, 11 Ind. Cas. 260, relied on. **A** TIRBENI SAHU *v.* LACHMI PANDE. (1923) A. I. R (A.) 346 **666**

——— **s. 165**—*U. P. Land Revenue Act (III of 1901), s 4*—*Lambardar, position of—Co-sharer in possession of sir or khudkasht—Suit to recover excess profits, maintainability of.*

A *lambardar* is not only a co-sharer but also the agent of the other co-sharers and is authorised to represent them in all transactions appertaining to the administration of the *mahal* and the collection of its profits.

A *lambardar* can sue, on his own behalf and on behalf of the other co sharers, such co-sharers of the village who hold *sir* and *khudkasht* land for a refund of the profits realised by them in excess of their shares.

Bishambhar Nath v. *Bhola*, 12 Ind. Cas. 920; 34 A. 98, 8 A. L. J. 1245, dissented from.

Ganga Singh v. *Ram Sarup*, 33 Ind. Cas. 119; 38 A. 223; 14 A. L. J. 252, followed. **A** KUNDAN LAL *v.* BASANT RAI **330**

——— **s 167**—*Suit cognisable by Revenue Court—Appeal—Revision—High Court, power of.*

The High Court has, by virtue of the provision contained in section 167 of the Agra Tenancy Act, no jurisdiction to entertain a revision petition against the order of a District Judge refusing to entertain an appeal against a decree of an Assistant Collector in a suit of the nature specified in the Fourth Schedule of the Act.

Parbhu Narain Singh v. *Harbans Lal*, 35 Ind. Cas. 279; 14 A. L. J. 281 at pp. 291, 292, *Jumna Prasad* v. *Karan Singh*, 46 Ind. Cas. 338; 41 A. 28; 19 A. L. J. 850 and *Gaj Kumar Chander* v. *Syed Salamat Ali*, 52 Ind Cas. 756; 42 A. 83; 17 A. L. J. 105; 1 U. P. L. R. (A) 142, followed.

Kesho Das v. *Morat Pandey*, 23 Ind. Cas. 320; 12 A. L. J. 367, distinguished. **A** ADYA SARAN *v.* KALI CHARAN, 1 A. L. J. 524; 45 A. 507; (1923) A. I. R. (A.) 580 **283**

Alluvion—*Accession—Bengal Alluvion and Diluvion Regulation (XI of 1825)—Right asserted on several occasions negatived—Presumption.*

There is no law under which alluvial land can be regarded as an accession to a village unless it is a case of gradual accretion within the meaning of Bengal Regulation XI of 1825.

Plaintiffs asserted their rights to certain alluvial lands in 1853, 1884, 1894, 1899, 1901 and 1903 and the right was negatived on each occasion. They brought a suit to establish their title to the lands in 1904 but withdrew it. In 1919 they

Alluvion—concld.

brought the present suit for declaration of their title to the lands. It was found that they had never been in possession of the lands in dispute.

Held (1) that the plaintiffs had not established any right to the land in dispute;

(2) that even if they had acquired any rights to the lands by accession, they had acquiesced in the deprivation of their rights and were no longer entitled to the property.

Secretary of State for India v. *Krishnamoni Gupta*, 20 C. 518; 4 Bom. L. R. 537; 6 C. W. N. 617, 29 I. A 104; 8 Sar P. C. J. 269 (P. C.) and *Basanta Kumar Roy* v. *Secretary of State*, 40 Ind. Cas 337; 44 C. 858; 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; 44 I. A. 104 (P. C), distinguished. **A** BIJAI SHANKER SELHER *v* RAM CHHITRA SINGH, 21 A. L. J. 409; (1923) A. I. R. (A) 500 45 A 461 **35**

Amendment of plaint—*Appellate Court, power of—Amendment, when not allowable.*

Although an Appellate Court has very wide powers in the matter of permitting an amendment of the plaint in a suit, yet that Court will not grant such permission if the plaintiff has already had an opportunity of amending his plaint, and has not availed himself of it, and the amendment is likely to operate prejudicially to the defendant. **S** MANOHAR DAS *v.* RAM DAS, (1923) A. I. R. (S.) 17 **549**

Appeal, Civil—*Objection to costs taken for first time, whether entertainable.*

An objection to an award of costs against a party cannot be entertained if taken in appeal for the first time Such an objection should be taken in the lower Court at the time when either the judgment is delivered or the decree published. **A** JAINI LAL *v.* FIRM MESSRS. DURGA PRASAD-DAU DAYAL, (1923) A. I. R. (A.) 334 **527**

——— *Order declining to accept security, whether appealable.*

An order declining to accept the security offered by a judgment-debtor before granting him an injunction staying the execution of a decree against him, is not appealable. Such an order is merely interlocutory, and it is well settled that an appeal lies only from a decree which conclusively determines the rights of the parties with respect to all or any of the matters in controversy. **L** BAJRANG DAS *v.* DONGARSEE DAS, (1923) A. I. R. (L.) 446 **783**

Appeal, second—*Finding not based on any evidence, whether binding.*

Although the findings of fact of a first Appellate Court are not open to question in second appeal it is always open to the second Appellate Court to consider whether there is in fact any evidence to support the findings. **Fat** DHANRAJ *v.* FIRM SANEHI RAM PANNA LAL **828**

Appellate Court—*Judgment of reversal, contents of.*

Where the judgment of an Appellate Court reverses the judgment of the Trial Court, it is absolutely necessary that good grounds should be

Appellate Court—concld.

shown for coming to any finding of fact. There ought, at any rate, to be sufficient material in the judgment to show that the evidence, and the reasons given by the Trial Court, have been duly considered in coming to a contrary decision. Pat BHIKHU MANDAL *v.* BHIKBHAKAR DUTTA, (1923) A. I. R. (Pat.) 275; 2 P. L. R. 32 **780**

Arbitration—*Private reference to arbitration—Examination of witnesses—Commission, Court, whether can issue—Civil Procedure Code (Act V of 1908), ss. 75, 151, Sch. I—Inherent powers of Court, when exercised—Consent of parties, whether can confer jurisdiction—Arbitration Act (IX of 1899), applicability of.*

When parties to a dispute refer it to a private arbitration without the intervention of a Court of Law, the Court has no jurisdiction to issue a Commission for the examination of witnesses in the matter referred to arbitration.

Rabiabai v. *Rahimabai*, 7 Bom. L. R. 560, and *Hayward* v. *Mutual Reserve Association*, (1891) 2 Q. B. 236; 65 L. T. 491; 39 W. R. 624, distinguished.

The powers regarding the granting of Commissions for examination of witnesses are expressly given by the Code of Civil Procedure, the Indian Arbitration Act and the Rules of the High Court and do not depend upon any implied or alleged inherent powers of the Court.

Section 75 of the Code of Civil Procedure should be read subject to the rules in the First Schedule to the Code and cannot be read as giving a Court power to issue Commissions to examine anybody anywhere before any private person, whether or not any suit has been instituted.

The Arbitration Act (IX of 1899) does not apply to all cases and where certain events arise which are not covered by the Act, then the parties are left without any remedy and the Court has no jurisdicton to remedy the defects under the Arbitration Act.

In re Babaldas Khemchand, 57 Ind. Cas. 907; 22 Bom. L. R. 842; 45 B. 1, explained.

Where the Court has no jurisdiction to pass an order, the consent of the parties cannot give it jurisdiction. **B** JAMES MACKINTOSH *v.* SCINDIA STEAM NAVIGATION CO., LTD., 24 Bom. L. R. 853; (1922) A. I. R. (B.) 444; 47 B. 250 **221**

Arbitration Act (IX of 1899), ss. 11, 14—*Arbitration and award—Receipt of fees by arbitrators from parties prior to inquiry—Performance of ministerial acts by arbitrator in absence of one party—Misconduct—Statement of arbitrator as to what took place before him, whether conclusive.*

Where parties are at variance as to what took place during the course of an inquiry before arbitrators, the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of inquiry, unless there very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence.

Arbitration Act—contd.

The statement of a Judge holding an inquiry as to what took place before him is almost conclusive as regards those facts and there is no reason why, as regards a statement before arbitrators appointed by the parties themselves, there should be any less rigid standard applied when dealing with questions of fact, asserted by one side and denied by the other.

A party to an inquiry before an arbitrator cannot challenge it on the ground that opportunity was not given to him to call witnesses when he himself did not court opportunity by asking the arbitrators to call witnesses or adjourn the inquiry, for the examination of witnesses.

Where a lawful and reasonable fee has been agreed by the parties to be paid to an arbitrator, he is not guilty of misconduct in getting payment of such fee before the commencement of the inquiry.

Where an act judicial in character is to be performed, the arbitrators are bound by the same rules as bind the Courts and are not entitled to decide or give their award in the absence of one or more of the parties to the arbitration without notice to them.

But where the act done is not of a judicial nature but merely ministerial in its character, it is competent to one or all of the arbitrators to have it performed in the absence of one or more of the parties.

Anderson v. *Wallace*, (1835) 3 Cl. & F. 26; 6 E. R. 1347; *Manindra Nath* v. *Mohanunda Roy*, 13 Ind. Cas. 161; 15 C. L. J. 360, followed.

Where before the commencement of an arbitration inquiry, the arbitrators recorded statements of the case of, and received documents from, each of the parties to the inquiry in the absence of the other :

Held, that the acts were purely ministerial and not judicial in their character and the award was not liable to be vitiated thereby. **M** *In the matter of* THE ARBITRATION ACT, 17 L. W. 648 **850**

——— **s. 15**—*Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Award filed in Court—Execution of award—Limitation—Article applicable.*

When an award becomes enforceable as if it were a decree of Court under section 15 of the Arbitration Act, all the actions of the successful party in enforcing his rights under the award become amenable to the provisions of the Civil Procedure Code and the Limitation Act which govern the execution of decrees.

An application for execution of such an award is, therefore, governed by Art. 182 of Schedule I to the Limitation Act. **L** POKHAR DAS *v.* RADHA KISHEN **927**

——— **s. 19**—*Contract, construction of—Dispute to be referred to arbitration—Damages, claim for, whether can be referred—Stay of suit—Discretion of Court.*

A contract for delivery of goods provided that, "should any disputes arise as to the interpretation of the contract or any matter in connection therewith or the carrying out thereof, the same shall be submitted to arbitration :"

Arbitration Act—contd.

Held, that claims for damages for breach of contract were not excluded under the clause.

A suit for damages for alleged breach of contract can be stayed by a Court in a proper case pending reference to arbitration.

But it is open to the Court to decline to stay the action either by reason of the fact that there are charges of fraud, or by reason of the Court coming to the conclusion that in arbitration complete justice cannot be obtained between the parties, or for some other proper cause that the matter should be kept in Court rather than be referred to arbitration.

Nobel Brothers Petroleum Production Co. v. *P. Stewart and Co.*, (1890), 6 T. L. R. 378, distinguished. **M** MAJETI SUBBIAH & CO. *v.* TETLEY & WHITLEY, 32 M. L. T. 380; 45 M. L. J. 39; 18 L. W. 77; (1923) M. W. N. 445; (1923) A. I. R. M.) 693 **673**

——— **s. 19**—*Stay of suit—Duty of Court—Discretion how to be exercised*—Onus—*Refusal to stay suit—Civil Procedure Code (Act V of 1908), s. 115—Illegal assumption of revision—Jurisdiction—No other remedy open—Interpretation of s. 115.*

In an application for the stay of a suit under section 19 of the Arbitration Act it is the *prima facie* duty of the Court to stay the suit and the *onus* is on the plaintiff to show why he should not be bound by his agreement to refer and that sufficient reason exists why the matter should not be so referred. The Court is vested with a discretion to stay or not to stay a suit but the discretion must be guided by judicial principles.

Goverdhandas Vishindas v. *Ramchand Manjimal*, 47 Ind. Cas. 783; 12 S. L. R. 41, *Abdullah Haroon* v. *Messrs. E. D. Sassoon & Co.*, 56 Ind. Cas. 76; 13 S. L. R. 201, followed.

Section 115, Civil Procedure Code, applies to jurisdiction alone, the irregular 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.

Balakrishna Udayar v. *Vasudeva Aiyar*, 40 Ind. Cas. 650; 19 Bom. L. R. 715; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 26. (P. C.), followed.

Section 115, Civil Procedure Code, should receive a literal rather than a narrow interpretation especially when the applicant has no other remedy.

Bai Atrani v. *Thakur Kunwar*, 33 Ind. Cas. 858; 40 B. 86; 17 Bom. L. R. 1097 and *Narain das* v. *Jassomal*, 65 Ind. Cas. 37; 15 S. L. R. 135, followed.

The lower Court refused to stay the suit under section 19 of the Arbitration Act on the sole ground that there was a breach of warranty on the part of one of the contracting parties and did not apply its mind to the question whether there was sufficient reason why it should not be referred in accordance with the submission:

Arbitration Act—concld.

Held, that the lower Court had illegally assumed jurisdiction, that there was an irregular exercise of it and that there was an erroneous conclusion of law **S** FORBES, FORBES CAMPBELL & CO., LTD. *v.* VERSIMAL DEWANMAL **1041**

Auction sale—*Extent of property sold, test of.*

The test determining the extent of the property sold at an auction is, to ascertain what the Court intended to sell and what the purchaser understood he bought. The question of what the Court could or should have sold does not arise.

Pettachi Chettiar v. *Sangili Vira*, 10 M. 241; 14 I. A. 84; 11 Ind. Jur. 272; 5 Sar. P. C. J. 38; 3 Ind. Dec. (N. S.) 921 (P. C.), *Abdul Aziz Khan* v. *Appayasami*, 27 M. 131; 8 C. W. N. 186; 31 I. A. 1; 6 Bom. L. R. 7; 8 Sar. P. C. J. 568 (P. C.), *Mahabir Pershad* v. *Moheswar Nath Sahai*, 17 C. 584; 17 I. A. 11; 5 Sar. P. C. J. 489; 8 Ind. Dec. (N. S.) 929 (P. C.), relied upon. **N** SAKHARAM *v.* GITABAI, (1923) A. I. R. (N.) 333 **823**

Bengal Alluvion and Diluvion Regulation (XI of 1825). *See* ALLUVION **35**

Bengal Estates Partition Act (V of 1897), ss. 7, 22, 23, 25, *application of—Partition proceedings—Suit raising objection to proceedings, maintainability of.*

The suit contemplated by section 25 of the Bengal Estates Partition Act is a suit raising a question referred to in section 23 of the Act and not a question under section 22 of the Act. Hence a suit which does not raise any question of right or title or of extent of interest of the plaintiff but raises an objection to the proceeding of the partition proceedings, before the Collector is not affected by section 25 of the Act.

Badri Narain Singh v. *Subhkaran Misser*, 61 Ind. Cas. 90; 6 P. L. J. 41; 2 P. L. T. 130, overruled. **Pat** KULDIP SAHAY *v.* RAJKUMAR SINGH, 1 P. L. R. 306; 4 P. L. T. 633 **1046**

——— **ss. 23, 25**, *application of—Partition proceedings—Suit objecting to partition, whether maintainable—Partition—Presumption.*

Section 25 of the Estates Partition Act applies to suits by the class of persons referred to in section 23 of the Act, that is to say, persons claiming a right or title in or to a parent estate and not to suits by persons objecting to any partition at all.

Previous partition may be presumed without the production of a formal partition-deed from the facts that the proprietors of the estate have been in separate possession of their *pattis* and have been separately collecting the rents throughout the areas allotted to them from different tenants for a very long time and there are a number of documents which apparently take it for granted that the different proprietors were in separate possession and held the different *pattis* in severalty as representing their respective interests in the estate. **Pat** NARSHING THAKUR *v.* BISHUNPERGASH SINGH, 4 P. L. T. 620; (1924) Pat. 21 **990**

Bengal Municipal Act (III of 1884), ss. 34, 43, 44 —*Evidence Act (I of 1872), s. 78 (5)—Lease granted by Chairman of Municipal Corporation not sanctioned by Commissioners at meeting—Legality—Burden of proof—Admissibility of proceedings of Municipal Corporation—Presumption as to nature and extent of powers of Municipal Corporation*—Ultra vires *transaction—Receipts of rent, whether validate transaction.*

Under the Bengal Municipal Act (III of 1884), a lease of land belonging to a Municipal Corporation granted by the Chairman of the Corporation is void unless the lease has been sanctioned by the Commissioners of the Corporation at a meeting, and the burden of proving that a particular lease fulfilled the requirements of the Statute lies upon the person who asserts its legality.

Jagannath Saha v. *Chairman of Berhampur Municipality*, 4 Ind. Cas. 55, 9 C. L. J. 286, followed.

Under sub-section (5) of section 78 of the Evidence Act, proceedings of a Municipal body in British India may be proved by a copy of such proceedings certified by the keeper thereof

Where a Corporation is constituted by a Statute, all persons and Corporations are presumed to know the nature and extent of its powers

Macgregor v. *Dover & Deal Railway Company* (1852) 18 Q. B. 618 at p. 631, 7 Railw. Cas. 227; 22 L. J. Q. B. 69; 17 Jur. 21; 19 L. T. (o. s.) 316; 88 R. R. 715; 118 E. R. 239, followed

Where a transaction of lease entered into by the Chairman of a Corporation is *ultra vires* under the law, it cannot be validated by ratification by reason of the Corporation having received rent for any length of time under it **C** AKSHAY KUMAR CHAND v. COMMISSIONERS OF BOGRA MUNICIPALITY 37 C. L. J. 580, (1923) A. I. R. (C.) 675 **506**

——— **s. 356, Sch. IV**—*Distress Warrant—Constituent of regular service—Omitting to specify date of return, effect of*

Where service of a Distress Warrant, issued under the Bengal Municipal Act cannot be effected personally on the defendant, the fact that it is left at his house and presented to an adult male member of his family constitute regular service under section 356 of the Act

The mere omission to specify the date of return in a Distress Warrant issued in the proper form provided by the Bengal Municipal Act, Schedule IV, does not render the warrant illegal **Pat** GOVERNMENT ADVOCATE, BEHAR AND ORISSA v. GANGA PRASAD, 3 P. L. T. 559 (1922) A. I. R. (Pat.) 532; 1 Pat. 423 **719**

Bengal Patni Taluks Regulation (VIII of 1819), s. 14—*Sale of* patni taluk *set aside—Purchaser, remedy of—Suit to recover purchase-money, whether maintainable.*

The object of the Legislature in enacting section 14 of the Bengal Patni Taluks Regulation was to avoid multiplicity of litigation and to afford protection to an innocent purchaser, the sale in whose favour might be cancelled without default on his part.

Where a sale of a *patni taluk* is set aside, the purchaser must have recourse to the remedy provided by section 14 of the Bengal Patni Taluks Regulation, to the extent that it is available, and he cannot maintain a separate suit to obtain the relief which, if he had so desired, might have been granted to him against the *zemindar* in the suit for reversal of the sale. **C** MOHAMMAD AMIN v. BIJOY CHAND MAHATAB, 50 C. 756, 38 C. L. J. 102, (1923) A. I. R. (C.) 732 **20**

Bengal Tenancy Act (VIII of 1885), ss. 22 (2), 49 —*Landlord and tenant—Occupancy holding purchased by co-sharer landlord, effect of—Sub-lessee, position of—Ejectment by notice.*

A co-sharer landlord who purchases an occupancy holding is not in the position of a *raiyat* with regard to the holding but holds it in his right as a co-proprietor, and a person to whom he lets out the land is not an under-*raiyat*, but a *raiyat* or a tenure-holder who is not liable to be ejected by service of notice under section 49 of the Bengal Tenancy Act. **C** ROSHAN ALI v. CHANDRA MOHAN DASS 50 C. 549, 27 C. W. N. 759; (1923) A. I. R. (C.) 701 **447**

——— **s. 29**—*Interpretation—Tenant taking settlement from proprietors, position of—Suit by* thekadar *for arrears of rent—Rate of rent payable—Enhanced rent paid for three years—Enhancement, whether validated.*

The rule of section 29 of the Bengal Tenancy Act is intended to be a strict one which the Courts should not allow to be defeated or evaded

Plaintiff, the *thekadar* of a *patta* in a certain estate, sued to recover arrears of rent on the basis of a lease. It appeared that defendant No. 1 took different leases from defendant No. 2 the proprietor of the estate and finally executed a new lease in respect of the whole of the area comprised in the previous *kabuliyats*. On the expiry of this *kabuliyat*, defendant No. 1 took a fresh settlement of the same land from the proprietor at a rental in kind the value of which was estimated at Rs. 61. A suit was brought in respect of this lease

Held, that defendant No. 1 had acquired occupancy rights by this settlement and that by virtue of section 29 of the Bengal Tenancy Act, his rent must be taken to be the original cash rent

(2) that the plaintiff's suit was an attempt to defeat the provisions of section 29 of the Bengal Tenancy Act and he was not entitled to get any rent other than the original cash rent.

Trap Ali v. *Kattpada Bandopadhya*, 31 Ind. Cas. 97, 23 C. L. J. 635, followed.

(3) that even if the enhanced rent had realised for three years, the illegal enhancement could not be validated. **Pat** MEYRICK v. DIPA PANDEY **22**

——— **ss. 30, 31-B, 37, 115**—*Intention of Legislature—"Prevailing rate," meaning of—Method of ascertaining prevailing rate—Occupancy holding—Enhancement of rent.*

Where more than 15 years have passed since the rents were last settled, the landlord of an occupancy holding is entitled to an enhancement if he can show that the rent paid by the *raiyat* in any par-

ticular case is below the prevailing rate paid by occupancy *raiyats* for lands of a similar description and with similar advantages in the same village or in neighbouring villages and that there is no sufficient reason for his holding at so low a rate.

The intention of the Legislature in section 30 clause (*b*) of the Bengal Tenancy Act appears to be that when a prevailing rate, whatever may be the exact meaning of that expression, has once been determined as stated in the section, the rate so found shall be deemed to be the prevailing rate unless it can be shown that the actual prevailing rate has risen by an increase in the rents in the village generally owing to a rise in the price of staple food crops.

The expression "prevailing rate" as used in section 31-B of the Bengal Tenancy Act, must have the same meaning as the same expression when used in section 30, that is to say, it must be the prevailing rate paid by the occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages.

In ascertaining the prevailing rate regard must be had to the rents paid by occupancy *raiyats* holding similar lands in the whole of the village or in neighbouring villages and not to the rents paid by some of them only. **Pat** RAMJI RAM *v.* RAM KUMAR SINGH, (1923) Pat 345 : 5 P. L. T. 77 **411**

——— ss 32, 105, 109—*Suit for abatement of rent—Plaintiff, what must prove—Question of determination of area, whether can be gone into in civil suit.*

In order to succeed in a suit for abatement of rent, brought under section 32 of the Bengal Tenancy Act, the plaintiff must show that there has been a diminution of area in the land held by him at the date of the suit.

In order to assess a fair rent upon a holding it is necessary for the Settlement Officer to ascertain what is the area held, and for this purpose he may either accept the area entered in the Record of Rights, or alter it after taking evidence. It is not necessary that a direct issue should be raised as to the area of the holding.

As the question of the determination of the area held forms the subject of proceedings taken before the Settlement Officer, under section 105 of the Bengal Tenancy Act, the question of area cannot be again raised in a civil suit. **Pat** KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE, (1924) Pat. 18; 5 P. L. T. 98 **670**

——— s. 50 (2)—*Presumption as to rental—Claim for enhanced rent—Plaintiff, what must prove.*

Where a landlord claims increased rent, he must, in order to succeed, rebut the presumption arising under section 50 (2) of the Bengal Tenancy Act, 1885, in favour of a tenant that if he held the tenure at a fixed rent for 20 years, he held it from the time of the Permanent Settlement **P. C.** KUMAR PRASANNA DEB RAIKAT *v.* UDHAB CHAMDRA SAHA, 18 L. W. 147; 1923) A. I. R. (P. C.) 86; 45 M. L. J. 779; 33 M. L. T. 432 **556**

——— s 86—*Non-transferable holding—Transfer by occupancy tenant—Landlord, whether entitled to eject transferee—Incumbrance, meaning of.*

A surrender of a non transferable holding by an occupancy *raiyat* to his landlord, where the *raiyat* has previously transferred a portion of the holding to another person, entitles the landlord to enter upon the whole holding and eject the transferee or to settle it with another tenant.

Per *Miller, C. J.*—The transfer of a non-transferable holding is not binding upon the landlord in the sense that it imposes upon him any obligation to recognise the transferee as his tenant.

Mohsenuddin v. *Bhagaban Chandra Sutradhar*, 61 Ind Cas. 443; 48 C. 605; 25 C. W. N. 29; 32 C. L. J 286, not followed.

The word "incumbrance" in section 86 of the Bengal Tenancy Act implies a subsidiary interest charged upon or carved out of a parent estate such as a lease, mortgage, charge, easement or other interest limiting the full rights of ownership in the estate to which it appertains. It is something which affects the quality of the parent estate making it something less than it was before the encumbrance was created.

Per *Mullick, J.*—The proper interpretation of section 86 of the Act is that, upon the surrender of an entire holding, the landlord is entitled to eject every occupant on the land except those protected by clause (6) of the section.

Per *Jwala Prasad, J.*—The sale of a portion or of an entire holding is not an incumbrance within the meaning of clause (6) of section 86 of the Bengal Tenancy Act.

In a non-transferable holding the tenant has no right to transfer without the consent of the landlord and the transfer of the whole or part of it is invalid so far as the landlord is concerned. **Pat** SAHORAJI KUER *v.* DHANI MIAN, 4 P. L. T. 501, 1 P. L. R. 402, (1923) Pat. 305; (1924) A. I R. (Pat.) 1 **794**

——— ss. 87, 167—*Landlord and tenant—Abandonment of holding, what amounts to—Usufructuary mortgage by tenant, effect of—Annulment of incumbrance—Procedure.*

There may be an abandonment of a holding apart from the provisions of section 87 of the Bengal Tenancy Act, but in such a case it must be proved either that the tenant has transferred his whole interest in the property and ceased to take any further interest therein, as, for example, by a sale of the whole property, or that he has abandoned the right to re-take possession in future or has either left the village without the intention of returning or done some other act which would clearly indicate that he no longer retained the *spes recuperandi*.

The mere fact that he has mortgaged the entire holding under a usufructuary mortgage and has given possession to the mortgagee continuing himself to reside in the same village, affords in itself no evidence from which it can be inferred that he has entirely abandoned his rights in the property and has no intention of ever redeem-

Bengal Tenancy Act—contd.

ing the mortgage and re taking possession. *Samujan Roy* v. *Munshi Mahaton*, 4 C. W. N. 493, *Monohar Pal* v. *Ananta Moyee Dasya*, 20 Ind. Cas. 198; 17 C. W. N. 802, distinguished;

The mere sale of a holding in execution of a rent-decree does not in itself, without further steps being taken by the purchaser, annul any incumbrance which there may be existing on the holding. **Pat** RAM LAL MANDER *v.* KULDIP NARAYAN TEWARI **841**

——— **ss. 103, 106**—*Entry in Record of Right —Presumption—Suit for correction of entry—Burden of proof.*

The plaintiffs landlords brought a suit under section 106, Bengal Tenancy Act, for correction of certain entries in the Record of Rights made under section 103 of the Act. The lower Court decreed the suit relying on Road Cess Returns and the Quinquennial Register prepared under Regulation XLVIII of 1793 :

Held, (1) that there was a presumption in favour of the defendants from an entry under section 103B of the Bengal Tenancy Act and the onus of proof was entirely on the plaintiffs to negative the effect of the said presumption ;

(2) that having regard to the provisions of the Cess Act, the Road Cess Returns were not admissible in evidence ;

(3) that even assuming that the entry in the Quinquennial Register was admissible in evidence it was not sufficent to negative the presumption under section 103B of the Bengal Tenancy Act. **C** PROMODE CHANDRA ROY CHAUDHURY *v.* BINAYAK DAS ACHARJYA CHAUDHURY, 27 C W. N. 548; (1923) A. I. R. (C.) 511 **201**

——— **s. 103 B**—*Record of Rights—Presumption of correctness—Prior documentary and oral evidence, value of—Provincial Settlement Record, value of—Occupancy tenant, status of, whether can be acquired by custom.*

Evidence of facts, documentary and oral, of a date prior to that of the publication of the Record of Rights is admissible and should be taken into consideration in determining whether the presumption under section 103 B of the Bengal Tenancy Act has been rebutted or not.

Sheonandan Persad Sukul v. *Bacha Raut*, 4 Ind. Cas. 54; 9 C. L. J. 284, followed

In determining the status of a tenant the Provincial Settlement Records are of high value, and are sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement Records, where it appears that there was a procedure by which the status of the tenant could have been changed to what it is recorded in the Revisional Settlement Records.

A person cannot by custom acquire the status of an occupancy tenant, notwithstanding that he is so recorded in the Record of Rights. If he relies on any custom, it is for him to allege and prove that custom. **Pat** RAGHUNATH MISRA *v.* RAH BEHERA, 1 Pat. 167; (1922) A. I. R. (Pat.) 548; 5 P. L. T. 140 **427**

Bengal Tenancy Act—concld.

——— **s. 170 (2)**—*Decree for arrears of rent, sale held in execution of—Application to set aside sale, after holding knocked down to auction-purchaser, competency of—Order refusing to set aside sale—Second appeal, whether lies.*

Section 170 (2) of the Bengal Tenancy Act operates as a bar to an application by the holder of a decree for arrears of rent to set aside a sale held in execution of that decree on the ground that the decree has been satisfied out of Court, when such application is made after the tenure or holding has been knocked down to the auction-purchaser.

An order refusing to set aside a sale held in execution of a decree for arrears of rent is not open to second appeal. **Pat** JAGDHARI RAI *v.* LANGAT GOPE, 4 P. L. T 495; (1923) A. I R. (Pat.) 572 **676**

——— **s. 174**—*Orissa Division—Sale for arrears of rent—S. 174, applicability of.*

The provisions of section 174 of the Bengal Tenancy Act apply to the sale of a holding for arrears of rent in Orissa.

In Orissa, section 174 of the Bengal Tenancy Act applies to suits that originate in the Civil Court as well as to those that originate in the Collector's Court under the law as it stood in Orissa before the section was there introduced.

Baikal Parida v. *Jogendra Nath Bose*, 11 Ind. Cas. 239; 14 C. L. J. 168; 16 C W. N. 511, approved. **P C** KSHETRABASHI MAHANTI *v.* RATNAKAR MAHAPATRA, 38 C. L. J. 219 **278**

——— **s 178**,*scope of—Suit by landlord against tenant—Dispute as to occupancy rights—Compromise by tenant giving up claim, validity of.*

Where there is a *bona fide* dispute between a landlord and the tenant as to the latter's possession of occupancy rights in the land and a compromise decree is passed in the suit on the admission of the tenant that no such rights exist, the tenant cannot subsequently contend that he, having as a matter of fact acquired occupancy rights in the land at the date of the compromise, the decree was not binding on him. To such a case section 178 of the Bengal Tenancy Act has no application. The section would be applicable if the occupancy right of the tenant was recognised and then given up by him under the compromise.

A compromise decree was passed in a suit brought by a landlord against the tenant in which there was a dispute about the existence of occupancy rights in the land in favour of the tenant. The compromise stated: "It has been settled between your petitioners, the plaintiff and the defendant, that a decree be passed in favour of the plaintiff in respect of the land in suit," and further, "that your petitioner, the defendant, has given up his claim to the *kashtkari* right in the land decreed;"

Held, that the compromise did not offend against the provisions of section 178 of the Bengal Tenancy Act. **Pat** C. G. MACDONALD *v.* TEKNARAIN RAI **997**

Berar Inam Rules of 1859—*Deshpandia allowance, whether* inam—*Succession*—*"Direct lineal heirs" in r. 5, meaning of.*

Deshpande allowance in Berar is an *inam* and is governed by the Berar Inam Rules of 1859. The *inam* falls under clause (4) (first) and is dealt with by r. 6 of the Rules.

The words "direct lineal heirs" in r. 5 of the Berar Inam Rules refer to the heirs of the person mentioned just before in the same clause, that is, the first grantee under the British rule and not to any future incumbent who has not been mentioned anywhere in the clause. **N** CHANDRABHAGA *v.* GANESH KESHEO **932**

Buddhist Law—*Succession—Wife living apart from husband, rights of.*

When a wife has lived apart from her husband, by mutual consent, on account of incompatibility of temperament, and there is no proof of undutiful conduct towards her husband, it would not, under the Buddhist Law disqualify her from inheriting to her husband's estate or disentitle her to claiming Letters of Administration as against a grandson. **L B** MAUNG MAUNG TIN *v.* MA HLA U, 2 Bur. L. J. 58; (1923) A. I. R. (R.) 150 **200**

Burma Gambling Act (I of 1899), s 12—*Conviction, when justified.*

Where a person is charged under section 12 of the Burma Gambling Act, the mere fact that on one occasion he received a sum of money from one of the players, or from the winner, would not be sufficient to justify his conviction: there ought to be evidence of other incriminating circumstances in order to prove the offence. **R** NGA SAN DUN *v.* EMPEROR, 2 Bur. L. J. 8: (1923) A. I. R. (R.) 144; 24 Cr. L. J. 933 **357**

———**s. 12**—*Offences contemplated by section—Duty of Court—Essentials to justify conviction—Informer, statement of.*

Section 12 of the Burma Gambling Act contemplates at least four distinct offences in relation to a common gaming house, and it should be explained to an accused person the exact charge he is called upon to meet.

In order to justify a conviction under the above section, there must be evidence of actual knowledge on the part of the accused.

There is no justification in law for making use of the statement of an informer to the detriment of a person accused under the Burma Gambling Act. **R** AH LIN *v.* EMPEROR, 2 Bur. L. J. 51 (1923) A. I. R. (R.) 141; 24 Cr. L. J. 871 **71**

Burma Laws Act (XIII of 1898), s. 13 (1)—*Burmese Buddhist Law—Gift—Possession, transfer of, whether necessary—Gift to become operative after donor's death, validity of.*

Under section 13 (1) of the Burma Laws Act, where the Court has to decide any question regarding succession, inheritance, marriage, etc., the rule is that Buddhist Law is to apply in cases where the parties are Buddhists, except in so far as such law has by enactment been altered or abolished.

There may be cases where the facts and circumstances surrounding a gift necessitate the decision of a question regarding succession or inheritance and when that is the case, Burmese Buddhist Law must form the rule of decision.

A Burmese Buddhist cannot dispose of his property after his death by Will, and no Burmese Buddhist can, therefore, under the guise of making a gift, be allowed in effect to make a Will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where, therefore, his act in making a gift, owing to the circumstances in which it is made, or the conditions attached thereto, is such as to affect the succession to or inheritance of his property after his death, Buddhist Law must be resorted to, to arrive at a decision as to whether his action can be maintained or is invalid.

Maung Pan U v. *Ma Kyi Nyo*, 8 Ind. Cas. 1200; 3 Bur. L. T. 107, *Annamalay Chetty* v. *Mahomed Ismail*, 23 Ind. Cas. 903; 7 L. B. R. 123; 7 Bur. L. T. 75, *Ma Pan Nyun* v. *Ma Hla Sein*, 30 Ind. Cas. 665; 8 L. B R. 190; 8 Bur. L. T. 149 and *Maung Ba Maung* v. *Maung Pyu*, 40 Ind. Cas. 854, relied on.

It is open to a Burmese Buddhist to make a gift or an alienation of some of his property during his lifetime, but it is not open to him to make a Will, or a gift which is to operate after his death, contrary to the terms of the Buddhist Law as to inheritance. **R** MA THEIN MYAING *v.* MAUNG GYI, 1 R. 351; (1924) A. I. R. (R) 13 **166**

Calcutta Improvement Act (V of 1911), ss. 42 (a), 54 (1)—*Improvement Scheme—Acquisition of land from Calcutta Corporation for recoupment—Board of Improvement Trustees, power of—Land required for "executing Improvement Scheme," meaning of—Land "affected by execution of scheme," whether covered.*

The Board of Trustees for the Improvement of Calcutta cannot in connection with an Improvement Scheme, acquire under section 54 (1) of the Calcutta Improvement Act, lands vested in the Corporation of Calcutta, which are "affected by the execution of the Scheme" within the meaning of section 42 (*a*) of the Act and are required for purposes of recoupment. Such lands are not lands required for "executing the Improvement Scheme" within the meaning of section 54 (1) of the Act.

Per *Richardson, J.*—Under clause (*a*) of section 42 of the Calcutta Improvement Act it is open to the Board of Trustees to make provision in an Improvement Scheme for the acquisition, for purposes of recoupment, of land which will, in their opinion, be affected or improved in value by the execution of the Scheme. **C** CORPORATION OF CALCUTTA *v.* CALCUTTA IMPROVEMENT TRUST, 50 C. 531; (1924) A. I. R. (C.) 85 **346**

Calcutta Rent Act (III of 1920), ss. 4, 11—*Statutory tenant—Agreement to pay more than the standard rent—Lease in terms of agreement—Object of lease, legality of—Lease, whether enforceable—Contract Act (IX of 1872) s. 23.*

Where the immediate object of a lease is to secure a rate of rent in excess of that allowed

Calcutta Rent Act—concld.

by the Calcutta Rent Act, thus tending to defeat the provisions of the Act, which disables a landlord from recovering more than the standard rent, the object is unlawful, and consequently the lease is void and cannot be enforced. ☞ SALEH ABRAHAM *v.* MANEKJI COWASJI, 50 C. 491; (1923) A. I. R. (C.) 57 **5.1**

Cause of action—Hundis *taken in liquidation of original transactions, suit on*—Hundis *found to be inadmissible in evidence*—*Plaintiff, whether can fall back on original cause of action.*

Plaintiff sued for Rs. 1,500 principal and Rs. 84-5-0 interest on two *hundis* reciting that there had been dealings between the parties ending in the striking of a balance of account for Rs. 2,500 which the defendants paid, as to Rs. 1,000 in cash and as to the balance of Rs. 1,500 by the *hundis*; inasmuch as the *hundis* were improperly stamped they were held to be inadmissible, and the question arose whether the debt could be proved *aliu di*:

Held, that a cause of action existed to the plaintiff independently of the two *hundis* and as the *hundis* were a mere setting and consequence of the earlier transactions the plaintiff was not precluded from falling back on his original cause of action.

Pursotim Narain v. *Taley Singh*, 26 A. 178; A. W. N. (1903) 217, distinguished. ☞ NATHU RAM *v.* DOGAR MAL, 4 L. 108 **555**

C. P Land Revenue Act (II of 1917), s. 203 (5) (8), *scope of*—Abadi *site*—*Express or implied contract between proprietor and holder, effect of*—*Absence of express contract*—*Implied contract, presumption of*—Wajib-ul-arz *or custom, whether excepted*

Nothing in section 203 of the C. P. Land Revenue Act would affect the terms of an express as well as an implied contract between the proprietor and holder of an *abadi* site.

Where there is no express contract between the proprietor and the holder of an *abadi* site an implied contract has to be presumed from the existence of a custom.

Section 203 of the C. P. Land Revenue Act does not override the provisions of a *wajib-ul-arz* or any existing custom.

Section 203 (5) of the C. P. Land Revenue Act speaks only of the classes of persons who hold sites in the *abadi* and not of the capacity in which they hold them and still less of the capacity in which they originally acquired them. ☞ ABDUL AZIZ KHAN *v.* BHAIRODAN **9.5**

——— **s. 219**—*Communal land*—*Trespasser*—*Suit for ejectment*—*Civil Court, jurisdiction of*—*Powers of Deputy Commissioner.*

A Civil Court has jurisdiction to try a suit by a *malguzar* to eject a trespasser from land set apart by an entry in the Administration Paper of the village for the communal purpose of a cattle stand, upon a portion of which he alleges the trespasser has encroached by the erection of a building. The Deputy Commissioner cannot determine the right to eject a trespasser from a communal land permanently under section 219 of the C. P. Land Revenue Act. He can eject him summarily. The jurisdiction of the Civil Court to determine such a right has been expressly saved under the section. ☞ SAKHARAM *v.* RAMCHANDRA, (1923) A. I. R. (N.) 326 **914**

C. P. Land Revenue Act—concld.

Chota Nagpur Tenancy Act (VI of 1908) s. 46—*Surrender of holding by tenant for consideration, validity of.*

It is open to a tenant to surrender his holding which is amenable to the provisions of the Chota Nagpur Tenancy Act to his landlord for a pecuniary consideration, and such a transaction does not amount to a transfer in contravention of the provisions of section 46 of that Act.

Tribhan Pande v. *Dindandhu Pande*, 44 Ind. Cas. 317; 3 P. L. J. 88 at p. 90, *Jairam* v. *Gopikisar*, 47 Ind. Cas. 32; 14 N. L. R. 125, *Abdul Majid* v. *Harcharan Halder*, 53 Ind. Cas. 17, referred on. ☞ BARIO SANTHAL *v.* FAKIR SANTHAL **6.1**

——— **ss. 46 (2), 72**—*Mortgage by tenant*—*Surrender*—*Landlord, whether bound by mortgage.*

The provisions contained in section 72 of the Chota Nagpur Tenancy Act are similar to those contained in section 86 of the Bengal Tenancy Act with this difference that the provision contained in clause (6) of the latter section does not find a place in the former section; and this omission leaves the power of surrender conferred by section 72 of the Chota Nagpur Tenancy Act unhampered by the existence of any incumbrance over the property.

Therefore, in spite of a prior sale or mortgage by a *raiyat* of his holding, he is free to exercise his right of surrender of the holding in favour of the landlord, for, under clause (2) of section 46 of the Chota Nagpur Tenancy Act no transfer by a *raiyat* of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing.

Whatever the value of a transfer by a *raiyat* of his non-transferable holding be so far as the transferee or any other person in the world is concerned, it is absolutely to be ignored and considered to be non existent so far as the landlord is concerned. The landlord is the owner of the property, and the *raiyat*'s interest is carved out of it only for limited purposes and the right of reversion which the landlord undoubtedly has in the land cannot be affected except by express statutory provision. That reversion is recognised in the right which accrues to the landlord by an abandonment of the holding or by a voluntary surrender by the tenant who willingly yields up to him the limited right which was carved out. Therefore it is immaterial that the transfer is for valuable consideration and the surrender for no consideration at all.

The principle that a person cannot be permitted to derogate from his own grant is not of universal application and cannot apply to the case of a landlord where, by a *bona fide* surrender by the tenant, he acquires a statutory right of re-entry into the land which was originally demised in favour of the tenant.

Chota Nagpur Tenancy Act—concld.

Mohsenuddin v. *Bhagaban Chandra*, 61 Ind. Cas. 433; 25 C. W. N. 20; 32 C. L. J. 286; 48 C. 605 (P. C.) distinguished.

No equitable considerations would arise in favour of a transferee of a non-transferable holding for he, with his eyes open and knowing the limited interest of the tenant and his unquestionable right under sections 72 and 73 of surrender and abandonment—the holding being non-transferable without the consent of the landlord—takes the grant. He must therefore have foreseen the possible result of surrender, or abandonment by the tenant. There is no reason why the landlord should be prejudiced unless he is a party to any fraud or dishonesty committed by his *raiyat* in surrendering the holding : **Sat** RAM PARAMON v. DOMAN KALAL, 4 P. L. J. 562 (Pat.) 898, (1924) A. I. R. (Pat.) 100. **209**

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 92—*Scheme — Application for further relief under scheme, whether application in execution — Appeal.*

When a suit is instituted under section 92 of the Civil Procedure Code to obtain a decree settling a scheme and a decree is passed embodying a scheme, the relief sought must, so far as the suit is concerned, be regarded to have been finally given and there remains nothing to obtain by way of execution.

Provisions in a scheme for further remedy by applications to the Court cannot be enforced "in execution of the decree" and orders granting or refusing such applications are not "decrees" under section 2 (2) of the Civil Procedure Code and are not appealable as such under section 47 the eof.

Damodar Bhat v. *Bhagirthi*, 24 B. 45; 1 Bom. L. R. 50; 12 Ind. Dec. (N. S.) 807. *Pravag Doss Ji* v. *Varu Mahant* v. *Tirumala Srirangachariar*, 18 M. 319; 15 M. L. J. 133. *Lokasikhamani Mudaliar* v. *Thiagaroya Chettiar*, 28 Ind. Cas. 415; (1915) M. W. N. 420; 5 L. W. 596, referred to and distinguished.

Where no procedure for the exercise of the powers conferred upon it by the scheme is specified in the scheme, the functions of the Court entertaining applications under some provision in the scheme must be regarded as judicial and the applicability both of its ordinary judicial procedure and of the law relating to appeals from its ordinary decisions must be presumed. *Ramaswami Gounder* v. *Muthu Velappa Gounder*, 71 Ind. Cas. 1030; 44 M. L. J. 1; 16 L. W. 848; (1923) M. W. N. 133; (1923) A. I. R. (M.) 192; 46 M. 536. *Venkatarama Ayyar* v. *Janab Hamid Sultan Maracayar Sahib Bahadur*, 70 Ind. Cas. 987; 44 M. L. J. 161; (1923) M. W. N. 78; 32 M. L. T. 114; 17 L. W. 656; (1923) A. I. R. (M.) 360. *National Telephone* v. *Postmaster General*, (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637. *Balakrishna Udayar* v. *Vasudeva Ayyar*, 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 20 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. 201 (P. C.), relied on. M. RUNGANATHA THATHACHARIAR v. KRISHNASWAMI THATHACHARIAR, 18 L. W. 237; (1923) M. W. N. 604. **189**

Civil Procedure Code—1908—contd.

——— s. 2 (11)—*"Legal representative," definition of scope of—Decree against intermeddler, whether binding on real heir.*

The definition of "legal representative" in section 2 (11) of the Civil Procedure Code is only for the purposes of procedure in instituting and defending suits and cannot affect the rules of substantive law.

It is true that when a person intermeddles with the property of a deceased person he must be regarded as a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but there is no principle of law which makes him the representative of the deceased so far as success on to the property of the deceased is concerned.

The mere fact that an intermeddler is joined as a party to a suit for recovery of possession cannot make a decree in that suit in any way binding on the real heir who is not a party to that suit, and who later on gets a decree against the intermeddler declaring his superior right. **A** LALSA RAI v. UDIT RAI **114**

——— s. 10—*Stay of suit—"Suit," whether includes appeal—Suits for different debts, whether concurred.*

For the purposes of section 10 of the Civil Procedure Code the word "suit" includes appeal.

Bipin Behary Mozumdar v. *Jogendra Chandra Ghosh*, 36 Ind. Cas. 641; 24 C. L. J. 514, followed.

Where the suits are for distinct and different debts for instance where the suits are for recovery of successive rents section 10 does not apply : JAMINI NATH MULLICK v. MIDNAPUR ZEMINDARY CO., 27 C. W. N. 772; (1923) A. I. R. (C.) 756. **231**

——— ss. 10, 115—*Order refusing to stay suit —Revision, whether lies.*

Inasmuch as an order refusing to stay a suit under section 10 of the Civil Procedure Code, does not amount to a decision of a case within the meaning of section 115 of the Civil Procedure Code, an application to revise such order cannot be entertained.

Mela Ram v. *Rikhikesh*, 69 Ind. Cas. 111; 33 P. W. R. 1922, (1923) A. I. R. (L.) 69. *Firm Ishar Das Dharm Chand of Amritsar* v. *Firm Bala Mal Durga Das of Amritsar*, 67 Ind. Cas. 870; (1922) A. I. R. (L.) 54; 4 L. L. J. 425. *Sultanat Jahan Begam* v. *Sundar Lal*, 58 Ind. Cas. 90; 42 A. 409, 18 A. L. J. 431 and *Buddhoo Lal* v. *Mewa Ram*, 67 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 (F. B.), relied on. L. BAGH SINGH v. BHAGWAN DAS **101**

——— ——— s. 11, O. XXXIV, rr. 7, 8—*Redemption suit—Preliminary decree—Failure of plaintiff to pay decreed amount, effect of—Second suit for redemption, maintainability of—Res judicata.*

Where a plaintiff obtains a decree for redemption of a mortgage by payment into Court of a certain sum within a certain time and then takes

Civil Procedure Code—1908—contd.

no steps towards making such payment and the period fixed elapses without any payment being made, a second suit to redeem on payment of the self-same sum is not barred by the rule of *res judicata*.

Shibbu Mul v. *Paira Singh*, 86 P. R. 1877, *Dhanpat Mal* v. *Jhaggar Singh*, 93 P. R. 1908; 164 P. L. R. 1908; 133 P. W. R. 1908 (F. B.), followed.

A preliminary decree in a redemption suit provided that if the plaintiff failed to pay the amount mentioned in the decree within the time limited "he shall be debarred from all right to redeem the property." Nothing further was done under the decree either by the plaintiff or by the defendant:

Held, that a second suit by the plaintiff to redeem the property was not barred by *res judicata* by virtue merely of the clause in the previous decree having the right of redemption, as there was no final determination in that suit of the issue whether the plaintiff's failure to pay the redemption price within the period fixed by the Court would terminate the relation of mortgagor and mortgagee and further as such an adjudication was not necessary for the decision of the suit.

A preliminary decree in a redemption suit ought not to direct more than that if the plaintiff makes a default, the mortgagee should have a right to ask for a final decree for foreclosure or sale as provided by r. 8 of O. XXXIV of the Civil Procedure Code. L SUNKA *v.* JHARU, (1923) A. I. R. (L.) 680 **919**

——— **s. 11, Expl. VI.** *applicability of.*

Section 11, Explanation VI, of the Civil Procedure Code, applies to a common right asserted by certain persons on behalf of themselves and others, but not to rights which are not common but several and distinct. O ZARIF-UN-NISSA *v.* SHAFIQ-UZ-ZAMAN, 26 O. C. 133; (1923) A. I. R. (O.) 185 **626**

——— **s. 11, Expl. VI, O. I, r. 8**—*Representative suit—Leave to sue on behalf of others not obtained —Compromise decree*—Res judicata.

Explanation VI to section 11 of the Civil Procedure Code is not confined only to cases where leave of the Court has been granted under O. I, r. 8 of the Code, nor does the explanation become inapplicable because the decree on the previous suit was based on a compromise and was not passed after contest.

A decree in a suit brought by the plaintiffs as trustees on behalf of themselves, and the whole body of persons worshipping or interested in a temple operates as *res judicata* in a subsequent suit filed under O. I, r. 8 of the Civil Procedure Code by certain other representatives of the village against the same parties notwithstanding that the prior suit was not brought under O. I, r. 8 and the decree was a compromise decree and not one passed after contest.

Srooman Madabushi Gopalacharlu v. *Emmani Subbamma*, 55 Ind. Cas. 984; 43 M. 487; 38 M. L. J. 493; (1920) M. W. N. 435; 27 M. L. T. 219, *Godimella Ranganma* v. *Panchangam Narasimhacharyulu*, 35 Ind. Cas. 116; 31M. L. J. 26; 1(916) 2 M. W. N. 258, followed.

Civil Procedure Code—1908—contd.

Jenkins v. *Robertson*, 1 H. L. Sc. 117, *In re South American and Mexican Company, Ex parte Bank of England*, (1895) 1 Ch. 37; 64 L. J. Ch.189; 12 R. 1; 71 L. T. 594; 43 W. R. 131, *Kumara Venkata Perumal* v. *Thatha Ramaswamy Chetty*, 9 Ind. Cas. 875; 35 M. 75; (1911) 1 M. W. N. 290; 9 M. L. T. 487; 21 M. L. J. 709 and *Madhavan* v. *Keshavan*, 11 M. 191; 4 Ind. Dec. (N. S.) 133, followed. M CHEVRAYA GOUNDAN *v.* ATHAPPA GOUNDAN, (1923) M. W. N. 515; (1924) A. I. R. (M.) 88 **336**

——— **ss. 16, 20**—*Decree improperly passed— Proper remedy—Suit for declaration that decree not binding on plaintiff, nature of—Cause of action—Jurisdiction.*

Where a decree has been improperly passed, the proper and convenient course is for the party aggrieved to go to the Court that granted the decree and get it set aside by that Court.

Before a Court can entertain a suit for a declaration that a decree granted by another Court is not binding on the plaintiff it must be shown that there is a cause of act on within the jurisdiction of the Court.

A mortgage decree in respect of properties situate within the jurisdiction of the Patna Court was passed by the Court at Benares. The judgment-debtor instituted a suit in the Court of the Subordinate Judge of Patna for a declaration that the decree was inoperative against him:

Held, (1) that the suit was not a suit for land and section 16 of the Civil Procedure Code did not apply;

(2) that the cause of action did not arise within the jurisdiction of the Patna Court;

(3) that the plaint should, therefore, be returned for the purpose of being filed in the proper Court. Pat BENARES BANK LTD., *v.* SURENDRA NARAIN SINGH **469**

——— **s. 20**—*Principal and agent—Suit by principal to recover money due—Place of suing.*

In the absence of an agreement to the contrary, or of special circumstances showing a different intention, a principal cannot, where his agent carries on business elsewhere, call upon him to render an account at his own place of business, on the ground that the money or goods were sent to the agent from such place.

Muhammad Shaffi v. *Karamat Ali*, 76 P. R. 1896, followed.

Defendants, who carried on business in Bombay, and who acted as Commission Agents of the plaintiffs, carrying on business at Delhi, used to send goods to the plaintiffs and the latter used to send money to the defendants. Plaintiffs instituted a suit at Delhi to recover from the defendants a sum of money which they alleged was due to them on the accounts.

Held, that, in the absence of any evidence that the money was payable by the defendants at Delhi, the Delhi Court had no jurisdiction to entertain the suit. L FIRM PIRTHI SINGH-JAMAYAT RAI *v.* FIRM HARSUKH DAS-JHOG MAL **849**

Civil Procedure Code—1908—contd.

——— **s. 24**—*Transfer of suit—High Court, powers of—Procedure.*

No Court can direct any transfer from one Court to another unless both Courts are subordinate to it.

A High Court will not, save upon most exceptional grounds, direct a Court subordinate to it to return a plaint, duly instituted, for presentation to a Court outside the jurisdiction of such High Court.

Abu Bakar Ahbul Rahiman & Co. v. *Rambux*, 40 Ind Cas. 393; 13 N. L. R. 81, followed. **N** TOPAN HARJI & CO. *v.* SINGHAI DALCHAND **548**

——— **s. 34 (2), O. XXI, r. 2, O XXXIV, r. 8**—*Notice of payment, applicability to mortgage suits—Position of* kanomdar *without notice—Failure to award interest—Presumption that interest refused.*

Order XXI, r. 1, clause (2) of the Civil Procedure Code which requires notice to be given to the decree-holder of any payment made into Court under a decree is inapplicable to a redemption decree where the decree-holder has to make the payment. Order XXXIV, r. 8 governing redemption suits does not require any notice to be given to a defendant after the decree has been passed before the plaintiff obtains possession, and a *kanomdar* who does not receive notice is not also prejudiced by such failure since he is not entitled to have delivery stayed pending a re-valuation of improvements.

Under section 34 (2) of the Civil Procedure Code where a decree is silent with respect to interest the Court should be deemed to have refused such interest **M** AMBI *v* PUTHIA KOVILAKATH VAITHIAN SRIDEVI, (1923) M. W. N. 753; 18 L. W. 686, 15 M. L. J. 687; (1924) A. I. R. (M.) 102 **566**

——— **s. 47**—*Order holding decree executable against person or property of judgment-debtor—Appeal, second, whether lies.*

The order of an Appellate Court holding that a decree-holder can proceed against the property but not against the person of the judgment-debtor, conclusively determines the rights of the parties with regard to the personal liability of the judgment-debtor to satisfy the decree and falls under section 47 of the Civil Procedure Code. A second appeal is, therefore, competent against such an order. **L** FIRM MUL CHAND-HUT CHAND *v.* FIRM GANDA MAL-RALLIA RAM **1039**

——— **ss. 47, 151, O. XXI, r. 29**—*Execution of decree—Order prohibiting payment to decree-holder—Appeal—Payment order enforced by decree-holder through Bank—Power of Executing Court to prohibit Bank from making payment.*

All orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed and relating to the execution thereof and are, as such, appealable.

Ghazidin v. *Fakir Bakhsh*, 7 A. 73; A. W. N. (1884) 226; 4 Ind. Dec (N. S.) 301, relied on

A decree-holder attached certain money belonging to his judgment-debtor which was lying to his credit in a branch of a certain Bank, and obtained a payment order from the Executing Court which he presented to another branch of the same Bank and asked it to collect the money. The money was obtained by the latter branch but before it could be paid to the decree holder the Executing Court issued an order prohibiting the Bank from making the payment.

Held, (1) that the Executing Court had no jurisdiction to make the order under O. XXI, r. 29 of the Civil Procedure Code, inasmuch as, at the time of making the order, there was no suit pending before it against the decree-holder on the part of the judgment-debtor;

(2) that after collecting the payment order the Bank held the money on behalf of the decree-holder as his agent and that the Court had no power to interfere with the actual delivery of the money to the decree-holder. **L** FITZHOLMES *v.* WARYAM SINGH, (1924) A. I. R. (L.) 514 **419**

——— **s. 47, O. XXI, r. 58**—*Execution of decree—Attachment—Objection by party against whom suit was dismissed, nature of—Appeal, whether lies*

A defendant against whom a suit has been dismissed is a party to the suit, within the meaning of section 47 of the Civil Procedure Code, and where an objection lodged by such a person to the attachment of certain property in execution of the decree passed in the suit is dismissed the order dismissing the objection is open to appeal.

The mere fact that an objection to an attachment by a party to the suit is lodged under O. XXI, r. 58 of the Civil Procedure Code, would not disentitle the objector from pleading that the objection was really under section 47 of the Code and that O. XXI, r. 58 of the Code was relied on under a mistaken view of the law, and that an appeal is competent from the order dismissing the objection. **L** GAURAN *v.* CHANDU LAL **747**

——— **s. 47, O. XXI, rr. 58, 60, 63**—*Objection to attachment by trustee—Judgment-debtor author of trust—Trustee, whether representative of judgment-debtor—First Appellate Court entertaining appeal without jurisdiction—Second appeal, if maintainable—Appeal, second—Jurisdiction, question of, whether can be raised for first time.*

In objecting to attachment of certain property in the execution of a decree under O. XXI, r. 58 of the Civil Procedure Code if the objector claims the property as a *mutwalli* of a trust, he does not do so as a representative of the judgment-debtor, even though the author of the trust may himself have been the judgment-debtor, except where such trust is created after the suit or the decree passed therein.

Nath Mal Das v. *Tajammul Husain*, 7 A. 36; A. W. N. (1884) 218; 1 Ind Dec (N.S.) 264, *Ramanathan Chettiar* v. *Levvai Marakayar*, 23 M. 195; 10 M. L. J. 64; 8 Ind. Dec. (N. S.) 535 and *Kartick Chandra Ghosh* v. *Ashutosh Dhara*, 12 Ind. Cas. 163; 39 C. 208; 14 C. L. J. 42; 16 C. W. N. 26, followed.

Where a Court of first appeal entertains an appeal in a case in which no appeal lay to it, a second appeal would lie.

Civil Procedure Code—1908—contd.

Jwala Prasad v. *Salig Ram*, 13 A. 575; A. W. N. (1891) 158; 7 Ind Dec. (N S) 363, *Wulayat Husain* v. *Ram Lal*, 25 Ind Cas 643; 12 A L. J. 1113 and *Bandiram Mookerjee* v. *Purna Chandra Roy*, 43 Ind. Cas. 758; 45 C 926; 27 C L. J. 115 followed.

An appellant is not barred from raising the question of jurisdiction in second appeal, even if he did not raise it in the First Appellate Court. A BHAGWAN DAS v. MAHMUD BANO 1053

———— s. 47, O. XLI, r. 6 2—*Execution of decree—Sale, application to stay—Appeal whether lies—Court, duty of.*

An order refusing to stay a sale of immoveable property in execution of a decree during the pendency of an appeal, under the provisions of O. XLI, r. 6 (2) of the Civil Procedure Code is appealable as a decree under section 47 of the Code.

Ram Nath Singh v. *Kamleshwar Prasad Singh*, 9 Ind. Cas. 323, 15 C. W. N. 432 distinguished

Under O. XLI, r. 6 (2) of the Civil Procedure Code, the Court, in the case of an order for the sale of immoveable property in execution of a decree, is bound, where an appeal is pending from such decree to stay the sale on the application of the judgment-debtor, on such terms as to giving security or otherwise as the Court thinks fit, until the appeal is disposed of. L FIRM PHAGGU MAL-MATA DIN v. BENARSI DAS 1101

———— s. 47, O XLI. r 6 2—*Execution of decree—Stay of sale—Order, nature of—Appeal, whether lies—Court, duty of.*

An order relating to the stay of sale of immoveable property in execution of a decree made under O. XLI, r. 6 (2) of the Civil Procedure Code, falls within the purview of section 47 of the Code and is appealable.

Subramania Pillai v. *Kumaravelu Ambalam*, 33 Ind. Cas. 66; 39 M. 541 relied on.

When an application to stay a sale is made under O. XLI, r. 6 (2) of the Civil Procedure Code, it is incumbent on the Court to stay the sale on such terms as to giving security or otherwise as the Court thinks fit. An order directing that the sale be stayed on condition that the decretal amount is deposited and paid to the decree-holders who are not required to furnish security, is against the spirit of the rule as it is tantamount to an order refusing to stay the sale. L SHANKAR DAS v. KASTURI LAL 789

———— s. 47, O XLI, r. (6) 2—*Stay of execution—Appeal, whether lies—Application to stay sale—Court, duty of.*

The expression "an order relating to the execution of a decree" in section 47 of the Civil Procedure Code is comprehensive enough to include an order relating to the stay of execution, and such an order is, therefore, appealable.

Srinivas Prosad Singh v *Kesho Prasad Singh*, 12 Ind. Cas. 745; 14 C. L. J. 480 relied on.

When an application is made under r 6 (2) of O. XLI of the Civil Procedure Code, it is obligatory on the Court to stay the sale on such terms as to giving security or otherwise as it thinks fit. L THE FIRM PHALLU MAL-HIRA LAL v. BANARSI DAS 665

———— s. 43, *applicability of, to proof of decree-debt in insolvency.*

Section 48 of the Civil Procedure Code deals only with the execution of a decree and has no applicability to the proof of a decree-debt in insolvency proceedings. M SIVASUBHARAMANIA PILLAI v THETHIAPPA PILLAI, 45 M. L. J. 100; 8 L. W. 630 (1923) M. W. N 895 572

———— s. 43—*Assignment of decree—Equities of judgment-debtor against original decree-holder—Effect on assignment.*

R obtained a decree on 9th February 1922 against *C* and assigned it to *C* on the same date. *G* filed a suit against *R* on 13th June 1922 on a separate cause of action and obtained a decree on 30th August 1922. *G* deposited the amount due under the decree of *R* and got it attached in execution of his own decree. *C* applied to have the attachment raised:

Held, in revision that as *G* had made cross-claim in the suit by *R*, the latter had notice of the claim though the suit was actually brought afterwards and assignee took the assignment subject to the claim of *C* under section 49 of the Civil Procedure Code.

Under section 49 of the Civil Procedure Code, the transferee of the decree holds it subject to the equities (if any) which the judgment debtor might have enforced against the original decree-holder N CHUNI LAL v GULZARI LAL I N L R (1923) 52

———— s. 60—*Attachment—Gratuity paid by University, whether attachable—Gratuity in consideration of past services, whether debt.*

Section 60 (g) of the Civil Procedure Code does not exempt private pensions or pensions payable by a body other than Government from attachment. A pension or gratuity payable by a University does not, therefore, fall within the purview of the section.

Janki Das v. *E. I. Ry. Company*, 6 A. 634; A. W. N. (1884) 210; 4 Ind. Dec. (N. S.) 247, distinguished.

The Syndicate of the Punjab University recommended a gratuity to be paid to the judgment-debtor in consideration of past services which the latter had rendered to the University, but before the gratuity could be paid to him it was attached by the decree holder in execution of his decree against the judgment-debtor:

Held, (1) that the gratuity not being a pension granted by Government was not exempt from attachment under section 60 (g) of the Civil Procedure Code;

(2) that the gratuity constituted a debt payable by the University to the judgment-debtor and was, therefore, liable to attachment under section 60 of the Code. L MUHAMMAD ABDULLA v JIWAN MAL 145

———— s. 60—*Non-transferable occupancy holding—Sale in execution of money-decree—Kulyat whether can object.*

Civil Procedure Code—1908—contd.

The measure of liability of a property to involuntary alienation under section 60 of the Civil Procedure Code is the power of voluntary alienation.

The transfer of the whole or part of a non-transferable occupancy-holding is operative as against the *raiyat* whether it is made voluntarily or involuntarily

Chandra Benode Kundu v. *Sheikh Alla Bux*, 58 Ind. Cas. 353; 48 C. 184; 24 C. W. N. 818; 31 C. L. J. 510(S P), followed.

A non transferable occupancy-holding is liable as against the *raiyat* to be sold in execution of a money-decree held by an ordinary creditor who is not the landlord.

Bhiran Ali v. *Gopi Kanth*, 24 C. 355; 1 C. W. N. 306, 12 Ind Dec. (N. s.) 904, dissented from. **C KENARAM PAL** *v* **KINU MANDAL** 50 C. 505; (1924) A. I. R. (C) 52 **879**

——— **s 61 O XXI. r 57**—*Execution of decree —'Default of decree-holder,' meaning of— Dismissal of execution application on account of absence of bidders— Attachment, whether continues —Application fresh, for attachment and sale —Order for production of schedules—Default —Dismissal of application— Alienation by judgment-debtor— Auction-sale under fresh application, position of.*

In execution of a money-decree certain properties of the judgment-debtor were attached and their sale was ordered but the execution petition was dismissed as there were no bidders at the sale A second execution petition was then filed with a prayer for attachment. The decree-holder was ordered to produce schedules. This was not done and the petition was dismissed. A day before the date of this dismissal the judgment-debtor granted two mortgages on the properties which were the subject of attachment. A third execution was thereafter filed, the properties were attached and sold and the sale was confirmed. In a suit by the mortgagee to enforce the mortgage as against the auction-purchaser:

Held, that neither the first nor the second order of dismissal of the execution petitions was on account of 'default' of the decree-holder within the meaning of O XXI, r 57 of the Civil Procedure Code and, therefore, on the date of the mortgage the original attachment on the first petition was subsisting in favour of the plaintiff and, it is being so the alienation was void as against the auction-purchaser.

The default of the decree holder under O. XXI, r. 57 of the Civil Procedure Code cannot be constituted either by his absence from the sale or his failure to bid at the sale, but must be a default in the discharge of some obligation laid on him by the Code or the rules framed under it, and the order in respect of which the default is contemplated must, further, clearly be one which could be made after attachment and not one which is appropriate only before attachment.

Order XXI, r. 57 of the Civil Procedure Code is applicable only to cases in which the stage of attachment has been passed and in which the Court is conscious that the next stage

Civil Procedure Code—1908—contd.

is intended and is not applicable to an abnormal case where no one concerned, neither the party nor the Court, is conscious of the true facts and where, if there is in fact an attachment, the party and Court are not aware of it and are proceeding as though there were none. **M VENKITESWARAYYAN** *v.* **ASWATHA NARAYAN**, (1923) M. W. N. 549, 45 M. L. J. 315; (1923) A. I. R. (M.) 103 **491**

——— **s 63. O. XXI, r 72**—*Mortgage-decree— Sale—Purchase by benamidar on behalf of decree-holder, whether void—Suit by decree-holder to enforce agreement against judgment-debtor, maintainability of*

Plaintiff obtained a mortgage-decree and brought the mortgaged property to sale. The property was purchased by a *benamidar* on behalf of plaintiff. Plaintiff then entered into an agreement with the judgment-debtor whereby the latter was to remain in possession of the property and to pay off the decretal amount by a certain date, in default of which plaintiff was to take possession of the property. The judgment debtor made default and plaintiff brought the suit for possession:

Held, (1) that the sale in execution of the plaintiff's mortgage decree in which the property was purchased for the plaintiff without the permission of the Court was affected with a mere irregularity and was not void but voidable;

(2) that the defendant, judgment debtor in the previous suit, could not claim to avail himself of the remedy provided by sub-r. 3 of r. 72 of O. XXI of the Civil Procedure Code in second appeal;

(3) that the suit was not barred by section 66 of the Civil Procedure Code inasmuch as the *benamidar* had never claimed title under the sale certificate

Per *Suhrawardy, J*—An execution-sale in which the decree-holder purchases the property without the permission of the Court is voidable and is liable to be set aside at the instance of the judgment-debtor or his representative, but the judgment-debtor has no absolute right to ask the Court to set aside such a sale and the matter is in the discretion of the Court.

Section 66 of the Civil Procedure Code only applies to a suit in which the plaintiff attempts to enforce his secret title as against the certificated purchaser. **C SARADINDU CHAKRAVARTI** *v.* **GOSTA BEHARI PRAMANICK**, 37 C. L. J. 405; 27 C. W. N. 208; (1923) A. I. R. (C.) 302 **196**

——— **s. 73**—*Application for rateable distribution—Powers of Court to go behind decree—Suit by one decree-holder for injunction to stop payment to another.*

A Court charged with the distribution of assets under section 73 of the Civil Procedure Code has no power to go into the question of the *bona fides* of a decree in respect of which an application for rateable distribution is made to it.

Ghulam Das v. *Uma Parshad*, 50 Ind. cas. 264; 15 N. L. R. 68; 17 A. L. J. 415; 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 U. P. L. R.

Civil Procedure Code—1908—contd.

(P. C.) 86 (P. C.); *In re Sunder Dass*, 11 C. 42; 5 Ind. Dec. (N. S.) 785; *Puran Chand Boid* v. *Surendra Narain Singh*, 16 Ind. Cas. 705; 17 C. W. N. 326; 16 C. L. J. 582, discussed and dissented from.

Peary Lal Das v. *Peary Lal Dawn*, 22 Ind. Cas. 407; 19 C. W. N. 903; 18 C. L. J. 646; *Chhaganlal* v. *Fazarali*, 13 B. 154; 7 Ind. Dec. (N. S.) 103, followed.

In distrib tion proceedings under section 73, Civil Procedure Code, it is open to an aggrieved decree-holder to file a suit immediately and stop payment to the opposite party by obtaining an injunction. **N** MAGANMAL *v.* RAGHUNATHRAO, 19 N. L. R. 172; (1924) A. I. R. (N.) 9 **749**

——— **s. 80**—*Suit against public officer*—Mala fides—*Notice whether necessary.*

Before instituting a suit against a public officer a plaintiff is bound to give notice under section 80 of the Civil Procedure Code even though in the discharge of his duty, the public officer acted *mala fide.*

Shahebzadee Shahunshah Begum v. *Fergusson*, 7 C. 499; 3 Ind. Dec. (N. S.) 871, dissented from.

Raghubans Sahai v. *Phool Kumari*, 32 C. 1130; 1 C. L. J. 542, distinguished.

Jogendra Nath Roy Bahadur v. *Price*, 24 C. 584; 12 Ind. Dec. (N. S.) 1058, *Samanthala Koti Reddi* v. *Porthuri Subbiah*, 46 Ind Cas. 86; 41 M. 792; 7 L. W. 586; 34 M. L. J. 494; 23 M. L. T. 357; (1918) M. W. N. 414 (F. B.), followed. **C** DAKSHINA RANJAN GHOSE *v.* UMAR CHAND OSWAL, 38 C. L. J. 104; 50 C. 992; 28 C. W. N. 10 **173**

——— **s. 99 O. I, r 10**—*Suit instituted in name of wrong plaintiff—Mistake, how rectified—Evidence Act* (*I of* 1872), *s.* 110—*Burden of proof—Question of lessor's title, whether relevant—Ostensible lessee merely trustee—Title of lessor, whether can be questioned—Transfer of Property Act* (*IV of* 1882), *s.* 108—*Contract to contrary, whether valid*—Nazul *land, lease of—Rules of Government, rule* 1820, *interpretation of.*

Where a plaint purports to be filed by a Municipal Board with the addition of the name of the Chairman as plaintiff, the error is not one of substance but merely of form and may be corrected under the provisions of O. I, r. 10, Civil Procedure Code, if the objection is taken in the Trial court.

Under section 99 of the Civil Procedure Code, this defect cannot be made the ground of any interference with the decree passed by the Court.

In a suit between a lessor and lessee, the latter cannot be permitted to deny the title of the former.

The question of the lessor's title is foreign to a suit for rent or in ejectment against the lessee and this is equally true in a case where the ostensible lessee is merely a trustee and liable to render account to the *cestui que trust.*

Bilas Kunwar v. *Desraj Ranjit Singh*, 30 Ind. Cas. 29; 37 A. 55; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 510; (1915) M. W. N. 757; 42 I. A. 202 (P. C.), followed.

Civil Procedure Code—1908—contd.

The terms of section 106 of the Transfer of Property Act are 'subject to any contract to the contrary' and a notice of ejectment complying with the terms of the contract is valid though it may offend against the terms of the aforesaid section.

Rule 1820 of Rules of Government regarding management of *Nazul* property by Municipal Boards lays down that when a terminable lease is given it shall not ordinarily be for a period shorter than 30 years. The use of the word 'ordinarily' necessarily implies exceptions and it is discretionary with Municipal Boards to give a lease for a shorter period. **O** SHAMSUDDIN KHAN *v.* FATEH SHAH, 9 O. & A. L. R. 1041 **926**

——— **s 104, O XXI, rr 66, 90, 92, O XLIII, r 1 (j)**—*Execution of decree—Application to set aside sale—Appeal, second, whether lies—Failure to issue notice before drawing up proclamation, effect of.*

A second appeal is not competent from the order of a District Judge passed on appeal against an order setting aside an execution sale under O. XXI, r. 92 of the Civil Procedure Code.

The failure of an Executing Court to issue notice to the judgment-debtor under O. XXI, r. 66 of the Civil Procedure Code, before drawing up the proclamation of sale amounts to an irregularity in publishing the sale within the meaning of O. XXI, r. 90 of the Code, and an application to set aside the execution sale on that ground is covered by the rule.

Bipin Bihari Bejali v. *Kanti Chandra Mandal*, 18 Ind. Cas. 715 and *Sheodhyan* v. *Bholanath*, 21 A. 311; A. W. N. (1899) 84; 9 Ind. Dec. (N. S.) 907, followed. **L** JAGGAN NATH *v.* DAUD, 4 L. 243, (1923) A. I. R. (L.) 592 **108**

——— **ss 109 (c) 110**——"*Decision,*" *meaning of—High Court reversing findings but affirming decision of Trial Court, effect of—Combined effect of several factors—High Court, whether will certify appeal.*

The term "decision" in the last clause of section 110, Civil Procedure Code, means the decree or order passed, and not the reasons given for passing such decree or order.

Where the decree of a Trial Court is affirmed on appeal by the High Court, it is not necessary that the judgment of affirmance should be based on precisely the same reasons as those given by the Trial Court. The mere circumstance, therefore, that there are no concurrent findings of fact would not remove the case from the last clause of section 110 of the Civil Procedure Code, and so relieve the person applying for leave to His Majesty in Council from showing that some substantial question of law was involved in the appeal.

Where an Appellate Court permits an issue which had been given up to be re-opened, and allows in the appellate stage further evidence to be taken, that in itself is not a sufficiently substantial question of law to entitle an applicant to appeal to His Majesty in Council, especially where the applicant was in no way prejudiced by the procedure adopted by the Appellate Court

Clause (*c*) of section 109 of the Civil Procedure Code imposes no limitation to the cases in which a High Court may certify a case as a fit one for appeal to His Majesty in Council, but the power given by that clause ought to be used very sparingly.

Where, in a case (*a*) the property involved is of very large value, (*b*) the decision of the High Court is based upon findings of fact which reversed the findings of the Trial Court, (*c*) the evidence upon which the High Court acted was not all before the Trial Court, and (*d*) a question of procedure of somewhat unusual character is involved, and it is possible that a higher Tribunal might take a different view in respect thereto:

Held, that the combined effect of these matters was such that the High Court ought to exercise its power under section 109 and certify the case as a fit one for appeal to His Majesty in Council. **Pat** BARO BAHADUR MAN SINGH *v.* NAWLAKHBATI, 5 P. L. T. 17; 2 P. L. R. 48 **58**

——— **s. 110**—*Appeal to Privy Council—Suit regarding nature of tenancy—Subject-matter, value of.*

Where the subject-matter of a suit is solely the nature of a tenancy, the value of which was Rs. 2,000, the fact that the tenancy affected property worth over Rs. 10,000 would not give a right of appeal to the Privy Council. **L** DHANNA MAL *v.* MOTI SAGAR, (1923) A. I. R. (L.) 28; 6 L. L. J. 78 **651**

——— **s. 110**, *applicability of—Suit for recovery of annuity—Value for purpose of appeal, how calculated.*

The value of the subject-matter in dispute for the purposes of an appeal to His Majesty in Council in a suit to recover an annuity is, under section 110 of the Civil Procedure Code, the annuity which is sought to be recovered, not the value of the property upon which that annuity is charged. **P C** ABID HUSAIN *v.* AHMAD HUSAIN 18 L. W. 146; (1923) A. I. R. (P. C.) 102; 26 O. C. 216; 45 M. L. J. 253; (1923) M. W. N. 300; 33 M. L. T. 232; 10 O. L. J. 288; 28 C. W. N. 289, 9 O. & A. L. R. 484 **532**

——— **s. 110**—*Application for leave to appeal to His Majesty in Council—Suit by Hindu widow—Plaintiff adopting son pendente lite—Son not brought on record—Substantial question of law.*

In a suit by a Hindu widow in possession of her husband's estate the defendants contended that the suit was not maintainable because a previous suit commenced by the predecessors-in-interest of the plaintiff had abated under O XXII, r. 9 of the Civil Procedure Code. It was also urged that as the plaintiff had, during the pendency of the suit, adopted a son it was incumbent upon her to bring upon the record as plaintiff the name of the minor boy she had adopted. Both these contentions were overruled and the suit was eventually decreed by the High Court. The defendant then applied for leave to appeal to His Majesty in Council:

Held, that neither of the questions raised was a substantial question of law within the meaning of section 110, Civil Procedure Code, and leave could not, therefore, be granted. **A** BU ALI KHAN *v.* SUJAN KAUR, 21 A. L. J. 665; (1924) A. I. R. (A.) 66 **100**

——— **s. 110**—*Decree modified on review—Application for leave to appeal to His Majesty in Council—Limitation*, terminus a quo—*Subject-matter of suit land assessed to revenue—Value, how calculated.*

Where the High Court reviews and modifies a decree passed by itself the period of limitation for an application for leave to appeal to His Majesty in Council begins to run from the date of the decree passed in review.

Joykishen v. *Ataoor Rohoman*, 6 C. 22; 5 Ind. Jur. 522; 6 C. L. R. 575; 3 Shome L. R. 197; 3 Ind. Dec. (N. S.) 15 (P. C.) and *Vadilal* v. *Fulchand*, 30 B. 56; 7 Bom. L. R. 664, relied on.

In determining whether the value of land in dispute is Rs. 10,000 or upwards, for the purpose of section 110, Civil Procedure Code, the rules under the Suits Valuation Act, in accordance with which land is valued for the purpose of jurisdiction in the Trial Court, do not apply. It is the market-value of the land which has to be ascertained for the purpose of that section. **L** NAWAZ ALI *v.* ALLU, 4 L. 185, 6 L. L. J. 14; (1924) A. I. R. (L.) 82 **520**

——— **ss. 111, 115**—*Madras High Court—Letters Patent (Mad.), cls. 39, 44—Government of India Act*, 1915 (5 & 6 Geo. V, C. (1), *s.* 107—*Single Judge, order of, in revision, whether appealable to Privy Council.*

Under section 111 (*a*) of the Code of Civil Procedure, read with clause 44 of the Letters Patent of the Madras High Court, no appeal lies to the Privy Council against an order of a Single Judge of the High Court passed in revision under section 115 of the Civil Procedure Code and section 107 of the Government of India Act, notwithstanding that such an order is a "final order" within the meaning of clause 39 of the Letters Patent. **M** SATYANARAYANA VARAPRASADA *v.* VENKATA BHASYAKARLU, 18 L. W. 655; 46 M. 950; 46 M. L. J. 117 **604**

——— **s. 115**—*Appellate Court, finding of, that no compromise or arbitration—Revision—High Court, jurisdiction of, to interfere.*

Where an Appellate Court finds that there was no lawful agreement to refer the disputes between the parties to a suit to arbitration, or a compromise of the suit, and directs a trial of the suit, there is not such a decision of the case to warrant interference by the High Court under section 115 of the Civil Procedure Code. **B** THAKOREDAS TRIBHOVANDAS *v.* LALMUBHAI TRIBHOVANDAS, 25 BOM. L. R. 452; (1923) A. I. R. (B.) 401 **102**

——— **s. 115**—*Misconstruing evidence—Material irregularity.*

The misconstruing of evidence amounts to material irregularity and affords good ground for revision. **L** FIRM GOKAL MAL-RAMCHAND *v.* FIRM NATH MAL-GULZARI MAL, (1923) A. I. R. (L.) 431 **812**

Civil Procedure Code—1908—contd.

——— s. 115—*Suit cognizable by Small Cause Court—Trial by Court under its ordinary powers—No objection to jurisdiction, either in Trial or Appellate Court—Revision—High Court, whether will interfere.*

Where a suit cognizable by a Court of Small Causes is tried by a Munsif under his ordinary jurisdiction without objection to his jurisdiction, and the parties have had a full trial and an appeal to the District Judge without objection on the point of jurisdiction, the High Court will not interfere in revision.

Ram Lal v. *Kabul Singh*, 25 A. 135, A. W. N. (1902) 219, followed.

Suresh Chunder Maitra v. *Kristo Rangini Dasi*, 21 C. 249; 10 Ind. Dec. (N. S) 798, discussed and followed.

Ramasamy Chettiar v. *Orr*, 26 M. 176; 12 M. L. J. 264, *Kolitpara Seetapaty* v. *Kankipaty Subbayya*, 1 Ind. Cas. 543, 33 M. 323; 20 M. L. J. 718; 6 M. L. T. 121 and *Shankarbhai* v. *Somabhai*, 25 B. 417, 3 Bom. L. R. 129, distinguished. **N** KAMRUDDIN *v.* INDRANI, 1 P. N. L. R. 179, (1924) A. I. R. (N.) 1 **769**

——— ss 115, 151—*Application under s 151—Inherent powers of Court—Existence of circumstances to justify review—Interference in revision—High Court, discretion of.*

Where a Subordinate Judge entertained an application under section 151, Civil Procedure Code, and set aside a prior order of dismissal of suit and where the order on the said petition might have been passed on review of the prior order if the Judge had exercised his power under that chapter on review, the High Court will not in revision under section 115 of the Civil Procedure Code interfere with the order under section 15, especially if it is substantially just. **M** BRITO *v.* BRITO **888**

——— ss. 115, 151—*Inherent power, refusal to exercise—Discretion—Revision, when competent.*

The revisional powers of a High Court are exercisable only in those cases in which the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity.

Section 115 of the Civil Procedure Code applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it, and is not directed against conclusions of law or fact which do not involve the question of jurisdiction.

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. 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 will not, in revision, interfere with an order passed under section 151 of the Civil Procedure Code which, on the face of it, is not perverse or illegal.

Sham Parshad v. *Ram Chand*, 20 Ind. Cas. 203; 10 P. R. 1914; 273 P. L. R. 1913; 217 P. W. R. 1913; 25 P. W. R. 1914, followed.

Bholu v. *Ram Lal*, 60 Ind. Cas. 720; 2 L. 66; 3 U. P. L. R. (L.) 29, distinguished. **L** PUNJAB BANKING CO LTD. *v.* DHANPAT RAI, (1921) A. I. R. (L.) 506 **487**

——— s 115, O IX. r. 13—*Application to set aside ex parte decree—Error of law—Revision—High Court, power of, to interfere.*

In an application to set aside an *ex parte* decree the burden of proving want of knowledge of the decree within thirty days of the application lies on the applicant, and where a District Judge on appeal against an order refusing to set aside an *ex parte* decree misunderstands and misapplies the law he commits a material irregularity in the exercise of his jurisdiction within the meaning of section 115 of the Civil Procedure Code, and his order is liable to be set aside on revision.

Manohar Lal v. *Sadiqa Begam*, 37 Ind Cas. 202; 101 P. R. 1916; 202 P. W. R. 1916, *Fazal* v. *Hashmati*, 31 Ind Cas 914; 40 P. R. 1916; 133 P. W. R. 1916. *Sughru Mal-Harcharan Das* v. *Snam Lal-Gokal Chand*, 40 Ind Cas. 777; 146 P. W R. 1918, followed. **L** FIRM MAGHI MAL-KHARAITI RAM *v.* FIRM GOPI RAM-RAM CHAND **1020**

——— s 115 O. XXI. rr 89. 92 (2)—*Application to set aside sale—Notice to parties affected—Judgment debtor, whether necessary party—Notice, issue of—Limitation—Revision—Court acting under erroneous view of law—High Court, whether will interfere—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Negligence of judgment-debtor to take out notice, effect of.*

A Court is not competent to make any order upon an application made by a judgment-debtor under O. XXI, r. 89 until notice of such application has been given under r. 92 to all the persons affected thereby.

Although an application under O. XXI, r. 89, to deposit must be made within 30 days of the date of the sale, no limitation is prescribed for the issue of a notice under r. 92.

Ganesh Bab Naik v. *Vithal Vaman Mahalya*, 19 Ind. Cas. 475; 37 B. 387; 15 Bom. L. R. 244, relied on.

Sumitra Kuer v. *Damri Lal*, 62 Ind. Cas. 61; 2 P. L. T. 336, and *Ajiudin Ahamed* v. *Khoda Bux Kaundkar*, 50 Ind. Cas. 5, dissented from.

Where in the body of his application for deposit a judgment-debtor states the name and address of the auction-purchaser and asks that the sale be set aside on his depositing the decretal amount, that is a sufficient application to make the auction-purchaser a party, and as soon as the notice is issued upon him he becomes a party to the proceedings.

Where an Appellate Court confirms an execution sale upon an erroneous view of the law its deci-

sion is final and cannot be interfered with under section 115, Civil Procedure Code.

Fazal Rab v. *Mansur Ahmed*, 45 Ind. Cas. 773; 40 A. 425; 16 A. L. J. 433, relied on.

The powers of superintendence vested in a High Court by section 107 of the Government of India Act, will not be exercised lightly, and certainly not where a petitioner is guilty of negligence. **Pat** BIBI ZAINAB *v* PARAS NATH, 4 P. L. T. 491; 1 P. L. R. 361; 2 Pat. 800; (1924) A. I. R. (Pat.) 37 **430**

——— **s. 115, O. XXI rr. 100, 101**—*Execution of decree—Dispossession by decree-holder—Possession on one's own account—Person in joint possession*—Benami, *question of, whether can be gone into—Revision—Decision basis of jurisdiction.*

It cannot be said that a person who is in joint possession of land with a judgment-debtor is not in possession on his own account, within the meaning of r. 101 of O. XXI of the Civil Procedure Code.

Cooverji Hirji v. *Dewsey Bhoja*, 17 B. 718; 9 Ind. Dec. (N S.) 471, dissented from.

Radha Gobinda Missir v *Raghunath Missir*, 20 Ind. Cas. 253; 18 C. W. N. 695; 18 C. L. J. 138, relied on.

In dealing with an application under r. 100 of O. XXI of the Civil Procedure Code, the Court is not entitled to go into the question of *benami* in order to determine whether the applicant was in possession of the disputed property in his own right.

Where the decision of a Court is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it comes within the purview of section 115 of the Civil Procedure Code.

Dhanwanti Kuer v. *Sheo Shankar Lal*, 51 Ind. Cas. 873; 4 P. L. J. 340; (1921) Pat. 364, followed.

Where by a misconstruction of the provision of law the Court held that the petitioner was not entitled to maintain an application under O. XXI, r. 100 of the Civil Procedure Code:

Held, that the order was one declining jurisdiction and was, therefore, open to revision under section 115 of the Code. **Pat** RAM KISHUN SINGH *v.* DAMODAR PRASAD **656**

——— **s. 115, O. XXXIII, r. 1**—*Leave to sue as pauper, refusal of—Revision, whether lies—Contradiction between evidence and finding—Material irregularity—Valuation of pauper's property—Redemption suit by pauper—Equity of redemption, whether 'subject-matter' of suit.*

A High Court has power under s. 115 of the Civil Procedure Code to revise an order refusing to grant permission to sue as a pauper.

Kapildeo Singh v. *Ramrikha Singh*, 8 Ind. Cas. 484; 33 A. 237; 7 A. L. J. 1191, *Mahadeo Sahai* v. *Secretary of State for India*, 65 Ind Cas. 255; 44 A. 248; 20 A. L. J. 55; (1922) A. I. R. (A.) 1, dissented from.

Budhoo Lal v. *Mewa Ram*, 63 Ind. Cas. 15; 43 A. 514; 19 A. L. J. 558, *Chattarpal Singh* v. *Raja Ram*, 7 A. 661 p. 665

A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854, *Muhammad Husain* v. *Ajudhia Prasad*, 10 A. 467; A. W. N. (1888) 179; 6 Ind. Dec. (N. S.) 313, distinguished.

Debo Das v. *Mohunt Ram CharanDas*, 2 C. W. N. 474, *Gopal Chandra Neogy* v. *Bigoo Mistry*, 8 C. W. N. 70, relied upon.

A direct contradiction between the evidence and the finding of the Court is a material irregularity which would justify interference in revision.

Under O. XXXIII, r. 1 of the Civil Procedure Code the Court is concerned only with the value of the property in the alleged pauper's possession, not with his efforts to realize it; if the property could fetch more than a certain amount it does not matter in the least whether the alleged pauper tried to obtain it.

In a suit to redeem a mortgage of property of which the plaintiff is not in possession, the right to redeem which he asserts, is the subject-matter of the suit for the purposes of r. 1 of O. XXXIII of the Code and in deciding whether he is entitled to sue as a pauper or not the value of that right must not be included in the means of which he is possessed. **N** ACHALSINGH *v.* SETH JIWANDAS, 19 N. L. R. 165 **993**

——— **s. 141, O. IX, rr 8, 9, O. XLIII, r. 1 (c)**—*Suit dismissed in default—Application for restoration—Dismissal in default—Appeal—Procedure.*

The procedure provided in the Civil Procedure Code in regard to suits must be followed so far as it can be made applicable, in all proceedings arising out of an application for the restoration of a suit dismissed in default of the plaintiff.

Manakji v. *Surajmal*, 10 Ind. Cas. 705; 7 N. L. R. 32, followed.

An appeal lies from an order dismissing an application for restoring to file an application for the restoration of a suit dismissed in default of the plaintiff. **N** KALICHARAN *v* RATANSINGH, 19 N. L. R. 119; (1923) A. I. R. (N.) 293 **589**

——— **s. 144**, *scope of—Auction-purchaser not decree-holder—Restitution, whether allowed—Judgment-debtor having no saleable interest—Sale, whether valid—Suit for recovery of possession, whether maintainable.*

Section 144, Civil Procedure Code, allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed on appeal. It does not allow restitution to be made against a third party, and does not apply where the auction-purchaser is not the decree-holder.

One *P.* had a money decree against *A.* in execution of which he attached certain property *A.* had died before the attachment and his daughter-in-law *L.* was impleaded as his legal representative. She objected to the attachment and the objection was eventually upheld by the High Court. Meanwhile the property had been sold by auction in execution of the decree and purchased by the defendant. *L.* then sued for recovery of possession:

Civil Procedure Code—1908—contd.

Held, (1) that the suit was not barred by section 144, Civil Procedure Code, as the plaintiff was no party to the decree;

(2) that the original judgment-debtor had no saleable interest in the property and consequently it was immaterial whether the decree was subsisting or not because the Court holding the sale had no jurisdiction to sell the property;

(3) that the plaintiff was entitled to recover the property but was liable to refund the surplus sale-proceeds which she had withdrawn from the Court. A BALWANT SINGH *v.* LAIQA BEGAM **238**

——— **ss 144, 151**—*Restoration, power of, extent of—Receiver, appointment of—Dismissal of suit—Court, power of, to pass necessary orders.*

The power of a Court to grant restitution is not confined to cases covered by the provisions of section 144 of the Civil Procedure Code, but, under that section, read with section 151, of the Code it may be extended to other cases.

A Court which appoints a Receiver has authority to pass orders necessary for winding up his charge, even after the dismissal of the suit.

Administrator-General of Bengal v. *Prem Lall Mullick*, 22 C. 1011 at p. 1012; 22 I. A. 203; 5 M. L. J. 157; 6 Sar. P. C. J. 660; 11 Ind. Dec. (N. S.) 672 (P. C.), relied on. L GANGA RAM *v.* NATHA RAM **858**

——— **s. 145, O. XXI, r. 40**—*Arrest of judgment-debtor—Execution of security-bond—Non-appearance of judgment-debtor on day fixed—Application by decree-holder for execution of decree against sureties—Amendment adding prayer for production of judgment-debtor—Waiver—Legality of order of arrest.*

In execution of a decree the judgment-debtor was arrested. He then paid a portion of the decree-debt and as regards the balance put in an application under O. XXI, r. 40, Civil Procedure Code, that he might be released from custody on security being given for re-appearance. A security-bond was executed by which the sureties undertook to produce the judgment-debtor on a day fixed, in default they were to be liable for the balance under the decree. The original execution application was thereafter treated as closed. On the day fixed, however, the judgment-debtor was not produced. The decree-holder thereupon applied by petition for warrants against the judgment-debtor and the sureties for the balance under the decree; but under the direction of the Court the decree-holder amended the relief into one directing the sureties to produce the judgment-debtor at a future date and in default to issue warrants against the sureties, stating at the same time that the sureties had committed default in producing the judgment-debtor and had rendered themselves liable for the decretal amount. The Court ordered the arrest of the sureties on the petition under section 145, Civil Procedure Code. On the application of the sureties thereupon to cancel the said order;

Held, (1) that the fact that the original execution petition was treated as closed did not put an end to the liability of the sureties under a later application;

Lalji Sahoy v. *Odoya Sunderi Mitra*, 14 C. 757; 7 Ind. Dec. (N. S.) 502, not followed.

(2) that the application for execution of the decree by the decree-holder by production of the judgment-debtor on a later date did not constitute a waiver or condonation of the right to enforce the security-bond already broken through non-production of the debtor on the previous hearing day;

(3) that the terms of the surety-bond for production of the judgment-debtor on a particular day, not having been complied with, the sureties had rendered themselves liable for the decretal amount and the order of execution against them as finally passed under section 145, Civil Procedure Code, was not open to any legal objection. M NAGIER *v.* KRISHNA CHETTIAR, (1923) M. W. N. 770 **830**

——— **s. 149**—*Omission to pay requisite Court-fee deliberate—Extension of time, whether should be granted*

Where insufficient Court-fees have been paid, and there is no *bona fide* mistake, but the non-payment of the full amount is deliberate, the party in default is not entitled to any grant of time, under section 149 of the Civil Procedure Code, to make up the deficiency. L RAMJI LAL *v.* SHIBBA, (1923) A. I. R. (L.) 309 **667**

——— **s. 151, O. XLI, rr. 23 & 25 Sch II. para. 15**—*Arbitration—Award, set aside on ground of unreasonableness—Remand, proper order of—Inherent power of remand, when can be exercised.*

The fact that an award does not seem to be reasonable is not a valid ground for setting it aside under the provisions of paragraph 15, Schedule II, Civil Procedure Code.

On the application of the parties, a suit was referred to three arbitrators and it was agreed that the award of the majority would be binding. One of the arbitrators disagreed with the award made by the other two and the Trial Court set it aside on the ground that it did not seem to be reasonable. The Appellate Court, holding that the question of the validity of the award had not been determined at all, remanded the case under O. XLI, r. 23 of the Civil Procedure Code. The plaintiffs appealed against this order:

Held, that the setting aside of the award by the Trial Court was not a decision on a preliminary point and the remand should have been under r. 25 of O. XLI of the Civil Procedure Code.

Krishnan Chetti v. *Muthu Palandi*, 22 M. 172; 8 Ind. Dec. (N. S.) 122, *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Limited*, 41 Ind. Cas. 598, 44 C. 929; 21 C. W. N. 877, 26 C. L. J. 40, distinguished.

Section 151 of the Civil Procedure Code can only be invoked in the absence of a perfectly clear provision of law applicable to the case which is before the Court. Fesh CHANDAN *v* BIBI **198**

——— **s. 153, O. I. r. 10**—*Appeal filed against deceased respondent—Procedure—Application to amend cause title by substituting names of legal representatives of deceased, maintainability of.*

Civil Procedure Code—1908 —contd.

Where an appeal is filed by mistake against a respondent who had died prior to the presentation of the appeal, the proper procedure to adopt is to file another appeal and to have the delay, due to the mistake committed in good faith, excused.

An application to amend the cause title of the memorandum of appeal by substituting for the name of the deceased respondent, the names of his legal representative is unsustainable and does not lie. Neither O. I, r. 10 of the Civil Procedure Code nor section 153 of the Code is applicable to such a case.

No such proceeding as an appeal against a party who is dead is authorised by the Code of Civil Procedure. **M** GOVINDU KAVIRAJ PUROHITO *v.* GAURANGA SAW, (1923)M W. N. 408; 18 L. W. 54; 45 M. L. J 231, (1924) A I. R. (M) 56 **739**

——— **O I, r. 1**, *when not applicable to appeals —Appeal, joint when may be preferred.*

The rule laid down in O. I, r. 1 of the Civil Procedure Code is intended to enable persons aggrieved by the same act or having the same right to relief to join in one suit instead of bringing separate suits, and is also applicable to appeals.

Plaintiff sued defendants Nos. 1 and 2 for the recovery of a certain amount due on a pro note of which he claimed to be the holder in due course and which defendant No. 1 had executed in favour of defendant No. 2 and which the latter had transferred to the plaintiff. The suit was dismissed as against defendant No. 1 but was decreed against defendant No. 2. Plaintiff and defendant No 2 filed a joint appeal claiming that the suit should be decreed against defendant No. 1 also:

Held, that, having regard to the provisions of O. I, r. 1 of the Civil Procedure Code, it was open to the plaintiff and defendant No. 2 to prefer a joint appeal against defendant No. 1 for the same relief, inasmuch as it involved a common question, *viz.*, whether defendant No. 1 could or could not be held liable for the plaintiff's claim **L** BULAQI MAL *v.* ABDUL RAHIM, (1923) A. I. R. (L.) 638 **550**

——— **O. II, r. 2**—*Suit for recovery of possession from mortgagees - Subsequent suit for redemption, whether barred - Cause of action.*

Where a suit against mortgagees for possession on the ground that the mortgagees were trespassers and the mortgage was not binding on the plaintiff by reason of absence of consideration and legal necessity is dismissed, a subsequent suit to redeem the property mortgaged is not barred by O II, r 2, Civil Procedure Code, as the cause of action in the two suits is different.

Barkhurdar v. *Chhatta Mal*, 48 Ind. Cas. 798; 119 P. R. 1918, distinguished. *Fa* JAIMAL *v.* GANESHI MAL, 4 L. 187, 5 L. L. J. 266 **528**

——— **O. II. rr. 3, 4, 5, 6 O VI rr 16, 17**—*Amendment of plaint—Joinder of several causes of action—Alternative claim, whether necessarily prejudices trial—Procedural law, object of.*

Civil Procedure Code—1908—contd.

It cannot be laid down as a general principle in all cases that an alternative claim necessarily prejudices, embarrasses or delays the fair trial of a case.

The whole object of the procedural law is to prevent multiplicity of suits and a plaintiff should not be compelled to institute a second suit if he can obtain appropriate relief in the first suit without in any way embarrassing the defendant.

Owen v. *Morgan*, (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 705, relied on.

Plaintiffs sued for rescission of an agreement for sale and for an order upon the defendants to refund the sum of money paid by them to the defendants towards the performance of the agreement. Subsequently, the plaintiffs applied for amendment of the plaint asking for a decree for specific performance of the agreement in the event of the Court finding it impossible to give them a decree for its rescission.

Held, that the causes of action could be conveniently tried or disposed of together if the application for amendment of the plaint was allowed and the alternative relief would not prejudice, embarras or delay the fair trial of the case. **Fat** CHANDRIKA PRASAD *v.* HIRA LAL, (1923) Pat. 357; 5 P. L. T. 40, 2 P. L. R. 52 **433**

——— **O. VI, r. 4**—*Pleadings—Fraud—Particulars*

A surrender like any other act in order to be operative must be *bona fide*, and if it is tainted with fraud, it confers no right upon the landlord and need not be avoided.

Where fraud is relied upon it must be expressly pleaded: positive facts and circumstances must be set out clearly giving rise to the application of fraud. **Fat** RAM URAON *v.* DOMAN KALAL, 4 P. L. T. 562, 2 Pat. 898, (1924) A. I. R. (Pat.) 100 **209**

——— **O. VI, r. 14**—*Plaint signed on instructions from plaintiff, validity of.*

Where a plaint is signed by a third person on instructions from and on behalf of the real and ostensible plaintiff, it must be regarded as having been signed by a person duly authorised within the meaning of O. VI, r. 14 of the Civil Procedure Code. **L** ALI AHMAD *v.* ABDUL GHANI **880**

——— **O. IX, r. 13**—*Decree*, ex parte, *application to set aside, dismissal of—Suit to set aside decree on ground of fraud, whether maintainable—Non-service of summons, whether can be proved —Fraud, when presumed.*

The fact that the plaintiff applied and failed to have an *ex parte* decree set aside under O. IX, r. 13 of the Civil Procedure Code does not prevent him from maintaining an action for setting aside the decree on the ground of fraud, and incidentally proving, as an index of the fraud, that summons was not served on him in the previous suit.

Radha Raman Shaha v *Pran Nath Roy*, 28 C. 475; 5 C. W. N. 757, followed.

Jangal Chaudhary v. *Lalji Paslan*, 60 **Ind.** Cas. 124; 6 P. L. J. 1; 1 P. L. T. 735; (1921) **Pat.** 3; 3 U. P. L. R. (Pat.) 1, discussed

Civil Procedure Code—1908—contd.

The failure to serve summons on a defendant may be accidental or deliberate; and where the Court finds as a fact, that there was no foundation for the suit itself, it is open to the Court to hold that the suppression of the summons was deliberate with the object of snatching a decree from the Court in the absence of the defendant. **Fat** JANKI KUER *v.* THAKUR RAI (1923) Pat. 336, 5 P. L. T. 37 **343**

——— **O. XVI, r 1**—*Witnesses, summoning of —Court, duty of.*

Under O. XVI, r. 1 of the Civil Procedure Code a party has an absolute right to summon witnesses and, so long as he pays the necessary expenses, to insist that their attendance shall be enforced. It does not matter that a party had himself originally undertaken to bring the witnesses and has failed to do so, nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal of the suit. The Court may in either of those cases refuse to adjourn the hearing for the attendance of the witnesses, but it has no power to refuse to issue summonses. The only case in which the Court has power to refuse to issue summonses is, where the application is not made *bona fide* or where in the exercise of its inherent powers to prevent the abuse of its own process it is necessary to refuse to issue the summons. **L** PRITAM SINGH *v.* SOBHA SINGH **666**

——— **O. XVII, r. 2, O IX r. 13**, *scope of— Defendant entering appearance—Prayer for adjournment—Case decided on merits*—Ex parte *proceedings.*

On a proper interpretation of O. XVII, r. 2 of the Civil Procedure Code a Court cannot pass a judgment on the merits under that rule under cover of the words "make such other order as it thinks fit."

Phul Koer v. *Hachmat Ullah Khan*, 29 Ind. Cas. 553; 37 A. 460; 13 A. L. J. 679, followed.

There can, strictly speaking, be no *ex parte* proceedings against any defendant who has entered an appearance and filed a defence.

In a suit for possession of land, all the defendants combined to file a written statement, issues were framed and a date fixed for the evidence of the parties. When the case came on for hearing only one defendant, *R*, was present who asked for an adjournment. The Court made an order that if *R.* would deposit a certain sum of money within two hours, the adjournment would be allowed. The money was not paid. Then, after taking the plaintiff's evidence, the Court decreed his suit. Another defendant, *D*, then applied under O. IX, r. 13, Civil Procedure Code, to have the decree set aside:

Held, that, although strictly speaking there could be no *ex parte* proceedings against a defendant who has entered an appearance and filed a defence, yet under the circumstances as the Court could not have delivered a judgment under O. XVII, r. 2 of the Civil Procedure Code, it must be deemed to have taken action under O. IX of the Code and its judgment and decree should be treated as *ex parte* proceedings liable to be set aside under O. IX, r. 13 of the Code. **A** RAM CHARAN LAL *v* RAGHUBIR SINGH, 21 A. L. J. 495; (1923) A. I. R. (A.) 551; 45 A. 618 **387**

Civil Procedure Code—1908—contd.

——— **O. XVII, r 3**—*Order directing plaintiff to furnish defendant with documentary evidence in certain language—Jurisdiction—Failure to comply with order—Dismissal of suit, whether justified.*

There is no statutory provision which empowers a Court to compel a plaintiff to supply the defendant with a copy of his documentary evidence in any specific language. An order, therefore, directing a plaintiff to furnish the defendant with copies of entries in his account-books in the Hindi language is without jurisdiction, and the dismissal of the suit under r 3 of O. XVII of the Civil Procedure Code for non-compliance with such an order is not justified. **Pat** DEBI LAL *v.* JAI PARKASH NARAIN SINGH **1**

——— **O. XX, r. 10**—*Suit for value of grain agreed to be given for maintenance—Decree, form of*

Where in default of an agreement to deliver a certain quantity of grain as maintenance, a suit is brought to recover the money value of the grain, it is not incumbent on the Court under O. XX, r. 10 to decree the grain itself and that only on failure of delivery of grain should a cash payment be enforced. **N** BHONAJEE *v.* SARASWATI **833**

——— **O. XXI, r. 2**—*Limitation Act (IX of* 1908), *s. 20—Execution of decree—Payment out of Court—Certification by decree-holder, form of —Limitation, extension of.*

There is no particular form under O. XXI, r. 2 of the Civil Procedure Code in which a decree-holder must certify a payment made to him out of Court, nor is there anything prescribed in the rule as to the time within which and the manner in which the decree-holder must certify a payment.

If the part payment of a decree amount is entered in an execution petition presented within three years from the date of such alleged payment, it amounts, if the fact of payment is proved, to certificate of payment under O. XXI, r. 2 of the Civil Procedure Code, and will operate to save limitation under section 20 of the Limitation Act. **L** FATTU *v.* NANAK CHAND **1029**

——— **O. XXI, rr. 2, 16**—*Transferee of decree— Application for execution—Judgment-debtor, whether can plead satisfaction—Procedure.*

Whether attachment proceedings are already commenced at the instance of a decree-holder or not, an assignee or transferee of the decree cannot continue any proceedings previously commenced, nor can he institute any fresh proceedings for the execution of the decree unless he makes an application under O. XXI, r. 16 of the Civil Procedure Code to the Court which passed the decree. Such an application is made to the Court as a Court which passed the decree and not as a Court which is executing the decree; and it is open to the judgment-debtor to plead that the claim has already been satisfied, even although the formalities

prescribed by O. XXI, r. 2, sub-rules (1), (2) of the Code have not been followed.

Bayyana Ramayya v. *Nidamarthi Krishnamurthi*, 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133 and *Ponnuswami Nadar* v. *Letchmanan Chettiar*, 12 Ind. Cas. 657; 35 M. 659; 10 M. L. T. 442; (1911) 2 M. W. N. 568; 22 M. L. J. 172, followed. **B** RAGHUNATH v. GANGA RAM 25 Bom. L. R. 474, 47 B. 614; (1923) A. I. R. (B.) 180. **893**

——— **O. XXI, rr 22 92 O. XXII, r. 4** — *Execution of decree —Death of judgment-debtor —Legal representative not brought on record— Sale, whether nullity—Notice, absence of— Irregularity—Hindu Law—Widow—Alienation —Inadequacy of price—Sale to pay off usufructuary mortgage.*

In execution of a decree, certain properties were attached and ordered to be sold. But before the sale actually took place, the judgment debtor died. The sale went on and was completed without any one being added to the record as the legal representative of the deceased judgment-debtor. No application under rr. 89, 90 or 91 of O. XXI of the Civil Procedure Code was made and the sale was confirmed under r. 92 and a sale certificate issued to the auction-purchaser. The legal representative of the deceased judgment-debtor did not challenge the validity of the sale. In a suit by the reversioner of the deceased to declare the sale a nullity on the ground that at the time of sale the estate was not represented by any one:

Held, that the sale could not be regarded as a nullity as the failure to add the legal representative of the deceased judgment-debtor was only an irregularity, which, if substantial injury had been caused thereby, would only entitle the party affected to institute proceedings to set aside the sale within the period prescribed by law.

Per *Spencer, J.*—If an order is passed by an Executing Court against a party without notice being given to him of the application which gave rise to the proceedings, the party behind whose back such proceedings are taken will not be bound by the order.

Where process is issued without the notice which O. XXI, r. 22 of the Civil Procedure Code prescribes in cases where the judgment-debtor is dead or the decree is more than one year old, the want of notice might constitute a material irregularity entitling a person whose interests are affected to apply under O. XXI, r. 90 or to bring a suit to have the sale set aside. But where the decree-holder has done all that the law requires him to do and the judgment-debtor or one of several judgment-debtors happens to die during the course of the execution of the sale warrant, the sale cannot be invalidated by the accident of the judgment-debtor's death before the sale is completed.

The law only prescribes the issue of notice to judgment-debtors or their legal representatives at the commencement of execution proceedings, and the latter cannot claim as a matter of right to have fresh notice if their representation of the deceased's estate commences during the progress of the carrying out of the processes of the Court nor are they justified in treating such processes as invalid for want of jurisdiction on the part of the Court and its officers.

Order XXII. r. 4 of the Civil Procedure Code is inapplicable to the execution proceedings.

Sheo Prasad v. *Hira Lal*, 12 A. 440; A. W. N. (1890) 103; 6 Ind. Dec (N. S.) 1026, *Bepin Behari Bera* v *Shashi Bhushan Datta*, 22 Ind Cas. 95, 18 C. W. N. 766; 18 C. L. J. 628, *Malkarjun* v *Narhari*, 25 B. 337; 5 C. W. N. 10; 10 M. L. J 368; 27 I. A. 216; 7 Sar P. C. J. 739; 2 Bom. L. R. 927 (P. C.) and *Jagadish Bhattacharjee* v. *Rama Sundari Dasya*, 51 Ind Cas. 972; 23 C. W. N 608; 29 C. L. J 411, followed.

Biswantapa v. *Ranu*, 9 B. 86, 5 Ind. Dec. (N. S.) 58, *Bivyakka* v. *Fakira*, 12 M. 211; 4 Ind. Dec. (N. S.) 497, *Narayana Kothan* v. *Kalianasundaram Pillai*, 19 M. 219; 6 Ind. Dec. (N. S.) 858, *Khairajmal* v. *Daim*, 32 C. 296 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A 23; 8 Sar. P. C. J. 734 (P. C.), *Somandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan*, 23 Ind. Cas. 251; 26 M. L. J. 267, distinguished.

Ramasami Ayyangar v. *Bagirathi Ammal*, 6 M. 180; 2 Ind. Dec. (N. S.) 404, *Groves* v. *Administrator-General of Bengal*, 22 M 119; 8 M. L. J. 288; 8 Ind. Dec. (N. S.) 84, *Somandan Karkat Edathil Rayarappan Nambiar* v *Malikandi Aketh Mayan*, 23 Ind. Cas. 251; 26 M. L. J. 267, *Raghunathaswami Iyengar* v. *Gopauj Rao*, 08 Ind. Cas. 667; 41 M. L. J 547; (1921) M. W. N. 732; 15 L. W. 123; (1922) A. I. R. (M.) 507, not followed.

Abi v. *Dhondu Pai*, 19 B. 276; 10 Ind. Dec. (N. S.) 187, *Gopal Chunder* v. *Gunamoni Dasi*, 20 C 570; 10 Ind. Dec. (N. S.) 251, *Premmoyi Choudhrani* v *Preonath Dhur*, 23 C. 636; 12 Ind. Dec. (N. S.) 423, considered.

A sale by a Hindu widow of certain items of property which are not encumbered in order to pay off a usufructuary mortgage of certain other items included in the sale cannot be justified on the ground of necessity.

A sale should not be revised long after it has taken place on a mere estimate as to what price the property sold ought to have fetched. **M** DORAISAMI v. CHIDAMBARAM PILLAI, 45 M. L. J. 433; 18 L. W. 577; 33 M. L. T. 25; (1923) M. W. N. 817 **46**

——— **O. XXI, r. 32**—*Restitution of conjugal right—Direction in decree that wife shall not be sent to Jail—Discretion, when to be exercised.*

The tendency of modern legislation is against sending women to Jail in civil matters, but when it is found that a woman against whom a decree for restitution of conjugal rights has been passed has contracted a second marriage and is living with her second husband, the discretion vested in the Court under O. XXI, r. 32 of the Civil Procedure Code should not be exercised in her favour. **L** JAGAN NATH v. BESANT RAM, (1923) A. I. R. (L.) 595 **24**

Civil Procedure Code—1908—contd.

——— **O XXI, rr. 54, 90**—*Execution sale—Inquiry into validity of proclamation before sale—Suit to set aside sale—Res judicata—Inam shrotriem land whether land paying revenue to Government—"Revenue," meaning of.*

The Code of Civil Procedure does not provide for any inquiry into the validity of the publication of a sale until after the sale has been held. If the Court does hold such an inquiry it must be regarded as having done so for its own satisfaction.

Where an inquiry is not prescribed by law but is undertaken by the Court only to decide on a collateral matter there is no security for the Court's application of the standard of proof appropriate to a judicial proceeding or for its having acted judicially and for its decision being a judgment.

The policy of the law is to postpone the consideration of the objections to the publication and conduct of a sale until after it has been held, when the essential issue whether loss has been caused can also be tried

Where, after a proclamation of sale, an application was made by the judgment-debtor to postpone the sale and the Court which ordered the sale to proceed, held an inquiry and decided that the publication of the sale proclamation was proper:

Held, that the order was not a sufficient answer to, nor did it operate as *res judicata* in, a later application under O. XXI, r. 90 of the Civil Procedure Code to set aside the Court sale on the ground of fraud and material irregularity in publishing and conducting the sale

A *shrotriem* village paying quit-rent or *jodi* to Government is land paying "revenue" to Government within the meaning of O. XXI, r. 54 of the Civil Procedure Code, and where such a village is brought to sale in Court auction, notice of sale ought to be affixed in the Collector's Office under O. XXI, r. 54, read with r. 67, of the Code.

Per *Devadoss, J*—The word "revenue" in r. 54 of O. XXI of the Civil Procedure Code is used in its ordinary and natural sense as meaning, the share of the produce of the land which the Government expects to get. **M** PAMIDIMARRI GNAMMA *v.* KETTIREDDI KRISHNA REDDI, 45 M. L. J. 268, 46 M. 736; (1923) M. W. N. 463 **869**

——— **O. XXI, r. 57**—*Execution of decree—Proceeding struck off at request of decree-holder—Attachment, whether continues—"Default," meaning of.*

The word "default" used in O. XXI, r. 57 of the Civil Procedure Code, is not restricted to default of appearance, but applies also to a failure to do what the decree holder is bound to do, that is, to go on with his application and have the property sold.

Where an execution proceeding is struck off at the request of the decree-holder, this amounts to a dismissal for default of the decree-holder within the meaning of O. XXI, r. 57 of the Civil Procedure Code and the attachment ceases to exist.

Civil Procedure Code—1908—contd.

Fateh Din v. *Qutab Din*, 67 Ind Cas. 543; 3 L. 7; (1922) A. L. R. (L.) 108, *Dildar Husain* v. *Sheo Narain*, 49 Ind. Cas. 113; 41 A. 157; 17 A. L. J. 52, relied on. **L** LAKHPAT RAI *v.* MAYYA MAL **824**

——— **O. XXI, r 63**—*Attachment, removal of—Fresh attachment.*

Where an order is made for the removal of an attachment on certain property, so long as that order is not set aside, a fresh application for attachment of the same property is not maintainable, even though the order removing the attachment was made *ex parte*, and the proceedings were irregular. **L B** MA THEIN TIN *v.* MA HTOO, 2 Bur. L. J. 60, (1923) A. I. R. (R.) 150 **322**

——— **O XXI, r 63**—*Sale, stay of, effect of—Fresh proclamation, necessity of—Abuse of jurisdiction.*

Where a Court stays a sale pending further orders, such stay does not amount to an adjournment of the sale, so as to dispense with the necessity of issuing a fresh proclamation of a sale, and if the Court orders the sale to take place without issuing a fresh proclamation, its action amounts to an abuse of jurisdiction. **L B** ABDUL HAKEIM *v.* NGA NI GRI, 2 Bur. L. J. 54; (1923) A. I. R. (R.) 151 **343**

——— **O. XXI, rr. 68, 90**—*Execution of decree—Sale—Substantial injury not established—Sale, when can be set aside at instance of judgment-debtor.*

A sale in execution of a decree cannot be set aside at the instance of the judgment-debtor, unless it can be shown that he has suffered material or substantial injury, even where it is established that there were irregularities or fraud in the publication and conduct of the sale. **Pat** RAJKANS SAHAY *v.* ASKARAN BAID, 1 Pat. 254, (1922) A. I. R. (Pat.) 556 **185**

——— **O. XXI, rr 66, 90**—*Sale proclamation—Statement as to revenue essential—Omission, effect of—Material loss—Burden of proof.*

Under O. XXI, r. 66, of the Civil Procedure Code a proclamation of sale should contain a statement as to the revenue assessed upon the estate to be sold. It is a material matter and its omission is the omission of a matter which would enable the judgment-debtor to base an application for setting aside the sale if he could comply with the other condition that the Code provides.

Macnaghten v. *Mahabir Pershad Singh*, 10 I. A. 25; 9 C. 636; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.), followed.

Where a judgment-debtor applies to have a sale in execution of a decree set aside it is for him to establish before the Court that he has suffered damage and if he fails to produce evidence on the point and does not ask for any opportunity to do so, it is too late in an appeal to the Privy Council for him to ask for such an opportunity on the ground that had he had such an opportunity he might have been able to satisfy the Court that he had suffered material

damage. P. C. BALIRAM SINGH *v.* NARSINGDAS PRAYAG DAS MOHTA. 18 L. W. 137; (1923) A. I. R. (P. C.) 93; 45 M. L. J. 403 546

——— O. XXI, r. 90—*Execution of decree—Sale, application to set aside—Objection—Proof—Court, duty of.*

An execution sale may be set aside under O. XXI, r. 90 of the Civil Procedure Code, on the ground of a material irregularity or fraud in publishing or conducting it, but the irregularity or fraud must be proved, and the Court must also be satisfied that the person applying to have the sale set aside has sustained substantial injury by reason of such irregularity or fraud.

An Execution Court is not competent to set aside a sale merely upon objection made to the sale, without any enquiry into the objection L ANUP CHAND *v.* KAWAL KAUR 784

——— O. XXI, rr. 90, 92, O. XXII, r. 4—*—Execution of decree—Sale, application to set aside—Death of decree-holder—Notice to legal representatives, whether necessary.*

Although the provisions of the Civil Procedure Code relating to substitution on the death of a party are not applicable to execution proceedings, an execution sale cannot be set aside unless notice of the application has been given to all persons affected thereby, as required by the proviso to clause (*a*) of r. 92 of O. XXI of the Code.

During the pendency of an application by a judgment-debtor to set aside an execution sale one of the decree-holder auction-purchasers died and his legal representatives were not properly substituted in his place and no notice was served upon them. Eventually the sale was set aside:

Held, that, in the present case, no notice having been given to the legal representatives of the deceased decree-holder auction-purchaser, the order setting aside the sale was liable to be set aside.

Jogendra Chandra Ray v. *Shyam Das*, 1 Ind. Cas. 108; 9 C. L. J. 271; 30 C. 543, *Jagat Tarini Dasi* v. *Rakhal Chandra Tewary*, 3 Ind. Cas. 324; 10 C. L. J. 390; 14 C. W. N. 752, distinguished. Pat RAMANAND SINHA *v.* BAJIT JHA 863

——— O. XXI, r. 101, *order under—Suit regarding title to property pending on the date of order—Separate suit, necessity of.*

An order under O. XXI, r. 101 of the Civil Procedure Code against a person, unless contested by a suit filed within the time prescribed, becomes conclusive against him, and the fact that there was already a suit pending regarding the title to the property would not absolve him from the obligation of filing a suit under r. 103 if he intended to contest the order under r. 101.

Pecla Yarakayya v. *Kanumuri Venkata Krishnamraju*, 41 Ind. Cas. 84; 6 L. W. 281; 22 M. L. T. 232; (1917) M. W. N. 721, followed.

The doctrine of *lis pendens* has no application to a declaration by Court relating to possession of property under r. 101. Such a declaration is not a transfer of the right. M KUMARAM UNI ACHAN *v.* KUNHIKRISHNAN NAIR, 19 L. W. 384 834

——— O. XXII, r. 4—*Appeal—Death of one of several respondents—Application for bringing on record legal representatives not made in time—Abatement—Test.*

In order to determine whether an appeal abates if the representative of one of the respondents is not brought on record, the test is "could the suit *ab initio* have been instituted and prosecuted with the deceased being left out."

Hadu v. *Lala*, 21 Ind. Cas. 951, 41 P. R. 1915; 15 P. L. R. 1914; 10 P. W. R. 1914; relied upon. N KATANLAL *v.* JAIDEO 820

——— O. XXII, r. 4—*Death of defendant—Application to bring legal representatives on record, by whom to be made—Withdrawal of suit—Costs.*

Under O. XXII, r. 4 of the Civil Procedure Code on the death of a defendant, the application to bring his legal representatives on the record is not confined to one made by the plaintiff only. The legal representatives of the deceased defendant are entitled on their application to be brought on the record and, if the plaintiff desires to withdraw the suit as against the defendant, to get the costs of the suit. M KUPPUSAMY CHETTY *v.* SINGARAVELU CHETTY, 18 L. W. 69; 45 M. L. J. 233; (1923) A. I. R. (M.) 679; (1923) M. W. N. 867 848

——— O. XXII, r. 4—*Death of one of several defendants—Decree passed against all defendants—Surviving defendants, whether can object to decree—Abatement of suit.*

It is not necessary that in order to enable the legal representatives of a deceased defendant to take the objection that a decree passed against the said defendant is a nullity on the ground that the defendant was dead at the time when the decree was made, the deceased defendant should have been the sole defendant in the suit. Such an objection can be taken by any of the surviving defendants.

Imam-ud-din v. *Sadarat Rai*, 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228, followed.

In the case of a sale in execution of an *ex parte* decree, one of the judgment-debtors objected to the sale on the ground that two of the judgment-debtors had died long before the institution of the suit and, therefore, the decree was a nullity:

Held, (1) that the judgment-debtor was competent to raise the objection that the decree was a nullity on the ground that it was made against two dead persons;

(2) that, however, the judgment-debtor could not succeed unless he could show that the decree was incapable of execution against him and the other surviving judgment-debtors;

(3) that the property having been purchased by a third party, the sale could not be set aside. Pat BIJAYA JAGDEO NATH SAH DEO *v.* PARTAP UDAINATH SAH DEO, (1923). Pat. 3, 4 321

——— O. XXII, rr. 4, 10—*Application for substitution, whether can be made in appeal—Assignment of interest pending suit—Limitation for substitution application.*

Civil Procedure Code—1908—contd.

An application under O. XXII, r. 10 of the Civil Procedure Code can be made on appeal.

Three months' limitation prescribed for bringing on the record the legal representatives of a deceased party does not apply to a case of assignment or devolution of interest pending the suit. C RAJANI KANTA ROY *v.* JYOTI PROSAD SINGH DEO, 27 C. W. N. 710; (1924) A. I. R. (C.) 90 **255**

——— **O. XXII, r. 9, O. XXIII, r. 1**—*Limitation Act (IX of 1908), s. 5—Abatement of suit—Application to bring legal representatives on record—Setting aside of abatement, whether condition precedent—Limitation—Ignorance of change in period of limitation, whether excusable—Withdrawal of suit—Permission to file fresh suit when can be given.*

An omission to set aside the abatement of a suit before bringing on record the heirs of a deceased defendant is a mere formal defect not affecting the merits of the case.

A delay in making an application to bring on record the heirs of a deceased defendant, due to a change in the period of limitation, of which the applicant was ignorant, can be rightly excused.

A plaintiff cannot be allowed to withdraw a suit with liberty to bring a fresh suit simply because the heirs of the defendant who has died cannot be served. B LAKSHMIBAI JAGANNATH JOSHI *v.* YESHWANT VITHAL BAGKAR, 24 Bom. L. R. 90; (1922) A. I. R. (B.) 449; 47 B. 92 **283**

——— **O. XXII, r. 10**—*Assignment of interest pending suit—Records sent to High Court in interlocutory matter—Application for substitution—Court, proper.*

Where in the case of an interlocutory appeal the High Court sends for the records of a pending suit for the purpose of dealing with that particular matter, for all other applications the suit continues pending in the Trial Court, and that Court has jurisdiction to entertain an application under O. XXII, r. 10, of the Civil Procedure Code, for substitution of an assignee from a plaintiff in his place, and a refusal to entertain such an application amounts to a failure to exercise jurisdiction. B BHOGILAL KIRPASHANKAR *v.* DAKASHA KOOVERJI, 25 Bom. L. R. 308; (1923) A. I. R. (B.) 303 **743**

——— **O. XXIII, r. 3**—*Registration Act (XVI of 1908), s. 17 (1) (b), (2) (vi)—Compromise relating to properties not subject of suit, recording of—Procedure—Registration, whether necessary.*

Where a suit is compromised, but the compromise relates to properties some of which are not the subject of the suit, the proper procedure for the Court recording the compromise is to record the whole of the agreement, and then to pass a decree in accordance with so much of it as relates to the subject-matter of the suit.

Hemanta Kumari Debi v. *Midnapore Zemindari Co., Limited*, 53 Ind. Cas. 534; 46 I. A. 40; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 777; (1920) M. W. N. 66; 27 M. L. T. 421; 11 L. W. 301; 31 C. L. J. 298; 22 Bom. L. R. 488; 47 C. 485 (P. C.), followed.

Where a suit has been adjusted in the manner contemplated by O. XXIII, r. 3 of the Civil Procedure Code, and the terms and conditions of the adjustment have been reduced to writing by the parties and the Court has duly recorded those terms and conditions and passed a decree in accordance with such of them as are the subject of the then existing litigation, then the writing of the parties may be produced in evidence in any subsequent suit without being registered.

Pranal Anni v. *Lakshmi Anni*, 26 I. A. 101 at p. 106; 1 Bom. L. R. 394; 22 M. 508; 3 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.), followed.

A suit relating to immoveable property of the value of more than Rs. 100 was compromised and the parties agreed to divide the property in dispute and some other property in certain proportions. The agreement was reduced to writing and was presented to the Court. The Court made an order thereon to the effect that as the compromise related to property outside the scope of the suit a decree could not be passed upon it, and the suit was dismissed "in accordance with the compromise." In a subsequent suit to enforce the compromise:

Held, (1) that the procedure adopted by the Court in recording the compromise in the previous suit was erroneous and that it should have recorded the whole compromise and then passed a decree in accordance with so much of it as related on the property in dispute;

(2) that the compromise not having been incorporated in the decree or order of the Court, was not admissible in evidence for want of registration.

Hari Chand v. *Maghi Mal*, 40 Ind. Cas. 675; 78 P. R. 1917; 95 P. W. R. 1917; 112 P. L. R. 1917 and *Khair-ul-nisa* v. *Bahadur Ali*, 27 P. R. 1906; 11 P. L. R. 1906; 17 P. W. R. 1906, distinguished. L GHULAM MUSTAFA KHAN *v.* GHULAM NABI, (1923) A. I. R. (L.) 581; 4 L. 203 **461**

——— **O. XXV, r. 1**—*Application to sue as pauper—Security for costs.*

A suitor *in forma pauperis* should not be required to give security for costs except on some very special ground. The fact that the applicant is being assisted by a relative is not such a ground.

Seshayyangar v. *Jainulavadin*, 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603, relied on. R MA SAW *v.* MAUNG SHWE GON, 2 Bur. L. J. 78; (1923) A. I. R. (R.) 244 **869**

——— **O. XXVI, rr. 11, 12**—*Commissioner for taking accounts—Dispute as to whether certain contracts were authorised—Reference to Commissioner—Commissioner's report, value of.*

The proceedings of a Commissioner appointed to take accounts are an inquiry for the information of the Court and when he finds a fact, his finding is not a decision upon it and his report can only be treated as evidence before the Trying Court.

R. M. S. Chetty v. *Mahomed Essa Saheb*, 5 C. W. N. 692 at p. 707, followed.

The question whether a contract is authorised or not is not one that can be referred to a Commissioner for taking accounts under O. XXVI, r. 11 of the Civil Procedure Code. S FIRM OF SETH VISHINDAS NIHAL CHAND v. NAZARALI SAMJI, (1924) A. I. R. (S) 9 1014

——— O. XXIX. r. 1—*Execution of decree, stay of—Fraud, allegation of—Temporary injunction—Prima facie case—Jurisdiction of Court—Territorial jurisdiction, absence of—Injunction, grant of.*

A temporary injunction staying a sale in execution of a decree on the ground that the decree was obtained by fraud cannot be granted unless there is a reasonable prospect of the allegation being proved.

A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits where he has property within its jurisdiction which can be proceeded against in the event of any contempt of the Court's authority. Pat RAMESHWAR SINGH v. KUMAR GANGANAND SINGH, 1 P. L. R. 462; 5 P. L. T. 121 381

——— O. XXII. r. 2—*Minor, suit instituted by, without next friend—Procedure—Practice.*

O. XXXII, r. 2 of the Civil Procedure Code does not cover a case where a suit purports to have been instituted by a major, but it is discovered during the pendency of the suit that the plaintiff is a minor. The practice in such a case is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend.

Beni Ram Bhutt v. *Ram Lal Dhukri*, 13 C. 189 at p. 191; 6 Ind. Dec. (N. S.) 625, relied on. L ALI AHMAD v SAID MIAN 1028

——— O XXXII. r. 3 (4)—*Minor defendant—Guardian* ad litem, *appointment of—Notice to minor, absence of, effect of.*

Where a Court by its action has given its sanction to the appearance of a person as guardian *ad litem* to a minor defendant, the absence of a formal order of appointment is not necessarily fatal to the proceedings.

Waltan v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.), followed.

The failure of the Court to issue the notice required by r. 3 (4) of O. XXXII of the Civil Procedure Code to a minor defendant is a mere irregularity and does not invalidate the appointment of the guardian *ad litem*.

Rambrichh Ram v. *Tarak Tewari*, 33 Ind Cas. 805; 14 A. L. J. 589, *Enuga Sundarama Reddi* v *Beswada Pattabhiramireddi*, 42 Ind. Cas. 421; (1917) M. W.N. 405; 6 L. W. 272, relied on.

Rajendra Prasad v. *Probodh Chandra Mitra*, 59 Ind. Cas. 936; 2 P. L. T. 116; 6 P. L. J. 82; (1921) Pat. 156, *Syed Ali Sarkar* v. *Manikjan Bibi*, 43 Ind. Cas. 728, *Ghanshyam Das* v. *Hardei*, 32 Ind. Cas. 380; 2 O. L. J. 562, distinguished.

What the Court has to look to is the substance of what occurred and not the shadow, and to interfere with the former proceedings only if it appears that the minor's interests were neglected by the person who undertook and was permitted by the Court to represent them. L PHULLI v. DEBI PARSHAD, (1923) A. I. R. (L.) 575 449

——— O. XXXII r. 4 (2)—*Guardian* ad litem *—Appointment, how long continues—Appeal, whether can be filed by any other person.*

Where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole of the *lis* or until it is revoked by Court; and the guardian so appointed is the only person who can file an appeal on behalf of the minor. An appeal filed by any other person is invalid.

Shambhu v. *Kanhaya*, 75 Ind. Cas. 457; 44 A. 610; 20 A. L. J. 599; (1922) A. I. R. (A.) 332 followed. A BHAGELU v. DHARMA, 21 A. L. J. 591; 45 A. 623; (1924) A I. R. (A.) 79 898

——— O. XXXII, r. 5—*Abatement, setting aside of—Sufficient ground—Appellant, duty of.*

It is obligatory on an appellant to keep himself informed of any devolution of interest that may take place by reason of the death of any of the respondents and it is not sufficient for setting aside an abatement merely to say that the applicant had no knowledge of the death of the respondent till many months after such death. Abatement of appeal gives a very important right to the persons against whom the appeal abates and it is not without sufficient reason that the Court should set aside an abatement. Pat PHULWATI KUMARI v. MAHESHWARI PROSAD SINGH 909

——— O. XXXIII. r 5—*Pauper application—Claim doubtful—Rejection of application.*

An application for leave to sue as a pauper cannot be rejected on the ground that the claim is "doubtful," that is to say, weak, as it is impossible to say whether it is weak till it has been tried. N RUPIBAI v. SADASHIV 744

——— O XXXIV, r. 1—*Mortgage taken by some members of Hindu joint family—Advance made out of joint funds—Suit on mortgage—All members, whether necessary parties—Mortgagee,* benamidar, *position of.*

A person who is named in a mortgage-deed as the mortgagee, although in fact merely a *benamidar* for those beneficially interested, can institute a suit in his own name, either for sale or foreclosure, and the suit cannot be dismissed merely because the beneficial owner is not added as a party.

Valtheeswara Iyer v. *Srinivasa Raghava Iyengar*, 50 Ind. Cas. 309; 42 M. 348; 36 M. L. J. 296; 9 L. W. 362; 25 M. L. T. 351; (1919) M. W. N. 299 (F. B.) and *Sachitananda Mahapatra* v. *Baloram Gorain*, 24 C. 644; 12 Ind. Dec. (N. S.) 1099, followed.

Plaintiffs, certain members of a Hindu joint family, advanced to the defendants a certain sum and took from them a mortgage of certain property to secure re-payment of the advance together with interest. The deed of mortgage did not indicate

Civil Procedure Code—1908—contd.

whether the advance was made by the plaintiffs out of their separate funds or whether it was part of the family property. They sued to recover the principal and interest and asked for the realisation of the same by the sale of the mortgaged property:

Held, (1) that there was no ground on principle why the plaintiffs who had a beneficial interest in the mortgage and who represented both themselves and other members of the family should be regarded as on a different footing from a *benamidar* who has no beneficial interest at all;

(2) that the question was simply one of authority; if the plaintiffs were authorised to enter into the transaction on behalf of the family, it must be taken that they were equally authorised to institute a suit to enforce it. **Pat** HIT LAL MAHTON v. JIBOO MAHTON **378**

——— **O XXXIV, rr. 4, 5**—*Mortgage—Proceedings to obtain decree absolute, nature of—Preliminary decree obtained on compromise—Application for decree absolute—Satisfaction of preliminary decree out of Court, whether can be proved.*

Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree, but are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution.

Ramjilal v. *Karan Singh*, 40 Ind. Cas. 424; 39 A. 532; 15 A. L. J. 448, relied on.

A preliminary decree based on a compromise arrived at between the parties and in which the terms of the compromise are embodied, is not a decree to which the terms of r. 5 of O. XXXIV of the Civil Procedure Code would apply, and where, in such a case, an application is made for a decree absolute for sale, it is open to the judgment-debtor to prove adjustment and satisfaction of the preliminary decree out of Court.

Mangar Sahu v. *Bhattu Singh*, 57 Ind. Cas. 473; 1 P. L. T. 416; 5 P. L. J. 672, relied on. **A** SITAL SINGH *v.* BAIJNATH PRASAD, 20 A. L. J. 602, (1922) A. I. R. (A.) 38; 14 A. 168 **485**

——— **O XXXIX, r 1**—*Injunction, ad interim*—Prima facie case—*Balance of convenience—Adjournment—Counsel, duty of, to argue.*

Where a plaintiff asks the Court to grant an *ad interim* injunction against the defendant during the hearing of the suit, he must show that *prima facie* he is entitled to succeed in his claim on the merits. The Court should in such a case see as well on which side lies the balance of convenience. Where the defendant has spent a large sum of money which would be wasted if the injunction is granted and the defendant is a man of means and any damage likely to be done by him can be recovered from him if the plaintiff succeeds in his claim the balance of convenience is against the grant of the injunction.

Obiter dictum:—The adjournment of a case fixed for arguments from date to date does not relieve the Pleader from the duty of being prepared to argue his client's case when he is asked to do so on any of the dates fixed for hearing. **Pat** KENNETH ARTHUR HILL *v.* RANJAN BARDHAN 5 P. L. T. 196 **859**

Civil Procedure Code—1908—contd.

——— **O. XXXIX, r. 2**—*Temporary injunction, when to be granted—Election, Municipal, suit to contest, validity of—Injunction restraining defendant from exercising functions of Municipal Commissioner, whether can be granted.*

A person asking the Court to exercise its discretionary jurisdiction by granting a temporary injunction must make out a strong *prima facie* case in support of the title which he asserts, and must satisfy the Court that its interference is necessary to protect him from irreparable or, at least, serious injury before the legal right can be established at the trial. Being an exceptional remedy, an injunction will be refused in the first instance except upon a clear *prima facie* case and upon positive averments of the equities on which the application for relief is based.

In a suit contesting the validity of a Municipal election, the plaintiff applied for a temporary injunction restraining the defendant from exercising the functions of a Municipal Commissioner during the pendency of the suit:

Held, that the plaintiff could in no way be injured by the defendant continuing to act as a Municipal Commissioner during the pendency of the suit and a temporary injunction could not, therefore, be granted. L RAMESHWAR DAS *v.* YAKIN-UD-DIN KHAN **428**

——— **O. XLI, r 5**—*Stay of execution pending appeal—Extensive estate—Receiver, appointment of.*

During the pendency of an appeal relating to the succession to an extensive impartible estate the management of which had for nearly half a century been in the hands of the Court of Wards and which required to be developed and managed with special care, respondent took out execution of his decree seeking delivery of possession of the estate and defendant applied for the appointment of a Receiver to manage the estate:

Held, that having regard to the history of the estate and its present condition, the best interests of the estate would be served by the appointment of a Receiver who would act under the direction of the Court. **C** PARTAB CHANDRA DEO *v.* JAGADISH CHANDRADEO, 37 C. L. J. 217 **417**

——— **O XLI, r. 19**—*Appeal—Dismissal for default—Appeal, fresh, whether can be entertained*—Res judicata—*Landlord and tenant—Non-transferable occupancy holding—Sale in execution of money-decree.*

An order dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit and can in no sense be regarded as adopting or confirming the decision appealed from. It merely recognises authoritatively that the appellant has not complied with the condition under which the appeal was open to him and, therefore, is in the same position as if he had not appealed at all.

Abdul Majid v. *Jawahir Lal*, 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 171 (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.), followed.

An order dismissing an appeal for default does not amount to a decree and does not operate as *res judicata*. R. 19 of O. XLI of the Civil Procedure Code gives an option to an appellant whose appeal has been dismissed for default to apply for re-admission of the appeal, but it does not take away any other remedy that may be available to him. The omission of a provision as to the competency of a fresh appeal in the rule cannot have the effect of taking away such right, if it is not otherwise barred.

There is nothing in law to prevent the entertainment of a fresh appeal on the dismissal for default of a previously filed appeal, provided the later appeal is otherwise in order and is filed within the period of limitation.

Raghu Prasad Singh v. *Jadu Nandan Prasad Singh*, 59 Ind. Cas. 896; 6 P. L. J. 27; 2 P. L. T. 28, (1921) Pat. 34, *Abeda Khatun* v. *Majubali Chowdhury*, 59 Ind. Cas. 760; 48 C 157; 24 C. W. N. 1020; 33 C. L. J. 304, distinguished.

A non-transferable occupancy holding can be sold in execution of a money-decree obtained by a co-sharer landlord.

Jugeshar Misra v. *Nath Koeri* 'Sundermohan Panigrahi Ghana Rout, 65 Ind. Cas. 335; 3 P. L. T. 205; (1922) Pat. 49; 4 U. P. L. R (Pat) 9; (1922) A. I. R. (Pat.) 19 & 114; 1 Pat. 317 (F. B.), followed. Pat SURAJDEO NARAIN SINGH, v. PARTAP RAI, 1 P. L. T 405, (1923) Pat. 213; (1923) A I R (Pat.) 514, 2 Pat. 730 **284**

——— **O. XLI, r 20**—*Appeal—Power of Court to add parties—Discretion—Neglect of Counsel.*

The Law of Limitation does not apply to action taken by an Appellate Court under r. 20 of O. XLI of the Civil Procedure Code, but the power to take such action is discretionary and should not be exercised where the appellant has been guilty of extreme neglect.

Shahab Din v. *Miran Bakhsh*, 25 Ind. Cas. 549; 79 P. R. 1914; 268 P. L. R. 1914; 169 P. W. R. 1914, followed.

It is an act of gross neglect to implead as an appellant a person who is a necessary party to an appeal without any authorisation from him. L MUNICIPAL COMMITTEE, BHERA v. SHIV RAM, (1923) A. I. R (L.) 503 **90**

——— **O XLI, r. 27**—*Additional evidence in Appellate Court, production of—"Requires," meaning of—"Any other substantial cause," meaning of—Appeal, second—Discretion, exercise of, whether can be challenged—Additional evidence, refusal to admit, in Court of first appeal—Second appeal, competency of.*

A party cannot claim admission of additional evidence, oral or documentary, as a matter of right. O. XLI, r. 27 of the Civil Procedure Code gives a discretion to the Court of Appeal to allow the production of such evidence, and lays down definite limits.

The word "requires" in O. XLI, r. 27 of the Civil Procedure Code means "needs or finds needful."

Kessowji Issur v. *Great Indian Peninsula Railway Company*, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 51; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.), relied on.

The words "any other substantial cause" occurring in O. XLI, r. 27 of the Civil Procedure Code mean a *causa ejusdem generis* to the grounds already mentioned; or, in other words, as meaning a case analogous to those specified previously.

Where a lower Court is invested with a discretion in a matter and it has exercised it in one way, it is not open to a Court of second appeal to interfere with that discretion.

The refusal of a Court of first appeal to admit additional evidence is not open to challenge in second appeal. O BADRI PRASAD v. MUKANDI, 9 O. L. J. 505, (1923) A. I. R (O) 109; 26 O. C. 66 **231**

——— **O XLI, r 31**—*Appeal—Judgment of Appellate Court, contents of—Reasons for judgment—Duty of Appellate Court.*

The Judge of an Appellate Court should state his own reasons for the conclusion at which he has arrived and should not confine himself to approving the reasons of the Court of first instance. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law L ASHIA BIV. SUGHRA JAN, (1923) A I. R. (L.) 658 **1013**

——— **O XLI, r. 33**—*Mortgage decree—Appeal by one defendant—Power of Appeal Court to set aside entire decree.*

An Appellate Court has power under O. XLI, r. 33, to set aside a mortgage decree in its entirety although only one of the defendants has appealed Pat AJBI CHAUDHURI v. JANAK LAL CHAUDHURI, (1923) Pat 332 **926**

——— **O XLV, r 15**—*Orders of Privy Council, execution of—Procedure—Persons interested in execution, whether must apply separately—Execution, limitations on.*

Order XLV, r. 15, Civil Procedure Code, makes it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission. But it is not necessary that each person interested in the execution of a particular order should obtain a separate transmission when that order has already been transmitted at the instance of one of the successful parties.

In the absence of any restrictions founded on the actual language of the decree or order of the Privy Council, it cannot be said that only the successful appellant can apply for execution.

Kassim Saib v. *Luis*, 17 M 82; 6 Ind. Dec. (N. S.) 56, *Natesa Ayyar* v. *Annasami Ayyar*, 25 M. 426, distinguished. M BALUSAMI IYER v. VENKATASAMI NAICKEN, 32 M. L. T. 240; (1924) A I R. (M) 95 **219**

——— **O. XLVII, rr. 1, 2**—*Application for review—Successor of Judge who made decree, when can grant review*

The words "or could not be produced by him at the time," of r. 1, O. XLVII of the Civil

Civil Procedure Code—1908—contd.

Procedure Code, must refer to the words which precede, namely, "was not within his knowledge." The whole clause must mean that these new important matters which are alleged by the applicant for review were not within his knowledge and, therefore, could not be produced by him at the time when the decree sought to be reveiwed was made.

It is not open to a Judge to grant an application for review of a decree made by his predecessor, upon grounds other than those in rr. 1 and 2 of O. XLVII of the Civil Procedure Code. **Pat** RAMESHWARDHARI SINGH *v.* SADHO SARAN SINGH **91**

——— **O. XLVII, rr. 1, 2**—*Pre-emption price ordered to be paid to wrong person—Direction in judgment followed in decree—Error, whether clerical—Review by successor of Judge.*

A direction in a decree erroneous but in accordance with the judgment that the pre-emption price should be paid to a wrong person is not a clerical mistake apparent on the face of the decree so as to entitle a person to apply for review of the decree to the successor of the Judge who passed it. **N** BALIRAM PIRAJI *v.* YESWANTA **829**

——— **O. XLVII, rr. 1 4. 7**—*Application for review—Incorrect exposition of law, whether sufficient reason—Order granting review, when appealable—Suit for declaration that decree collusive—No present loss to plaintiff—Suit, whether maintainable.*

The production of an authority which was not brought to the notice of the Court at the hearing and which lays down a view of the law contrary to that taken by the Court is not a sufficient ground for a review and an order granting such a review is appealable

Chhajju Ram v. *Neki*, 72 Ind. Cas. 566; 26 C. W. N. 697; 30 M. L. T. 295; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112, 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.), followed.

A suit by the transferee of a recorded tenant of a non-occupancy holding for a declaration that a decree obtained by the landlord against the tenant for a rate of rent higher than the actual rate, was fraudulent and collusive and should be set aside, is not maintainable unless it can be shown that the transferee has suffered actual damage.

Asarfi Singh v. *Ram Khelawan Sinha*, 49 Ind. Cas. 785; 4 P. L. J. 115; (1919) Pat. 49 (F. B.), distinguished. **Pat** GARABINI KUMARIN *v.* SURJA NARAIN SINGH, (1923) Pat. 361; 5 P. L. T. 52 **177**

——— **O. XLVII, rr. 1, 7** *See* INDIAN SOLDIERS (LITIGATION) ACT, S. 10 **262**

——— **O. XLVII, r. 4**—*Review, order granting, without notice to opposite party—Prejudice—Opportunity given to object—Legality of order.*

An order granting an application for review of an order dismissing a suit in default is not illegal merely because notice of the application was not given to the opposite party, if that party had been given every opportunity to raise any objection that he could raise, and was, therefore, in no way prejudiced by non-issue of notice to him.

Taj Muhammad v. *Kanshi Mal*, 19 Ind Cas. 864; 237 P. L. R. 1913; 135 P. W. R. 1913, relied on. **L** FIRM GOPAL MAL-GANDA MAL *v.* HARA CHAND, (1923) A. I. R. (L.) 303 **656**

Code of Criminal Procedure (Amendment) Act (XVIII of 1923) **727**

Commissions—*Commissioner, duty of—Fees, recovery of, mode of—Mortgage-bond obtained in lieu of fees, whether enforceable.*

It is entirely contrary to the duty of a Commissioner to approach an individual party and get him to pay sums of money in discharge of an untaxed bill of costs upon the footing that, unless this is done, the report will not be filed. A Commissioner's duty is to keep all parties at arm's length, to receive no favour from any one, to look to one no more than to another.

The work done by a Commissioner is not work done for any of the parties; it is work done for the Court. If the Commissioner wants the payment of his fees he must look to the Authority that appointed him and whose duty it is to put proper pressure on the right party and to provide for an adequate remuneration for the Commissioner in a reasonable and proper way. For the Commissioner himself to put any sort of pressure on one party so as to make the immediate payment of an untaxed bill a condition without which the Commissioner's duty would not be done or would be done at another time is not merely ill-advised conduct; it is improper and illegal conduct.

A mortgage-bond obtained by a Commissioner from one of the parties in lieu of payment of an untaxed bill of costs is an improper advantage obtained by an Officer of Court by abuse of his position as such Officer and is not enforceable.

Gopalaratnamayyar v. *Bupala Narasimma Nayudu*, 4 M. 300; 1 Ind Dec. (N. S.) 1173; distinguished. **C** PRAMATHA NATH SEN GUPTA *v.* ABDUL AZIZ MEAH, 37 C. L. J. 406, 27 C. W. N. 430; (1923) A. I. R. (C.) 136 **443**

Companies—*Company in liquidation—Shareholder, liability of, as contributory—Fraud, plea of, whether can be put forward.*

Once an application has been made for the compulsory winding-up of a Company, a shareholder cannot be relieved of his liability as a contributory in the winding-up proceedings on the ground that he was induced to purchase the shares allotted to him by a fraudulent representation. **L** ORIENT BANK OF INDIA LTD. *v.* HABIBULLAH KHAN **745**

Compromise—*Decree in accordance with compromise, when binding—Partition, suit for—Preliminary decree not appealed against, effect of—Final decree, whether can be attacked—Appeal—Preliminary decree not capable of enforcement—Procedure.*

There can be no compromise binding upon all the parties to a partition suit until and unless all the parties have joined in the compromise.

Compromise—concld.

It is not open to an appellant in an appeal against the final decree in a partition suit to attack the preliminary decree, which might have been directly challenged by an appeal.

Loke Nath Singh v. *Gaju Singh*, 31 Ind. Cas. 426; 22 C. L. J. 333; 20 C. W. N. 178.

In a suit for partition of joint properties, a petition of compromise was filed stating that certain specified properties were self-acquired of one or other of the parties and claiming partition of what was admitted to be joint. Two of the defendants did not join in the petition. A preliminary decree was passed in terms of the compromise, when the actual petition was undertaken those two defendants objected, but their objection was overruled and a final decree was made in accordance with the terms of the compromise. The defendants appealed:

Held, that as all the parties to the suit did not join in the compromise it was not binding, but that since the defendants had not challenged the preliminary decree, they could not appeal against the final decree;

(2) that since, however, the preliminary decree as it stood was indefinite and not capable of enforcement, the final decree must be vacated. C TARAPRASANNA SARKAR *v.* KALIKAMOHAN SARKAR, 38 C. L. J. 111; (1924) A. I. R. (C.) 80 **319**

Confession—*Retracted confession, value of—Particulars necessary to be established—Shy witness, statement of, whether can be transferred to Sessions record—Evidence Act (I of 1872), s. 154.*

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence.

A Court must not regard the confession of an accused person in the same light as an admission made by parties in civil litigation.

What has to be seen in the case of a confession is (1) whether the same was made voluntarily, *i.e.*, whether the disqualifying conditions given in section 24 of the Evidence Act were absent, and (2) whether, if so, the confession is true as tested by the circumstances in which it was made, its internal evidence of truth and its consistency with other evidence. It cannot be laid down that independent evidence in the sense of evidence corroborating the details of the crime itself is obligatory.

A statement of a witness made before the Committing Magistrate cannot be transferred to the Sessions Record simply on the ground that the witness was "shy and speechless."

Section 154 of the Evidence Act gives a very wide discretion to the Courts and the proper course in such a case is to give permission to the prosecution to ask the witness a leading question and then to read out the evidence before the Comitting Magistrate and so obtain an admission or a denial of its truth. **Pesh** MOTI RAM *v.* EMPEROR, 24 Cr. L. J. 904 **152**

Construction of document—*Charitable trust—Hindu Law—Trustee, failure to appoint, effect of.*

Construction of document—contd.

Under the Hindu Law a trust cannot fail for want of the appointment of trustees and the Court will appoint a manager on the failure to appoint of those entitled to appoint him.

A deed of partition contained the following clause:—

"One house (*shiwala*) with shops under it and Rs. 10,000 (ten thousand rupees), out of the whole heritage of the deceased, have been set apart for charitable purposes as *wakf* property. The said Rs. 10,000 is to be spent as follows;—

		Rs.
(*a*)	for a *sada barat* ..	8,000
(*b*)	for the construction of a *shiwala*	1,000
(*c*)	for the expenses in connection with the *sati* of the family..	1,000
	Total ..	10,000"

Held, (1) that the intention of the executants of the deed was to create a public and charitable endowment in respect of the immoveable property and the cash;

(2) that the intention was that the cash should not be consumed, but that the income or interest only should be spent on maintaining the *wakf*. L KIDAR NATH *v* WAZIR CHAND **903**

——— *"Construction," meaning of—Second appeal—Decision as to meaning of words, whether can be challenged in second appeal.*

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

Chatenay v. *Brazilian Submarine Telegraph Co.*, (1891) 1 Q. B. 79 at p. 85; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65, relied on.

A decision, therefore, as to the meaning of words, and apart from their legal effect, used in a mortgage-deed describing the property transferred cannot be challenged in second appeal. A BADRI PRASAD *v.* RAJKUNWAR, (1923) A. I. R. (A.) 337 **686**

——— *Deed of gift—General words conveying property—Subsequent limitation to particular property—Natural meaning of words employed.*

A deed of gift by a Hindu stated, "I give to my daughter the undermentioned properties worth Rs. 399; namely, the properties described in Schedule (*ka*) and the money-ending business mentioned in Schedule (*kha*) below. From this day she shall be competent to realise from the debtors under notes of hand or bonds, etc., the principal with interest either amicably or by law suit." The Schedule (*ka*) gave certain lands, "Cultivated in *nij jote*—Value Rs. 299." The Schedule (*kha*) gave, "Amounts due from various persons on account of money-lending business:—Out of the same Rs. 100 due from *N*. under a mortgage-bond." The deed wound up by saying, "This deed of gift is executed in respect of Rs. 399, being the value of the properties of Schedule (*ka*) and the dues from debtor mentioned in Schedule (*kha*)." It was common ground that the words, "cultivated in *nij jote*—Value Rs. 299," in Schedule (*ka*) and

Construction of document—contd.

the words, "Out of the same Rs. 100 due from *N.* under a mortgage-bond," were interpolated by or with the authority of the donor after the remainder of the deed was written. The contention of the daughter was that these two passages were inserted in the deed for the purpose of ascertaining and specifying the stamp duty which was payable in respect of the deed, and that the deed in fact transferred to her all the debts which were due in respect of the money-lending business:

Held, rejecting the contention, that the natural and obvious meaning of the deed was that the donor intended to make a gift of the one particular debt specified in the deed, namely the debt due from *N.* and not of all the debts due in respect of the money-lending business. **C** FANINDRA NATH ROY v. BHOLA DASSI DEBI, 38 C. L. J. 21 **402**

——— *Lease—Covenant to vacate on one week's notice—Refusal to vacate on notice—Damages, measure of.*

Plaintiff granted defendant a lease of a house for eleven months on payment of a monthly rent, which provided that the defendant would vacate the house on one week's notice of ejectment:

Held, that the stipulation for the monthly payment of rent did not affect the plaintiff's right to serve a week's notice of ejectment on the defendant at any time, and that it was not necessary that the notice should terminate on the last day of a month.

Where a tenant has held over wilfully and contumaciously, the Courts in India would properly award reasonable damages to the landlord and the amount of double the rent may be taken as a fitting standard of damages.

Pirbhu Dial v. *Ram Chand*, 5 P. R. 1904; 42 P. L. R. 1904, followed. **L** RURE KHAN v. GHULAM MUHAMMAD **1034**

——— *Mortgage-deed—Mortgage by conditional sale—Deed of further charge or* mashrat-ul-rehan*—Consolidation—Redemption—Evidence Act (I of 1872), s. 90—Transfer of Property Act (IV of 1882), s. 59—Hypothecation deed executed before Transfer of Property Act—Signature of executant, absence of—Presumption of genuineness.*

A person mortgaged his property by way of conditional sale. Later on, he borrowed some more money from his mortgagee and executed a deed which recited the earlier mortgage by conditional sale and stated that a further loan was taken from the mortgagee which was to be included in the money due on the earlier mortgage and repaid with it. It also contained a covenant that, until the money due on the latter deed was paid, the mortgagor would not be entitled to redeem the mortgage by conditional sale or to transfer any portion of the mortgaged property. The deed was described as a deed of further charge (*dastawez i massuk mashrat-ul-rehan*):

Held, that the amount due on the deed of further charge was to be consolidated with that due on the mortgage by conditional sale.

Ranjit Khan v. *Ramahan Singh*, 2 Ind. Cas. 854; 31 A. 432; 6 A. L. J. 654 and *Har Pershad* v. *Ram Chandar*, 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A.) 139; 44 A. 57; (1922) A. I. R. (A.) 174, followed.

Baldeo Rai v. *Murli Rai*, 16 Ind. Cas. 638; 10 A. L. J. 20 and *Kesar Kunwar* v. *Kashi Ram*, 50 Ind. Cas. 777; 37 A. 631; 13 A. L. J. 880, distinguished.

A Court may presume the genuineness of a document more than 30 years old, which was executed before the Transfer of Property Act came into force, and which was properly registered by the executant, even if it is not signed by the executant personally nor bears his mark. **A** GAYA SINGH v. SURAJBALI SINGH **931**

——— *Perpetual lease—Rent payable yearly—No right to eject tenant or enhance rent—Lease or sale.*

Where a document purporting to be a perpetual lease of a certain plot of land provided that the lessee, generation after generation, would be entitled to remain in possession of the leased property as *pattadar* and would have the right to have his name recorded in the revenue papers as tenant and perpetual *pattadar*, that he would be liable to pay the rent reserved year after year and instalment after instalment and that in the event of the rent falling in arrears, the lessor would have all the rights of an owner with respect to its realizat on but that there would be no right to have the lease cancelled, the rent enhanced or to eject the lessee:

Held, that as under the terms of the document the proprietary interest of the lessor had not ceased and the liability to pay Government revenue rested on him, the document could not be construed as an out and out sale.

Lalji Misir v. *Jaggu Tiwari*, 7 Ind. Cas. 930; 33 A. 104; 7 A. L. J. 1022 and *Mohammad Niaz Khan* v. *Mohammad Idrees Khan*, 44 Ind. Cas. 227; 16 A. L. J. 233; 40 A. 322, distinguished. **A** BHAIRO TEWARI v. RAMNATH RAI, 21 A. L. J. 734; (1923) A. I. R. (A.) 60 **404**

——— *Relinquishment by landlord of right to produce of trees of occupancy tenant—Relinquishment for life or in perpetuity—Grant without words of inheritance—Grant "for ever"—Presumption.*

The proprietor of a Raj executed in 1858 a document in the nature of a *parwana* addressed to the managers of his estate which, after reciting that a certain occupancy tenant had done great good work, proceeded, "Hence because of that good work it is ordered that whatever trees have been planted by his (the occupancy tenant's) ancestor and also if he plants any, the share of the Raj in them is given up. Hence this *parwana* is written to all forbidding you in any way to interfere with the trees standing on the *nakdi* holding of the said occupancy tenant for ever." A descendant of the executant of the document brought in 1916 a suit against a descendant of the occupancy tenant for a half share in the trees standing upon the later's holding. There was no evidence to show that any claim had ever been made by the proprietor of the Raj to participate in the produce of the trees since

Construction of document—concld.

the document was executed excepting once when by forcible means and under duress the tenant was obliged to disgorge a small sum of money:

Held, (1) that although the meaning of the document was not very clear, the intention of the executant was to relinquish the right to the trees both present and future as was borne out by the concluding words of the document which forbade his servants from interfering with the trees on the holding for ever;

(2) that this interpretation was in consonance with what had actually taken place since the execution of the document;

(3) that the absence of any words of inheritance in the document was of no significance, as it was not a grant of land to a grantee, the so-called grantee being already an occupancy holder of the land having a permanent interest in the land descendible to his heirs.

Even if a grant contains the word "always" or the words "for ever" or similar words, if the grant is clearly of a life-interest only, the mere use of such words will not have the effect of extending the grant beyond the lifetime of the grantee.

Where there are no words of limitation in a grant then, even if there are no specific words of inheritance, it may still be a grant in perpetuity. **Pat** MAHARAJ RAI *v.* JANKI KUER **1031**

——— *Will or gift.*

A document which was throughout called a Will began by reciting that the executor's death was drawing near and he was too weak to go to the Office of the Sub-Registrar and that, therefore, he executed the Will in presence of the *Panches*. It also recited: "While I am alive out of the entire lands mentioned in this Will I have given forthwith half to my younger brother:"

Held, that the words "While I am alive" and "forthwith" did not imply a gift *in praesenti* and that the document was a Will. **N** ZUGLAI *v.* RATAN **687**

Construction of Statutes—*Court, duty of.*

No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed.

Liverpool Borough Bank v. *Turner*, (1860) 2 De G. F. & J. 502; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. (N. S.) 494; 9 W. R. 292; 129 R. R. 172; 45 E. R. 715, followed. **C** GOVERNMENT OF ASSAM *v.* SAHEBULLA, 38 C. L. J. 77; 27 C. W. N. 857; 24 Cr. L. J. 881; (1924) A. I. R. (C.) 1 **129**

Contract—*Stipulation empowering one party to rescind, effect of—Contract, whether valid.*

Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency.

Such a stipulation should be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of its own wrong.

New Zealand Shipping Company v. *Societe Des Ateliers Et Chantiers De France*, (1919) A. C. 1; 87 L. J. K. B. 746; 118 L. T. 731; 14 Asp. M. C. 291; 62 S. J. 519; 34 T. L. R. 400, relied upon.

In a contract of sale and purchase of goods if the seller refuses to deliver the goods sold to the buyer, he would be liable for breach of contract unless he assigns some reason which would justify his refusal to give delivery.

A stipulation empowering the seller "to cancel or not to cancel the goods for any reasons whatever," does not, howeve , destroy the mutality of the contract which would be valid and binding in spite of the stipulation. **B** CHOTALAL LALUBHAI *v.* CHAMPSEY UMERSA & SONS, 24 Bom. L. R. 877; (1923) A. I. R. (B.) 75 **233**

Contract Act (IX of 1872), ss. 16, 23—*Undue influence—Public policy—Transfer made to stifle non-compoundable case, whether can be avoided—*"In pari delicto melior est conditio possidentis," *applicability of.*

Where contracts or transactions are prohibited by law for the sake of protecting one set of men from another set of men; the one from their situation or condition being liable to be oppressed or imposed upon by the other; the parties cannot be said to be *in pari delicto* and the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

Browning v. *Morris*, (1778) 2 Cowp. 790; 98 E. R. 1364, *Kearley* v. *Thomson*, (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804, relied on.

Therefore, where one person has, in such circumstances, paid money to another or has executed deeds in favour of another in pursuance of an illegal agreement, *e. g.*, with the object of stifling a prosecution for a non-compoundable offence, though both parties are *in delicto* yet they are not *in pari delicto* and the person who has paid the money or executed the deeds may recover it back in an action for money had and received or may apply for the setting aside of the deeds.

Atkinson v. *Denby*, (1861) 6 H. & N. 778; 123 R. R. 824; 30 L. J. Ex. 361; 7 Jur. (N. S.) 1205; 4 L. T. (N. S.) 252; 9 W. R. 539; 158 E. R. 321, *Smith* v. *Cuff*, (1817) 6 M. & S. 160; 18 R. R. 340; 105 E. R. 1203 and *Smith* v. *Bromley*, (1760) 2 Douglas 696 *n.*; 99 E. R. 441, relied on. **C** RAM KUMAR DAS *v.* NANDA KUMAR SHAHA, 50 C. 639 **27**

——— **s. 25**—*Suit to recover debt—Unauthorised promise of payment by defendant's Pleader—Statement not signed by Pleader—Fresh contract—Defendant, whether bound.*

In a suit for recovery of money the Pleader for the defendant stated that if the plaintiff presented Probate or Letters of Administration or a Succession Certificate, the defendant would have no objection to paying the amount. This suit was dismissed on the ground that the plaintiff had failed to obtain a Succession Certificate

Contract Act—contd,

Subsequently, the plaintiff obtained the certificate and brought a second suit:

Held, that in the absence of any proof that the Pleader in the first case had any general or special authority from the defendant which would entitle him to enter into a contract on behalf of the defendant to pay the debt, section 25 of the Contract Act had no application;

(2) that the section was further inapplicable in the absence of anything to show that the record of the statement made by the Pleader was signed by him or by any other agent of the defendant. A BANSIDHAR *v.* BABU LAL, 21 A. L. J. 713; (1924) A. I. R. (A.) 12 309

——— **ss. 25 (2), 62**—*Limitation Act (IX of 1908), ss. 19, 20—Contract, breach of—Settlement of damages—Suit to recover damages—Cause of action—Limitation—Extension of time.*

An oral settlement between the parties to a contract providing in case of a breach of the contract, for the payment of compensation by the defaulter is not a new contract within section 62 of the Contract Act and the cause of action would accrue on the date of the breach of the contract. Such a settlement does not extend the period of limitation under section 19 or section 20 of the Limitation Act, where the cause of action had already accrued.

Neither section 25 (2) of the Contract Act nor section 92 (4) of the Evidence Act applies to the settlement as there is neither a new contract nor a modification of the original contract. N KAMAL NARAYAN *v.* BANI RAM, (1923) A. I. R. (N.) 332 440

——— **s. 30**—*Wagering contract—Test*—Pacca Adatia *and constituent—Principal and agent.*

If parties to a contract of sale and purchase of goods do not intend to make an actual transfer of goods but merely to pay and receive money according as the market price varies one way or another from the contract price of given dates, the transaction is a wagering contract.

Relationship between *Pacca Adatias* and their constituents is not one of principal and agent but of principal and principal and damages sustained by the former as a result of wagering contracts are not recoverable from the latter. N HARNARAYAN JODHRAJ *v.* RADHAKISAN CHANDRABHAN, (1923) A. I. R. (N.) 344 906

——— **s. 45**—*Joint promise to pay—Suit by one promisee for share, whether lies—Consolidation of suits by different plaintiffs—Powers of Court—Civil Procedure Code (Act V of 1908), s. 151.*

Under section 45 of the Contract Act in regard to a promise to pay made to two or more persons jointly, proceedings to enforce the claim must be taken by all promisees and a suit for his share of the amount brought by one of several promisees is liable to be dismissed.

Under section 151 of the Civil Procedure Code a Court has inherent power to consolidate suits, and it should adopt this procedure where suits are brought by different plaintiffs for the recovery of debts which formed originally one whole, but were split up subsequently on account of the dissolution of the firm to which they were due. N KISENLAL *v.* CHENDBA 617

——— **s. 62**—*Novation—Hundi executed in lieu of prior hundi—Suit on subsequent hundi not maintainable—Creditor whether can fall back on prior hundi—Cancellation, effect of—Negotiability, whether affects liability.*

The question as to the negotiability or non-negotiability of an instrument is quite distinct from the question of a party's discharge from liability to the holder, and the liability of the drawer of a bill of exchange or of any subsequent party thereto is not in any way affected by the document being negotiable or otherwise. Nor can a mere cancellation of a bill of exchange have the effect of discharging a party from liability unless it is made with the express intention of discharging that party, for if it is made unintentionally or is made under a mistake it will be inoperative.

Where a *hundi* is executed in lieu of a prior *hundi* it is a question of fact in each case whether the parties intended the execution of the subsequent *hundi* as absolute or conditional discharge of the prior *hundi*, the presumption being that the debt is only conditionally discharged.

Where an insufficiently stamped *hundi* is given in renewal of a prior *hundi* and a suit on the basis of the subsequent *hundi* is held not to be maintainable, the creditor can fall back upon the prior *hundi* and section 62 of the Contract Act is not a bar to his doing so.

Sundar Das v. *Puran Singh*, 67 Ind. Cas. 856; 11 P. W. R. 1922; (1922) A. I. R. (L.) 56, relied on. L RAHMAT ALI-MUHAMMAD FAIZI *v.* DEWA SINGH-MAN SINGH, 4 L. 151; 5 L. L. J. 361; (1923) A. I. R. (L.) 396 827

——— **s. 72**—*Payment made under protest to avoid attachment, whether made under coercion.*

A payment made by the owner of a property under protest in order to avoid an unlawful attachment of the property is made under coercion and is recoverable under section 72 of the Contract Act. P U KANHAYA LAL *v.* NATIONAL BANK OF INDIA, LD., (1923) A. I. R. (P. C.) 113; 45 M. L. J. 477; 33 M. L. T. 349; 25 Bom. L. R. 1248; 4 L. 284 7

——— **s. 74**—*Bond—Enhanced interest on default—Stipulation, whether penal.*

Where a bond provides for the payment of a certain sum with interest at a particular rate, and stipulates that on breach of such payment interest at a higher rate will be payable, the stipulation regarding such increased interest is by way of penalty within the meaning of section 74 of the Contract Act. O FAQIR CHAND *v.* BAIJ NATH, 9 O. & A. L. R. 873 888

Court, *functions of.*

A Court is nobody's agent. It is a Tribunal to decide disputes between two parties and must, with a view to perform its functions justly and properly, act independently of any of the two parties engaged in a litigation before it. O ALI ABBAS *v.* KUNWAR SHER BAHADUR SINGH, 9 O. & A. L. R. 815 867

Court-Fees Act (VII of 1870), ss. 7 (iv) (c)—*Suit for declaration of plaintiffs' right and consequential relief—Valuation of the relief sought—Court-fee payable.*

Plaintiff purchased certain property inherited by defendant under a Will, and brought the present suit for a declaration of his right: for the administration of the estate of the testator, if any portion remained unadministered, and for the appointment of a Receiver, and valued the relief sought at Rs. 1,500 in respect of each claim. The question was as to the amount of Court-fee payable on the plaint:

Held, that the suit was one for a declaratory decree where consequential relief is prayed, and that, an *ad valorem* Court-fee was payable under section 7, clause (iv) of the Court-Fees Act, according to the amount at which the relief sought was valued in the plaint. **G** RUP CHAND GHOSE *v.* KHIRODAMAYI DASI, 27 C. W. N. 457; (1923) A. I. R. (C.) 320 **567**

——— **s. 7 (iv) (f)**—*Suit for accounts—Appeal by defendant—Valuation of appeal.*

In an appeal against a preliminary decree for accounts where the defendant-appellant does not deny his liability to render accounts but wants certain restrictions to be placed upon the power of the plaintiff to take accounts from him, he is free to put his own valuation on the memorandum of appeal and is not bound by the valuation of the plaintiff in the plaint, particularly when it is difficult to assess the relief sought by the defendant-appellant in appeal. **Pat** KULDIP SAHAY *v.* HARIHAR PRASAD JHA, 4 P. L. T. 628 **871**

——— **s. 7 (v)**—*Redemption of mortgage—Appeal for reduction of amount payable on redemption—Court-fee payable.*

The Court-fee payable on a Memorandum of Appeal in a suit to redeem a mortgage in which the appellant seeks for a reduction of the amount payable for redemption, is an *ad valorem* fee calculated on the difference between the amount claimed to be payable and the amount decreed as the price of redemption.

Lekh Ram v. *Ramji Das*, 57 Ind. Cas. 215; 3 L. L. J. 370; 1 L. 234; 144 P. L. R. 1920, relied on. **L** RAMJILAL *v.* SHIBBA, (1923) A. I. R. (L.) 309 **667**

——— **s. 7 (v), (b) and (d)**—*Suit for recovery of land not an entire holding—Court-fee payable.*

The Court-fee payable on a plaint in a suit for the recovery of land which is not an entire holding or a definite share or fractional part of a holding separately assessed to revenue but consists of individual field plots which form part of a holding that which are not separately assessed, is that prescribed by section 7 (*v*) (*d*) of the Court-Fees Act. **R** MA SHA MA *v.* SAMASUNDRAM CHETTY, 2 Bur. L. J. 39; 1 R. 492; (1923) A. I. R. (R.) 246 **217**

——— **s. 7 (v) (c), Sch. II. Art. 17 (4)**—*Madras Civil Courts Act (III of 1873), s. 12—Suit to set aside award—Value for purposes of Court-fees and jurisdiction.*

A suit to set aside an award is, for the purpose of Court-fees, governed by Art. 17, clause (4) of Schedule II to the Court-Fees Act, and the Court-fee payable on a plaint in such a suit is a fixed fee of Rs. 15.

For the purposes of jurisdiction, the value of the subject-matter of a suit to set aside an award is the actual value of the interest affected by the award, and involved in the suit. The plaintiff in such a suit is not at liberty to arbitrarily place his own valuation on the relief he seeks. Thus, where an award directs the payment by a person of a particular sum of money, and he institutes a suit to have the award set aside, the value of the suit for purposes of jurisdiction is the amount which he is directed by the award to pay.

Keshava Sanabhaya v. *Lakshminarayana*, 6 M. 102; 7 Ind. Jur. 186; 2 Ind. Dec. (N. S.) 413, *Ganapati* v. *Chathu*, 12 M. 223; 4 Ind. Dec. (N. S.) 505, *Rachappa Subrao* v. *Shidappa Venkatrao*, 50 Ind. Cas. 280; 43 B. 507; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.), *Mohini Mohan Misser* v. *Gour Chandra Rai*, 56 Ind. Cas. 762; (1921) Pat. 105; 5 P. L. J. 307; 1 P. L. T. 390; 2 U. P. L. R. (Pat) 123, followed. **M** VENKATACHELAM PILLAI *v.* SRINIVASA AIYAR, 18 L. W. 399; (1923) M. W. N. 747; (1924) A. I. R. (M.) 81 **115**

——— **s. 7 (v) Sch II. Art. 17 (6)**—*Suit by Muhammadan co-sharer in possession of some items against other co-sharers for partition, nature of.*

A suit by a Muhammadan co-sharer against her other co-sharers for partition and possession of her share of her deceased father's properties alleging that she is in possession of some of the items as indicative of her joint possession in law with the other co-sharers of the deceased's estate, is one for partition and possession of one's share by one having joint possession of the estate taken as a whole and falls under Art. 17, clause (6) of Schedule II to the Court-Fees Act and not under section 7 (*v*) of the Act.

Gili v. *Varada Raghavayya*, 55 Ind. Cas 517; 43 M. 396; 38 M. L. J. 92; 11 L. W. 174; (1920) M. W. N. 124; 27 M. L. T. 146 and *Ahamuddin Tamiruddin* v. *Amiruddin*, 44 Ind. Cas. 216, followed. **M** KURSHIT KATHUM *v.* HYDER KHAN. (1923) M. W. N. 564 **98**

——— **Sch II. Art. 17 (vi)**—*Suit for declaration that plaintiff is entitled to a certain deposit in a Bank—Appeal—Court-fee payable.*

Plaintiff obtained a decree declaring that he was entitled to a certain sum lying in deposit with a Bank and directing the Bank to pay the amount to him. Defendant appealed and stamped the memorandum of appeal with a Rs. 10 stamp under Art. 17 (*vi*) of Schedule II to the Court-Fees Act;

Held that the memorandum of appeal was correctly stamped.

Kirpal Singh v *Sant Singh*, 13 Ind. Cas. 305; 71 P. R. 1911; 30 P. L. R. 1912; 205 P. W. R. 1911, followed. **L** UTTAM DEVI *v.* DINA NATH. (1923) A. I. R. (L.) 359 **774**

Court of Wards, *statements by Deputy Commissioner and Board of Revenue, effect of.*

Any statement made by a Deputy Commissioner or the Board of Revenue in derogation of the rights of a person on whose behalf an estate is held by the Court of Wards cannot be deemed to have been made on that person's behalf or as his agent. O ZARIF-UN-NISSA *v.* SHAFIQ-UZ-ZAMAN, 20 O. C. 133, (1923) A. I. R. (O.) 185 **626**

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 195—*Penal Code (Act XLV of 1860), s. 211*—*Application to Deputy Commissioner, for enquiry, whether complaint—Sanction to prosecute—False complaint—Procedure.*

M. addressed an application to a Deputy Commissioner, saying that his application to the Police was not enquired into and praying that the Deputy Commissioner should order an enquiry or start himself an enquiry. *M.* did not ask for the trial and punishment of the accused :

Held, that the application was not a "complaint" for the purposes of section 211 of the Act.

As a matter of judicial prudence, sanction to prosecute for making a false complaint ought not to be granted unless the complaint has been properly dealt with and dismissed. N MAHADU *v.* EMPEROR, 24 CR. L. J. 959 **543**

——— **ss. 34, 439**—*Sentence passed by Magistrate under s. 34—Enhancement, limit of—Procedure.*

Clause (3) of section 439 of the Criminal Procedure Code limits the power of enhancement and lays down that where the sentence dealt with under the section has been passed by a Magistrate acting otherwise than under section 34 of the Code, the Court shall not inflict a greater punishment for the offence, which in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate of the First Class. This limitation does not apply to a sentence which has been passed by a Magistrate acting under section 34 of the Code.

At the same time, except in very exceptional cases, a sentence by the High Court under its powers of enhancement should not, where the sentence has been imposed by a Magistrate, exceed one of seven years' rigorous imprisonment, which a Magistrate acting under section 34 has power to pass, the usual course when a Court thinks that a sentence of seven years' rigorous imprisonment would not meet the ends of justice would be to set aside the trial and order the case to be committed to the Court of Session. L SEWA SINGH *v.* RANJHA, (1923) A. I. R. (L.) 600; 24 CR. L. J. 932 **356**

——— **ss. 35, 307 (3), 423 (1) (d).** *See* PENAL CODE, 1860, s. 571 **299**

——— **s. 90**—*"After recording its reasons," meaning of—Warrant, issue of, without recording reasons, effect of—Magistrates, duty of.*

The words "after recording its reasons in writing" in section 90 of the Criminal Procedure Code are not *imperative* but *directory*.

A warrant which, on the face of it, is a good and valid warrant, is signed by the Magistrate, sealed with the seal of the Court addressed to a Police Officer, and which states the reason upon which the Magistrate relied, is not invalid merely by reason of the fact that the Magistrate has omitted to record in writing, otherwise than in the warrant, the reason which actuated him to issue the warrant.

Sukheswar Phukan v. *Emperor*, 11 Ind. Cas. 593; 38 C. 789; 12 Cr. L. J. 409; 15 C. W. N. 1001; 15 C. L. J. 186, overruled.

Before issuing a warrant the Magistrate should record his reasons specifically in writing and should not be satisfied with signing a warrant in the form given in the schedule to the Criminal Procedure Code.

N. R. Chatterjea, J.—(dissenting)—Section 90 requires not merely the statement in the form of the warrant that the Court has good and sufficient reasons but these reasons should be stated. The mere signing of the warrant which states that the Court has reason to believe is not sufficient compliance with the law. C GOVERNMENT OF ASSAM *v.* SAHEBULLA, 38 C. L. J. 77; 27 C. W. N. 857; 24 CR. L. 881; (1924) A. I. R. (C.) 1 **129**

——— **s. 106**—*Conviction under s. 323—Order for security—"Involve," meaning of.*

To justify an order for security under section 106, Criminal Procedure Code, there must be an express finding to the effect that the act involves a breach of the peace or an evident intention of committing the same, or the evidence must be so clear as to satisfy the Court (without an express finding) that such was the case.

The word "involve" in section 106 of the Code connotes the inclusion not only of a necessary but also of a probable feature, circumstance, antecedent condition or consequence.

Jib Lal Gir v. *Jogmohan Gir*, 26 C. 576; 13 Ind. Dec (N. S.) 970 and *Emperor* v. *Manik Rai*, 11 Ind. Cas. 589; 33 A. 771; 8 A. L. J. 925; 12 Cr. L. J. 405, followed. N NANHA *v.* KANHAYALAL, 25 CR. L. J. 71 **983**

——— **ss. 106, 107, 406**—*Order under s. 106—Order under s. 107—Appeal.*

Orders under section 106, Criminal Procedure Code, directing security for good behaviour to be given can be appealed from under section 406 of the Code, but no appeal lies in proceedings instituted under section 107 for keeping the peace read with section 118 of the Criminal Procedure Code. N SHAMRAO *v.* EMPEROR, 19 N. L. R. 160; 25 CR. L. J. 67 **979**

——— **ss. 107, 144, 145**—*Dispute with regard to land—Both parties called upon to show cause—One party subsequently called upon to show cause why it should not be bound over—Proceedings set aside by District Magistrate—Fresh proceedings under s. 145 ordered—Illegality—Irregularity in form without prejudice to party—Interference—Revision, whether desirable.*

In many cases where in orders there has been irregularity of form but where it appears that no harm would be done to the parties, although by a wrong method a right result may have been reached, it is undesirable that the High Court should exercise its discretionary jurisdiction in revision.

Criminal Procedure Code—contd.

Upon a Police report a Magistrate recorded an order under section 144, Criminal Procedure Code, and issued notice to the parties to show cause. On the date fixed for hearing proceedings were drawn against one party under section 107 of the Code and a date was fixed for showing cause why they should not be bound over. This party applied to the District Magistrate to set aside this order. Without issuing any notice to the other party the District Magistrate set aside the preliminary order under section 107 and directed that proceedings be taken under section 145 of the Code. Proceedings were taken up accordingly and the party applied to the High Court in revision:

Held, that the District Magistrate had no power to set aside the order under section 107 nor had he any jurisdiction to direct the Sub-Divisional Magistrate to initiate proceedings under section 145. **Pat** BANSIDHAR MARWARI *v.* INDAR NARAIN SINGH, 24 CR. L. J 865 **65**

——— **ss. 107, 514**—*Security to keep the peace—Conviction for rioting—No order as to security—Proceeding, separate, for confiscation of security, validity of.*

If a Criminal Court, knowing that a person charged before it is under security to keep the peace or to be of good behaviour, in sentencing that person in the case before it makes no reference to the confiscation of that security and takes no steps towards its confiscation, it is not competent for that Court or any other Court in a subsequent and separate proceeding to take such steps.

Emperor v. *Mawaz*, 18 Ind. Cas. 403; 13 P. R. 1913 Cr.; 7 P. W. R. 1913 Cr.; 14 Cr. L. J. 67; 39 P. L. R. 1913 (F. B.), followed. **L** MUNSHI *v.* EMPEROR, 25 CR L. J. 4 **692**

——— **s. 110**—*"By habit" and "habitually," meaning of—Penal Code (Act XLV of 1860), s. 383—Extortion—Picketing shops and realising fines—Offence.*

The word "by habit" as used in section 110 (*d*), Criminal Procedure Code, means persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts. The word does not merely signify an inclination by nature to do such acts. The word "habitually" in the same section means repeatedly or persistently

The realisation of fines by means of picketing for the purpose of preventing the sale of foreign cloth, is extortion within the meaning of section 383 of the Penal Code. **N** LOCAL GOVERNMENT *v.* HANMANT RAO, (1924) A. I. R. (N) 19 **764**

——— **ss. 110, 117**—*Evidence of mere suspicion, value of—Prosecution, duty of—Evidence of good repute—Court, duty of—Powers to be exercised with caution.*

Evidence of mere suspicion of a person having taken part in certain criminal offences is not evidence of general repute within the meaning of section 117, clause (3), Criminal Procedure Code.

In order to bind a person down in security to be of good behaviour under section 110 of the Criminal Procedure Code, there should be evidence in which the accused is proved to have been concerned in certain criminal cases, or some direct evidence to establish his complicity in such cases; the evidence ought to be of such a nature as to lead to a reasonable and definite ground for coming to the conclusion that the accused is a habitual thief.

When proceedings under section 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence and should find substantial reasons for not believing the evidence before it makes an order.

The powers given to a Court by section 110 of the Code should be exercised with extreme caution and with very great discretion. **Pat** AMJAD ALI *v.* EMPEROR, 5 P. L. T. 120; 2 P. L. R. 70 Cr.; 25 CR. L. J. 35 **723**

——— **ss. 110, 169**—*Evidence against accused in connection with substantive offence of no value—Discharge of accused under s. 169—Evidence, whether can be used to support charge under s. 110—Magistrate acting on information obtained from Special Diary improper.*

Where the evidence against an accused person in connection with a dacoity is considered by the Police to be of so little value as to result in his release under section 169 of the Code of Criminal Procedure, without even being placed before the Court it is contrary to all accepted principles to make use of this evidence as a ground for binding the accused over on a charge under section 110. Nor is it open to a Magistrate to act upon information not given in evidence but obtained from a perusal of the Special Diary. **A** JHANDU SINGH *v.* EMPEROR, (1924) A. I. R. (A.) 142 25 CR. L. J. 45 **733**

——— **ss. 123, 498**—*Sessions Judge, if competent to grant bail pending hearing of reference under s. 123 Criminal Procedure Code*

Pending the hearing of a reference made to a Sessions Judge under section 123 (2) of the Criminal Procedure Code in respect of an order made under section 118 of that Code, the Sessions Judge has jurisdiction, under section 498, to admit the person adversely affected by that order to bail. **C** AHMED ALI SARDAR *v.* EMPEROR, 37 C. L. J. 592; 50 C. 969; (1923) A. I. R. (C.) 723; 24 CR. L. J. 953 **537**

——— **ss 144, 145**, *applicability of—Magistrate, duty of—Jurisdiction—Revision direct to High Court, maintainability of—Government of India Act 1915 (5 & 6 Geo V, C. 61), s. 107.*

Section 144 of the Criminal Procedure Code is applicable only to temporary orders in urgent cases of nuisance or apprehended danger; its provisions do not apply to cases where there is a dispute as to land for the settlement of which section 145 provides the proper remedy.

Lachman Ram v. *Dairu Dusadh*, 48 Ind. Cas. 342; 19 Cr. L. J. 1002, followed.

In a proceeding under section 144 of the Criminal Procedure Code the Magistrate, without taking any evidence and without considering the docu-

ments produced or which might have been produced by the parties, found in favour of the second party and made an order absolute as regards possession. On revision:

Held, that the order was without jurisdiction, and could not be sustained, inasmuch as action under section 144 of the Code of Criminal Procedure, can only be taken after the Magistrate is satisfied that immediate prevention or speedy remedy is necessary and when he is so satisfied that it is so, he must state the material facts in the order.

Karoolal Sajwal v. *Shyam Lal*, 32 C. 93; 9 C. W. N. 364; 1 C. L. J. 216; 2 Cr. L. J. 215, followed.

Where an order made by a Magistrate is outside the scope of cl (1) of section 144 of the Criminal Procedure Code it cannot be treated as an order made under that section, but is an unauthorised order made without jurisdiction and the High Court can, in exercise of its power of superintendence under section 107 of the Government of India Act, set it aside, even though no application was in the first instance made to the District Magistrate as required by sub-section (1) of section 141 of the Criminal Procedure Code. Pat AKAL MAHTON v. MAHABIR MAHTO, 1 P. L. R. 223; 24 CR. L. J. 947; 5 P. L. T. 90 531

——— s. 145—*Decision as to possession by Civil or Criminal Court, whether binding on Magistrate—Written statement—Statement supported by evidence of deponent—Discretion—Further evidence, when necessary.*

It is not always incumbent upon a Magistrate trying a case under section 145 of the Criminal Procedure Code to give effect to the decision of a Civil or Criminal Court, and no hard and fast rule can be laid down in this respect.

Where, in a proceeding under section 145 of the Criminal Procedure Code, one of the parties files a written statement, and that statement is supported by his own evidence in Court, the Magistrate, in relying upon the written statement, does not act without jurisdiction; nor does he do so in not accepting a decision in a previous case of rioting as to possession.

It is in the discretion of the Magistrate in a proceeding under section 145 of the Criminal Procedure Code to take further evidence, if he thinks it is necessary to do so. If he is satisfied on the evidence, produced as to the party in actual possession, it is not necessary for him to take further evidence. Pat BHULAN RAUT v. KUMAR RAI, 2 CR. L. J. 951; 5 P. L. T. 60 535

——— s. 145—*Dispute over property—Preliminary order—Omission to mention source of information—Jurisdiction.*

The jurisdiction of a Magistrate to take proceedings under section 145 of the Criminal Procedure Code, is not ousted by his merely omitting to mention in the preliminary order the source of information upon which he was satisfied that a dispute existed concerning certain property and was likely to cause a breach of the peace. O SHER BAHADUR SINGH v. FAZAL ALI, 9 O. & A. L. R. 865; 25 CR. L. J. 48 786

——— s. 145—*Examination of witnesses—Magistrate, discretion of—Document admitted without being proved—Jurisdiction, whether affected.*

In a proceeding under section 145 of the Criminal Procedure Code, it is in the discretion of the Magistrate to refuse to examine all the witnesses produced by any party, but the discretion is one which must be exercised with due care and caution and with careful regard to the circumstances of each particular case.

Biswanath Mahapatra v. *Shivanand Saraswati*, 61 Ind. Cas. 718; 2 P. L. T. 330; 22 Cr. L. J. 430, distinguished.

The admission of a document without being duly proved and without any objection may be an illegality, it does not affect the jurisdiction of the Magistrate to pass the final order in the case. Pat WAHIDUNNISSA v. PICHIT LAL MISSIR, 24 CR. L. J. 954 538

——— s. 145—*Possession of auction-purchaser on date of initiatory order and two months before—Subsequent dispossession—Proper order.*

In execution of a decree obtained against the predecessor-in-interest of the first party to the proceedings under section 145 of the Criminal Procedure Code, a tank and a house were purchased at an auction-sale by the second party. The auction-purchasers obtained possession of the tank in November 1918 through the Civil Court five days before the death of the judgment-debtor. It was found, however, that, notwithstanding the delivery of possession, the first party continued to be in possession up to the day when proceedings were instituted. It was found further that the auction-purchaser took possession of the residential house in May 1920 but that on the date when the proceedings were instituted and for more than two months preceding that date the members of the first party were in possession:

Held, (1) that so far as the tank was concerned, the Magistrate ought to have declared the first party and not the second to have been in possession;

(2) that so far as the house was concerned there must have been a dispossession of the auction purchasers giving rise in their favour to a fresh cause of action and the Magistrate should have declared the first party to be in possession.

Hazari Khan v. *Nafar Chandra Pal Chowdry*, 40 Ind. Cas. 718; 22 C. W. N. 479; 18 Cr. L. J. 718; *Kulada Kinkar Roy* v. *Danesh Mir*, 33 C. 33; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (P. B.), followed. C SHAHABAJ MANDAL v. BHAJAHARI NATH, 25 C. W. N. 743; 49 C. 177; (1922) A. I. R. (C.) 364; 24 CR. L. J. 875 75

——— s. 145, *proceeding under—Decree of Civil Court, effect of.*

A Magistrate in deciding the question of possession under section 145 of the Criminal Procedure Code is not in every case bound by the previous order of a Civil or Criminal Court relating to the possession of the subject-matter of the dispute and the weight to be attached to any such previous order depends upon the facts and circumstances of the particular case before him.

Where, however, there is a recent order of a Civil Court delivering possession to a particular party, that order ought to be respected and given effect to by a Magistrate acting under section 145 of the Criminal Procedure Code, unless and until there is something shown which might induce the Magistrate to hold that, subsequent to the delivery of possession, something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court. **Pat** RAMBARAI RAI *v.* SAGINA RAI, 4 P. L. T. 333; (1923) A. I. R. (Pat.) 437; 24 CR. L. J. 939 **363**

——— **s. 145**, *proceedings under, object of—Breach of peace, apprehension of—Possession—Title, enquiry as to, whether relevant.*

The object of the provisions contained in section 145 of the Criminal Procedure Code is to bring to an end by a summary process disputes relating to land, which are in their nature likely, if not suppressed, to end in breaches of the peace.

The mere circumstance that the dispute is one of a religious nature is not sufficient to justify a Magistrate to take action under section 145 of the Criminal Procedure Code. There must be positive evidence on the record that a breach of the peace is likely to occur if proceedings under the section are not taken.

Section 145 of the Criminal Procedure Code is concerned solely with the fact of actual physical possession whether lawful or unlawful and questions as to title are quite irrelevant and entirely outside the scope of the section. **L** BHAGWAN DAS *v.* MAULA DAD KHAN, 25 CR. L. J. 78 **80**

——— **ss. 145, 146**—*Property—Joint possession of parties—Order of attachment, whether legal.*

Where in a dispute concerning property which the Magistrate finds is joint property and in the joint possession of the parties, he has no jurisdiction to make an order under section 145, or section 146 of the Criminal Procedure Code. **Pat** NAND KISHORE MISSIR *v.* KALIKA MISSIR, (1923) A. I. R. (Pat.) 546; 24 CR. L. J. 809; 5 P. L. T. 45 **69**

——— **ss. 145, 146, 439**—*Order of attachment, when can be passed—Magistrate, duty of—Magistrate refusing to make inquiry—Revision—High Court, power of.*

An order under section 146 of the Criminal Procedure Code attaching the subject-matter in dispute can only be passed after the Magistrate has taken evidence under section 145, and has satisfied himself that none of the parties was in possession, or that he is unable to satisfy himself as to which of them was in possession.

Where a Magistrate refuses to make an inquiry under section 145 (4), his proceeding cannot be held to be one under that section so as to bar the jurisdiction of the High Court to revise his order. **M** NILKANTH *v.* SURYABHAN, (1923) A. I. R. (N.) 297; 24 CR. L. J. 880 **80**

——— **ss. 154, 157, 162, 342, 540**—*Local inspection by Magistrate, when permissible—Results, whether can be embodied in the testimony of witnesses.*

It is competent to a Magistrate to make a local inspection for the purpose of enabling him to understand better the evidence which is laid before him and to use the evidence of his own eyes to test the truth of what the witnesses have deposed to, and it is immaterial that the result of such inspection is not at once put on record and laid open to the scrutiny of parties; nor is it necessary that the accused or their representatives should invariably be present at a local inspection.

Where, after a local inspection, the Magistrate recalls the prosecution witnesses under section 540, Criminal Procedure Code, and really embodies the results of his inspection in the examination of such witnesses on re-call and the accused are afforded a full opportunity of cross-examining them with reference to the facts then elicited, the procedure adopted is not illegal nor prejudicial to the accused.

Queen-Empress v. *Maniham*, 19 M. 263; 6 M. L. J. 143; 2 Weir 725; 6 Ind. Dec. (N. S.) 888; *Babbon Shaikh* v. *Emperor*, 5 Ind. Cas. 365; 37 C. 340; 14 C. W. N. 422; 11 Cr. L. J. 121; 11 C. L. J. 335; *In the matter of the petition of Lalji*, 19 A. 302; A. W. N. (1897) 52; 9 Ind. Dec. (N. S.) 198; *Sudhama Upadhya* v. *Queen-Empress*, 23 C. 328; 12 Ind. Dec. (N. S.) 219; *Alia Rai* v. *Jhingur Tewari*, 13 Ind. Cas. 844; 39 C. 476; 16 C. W. N. 424; 15 C. L. J. 403; 13 Cr. L. J. 156, considered.

Section 342 of the Criminal Procedure Code does not make it legally incumbent on a Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses after the framing of the charge when they are re-called by the Magistrate under section 540, Criminal Procedure Code, though it is highly desirable that he should so question the accused if the evidence contains any new matter of importance.

Referred Trial 160 of 1922, followed.

A Deputy Superintendent of Police is an officer legally competent to investigate the facts of offences of murder and dacoity within the meaning of section 157, Indian Evidence Act, and a statement of a witness recorded by such an officer is not inadmissible merely because it was not recorded as required by section 154, Criminal Procedure Code. **M** THACKROTH HYDROSS, *In re*, 18 L. W. 113, 45 M. L. J. 279; (1923) A. I. R. (M.) 694; (1923) M. W. N. 860; 25 CR. L. J. 7 **695**

——— **s. 162**—*Police diaries, use of.*

Section 162 of the Code of Criminal Procedure forbids reference to Police diaries or to their use as evidence either for or against an accused person and a consent or desire on the part of the defence Counsel cannot legalise such reference or use. **O** MANNA LAL *v.* EMPEROR, 9 O. & A. L. R. 947; 25 CR. L. J. 49 **753**

——— **ss. 164 (2) 364**—*Confession not recorded in accordance with law—Conflict with prosecution evidence—Confession, value of.*

A confession which is not recorded in accordance with the procedure laid down by section 164 (2), read with section 364, of the Criminal Procedure Code, and the details of which conflict with the evidence for the prosecution,

Criminal Procedure Code—contd.

and which is retracted on the first possible occasion, is of no value as evidence as against the person making it. L HARPHUL *v.* EMPEROR, (1923) A. I. R, (L.) 429; 25 CR. L. J. 58 762

——— **ss. 179, 181, 185**, *scope of.*

Section 179 of the Code of Criminal Procedure is controlled by section 181 in respect of the offences mentioned in the latter section.

No question of convenience or expediency can be considered under section 185 of the Criminal Procedure Code. That section deals with the questions of competency only when they are involved in doubt.

Charu Chandra v. *Emperor*, 37 Ind. Cas. 145; 44 C. 595; 21 C. W. N. 820; 25 C. L. J. 165; 18 Cr. L. J. 81, followed. A GIRDHAR DAS *v.* EMPEROR, 2 Cr. L. J. 92 ; (192) A. I. R. (A.) 77 353

——— **s. 195**—*Applicability of section—"Any proceeding"—"Judicial proceeding."*

The provisions of section 195 of the Criminal Procedure Code apply to "any proceeding" and are not necessarily restricted to a "judicial proceeding." R ABDUL AZIZ *v.* MAUNG TIN, 2 Bur. L. J. 48; (1923) A. I. R. (R.) 225; 24 Cr. L. J. 874 74

——— **s. 195**—*Sanction for prosecution—Evidence in original suit—Court, whether can go beyond.*

In giving or upholding a sanction under section 195 of the Criminal Procedure Code a Court is not restricted to the evidence recorded in the original suit. It has inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it under sub-section (6) of the section.

In re Paree Kunnammed, 26 M. 116; 2 Weir 189, dissented from.

Budhu Lal v. *Chattu Gope*, 39 Ind. Cas. 465; 21 C. W. N. 269 at pp. 279, 280; 25 C. L. J. 193; 18 Cr. L. J. 497; 44 C. 816, relied on. N PARMANAND PARWAR *v.* KARTAR NATH, (1924) A. I. R. (N.) 35, 25 CR. L. J. 15 703

——— **s. 195**—*Sanction to prosecute—Public Officer, complainant—Sanction, whether necessary.*

The sanction of a Public Officer for a prosecution under section 195, of the Criminal Procedure Code is not necessary in a case where the complainant is himself the Public Officer concerned. Pat GOVERNMENT ADVOCATE BEHAR & ORISSA *v.* GANGA PRASAD, 3 P. L. T. 55; (1922) A. I. R. (Pat.) 532; 1 Pat. 423; 25 CR. L. J. 31 719

——— **s. 195(4)**—*Sanction to prosecute—Application giving full particulars—Order of sanction omitting to give particulars—Sanction, whether valid.*

An application for sanction to prosecute should be read with the order granting such application, and if the necessary particulars required by sub-section (4) of section 195 of the Criminal Procedure Code are given in the application, the fact that the order omits to give these particulars would not render the sanction, a bad sanction.

Criminal Procedure Code—contd.

Dulloo Singh v. Deputy-Inspector General of Police C. I. D. Bengal, 65 Ind. Cas. 570; 49 C. 551; 23 Cr. L. J. 138; (1922) A. I. R. (C.) 412, followed. C KALI SINGH *v.* EMPEROR, 50 C. 41; 24 Cr. L. J. 949; (1924) A. I. R. (C.) 53 533

——— **s. 195 (7)**—*Penal Code (Act XLV of 1860), s. 182—Magistrate, First Class, whether subordinate to Sessions Judge—Person deliberately giving false information to public servant—Public servant not legally entitled to take action—Informant, whether liable.*

First Class Magistrates, when acting as a Court are, for the purposes of sub clause (7) to section 195, Criminal Procedure Code, subordinate to the Sessions Judge.

When a person gives false information to a public servant deliberately asking that public servant to take certain action, it cannot be said that he is not punishable under section 182, Penal Code, merely because the public servant was not legally entitled to take the action requested.

Manohar v. *Emperor*, 47 Ind. Cas. 91; 10 A. L. J. 614; 19 Cr. L. J. 835, dissented from.

One *D*, purporting to act on behalf of his father, *G*, applied to a Cantonment Magistrate to have two shops opened and the property found in them placed in deposit. *G* was the owner of these shops and it was alleged that the tenant *S* had disappeared and that his whereabouts were not known. The application was granted and the shop was opened by the Police under direction from the Magistrate. Subsequently, an application was made by one *G D* acting on behalf of his brother *S* objecting that false information had been given and stating that a civil suit was pending regarding the title to the shops. The Magistrate thereupon cancelled his previous order and directed that *S* should be put in possession. *S* then applied for sanction to prosecute *G* under section 182, Penal Code. The Cantonment Magistrate granted sanction to prosecute both *G* and *D*. They appealed to the Sessions Judge who revoked the sanction. *S* applied for revision:

Held, that the Magistrate purported to act as a Court and that the Sessions Judge had authority to hear the appeal against that order and if necessary to revoke it. Pesh SANT RAM *v.* DIWAN CHAND; 24 CR. L. J. 913 289

——— **s. 205**—*Permission to accused to appear by Pleader revoked—Power of Magistrate—Discretion, how to be exercised.*

The power conferred on a Magistrate under section 205 of the Criminal Procedure Code of exempting a person from personal appearance is discretionary, and where a Magistrate, in exercise of this discretion, permits a person to appear by a Pleader, the concession so extended ought not to be revoked. U DWIGENDRA NARAIN BAGCHI *v.* EMPEROR, 38 C. L. J. 9; 24 Cr. L. J. 902 150

——— **s. 307**—*Judge disagreeing with Jury—Reference—High Court, when may interfere.*

The High Court will interfere on a reference under section 307 of the Criminal Procedure

Code only when it is satisfied that the verdict of the Jury is so manifestly wrong that it ought to be set aside.

Queen v. *Sham Bagdi*, 13 B. L. R. App. 19; 20 W. R. Cr. 73, *Emperor* v. *Surnamoyee Biswas*, 21 Ind. Cas. 900; 41 C. 621; 4 Cr. L. J. 660, followed. C EMPEROR *v.* NRITYA GOPAL ROY, 38 C. L. J. 1; 24 CR. L. J. 897 145

——— s. 337—"*Inquiry*", *meaning of—Pardon tendered during investigation, validity of.*

The word "inquiry" in section 337 of the Criminal Procedure Code is meant to include everything done in a case by a Magistrate, whether the case has been *challaned* or not

When a case has been reported to a Magistrate by the Police, and he is asked to tender a pardon and does so, there is an "inquiry" within the meaning section 337 of the Criminal Procedure Code, and the tender of pardon is perfectly valid.

Bhallu Singh v. *Queen-Empress*, 3 P. R. 1897 Cr., followed.

Motilal Hiralal v. *Emperor*, 64 Ind. Cas. 49; 23 Bom. L. R. 884; 46 B. 61; 22 Cr. L. J. 728; (1922) A. I. R. (B.) 138, dissented from. L SHER MUHAMMAD *v.* EMPEROR, 3 L. 431; (1923) A. I. R. (L.) 270; 24 Cr. L. J. 941 365

——— s. 342—*Examination of accused at conclusion of prosecution evidence, absence of, effect of—Illegality—Re trial*

A Trial Magistrate took down the statement of the accused after recording the evidence of some of the prosecution witnesses. The evidence of several prosecution witnesses was recorded thereafter and a charge was framed but no further examination of the accused took place;

Held, that the failure to comply with the provisions of section 342 of the Criminal Procedure Code had vitiated the trial, and that the trial must be resumed from the point where the Court examined the accused.

Where the terms of the Criminal Procedure Code are clear there is no excuse for a deliberate disregard of them. C HAMID ALI *v.* SRIKISSEN GOSSAIN, 37 C. L. J. 413; 28 C. W. N. 118; 24 Cr. L. J. 913 367

——— s. 342—"*Examined*," *meaning of—Examination of accused after cross-examination of prosecution witnesses, whether obligatory.*

The word "examined" in section 342 of the Criminal Procedure Code does not merely refer to the examination-in-chief of the prosecution witnesses but includes their cross-examination and re-examination.

Mazahar Ali v. *Emperor*, 71 Ind. Cas. 662; 27 C. W. N. 99; 6 C. L. J. 417; 24 Cr. L. J. 198; (1923) A. I. R. (C.) 196; 50 C. 223, followed.

Per *Buckland, J.*—In all cases, whether additional witnesses have been called after a charge has been framed or not, the obligatory examination of the accused under section 342 of the Criminal Procedure Code should take place after all the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence.

Per *Cuming, J.* (*dissenting*).—The expression "examined" used in section 342 of the Criminal Procedure Code does not include cross-examination or re-examination. C DIBAKANTA CHATTERJEE *v.* GOUR GOPAL MUKERJEE, 27 C. W. N. 743; (1923) A. I. R. (C.) 727; 50 C. 939; 25 CR. L. J. 27 715

——— ss. 367, 424—*Judgment of Appellate Court, requisites of.*

The provisions of section 424, read with section 367, Code of Criminal Procedure, are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically, and that the Appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the Trial Court, but should, without being a long and elaborate one, be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record. R BAGH *v.* EMPEROR, 2 Bur. L. J. 101; 1 R. 301, (1923) A. I. R. (R.) 188; 24 Cr. L. J. 920 297

——— s. 423—*Acquittal, setting aside of—Appellate Court, power of.*

Accused was charged with offences under sections 143 and 379 of the Penal Code. He was convicted under section 143 and acquitted of the offences under section 379. On appeal, the Sessions Judge upheld the conviction under section 143 and also passed an order setting aside the acquittal in respect of the offence under section 379:

Held, that the Sessions Judge had no jurisdiction to set aside the acquittal as this was not a case of altering conviction within the meaning of section 423 of the Criminal Procedure Code. C PRASANNA CHANDRA *v.* UPENDRA NATH, 27 C. W. N. 555; 37 C. L. J. 409; (1923) A. I. R. (C.) 653; 24 CR. L. J. 938 382

——— s. 437—*Further enquiry—No fresh material—Magistrate, power of.*

A Magistrate has jurisdiction to order a further enquiry under section 437, Criminal Procedure Code, upon the same materials which were before the Subordinate Magistrate who tried the case in the first instance.

Queen-Empress v. *Chotu*, 9 A. 52 at p. 59; A. W. N. (1887) 281; 5 Ind. Dec. (N.S.) 465 (F. B.), applied.

Hari Dass Sanyal v. *Saritulla*, 15 C. 608; 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 989 (F. B.) and *Queen-Empress* v. *Balasinnatambi*, 14 M. 334; 1 M. L. J. 343, 2 Weir 557; 5 Ind. Dec. (N. S.) 234 (F. B.), relied upon. O HAIDER KHAN *v.* EMPEROR, 9 O. & A. L. R. 869; 25 CR. L. J. 66 978

——— s. 438—*Criminal appeal—Memo. of appearance filed by Pleader*—Vakalat—*Criminal Rules of Practice, r.* 141.

Where an appeal in a criminal case after being entertained by a proper Court is transferred to a Sub-Divisional Magistrate for disposal and a memorandum of appearance is filed by Pleader for the conduct of the appeal, the Magistrate is not entitled to insist on the filing of a *Vakalat*.

Criminal Procedure Code—contd.

In re Munirama Reddi, 1 Ind. Cas. 546; 5 M. L. T. 290; 9 Cr. L. J. 305, followed. **M** *In re* MANIKONDA LINGAYYA, 45 M. L. J. 673; 18 L. W. 960; (1924) M. W. N. 511; 133 M. L. T. 224; 25 CR. L. J. 73 **985**

——— **s. 439**—*Revision—Sentence, plea of, when can be urged.*

Where no plea on the question of the severety of the sentence is urged before the Court of Appeal it cannot be taken in revision before the High Court. **A** MAHADEO PRASAD *v.* EMPEROR, 21 A. L. J. 654; 24 Cr. L. J. 911; 45 A. 680; (1924) A. I. R. (A) 131 **159**

——— **s. 476**—*Order directing prosecution based on inadmissible evidence, legality of—Discretion of Court, exercise of.*

An order under section 476 of the Criminal Procedure Code directing the prosecution of a person for forgery should not be made on the basis of a piece of evidence which is inadmissible and which cannot be legally regarded as evidence at all, especially when there is positive legal evidence against it.

The power conferred by section 476 of the Criminal Procedure Code on Courts should be exercised with great caution and care and with due regard to the evidence on which the order is sought to be based. **A** PEARY LAL *v.* EMPEROR, 21 A. L. J. 399; (1923) A. I. R. (A.) 601; 24 Cr. L. J. 900 **148**

——— **s. 488 (5)**—*Maintenance, order for—Subsequent temporary stay of wife with husband, effect of.*

The return of a wife to her husband temporarily after obtaining an order for maintenance may have the effect of suspending the operation of the order, it has not the effect of cancelling the order in the way in which it can be cancelled under section 488 (5) of the Code of Criminal Procedure. **C** PARUL BALA DEBI *v.* SATISH CHANDRA BHATTACHARJEE, 37 C. L. J. 18; (1923) A. I. R. (C.) 456; 24 Cr. L. J. 945 **529**

——— **s. 488 (6)**—*Order for maintenance—Jurisdiction of Magistrate to revise order of predecessor.*

A Magistrate has power under section 488 (6) of the Criminal Procedure Code to re-open a case in which maintenance has been awarded by his predecessor, and to revise the order granting maintenance where the petition is presented within three months of the order. **R** MAUNG TUN YIN *v.* MA THEIN SHIN, 2 Bur. L. J. 61; (1923) A. I. R. (R.) 159; 24 Cr. L. J. 928 **304**

——— **s. 532**, *scope of—Absence of accused—Trial when can proceed—Jurisdiction—Defect, whether cured by consent of accused—Point not raised at trial—Revision—High Court, whether can interfere.*

Section 205 of the Criminal Procedure Code applies only to cases in which the Magistrate has issued a summons in the first instance. It does not apply to a case where the accused has been arrested without or after the issue of a warrant.

When a Magistrate has no jurisdiction to hear a case in the absence of the accused, jurisdiction cannot be conferred by any consent on the part of the accused.

The fact that the accused does not take objection to the trial on the ground that the Court has no jurisdiction to proceed with it would not debar him from raising the same point in a petition for revision before the High Court. The defect is not cured by section 537 of the Code. **Fat** ABDUL HAMID *v.* EMPEROR, (1923) Pat. 239; 2 Pat. 793; 24 Cr. L. J. 872; 2 P. L. R. 1 Cr; (1924) A. I. R. (Pat.) 46 **72**

——— **s. 522**—*Criminal trespass, conviction for—Criminal force, use of, absence of—Restoration of possession, order for, whether can be made.*

Petitioners were convicted of an offence under section 447 of the Penal Code by reason of their having continued to cultivate certain fields in spite of their ejectment. There was nothing to indicate that the offence was attended by the use of criminal force;

Held, that an order under section 522 of the Criminal Procedure Code directing the restoration of possession of the fields to the complainant, could not, in the absence of a finding as to the use of criminal force, be made in the case. **A** CHUNNI LAL *v.* BALDEO, 21 A. L. J. 595; (1924) A. I. R. (A.) 84; 25 CR. L. J. 42 **780**

——— **s. 537**, *scope and applicability of—Criminal trial—Procedure prescribed by Statute not followed—Cross-cases—Prosecution witnesses in each case treated as defence witnesses in the other, legality of—Consent of accused, effect of.*

The consent of the accused or his Counsel cannot validate a course of procedure which the law does not authorise.

In all penal matters the utmost strictness as to procedure must be observed. Where the mode in which a criminal trial is to be conducted is regulated by Statute, a departure from the authorised procedure can itself only be sanctioned by a statutory provision.

Section 537 of the Criminal Procedure Code does not apply to an infringement of a statutory requirement. It only applies to errors, omissions, or irregularities of a formal and technical nature which may occur by accident or oversight, and does not cover a substantial departure from the mode of conducting criminal trials laid down by law.

Subrahmania Ayyar **v.** *King-Emperor*, 25 M. 61 at p. 9; 11 M. L. J. 233; 3 Bom. L. R. 340; 28 I. A. 257; 5 C. W. N. 866 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.) followed.

In two cross-cases which arose out of the same occurrence and were being separately tried by a Sessions Judge, the evidence of the prosecution witnesses in each case, which included the depositions of the accused in the cross-case, was, at the request of the accused, treated as defence evidence in the cross-case:

Held, (1) that this mode of recording defence evidence was hopelessly and entirely illegal inasmuch as:—

(*a*) it resulted substantially in the accused in both cases being tried jointly, which was illegal;

Criminal Procedure Code—concld.

(*b*) the evidence of each accused person as prosecution witness in the cross-case was treated as defence evidence in his own case and the case of is co-accused, which was not permissible under the law, and

(*c*) as the evidence which was treated as defence evidence in each case had not been recorded in the presence of all the accused in that case;

(2) that the consent of the accused did not cure the illegality;

(3) that the case was not covered by the provisions of section 537 of the Criminal Procedure Code;

(4) that the trial must be set aside and new trials ordered. L ALLU *v.* EMPEROR, 4 L. 376; (1924) A. I. R. (L.) 104; 6 L. L. J. 193; 25 CR. L. J. 68 **980**

——— s. 540—*Examination of witnesses after close of case—Illegality—Discretion of Magistrate, exercise of.*

After both sides to a case had closed their respective cases and after arguments had been heard and a date had been fixed for delivery of judgment, two witnesses who were named by the prosecution were examined by the Magistrate under section 540 of the Criminal Procedure Code:

Held, that the procedure adopted by the Magistrate was entirely unjustifiable and the trial must be set aside.

The power conferred by section 540 of the Criminal Procedure Code on Magistrates is very wide, but the wider the power, the more cautious should be the exercise of discretion on the part of the Magistrate. C NATABAR GHOSE *v.* ADYA NATH BISWAS, 37 C. L. J. 415; 27 C. W. N. 655; (1923) A. I. R. (C.) 690; 24 CR. L. J. 957 **511**

Criminal trial— *Duty of prosecution to call witnesses.*

In a criminal trial, the Public Prosecutor is not bound to call as witness for the Crown any person whose evidence in his opinion is unnecessary.

Queen-Empress v. *Durga*, 16 A. 84; A. W. N. (1894) 7; 8 Ind. Dec. (N. S.) 55 (F. B.), followed.

Dhuno Kazi v. *Empress*, 8 C. 121; 10 C. L. R. 151; 6 Ind. Jur. 251; 4 Ind. Dec. (N. S.) 77 and *Ram Ranjan Ry* v. *Emperor*, 27 Ind. Cas. 554; 42 C. 422; 19 C. W. N. 23; 16 Cr. L. J. 170, distinguished. M DORAISWAMI UDAYAN *v.* EMPEROR, 33 M. L. T. 213; (1923) M. W. N. 782; 45 M. L. J. 846; 25 CR. L. J. 75 **867**

Custom—*Adoption—Sonless proprietor—Proof of adoption—Registered deed.*

In a case where the powerof customary adoption by a sonless proprietor is not disputed, all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention is the execution and registration of a deed of adoption, coupled with a clear declaration in Court and subsequent treatment as adopted son. The proof of such subsequent treatment cannot, however, be reasonably demanded in a case where, very soon after the execution of the deed of adoption, the reversioners of the adoptive father sue for a declaration that the adoption did not in fact take place

Gurbachna v. *Bujha*, 9 Ind. Cas. 821; 42 P. R. 1911; 63 P. W. R. 1911; 99 P. L. R. 1911, followed. L MEHAN SINGH *v.* KEHAR SINGH, (1923) A. I. R. (L.) 523; 6 L. L. J. 39 **817**

——— *Alienation—Consent of near reversioner—Remote reversioner, whether can challenge alienation.*

A remote reversioner does not derive his right to challenge an alienation through a nearer reversioner, and when a nearer reversioner has placed himself in a position which disables him from challenging an unauthorised alienation, for instance, by acquiescing in or consenting to the alienation, it is open to a more remote reversioner to challenge it on his own account. L SINGH RAM *v.* BHAGWANA **1056**

——— *Alienation—Male proprietors, restrictions on powers of—Lohars of Jagadhari, Ambala District.*

Although the *Lohars* of Jagadhari, in the Ambala District, do not observe the Muhammadan Law in all matters of inheritance, and among them a widow is not competent to alienate except for necessity there are no restrictions on the powers of alienation by male proprietors. L GHULAM SABIR *v.* TABA HUSSAIN **779**

——— *Alienation— Necessity — Money borrowed to satisfy pre-emption decree.*

Money borrowed by a sonless proprietor on the security of ancestral land to enable him to reap the benefit of a decree for pre-emption is an act of good management and the loan must be held to have been raised for valid necessity.

Yakub Khan v. *Raghpat Rai*, 17 Ind. Cas. 235; 165 P. W. R. 1912; 192 P. L. R. 1912, followed.

Sobha Singh v. *Kishore Chand*, 65 P. R. 1907; 203 P. L. R. 1908; 146 P. W. R. 1907, distinguished. L PARTAP SINGH *v.* HAKIM SINGH, 4 L. 171; (1923) A. I. R. (L.) 80; 6 L. L. J. 99 **87**

——— *Alienation—Necessity, presumption as to—Lapse of time—Question of proof.*

A male proprietor is not entitled to anticipate necessity for an alienation; nor can such necessity be presumed.

Knazan Singh v. *Suhel Singh*, 54 Ind. Cas. 923; 156 P. R. 1919 and *Miran Bakhsh* v. *Gou e Ram*, 13 Ind. Cas. 556; 89 P. W. R. 1912, followed.

Mere lapse of time does not remove the need for proving necessity although it may render the quantum of proof comparatively small. L WALI MUHAMMAD *v.* FATEH KHAN, (192) A. I. R. (L.) 307 **680**

——— *Alienation—Necessity — Recitals in deed, evidentiary value of.*

Recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain, but when a long time has elapsed between an alienation and the suit challenging it, and when all those who could have given evidence on the relevant points have grown

Custom—contd.

old or have passed away, a recital in the deed of transfer, consistent with the probabilities and circumstances of the case, assumes greater importance and cannot lightly be set aside.

Nanda Lal v. *Jagat Kishore Acharjya*, 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.), followed. **L** TARA CHAND *v.* RAHMAN SHAH 674

——— *Ancestral property—Burden of proof—Village deserted and re-occupied, effect of.*

A party asserting that land in dispute is ancestral must prove the fact, and conjectures cannot be accepted as substitutes for proof.

Atar Singh v. *Thakar Singh*, 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.), followed.

The history of a village showed that in 1840 all the proprietors, including the common ancestor of the parties to the dispute, left the village and took up their residence elsewhere. For a period of 25 years the village site was deserted and the fields untilled. Thereafter, certain of the descendants of the previous proprietors, including the son of the common ancestor of the parties, returned to the village and commenced cultivation;

Held, that the land occupied by each descendant on return to the village must be treated as his self-acquisition and could not be regarded as the property of his ancestor who abandoned the village, even though the decendant actually resumed possession of the same land as was held by the ancestor.

Manohar v. *Nanhi*, 66 Ind. Cas. 399; 2 L. 366; (1922) A. I. R. (L.) 320, followed. **L** RAM SARAN DAS *v.* HARPHUL 913

——— *Ancestral property—Gift to female—Property, whether remains ancestral—Reversion.*

Land gifted by a proprietor to a wife or daughter retains its ancestral character, and, on the failure of male heirs of the donee, reverts to the family of the donor and the *onus* lies heavily on a person alleging otherwise to show that a special custom exists in the tribe to the contrary. **Peshi** GHULAM KHAN *v.* GHULAM HAIDER KHAN 214

——— *Customary right, acquisition of.*

A Court should not hold in favour of the existence of a local custom unless it is satisfied of its reasonableness and of its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that, originally, by agreement or otherwise, the usage had become the customary law of the place in respect of the persons or things which it concerned.

Kuar Sen v. *Mamman*, 17 A. 87; A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 381, relied on. **M** TALUK BOARD, DINDIGUL *v.* VENKATARAM AIYAR, 45 M. L. J. 333; 18 L. W. 366; 33 M. L. T. 40; 46 M. 866 38

Custom—contd.

——— *Pre-emption*—Wajib-ul-arz, *entry in construction of.*

A clause in a *wajib-ul-arz* provided that in case of a transfer by a co-sharer of his share by sale or mortgage he must give preference to his co-sharers over a stranger, and that, in case, a mortgage given by a co-sharer has matured and the mortgagor is unable for want of funds to redeem the mortgage, any of his co-sharers can pay off the mortgage and retain the share so redeemed until the original mortgagor is in a position to pay his co-sharer:

Held, that the clause was merely a statement of matters which the co-sharers had agreed upon and did not amount to a record of custom.

Surajbali Singh v. *Mohammad Nasir*, 48 Ind. Cas. 220; 16 A. L. J. 879, relied upon. **A** SHEO BADAN TEWARI *v.* SAHEBZADI KUER, 21 A. L. J. 378; 45 A. 459; (1923) A. I. R. (A.) 523 792

——— *Pre-emption*—Wajib-ul-arz, *entry in, presumption as to rebuttal of.*

The *Wajib ul-arz* of a village drawn up at the Settlements of 1833 and 1860 recorded the existence of a custom of pre-emption. At the time of the Settlement of 1860, however, a note was recorded that the village was waste or desolate up to 1829:

Held, that the note was insufficient to rebut the presumption of the existence of the custom of pre-emption. **A** BANSI *v.* RAM BARAN, 21 A. L. J. 60; (1923) A. I. R. (A.) 130; 45 A. 185 751

——— *Proof required.*

A custom is matter which has to be proved with more thoroughness and with greater precision than a case which merely affects the parties, who are on the record and does not adversely affect parties who themselves are not present in Court, but are nevertheless interested by virtue of belonging to the same community. **A** DEOLA KUAR *v.* MATHURA SINGH, (1923) A. I. R. (A.) 341 657

——— *Succession—Dancing girls—Males and females, whether share equally.*

Amongst the dancing girls, or Devadasis community, in Southern India there is a well-recognised custom, contrary to the ordinary Hindu Law and usage, by which females share in inheritance equally with males. **M** BERA CHANDRAMMA *v.* CHADRAM NAGANNA, 45 M. L. J. 228; (1923) M. W. N. 567; 18 L. W. 569; (1923) A. I. R. (M.) 941 170

——— *Succession—Daughter* v. *Collaterals of sixth degree—Kalwan Jats of* Mauza *Waziripur, Tahsil Raya, Sialkot District.*

Among Kalwan Jats of *Mouza* Waziipur in the Raya Tahsil of the Sialkot District, a daughter excludes collaterals in the sixth degree from succession to the ancestral property of her father. **L** JIWAN *v.* WADHAWA 855

——— *Will—Awans of Kot Sarang, Tahsil Tallagang, District Attock.*

A sonless Awan of Kot Saran in the Talagang Tahsil of the Attock District has no power to dispose of his ancestral property by Will.

Custom—concld.

The power to gift *inter vivos* does not necessarily include a power of testation. L RAKHI *v.* BAZA, (1923) A. I. R. (L.) 305 659

——— *Will—Muhammadzais of Charsadda, District Peshawar—Disinheritance of sons—Will, whether valid.*

Under the custom obtaining among Muhammadzais of Charsadda Tahsil in the Peshawar District, a Will which completely disinherits the sons of the testator is, *ipso facto*, invalid. **Pesh** MAZIUDIN *v.* HASSAN KHAN 397

DEFINITIONS:—

A person who would have succeeded according to the provisions of the Act. *See* OUDH ESTATES ACT, 1869, S. 8 626

After recording its reasons. *See* CRIMINAL PROCEDURE CODE, 1898, S. 90 129

Allowance. *See* INCOME TAX ACT, 1922, S. 10 (2) (*iii*) 339

An order relating to the execution of a decree. *See* CIVIL PROCEDURE CODE, 1908, S. 47 615

Any other substantial cause. *See* CIVIL PROCEDURE CODE, 1908, O. XLI, R. 27 331

By habit. *See* CRIMINAL PROCEDURE CODE, 1898, S. 110 764

Case. *See* PUNJAB COURTS ACT, 1918, S. 44 662

Construction. *See* CONSTRUCTION OF DOCUMENT 686

Contract. *See* U. P. LOCAL AND RURAL POLICE RATES ACT, 1914, S. 8 (*a*) 267

Debt. *See* SUCCESSION CERTIFICATE ACT, 1889, S. 4 237

Decision. *See* CIVIL PROCEDURE CODE, 1908, SS 109 (*c*), 110 58

Default. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 57 824

Default of decree-holder. *See* CIVIL PROCEDURE CODE, 1908, S. 64 491

Direct lineal heirs. *See* BERAR INAM RULES OF 1859 932

Estoppel. *See* U. P. MUNICIPALITIES ACT, 1916, S. 267 777

Examined. *See* CRIMINAL PROCEDURE CODE, 1898, S. 342 715

Executing Improvment Scheme. *See* CALCUTTA IMPROVEMENT ACT, 1911, S. 42 (*a*) 346

Firm. *See* LIMITATION ACT, 1908, S. 22 81

Habitually. *See* CRIMINAL PROCEDURE CODE, 1898, S 110 764

Incumbrance. *See* BENGAL TENANCY ACT, 1885, S. 86 794

Inquiry. *See* CRIMINAL PROCEDURE CODE, 1898, S. 337 365

Involve. *See* CRIMINAL PROCEDURE CODE, 1898, S. 106 983

Judgment. *See* LETTERS PATENT (MAD.), CL. 15 901

Legal Representative. *See* CIVIL PROCEDURE CODE, 1908, S. 2 (11) 114

Likely to be dangerous to human life and property. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, S. 249 691

Loss. *See* RAILWAYS ACT, 1890, SS. 72, 76 26

Make such other order as it thinks fit. *See* CIVIL PROCEDURE CODE, 1908, O. XVII, R. 2 287

DEFINITIONS—concld.

Or could not be produced by him at the time. *See* CIVIL PROCEDURE CODE, 1908, O. XLVII, RR. 1, 2 91

Payment. *See* PUNJAB PRE-EMPTION ACT, 1905, S. 22 271

Person aggrieved. *See* PROVINCIAL INSOLVENCY ACT, 1907, S. 24 (3) 572

Prevailing rate. *See* BENGAL TENANCY ACT, S. 30 411

Property. *See* HINDU LAW—DEBT 497

Registered Firm. *See* INCOME TAX ACT, 1922, S. 10 (2) (*iii*) 339

Requires. *See* CIVIL PROCEDURE CODE, 1908, O. XLI, R. 27 331

Revenue. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 54 369

Signing. *See* LIMITATION ACT, 1908, S. 19 1004

Suit. *See* CIVIL PROCEDURE CODE, 1908, S. 10 231

Thandika property. *See* PENAL CODE, S. 441 253

Divorce Act (IV of 1869), s. 2—*Excommunication by sect or Church, effect of—Excommunicated person whether ceases to be Christian—Profession of Christianity—Native Converts' Marriage Dissolution Act (XXI of 1866), s. 16—Conversion of married Hindu to Christianity—Dissolution of marriage—Procedure.*

Where a person who professes the Christian religion is excommunicated by the sect or Church to which he belongs he does not thereby cease to profess Christianity within the meaning of section 2 of the Divorce Act. The question of profession of Christianity is a question of his own action and not of the action of his Church.

Under the Native Converts' Marriage Dissolution Act the conversion to Christianity of one of two spouses of a Hindu marriage does not dissolve the marriage. Under that Act, to obtain dissolution of marriage the convert must first of all apply for restitution of conjugal rights and then, after the lapse of a year, for dissolution of the marriage if conjugal rights are refused. Otherwise, the conversion to Christianity of one of two spouses has no effect on the existing marriage.

Per *Oldfield, J.*—The policy of the Divorce Act appears to require the application of the words of section 2 of the Act to what may be a substantial class of persons in this country, *viz*, those who have abandoned a particular sect, but who still remain unattached to any religion other than Christianity.

Per *Ramesam, J.*—The religion of a person is what that person professes and it does not require recognition by the other persons belonging to that religion. A Hindu who professes to be a Hindu, though he may be excommunicated by all the existing Hindu castes, is still a Hindu, though probably he is subject to great social inconvenience. In this respect there is nothing peculiar to Christianity. If a person says that he is a Christian though he does not belong to any of the existing Christian Churches, he is still a Christian. Probably his creed is different from the existing creeds and he is subject to social inconvenience in respect of the perform-

Divorce Act—concld.

ance of marriage and burials, but he would still be a Christian. **M** PAKKIM SOLOMON *v.* CHELLIAH PILLAI, 45 M. L. J. 208; 46 M. 839; (1924) A. I. R. (M.) 18; 33 M. L. T. 231 17

Easement rights—*Trees standing in adjoining fields—Loss by shade—Suit for damages, whether lies—Enjoyment of natural rights—Limits.*

A suit does not lie for compensation for damages caused to crops in a field by the shade of trees standing in an adjoining field falling in it.

The use and enjoyment of land in respect of rights of light, sun's heat and air is restricted by the claim of similar rights in respect of adjoining lands by their owners.

Bryant v. *Lefever*, (1879) 4 C. P. D. 172; 48 L. J. C. P. 380; 40 L. T. 579; 27 W. R. 592, cited. **N** GUMAN SINGH *v.* UMRAO SINGH. 19 N. L. R. 191 559

Electricity Act (IX of 1910), Sch cl. VI, Pro. 2 (c)—*Defective cut-out causing loss of energy—Electric Company, whether justified to discontinue supply.*

Where the seals on the cut-outs on a consumers premises are not in good order and condition, as a result of which there has been a leakage of energy, the Electric Company is entitled to discontinue the supply of energy to the consumer, as such a state of things must be deemed to be, "likely to affect injuriously the use of energy by the licensee or by any other person," within the meaning of clause VI (1), proviso (2) (*c*) of the Schedule to the Electricity Act.

Lahore Electric Supply Company v. *Durga Das*, 45 Ind. Cas. 171; 85 P. R. 1918; 70 P. W. R. 1918; 77 P. L. R. 1918, followed. **L** KARORIMAL *v.* THE E. T. AND LIGHTING CO., LTD, 4 L. 182; 6 L. L. J. 86 456

Enhanced punishment—*Penal Code (Act XLV of 1860), ss. 369, 411—Conviction under s. 399, whether may be considered in awarding enhanced punishment under s. 411.*

Where an accused person is convicted under section 411 of the Penal Code the fact that he was previously convicted under section 369 of the same Code cannot be taken into consideretion in awarding enhanced punishment, as the latter is not punishment under Chapter XII or Chapter XVII of the Code. **L** FATTU *v.* EMPEROR, (1923) A. I. R. (L.) 286; 24 Cr. L. J. 944; 6 L. L. J. 110 368

Equity—*Alienation by Hindu widow—Mortgage in favour of reversioners redeemed by alienee—Suit to declare alienation invalid by reversioners—Declaration as to liability of reversioners to pay mortgage-debt, grant of.*

Plaintiffs alleging themselves to be the presumptive reversioners of one *G.* sued for a declaration that a deed of gift executed by the widow of *G.* in favour of the defendant was invalid as against them. It appeared that after the gift had been executed the defendant donee redeemed a mortgage executed by *G.* in favour of the plaintiffs and some other persons:

Held, that in the event of the gift being declared invalid, the Court could very properly make

Equity—concld.

a declaration in this very suit to the effect that the plaintiff surviving the widow of *G.* would be entitled to actual possession of their share of the property only on payment to the defendant or his legal representatives of their share of the mortgage-debt.

Ghansham Singh v. *Teg Bahadur Singh*, 13 Ind. Cas. 191; 9 A. L. J. 496, distinguished.

Moulvee Mahomed Shumsool Hooda v. *Shewukram*, 22 W. R. 409; 2 I. A. 7; 14 B. L. R 226; 3 Sar. P. C. J. 405 (P. C.), followed. **A** RAGHUNADAN SINGH *v.* TULSHI SINGH 244

Estate—*Inheritance—Death of last holder—Reversion of estate.*

If an estate is an absolute estate of inheritance it cannot revert, in any circumstances, to the original grantor, for the law regards the Crown as the heir of the last holder. But if the estate is a limited estate, such as a fixed rate tenancy, it reverts on the death of the last holder without heirs not to the Crown but to the *zemindar*. **A** RAMMAN BIBI *v.* MATHRA PRASAD, (1923) A. I. R. (A.) 374 621

Estoppel—*Defendant agreeing to be bound by decision of Trial Court, whether can question decision in appeal.*

The mere fact that the defendant in a suit offers to be bound by the decision of the Trial Court arrived at after a local inspection, would not estop him from questioning the correctness of that decision in appeal, when it is not shown that the plaintiff had also agreed.

Shahzadi Begam v. *Muhammad Ibrahim*, 59 Ind. Cas. 787; 43 A. 266; 19 A. L. J. 14, distinguished. **A** GHULAM HUSAIN *v.* GANESH LAL, (1923 A. I. R. (A.) 373 619

Evidence—*Accused a Brahmin whether sufficient to reject evidence otherwise reliable.*

The mere fact that an accused person is a Brahmin is not a sufficient reason for rejecting the evidence of witnesses who testify against him, and who are *prima facie* reliable. **L** SHEO RAM *v.* EMPEROR, (1923) A. I. R. (L.) 436; 25 CR. L. J. 45 733

Evidence Act (I of 1872), s. 14—*Accused charged with belonging to gang of dacoits—Evidence of offences other than dacoity, admissibility of.*

When several persons are charged with belonging to a gang of persons habitually committing dacoity under section 400 of the Penal Code, evidence of the commission by them of offences other than dacoity, being evidence of bad character, is inadmissible under section 14 of the Evidence Act.

Public Prosecutor v. *Bongiri Pottigadu*, 2 Ind. Cas. 307; 32 M. 179; 5 M. L. T. 100; 9 Cr. L. J. 567, *Emperor* v. *Debendra Pershad*, 2 Ind. Cas. 601; 36 C. 573 at p. 584; 13 C. W. N 973; 9 C. L. J. 610; 10 Cr. L. J. 91, *Emperor* v. *Panchu Das*, 58 Ind. Cas. 929; 47 C. 671 at pp. 692, 696; 24 C. W. N. 501; 31 C. L. J. 402; 21 Cr. L. J. 849, relied on. **B** FENWICK *v.* SIR MALCOLM 46 B. 958; 25 Bom. L. R. 214; (1923) A. I. R. (B., 71; 24 CR. L. J. 867 6

——— **s 25**, *scope of—Murder—Accused indicating spot where body buried, effect of.*

Section 25 of the Evidence Act lays down that a confession to a Police Officer shall not be used *as against* the person making it, it does not say that such a confession shall be inadmissible for all purposes. Such a confession may be used for the purpose of arriving at a conclusion whether a subsequent judicial confession should be believed or not.

Where in the case of a murder a person gives information which leads to the recovery of the dead body, that fact alone would not be sufficient to connect him with the murder **L** GULAB *v.* EMPEROR, (1923) A. I. R. (L.) 315; 6 L. L. J. 55; 25 CR. L. J. 5 **698**

——— **s. 25**—*Statement by one accused to Police criminating co-accused—Admissibility.*

A statement by one accused to the Police that certain property which he produced had been given to him by two other accused who were charged with him as being members of a gang of dacoits, is inadmissible as being an admission of a criminating circumstance under section 25 of the Evidence Act. **B** EMPEROR *v.* SHER MAHOMED 46 B. 961; (1923) A. I. R. (B.) 65; 24 Cr. L. J. 870 **70**

——— **ss. 27, 114, 133** *Accomplice, testimony of—Corroboration — Circumstantial evidence—Retracted confession, value of—Confession to Police—Discovery consequent upon confession—Statement, how far admissible*

The rule of law enacted in section 133 of the Evidence Act must be subjected to the test deduced from the accumulated experience of human conduct in relation to the test money of an accomplice. The guiding rule in this behalf is furnished by Illustration (*b*) of section 114 of that Act which lays down "that an accomplice is unworthy of credit unless he is corroborated in material particulars."

An accomplice is too immoral a person to be worthy of credit without corroboration in material particulars and if corroboration is not forthcoming, because it is not possible in the nature of things that it should be forthcoming, it does not make the accomplice less immoral or his uncorroborated testimony less unworthy of credit.

It would be wholly unsafe to treat a piece of circumstantial evidence which is widely dissociated from the *corpus delicti* as a material particular to be of any corroborative value to the testimony of an accomplice.

In cases dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The favourable impressions on the Judge's mind as to the demeanour of an accomplice in Court cannot take the place of corroboration in material particulars to make the testimony of the accomplice worthy of credit.

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of his guilt without independent corroborative evidence. But the credibility of a confession is in each case a matter to be decided by the Court in the light of the circumstances in which the confession was originally made and in which it was afterwards withdrawn.

So much of a confession made to the Police as directly leads to the recovery of certain articles is admissible in evidence but a further statement with regard to them, for instance, that they were stolen property, is no part of the information directly leading to their discovery and is inadmissible under section 27 of the Evidence Act. **O** MANNA LAL *v.* EMPEROR, 9 O. & A. L. R. 947; 25 CR. L. J. 41 **758**

——— **s 30**—*Confession of co-accused—Substantial self-implication—Admission of actual guilt, whether necessary—Confession, retracted, value of—Corroborative evidence.*

All that is required to make the confession of an accused person admissible against a co-accused under section 30 of the Evidence Act is that the confession shall substantially implicate its maker in regard to the offence with which he and his co-accused are charged. It is not necessary that there should be an admission of actual guilt. The admission may establish constructive guilt only.

Empress of India v. *Ganraj*, 2 A. 444; 4 Ind. Jur. 581; 1 Ind. Dec. (N. S.) 851 and *Empress of India* v. *Mulu*, 2 A. 646; 5 Ind. Jur. 263; 1 Ind. Dec. (N. S.) 991, explained.

A retracted confession ought to be viewed with the greatest suspicion even as against the maker himself, but where the corroborating evidence is clear and convincing there is no reason to discard it. **Pat** SUKA RAUT *v* EMPEROR, 4 P. L. T. 505; 25 CR. L. J. 17 **705**

——— **s 30**—*Confession, whether evidence against co-accused.*

A confession made by an accused person can be taken into consideration and used as evidence not only against himself, but also against a co-accused tried jointly with him for the same offence.

Emperor v. *Kehri*, 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360, followed. **N** RADHI *v.* EMPEROR, (1924) A. I. R. (N.) 27; 25 CR. L. J. 13 **701**

——— **s. 74**—*Quinquennial reports, whether public documents—Entry in* Thak *or Revenue Survey—Title, evidence of.*

The Quinquennial Register prepared under the directions of the Board of Revenue under Regulation 48 of 1793 is a public document and is admissible in evidence as such.

Sreemutty Oodoy Monee Debee v. *Bishonath Dutt*, 7 W. R. 14, followed.

An entry in a Thak and Revenue Survey map cannot be taken as evidence of title. **Pat** RAMNANDAN SAHAY *v.* JAGOVIND PANDEY, 2 Pat. 839 **855**

——— **s 78**, *scope of.*

Section 78 of the Evidence Act is a permissive and not an exclusive section. **C** SEODAYAL KHEMKA *v.* JOHARMULL MANMULL, 50 C. 549; (1924) A. I. R. (C.) 74 **81**

Evidence Act—contd.

——— **s. 90**—*Document thirty years old—Period, how to be reckoned*

The period of thirty years mentioned in section 90 of the Evidence Act must be reckoned, not from the date on which the document is put into Court, but from the date on which after it has been tendered in evidence, its genuineness becomes the subject of proof.

Minu Sirkar v. *Rhedoynathroy*, 5 C. L. R. 135, relied on. **L** LADHA SINGH *v.* HUKUM DEVI, 4 L. 233; 6 L. L. J. 97 **57**

——— **s. 92**—*Evidence varying amount of consideration in sale-deed—Admissibility.*

Evidence to vary the amount of consideration in a registered sale-deed is inadmissible, though want or failure or difference in kind of the consideration may be proved.

Eshenchunder Singh v *Shamachurn Bhutto*, 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N S.) 87; 2 Sar P. C. J. 209; 20 E. R. 3, followed **C** ANNADA CHARAN SIL *v.* HARGOBINDA SIL, 27 C. W. N. 496; 37 C. L. J. 552; (1923) A. I. R. (C) 570 **557**

——— **s. 102**—*Evidence of both parties considered by Court—Burden of proof, question of, whether material.*

Where the parties to a suit have led evidence and the Court has, on that evidence, material to go upon for deciding any disputed point, the question of the burden of proof is not very pertinent.

Seturatnam Aiyar v. *Venkatachela Gounden*, 56 Ind. Cas. 117; 43 M. 567 at p. 577; (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.) and *Krishna Kisor De.* v. *Nagendrabala Chaudhurani*, 65 Ind. Cas. 694; 25 C. W. N. 942; 34 C. L. J. 33, relied on. **N** SONAJI *v.* DAULAT **782**

——— **s. 102**—*Suit for mesne profits—Burden of proof*—Prima facie *evidence by plaintiff—Burden, whether shifted on to defendant.*

In a suit for mesne profits it is for the person out of possession to prove what profits the man in possession of his property made out of it and the latter can be made to pay only so much of the profits as the ousted owner can manage to find evidence to prove in detail in the face of the opposition from the trespasser, but as soon as the plaintiff gives some evidence proving *prima facie* that the profits were somewhere about the sum alleged, the burden of proving that they were less shifts to the shoulders of the defendant.

Gopala Kunbi v. *Ramkrishnapuri*, 50 Ind. Cas. 930; 15 N. L. R. 95, followed. **N** JAILALSAO *v.* LAL FATEHSINGH **826**

——— **s. 110**—*Lease unregistered—Admissibility in evidence—Relationship of landlord and tenant—Ownership.*

An unregistered lease deed is admissible in evidence to show the position of landlord and tenant and would, under section 110 of the Evidence Act, tend to show ownership. **N** ANNAJI *v.* LAXMAN **622**

——— **s. 115**—*Contract Act* (*IX of* 1872), *s.* 11 —*Specific Relief Act* (*I of* 1877), *s.*

Evidence Act—concld.

Contract by minor—Fraudulent misrepresentation—Estoppel—Restoration of benefit.

A plaintiff seeking to avoid a transaction on the ground that he entered into it during his minority is not estopped from setting up the plea of minority by reason of a fraudulent misrepresentation as to his age made by him at the time of entering into the transaction.

Mahomed Syedol Ariffin v. *Yeoh Ooi Gark*, 39 Ind. Cas 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678; 43 I. A. 256 (P. C.) and *Leslie Limited* v. *Sheill*, (1914) 3 K. B. 607; 83 L. J. K. B. 1145; 111 L. T. 106; 58 S. J. 453; 30 T. L R. 460, followed.

Wasinda Ram v. *Sita Ram*, 59 Ind. Cas. 393; 1 L. 389; 51 P. W. R. 1920, distinguished.

A plaintiff in such a case, however, cannot avoid the transaction without restoring the benefit received by him thereunder. **L** KAPURA *v* ARJUN SINGH, (1923) A. I R. (L.) 511 **269**

——— **s. 116**—*Estoppel—Third persons not claiming under tenant, whether estopped from claiming possession by escheat.*

Third persons who do not claim possession of land under the tenant thereof, are not estopped from claiming possession by escheat.

Tadman v *Henman*, (1893) 2 Q. B. 168; 5 R. 479; 57 J. P. 664, relied on. **A** MAHARAJA OF JAIPUR *v.* SURJAN SINGH, 20 A. L. J. 615; (1922) A I R. (A) 333; 44 A. 671 **485**

——— **s. 154.** *See* CONFESSION **152**

Execution of decree—*Decree satisfied by temporary alienation of judgment-dbtor's land—Executing Court, power of, to modify terms of alienation.*

A money-decree was fully satisfied by the grant of a lease for 20 years to the decree-holder of some land belonging to the judgment-debtor and the case was sent to the record-room. Some years afterwards, the Executing Court, on the application of the judgment-debtor, cancelled the remaining portion of the lease and directed that possession of the land be restored to the judgment-debtor on his paying to the decree-holder a certain sum of money which was found on calculation to be due to the decree-holder;

Held, that the Executing Court had become *functus officio* as soon as the decree was fully satisfied by the grant of the lease, and was not, therefore, competent subsequently to reduce the term of the lease which had been given in full satisfaction of the decree.

Madho Prasad v. *Mahtab Chand*, 8 Ind. Cas. 410, relied on. **L** HIRA SINGH *v.* MADHO **870**

——— *Duty of Court—Pre-emption decree—Transfer to stranger—Pre-emptor, whether can execute decree.*

The Court to which application is made for execution of a decree is bound by the terms of the decree and has no power to go behind those terms or to enter into questions beyond the scope of the decree.

The holder of a decree enforcing a right of pre-emption, who subsequently to the date of the

Execution of decree—concld.

decree sells the property to a stranger, does not by such conduct debar himself from obtaining possession of the property in execution of the decree. In praying for execution of the decree he is merely obeying its terms, and, the only right of the vendee judgment-debtor is to receive the purchase-money before handing over possession to the decree-holder.

Ram Sahai v. *Gaya*, 7 A. 107; A. W. N. (1884) 224; 4 Ind. Dec. (N. S.) 305, relied on.

Mehr Khan v. *Ghulam Rasul*, 64 Ind. Cas. 191; 2 L. 282; 3 L. L. J. 553; (1922) A. I. R. (L.) 300, distinguished. L FAQIR MUHAMMAD KHAN *v.* PIRDAD KHAN 844

——— *Sale—Stay of sale pending appeal—Property to remain under attachment—Stay of sale, whether justified.*

The continuance of an attachment on property in execution of a decree sufficiently secures the rights of a decree-holder to warrant an order staying sale of the property during the pendency of an appeal against the decree.

Radha Balab Singh v. *Sewa Ram*, 15 Ind. Cas. 876; 94 P. W. R. 1912, followed. L RAM GOPAL *v.* MANPHUL SINGH, (1923) A. I R (L.) 415 791

Family settlement, *nature of—Award, whether a settlement—Award when binding a person whose interests are analogous to those of parties to arbitration—Award, by whom may be questioned.*

A family settlement implies a mutual settlement by certain contending parties belonging to the same family of some disputed claims and rights. An award of arbitration is not a settlement of that character. It is a decision of a tribunal constituted by the contending parties for the settlement of their disputes, and in so far as it is a lawful and valid award, it is binding on the parties to the arbitration proceedings and their privies. Whether such an award is binding on persons whose interests are analogous to those of the parties to the arbitration proceedings, is a matter which is not capable of an inflexible answer. In each case it has to be determined whether the person who agreed to the reference to arbitration was seeking to assert a right common to himself and others and had acted fairly in representing those whose interests he had undertaken to protect.

An arbitration award can be questioned by those only who were no parties to the arbitration proceedings, but not by a person who was a party to the arbitration or to the decree passed in accordance with it, or by his representatives-in-interest. O ZARIF-UN-NISSA *v.* SHAFIQ-UZ-ZAMAN, 26 O. C. 133; (1923) A. I. R. (O.) 185 626

Fraud.

A party cannot come into Court with fraud on his lips and ask for relief: as to such the Courts of Justice are not open. C ANNADA CHARAN SIL *v.* HARGOBINDA SIL, 37 C. L. J. 552; 27 C. W. N. 496; (1923) A. I. R. (C.) 570 557

Government of India Act, 1919, (9 & 10 Geo. V, C. 101), s. 80 (A)—*Court-Fees Act* (*VII of* 1870), *Sch. I, Art.* 11—*Bengal Court-Fees* (*Amendment*) *Act* (*I V of* 1922), *whether* ultra vires—*Fee payable on Letters of Administration, whether tax.

Under the provisions of section 80 *A* of the Government of India Act, a local Legislature may, subject to the limitations mentioned in sub-section (3) of the section, repeal or alter as to that Province any law made before or after the commencement of the Act by any authority in British India.

The limitations imposed by sub-section (3) of section 80 A of the Government of India Act relate under clause (*a*) to the imposition of new taxes other than those set out in Schedule I of the Scheduled Taxes Rules and under clause (*h*) to the Acts set out in the Schedule to the Previous Sanction Rules.

The Court-Fees Act is not set out in the Schedule to the Previous Sanction Rules, and a Court-fee not being a stamp duty within the meaning of Schedule I of the Scheduled Taxes Rules, the amendment of the Court-Fees Act by a local Legislature does not require the previous sanction of the Governor-General in Council. The Bengal Court-Fees (Amendment) Act of 1922 was not, therefore, *ultra vires* the Bengal Legislature for want of such sanction.

The sum charged under the provisions of the Court-Fees Act upon a grant of Probate or Letters of Administration is not a tax or duty levied upon the property upon which the Probate or Administration operates but is merely a fee levied by the Court issuing the Probate or Letters of Administration for the work done in this connection, and must be paid according to the scale prescribed in the Province in which the grant is made, irrespective of the fact whether the whole of the property in respect of which the grant is made is or is not situate within that Province. C *In the goods of* G. T. WILLIAMS, 50 C. 597; 27 C. W. N. 812; (1924) A. I. R. (C.) 115 466

Grove land—*Tenant, rights of.*

While grove land has the characteristics of a grove the tenant thereof can do what he wishes upon it, and there is no objection to his constructing houses for agricultural purposes, or for any other purposes upon it; he may even construct a residential house upon it. Where, however, the land loses its characteristics of a grove, the case may be altered. A AHMAD HUSAIN *v.* SIRAJUDDIN, (1923) A. I. R. (A.) 372 616

Guardian and minor—*Guardian* ad litem, *appointment of—Period for which appointment enures—Appeal on behalf of minor.*

Where a guardian *ad litem* for a minor is appointed, his appointment enures for the whole of the *lis* in the course of which it was made, unless and until it is revoked by the Court, and such guardian only has the right to prefer an appeal on behalf of the minor.

Jwala Dei v. *Pirbhu*, 14 A. 35; A. W. N. (1891) 192; 7 Ind. Dec. (N. S.) 394, followed.

Venkata Chanarasekhara Rax v. *Alakarajamba Maharani*, 22 M. 187; 8 Ind. Dec. (N. S.) 133, *Bawan Das* v. *Bishnath*, A. W. N. (1899) 203,

Guardian and minor—concld.

In the matter of the application of Sukhdeo Rai, 2 A. L. J, 489, relied on. A SHAMBHU *v.* KANHAVA, 44 A. 619; 20 A. L. J. 599; (1922) A. I. R. (A.) 332 457

Guardians and Wards Act (VIII of 1890), s. 17 —*Father, when ought not to be appointed guardian of his son.*

Where a father neglects to maintain a son, and it appears that the welfare of the son would not be promoted by his being placed under the guardianship of his father, the latter ought not to be appointed guardian. L MUKABAR *v.* KARIM. BAKSH, (1923) A. I. R. (L.) 383 486

——— s. 19 (*b*)—*Guardianship—Mother, position of—Unfitness of mother not proved—Application by other relatives, whether can be considered.*

The principle underlying clause (*b*) of section 19 of the Guardians and Wards Act applies to a mother as well as to a father though with less force, and it must be shown that a mother is unfit to be the guardian of the person and property of her minor child before the relative fitness of other relatives can be considered. N SUMITRI BAI *v.* SUBHADRA BAI 564

——— s. 39 (h)—*Guardian, appointment of—Person residing outside jurisdiction of Court, whether eligible for appointment.*

There is nothing in the Guardians and Wards Act to prevent a Court from appointing as guardian a person who ordinarily resides outside the limits of its jurisdiction.

Asghar Ali v. *Amina Begam*, 24 Ind. Cas. 59; 30 A. 280; 12 A. L. J. 392, dissented from. N AHILYABAI *v.* VITHABAI 595

——— ss. 47, 48—*Order fixing maintenance and education allowance of ward—Appeal, whether lies.*

No appeal lies from an order on a guardianship application fixing the amount to be paid by the guardian of the property for the maintenance and education of the ward.

Gopammal v. *Srinivasa Iyengar*, 27 Ind. Cas. 921; 28 M. L. J. 96, followed. N TULSAI *v.* TULSAI 592

Hindu Law—Alienation—*Ancestral property—Money payable by successful pre-emptor, whether antecedent debt—Legal necessity—Re-purchase of property sold by separated brother—Transaction by manager ratified by son—Estoppel.*

Money payable by a successful plaintiff in a pre-emption suit is not an antecedent debt for the purpose of supporting an alienation of the family property.

Chalurbhuj v. *Gobind Ram*, 74 Ind. Cas. 571; 21 A. L. J. 348; 45 A. 407, followed.

The re-purchase of property sold by a separated brother is not a purpose which constitutes legal necessity under Hindu Law.

A transaction by a manager of a Hindu family can be ratified by his son so as to estop the latter from afterwards disputing it.

Hindu Law—contd.

Narayana Aiyar v. *Ram Aiyar*, 20 Ind. Cas. 625; 38 M. 396; (1913) M. W. N. 588; 14 M. L. T. 89, 25 M. L. J. 219, followed.

It the person entitled to avoid sale of property leads the purchaser to believe that the title is good, the purchaser is certainly prejudiced if the party making representation is allowed to resile from it and to attack the purchaser's title after an interval of several years.

Where, therefore, in a mutation proceeding a person stated that he had no objection to the vendee's name being entered in the records against the property sold by his father;

Held, that the person was estopped from challenging the sale. A SHEO DAN SINGH *v.* HABIB ULLAH KHAN 572

——— **Ancestral property**—*Sale in execution of decree against father—Suit to set aside sale by sons—Immoral debts—Notice—Want of legal necessity, if sufficient reason—Onus of proof.*

Where joint ancestral property has passed out of the joint family either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debtor or under a sale in the execution of a decree for the father's debt, the sons cannot recover that property unless they show that the debts were contracted for immoral purposes and the purchaser had notice that they were so contracted.

Want of legal necessity is not a sufficient ground to defeat an auction-purchaser or his assignee of the rights acquired by virtue of the auction-sale.

Girdharee Lall v. *Kantoo Lall*, 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 300; (P. C.) and *Sahu Ram Chandra* v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498, 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 221; 6 L. W. 213; 44 I. A. 126 (P. C.), relied on. A JADUBIR *v.* GAJADHAR, 21 A. L. J. 809 765

——— **Custom**—*Succession—Daughters* v. *widow and daughters of predeceased son—Joshi Brahmins of Hoshiarpur—Presumption.*

High caste Hindus living in towns and working as traders are presumably governed by the Hindu Law, and in the absence of sufficient evidence it cannot be said that that law is superseded on any particular point by custom.

There is no special custom among the Joshi Brahmins of Hoshiarpur which entitles the widow and daughters of a predeceased son to succeed in preference to daughters. L BAL KAUR *v.* DEVKI, 4 L. 230; (1923) A. I. R. (L.) 579; 6 L. L. J. 69 109

——— **Debt**—*Pious duty of son—Provincial Insolvency Act (V of 1920), s. 3 (8)—Hindu father adjudged insolvent, right of, to dispose of son's interest in ancestral property—"Property," meaning of.*

It is the pious duty of a Hindu son to pay his father's debts even in the father's lifetime,

Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immoveable property for the payment of his own debts not contracted for immoral purposes, and such interest is, therefore, "property" within the meaning of section 3 (*a*) of the Provincial Insolvency Act, and, on the father being adjudged insolvent, vests in the Receiver.

Fakirchand Motichand v. *Motichand Hurruckchand*, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294. *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas*, 11 B. 37; 6 Ind. Dec. (N. S.) 24, *Rangayya Chetti* v. *Thanikachalla Mudali*, 19 M. 74; 6 Ind. Dec. (N. S.) 757 and *Harmukh Rai-Munna Lal* v. *Radha Mohan*, 54 Ind. Cas. 931; 158 P. R. 1919; 100 P. W. R. 1919, relied on. S CHELARAM v. OFFICIAL RECEIVER, (1923) A. I. R. (S.) 20; 16 S. L. R. 226 497

——— **Father's debts**—*Son's pious duty to pay, when arises.*

The pious obligation of a Hindu son to pay his father's debt exists during the lifetime of the father and does not arise only in the event of the death of the father.

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 421; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.) and *Nanomi Babuasin* v. *Modhun Mohun*, 13 C 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.), followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 430; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.) and *Chet Ram* v. *Ram Singh*, 67 Ind Cas. 569; 44 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 80; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; (1922) A. I. R. (P. C.) 247; 3 P. L. R. 1922; 24 Bom. L. R. 1231; 27 C. W. N. 150; 49 I. A 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.), discussed. **Pat** DEBENDRA KUMAR v. THE FYZABAD BANK, LTD., 4 P. L. T. 516; (1924) A. I. R. (Pat.) 94 53

——— **Guardianship** — *Marriage performed without consent of guardian, validity of.*

Under the Hindu Law, in the absence of the father and paternal male relations, the right of selecting a husband for a female infant devolves upon the mother and she is fully competent to give her daughter in marriage.

The rules of Hindu Law as to the duty of giving in marriage are directory and not mandatory and in the absence of force or fraud a Hindu marriage, otherwise legally contracted and performed with necessary ceremonies, is not invalidated by the absence of the consent of the guardian entitled to give such consent.

Maya Devi v. *Ram Chand*, 31 Ind. Cas. 186; 20 P. R. 1916; 177 P. W. R. 1915, *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316; 1 M. L. J. 85; 5 Ind. Dec. (N. S.) 221, *Ghasi* v. *Sukru* 19 A. 515; A. W. N. (1897) 139; 9 Ind. Dec. (N. S.) 333, *Mulchand Kuber* v. *Bhudhia*, 22 B. 812; 11 Ind. Dec. (N. S.) 1125 and *Gajja Nand* v. *Emperor*, 64 Ind. Cas. 500; 2 L. 288; 8 P. L. R. 1922; 23 Cr. L. J. 20, relied on.

Dyal v. *Narain Das*, 64 P. R. 1884, distinguished. L JAGAN NATH v. BASANT RAM, (1923) A. I. R. (L.) 595 24

——— **Inheritance** — *Exclusion — Burden of proof—Leprosy.*

The presumption of Hindu Law is against disqualification of an heir and the burden of proof of disqualification lies on a person who seeks to exclude another who would be an heir, should no cause of exclusion be established.

Where it is contended that a person is excluded from inheritance by reason of disease, the strictest proof of the disease as will disqualify him at the time the succession opens will be required.

Under the Hindu Law leprosy, to be a ground of exclusion from inheritance, must be of the sanious or ulcerous and not of the anaesthetic type.

Janardhan Pandurang v. *Gopal Pandurang*, 5 B. H C. R. (A. C. J.) 145, *Ananta* v. *Ramabai*, 1 B. 554; 1 Ind. Dec. (N. S.) 367 *Rangayya Chetti* v. *Thanikachala Mudali*, 19 M. 74 6 Ind. Dec. (N. S.) 757, *Helan Dasi* v. *Durga Das Mundal*, 4 C. L. J. 323 *Bhagaban Ramanuj Das* v. *Ram Praparna Ramanuj Das*, 22 C. 843; 22 I. A. 94; 6 Sar. P. C. J. 536; 11 Ind Dec. (N. S.) 558 (P. C.) and *Kayarohana Pathan* v. *Subbaraya Thevan*, 19 Ind Cas. 600; 38 M. 250; 13 M. L. T. 460; (1913) M. W. N. 642; 25 M. L. J. 251, relied on. C KARALI CHARAN PAL v. ASHUTOSH NANDI, 50 C. 601; (1923) A. I. R. (C.) 331; 27 C W. N. 959 474

——— **Joint family**— *Alienation by manager— Suit by co-parcener to set aside alienation— Rights and equities of alienee—Partition— Mesne profits.*

Under the Mitakshara Law, an alienee from an undivided co-parcener of a specific item of family property is entitled to sue for a partition of the family property and for an equitable right in such partition to have that property assigned to his alienor's share if it is possible to do so consistently with the rights of the other co-parceners. But such equity is not restricted to a mere right to sue. Where a co-parcener has sued for recovery of the property alienated by another co-parcener or for partition, the alienee, as a defendant, is entitled to claim partition in that suit itself and have his alienor's share ascertained where it can be conveniently done, without driving the parties to a separate suit, so as to avoid multiplicity of litigation.

Aiyyagari Venkatarammayya v. *Aiyyagari Ramayya*, 25 M. 600 (F. B.), *Chinnu Pillai* v. *Kalimuthu Chetti*, 9 Ind. Cas. 596; 35 M. 47; (1911) 1 M. W. N. 238 9 M. L. T. 389; 21 M. L. J. 246, *Deendyal* 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.), *Hardi Narain Sahu* v. *Ruder Perkash Misser*, 10 C. 626; 11 I. A 26; 8 Ind. Jur. 211; 4 Sar. P. C. J. 510; 5 Ind. Dec. (N. S.) 420 (P. C.), *Kota Balabhadra Patro* v. *Khetra Doss*, 37 Ind. Cas. 168; 31 M L.

Hindu Law—contd.

J. 275; 4 L. W. 99; (1917) M. W. N. 149, *Maharaja of Bobbili* v. *Venkatavaramanjulu*, 25 Ind. Cas. 585; 39 M. 265; 16 M. L. T. 181; 27 M. L. J. 409, *Subbe Goundan* v. *Krishnamchari*, 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A I. R. (M) 112, *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* 20 Ind Cas. 958; 40 C. 966 (1913) M. W N 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C L J. 237; 15 Bom L. R. 867; 11 A. L. J. 865; 25 M L. J. 512; 10 N. L. R. 11; 40 I. A. 213 (P C), *Davud Beevi Ammal* v. *Ramakrishna Aiyar*, 72 Ind. Cas. 81; 17 L. W. 332; 44 M. L. J. 309; (1923, M. W. N. 20; 32 M L. T. 263; (1923) A. I. R. M.) 467 and *Nanjaya Mudali* v. *Shanmuga Mudali*, 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576 considered.

Where two out of th rteen Velies of joint family lands were improperly alienated by the managing member of a joint family consisting of father and son, in a suit after his death by his grandson, the only surviving co-parcener of the family, to set aside the alienation and to recover the property from the alience

Held, that the alienor, who was a half sharer in the family, having been entitled to property at least equal in value to the property alienated —the family property being a great deal more than double the extent sold—, the alienee was entitled to have the whole of the alienated item allotted to his alienor's share and the plaintiff was not entitled to a decree to any extent and his suit was, therefore, liable to be dismissed.

A sale by the manager of a Hindu joint family is not *prima facie* void but is only voidable at the instance of the other members of the family, and where a co-parcener succeeds in setting aside an alienation and getting a decree for possession, he is not entitled to mesne profits prior to the date of plaint.

Hanuman Kamat v. *Hanuman Mundur*, 19 C. 123; 18 I. A. 158; 6 Sar. P C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.), *Subbe Goundan* v. *Krishnama chari*, 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112, followed. **M** RAMASWAMI IYER *v.* VENKATARAMA IYER, 45 M. L. J. 203; 18 L W. 183; (1914) A. I. R. (M.) 81, (1923) M W. N. 786; 46 M. 815 **406**

——— **Joint family** — *Alienation* — *Manager, powers of*—*Sons challenging alienation by father* —*Burden of proof*— *Antecedent debt, nature of.*

The manager of joint Hindu family property may alienate the interest of himself and also of the co-parceners for family necessity, and when the manager is also the father he may alienate those interests to satisfy an existing debt provided that the debt is an antecedent debt and that it was not incurred for immoral purposes.

Bhagat Singh v. *Ram Parkash*, 69 Ind. Cas. 602, followed.

When sons attempt to challenge an obligation contracted by their father, the *onus* lies upon them to prove immorality.

Hindu Law—contd.

In order to validate an alienation for antecedent debt not only antecedency in time but real dissociation in fact is required.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.), *Lakhu Mal* v. *Bishen Das*, 66 Ind. Cas. 408; 3 L. 74; (1922) A. I. R. (L.) 291, followed.

It is not open to the manager of a joint family estate to embark upon purely new and speculative business under the plea that the expansion of business in general will be beneficial to the estate. **Pesh** SANT RAM *v.* GURDAS MAL **239**

——— ——— **Joint family**—*Debt*—*Liability of member.*

Obiter:—It is settled law that in the case of an ancestral business all members of a Hindu joint family including minors are liable for debts incurred in the course of business to the extent of their shares in the family property.

Raghunathji Tarachand v. *Bank of Bombay*, 2 Ind. Cas 173; 34 B. 72; 11 Bom. L. R. 255, relied upon. **N** RATAN LAL *v.* JAIDEO **820**

——— ——— *Decree against father*—*Execution against joint family estate, whether allowable*— *Partition subsequent to decree*—*Creditor, rights of, whether affected.*

Where a simple money-decree is passed against the father and manager of a joint Hindu family, it can be executed against the whole of the estate and operates against the interests of the sons. Any part tion of the property subsequent to the date of the decree would not affect the creditor's rights against the joint fam ly property, which rights would be the same as on the date on which the decree was passed, and would not be affected by subsequent actions of the members of the family.

Sripat Singh Dugar v. *Prodyot Kumar Tagore*, 39 Ind. Cas. 252; 44 I. A. 1; 32 M L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524 (P. C.), followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 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; 15 A. L. J. 437 (P. C.), distinguished. **A** SHAMBHU DYAL SINGH *v.* ISWAR SARAN, (1923) A. I. R. (A.) 306 **597**

——— ——— *Insolvency of manager*—*Shares of other members, whether vest in Official Receiver.*

On the insolvency of the managing member of a joint Hindu family, the Official Assignee succeeds to the undivided interest of the insolvent in the joint property and his rights as managing member so far as they can be exercised for his own benefit, but he is not entitled to have vested in him the shares of the other members though he is entitled to deal with them as the insolvent would lawfully have done if there had been no insolvency.

Hindu Law—contd.

Official Assignee of Madras v. *Ramachandra Aiyar*, 68 Ind. Cas 898; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 509; (1923) A. I. R. (M) 55; 46 M. 54, followed.

Bihari Lal v. *Sat Narain*, 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L) 1 (F B), referred to and not followed. M VARADARAJAN *v.* SRINIVASA RAO 471

——— **Joint family**—*Mortgage by father—Sale in execution—Sons, whether can recover their share.*

Under the Mitakshara Law a judgment against a Hindu father cannot be executed against the whole of the family property if the debt in respect of which the judgment has been obtained was one incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone.

Sripat Singh Dugar v. *Prodyot Kumar Tagore*, 39 Ind. Cas. 252; 44 C. 524; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 I. A. 1 (P. C.), followed.

Where joint family property has passed out of the family under a sale in execution of a decree for the father's debt, his sons cannot recover the property without showing that the debt was contracted for immoral purposes and that the purchaser had notice that it was so contracted, irrespective of the fact whether the father is dead or alive.

Suraj Bunsi Koer v. *Sheo Persad Singh*, 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.), followed. A SITLA PRASAD *v.* CHAMELI BAHU, 21 A. L. J. 683; 9 O. & A. L. R. (A) 766; (1924) A. I. R. (A) 111 316

——— *Partition—Separate acquisition of member—"Gains of science," what are.*

The acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint family funds, is his self-acquired property, and is not subject to partition.

Lakshman Mayaram v *Jamnabai*, 6 B. 225 6 Ind. Jur. 369; 3 Ind. Dec. (N S) 608, relied on.

Under Hindu Law the ordinary gains of science are divisible when such science has been imparted at the family expense and acquired while receiving a family maintenance; but it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family.

By the "gains of science" is meant the special training for a particular profession which is the immediate source of the gains, and not the general elementary training which is the stepping stone to the acquisition of all science.

There is no authority in the Mitakshara for the contention that acquisitions made personally and without the aid of joint funds by a member of a joint family, who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property.

Hindu Law—contd.

Meharam Ramrakhiomal v. *Rewachand Ramrakhiomal*, 44 Ind. Cas. 269; 45 C. 666; 22 C. W. N 377; 4 P. L. W. 197; 34 M. L. J 327; 7 L. W 361; 23 M. L. T. 218; 16 A. L. J. 281; 27 C. L. J. 345; 20 Bom. L. R. 566; (1918) M. W. N. 587; 12 S. L. R. 116; 45 I. A 41 (P. C.), relied on. L UTTAM DEVI *v.* DINA NATH, (1923) A. I R (L.) 359 774

——— **Joint family**—*Presumption—Separation—Presumption, whether exists as to date of separation—Partition proof of—Cesser of commensality.*

There is undoubtedly a presumption that every Hindu family is joint. But if the family is no longer joint, there is no presumption as to the date on which separation was effected.

Nagashar Bakhsh Singh v *Ganesha*, 56 Ind. Cas. 306; 23 O. C. 1; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 15 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 42 A. 368; 13 L. W. 622; 47 I. A. 57 (P. C.), distinguished.

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property.

Ganesh Dutt Thakoor v. *Jewach Thakoorain*, 1 C. 26 142; M. L. J 8; 31 I. A. 10; 8 C W N. 146; 8 Sar P C. J 575. 6 Bom. L. R 1 (P. C.), followed. O DHAUNTAL KHAN *v.* RAM LAL KALWAR, 10 O. L. J 412 227

——— *Presumption—Separation, proof of—Receiver, necessary conditions for—Effect of re-union—Members, whether bound by act of manager—Property acquired during separation, whether becomes joint after re-union.*

The natural presumption of the Hindu Law is in favour of a family being joint and the burden of proving separation lies on the party alleging it.

For a re-union two things are essential: firstly that one can re-unite with his father, brother or paternal uncle; and, secondly, that the re-union must take place after separation, so that the parties seeking to re-unite must have separated before the re-union.

Basanta Kumar Singha v. *Jogendra Nath Singha*, 33 C. 371; 3 C. L. J. 98; 10 C. W. N. 236, followed.

To constitute a valid re-union the parties should not only live in one mess and in one place and like one family, but they should again joint each other's share of the property and remain in possession.

The effect of a re-union is to place the united co-parceners in the same position as they would have been in, had no partition taken place and the property of the united members stands on exactly the same footing as that of members who have always been undivided so that, upon the death of any one of the re-united members, his share will pass by survivorship to the remaining members and will not get into the hands of any undivided member so long as there are undivided members in existence.

All members of a joint Hindu family, whether minor or adult, are bound by the act of the manager

Hindu Law—contd.

or *karta* of the family unless they prove that the *karta* entered into transactions which were prejud cial to their interests and not for their benefit.

A property acquired during the separation by a member of the family will be presumed, after the re-union, to have been acquired out of the funds of the joint estate and the re-united members will be entitled to a share in it.

Prankishen Paul Chowdry v. *Mothooramohun Paul Chowdry*, 10 M. I. A. 403; 5 W. R. P. C. 11; 1 Suth. P. C J. 609; 2 Sar. P. C. J. 164; 19 E. R. 1025, followed.

In a suit for partition it appeared that there had been a separation but subsequently the plaintiff and defendant, two brothers, had entered into an agreement whereby they had agreed to live together and to hold the property in certain specified shares:

Held, that there was no re-union in the sense that the two brothers became co-parceners of a joint Mitakshara family. **Fat** NENHA OJHA *v.* PARBHU DUTT OJHA **508**

——— **Legal necessity**—*Proof, nature of.*

In the case of a mortgage by a Hindu charging the family property, where the question of legal necessity arises it is not sufficient only to prove the occasion upon which the money was borrowed but also that there was real necessity to borrow money at that time and evidence ought to be given to show that the borrower had not sufficient funds for the purpose just then. **Fat** AJTI CHAUDHURI *v.* JANAK LAL CHAUDHURI, (1923) Pat. 332 **846**

——— *Recitals in a deed, value of*—*Onus on creditor.*

The creditor of a member of a joint Hindu family must prove facts which embody the representations of the alleged needs of the family estate and the motives influencing the immediate loan. This onus is not discharged by merely relying on the recitals contained in a deed. A recital is not a substitute for evidence of the facts which a creditor must prove.

Salu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.); *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 420; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.); *Brij Lal* v. *Inda Kunwar*, 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; (1914) M. W. N. 405; 12 A. L. J. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794 19 C. L. J. 479 (P. C.), and *Nanda Lal* v. *Jagat Kishore Acharjya*, 36 Ind. Cas. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.), referred to and relied upon. **O** RAM NATH *v.* RAM HARAKH, 10 O. L. J. 245; 9 O. & A. L. R. 857; (1924) A. I. R. (O.) 49 **770**

Hindu Law—contd.

——— **Minor**—*De facto guardian, powers of*—*Default by guardian de jure*—*De facto guardian, position of.*

Hindu Law fully recognizes a *de facto* guardian and an alienation made by him, if made in the interests of the minor, has exactly the same legal effect as that made by a *de jure* guardian.

When a *de jure* guardian has neglected to perform his duties, or has shown apathy or hostility as regards the interests of the minor, the position of a *de facto* guardian in this respect becomes materially stronger. **Fesh** SUNDAR SINGH *v.* RAGHBIR SINGH **384**

——— **Property** *inherited through materna grandfather, nature of.*

Property inherited by a Hindu through his maternal grandfather is obstructed heritage and is his self-acquired property, and his male issue do not take any interest in it by birth. **L** PHULI *v.* DEBI PRASHAD, (1923) A. I. R. (L.) 575 **449**

——— **Rajbansis**—*Widow, re-marriage of*—*Forfeiture of estate*—*Custom*—*Hindu Widow's Re-marriage Act* (*XV of* 1856), *s* 2.

Rajbansis are governed by the ordinary Hindu Law.

Ram Das v. *Chandra Dassia*, 20 C. 409; 10 Ind. Dec. (N. S.) 277, followed.

A Rajbansi widow on re-marriage forfeits her former husband's estate, even though there is a custom of re-marriage in her caste. **C** SANTALA BEWA *v.* BUDASWARI DASI, 50 C. 727; 27 C. W. N. 669; (1924) A. I. R. (C.) 98 **11**

——— **Sadhus**—*Inheritance, rules of*—*Property acquired by* Sadhu, *whether* wakf.

A person on being initiated into a fraternity of *Sadhus* severs his connection with all his natural relations and kinsmen and becomes not only a disciple but also the spiritual son of his *guru*. Thus all other disciples of his *guru* become his religious brothers and the *guru's guru* is his grandfather and the disciples of the latter are his uncles and inheritance is governed by the religious relationship thus established.

Secular property, even if acquired by a *Sadhu*, does not change its character unless dedicated for a special purpose, religious or charitable. **L** KISHAN DAS *v.* LACHHMAN SINGH, (1923) A. I. R. (L.) 544; 5 L. L. J. 351 **94**

——— **Widow**—*Power of alienation*—*Legal necessity*—*Contribution towards expenses of* Sradh *of near relation of husband.*

A contribution by a Hindu widow towards the expenses of the *sradh* of a near relation of her husband half of whose property was in her possession, her obligation to contribute half the expenses being admitted by one of the next reversioners constitutes a legal necessity. **Fat** RAMSUNDER KUER *v.* SATRUHAN PRASAD CHAUDHURI **846**

——— *Surrender, constituents of.*

In order that a surrender by a Hindu widow of her widow's estate, inherited from the last male owner, may be effective and valid, there must be a total surrender of that estate, and

Hindu Law—*concld.*

the arrangement between the widow and the reversionary heir should not be such as can be described as a device to partition the estate between the widow and the reversionary heir. C JARI LAL PAL *v.* LAL BEHARI HAZRA, (1923) A. I. R. (C.) 499 625

——— **Will**—*Property dedicated to religious usage—Appointment of testator's widow as shebait—Power to appoint successor—Person born after testator's death, whether can be appointed.*

Property cannot be made inheritable otherwise than as the law allows but there may be exceptional cases in which Hindu Law sanctions a departure from the rule that the donee must be in existence.

Sreemutty Soorjeemoney Dossee v. *Denobundoo Mullick*, 6 M. I. A. 526 at p. 555; 1 Ind. Jur. (N. S.) 37, 4 W. R. P. C. 114; 1 Boul Rep. 228; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583, 19 E. R. 198 and *Jotendromohun Tagore* v. *Ganendromohun Tagore*, I. A. Sup. Vol. 47; 18 W. R. 359; 9 B. L. R. 377; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 P. C.), followed.

A trusteeship with power to appoint a successor is well known to and recognised by Hindu Law.

A Hindu made a Will according to which after leaving certain properties to his daughter he made provision for the performance of his *sradh* and dedicated certain properties to religious uses. He appointed his wife his executrix and *shebait* and gave her power to appoint her successor. The widow of the testator left a Will by which she appointed a great-nephew of her deceased husband, born after his death, as *shebait*. The heirs of the testator brought a suit for the construction of his Will:

Held, that the power given to the widow was not badly exercised and the appointment by the widow of a successor to herself was not inconsistent with Hindu Law the fact that the successor so appointed was not alive at the time of the death of the testator would not make the appointment invalid. G MATHURA NATH MUKHERJEE *v.* LAKHI NARAIN GANGULY, 50 C. 420; (1924) A. I. R. (C.) 68 435

Hindu Widow's Re-marriage Act XV of 1856. *See* HINDU LAW 11

Inam Rules—Deshmukh Inam *in cash—Agreement to accept lesser amount, whether binding on heirs.*

An agreement by a person entitled to receive a share in a *Deshmukhi Lawajma* to accept a smaller share cannot bind his heirs and successors as he has no power to affect their interest.

Krishnaji v. *Manwar Ali*, 6 Ind Cas. 821; 6 N. L. R. 72, *Aman Ali* v. *Imambi*, 22 Ind. Cas. 89; 9 N. L. R. 188, distinguished.

A *Deshmukhi* cash *inam* does not fall under rule VI (2) so as to be governed by rule V (2) of the *Inam* Rules. All the same, the grant is a perpetual hereditary grant for the maintenance of the dignity of the members of the family and each person entitled for the time being to a share therein must be held to be holding that share for his life only. N SHANKARRAO *v.* KHUSHALRAO, (1923) A. I. R. (N.) 329 999

Income Tax Act (VII of 1918), s. 51—*Revenue Authority, duty of—Refusal to state case—High Court, whether can compel reference.*

When a capacity or power is given to a public authority, there may be circumstances which couple the power with a duty to exercise it.

Under section 51 of the Income Tax Act, the Chief Revenue Authority is bound to state a case for the opinion of the High Court on the application of the assessee. In case the Revenue Authority improperly refuses to state a case, the High Court can compel it to do so.

Chief Commissioner of Income Tax, Madras v. *Northern Anantapur Gold Mines, Limited*, 64 Ind. Cas. 682; 44 M. 718; 14 L. W. 108; (1921) M. W. N. 502; 41 M. L. J. 177, overruled. P. C. ALCOCK, ASHDOWN & CO. *v.* CHIEF REVENUE AUTHORITY OF BOMBAY, 21 A. L. J. 689; 25 Bom. L. R. 920; (1923) A. I. R. (P. C.) 138; (1923) M. W. N. 557; 33 M. L. T. 267; 45 M. L. J. 592; 47 B. 742; 18 L. W. 918 392

Income Tax Act (XI of 1922), s. 10 (2) (iii)—*"Allowance," what is—Capital put into firm by certain partners—Sum paid as interest, whether allowance—"Registered firm," meaning of—Application for registration filed beyond time but prior to assessment, effect of.*

A sum paid as interest to partners for capital put into a firm represents merely an assignment of a part of the net profits for the year in favour of partners who are regarded as entitled to such assignment by reason of special advances of capital made by them in the course of the year and is not an "allowance" admissible under section 10 (2) (*iii*) of the Income-Tax Act.

When a firm does not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year is due it cannot be held to be a registered firm for the year in question by filing the application prior to the assessment.

The mere blunder of an Income-Tax Officer cannot make a firm a "registered firm" for the purposes of assessment during a certain financial year, if they are not such within the meaning of the definition. A LALLA MAL-HARDEO DAS COTTON SPINNING MILLS, *In the matter of*, 21 A. L. J. 703; (1924) A. I. R. (A.) 137 339

Indian Soldiers (Litigation) Act (IX of 1918), s. 10—*Soldier, decree against—Application for review—Application to set aside decree—Soldier serving under War conditions—Admission of application beyond time—Decree, whether can be set aside against all defendants.*

It is a sufficient ground for admitting an application for review of judgment filed after the period of limitation that the applicant is certified by the Adjutant-General to have been serving under War conditions, immediately after which he makes the application.

P, one of the defendants in a suit, left India in August, 1918 to serve under War conditions, and returned at the end of October, 1919. Meanwhile, the suit had been disposed of adversely to him in July, 1919. Immediately after his return, he made an application under section 19

Indian Soldiers (Litigation) Act—concld.

of the Indian Soldiers (Litigation) Act and also for a review of the decree passed in his absence:

Held, that under the circumstances of the case, the Court could set aside the decree either under the latter part of section 10 of the Act or under its general powers of review contained in O. XLVII, r. 1 of the Civil Procedure Code.

Where a soldier who has been serving under War conditions applies to have a decree or order passed against him set aside, if the decree or order is of such a nature that it cannot be set aside as against such a soldier only, it may be set aside as against all or any of the parties against whom it is made. **U** HAMABATI DEVI *v.* PRAN KRISHNA BANERJEE, 27 C. W. N. 193 **262**

——— s. 11, *meaning and applicability of—Plaintiff who has ceased to be Indian Soldier, whether can take advantage of provision—Intention of Legislature—Interpretation of Statutes.*

If the language of a Statute is clear and unambiguous the Court must give effect to it and has no right to extend its operation in order to carry out the real or supposed intention of the Legislature.

The Legislature in enacting the Indian Soldiers Litigation Act intended to provide for the special protection in respect of civil and revenue litigation of Indian Soldiers serving under War conditions and contemplated that a person's right to have recourse to a Court of Law should not be adversely affected by reason of his serving as a soldier under War conditions. It was consequently provided that the period of such service should be excluded from the period of limitation prescribed for the suit, appeal or application which he might bring before a Court of Law and it was intended that the period of limitation should not run against him during the time he was serving under War conditions.

The language of section 11 of the Indian Soldiers Litigation Act, however, embraces only those cases in which the plaintiff *is* an Indian Soldier at the time of the institution of the suit, and the mere fact that he was a soldier for some time during the period of limitation prescribed for the suit does not benefit him if he has ceased to be a soldier on the date of the institution of the suit. **L** PIARA SINGH *v.* MULA MAL, (1923) A. I. R. (L.) 655; 4 L. 323; 5 L. L. J. 551 **915**

Injunction, *nature of—Injunction, when can be claimed.*

An injunction is a discretionary relief and cannot be obtained by a plaintiff out of possession, when he does not ask for possession against defendants who are actually in possession.

Mir Husain Bux v. *Kando*, 32 Ind. Cas. 689; 9 S. L. R. 174 and *Rathnasabapathi Pillai* v. *Ramasami Aiyar*, 5 Ind. Cas. 630; 33 M. 452; 20 M. L. J. 301; (1910) M. W. N. 112; 7 M. L. T. 311, relied on. **S** MANOHARDAS *v.* RAMDAS, (1923) A. I. R. (S.) 17 **549**

——— *to restrain arbitration—Award filed in Court, effect of.*

Injunction—concld.

An injunction cannot be granted where the thing sought to be prevented has been done and cannot be undone. For instance, an injunction cannot be granted restraining the opposite party from proceeding with an arbitration, where it is found that the arbitration proceedings have already been held, and an award has been made and filed in Court. In such a case the Court is entitled to take into consideration events which have happened pending the suit or appeal. **L** FIRM OF NARAIN DAS-JAINI LAL OF DELHI *v.* FIRM OF JAI NARAIN-BAIN LAL OF DELHI, (1923) A. I. R. (L.) 24; 5 L. L. J. 210 **786**

In pari delicto melior est conditio possidentis, applicability of. *See* CONTRACT ACT, ss. 16, 23 **27**

Interest Act (XXXII of 1839)—*Interest, whether allowable without notice of demand or agreement.*

In the absence of an express agreement to pay interest, or a written demand or notice that interest would be charged under the provisions of the Interest Act, a claim as to interest cannot be entertained.

Edulji & Co. v. *McDonald*, 55 P. R. 1901, *Fillingham* v. *Captain C. I. Dunn*, 20 Ind. Cas. 194, 8 P. R. 1914; 260 P. L. R. 1913; 235 P. W. R. 1913, followed. **L** DES RAJ SAWHNY *v.* FRAY'S MOTOR WORKS, (1923) A. I. R. (L.) 302 **64**

Interpretation of documents—*Ambiguous document.*

It is a well-known rule of interpretation that in a case where there is any ambiguity in the terms of a document, there is no safer guide to come to a true conclusion than to see how the parties have acted under that document. **O** ALI ABBAS *v.* KUNWAR SHER BAHADUR SINGH, 9 O. & A. L. R. 815 **267**

Interpretation of Statutes—*Rule of interpretation.*

Per *Oldfield, J.*—In construing the words of a Statute, recourse to other Statutes is not legitimate when they are not *in pari materia* with the Statute under interpretation and it is unnecessary when the *prima facie* interpretation of the words is consistent with the circumstances and object of the provision. **M** PAMIDIMARRI GNAMMA *v.* KETTI REDDI KRISHNA REDDI, 45 M. L. J. 263; 46 M. 739; (1923) M. W. N. 403 **369**

Joint trial, *objection to, when should be taken.*

An objection to the joint trial of accused persons ought to be taken at the beginning of the trial, or, at least, at an early stage thereof. Such an objection taken after the witnesses on both sides have been examined and when the case is being argued, cannot be entertained. **Pat** AMJAD ALI *v.* EMPEROR, 5 P. L. T. 129; 2 P. L. R. 79 CR.; 25 CR. L. J. 35 **723**

Jurisdiction, *civil or revenue—Suit for share in occupancy tenure, nature of—Civil Court, whether can take cognizance.*

A suit to establish the plaintiff's right to a share in an occupancy tenure is cognizable by a Civil Court. **L** SANTA SINGH *v.* VIR SINGH, 4 L. 195; (1923) A. I. R. (L.) 500; 6 L. L. J. 47 **545**

——— *of Courts—Exclusion of jurisdiction—Consent of parties.*

Jurisdiction—concld.

An agreement between the litigants to have the suit tried in a particular Court to the exclusion of other Courts which may also lawfully entertain the same, is unenforceable.

Prosunno Chunder Bose v. *Prosunno Chunder Roy*, 15 W. R. 343, and *Barkat-un nissa Begam* v. *Mahboob Ali Mian*, 52 Ind. Cas. 684 at p. 685; 17 A. L. J. 1068; 1 U. P. L. R (A.) 187; 42 A. 70, distinguished.

Litigants can no more by agreement *inter se* divest a Court of its inherent jurisdiction over the subject-matter of a suit than they can confer jurisdiction upon it by consent where it has none. L KIDRI PRASAD v. K. R. KHOSAJA, (1923) A. I. R (L.) 425; 5 L. L. J. 300 **590**

——— *Plaint not disclosing cause of action.*

Unless a plaint discloses a cause of action there can be no jurisdiction. L JAWAHAR SINGH v. N. D. SASSON AND CO., KARACHI, (1923) A I R. (L.) 290 **165**

Land Acquisition Act (I of 1894), s. 18—*Acquisition of land in possession of tenant—No reference by landlord—Reference at instance to tenant—Separate sum awarded—Landlord, right of.*

Where a landlord is satisfied with the sum awarded to him by the Collector for land acquired in the occupation of a tenant and does not ask for a reference under section 18 of the Land Acquisition Act, he cannot deprive the tenant of any additional sum which the latter is able to obtain from the Land Acquisition Judge under a reference made at his instance alone C SASI KANTA ACHARYYA v. ABDUR RAHMAN, 38 C. L. J. 265; (1924) A. I. R. (C.) 158 **203**

Landlord and tenant—*Adverse possession—Non-payment of rent.*

The mere non-payment of rent or discontinuance of payment of rent does not by itself create adverse possession. So long as the relationship of landlord and tenant exists, the tenant cannot acquire an adverse title as against his landlord.

Bykant Nath Shaha v. *Rajendra Narain Rai*, 12 C. 333; 6 Ind. Dec. (N. S.) 227, *Rim Narain Singh* v. *Mina Koery*, 25 C. 45; 13 Ind. Dec. (N. S.) 32 and *Prosonna Kumar Mukherjee* v. *Srikant Raut*, 16 Ind. Cas. 365; 40 C. 173, 16 C. L. J. 202; 17 C. W. N 137, relied on.

One who enters as tenant is not, merely because of that fact, precluded from subsequently holding adversely to his landlord. But to enable him to do so, it is necessary for him to renounce the idea of holding as tenant and to set up and assert an exclusive right in himself. It is further essential that the landlord should have actual notice of the tenant's claim, or that the tenant's acts of ownership should be of such an open, notorious and hostile character that the landlord must have known of it. Such conduct on the part of the tenant necessarily furnishes the landlord with the legal right to enter and re-possess himself of the premises. Hence an adverse possession by the tenant cannot be predicated from the mere fact of non-payment of rent or discontinuance of payment of rent, unless in connection therewith the landlord has been apprised that the tenant claims title in himself. When the tenant thus disclaims the title of the landlord, claims title in himself, and the landlord has notice of that fact, it has the effect of an ouster and disseisin, even though this has happened during the continuance of the term of the tenancy. The theory on which adverse possess on becomes a perfect title is that the true owner has, by his own fault, failed to assert his right against the hostile holder. Consequently, where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and an assertion of an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the Statute of Limitations.

A possession commencing under the authority of or in subordination to the true title does not become transformed into a hostile one by a mere change in mental attitude It must be shown that the true owner had knowledge of the adverse holding, or it must be so open and notorious as to raise a presumption of notice to him. C GIRIS CHANDRA GANGOPADHYAY v. KRISHNA DE NAG, 30 C. L. J. 266; (1924) A. I. R. (C.) 168 **325**

Landlord and tenant—contd.

——— *Long possession and uniform payment of rent whether creates permanent tenancy—Ejectment—Tender or delivery of notice to headman of family, whether sufficient service—Transfer of Property Act (IV of 1882), s. 106.*

Long possession and uniform payment of rent are not by themselves sufficient to justify the finding that the tenancy was permanent from its inception.

When there is a tender or delivery of the notice of ejectment to the head member of the family, there is sufficient service notwithstanding that there is no proof of prior tender or delivery to each of the joint tenants personally. C KEDAR NATH SADHUKHAN v. MADHU SUDAN DAS, 37 C. L. J. 478; (1923) A. I. R. (C.) 682 **105**

——— *Occupancy tenancy—Trees standing on tenancy—Tenant, rights of.*

An occupancy tenant acquires no transferable rights in trees standing on the occupancy tenancy, even though the trees were planted by himself with the consent of the landlord.

Daya Kishen v. *Mohammad Wasir Ahmad*, 30 Ind. Cas. 565; 13 A. L. J. 833, relied on.

Muhammad Ismail Khan v. *Mithu Lal*, 17 Ind. Cas. 656; 11 A. L. J. 649, *Habibullah* v. *Kalyan Das*, 25 Ind. Cas. 169 12 A. L. J 1080 and *Muhammad Yasin* v. *Ilahi Bakhsh*, 16 Ind. Cas. 455; 34 A. 545 10 A. L. J. 73, distinguished. A ABDUL RAUF v. RAJU MUHAMMAD SHAH, (1923) A. I. R. (A.) 340 **655**

——— *Suit for arrears of rent—Kabuliyat admitted by tenant—Decree.*

Plaintiff sued to recover arrears of rent in respect of certain lands alleged to have been settled with the defendant, who had executed a *kabuliyat* in favour of the plaintiff and had obtained possession of the lands:

Landlord and tenant—concld.

Held, that inasmuch as the execution of the document regulating the rights of the parties was established, the plaintiff was entitled to recover the arrears claimed. C PRABHAT CHANDRA CHATTERJI *v.* BIJOY CHAND MAHATAP, 50 C. 572; (1924) A. I. R. (C.) 84 **89**

——— *Tenant at fixed rent—Permanent tenancy—Excavations by tenant—Suit for damages by landlord—Injunction.*

There is nothing in the law which prevents tenants having permanent heritable rights at a fixed rent from using the land of the tenancy in any manner they think fit so long as there is no risk to the right of the landlord to recove the rent payable and, unless there are any reservations, the landlord has no right in the case of such tenures other than the right to receive the stipulated rent.

A tenant holding permanently at a fixed rent made excavations on the lands of the tenancy for the purpose of making bricks. The landlord brought a suit for damages and injunction:

Held, that, in the absence of evidence that the excavations were such as would be detrimental to the right of the landlord to recover the rent payable, the landlord's claim with respect to damages or injunction was not sustainable.

Anund Coomar Mookerjee v. *Bissonath Banerjee*, 17 W. R 416 and *Girish Chandra Chando* v. *Sirish Chandra Das*, 9 C. W. N. 255, distinguished. C BARADA PRASAD BANERJEE *v.* BHUPENDRA NATH MUKHERJEE, 50 C. 694; (1924) A. I R (C.) 56 **56**

——— *Tenant's house falling down—Test for determining whether site reverts to landlord—Abandonment, what is.*

The test for determining whether, when the house of a tenant falls down, the site reverts to the landlord, is whether the tenant has abandoned the premises. The mere fact that he has not repaired the premises for a considerable time is no proof of abandonment. A MAHADEO *v.* RAM BHAROSH, (1923) A. I. R. (A.) 305 **679**

——— *Village shop keeper, Kachcha shop—Re-building of pucca—Ejectment.*

A village shop keeper who purchased a site in the village from a non-proprietor, constructed a *kachcha* house on it and occupied it for long period without objection by the non-proprietors, does not become liable to ejectment by re-building the house as *pucca*.

Ghorey v. *Shib Lal*, 58 Ind. Cas. 410; 18 A. L. J. 781; 2 U P. L. R. (A.) 266, relied upon. A UDAL *v.* GULAB RAI **813**

Legal Practitioners Act (XVIII of 1879), s. 13 *—Pleader instigating people not to pay taxes and avoid Courts—Misconduct—Disciplinary jurisdiction, exercise of.*

A legal practitioner who instigates people not to pay taxes to the Government and to eschew the established Courts of the land is not, so long as he continues to profess and preach those views, a fit person to be entrusted with a part of the administration of justice in the Courts and his conduct is such as calls upon the High Court in the exercise of its disciplinary powers to take action against him under section 13 of the Legal Practitioners Act.

Per *Coutts Trotter, J.*—The last thing the Courts should consider themselves concerned with in the ordinary way is what the political opinions of anybody are, whether they are members of the legal or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, a Pleader who comes to ask for the issue or renewal of a *sanad*, is applying to be treated as a part of the machinery for the maintenance of law and order in the body politic and to take an active part in administering for the other objects of the Crown the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position while at the same time he is saying that law and order should be disobeyed, that taxes are not to be paid and that public offices are to be abandoned in order to paralyse the very life of the body politic. M JOSYULA RAMCHANDRA RAO *In the matter of*, (1923) M. W. N. 708; 18 L. W 689; 45 M. L. J. 681; (1924) A. I R. (M.) 129; 25 CR. L. J. 65 **977**

——— **ss. 13 (b), (f), 14**—*Jurisdiction of Subordinate Judge to order enquiry—Pleader asking Bench Clerk before judgment is pronounced as to what is the trend of judgment—Professional misconduct.*

A Subordinate Judge is quite competent, under section 14 of the Legal Practitioners Act, to order an enquiry into the facts and circumstances of a case whether it comes under clause (*b*) or whether it comes under clause (*f*) of section 13 of the Act.

No Pleader, standing, as he does, in a fiduciary position towards the Court, is entitled either out of motives of curiosity or still less out of other less excusable motives to endeavour to find out before judgment is delivered or when the judgment is written or partly written what in fact is the effect of it. Such conduct although in some cases it may be innocent enough, in other cases may lead to most improper practices amounts to professional misconduct. **Pat** *In the matter of* NARENDRA NATH ROY, (1923) Pat. 329; (1924) A. I. R. (Pat.) 131; 25 CR. L. J. 40 **728**

——— **s. 36**—*Touts, publication of list of—Fourth Presidency Magistrate, jurisdiction of.*

Inasmuch as the Court of a Fourth Presidency Magistrate is subordinate to that of the Presidency Magistrate, the presiding officer of that Court has no jurisdiction to publish a list of touts applicable to Courts, other than his own, which are not subordinate to his Court. C JAGAT CHANDRA GHOSE *v.* EMPEROR, (1923) A. I. R. (C.) 484; 25 CR. L. J. 34 **722**

Legal representative—*Wife impleaded as legal representative of deceased husband in a suit for maintenance—Subsequent suit in personal capacity.*

It is not open to a person who is added as a legal representative of a deceased judgment-debtor, to raise any defences personal to himself or herself.

Legal representative—concld.

In a suit for maintenance a charge for maintenance was declared against certain properties of the judgment-debtor. Some of these items were, however, the *stridhanam* properties of his wife. Pending appeal, the judgment-debtor died and his wife was brought on the record as his legal representative. In a subsequent suit for enhanced maintenance :

Held, it was open to the wife or her representative-in-interest to plead that the charge in the prior suit against her properties was not binding on her and her personal estate. **M** GUNNAN AKKAMMA *v.* NUNE VENKATAPATHI **623**

Lessor and lessee—*Holding over—Damages.*

A lessee who holds over contrary to the terms of his lease, is liable to the lessor for damages for the full term during which he has held over. **L** SAHIB DAYAL *v.* DHANPAT RAI, (1923) A. I. R. (L.) 281 **490**

Letters Patent (Mad.), cl. 15—*Refusal to alter terms of sale proclamation—Refusal to extend time of Court sale—Order, whether "judgment" and appealable.*

An order by a Single Judge on the Original Side of the Madras High Court refusing to alter the terms of a sale proclamation by raising the upset price and dividing the property into lots is purely one of discretion and of merely interlocutory nature. It is not a "judgment" within the meaning of clause 15 of the Letters Patent and is not appealable.

An order refusing to postpone a Court sale or to extend the time allowed to raise money by mortgage or private sale of the properties which are the subject of Court sale is also interlocutory and is not appealable.

Tuljaram Row v. *Alagappa Chettiar*, 8 Ind. Cas. 310; 55 M. 1 (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1, relied on.

Sivagami Achi v. *Subrahmania Ayyar*, 27 M. 259; 14 M. L. J. 57, doubted. **M** KAVERIBAI AMMAL *v.* B MEHTA & SONS, 18 L. W. 615; (1923) M. W. N. 804; 46 M. L. J. 71 **901**

Letters Patent (Pat.)—*Remand by Single Judge of High Court for re-trial, whether judgment.*

Where a Single Judge of the Patna High Court sets aside the decision of the lower Appellate Court and orders a re-trial by that Court that decision amounts to a judgment within the Letters Patent and an appeal lies to a Division Bench therefrom. **Pat** AJTI CHAUDHURI *v.* JANAK LAL CHAUDHURI, (1923) Pat. 332 **946**

Licensor and licensee—*Licensee in possession—Denial of title of grantor, effect of.*

A licensee in possession does not, like a tenant, by denying the title of the grantor of the license, forfeit the license and become liable to ejectment.

Dharam Kunwar v. *Fakira*, A. W. N. (1901) 157 and *Akbar Ali Khan* v. *Shah Muhammad*, 40 Ind. Cas. 443; 39 A. 621; 15 A. L. J. 592, followed. **A** DURGA *v.* BABU RAM, (1923) A. I. R. (A.) 403 **596**

Limitation—*Suit for compensation for loss of goods consigned by Railway—Limitation* terminus a quo.

The period of limitation for a suit for compensation for loss of goods consigned by Railway commences to run from the date when the loss is definitely ascertained or brought home; **A** DEVI DEEN & SONS *v.* ROHILKHAND & KUMAUN RAILWAY, (1923) A. I. R. (A.) 342 **669**

Limitation Act (IX of 1908), s. 5—*Appeal filed beyond time, admission of—Negligence of appellant's agent or of Pleader's clerk, whether 'sufficient cause.'*

Negligence of an appellant's agent or of his Pleader's clerk is not 'sufficient cause' within the meaning of section 5 of the Limitation Act for the admission of an appeal filed beyond limitation.

Budhu v. *Dewan*, 28 Ind Cas. 265; 37 A. 267; 13 A. L. J. 286 and *Sarat Chander Bose* v. *Saraswati Debi*, 34 C. 216; 5 C. L. J. 380, relied upon. **A** MAHTAB KUER *v.* BIRHMO, 21 A. L. J. 817; 9 O. & A. L. R. 1017 **254**

——— **s. 5**—*Ignorance of rule of practice—Extension of time.*

Ignorance of a rule of practice of which sufficient notice has been given is no excuse for extension of time under section 5 of the Limitation Act. **N** GOPAL GANESH *v* WALABHDAS SANTUKIRAM **878**

——— **s. 12**—*Copies applied for on day of judgment—Appeal—Limitation, computation of.*

The day on which judgment is delivered must first be excluded in computing the period prescribed for filing an appeal and then the time requisite for obtaining the necessary copies must be excluded; that is to say, if copies are applied for on the day on which judgment is delivered, that day cannot be included in the period requisite for obtaining copies under section 12 of the Limitation Act. **L** ATA MUHAMMAD *v.* PIR KHAN **1055**

——— **s. 12**—*Time requisite for obtaining copies—Decree signed long after judgment—Limitation, commencement of.*

Appellant applied for a copy of the decree to be appealed against, but he was unable to obtain it as no decree had been prepared and signed. A decree was prepared several months later, and the appellant then made a fresh application for a copy of the decree and filed the appeal after obtaining the copy :

Held, that the appellant was entitled to compute the period of limitation for the appeal from the date of the signing of the decree.

Ram Asray Singh v. *Sheonandan Singh*, 35 Ind. Cas. 868; 1 P. L. J. 573; 1 P. L. W. 35; (1917) Pat. 21 (F. B.), followed.

Jyotindra Nath Sarkar v. *Lodna Colliery Co., Limited*, 62 Ind. Cas. 649; 6 P. L. J. 350; 2 P. L. T. 361; (1921) Pat. 177 (F. B.), distinguished. **Pat** MOHAMMAD MOINUDDIN ASHRAF *v.* MOHAMMAD ISHAQ ASHRAF, (1923) A. I. R. (Pat.) 529; 1 P. L. R. 459 **265**

——— **s. 14, Sch. I, Art. 182**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 11—Execution petition—Prayer for superfluous relief, effect of—Petition, whether step-in-aid of execution—*

Limitation Act—contd.

Misjoinder of causes of action in petition—Time spent in prosecuting petition, whether deducted.

An incorrectness or superfluity as to the reliefs asked for in an application for execution of a decree does not vitiate the application to such an extent as to debar the decree-holder from claiming it to be a step in aid of execution.

An application for execution of a mortgage-decree was filed on the 20th February 1919 but that the relief asked for was not in accordance with the decree. An appeal to the High Court against that order was dismissed on the 2nd July 1920. A second application for execution was filed on the 11th May 1922. The mortgagor again objected by a petition dated the 16th June 1922, and the application was dismissed on the 13th July. On appeal by the decree-holder to the High Court:

Held, (1) that the application of the 20th February 1919 did not offend against the provisions of O. XXI, r. 11 of the Civil Procedure Code and was a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act;

Amrit Lal v. *Murlidhar*, 67 Ind. Cas. 538; 3 P. L. T. 422; (1922) Pat. 229; (1922) A. I. R. (Pat.) 188; 1 Pat. 651, distinguished.

(2) that the basis of the decision of the Subordinate Judge and of the High Court in appeal was that it was not right for the Execution Court to entertain an application in which the legitimate prayer for the execution of the decree was joined with a prayer which the Court thought it was not competent to grant and which related to relief given by another decree;

(3) that, consequently, the defect was one in the nature of a misjoinder of causes of action and was covered by section 14 of the Limitation Act;

(4) that, therefore, the decree-holder was entitled to the benefit of the time which was taken in prosecuting the previous execution proceeding from the 20th February 1919 to the 2nd July 1920. **Pat** KISHORI MAL v. JAGDISH NARYAN SINGH 312

——— s. 19—*Acknowledgment—'Signing,' what amounts to.*

Where the usual method of a *guru* or 'spiritual leader' in sending communications to his *chelas* or the disciples consists in superscribing the communications with the words "Sri Sri Hari Sarnam," and not in affixing his signatures, any communication drawn up in this form and in the hand-writing of the *guru* will be treated as signed by him, although it does not bear his actual name; and any acknowledgment of liability signed in this manner and in his hand-writing will be valid for purpose of saving limitation within the meaning of section 19 of the Limitation Act.

Gangadharra Venkatesh v. *Shidramapa Balapa Desai*, 18 B. 586; 9 Ind. Dec. (N. S.) 899, *Chidambaram Chetti* v. *Ramaswami Chettiar*, 26 Ind. Cas. 911; 27 M. L. J. 631 and *Sadasook Agarwalla* v. *Baikanta Nath Basunia*, 31 C. 1043; 9 C. W. N. 83, relied upon. **A** GOPAL DAS v. BANMALI LAL 1004

Limitation Act—contd.

——— s. 20, Sch. I, Art. 75——*Instalment bond, suit on—Default in payment of instalments*—Terminus a quo.

Plaintiff sued to recover money due on a bond. It was an instalment bond providing that the first instalment should be paid on the 18th June 1913, the second on the 19th June 1914 and the subsequent instalments on the 19th June of every year. The plaintiff alleged and the Court found that the first two instalments were paid but that the third was not paid. Plaintiff, therefore, contended that his cause of action arose on the 19th June 1915:

Held, that section 20 of the Limitation Act did not apply to the case and it was open to the Court to find that the instalments were paid even though the fact of payment did not appear in the hand-writing of the defendant;

(2) that the suit was governed by Art. 75 of the Limitation Act and the period of limitation began to run from the date when the default was made, *i.e.*, the 19th June 1915. **Pat** MUNDO SINGH v. KRISHNA DAYAL GIR, (1924) Pat. 67 **88**

——— s. 22, Sch. I, Art. 177—*Amendment of plaint, when permissible—Addition or substitution of parties—Court, powers of—Partnership—Stranger joining member, status of—Firm, whether can become member—"Firm," meaning of—Official version of an Act, value of.*

A Court has jurisdiction to add or substitute parties *suo motu* untrammelled by the provisions of the Limitation Act, but it is not entitled, when making amendments, to effect the substitution or addition of parties to disregard the provisions of that Act.

A firm as such is neither a person nor an entity and, therefore, cannot be a member of a partnership. The term "firm" is merely a collective name for the individuals who are members of the partnership.

In considering the terms of an Act of the Legislature the version of the Act contained in the Acts printed and published by order of the Government, and not the version set out in the *Gazette* is the accurate and true version of the Act which the Legislature enacted.

26 C. W. N. CL, dissented from.

Under Art 177 of the Limitation Act, 1908, as amended by Act XXVI of 1920, ninety days from the period within which an application to bring legal representatives on the record should be made is ninety days from the death of the party.

A stranger who is jointly interested with a member of a partnership does not thereby become a partner in the partnership itself.

In a suit by certain members of a partnership for a declaration that the partnership is dissolved, and for accounts, enquiries or incidental reliefs, one of the defendants was sued as a firm. Subsequently, the plaint was allowed to be amended and the full names and description of the partners of the alleged firm were put in;

Held, that the amendment did not amount to an addition of new parties, but was an amendment merely for the purpose of more clearly

describing the parties who were already before the Court, and did not, therefore, fall within section 22 of the Limitation Act. **C** SHODOYAL KHEMKA *v.* JOHARMULL MANMULL, 50 C. 549; (1924) A. I. R. (C.) 74 **81**

——— **s. 26, Expl.** — *Easement—Period of user necessary to establish easement—Interruption—Denial of right—Cause of action.*

A mere denial of right affords a cause of action, and any person whose property is threatened with a servitude may bring a suit for a declaration that an easement is enjoyed on sufferance and not as of right. The effect of the Explanation to section 26 of the Limitation Act is to confer an indefeasible right of easement on any person after an enjoyment of anything over nineteen years, provided he waits less than one year before challenging an interruption and the beginning of his enjoyment arose twenty years before suit. But the Explanation does not come into operation where, at the time of the suit, there had been no interruption. **L** GHIRAGH DIN *v.* GHULAM MUHAMMAD **608**

——— **Sch. I, Art. 14**—*Punjab Redemption of Mortgages Act (II of 1913), ss. 9, 12—Application for redemption, dismissal of—Suit for redemption—Limitation.*

An application by a mortgagor to redeem a mortgage under the provisions of the Punjab Redemption of Mortgages Act was dismissed by the Collector on the ground that the mortgagor had lost his right to redeem by the efflux of time. The mortgagor then instituted a regular suit in the Civil Court for redemption of the mortgage;

Held, that the suit was practically one under section 12 of the Act to set as de the order of the Collector and fell within the purview of Art. 14 of Schedule I to the Limitation Act. **L** RAM CHAND *v.* KAURA **855**

——— **Arts. 29, 96, 120**—*Agra Tenancy Act (II of 1901), s. 142—Suit for compensation for seizure of crops under decree ultimately set aside—Limitation—Civil Courts, jurisdiction of.*

A distraint effected under the Agra Tenancy Act is a seizure of moveable property under legal process.

M. brought a suit against *R.* for arrears of rent under the Agra Tenancy Act claiming that the latter was his tenant in respect of certain land. The Trial Court dismissed the suit but it was decreed by the first Appellate Court. *R.* preferred a second appeal which was decided in his favour, but in the meanwhile *M.* had levied rent from *R.* by means of the process of distraint provided by the Tenancy Act. Sometime afterwards, *R.* brought a suit against *M.* claiming the amount of the payment levied from him by the latter together with interest;

Held, (1) that assuming the suit to be cognizable by a Civil Court, it was governed by Art 29 of the Limitation Act and not by Art. 96 or Art. 120 of the Act;

(2) that the seizure of the crops by *M.* was under legal process and was wrongful even though

M. had at the time a decree of a Court in favour of his title;

(3) that the proper course for *R.* was to have proceeded under section 144 of the Civil Procedure Code;

(4) *Obiter*—that the suit was not cognizable by a Civil Court as it was in substance a suit for compensation for wrongful restraint for which provision was made in section 142 of the Agra Tenancy Act.

Article 120 of the First Schedule to the Limitation Act should never be invoked if there is any other Article in the Schedule which upon reasonable interpretation of its language covers the particular suit with which the Court is dealing. **A** MAN SINGH *v.* RAM NATH **922**

——— **Sch. I, Arts. 62, 123, 127**—*Hindu joint family—Separation—Joint-debt realized after separation—Suit for share by separated member—Limitation applicable—Art. 127, applicability of.*

A suit by a separated member of a joint Hindu family against the other members of the family to recover his share of money due on certain bonds which remained the joint property of the parties, but the money due on which was realised after separation to the exclusion of the plaintiff is, as to limitation, governed by Art. 62 of Schedule I to the Limitation Act.

Amina Bibi v. *Najmunnissa Bibi*, 27 Ind. Cas. 712; 37 A. 233; 13 A. L. J 255 and *Abdul Gaffar* v. *Nur Jahan Begum*, 29 Ind. Cas. 347; 37 A 434; 13 A. L. J. 686, followed.

Umardaraz Ali Khan v. *Wilayat Ali Khan* 19 A. 169; A. W. N. (1897) 34; 9 Ind. Dec. (N. S.) 111 and *Mahomed Riasat Ali* v. *Hasin Banu*, 31 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique & Jackson's P. C. No. 133; 10 Ind. Dec. (N. S.) 737 (P. C.), distinguished.

Art. 127 of Sch I to the Limitation Act presupposes the continuation of a joint family and of the joint family property till the date of suit and an exclusion from the enjoyment of such joint property of one party by another. It does not apply to a case where a family has separated and divided its property prior to the suit. **A** BHAGWAN DAS *v.* SUKHDEO KORIE **953**

——— **Art. 118**—*Suit for declaration that adoption invalid—Limitation, terminus a quo.*

The period of limitation for a suit for a declaration that an adoption by a Hindu widow is invalid and for a further declaration that the plaintiff is a reversioner of the husband of the widow, commences to run, under Art. 118 of Sch. I to the Limitation Act, from the date of the knowledge of the alleged adoption. **A** RAM LAL RAI *v.* MURTA KUER, (1923) A. I. R. (A.) 361 **676**

——— **Arts. 118, 144**—*Adoption, invalid—Suit for possession against adoption—Limitation.*

Under a family arrangement among the members of a joint Hindu family, the widow of a deceased member was given, in lieu of maintenance, a certain share in a village which share was to revert to the family on her death unless in

Limitation Act—contd.

the meantime she adopted a son to her deceased husband. The widow got the share mutated in her own name as well as in that of another person whom she declared she had adopted. About eleven years after the death of the widow, the reversioners sued the alleged adoptee for possession. It was found that there had been no adoption in fact:

Held, that the suit not being merely for a declaration that the defendant's adoption was invalid was not barred under Art. 118 of Schedule I to the Limitation Act, and that as it was brought within 12 years of the death of the widow, the plaintiffs were entitled to succeed. A RADHA DUTAIYA *v.* RASHIK LAL, 20 A. L. J. 814; (1923) A. I. R. (A.) 25; 45 A. 1 **14**

——— **Sch I, Art. 120**—*Suit for construction of Will—Limitation, starting point—Declaratory suit, when maintainable—Further relief—Specific Relief Act (I of 1877), s. 42, proviso, effect of.*

A suit for the construction of a Will is governed by Art. 120 of the Schedule to the Limitation Act, but the right to sue does not accrue from the death of the testator or the date of the Probate of the Will so long as the estate is in the hands of the executor and the administration had not been completed. The right to obtain construction of the Will is a continuing right.

Chukkun Lal Roy v. *Lolit Mohan Roy*, 20 C. 906; 10 Ind. Dec. (N. S.) 609, followed.

A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to section 42 of the Specific Relief Act, unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for

The proviso to section 42 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, C RAMKAMAL BANIK SAHA *v.* SYAM SUNDAR BANIK SAHA, 37 C. L. J. 482 **41**

——— **Art. 123**, *applicability of—Suit against co-legatee for share of estate—Limitation.*

A suit by a legatee to recover a share of the estate of the deceased bequeathed to him from a co-legatee who is in possession of that share is governed by Art. 123 of Schedule I to the Limitation Act.

Maung Tun Tha v. *Ma Thit*, 38 Ind. Cas. 809; 44 C. 379; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527, 26 C. L. J. 169; 9 L. B. R. 56; 10 Bur. L. T. 138; 44 I. A. 42 (P. C.), *Zemindar of Bhadrachalam & Palavancha* v. *Venkatadri Appa Rao*, 70 Ind. Cas. 689; 43 M. L. J. 486; (1922) M. W. N. 532; 16 L. W. 369; (1922) A. I. R. (M) 457; 46 M. 190, relied on. L GURBAKHSH SINGH *v.* BNAGWAN SINGH **924**

——— **Art. 132**—*Mortgage—Agreement to pay by instalments—Default—Limitation—Civil Procedure Code (Act V of 1908), s. 11, O. VII, r. 6*—Res judicata—Benamidar—*Beneficial owner, whether affected—Pleadings—Limitation, ground of exemption from, not specified in plaint, effect of—Admission of Counsel on point of law, whether binding on party.*

A mortgage-deed provided for re-payment of the mortgage-money and interest by monthly instalments. It was also agreed that default in payment of each instalment should constitute a separate cause of action. Default having been made in payment of the instalments, the mortgagee sued to recover the amount of the instalments and interest:

Held, (1) that the suit was governed by Art. 132 of Schedule I to the Limitation Act and that limitation in respect of each instalment began to run from the date of default in respect of that instalment;

(2) that the mere forbearance of the mortgagee to sue for the recovery of the amount of the instalments in respect of which default had been made did not amount to waiver and did not stop limitation from running.

In a proceeding by or against a *benamidar* the person beneficially entitled is fully affected by the rules of *res judicata*.

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. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.), relied on.

When a suit, as laid in the plaint, is *prima facie* barred by limitation, the plaintiff must state in the plaint the ground upon which exemption from the Law of Limitation is claimed, and where no such ground is stated the plaintiff cannot be subsequently allowed to set up and prove such a ground.

An admission made by a party's Counsel on a point of law is not binding on the party, and if the opposite party has not been prejudiced by such an admission, there is no provision of law to prevent the party on whose behalf the admission was made from taking the point in appeal. L NANAK CHAND *v.* MUHAMMAD KHAN **1048**

——— **Sch. I, Art. 139**—*Lessor and lessee—Lessee holding over after expiry of lease—Adverse possession—Suit for ejectment—Limitation* terminus a quo.

Where after the expiry of the term of a lease the lessee holds over and pays no rent, his possession is adverse to the lessor, and a suit for his ejectment must be instituted within the period prescribed by Art. 139 of Sch. I to the Limitation Act, the said period commencing to run from the date on which the lease expired.

Bilas Kunwar v. *Desraj Ranjit Singh*, 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 235; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.), followed.

Pusa Mal v. *Makdum Bakhsh*, 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584, distinguished. A BISHESHAR NATH *v.* KUNDAN, 44 A. 583; 20 A. L. J. 593; (1922) A. I. R. (A.) 318 **454**

Limitation Act—contd.

——— **Sch. I, Art. 141**, *applicability of.*

Article 141 provides for a suit by a person entitled to possession on the death of a Hindu or Muhammadan female but, it does not apply where the Hindu or Muhammadan female has been in possession of a full estate.

Ghisa Singh v. *Gajraj Singh*, 33 Ind. Cas. 371; 18 O. C. 289; 3 O. L. J. 45, *Bishesnar Bakhsh Singh* v. *Rameshar Bakhsh Singh*, 44 Ind. Cas. 308; 21 O. C. 1; 4 O. L. J. 648, followed. **O** ZARIF-UN-NISSA *v.* SHAFIQ-UZ ZAMAN, 26 O. C. 133; (1923) A. I. R. (O.) 185 **626**

——— **Arts. 142, 144**—*Adverse possession—Trespasser, transferee from, whether entitled to tack on period of possession to that of predecessor.*

Where a trespasser sells his claim to possession to a purchaser, the latter is entitled to tack the previous possession of his prepecessor to his own possession for purposes of limitation and each subsequent purchaser of the claim or right to possession has a similar right to tack the previous periods of his predecessors-in title. **R** MA MI *v.* HADJI MAHOMED, 1 R. 176; (1923) A. I. R. (R.) 261 **31**

——— **Art. 144**, *applicability of.*

Article 144 of the Limitation Act, 1908, does not apply where a suit is otherwise specially provided for.

Runchordas Vandrawandas v. *Parvatibai*, 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 26 I. A. 71; 1 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.), followed. **O** ZARIF-UN-NISSA *v.* SHAFI-UZ-ZAMAN, 26 O. C. 133; (1923) A. I. R. (O.) 185 **626**

——— **Art. 144**—*Trees planted on land of another without his consent—Suit for removal of trees and possession of land—Limitation.*

The defendant planted trees on the plaintiff's land without having any right to do so and the plaintiff sued for the removal of trees and for possession of the land :

Held, that the period of limitation applicable to the suit was 12 years.

Musharaf Ali v. *Iftkhar Husain*, 10 A. 634; A. W. N. (1888) 257; 6 Ind. Dec. (N. S.) 427, distinguished. **A** MUHAMMAD SHAFI *v.* BINDESHRI SARAN SINGH **266**

——— **Art. 145**—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 44, 45—Attachment of property—Suit for possession from sipurd-dar by owner—Limitation.*

The period of limitation for a suit against a *sipurd-dar*, or temporary Officer of the Court in charge of attached property, for the return of the property by the successful objecting owner of the property is thirty years under Art. 145 of Schedule I to the Limitation Act and commences to run from the date when the Court orders the return of the property to the owner, as the relationship of depositor and depositary is created between the owner of the property and the *sipurd-dar* on that date. **N** LAKSHMMICHAND *v.* DULICHAND, (1924) A. I. R. (N.) 12 **787**

Limitation Act—contd.

——— **Sch. I, Art. 156**—*Civil Procedure Code (Act V of 1908), O. XX, rr. 1, 7—Judgment signed but not pronounced till later date—Limitation, operation of.*

Although under Art. 156 of the Limitation Act the period of limitation for an appeal begins from the date of the decree or order appealed from, where a judgment is signed but not pronounced till a later date, limitation begins to run from the date of the pronouncement of the judgment, as, in view of the provisions of O XX, r. 7, of the Civil Procedure Code, whatever might be the date upon the face of the decree, it must be considered as dated on the date of the pronouncement of the judgment.

The day on which judgment is pronounced within the meaning of O. XX, r. 7 of the Civil Procedure Code is the day on which it is pronounced in open Court in accordance with O. XX, r. 1 of the Code. **Pat** SAGARMAL MARWARI *v.* LACHMISARAN MISIR, 1 Pat. 771; (1923) A. I. R. (Pat.) 129 **879**

——— **Art. 164**—*Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 13—Proceedings other than suits—Limitation.*

Article 164 of the Limitation Act is not restricted to applications to set aside *ex parte* decrees passed in suits. It also applies to similar applications made in proceedings other than suits, *e.g.*, a petition to file an award under the Arbitration Act. **S** FLEMING SNAW & CO., *v.* MANGALCHAND-DWARKADAS **1035**

——— **Art. 181**—*Preliminary decree affirmed in appeal—Application for final decree—Starting point of limitation—Time fixed for payment of money, commencement of—Effect of disposal of appeal on decree.*

When a preliminary decree in a mortgage suit is affirmed on appeal, an application made within three years of the date of the affirmance in order that a final decree might be passed is within the period prescribed by Art. 181 of the Limitation Act.

Gafadhar Singh v. *Kishen Jiwan Lal*, 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734, *Nizamm-ud-din Shah* v. *Bohra Bhim Sen*, 43 Ind. Cas. 870; 40 A. 203; 16 A. L. J. 85 and *Jayanti Venkayya* v. *Damisetti Sathiraju*, 64 Ind. Cas. 470; 44 M. 714; 41 M. L. J. 117; 14 L. W. 180, followed.

Time for the doing of any thing under a decree runs from the date of the ultimate decree which terminates the litigation and becomes, as soon as it is passed, the only operative decree between the parties.

When time is fixed by the lower Court for payment of money, and the decree of that Court is confirmed on appeal, the time for payment runs from the date of the decree of the Appellate Court though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree.

If the decree of the lower Court is reversed by the Appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the Appellate Court it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place

Limitation Act—concld.

for all intents and purposes; both the decrees cannot exist simultaneously.

Arunachella v. *Veludayan*, 5 M. H. C. R. 215 and *Mahammad Sulaiman* v. *Muhammad Yar Khan*, 11 A. 267; A. W. N. (1889) 55; 13 Ind. Jur. 427; 6 Ind. Dec. (N. S.) 598 (F. B.), followed.

Batuk Nath v. *Mumn Dei*, 23 Ind. Cas. 644; 41 I. A. 104; 19 C. L. J. 574; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 16 Bom. L. R. 360; 27 M. L. J. 1; 1 L. W. 729; (1914) M. W. N. 437 (P. C.), *Abdul Majid* v. *Jawahir Lal*, 23 Ind. Cas. 640; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.) distinguished. G UMA CHARAN CHAKRABARTI *v.* NIBARAN CHANDRA CHAKRABARTI, 37 C. L. J. 452; (1923) A. I. R. (C.) 389 2

——— **Sch. I, Art. 182 (5)**—*Execution of decree—Order by Court—Application for time—Step-in-aid of execution.*

An order by an Execution Court fixing a date cannot be relied upon as a step-in-aid of execution within the meaning of Art. 182 (5) of Schedule I to the Limitation Act, inasmuch as the step is not taken by the decree-holder; nor can an application by the decree-holder for further time be regarded as an application to the Court to take a step in-aid of execution so as to give a fresh start of limitation.

Kedarnath Dutt v. *Harra Chand Dutt*, 8 C. 420; 4 Ind. Dec. (N. S.) 268, *Chalavadi Kotiah* v. *Polpuri Alimelammah*, 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 329, distinguished. M PARTHASARATHI CHETTI *v.* ABDUL RAHIM SAHIB, 18 L. W. 109; (1923) A. I. R. (M.) 686; (1923) M. W. N. 871 489

Limited owner—*Alienation—Consent of some of several reversioners—Alienation, validity of.*

Any reversioner can sue to set aside a sale made by a limited owner and the consent of other reversioners to the sale does not debar him from doing so. **Pesh** ZABTA KHAN *v.* SAID HABIB 246

Madras Civil Courts Act (IX of 1873), s. 12
See COURT-FEES ACT, O. VII, r. (c) 115

Madras District Municipalities Act (V of 1920), s. 249, Sch. V, cl. (q)—*"Likely to be dangerous to human life, health or property," interpretation of—Machinery—Presumption of danger—Conversion of paddy into rice, whether industrial purpose.*

The expression "which is likely to be dangerous to human life or health or property" occurring in Schedule V, clause (*q*), of the Madras District Municipalities Act must be read as qualifying not only the last clause "any industrial purpose" but has to be read with each one of the prece ing clauses.

Ordinarily, a y large machinery is dangerous to hu an life, but this cannot be presumed with refer nce to any particular machinery, such as a rice mill for converting paddy into raw rice.

The conversion of paddy into rice is an industrial purpose within the meaning of clause (*q*) of Schedule V in Madras Act V of 1920. M RAMA CHANDRA, *In re*, 45 M. L. J. 555; (1923) M. W. N. 767; 18 L. W. 618; 33 M. L. T. 234; 25 CR. L. J. 3 691

Madras District Municipalities and Local Boards (Amendment) Act (II of 1922)—*Madras Local Boards Act (XIV of 1920)—Election of President of Taluk Board—Members without oath of allegiance—Legality.*

The election of a President of a Taluk Board by members of that Board who have not taken the oath of allegiance as prescribed by Madras Act II of 1922 is invalid. M V. E. RAJAHBATHER MUDALIAR *v.* A. M. VISWANADHA REDDI, 45 M. L. J 543 620

Madras Estates Land Act (I of 1908), s. 3—Inam *granted prior to* 1802, *whether estate—Presumption.*

The fact that certain lands were granted as an *inam* prior to 1802 affords strong evidence that the lands so granted were excluded from the Permanent Settlement and do not form part of an "estate" within the meaning of section 3 of the Madras Estates Land Act.

Kuppu Reddi Nookayya v. *Mandaluka Bheemanna*, 73 Ind. Cas. 733; (1923) M. W. N. 176; 17 L. W. 712; (1923) A. I. R. (M.) 454; 44 M. L. J. 91, followed. M TOTA VARAHALIAH *v.* VATSAVAVA VENKATA, 18 L. W. 324; (1923) M. W. N. 732; (1924) A. I. R. (M.) 117 485

Madras Local Boards Act (XIV of 1920), s. 129—*Absence of drain or cesspool—Sewage water allowed to overflow on road—Offence.*

There is no provision in the Madras Local Boards Act, XIV of 1920, which imposes upon a local authority any obligation to construct a drain or cesspool in every street. The absence of a drain or cesspool is not an excuse or justification for the owner of the premises for letting sewage water flow over the neighbouring road. Such an act is an offence under section 129 of the Act.

Queen-Empress v. *Sewadappayyar*, 15 M. 91; 1 Weir 747; 5 Ind. Dec. (N. S.) 412, *Emperor* v. *Nagan Chetty*, 30 M. 221; 17 M. L. J. 372; 6 Cr. L. J. 235, followed. M PUBLIC PROSECUTOR *v.* PACHAPPA MUDALIA, 18 L. W. 694; 25 CR. L. J. 56 760

Madras Small Cause Court Rules, O. XXXVII, r. 1—*Suit on pro-note—Summons in Form No. 13—Direction to file application to defend three days before hearing, legality of.*

A direction in a summons in Form No. 13 issued to the defendant under O. XXXVII, r. 1 of the Madras Small Cause Court Rules that the application for leave to defend the suit must be filed in the Office of the Registrar and copies thereof must be served on the plaintiff or his Pleader not later than three clear days before the date of hearing is unreasonable and invalid.

In the absence of any provision giving power to the Court to extend the time fixed in the summons or any provision compelling service of notice sufficiently early to enable the defendant to comply with the direction, the direction in the summons must be held to be *ultra vires* and a Court acts without jurisdiction in enforcing such a direction.

Madras Smal Cause Court Rules—concld.

Rules framed for the guidance of Courts of Justice should exhibit a greater degree of reasonableness and fairness than the rules and byelaws made by statutory bodies. *Stiles* v. *Galinski* [*Nokes* v. *Corporation of Islington*], (1904) 1 K. B. 615; 73 L. J. K. B. 485; 90 L. T. 437; 52 W. R. 462; 68 J. P. 183; 2 L. G. R. 341; 20 T. L. R. 219, *Arlidge* v. *Islington Corporation*, (1909) 2 K. B. 127, 78 L. J. K. B. 553; 100 L. T. 903; 7 L. G. R. 649; 73 J. P. 301; 25 T. L. R. 470, *Johnson* v. *Croydon Corporation*, (1886) 16 Q. B. D. 708, 55 L. J. M. C. 117; 54 L. T. 295; 50 J. P. 487, *Quazie Mahmudar Rohman* v. *Sarat Chandra Dutt*, 5 C. W. N. 250, *British India Steam Navigation Company Limited* v. *Sharafally*, 70 Ind. Cas. 888; 44 M. L. J 100; 17 L. W. 705; (1923) A. I. R. (M) 435, considered.

In the case of small causes expedition and saving of time are aimed at in framing the rules, but the rules should not be such as to make them impossible of compliance in some cases, however honest and *bona fide* may be the attempt of a party to comply with them. **M** D. K. KANNISA *v.* DEVICHAND, 18 L. W. 414; (1923) M. W. N. 750; 45 M. L. J 69; 46 M. 847; (1924) A. I. R. (M.) 46 **390**

Majority Act (IX of 1875), s. 2—*Muhammadan Law—Marriage—Majority, age of—Right to contract marriage.*

The Muhammadan Law of marriage, dower and divorce is not affected by the provisions of the Majority Act as to the age of majority. Minority, under the Muhammadan Law, terminates on completion of the fifteenth year, and every Muhammadan of sound mind who has attained puberty may validly enter into a contract of marriage, even if he or she is a minor under the provisions of the Majority Act. **L** BEGUM BIBI *v.* RAHMAT KHAN **892**

Malabar Law—Tarwad—Karnavan—*Renewal of* kanom *before date of expiry*—Bona fide *dispute as to validity of prior renewal—Compromise, whether binding on* Tarwad—*Powers of Karnavan—Costs when payable by successful party.*

The *karnavan* of a Malabar *tarwad* executed a *kanom* demise for consideration in renewal of an existing tenure, before the date of its expiry in settlement of a *bona fide* dispute with the *kanomdar* relating to the validity and binding character of a still earlier renewal by which the existing tenure was created by a prior *karnavan*. In a suit by the senior *anandravan* of the *tarwad* to set aside the demise as not binding on the *tarwad*;

Held, that the *kanom* having been executed in settlement of a *bona fide* dispute between the parties and for the benefit of the estate so as to avoid litigation was valid and binding on the members of the *tarwad* and it was immaterial that the sum received by the *karnavan* was spent for the benefit of the estate or misappropriated by him for his own purposes, provided there was no collusion between him and the defendant.

Ramsumran Prasad v. *Shyam Kumari*, 69 Ind. Cas. 71; 49 I. A. 344; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 711; 16 L. W. 959; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.), followed.

If a person compromising with a *karnavan* is satisfied that the compromise is a *bona fide* one and that, in the ordinary course, a benefit will accrue to the estate, it is not necessary for him to prove that it actually did so as against the allegation that the benefit which should have accured was fraudulently misappropriated by the *karnavan* unless the person compromising is a party to the fraud and acts in collusion with the *karnavan*.

A renewal of a *kanom* by the *karnavan* of a Malabar *tarwad* before the expiry of its period when such renewal is to take effect from the date of its expiry is not valid unless it is shown to be for necessity, for it is impossible to predicate some years in advance what the state of affairs will be when the original *kanom* expires and what incidents should be imposed, in order to make the demise beneficial. Where, however, the *karnavan* obtains the consent of the *kanomdar* to a premature renewal to take effect at once, it does not necessarily follow that it is an act of bad management even if necessity be not proved, for the *karnavan* has full powers of management and is in a position to decide whether the transaction is a prudent one or not.

The position of the *karnavan* of a *tarwad* is higher than that of a Hindu widow and he has in some respects greater powers than a manager of a joint Hindu family. He has full power of management of the family property and is entitled to make alienations by way of *kanoms* of the *tarwad* property without necessity.

Ponambilath Parapravan Kunhamod Hajee v. *Ponambilath Parapravan Kuttiath Hajee*, 3 M. 160; 1 Ind. Dec. (N. S.) 675, relied on.

A successful party should not be made to pay the loser's costs save in exceptional cases, such as, when his false contentions have been the cause of unduly swelling his opponent's costs. **M** KENATH PUTHEN VEETIL *v.* KARUMATHIL, 18 L. W. 203; 45 M. L. J. 258; (1923) M. W. N. 807; (1923) A. I. R. (M.) 700 **476**

Minor—*Alienation by guardian—Test for determining whether alienation binds minor—Alienee duty of.*

The test for determining whether an alienation by the guardian of a minor is binding on the minor is, whether the alienation was for necessity or for the benefit of the minor. It is for the alienee to establish that he made all proper and necessary inquiries, and that he had acted in good faith in advancing monies to the natural guardian of the minor.

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393 at pp. 423, 424; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P. C.), followed. **B** RAOJI THAKARAM PATEL NILHARKAR *v.* HEMRAJ SADARAM MARWADI, (1923) A. I. R. (B) 213 **561**

——— *Certificated guardian of person, application by, for sanction of marriage—Proper procedure—Benefit of minor.*

Minor—contd.

When once a guardian of the person of a minor is appointed under the Guardians and Wards Act, any application for the marriage of the minor must be considered from the point of view of benefit to the minor. A relation who is entitled to be heard on the application may be heard, but his opposition to the application must be considered at its true value and cannot be considered as an absolute bar to the Court giving sanction to the marriage. **B** GANU GOPAL SONAR *v.* DATTATRAYA LAXMAN POTDAR, 24 Bom. L. R. 815; (1922) A. I. R. (B.) 335 128

——— *Compromise on behalf of minor—Court, duty of—Opinion of next friend or guardian, whether can be ignored—Guardian acting improperly—Procedure.*

It is settled law that, although the Court can and must approve of a compromise on behalf of infants, it cannot and will not force one upon them against the opinion of their next friend or guardian *ad litem* in the act on.

In re Birchall, Wilson v. *Birchall,* (1882) 16 Ch. D. 41; 44 L. T. 113; 29 W. R. 27, followed.

If the Court finds that a guardian or next friend is acting improperly and against the infant's interests in refusing to assent to an arrangement which appears clearly beneficial to them, steps may be taken to remove him and substitute some other person. **C** HEMANGINI DASSI *v.* BHAGWATI SUNDARI DASSI, 27 C. W. N. 792; (1923) A. I. R. (C.) 685 682

———, *liability of—Debt incurred by father during minority of son—Hypothecation by minor on attaining majority of his own property for father's debt—Want of consideration—Necessity*

Where there is no previous contract by a minor at all but only by his father, the liability of the father can be no consideration for a fresh contract by the minor on attaining majority whereby he hypothecates his property to secure payment of a debt arising out of the said liability. Should it be proved that the liability was incurred for necessaries or benefit of the minor, or that at the time the hypothecation bond was entered into there was a genuine claim against the minor and a suit against him was threatened, then an adjustment of accounts whereby the creditor accepted a certain sum and his undertaking not to sue the minor for the sum due, might be a good consideration for the bond.

A liability under a contract which is void on the ground that one of the contracting parties is a minor is no consideration for a fresh contract made by the minor on attaining majority.

Krishnan Chetty v. *Vellachami Thevan,* 12 Ind. Cas. 568; 37 M. 38; 10 M. L. T. 385; (1911) 2 M. W. N. 401; 21 M. L. J. 1077 and *Narendra Lal Khan* v. *Hrishikesh Mukherjee,* 46 Ind. Cas. 705, foll wed. **Pat** CHIKHURI RAM *v.* GOPAL NARAIN RAM 1002

——— *Transfer not for benefit of, nature of—Subsequent transferee, whether can question transfer.*

A transfer which is not for the benefit of a minor, is voidable at the instance of the minor and cannot be questioned by a subsequent transferee. **L** MUHAMMAD HAFIZULLAH KHAN *v.* BULAQI MAL, (1923) A. I. R. (L.) 299; 4 L. 156; 5 L. L. J. 355; 6 L. L. J. 42 99

Minor—concld.

Mortgage *by way of conditional sale—Agreement to transfer—Equity of redemption—Part performance—Suit for redemption—Agreement whether admissible in evidence—Registration Act (XVI of 1908), s. 17.*

Plaintiffs conveyed two Survey Nos. 76 and 394 to the defendants for Rs. 1,200 by a deed of sale. At the same time another deed was passed between the parties whereby the plaintiffs undertook to pay to the defendants Rs. 125 per annum for a period of ten years and on such re-payment the defendants undertook to re-sell the property to the plaintiffs. Subsequently, the parties arrived at an arrangement which was embodied in an unregistered document and by which the plaintiffs gave Survey No. 76 to the defendants as sold for the mortgage amount and retained the other Survey No. free from the mortgage-debt. Defendants took possession of Survey No. 76 accordingly. Later on plaintiffs sued to have an account taken of the mortgage:

Held, that, inasmuch as the agreement arrived at between the parties with regard to the apportionment of the two Survey Nos. had been acted upon for some eleven years prior to the suit it was, according to the equitable principle of part performance, binding and the plaintiffs were not entitled to succeed.

Per *Marten, J.*—To establish the principle of part performance it must be shown that the respective parties have so changed their respective positions, that the change can only be referable to the contract alleged.

Per *Marten, J.,* (*Fawcett, J. Contra.*)—A document which embodies an agreement between the parties and does not itself purport to be a sale-deed, but merely creates a right to get formal sale-deeds if necessary does not as such require registration.

Mahomed Musa v. *Aghore Kumar,* 28 Ind. Cas 930; 42 I. A. 1; 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. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.), *Hiralal* v. *Shankar,* 62 Ind. Cas. 637; 23 Bom. L. R. 506; 45 B. 1170, *Salamat-uz-zamani Begam* v. *Masha Allah Khan,* 43 Ind. Cas. 645; 40 A. 187; 16 A. L. J. 98, followed. **B** SANDU VALJI *v.* BHIKCHAND SURAJMAL, 25 Bom. L. R. 381; 47 B. 621; (1923) A. I. R. (B.) 473 118

——— *Construction of deed—Interest, whether charge on property—Redemption—Improvements made without consent of mortgagor—Mortgagee, whether entitled to amount spent on improvements.*

A mortgage-deed after providing that the mortgage-money would carry interest at a certain rate concluded with the statement that when the mortgagor makes the payment he will pay the whole money:

Held, that the stipulation meant that the mortgagor would pay the "whole money", *i. e.,*

principal and interest, at one time, and that, therefore, the interest was a charge on the property.

A mortgagee who has effected improvements on the mortgaged property is entitled to be paid, at the time of redemption, the amount spent by him on such improvements, provided the sum spent is not unreasonable, and the improvements have increased the value of the property.

Rikhi Kesh v. *Jwala Sahai*, 52 Ind. Cas. 862; 78 P. R. 1919, followed.

Rupan Singh v. *Champa Lal*, 26 Ind. Cas. 521; 37 A. 81; 13 A. L. J. 14, distinguished. **L** LADHU RAM *v.* ABDULLA, (1923) A. I R. (L.) 587 183

——— *Crops still to be sown, hypothecation of —Transfer—Notice—Bona fide purchaser, liability of.*

A mortgage of a future crop still to be sown and cultivated is recognized in India. The transaction is not governed by the Transfer of Property Act or by the Indian Contract Act, in so far as it is neither a mortgage of immoveable property nor a pledge of existing moveable property. It is in the nature of an agreement to mortgage moveable property that may come into existence in future, and as such it creates an equitable charge which is valid and enforceable.

Misri Lal v. *Mozhar Hossain*, 13 C. 262; 6 Ind Dec. (N. S.) 674, followed.

A *bona fide* purchaser of such property without notice of the prior charge is not liable for the money due on such a charge.

Bansidhar v. *Sant Lal*, 10 A. 133; A. W. N. 1888) 35; 6 Ind. Dec. (N. S.) 90 and *Sreeram Narasiah* v. *Bommireddi Venkataramiah*, 47 Ind. Cas. 976; 35 M. L. J. 450; 8 L. W. 517; (1918) M. W. N. 718; 24 M. L. T. 454; 42 M. 59, relied upon. **A** RAM SARUP *v.* MOHAN LAL 816

——— *Deposit of title-deeds—Equitable mortgage.*

H. entered into partnership with one *C.* for the making and sale of oil. There was an existing mortgage on one of the mills brought into the partnership by *C*, and in order to pay it off *C.* asked *H.* to raise a certain sum of money. It was provided in the deed of partnership that the mortgage should be paid off out of the share of profits of *C.* Under instructions from *H*, his clerk paid off the mortgage and brought back the title-deeds. There was no proof that *C.* had agreed verbally to create any equitable mortgage in favour of *H.* On the other hand, *H.* admitted that he took charge of the books as manager and, further, there was no entry in his books of any transaction by way of mortgage:

Held, that the deposit of title-deeds did not create any equitable charge in favour of *H.* **P. C.** HENG MOH & CO. *v.* LIM SAW YEAN, 18 L. W. 92; (1923) A. I. R. (P. C.) 87; (1923) M W. N. 614; 45 M. L. J. 776; 33 M. L. T. 430; 1 R 545 287

——— *Mortgagee purchasing portion of mortgaged property—Part redemption of mortgage—Amendment of mortgage-decree.*

Where a mortgagee by his own act in acquiring one of the mortgaged properties has split up the integrity of the mortgage, any person interested in a share of the mortgaged properties may redeem that share on payment of the proportionate amount of the balance of the mortgage-debt and is entitled to get a decree passed on the mortgage a ended for that purpose if it does not already make the necessary apportionment in proportion t the value of the properties held by each of such persons.

Debendra Nath Sen v. *Mirza Abdul Samad Seroji*, 1 Ind. Cas. 264; 10 C. L. J. 150, *Surjiram Marwari* v. *Barhamdeo Prasad*, 2 C. L. J. 202 and *Nawab Azimut Ali Khan* v. *Jowahir Singh*, 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth. P. C. J. 346; 2 Sar. P C. J. 573; 20 E. R. 602, relied upon. **Fat** RAGHUNATH PRASAD SINGH *v.* SADHU SARAN PROSAD SINGH 821

——— *Mortgagors jointly and severally liable—Mortgagee realising money from one of the mortgagors—Contribution, liability for.*

Plaintiff No. 1 and defendant No. 1 mortgaged their respective properties to one *A* for Rs 400, agreeing as between themselves to take the mortgage-money half and half, but their liability to the mortgage was joint and several. *A*, having brought a suit to enforce his mortgage got a decree and in execution thereof brought the plaintiffs' property to sale. Plaintiffs then brought the present suit claiming contribution from the defendants to the extent of that portion of the mortgage-money which was appropriated by them:

Held, that the mortgagee was entitled to proceed against the plaintiffs' properties for the entire debt due to him and as the plaintiffs were compelled to discharge an obligation which vested not only on them but also on the defendants, the defendants were liable to pay contribution to the plaintiffs.

Wajahat Husain v. *Ratan Lal*, 12 Ind Cas. 182; 8 A. L. J. 1092, distinguished. **Fat** SANT LAL SINGH *v.* NANKU LALL SINGH, (1923) P T. 369 86

——— *Part payment of consideration—Ekrarnama about payment of balance—Mortgagor accepting payment after due date—Acquiescence.*

In equity all that is required, *prima facie* even when the period of payment is expressed, is that the promisor should show that he was ready to perform his part within a reasonable time.

Plaintiff sued on a mortgage executed in his favour by the defendant on the 12th December 1910 for Rs. 7,000. At the time of the mortgage Rs. 3,000 only were paid to the mortgagor and an *ekrarnama* of even date with the mortgage was executed with regard to the payment of the balance by a certain specified date. The payment was not made by that date but the mortgagor accepted a payment subsequent to that date:

Held, that by this belated payment there was no new or substituted contract, but merely a waiver of the stipulation as to the time of payment;

Mortgage—contd.

(2) that the mortgagor having accepted a payment after due date had acquiesced in the arrangement and could not now contend that the mortgage was only for the amount originally advanced. **Fat** BIBI HAFIZUNNISSA *v.* IMAMUDIN KHAN 123

——— *Personal covenant by mortgagor—Suit on mortgage—Decree, form of—Personal decree, when passed.*

A decree in a mortgage suit when the mortgage contains a personal covenant should direct "that if there is any deficit the mortgagee should be at liberty to apply for a personal decree for the balance against the mortgagor"

A personal decree in a mortgage suit is passed only when it is found that the net proceeds of sale of the mortgaged property are insufficient to pay the mortgage amount. **B** KESHAV MANJA BHAT *v.* GOVIND NAGA BHAT, 24 Bom. L. R. 845; (1923) A. I. R. (B.) 32 188

——— Post diem *interest—Interest on repairs.*

The ordinary rule as regards the payment of interest on a mortgage is, that the mortgagee is entitled to *post diem* damage at the rate of interest stipulated in the instrument of mortgage and for the whole period during which the principal sum has remained unpaid.

Moran Mal v. *Muhammad Bakhsh*, 66 Ind. Cas. 771; 3 L. 200; (1922) A. I. R. (L.) 254; 4 U. P. L. R. (L.) 55; 42 P. L. R. 1922 (F. B.), followed.

The question whether a mortgagee is entitled to interest on the cost of repairs must be determined with reference to the terms of the particular contract under consideration. **L** RAMJI LAL *v.* SHIBBA, (1923) A. I. R. (L.) 309 667

——— *Prior and puisne mortgagees—Foreclosure by prior mortgagee—Puisne mortgagee not impleaded—Right to redeem prior mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.*

In a suit by a puisne mortgagee the prior mortgagee was impleaded as a defendant but was discharged as he pleaded paramount title. The puisne mortgagee purchased the mortgaged property in execution of the final decree on 15th November 1916. The prior mortgagee sued on his mortgage without making the puisne mortgagee a party and obtained a final decree on 12th October 1916 and possession on 17th October 1916. The puisne mortgagee sued to redeem the prior mortgagee who in his turn claimed to redeem the former as he had foreclosed the equity of redemption:

Held, that the prior mortgagee could not be allowed to redeem as he would thus get an advantage of his own breach of the law in not impleading the puisne mortgagee as a party to his suit.

Hassanbhai v. *Umaji*, 28 B. 153; 5 Bom. L. R. 892, not followed. **N** GOVINDRAO *v.* RUKMANAND 899

——— *Prior and subsequent mortgages—Decree on subsequent mortgage—Sale in execution—Auction-purchaser, whether entitled to recover possession—Prior mortgagee, rights of.*

One *R* mortgaged his property to *S* on the 14th December 1902. In 1912 *R* sold a portion of

Mortgage—contd.

the property to *S* for Rs. 400 found due on the mortgage. His right under the mortgage of 1902 was kept alive. Meanwhile, on the 20th July 1907, *R* had mortgaged his entire property to *C* who obtained a mortgage-decree and put the property to sale when the plaintiff purchased it. Plaintiff could not, however, obtain possession on account of an objection by *S* and instituted the present suit for recovery of possession:

Held, (1) that *S* being in possession of the property as owner his right of redemption was not lost in spite of the purchase made by the plaintiff in execution of mortgage-decree of *C*;

(2) but that *S* had only a right of redemption and could not resist the possession of the plaintiff unless he redeemed the property.

Parasram Singh v. *Pandohi*, 67 Ind. Cas. 533; 20 A. L. J. 401; (1922) A. I. R. (A.) 135; 44 A. 462; 4 U. P. L. R. (A.) 145, followed. **Fat** BIRINCHI SINGH *v.* SAROJA PRASAD MUKERJI, 5 P. L. T. 95 922

——— *Prior and subsequent mortgages—Prior mortgagee failing to set up mortgage in suit on puisne mortgage, whether can enforce it against mortgagor.*

The rule that a prior mortgagee who abstains from setting up his prior mortgage in a suit by a puisne mortgagee cannot afterwards set up that mortgage against the puisne mortgagee or against the auction-purchaser under a decree obtained on the puisne mortgage, has no application to a case where the prior mortgagee seeks to enforce his mortgage against the mortgagor or his representative.

Appellant, who held a mortgage on certain property obtained a decree for sale on foot of his mortgage. Subsequently, he obtained a simple money-decree against the mortgagor and brought the mortgaged property to sale in execution subject to his mortgage-decree, which was duly notified. The property was purchased by the respondent. Meanwhile, a puisne mortgagee had brought a suit for sale on his mortgage to which appellant was made a party. In that suit appellant failed to set up his prior mortgage on the basis of which he held a decree for sale. He now sought to execute that decree against the respondent:

Held, that there was nothing to prevent the appellant from executing his decree against the respondent who was in the same position as the mortgagor and who was not only aware of the mortgage decree on the date on which he purchased the property, but had purchased the property subject to the mortgage-decree which appellant was now seeking to execute. **A** KUNDAN LAL *v.* JAGAT RAM 108

——— *Prior and subsequent mortgagees—Subsequent mortgagee, whether can question prior mortgage.*

It is not open to a subsequent mortgagee who takes his mortgage with notice of a prior mortgage to question the prior mortgage on the ground that certain terms contained in it operate as a clog on the equity of redemption.

Aziz Khan v. *Duni Chand*, 20 Ind. Cas. 812; 305 P. L. R. 1913; 195 P. W. R. 1913, followed. **L** RAHMAT ALI v. SHADI RAM 877

——— *Redemption—Covenant to pay interest on cost of improvements—Term fixed for redemption—Post diem interest, liability to pay—Covenant, absence of—Damages, rate of—Preliminary and final decrees—Appeals against both decrees—Court-fee payable.*

In the case of a mortgage with possession it may be unusual for a mortgagor to agree to pay interest on the cost of improvements, because the mortgagee in possession himself reaps the benefit of such improvements, but where the mortgagor expressly agrees to pay such interest, he is bound by the covenant.

Hunoomanpersaud Panday v. *Babooee Munraj Koonweree*, 6 M. I. A. 393; 18 W. R. 81 *n.*; Sevestre 253*n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 F. R. 147, distinguished.

When a mortgage-deed contains no express stipulation for the payment of interest after the due date, the correct rule is that the law raises no presumption either in favour of or against an implied intention to pay interest after the due date. The determination of the question rests entirely upon the interpretation of the instrument and no definite rule of construction can be laid down except that the deed must be viewed as a whole, and the Court should avoid an interpretation which would ascribe to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest and that the creditor shall have no remedy provided by the contract, but shall be driven to treat the contract as broken and to seek for damages. It is more reasonable to ascribe to the parties the intention of making a perfect contract.

Where, however, there is no stipulation, and no implied intention to pay *post diem* interest, the mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties, but the Court has discretion to reduce the rate if it is found to be unusual.

Motan Lal v. *Muhammad Bakhsh*, 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 (P. R.) and *Chajmal Das* v *Brij Bhukan Lal*, 17 A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652 (P. C.), followed.

A stipulation to pay interest at the rate of Rs. 1-8 per mensem both on the mortgage money and on the cost of improvements is an unusual one, within the meaning of the above rule.

A preliminary decree in a redemption suit directed redemption on payment of a certain sum. The plaintiff appealed seeking to reduce the sum on payment of which redemption was allowed by the Trial Court and paid *ad valorem* Court-fees on the amount by which he sought the decretal amount to be reduced. He paid the decretal amount into Court and a final decree in the suit was made, against which a similar appeal was preferred by the mortgagor but the Court-fee paid on the memorandum of appeal was only Rs. two. On objection being taken by the respondent as to the amount of the Court-fees paid on the latter appeal :

Held, that the final decree was a mere corollary to the preliminary decree and followed it as a matter of course and that the appeal from that decree was really of a formal nature, which did not contest anything beyond what was contended in the appeal from the preliminary decree, and *ad valorem* Court-fees having been paid on the latter appeal, the appellant could not be required to pay a similar fee on the appeal from the final decree. **L** BUDHU RAM *v.* NIAMAT RAI, (1923) A. I. R. (L.) 632; 6 L. L. J. 72; 4 L. 406 375

Muhammadan Law—*Breach of promise of marriage—Damages, measure of—Contract Act (IX of 1872), s. 73.*

Under the Muhammadan Law in a suit by a plaintiff for damages for breach by the defendant to give his daughter in marriage to the plaintiff, the latter is entitled only to receive compensation under section 73 of the Contract Act for any loss or damage caused to him by the breach, or which the parties knew would be likely to result from the breach of it.

Abdul Razak Keval v. *Mahomed Hosein Dalvi*, 38 Ind. Cas. 771; 19 Bom. L. R. 164; 42 B. 499, relied on. **L** GHULAM MUHAMMAD *v.* MEHRAJ DIN, (1923) A. I. R. (L.) 679 746

——— *Devise in favour of one heir, without consent of others, effect of*

Under the Muhammadan Law a devise in favour of one of several heirs is inoperative without the consent of the other heirs. **O** ZARIF-UN-NISSA *v.* SHAFIQ-UZ-ZAMAN, 26 O. C. 133; (1923) A. I. R. (O.) 185 626

——— *Marriage — Impotent person, definition of—Suit for cancellation of marriage—Wife, what must establish—Procedure—Expert evidence, value of—Finding based on opinion of experts, whether conclusive—Second appeal.*

According to Muhammadan Law, a person is said to be 'impotent' if he is unable to have connection with a woman, though he has the natural organ; or if he is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others. Whether the disability be by reason of disease, or weakness, or original constitution, or advanced age or enchantment, he is still to be accounted impotent with respect to her with whom he cannot have connection.

The right of a wife to claim a judicial divorce on the ground of her husband's impotency is contingent on her succeeding to establish that she did not know of his impotency at the time of her marriage, and that it has not since then been removed; but the divorce must remain suspended for a year after the decree in order that it might be ascertained whether the defect is removable.

Wilson's Muhammadan Law, 5th Edition, p. 145.

Muhammadan Law—concld.

A. v. *B.*, 21 B. 7[illegible]; 11 Ind. Dec. (N S.) 54, relied upon.

A finding based on the opinion of experts is not necessarily a finding based on facts proved or directly demonstrated and may be interfered with in second appeal.

The opinions of experts are relevant but not conclusive as to matters to which they relate and where they materially differ, their value and sufficiency may legitimately form the subject of consideration and scrutiny despite the acceptance of any one of them by one Court or another.

Plaintiff sued for the annulment of her marriage with the defendant alleging that he was impotent and that she came to know of this fact after her marriage. It appeared that she had lived with him for about six years but that her hymen was intact and there were also other signs of virginity. On the other hand, the medical evidence showed that the defendant was potent and quite fit for sexual intercourse:

Held, (1) that as the hymen was intact and there was nothing to show that the physical conditions of the hyme were of an abnormal character, very strong evidence was needed to rebut the presumption which arose from that state of things against the consummation of the marriage by the husband in spite of the wife having lived with him for about six years;

(2) that a *prima facie* case having been made out the plaintiff was entitled to a decree *nisi* for the annulment of her marriage with the defendant, but that the decree would not be made absolute till a year's lence during which period the plaintiff would allow full access to the defendant to exercise his material rights;

(3) that if after the expiry of the above period she satisfied the Court that her husband continued to be impotent, the decree would be confirmed. A ALTAFAN *v.* IBRAHIM, 21 A. L. 811; (1924) A. I. R. (A.) 116 502

Native Converts' Marriage Dissolution Act (XXI of 1866), s. 16. *See* DIVORCE ACT, 1869, S. 2 17

Negotiable Instruments Act (XXVI of 1881), s. 9 *—Holder in due course, who is—Pro-note payable on demand, negotiation of.*

To constitute a person a holder in due course three things are necessary, (1) that the holder of the promissory-note must be a holder for consideration, (2) that it must have been transferred to him before the amount mentioned in it became payable, and (3) that the transferee must be a transferee in good faith, and that he should not have any reason to believe that there was any defect in the title of the transferor.

Where a promissory-note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

D. N. Shah & Co. v. *Bengal National Bank, Ltd.*, 60 Ind. Cas. 940; 47 C. 861; 33 C. L. J. 541, relied on. L BULAQI MAL *v.* ABDUL RAHIM, (1923) A. I. R. (L.) 635 950

Negotiable Instruments Act—concld.

——— **s. 28,** *applicability of*—Hundi *signed by* Munim *of firm*—Munim, *whether personally liable.*

Section 28 of the Negotiable Instruments Act has no application where a *hundi* is signed by a person in his capacity as the *Munim* of a firm, so as to make him personally liable. A FIRM HAZARI LAL CHHANGA MAL *v.* SOHAN LAL, (1923) A. I. R. (A.) 407 609

Opium Act (I of 1878), s. 9 (c)—*Illegal possession —Prosecution, duty of.*

To justify a conviction under section 9 (*c*) of the Opium Act, of being in illegal possession of opium, the prosecution must prove that the premises where the opium was found were in the occupation of the accused. L B MA MI *v.* EMPEROR, 2 Bur. L. J. 15; (1923) A. I. R. (R.) 152; 24 Cr. L. J. 934 358

Oudh Estates Act (I of 1869), ss. 8, 13, 22, 23, *scope of—Interpretation—"A person who would have succeeded according to the provisions of the Act," meaning of—Will, inoperative—Consent of parties, effect of.*

Section 13 of the Oudh Estates Act, 1869, was devised to impose restrictions on sudden freaks of impulse. It insisted upon certain formalities in the case of gifts and devises and fixed certain time limits for the performance thereof in order that the strongest proof might be available of a disposing mind of deliberate intention in case the donee or legatee happened to be a person who was not the legal heir to the estate under the special rules of succession or the ordinary law applicable to such estates or one of his younger sons.

The expression "a person who would have succeeded according to the provisions of the Act" in section 13 of the Oudh Estates Act, is confined to the persons or one of the persons to whom the estate would have descended according to the provisions of the special clause of section 22 of that Act applicable to the particular case.

The proper intrepretation of sub-section (1) of section 13 appears to be that the privilege is confined to the one person who would succeed to the *taluqdar's* estate under the Act, and that the words "under the ordinary law to which persons of the donor or testator's tribe and religion are subject" govern cases falling under section 22, clause 11, and section 23 of the Act. If there is a person existing, who would succeed under the special provisions of section 22 (first ten clauses) that person alone would be the privileged person.

A Will which fails to satisfy the conditions imposed by section 13 of the Oudh Estates Act is inoperative, and, being thus void and unenforceable, the mere consent of parties would not validate it. It may create a new title to take the place of that which was inchoate, defective or imperfect.

The use of the word "ordinarily" in List No. 2 prepared under section 8 of the Oudh Estates Act implies that an occasional variation by consent or otherwise would not affect the custom of devolution.

Oudh Estates Act—concld.

Murtaza Husain Khan v. *Mohammad Yasin Ali Khan*, 36 Ind. Cas. 299; 38 A. 552; 20 M. L. T 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538; 43 I. A. 269 (P. C.), followed. **O** ZARIF-UN-NISA *v* SHAFIQ-UZ-ZAMAN, 26 O C. 133; (1923) A. I. R. (O.) 185 626

Oudh Rent Act (XXII of 1886), s. 127—*Trespasser —Ejectment—Jurisdiction of Revenue Courts.*

Section 127 of the Oudh Rent Act was enacted to provide for the case of a trespasser and to prevent such a case going out of the jurisdiction of the Revenue Courts. Under clause (2) of section 127 a Court is bound to pass a dercee for ejectment, if such an application is made by the plaintiff when the Court passes a decree for arrears of rent against the trespasser. **O** PARMESHUR LAL *v.* RUKMIN, 9 O. & A. L. R. 871 875

Parties—*Suit by assignee of bond—Assignor whether necessary party—Limitation Act (IX of 1908), s. 20—Party not necessary for decision of suit, joinder of, after limitation, effect of.*

The assignor of a bond, who has received consideration for the transfer, is not a necessary party to a suit brought by the assignee to recover on the bond. If the presence of a party, who is added after the prescribed period, is not necessary to enable the Court to award such relief as may be given in the suit framed by the plaintiff, and he is joined *ex majore cautella*, the suit is not barred merely because limitation had expired at the time when he was impleaded. **L** KUNJ LAL *v.* HARI RAM, (1923) A. I. R. (L.) 438 781

Partition—Birt jajmani, *partition of—Building on joint land—Compensation to other co-sharers.*

Future income from *birt jajmani* when the same consists of offerings made by Ganges pilgrims cannot be partitioned by the allotment of clients either by locality or family, and the only method of partitioning such property is by dividing the various paraphernalia attached to it, namely, the books in which pilgrims enter their names, the *ghat*, the *chauki*, the platform, the shed etc., and to allow the parties to use a similar flag.

Where a portion of joint land is built upon by a co-sharer and on partition the building is allotted to such co-sharer, the other co-sharers must be given compensation or land equivalent to the occupied by the site of the house. **A** RAM CHANDER *v.* CHHABBU LAL, 21 A. L. J. 358; (1923) A. I. R. (A.) 350; 45 A. 445 323

——— *Common property—Suit for partial partition, maintainability of—Procedure.*

Though suits for partition of common property (as distinct from joint property) in which the whole of the property available for partition has not been included are inexpedient, they are not unsustainable on that account. It is always open to the defendant in such a case, if he thinks himself prejudiced by the exclusion of any property, himself to bring a suit in respect of it and have it tried with the suit already pending.

Partition—concld.

Mahomed Fazlur Rahman Chowdhri v. *Mahomed Fayzur Rahman Chowdhri*, 10 Ind. Cas. 354; 15 C. W. N. 677; *Moideensa Rowthen* v. *Mahammad Kasim Rowthen*, 28 Ind. Cas. 895 and *Korumbakhatparkum Vengalasheri Moideen Kutti* v. *Thuniyilandiyal Mariamumma*, 70 Ind. Cas. 113; 14 L. W. 502; 41 M. L. J. 457 distinguished. **M** PAKKIRI KANNI *v.* MOHAMMAD MANJOOR SAHIB (1923) M. W. N. 565; 45 M. L. J. 321; 18 L. W 315; 33 M. L. T. 44; 46 M. 844; (1924) A. I. R. (M.) 124 334

Partnership—*Accounts, settled whether can be opened—Share of retiring partners carried over—Mistake—Fraud.*

Where on the dissolution of a trading partnership owing to the retirement of some of the partners, accounts were taken and part of the retiring partners' share of the profits was carried over by the surviving partners to a new account:

Held (1) that the action of the surviving partners amounted either to a mutual mistake or to fraud and that in either case the retiring partners were entitled to a rectification of the mistake or fraud:

(2) that as the whole account was not impugned it was sufficient to give the retiring partners leave to surcharge and falsify. **R** G. ABDOOLLA *v.* I. A. MAHOMED 171

Penal Code (Act XLV of 1860), s. 21 (10)—*Public Officer—Tax Collector of Municipality.*

A person employed by a Municipality for the purpose of collecting taxes is a Public Officer under section 21 (10) of the Pena Code. **Pat** GOVERNMENT ADVOCATE BEHAR & ORISSA *v.* GANGA PRASAD, 3 P. L. T. 559; (1922) A. I. R. (Pat.) 532; 1 Pat. 423; 25 CR. L. J. 31 719

——— **ss. 71, 121, 124A**—*Waging of War—Offence, when complete—Inflamatory speech—Effect on audience sole test—Two offences by one speech—Sentence - High Court, power of—Criminal Procedure Code (Act V of 1898), ss. 35, 307 (3), 423 (1) (d).*

So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitelvand clearly incites to action that he is guilty of instigating and, therefore, abetting the waging of war.

Emperor v *Ganesh Damodar Sava kar*, 5 Ind. Cas. 854; 34 B. 394 at p. 408; 12 Bom. L. R. 105, 11 Cr. L. J. 264, followed.

Per *Shah, A. C. J.*—It is not necessary that as a result of the abetment the war should be waged in fact. But the main purpose of the instigation should be the 'waging of war.' It should not be merely a remote and incidental purpose, but the thing principally aimed at by the instigator

Per *Crump, J.*—Instigation is active suggestion or stimulation of another to do an act.

The test, the only test, is to read the words, and to decide what is the probable effect on the audience to whom they were addressed.

The accused was charged of abetting the waging of war and of sedition under sections 121 and 124A of the Penal Code in respect of a speech made

Penal Code—contd.

as President of the Muslim League. The accused in his speech had pleaded for a change in the words of the aims and objects of the Muslim League which were "The attainment of Swaraj by the people of India by all peaceful and legitimate means" and for substituting the words "possible and proper" for the words peaceful and legitimate. He had also advocated the immediate setting up of a parallel Government on the lines of a Republic of the United States of India, independent of all British control and the establishment of National Courts, Schools and Army. He had further remarked that in case of a declaration of Martial Law by the Established Authority a necessary consequence of the declaration of independence, the people of India and the Muhammadans at any rate, would carry on a guerilla warfare because none could remain non-violant after the resort to machine guns and the gallows by the British Government. On the charge under section 124 A, the Trying Judge disagreed with the assessors and convicted and sentenced the accused. There was no appeal from this conviction. As regards the other offence which was tried with the assessors as jurors, he disagreed with the verdict of 'not guilty' and referred the case to the High Court under section 307 of the Criminal Procedure Code:

Held, (1) that if the worst construction were put upon the speech it amounted to a prophecy or even a threat that violence may be necessary in future but it did not constitute a direct and clear incitement to violence and, therefore, the accused was not guilty of an offence under section 121, Penal Code;

(2) that in view of the Explanation to section 35 of the Criminal Procedure Code and the provisions of section 71, Penal Code, the accused was liable to one punishment only in respect of the speech.

Queen-Empress v. *Malu*, 23 B. 706; 1 Bom. L. R. 142; 12 Ind. Dec. (N. S.) 472 (F. B.), followed.

(3) that had the reference been allowed, the High Court would have been competent, in view of the provisions of section 307 (3) and section 423 (1) of the Criminal Procedure Code, to set aside the sentence under section 124A of the Penal Code, although that part of the case was not before it, and to award sentence under section 121 of the Code. **B** EMPEROR *v.* HASRAT MOHANI, 24 Bom. L. R. 885; (1922) A. I. R. (B) 284; 24 CR. L. J. 93 299

——— ss 147, 353—*Rioting and assault on public servant—Illegal attachment—Resistance—Offence—Charge in case of rioting—Common object, proof and specification of.*

A bailiff, acting under an illegal warrant of attachment, seized the cattle of one of the accused and was proceeding to remove them, whereupon the accused resisted the removal and in doing so inflicted slight injuries on the companions of the bailiff:

Held, that the accused were not guilty of any offence under section 147 or section 353 of the Penal Code.

Bisu Haldar v. *Emperor*, 11 C. W. N. 836; 6 C. L. J. 127; 6 Cr. L. J. 38, relied on.

Penal Code—contd.

Before a conviction can properly be maintained for the offence of rioting it is necessary that there should be a clear finding as to the common object of the unlawful assembly; and also that the common object so found should have been clearly stated in the charge so that the accused person might have an opportunity of meeting it.

Sabir v. *Queen-Empress*, 22 C. 276; 11 Ind. Dec. (N. S) 185, relied on. **L** ALLAH DAD *v.* EMPEROR, 25 CR. L. J. 43 731

——— s 211—*Complaint—No intention to set law in motion—Complainant, whether guilty.*

No offence is committed under section 211 of the Penal Code, when there is no intention to set the law in motion against anybody.

One *D.* laid information before the Police that a theft had occurred at his house and that he suspected the applicant. Thereupon, the Police started their investigation kept the applicant in custody and ill-treated him. The latter made an application praying that enquiry be conducted in the presence of the Magistrate. The Magistrate sent the application to the District Superintendent Police for report. After the report was received, notice was issued to the applicant to appear before the Magistrate when the Magistrate examined and cross-examined him at great length and directed the application to be taken on the file as a complaint under section 330 of the Penal Code. Then having held "a preliminary enquiry" he dismissed the complaint under section 203 of the Criminal Procedure Code and taking proceedings under section 476 of that Code ordered the applicant to be prosecuted under section 211 of the Penal Code:

Held, that the application in question was not a complaint within the meaning of the Criminal Procedure Code, no offence was committed and the order of prosecution was bad. **N** RAMRAO GURAO *v.* EMPEROR, 6 N. L. J. 202; (1923) A. I. R. (N.) 313, 24 Cr. L. J. 910 158

——— ss. 299, 300, paras 3 and 4—*Dhatura poisoning—Bodily injury likely to cause death—Offence whether amounts to murder.*

Where a person administers *dhatura* poison to another, it is likely or at least probable that he intended to cause such bodily injury as was likely to cause death and, therefore, he is guilty of murder. **A** NANHU *v.* EMPEROR, 45 A. 557; (1923) A. I. R. (A.) 608; 24 Cr. L. J. 937 361

——— s. 300—*Culpable homicide amounting to murder, constituents of—Finding, nature of.*

In order to constitute the offence of culpable himicide amounting to murder, there should be a finding that the act which caused death was done with the intent on of caus ng death, or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. An injury that is merely likely to cause death does not of necessity amount to murder.

Shwe Ein v. *King-Emperor*, 3 L. B. R. 122; 3 Cr. L. J. 355, followed.

In all such cases the Sessions Judge should consider and come to a finding which must be

clearly recorded that the degree of probability of death ensuing is so great as to bring the case within either the first or third clause of section 300 of the Penal Code. R APALU *v.* EMPEROR, 2 Bur. L. J. 94; 1 R. 285; (1923) A. I. R. (R.) 174; 24 Cr. L. J. 919 295

——— ss. 300, 304—*Culpable homicide, when murder.*

Culpable homicide is not murder unless the act by which the death is caused is done with the intention stated in one or more of the clauses of section 300. Where the question is, whether the injuries caused are sufficient in the ordinary course of nature to cause death, the nature of the weapon used and of the injuries caused must be taken into consideration.

Accused assaulted the deceased and inflicted no less than fifty injuries, but no blow was inflicted on any vital part with sufficient violence to cause serious damage, such as fracture of the skull;

Held, that the case fell under the second clause of section 304 of the Penal Code. L DARAZ *v.* EMPEROR, (1923) A. I. R. (L.) 317; 25 CR. L. J. 1 689

——— s. 302—*Death caused by dangerous weapon —Murder—Sentence.*

Two persons who were armed with *chhavis* attacked the deceased, who was their enemy, and inflicted two incised wounds on his head, one of which fractured his skull and caused his death;

Held, that both of them were equally responsible for the result of their joint assault, and were guilty of an offence under section 302 of the Penal Code the appropriate sentence being one of death.

In a case of murder the sentence of death should ordinarily be imposed unless there is a mitigating circumstance which would justify the Court in awarding the lesser sentence prescribed by the law. The mere fact that only one blow proved fatal does not furnish any adequate ground for not inflicting the sentence of death. L WARYAM SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 598; 24 Cr. L. J. 935; 6 L. L. J. 62 359

——— s. 302—*Murder by father of newly born illegitimate child—Mitigating circumstances—Sentence.*

In the murder of her newly born illegitimate child by a woman there are mitigating circumstances sufficient to reduce the appropriate penalty of death very much below a sentence of transportation for life.

Most of these circumstances apply, though certainly in a less degree, to the case of the father of such a child, more especially where the mother is his own sister. N DHANIA KUNBI *v.* EMPEROR, 25 CR. L. J. 63 767

——— s. 353—*Execution of warrant after expiry of time fixed by* Nazir—*Obstruction to* Amin—*Offence.*

An *Amin* who executes a warrant before the expiry of the time fixed by the Munsif for its return but after the time given by the *Nazir*, acts in the proper discharge of his duty within the meaning of section 353 of the Penal Code,

since he derives his authority to execute the warrant in virtue of his office from the Court and the fact that the *Nazir* directs an earlier return, as a matter of office routine, does not affect the *Amin's* authority.

Sabed Ali v. *Emperor*, 19 Ind. Cas. 706 40 C. 849; 14 Cr. L. J. 274; 17 C. W. N. 941, followed. M *In re* GARAPATI KOTAYYA, 32 M. L. T. 248; (1923) M. W. N. 444; 45 M. L. J. 74; (1923) A. I. R. (M.) 687; 25 CR. L. J. 64 768

——— ss. 362, 366—*Abduction when becomes offence—Kidnapping, whether continuing offence —Abetment, when can take place.*

Abduction in itself constitutes no offence and only becomes an offence when certain criminal intents are proved.

An offence under section 366, Indian Penal Code, is not a continuing offence.

The actual kidnapping or abduction may be abetted but when the offence is complete, abetment cannot be proved against persons who may have taken a subsequent part in the proceedings of the parties.

B, aged 25, left her husband's house of her own free will and to all intents and purposes took up the life of a prostitute. Later on, she lived with the accused to whom she had been handed over by *N* (with whom she had contracted a liaison) on payment of Rs. 300. The accused was proceeded against under sections 366-109, Indian Penal Code;

Held, that inasmuch as *B* had left her husband's house of her own free will and no force or inducement had been used to seduce her, no offence of any kind had been proved against the accused. Pesh GHULAM YUSUF *v.* EMPEROR, 24 CR. L. J. 921 297

——— s. 376—*Rape—Consent—Complainant, uncorroborated testimony of, value of—Struggle, evidence of.*

Where a person is charged with the offence of having committed rape, the question for determination is whether the woman was or was not a consenting party, and in this connection her testimony without any independent evidence in support thereof that she was not a consenting party is insufficient for a conviction. The first and foremost circumstance that can be looked for in cases of this kind is the evidence of resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the infliction of personal injuries and even injuries on her private parts. L MAHLA RAM *v.* EMPEROR, 25 CR. L. J. 74 986

——— ss. 376, 458, *conviction under—Separate sentences, legality of.*

The conviction of an accused person under sections 458 and 376 of the Penal Code, and the awarding of a separate sentence for each offence is not illegal, as the two offences are not portions of the same transaction, the offence under section 458 being complete as soon as a man breaks into a house at night after making the necessary preparations as specified in the section, irres-

Penal Code—contd.

pective of his committing any other offence. L LABH SINGH *v.* EMPEROR, (1923) A. I. R. (L.) 291; 24 Cr. L. J. 877; 6 L. L. J. 111 77

——— s 378—*Water when can be subject of theft.*

Water when conveyed in pipes and so reduced into possession can be the subject of theft.

Ferens v. *O' Brien,* (1883) 11 Q. B. D. 21; 52 L. J. M. C. 70; 31 W. R. 643; 15 Cox C. C. 332; 47 J. P. 472, *In re Chockalingam Pillay,* 13 Ind. Cas. 819; (1912) M W. N. 119; 11 M. L. T. 162; 13 Cr. L. J. 131, followed.

Where a person takes a water connection from a Municipal water pipe into his house contrary to law and without the permission or knowledge of the Municipal Board, he is guilty of an offence under section 378 of the Penal Code. A MAHADEO PRASAD *v.* EMPEROR, 21 A. L. J. 654; 24 Cr. L. J. 911; 45 A. 680; (1924) A. I. R. (A.) 131 169

——— s. 383—Nikah khawan, *whether bound to perform* Nikah—*Demand of heavy fee, whether an offence.*

A *nikah khawan* is not bound to read a *nikah* for a person unless he chooses to do so, and it is no offence for him to demand any fee he likes for doing so. L NIZAM DIN *v.* EMPEROR, 4 L. 179 24 Cr. L. J. 958 542

——— s. 405—*Station Master failing to credit over-charge on sale of tickets sold—Offence.*

An Assistant Station Master of the North-Western Railway one of whose duties was to issue tickets to passengers and charge fares as fixed by the Railway, was convicted of an offence under section 405 of the Penal Code, in that he had made an over-charge of the aggregate amount over some of the tickets issued by him, and had not credited the excess realized to the Railway:

Held, that, although the over-charges had actually been made and their payment deliberately withheld from the Railway, accused could not be convicted under section 405 of the Penal Code as he was not a trustee within the meaning of that section. L KUDRAT NATH *v.* EMPEROR, (1923) A. I. R. (L.) 295; 24 Cr. L. J. 879; 6 L. L. J. 125 79

——— ss. 411, 414—*Receiving stolen property—No evidence about property being stolen—Conviction, whether justifiable—Offence under* s. 411, *prosecution, duty of.*

Although there may be cases in which it may not be necessary in a case under sections 411 or 414, Penal Code, to prove that the property was stolen from a particular individual. Yet, as a rule a person cannot be called upon to account for the possession of property where there is no evidence whatever that the property has been stolen.

A mere suspicion against the accused that the property was not his own would not justify a conviction under section 411 in the absence of direct or circumstantial evidence, establishing beyond a reasonable doubt that the property was stolen.

In order to justify a conviction under section 411, enal Code, it is the duty of the prosecution to establish that the accused dishonestly retained the property and had knowledge at the time of the receipt that the property was obtained

Penal Code—contd.

in one of the ways specified in section 410 of the Indian Penal Code. N YASINKHAN *v.* EMPEROR, 19 N. L. R. 176; 24 Cr. L. J. 960; (1924) A. I. R. (N.) 48 544

——— s. 441—*Criminal trespass, what constitutes—Offence, relating to public property—Court, duty of*—Thandika *property, whether public property.*

A person who has a right of entry into a building cannot be held to be a trespasser by reason of his failure to obtain the consent or permission of the party in occupation, or by reason of anything which he does in such building, unless it is shown that the thing so done was an offence, or was otherwise of such a nature as to bring the entire proceedings within the definition of criminal trespass in section 441 of the Penal Code.

Thandika property is public property and any investigation of the question of title may be one of considerable complexity. Consequently, cases involving criminal offences in relation to such property, ought not to be tried summarily. Before issuing a process in such a case the complaint and complainant should be closely examined in order to ascertain whether it is a proper case for a Criminal Court, and still more so before convicting an accused. R MAUNG SHWE KU *v.* EMPEROR, 2 Bur. L. J. 55; (1923) A. I. R. (R.) 157; 24 Cr. L. J. 929 283

——— s. 447, *offence under—Intention—Question of inference—Court, duty of—Summary trial—Clear finding, necessity of.*

The essence of an offence under section 447, Penal Code, lies in the intent of the accused to commit an offence or to intimidate, insult, or annoy any person in possession of the property with reference to which the trespass is made.

A man is presumed to intend the natural consequences of his acts, and if any annoyance must inevitably attend his acts and he does those acts without any reasonable justification, he must be held to intend to annoy, even though he had no desire to do so and his only desire is to obtain some advantage for himself.

The question whether a man should be presumed to have intended the natural consequences of his acts when the intention impelling the commission of the act is stated to be one by the prosecution and another by the accused, is a question of inference to be drawn from all the circumstances of the case and to do that is the primary duty of the Trial Court.

In summary trials it is all the more important that there should be clear findings on questions of fact because it is only through such findings that the Court of Revision can form its own judgment with regard to the legality or otherwise of the proceedings of the Trial Court. O EMPEROR *v.* JAGMOHAN DAS, 9 O. & A. L. R. 1001; 24 Cr. L. J. 916 282

——— s. 488—*Code of Criminal Procedure (Amendment Act XVIII of* 1923), *Sch. II, cl. XX—First Class Magistrate—Jurisdiction—Order of discharge after defence, value of.*

Under the Code of Criminal Procedure, as modified on the 1st of September 1923, a Magistrate

Penal Code—concld.

of the First Class has jurisdiction to try an offence under section 494, Penal Code, and dispose of the same without committing the case to the Court of Sessions, and an order of discharge passed by the Magistrate in such a case, after the accused had been called upon to enter on his defence, is tantamount to an acquittal. **O** DAL CHAND *v.* RAM LAL, 10 O. L. J. 412 727

Pleadings—*Appellate stage of suit—Amendment of plaint.*

Plaintiff, a Burmese Buddhist, sued his wife for possession of all the joint property on the ground that she had committed adultery by taking another husband in spite of his protest. The defendant in her written statement alleged that there had been a divorce by mutual agreement. The plaintiff succeeded in the first Court. In appeal, the defendant urged for the first time that the plaintiff had no cause of action since he did not allege a divorce, nor did he pray for one. The plaintiff then made an oral application for amendment of plaint which was refused. On second appeal:

Held, that having regard to the fact that the omission from the plaint of a prayer for divorce was in all probability due to the fact that the plaintiff and his legal adviser considered that the marriage was already dissolved, which view, though erroneous, was under the circumstances at least excusable, and also having regard to the fact that the objection to the form of the suit was taken for the first time in appeal, the case was pre-eminently one in which an amendment of the plaint should have been allowed in order that justice might be done.

Quære.—Whether a suit lies by a Burmese Buddhist for possession of all the joint property on an allegation of the commission of adultery by his wife, without a prayer for divorce? **R** MAUNG PO HAN *v.* MA SO YI, 2 Bur. L. J. 65; (1923) A. I. R. (R) 160 6

———— *Cause of action arising during pendency of suit—Procedure.*

Where a suit is found to have been premature at the time when it was filed but a valid cause of action arises during the time it is pending, and the plaintiff is otherwise entitled to succeed, the Court should pass a decree in his favour and not compel him to institute another suit for the purpose.

Sita Ram v. *Ram Chandra*, 44 Ind. Cas. 863; 26 P. R. 1918; 51 P. W. R. 1918; 114 P. L. R. 1918, *Ghulam Fatima* v. *Rahman*, 50 Ind. Cas. 270; 127 P. R. 1919, followed. **L** KANSHI RAM *v.* JAIMAL SINGH, (1923) A. I. R. (L) 590; 6 L. L. J. 31 562

————, *construction of—Ejectment suit—Redemption, decree for, whether can be passed—Power of Court.*

Pleadings must be strictly construed and parties must be restricted to what they allege in their plaint or in their written statements, as the case may be.

A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment,

Pleadings—concld.

Parshotam Bhaishankar v. *Rumal* [*Zunjar*, 20 B. 196; 10 Ind. Dec. (N. S.) 689, relied on.

Plaintiffs sued for possession of certain land on the allegation that a sale of the land in favour of the defendants by the widow of a deceased reversioner of the plaintiffs was without consideration and necessity. The Court found that a mortgage executed by the widow in favour of the defendants in respect of a portion of the land was binding on the property and gave the plaintiffs a decree for possession on payment of the amount of the mortgage:

Held, that the Court was competent to pass a decree for redemption in the suit as it tended to reduce litigation. **L** PALU *v.* RASILU, (1923) A. I. R. (L.) 675 740

————, *evidence, finding—Governing principle—Parties to be kept to their pleadings.*

The allegations in a plaint, the evidence and the finding should correspond in legal intent, and parties ought not to be permitted to depart from their deeds and to establish a case not set up in their pleadings. **C** ANNADA CHARAN SIL *v* HARGOBINDA SIL, 37 C. L. J. 552; 27 C. W. N. 496; (1923) A. I. R. (C.) 570 557

———— *Title, accrual of, during pendency of suit—Procedure—Co-owners—Suit by one co-owner to eject trespasser, maintainability of.*

Where on the date of suit a plaintiff has no title to the property in suit but before the case is disposed of by the First Court, he becomes entitled to the property and an amendment of the plaint can then be allowed setting forth the claim as arising on such accrual of title, the Court acts rightly in disposing of the suit on the footing of the plaintiff's title acquired during the pendency of the suit. One co-owner may sue to eject a trespasser without the other co owners being made parties to the suit, provided the title of the latter is not denied.

Ahmad Sahib Shutari v. *Magnesite Syndicate Limited*, 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598, followed. **M** PENDEKKALLU THIMMAYYA *v.* PENDEKKALLU SIDDAPPA 112

Poramboke land—*User by villagers for communal purposes—Right of Government to grant land for building purposes—Acquisition of right by villagers.*

A piece of *Natham Poramboke* land in a village which had been used by the villagers from time immemorial as a threshing floor in time of harvest, for stocking manure and green leaves, for drying paddy and other communal purposes connected with agricultural operations, was granted by Government to a Taluk Board for building purposes:

Held, that the enjoyment of the land by the villagers was of too fugitive and permissive a character to afford support to the acquisition of any right based on prescription or custom, and that consequently the grant by Government for building purposes was legal.

Per *Ayling, J.*—According to the Common Law of the country, the control of the *gramanatham*

Poramboke land—concld.

vests in the Revenue Authorities and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes.

Collector of Godavari District v. *Jannavula Pedda Rengayya*, 4 M. L. T. 440, followed.

Per *Odgers, J.*—The user alleged in the case was much too indefinite in extent and application to constitute evidence of any custom. **M** TALUK BOARD, DINDIGUL *v.* VENKATARAMA AIYER, 45 M. L. J. 333; 18 L. W. 366; 33 M. L. T. 40; 46 M. 866 **38**

Possessory title, *suit based on—Trespasser, position of.*

A person in possession of property on being dispossessed by another person without any better title is entitled to sue for recovery of possession on his possessory title alone.

Wali Ahmad Khan v. *Ajudhia Kandu*, 13 A. 537; A. W. N. (1891) 196; 7 Ind. Dec. (N. S.) 340 and *Abdul Hamid* v. *Sarbuland Khan*, 78 P. R. 1902; 137 P. L. R. 1902, relied on. **L** KARIM BAKHSH *v.* GAUHAR ALI **887**

Practice—*Paper-book—Appeal in execution proceedings—Papers to be printed.*

Where the question in appeal was whether a decree was capable of execution and the Registrar refused to get the decree and the agreement on which it was passed printed on the ground hat they were not exhibited, though they formed part of the record :

Held, that the decree should be printed in the paper-book, but as regards other papers, if they formed part of the decree, they should be printed, otherwise not. **Pat** NRIPENDRA NATH *v.* JHUMAK MANDER, 4 P. L. T. 512 **681**

———*Suit for possession based on ownership—Title by adverse possession found by First Court—No plea of prejudice on appeal—Appeal, second—Adverse possession, plea of, not definitely set up in the plaint whether can be urged.*

Where in a suit for possession the plaintiff based his title *inter alia* on ownership and the Court of first instance found plaintiff and his predecessor had been in possession of the suit property for over the statutory period and decreed the suit and on appeal no plea was raised by the defendants-appellants that he was prejudiced or taken by surprise by the plaintiff's title by prescription being considered by the First Court, the defendant in second appeal is not entitled to contend that plaintiff's title by adverse possession was not definitely pleaded in the plaint.

Sundari Dassee v. *Mudhoo Chunder Sircar*, 14 C. 592; 7 Ind. Dec. (N. S.) 392, followed.

Somasundarum Chetty v. *Vadivelu Pillai*, 31 M. 531; 4 M. L. T. 344, *Shiro Kumari Debi* v. *Govind Shaw Tanti*, 2 C. 418; 1 Ind. Dec. (N. S.) 556, distinguished. **M** MUKAMBIKA SHETTITHI *v.* SHIDDAYA SHETTI, 18 L. W. 553; (1924) A. I. R. (M.) 116 **613**

Pre-emption—*Custom—Outgrowth of* mohalla *or suburb, rule applicable to*—Mohalla *Hussain Agahi, Multan City.*

There is no authority for the proposition that an accretion to or an outgrowth of an old sub-division of a town within the limits of the town is to be regarded as a new sub-division of it.

Allah Ditta v. *Muhammad Nazir*, 7 Ind. Cas. 716; 84 P. L. R. 1910; 102 P. W. R. 1910, *Imperial Oil Soap and General Mills Co., Limited, Delhi* v. *Misbah-ud-din*, 61 Ind. Cas. 325; 2 L. 83, distinguished.

It cannot be argued that a sub-division of a town cannot expand where its old boundary and the land adjoining it are divided by a steep declivity. An outgrowth or expansion can take place on adjoining land whether it be on the same level as the old town or on a lower or higher level as in the case of hilly places.

The custom of pre-emption prevails in Mohalla Hussain Agahi of Multan City. **L** FIAZ AHMAD SHAH *v.* CHURCH MISSIONARY TRUST ASSOCIATION, LONDON **910**

———*Mortgagee in possession, position of*—Wajib ul-arz—*Suit for pre-emption, when maintainable.*

Even after making a mortgage of his share, a co-sharer has a proprietary interest left in him so as to entitle him to bring a suit for pre-emption.

The main fact that a person has taken a possessory mortgage of a share in a village does not make him a proprietor of the village so as to resist a claim for pre-emption. **A** PADAM SINGH *v.* UMRAO SINGH 21 A. L. J. 527; (1924) A. I. R. (A.) 48 **104**

———*Sale in recognition of superior right of pre-emption, whether subject to pre-emption.*

Pre-emption can be enforced without the intervention of the Courts.

When a vendee in recognition of a pre-emptor's right conveys his bargain to the latter, he is not really effecting a fresh sale, but is merely substituting the pre-emptor for himself as vendee, and such a re-sale or re-conveyance gives rise to no right to pre-empt. **L** FAIZ MUHAMMAD *v.* MUHAMMAD ISMAIL **848**

Presidency Towns Insolvency Act (III of 1909), s. 9—*Act of Insolvency—Departure of some of several members of firm with intent to defeat creditors.*

Where it is put forward as an alleged act of bankruptcy that the partners of a firm have departed from their usual place of business or otherwise absented themselves that must refer to the individual partners. One man cannot as an agent for another depart from his usual place of business.

In the case of a firm with two partners the departing from the usual place of business with intent to delay and defeat the creditors must be a departure of both the partners and not merely the departure of one of them, and an adjudication order cannot be made against the firm unless both the partners depart with the same intent. **B** *In re* MAHOMED HASHAM & CO., 24 Bom. L. R. 861; (1923) A. I. R. (B.) 107 **203**

Principal and agent—concld.

application to such a case. **Pat** JAGDIP PRASAD *v.* RAJO KUER, (1923) Pat. 177; 4 P. L. T. 531; (1923) A. I. R. (Pat.) 464 **1022**

Procedure—*Cross-cases—Trial by one Magistrate.*

It is desirable that cross-cases arising out of the same occurrence should be tried by the same Magistrate. C SAMIR *v.* BENI MADHAB GOPE, 37 C. L. J. 410; 27 C. W. N. 700; (1923) A. I. R. (C.) 644; 24 Cr. L. J. 940 **364**

——— *Insolvency—Evidence recorded by Official Receiver—Consent of parties.*

Where a matter has to be decided on trial by a Court, the Court should hold the trial itself and retain advantage of seeing the witnesses give evidence following the course of proceedings. It is undesirable that it should delegate its duty to a person whose interest and duty may conflict in the conduct of the proceedings.

In proceedings arising out of an application made by an Official Receiver for the setting aside of an alienation by the insolvent the parties agreed that the statements of the witnesses should be recorded by the Official Receiver and they were so recorded:

Held, that the procedure adopted was extremely undesirable but was validated by the consent of the parties.

Jainab Bibi Saheba v. *Hyderally Saheb*, 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, followed. **M** KRISHNA IYER *v.* THE OFFICIAL RECEIVER OF TRICHINOPOLY **445**

——— *Plaint describing defendant as minor—Defendant contesting suit as major—Plaint not amended—Suit, whether can proceed—Conduct of parties, whether cures irregularity.*

A defendant was originally impleaded as a minor and an application made for appointment of his mother as guardian. The defendant, however, appeared and stated he was of age. The Trial Court went into the question and found he was of age. He was actually represented by a Vakil and contested the suit. No application for amendment of the plaint was, however, made nor was any amendment ordered by the Court, and his name continued in the plaint as a minor under the guardianship of his mother. On appeal to the lower Appellate Court he was represented as major and was again represented by a Vakil. The lower Appellate Court finding other issues in favour of the plaintiff-appellant dismissed the suit on the technical ground that the defendant-respondent had been treated in the Court of first instance as a minor, whereas in fact he was of age. In second appeal to the High Court :

Held, that as the defendant had full knowledge of the proceedings in Court, having actually appeared and been represented by Vakils in both the Courts, the suit could not be dismissed merely on the technical ground urged, and that assuming there was any irregularity it was fully cured by the conduct of both the parties.

Ramachari v. *Duraisami Pillai*, 21 M. 167; 7 Ind. Dec. (N. S.) 474 and *Ganga Ram* v. *Mihin Lal*, 28 A. 416; 3 A. L. J. 187; A. W. N. (1906) 73, relied on. **A** HARGOBIND SINGH *v.* HUKUM CHAND, 21 A. L. J. 531; 45 A. 608; (1924) A. I. R. (A.) 94 **351**

Procedure—concld.

——— *Two cases decided simultaneously—Two appeals—One appeal dismissed as time-barred—Decision, whether* res judicata qua *other appeal—Refusal of Appellate Court to entertain other appeal—Miscarriage of justice—Irregularity—Revision.*

The right of a party to appeal in one out of two cases simultaneously decided must be recognised especially where it does not involve the setting aside of any decree held by the opposite party which has become final by reason of non-appeal.

A porprietor left a Will bequeathing the whole of his property to his two daughters. On the strength of this Will the daughters alienated some land to one person and a house to another. The brother of the deceased proprietor brought two suits for possession alleging that the testator had no power to make a Will and that no title was conferred by it on the alienors. The issue in both the suits was the same. They were heard and decided together by a single judgment which was recorded in the case relating to the land. In the case relating to the house a formal order referring to this judgment was made. The alienors appealed against the decree given in the suit relating to the land. The appeal against the decree given in the suit relating to the house was filed out of time. The Divisional Judge dismissed this latter appeal as time-barred and then held with regard to the appeal regarding the land suit that no appeal could lie because by reason of the dismissal of the other appeal, the only issue had been finally decided and constituted *res judicata*, and dismissed this appeal also. The alienors preferred an application for revision:

Held, (1) that the refusal of the Divisional Judge to entertain the appeal on the ground that his jurisdiction to hear it had been ousted by reason of the operation of the law of *res judicata* was wrong and amounted to a miscarriage of justice ;

(2) that the miscarriage amounted to an irregularity within the meaning of the law governing revisions ;

(3) that the fact that no application for revision had been lodged against the dismissal as time-barred, of the appeal respecting the house, did not debar the Court from entertaining this revision;

Akhi v. *Hazratgul*, 71 Ind. Cas. 1009, *Rahim Bakhsh* v. *Fakhar-un-nisa*, 31 P. R. 1898 and *Jogal Kishore* v. *Chammo*, 85 P. R. 1905; 151 P. L. R. 1905; 105 P. W. R. 1905 (F. B.), distinguished.

(4) that the defendants had the right to appeal to the Divisional Court and to obtain an adjudication in the land suit without necessarily appealing in the case of the house suit ;

(5) that the order of the Appellate Court dismissing an appeal as time-barred could not be said to amount to an adjudication upon the issues in suit. **Fesh** BABO *v.* JEHANGIR **479**

Principal and agent—concld.

application to such a case. **Pat** JAGDIP PRASAD *v.* RAJO KUER, (1923) Pat. 177; 4 P. L. T. 531; (1923) A. I. R. (Pat.) 464 **1022**

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Held, that as the defendant had full knowledge of the proceedings in Court, having actually appeared and been represented by Vakils in both the Courts, the suit could not be dismissed merely on the technical ground urged, and that assuming there was any irregularity it was fully cured by the conduct of both the parties.

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Held, (1) that the refusal of the Divisional Judge to entertain the appeal on the ground that his jurisdiction to hear it had been ousted by reason of the operation of the law of *res judicata* was wrong and amounted to a miscarriage of justice;

(2) that the miscarriage amounted to an irregularity within the meaning of the law governing revisions;

(3) that the fact that no application for revision had been lodged against the dismissal as time-barred, of the appeal respecting the house, did not debar the Court from entertaining this revision;

Akhi v. *Hazratgul*, 71 Ind. Cas. 1009, *Rahim Bakhsh* v. *Fakhar-un-nisa*, 31 P. R. 1898 and *Jogal Kishore* v. *Chammo*, 85 P. R. 1905; 151 P. L. R. 1905; 105 P. W. R. 1905 (F. B.), distinguished.

(4) that the defendants had the right to appeal to the Divisional Court and to obtain an adjudication in the land suit without necessarily appealing in the case of the house suit;

(5) that the order of the Appellate Court dismissing an appeal as time-barred could not be said to amount to an adjudication upon the issues in suit. **Fesh** BABO *v.* JEHANGIR . **479**

Provincial Insolvency Act (III of 1907), ss. 24 (3), 28, 39 (4), 146—*Proof of debt after discharge of insolvent and declaration of dividend, admissibility of—Debt enforceable at date of adjudication but subsequently barred whether can be proved—Insolvent, whether person aggrieved by order admitting creditor to proof of debt—Appeal.*

An insolvent is a "person aggrieved" within the meaning of section 46 (2) of the Provincial Insolvency Act of 1907 by an order admitting a creditor to proof of his debt and is, therefore, entitled to appeal against it.

Under sections 24 (3) and 39 (4) of the Provincial Insolvency Act of 1907, a creditor is not bound to tender proof of his debt before the discharge of the insolvent or before the declaration of the final dividend, but is entitled to tender proof of his debts at any time during the administration so long as there are assets to be distributed and no injustice is done to third parties.

Ex parte Boddam, In re Taylor, (1860) 45 E. R. 763 at p. 765; 2 De G. F. & J. 625; 29 L. J. Bk. 20; Jur. (N. S.) 570; 2 L. T. 343; 8 W R. 457; 129 R. R .224 *In re McMurdo, Penfield* v. *McMurdo,* (1902) 2 Ch. 684 at pp. 699, 706; 71 L. J. Ch 691; 86 L. T. 814; 50 W. R. 644, *Lakshmanan* v. *Muttia,* 11 M. I; 4 Ind. Dec. (N. S.) 1, followed.

A debt not barred at the commencement of the Insolvency does not, in and for the purpose of the insolvency, become barred by lapse of time and, therefore, under section 28 (1) of the Provincial Insolvency Act, any debt of the insolvent subsisting on the date of adjudication is provable in insolvency even though on the date of presentation of proof the debt had become barred.

Ex parte Ross, (1827) 2 Gl., & J. 46 and 330, *In re Benzon, Bower* v. *Chetwynd,* (1914) 2 Ch. 68; 83 L. J. Ch. 658; 110 L. T. 926; 21 Manson 8; 58 S. J. 430; 30 T. L. R. 435, *In re McMurdo, Penfield* v. *McMurdo,* (1902) 2 Ch. 684 at pp. 699, 706, 71 L. J. Ch. 691; 86 L. T. 814; 50 W. R. 644, *Ex parte Lancaster Banking Corporation, In re Westby,* (1878) 10 Ch D. 776; 48 L. J. Bk. 89; 39 L. T. 673; 27 W. R. 292, relied on.

Subbarayan v. *Natarajan,* 70 Ind. Cas. 396; 45 M. 785; 16 L. W. 68; (1922) M. W. N. 424; 43 M. L. J. 168; 31 M. L. T. 140; (1922) A. I. R. (M.) 268, (F. B.) distinguished.

Per *Oldfield, J.*—When a decree-holder can prove his decree-debt in insolvency no question of his right to execute the decree, within the meaning of section 48 of the Civil Procedure Code, is raised.

Per *Venkatasubba Rao, J.*—The object underlying section 24 of the Provincial Insolvency Act is to enjoin upon creditors to tender proof as early as possible, a course tending to convenience in the administration of the insolvent's estate and the provision does not enact a rule of limitation. **M** SIVASUBBARAMANIA PILLAI *v.* THEETHIAPPA PILLAI, 45 M. L. J. 160; 18 L. W. 636, (1923) M. W. N. 895; (1924) A. I. R. (M.) 103 **572**

——— **s. 34**—*Insolvency—Execution sale of insolvent's property before adjudication—Sale-proceeds—Receiver, rights of.*

Where property belonging to an insolvent is sold in execution of a decree and the sale-proceeds are deposited in Court before the date of the order of adjudication, the amount deposited is excepted from the general provision contained in section 34 of the Provincial Insolvency Act of 1907, that property of the insolvent realised in the course of an execution should not be claimed by any person against the Receiver. **M** SRINIVASA NAICKER *v.* OFFICIAL RECEIVER OF SOUTH CANARA **172**

Provincial Insolvency Act—1907—concld.

——— **s. 37**—*Fraudulent transfer—Transfer under pressure—Charge—Note on* hundi, *whether operates to create charge—Registration Act (XVI of 1908), ss.* 17 (1) (b), 49.

Where the dominant motive of a debtor in making a transfer in favour of a creditor is to save himself from exposure or from proceedings in Court, the transfer cannot be held to be fraudulent within the meaning of section 37 of the Provincial Insolvency Act.

Puran Chand v. *Punjab National Bank, Limited* 59 Ind. Cas. 578; 3 L. L. J. 44; 3 U. P. L. R. (L. 6 and *Ex parte Taylor, In re Goldsmid,* (1887) 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148, relied on.

At the foot of an unregistered *hundi* for over Rs 100, a note was added in the following words: "Our property at Delhi and Ludhiana shall be liable for this debt:"

Held, (1) that the note did not operate to create a charge on the property;

(2) that, in any case, the *hundi* being unregistered it was inadmissible in evidence under section 49 of the Registration Act to establish a charge on the property. **L** PURAN CHAND *v.* PURAN CHAND, (1923) A. L. R. (L.) 652 **441**

Provincial Insolvency Act (V of 1920), s. 3—*Creditor's petition—Transfer by District Court to Sub-Court—Jurisdiction.*

Under section 3 of the Provincial Insolvency Act the District Court is the only Court having jurisdiction to deal with creditors' petitions, in the absence of any Notification of the Local Government investing Subordinate Courts with jurisdiction over this class of cases. An order, therefore, of the District Court transferring such a petition to a Sub-Court for disposal is *ultra vires.* **M** PREMCHAND INDOJI *v.* SOLETI GOPALAPPA, (1923) M. W. N. 754; 45 M. L. J. 689, 18 L. W. 685 **876**

——— **s. 34 (2)**—*Debt, proof of—Limitation plea—Time, point of, at which applicable—Court, power of, to reject application to enter creditors on schedule—Grounds other than limitation.*

Under section 34 (2) of the Provincial Insolvency Act, 1920, the date of the adjudication is the point with reference to which it should be determined whether the recovery of a debt is barred by time or not.

When a debt is held to be provable within the meaning of the foregoing section, it is still open to the Court to reject the application for entering the name of the creditor on the schedule, on grounds other than that of the debt being barred by limitation. **O** IJAZ HUSAIN *v.* LACHMAN DAS, 9 O. & A. L. R. 796 **790**

Provincial Insolvency Act—1920—concld.

——— s. 53—*Fraudulent transfer, setting aside of—Creditor, whether can take action—Limitation.*

The language of section 53 of the Provincial Insolvency Act makes it incumbent on the Court to annul every transfer of property made by an insolvent if the transferor is adjudged insolvent within two years from the date of the transfer provided it comes to a finding that such transfer was not made in good faith and for valuable consideration. The section contemplates that action under it will be taken by the Receiver but it does not mean that even where the Receiver refuses or neglects to act no one else can set the proceedings under this section in motion. Whether the Court chooses to take action itself under the section or is moved by the Receiver or by a creditor it is not bound by any period of limitation and Art. 181 of Schedule I to the Limitation Act has no application to such a proceeding.

Pirthi Nath v. *Baskeshar Nath*, 69 Ind. Cas. 403, followed. L DARYAI SINGH *v.* KUNJ LAI, 995

——— s. 54—*Fraudulent preference, what amounts to.*

In order to hold that a transfer by a debtor in favour of a creditor constitutes a fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act, the Court must be satisfied that the dominant or substantial motive of the debtor in making the transfer was to prefer the particular creditor and not to secure some advantage for himself.

Sharp v. *Jackson*, (1899) A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Manson 264 and *In re Rai Mohan Shaw*, 53 Ind. Cas. 175, relied on.

A debtor approached one of his creditors for a fresh loan which he required for business purposes. The creditor refused to advance the loan unless his previous debt was also secured. The debtor then agreed to grant him a mortgage of certain property to secure the previous debt and the fresh advance:

Held, that the mortgage did not constitute a fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act. L DAULAT RAM *v.* DEOKI NANDAN 861

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35—*Suit to recover value of silver misappropriated by defendant, whether cognisable by Small Cause Court.*

Plaintiff sued to recover from defendant a certain sum with interest being the value of some silver made over by him to the defendant for conversion into ornaments and misappropriated by the latter. Plaintiff had prosecuted the defendant under section 406 of the Penal Code and had obtained a conviction, which had, however, been set aside on appeal:

Held, that the suit fell within the scope of Art. 35 of Schedule II to the Provincial Small Cause Courts Act, and was not cognisable by a Small Cause Court.

Cherakuddin v. *Ram Sraman*, 62 Ind. Cas. 432; 48 C. 879; 25 C. W. N. 256, *Nabi Bakhsh* v. *Muhammad Ali*, 67 Ind. Cas. 305; 3 L. L. J. 380 and *Sughra* v. *Ram Lal Misra*, 59 Ind. Cas. 593; 23 O. C. 352, relied on. L RAGHBIR SINGH *v.* SINGH RAM 928

Provincial Small Cause Courts Act—concld.

Public Gambling Act (III of 1867), ss. 4, 5, 6—*Police raid—Gaming going on—Instruments of gaming found—Common gaming house, presumption as to—Direct evidence, whether necessary.*

The Police, having obtained a warrant, raided a house in which they found the accused persons, gaming was going on and there were instruments of gaming:

Held, that, under the circumstances, the presumption contained in section 6 of the Act applied and dispensed with the necessity of direct evidence that a commission was being taken by the keeper of the house.

Lachchi Ram v. *Emperor*, 65 Ind. Cas. 852; 20 A. L. J. 218; 23 Cr. L. J. 196; (1922) A. I. R. (A.) 61, distinguished. A SITA RAM *v.* EMPEROR, 24 Cr. L. J. 934; 45 A. 671 358

Punjab Courts Act (VI of 1918), s. 41 (3)—*Appeal, second—Question of custom—Application for certificate—Order directing grant of certificate—Certificate, separate, whether necessary—Custom* v. *personal law—Adoption—Uncle's daughter's son*—Rai Brahmans *of Mohra Bhattan, Tahsil and District Rawalpindi.*

Where the order of a District Judge directing the grant of a certificate under section 41 (3) of the Punjab Courts Act, read with the application for the grant of the certificate, contains all the particulars required by the section, the omission to draw up a formal certificate is immaterial.

Rai Brahmans of Mauza Mohra Bhattan, Tahsil and District Rawalpindi, are governed by Hindu Law in matters of adoption, and the adoption of an uncle's daughter's son is recognised among them as valid.

The strict Hindu Law of adoption is often modified by custom in the Punjab. L BASHU RAM *v.* PIARA CHAND, 4 L. 434 988

——— s. 41 (3)—*Custom—Inheritance—Finding that Muhammadan Law applies—Second appeal—Certificate, necessity of.*

Where on the question of the right of inheritance the lower Appellate Court finds that the parties are governed by Muhammadan Law and not by custom, that finding cannot be challenged in second appeal without a certificate. L RASUL KHAN *v.* HAWASI, (1923) A. I. R. (L.) 284 458

——— s. 44—*" Case," meaning of.*

The word " case " in section 44 of the Punjab Courts Act does not necessarily mean the whole case, but it at least means a particular branch of a case for which an independent remedy or different procedure is provided by the Civil Procedure Code. Consequently, where, after framing a preliminary issue, the Court decides that a suit can be brought in the form in which it was presented, that does not amount to the decision of a case within the meaning of the section. L ABDUL HAFIZ *v.* RASHIDA KHATUN, (1923) A. I. R. (L.) 288 662

——— s. 44—*Civil Procedure Code* (*Act V of 1908*), *O. XVI, r. 19—Revision—Interlocutory order—Order in contravention of law—Interference by High Court.*

Interlocutory orders cannot, or at any rate should not, be interfered with by the High Court in revision, even though such orders are made in contravention of an express provision of the law, such as an order which contravenes the provisions of r. 19 of O. XVI of the Civil Procedure Code.

Gulab Chand v. *Sher Singh*, 35 Ind Cas. 608; 149 P. W. R. 1916; 8 P. L. R. 1917, followed. L FIRM RAHMAD ULLAH-FAKHAR UD-DIN *v.* FIRM RAHIM BAKHSH-QUMAR-UD-DIN, (1923) A. I. R. (L.) 301 107

Punjab Land Revenue Act (XVII of 1887), s. 31 (2)—*Evidence Act* (*I of 1872*), *s. 74—History of District attached to Settlement Record, whether part of Record of Rights—Public document—Proof—Certified copy.*

The history of a District attached to a Settlement Record does not form part of the Record of Rights as it is not one of the documents specified in section 31 (*2*) of the Punjab Land Revenue Act. But it may be presumed that it was compiled by or by the direction of the Settlement Officer, and is, therefore, a public document within the meaning of section 74 of the Evidence Act, provable by the production of a certified copy. L MUHAMMAD KHAN *v.* SULTAN AZAM 1040

Punjab Municipal Act (III of 1911), ss. 56 (4), 131—*Well, private, used by public—Dedication to public—Presumption—Well, whether vests in Municipal Committee—Well in dangerous condition—Procedure.*

In India, ordinarily, the owners of wells do not prohibit the public from using them. It is considered to be a meritorious act to allow the public to take water even from private wells. So the mere fact that the public have been allowed to take water from a private well for a number of years cannot necessarily lead to the conclusion that the well was dedicated to the public.

A private well does not vest in the Municipal Committee merely because of long user by the public and section 56 (*b*) of the Punjab Municipal Act has no application to such a well.

If a private well appears to a Municipal Committee to be injurious to health or offensive to the neighbourhood, it has ample power under section 131 of the Punjab Municipal Act by notice to require the owner to cleanse, repair, cover, fill up or drain it off. L NUR AHMAD KHAN *v.* MUNICIPAL COMMITTEE, AMRITSAR 886

——— ss. 61 (B), 242 (1) (a)—*Notified area—Local Government, power of, to impose taxes, extent of.*

The Local Government has no power under section 242 (1) (*a*) of the Punjab Municipal Act to impose in a Notified Area those taxes, which a Municipal Committee can only impose with the previous sanction of the Governor-General in Council, and its powers are restricted to the imposition of the taxes detailed in section 61 (*B*) of the Act, for which only the previous sanction of the Local Government is required. L NOTIFIED AREA COMMITTEE, UNA *v.* AMAR SINGH, 4 L. 442 908

——— ss. 84, 86—*Tax levied illegally—Suit to recover amount paid, whether maintainable—Civil Courts, jurisdiction of.*

The special procedure enacted in sections 84 and 86 of the Punjab Municipal Act relates only to appeals against the assessment or levy of a tax under the Act and does not provide a remedy for an act which might be done in violation of the provisions of the Act.

Section 86 of the Punjab Municipal Act does not oust the jurisdiction of the Civil Courts to relieve one subject of the Crown against an illegality imposed upon him by any other subject.

G. I. P. Railway Co. v. *Amraoti Municipality*, 16 Ind. Cas. 449; 8 N. L. R. 107, relied on.

A Civil Court has jurisdiction to entertain a suit to recover the amount of a tax illegally levied by a Municipality on the plaintiff, and failure on the part of the plaintiff to take action under section 84 of the Punjab Municipal Act does not bar the suit.

Committee of Notified Area, Una v. *Chatar Behari Narain*, 44 Ind. Cas. 910; 74 P. L. R. 1918; 74 P. W. R. 1918, followed. L MUNICIPAL COMMITTEE, PIND DADAN KHAN *v.* BHAGWAN SINGH 737

Punjab Pre-emption Act (II of 1905), s. 22—*Price fixed or paid in good faith, proof of—Onus—Payment, meaning of—Market-value, method of determining—Test.*

The *onus* of proving that the consideration for a pre-emptible sale entered in t sale-deed was fixed and paid in good faith, rests solely upon the vendee and it rests upon him from the very outset and not by reason of the burden having shifted by evidence, slight or otherwise, produced by the pre-emptor.

Gulab v. *Ram Singh*, 102 P. R. 1890, followed.

The word "payment" means more than a public transfer of cash from hand to hand. A genuine payment implies that this transfer is permanent and real and that the vendor is really parting with and the vendee really acquiring something of value.

A reference to record sales is a very unsatisfactory method of determining market-value and the results of such a calculation should be regarded with the utmost caution.

A calculation based on an actually existing lease is certainly one of the best methods which can be adopted for calculating the market-value of the leased property.

The price proved actually to have been paid is the best test of market-value. Peah AHMADJI KHAN *v.* GULMIR 271

Punjab Pre-emption Act (I of 1913), s. 15—*Village immoveable property—Question of fact—Appeal, second—Custom prevailing in town, whether applies to suburb—Machine* Mohalla, *Jhelum City.*

Punjab Pre-emption Act, 1913—concld.

The question whether a particular piece of land is village immoveable property or has become part of a town is a question of fact and cannot be agitated in second appeal.

Ma mud v. *Jumma*, 54 Ind. Cas. 646; 28 P. R. 1919; 16 P. L. R. 1920, followed.

It is possible that a village may become absorbed in a town.

Kishan Dial v. *Ali Bakhsh*, 87 P. R. 1890, relied on.

It is not necessary that a custom of pre-emption prevailing in a town should apply to its outgrown *mohallas* or suburbs.

Umar Bakhsh v. *Abdul Karim*, 70 P. R. 1898, *Karam Ilahi* v. *Babua Mal*, 21 P. R. 1900, and *Abdulla* v. *Punnu Ram*, 42 P. R. 1906; 85 P. L. R. 1907; 79 P. W. R. 1906, followed.

The Machine *Mohalla* has become a suburb of Jhelum City and has ceased to be a part of the village of Pira Ghaib.

There is no custom of pre-emption in the Machine *Mohalla* of Jhelum City. L DIWAN CHAND v. NIZAM DIN, (1923) A. I. R. (L) 443 610

Punjab Tenancy Act (XVI of 1887), s. 77 (3), proviso (1)—*Jurisdiction of Civil and Revenue Courts—Ejectment suit—Occupancy rights claimed by defendant—Suit, whether cognizable by Revenue Court.*

Plaintiffs sued to eject defendants on the ground that they were trespassers. Defendants put forward the plea that they were occupancy tenants of the land in dispute;

Held, that, having regard to proviso (1) to section 77(3) of the Punjab Tenancy Act, the suit was cognisable by a Revenue Court and not by a Civil Court.

Wadhawa v. *Musammat Hassi*, 29 Ind. Cas. 778; 73 P. R. 1915; 111 P. L. R. 1915; 64 P. W. R. 1915, *Mihan Singh* v. *Bhagwan Kaur*, 37 Ind. Cas. 390; 111 P. R. 1916; 234 P. W. R. 1916, followed.

Ghulam v. *Jowala Singh*, 48 Ind. Cas. 363; 103 P. R. 1918; 179 P. W. R. 1918; 130 P. L. R. 1918, dissented from. L PARABH DAYAL v. RADHO 818

Railways Act (IX of 1890), ss. 72, 76—*Risk Note, Form B—"Loss," meaning of—Goods consigned for carriage—Suit for damages—Liability of Railway Company—Burden of proof.*

The loss referred to in section 72 and other sections of Chapter VII of the Railways Act is the loss suffered by the consignor or the true owner, where such loss occurs by reason of misdelivery or non-delivery.

The word "loss" in the Risk Note, Form B, is not confined to the case of involuntary or unwilling parting with the things with reference to which the word is used.

Great Indian Peninsular Railway Company v. *Jitan Ram-Nirmal Ram*, 72 Ind. Cas 440; 4 P. L. T. 173; (1923) Pat. 82; 1 P. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442, followed.

Where goods are consigned to a Railway Company for carriage under the Risk Note, Form B, the ordinary liability of the Railway Company under section 76 of the Railways Act is limited by the special agreement entered into by and between the parties under the Risk Note.

Great Indian Peninsular Railway Company v. *Jitan Ram-Nirmal Ram*, 67 Ind. Cas. 664; 3 P. L. T. 222; (1922) A. I. R. (Pat.) 17, followed.

In order to succeed in an action for damages for loss of goods consigned to a Railway Company for carriage under the Risk Note, Form B, it is incumbent upon the plaintiff to prove wilful neglect on the part of the Railway Company or theft by or wilful neglect of its servants, agents or carriers.

Ghelabhai Punsi v. *East Indian Peninsular Railway Company*, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525, dissented from. Pat EAST INDIAN RAILWAY CO., LTD. v. NET RAM-GANESH LAL 26

——— **ss. 72, 80**—*Consignee, right of—Strike of Railway employees, whether enough to exonerate Company from liability.*

A consignee has a right of suit against the Railway to which the goods are delivered by the consignor thereof as well as against the particular Railway Administration on whose Railway the loss occurs.

Mere proof that a strike took place on the Railway of the defendant Company is by no means a justifiable basis for the inference that the defendant is not liable. Pat ARJUN DAS-GULAB RAI v. E. I. RAILWAY CO. 18

——— **s. 76**—*Risk Note in Form H—Suit for damages for loss—Burden of proof.*

Where goods are consigned by a Railway Company under a Risk Note in Form H and are lost or damaged in transit, the *onus* is on the consignor claiming compensation to prove that the loss or damage was occasioned by any act or neglect on the Company or its servants.

The incidence of such burden of proof is in no way affected by section 76 of the Railways Act.

Smith Limited v. *Great Western Railway*, (1922) 1 A. C. 178; 91 L. J. K. B. 431; 27 Com. Cas. 247; 38 T. L. R. 359, *East Indian Railway Company* v. *Nathmal-Behari Lal*, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321, *East Indian Railway Company* v. *Nilkanta Roy*, 22 Ind. Cas. 679; 41 C. 576; 19 C. W. N. 951; 19 C. L. J. 142, followed.

Ghelabhai Punsi v. *East Indian Railway Company*, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 225, *Curran* v. *Midland Great Western Railway Company, of Ireland*, (1896) 2 Ir. R. 183; 2 Ir. L. R. 739, not followed. M NARAYANA IYER v. SOUTH INDIAN RY. CO., 18 L. W. 322; (1923) M W. N. 731 260

Reformatory Schools Act (VIII of 1897), s. 4—*Order for detention, when can be made—Youthful offender, who is.*

An order for detention in a Reformatory School can only be made in the case of a youthful offender, *i.e.*, a boy below the age of 15 years, as, techn cally, under section 4 of the Reformatory Schools Act, a boy ceases to be a youthful offender, when he reaches that age. B HAMID v. EMPEROR, 2 Bur. L. J. 96; 24 Cr. L. J. 918; (1924) A. I. R. (R.) 16 294

Registration—*Lease for thirty years determinable at will of lessor—Registration, whether necessary —Right of lessee.*

A lease of land purported to be for thirty years and reserved a yearly rent, and stated that the lessee would vacate the land in case he failed to pay the rent reserved or whenever the lessor required him to do so. The question was whether the lease was admissible in evidence without being registered:

Held, that the lease was not for a term exceeding one year, nor had the lessee the right to remain in possession for thirty years, as the lessor could on the day succeeding the grant of the lease have required the lessee to vacate, and that, consequently, the lease did not require registration to render it admissible in evidence against the lessee. A GHASI RAM *v.* MALONY CLUB, (1923) A. I. R. (A.) 382 603

——— s. 17 *See* MORTGAGE 118

Registration Act (XVI of 1908), s. 17—*Document affecting property worth over Rs.* 100—*Family settlement—Compromise—Property affected exceeding Rs.* 100 *in value—Registration compulsory* —Res judicata—*Representative suit, decision in, whether operates as* res judicata.

A document which purports or operates to create or extinguish a y right or interest in moveable property worth Rs. 100, even though it records a family settlement or compromise, is compulsorily registrable, and, unless registered, has no binding effect.

Jagrani v. *Bisheshar Dube*, 35 Ind. Cas. 701; 38 A. 366; 14 A. L. J. 449 (F B.), relied on.

A suit instituted in the interests of estate and for the benefit of not only the plaintiffs, but all persons who come to succeed after them, is a representative suit and the decision arrived at therein, in the absence of any fraud or collusion, is binding on subsequent reversioners and operates as *res judicata*.

Risal Singh v. *Balwant Singh* 48 Ind. Cas. 553; 40 A 593; 45 I. A. 168; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C W. N. 376; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511 (P. C) and *Kesho Prasad Singh* v. *Sheopargash Ojha*, 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P L. R. (A.) 117; 44 A. 19; (1922) A. I. R. (A) 301, relied on.

Narain Singh v. *Raj Kumar Singh*, 66 Ind. Cas. 62; (1922) A I. R. (A.) 217; 44 A. 428; 20 A. L.J. 251, distinguished. A CHHAJJU *v.* GOKUL, (1923) A. I R. (A.) 338 593

——— ss. 17, 49—*Evidence Act* (*I of* 1872), *s.* 92, *proviso* (1)—*Registered deed of gift— Unregistered deed modifying terms of registered deed, admissibility of, in evidence—Evidence to show invalidity of deed of gift, admissibility of* —*Transfer of Property Act* (*IV of* 1882), *s.* 123.

A Burmese Buddhist executed a registered deed of gift of some immoveable property in favour of three of her sons and subsequently obtained an unregistered deed from them stating that the deed of gift would not be operative till after the death of the owner:

Held, (1) that the subsequent deed was not admissible in evidence for want of registration so as to affect the land;

Registration Act—contd.

(2) that the fact, however, that such a document was drawn up could be proved and was relevant to explain the nature and character of the donor's possession subsequent to the execution of the deed of gift;

Varada Pillai v. *Jeevarathnammal*, 53 Ind. Cas. 901; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 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.), relied on.

(3) that evidence as to the intention of the donor to make a gift which would be operative only after her death was admissible under proviso (1) to section 92 of the Evidence Act, as the fact, if established, would have the effect of invalidating the deed of gift under Burmese Buddhist Law.

Section 123 of the Transfer of Property Act lays down the method by which it is essential that a gift of immoveable property should be carried into effect, and abrogates the rule of Burmese Buddhist Law that transfer of possession is necessary to complete a gift. R MA THIN MYAING *v.* MAUNG GYI, 1 R. 851; (1924) A. I. R. (R.) 13 166

——— ss. 33, 34, 35, 87—*Presentation for registration — Power-of-attorney—Presumption— Execution*—Omnia praesummuntur, rite et solemniter acta, *applicability of.*

Where an endorsement on a registered deed states that the person presenting the deed for registration held a special power-of-attorney authorising him to present it, it must be presumed, under the terms of section 33 of the Registration Act, that the power-of-attorney was a proper power.

By section 34 of the Registration Act the duty of enquiring as to execution is put upon the Registering Officer and section 35 of the Act provides that if he is satisfied as to various particulars he shall register the document, therefore, the fact of registration gives rise to the presumption of *omnia præsumuntur rite et solemniter acta*, and the fact of execution of the document by parties by whom it purports to have been executed must be presumed. P C KANHAVA LAL *v.* NATIONAL BANK OF INDIA, LTD, (1923) A. I. R. (P. C.) 114; 45 M. L. J 497; 33 M. L. T. 349; 25 Bom. L. R. 1248; 4 L. 284 7

——— s. 52—*Sale-deed—Presentation by vendee —Refusal of vendor to sign endorsement, effect of —Registration, validity of.*

The mere refusal by the vendor to sign the registration endorsement would not affect the validity of the sale, where the deed was presented for registration by the vendee who had duly signed the presentation endorsement as required by section 52 of the Registration Act.

Sagaji v. *Namdev*, 23 B. 525; 1 Bom. L. R. 51; 12 Ind. Dec. (N. S) 349, *Baijnath Singh* v. *Paltu*, 30 A. 125; 5 A. L. J. 961; A. W. N. (1908) 38, *Subbaier* v. *Moniam Subramania Iyer*, 10 Ind. Cas 546; 36 M. 8; 10 M. L. T. 51; (1911) 2 M. W. N. 6; 21 M. L. J. 800, relied on. A ISLAM FATIMA *v.* TAMIZ ALI 111

Registration Act—concld.

——— ss. 71, 73, 77—*Denial of execution—Refusal of registration—Remedy—Application under section 73, not filed—Suit to compel registration, maintainability of—Appeal to Registrar, when can be treated as application under s. 73—Application, otherwise maintainable—Section wrongly mentioned—Duty of Court—Dismissal, whether legal—Suit under s. 77, scope of.*

In a suit to compel registration under the Registration Act, the Court has simply to determine the fact of execution and, if a *prima facie* case of execution is made out and the requirements of the law complied with, to order the registration of the document.

Raj Lakhi Ghose v. *Debendra Chundra Mojumdar*, 24 C. 668; 1 C. W. N. 444; 12 Ind. Dec. (N. S.) 1114 and *Balambal Ammal* v. *Arunachala Chetti*, 18 M. 255; 6 Ind. Dec. (N. S.) 527, relied upon.

If a Sub-Registrar refuses to register a document on the ground of the denial of execution by the executant, the person seeking registration is bound, under the Registration Act, to make an application to the Registrar under section 73 of the Act in order to establish his right to have the document registered.

Such an application must be in writing and must be accompanied by a copy of the reasons recorded under section 71 and the statements in the application should be verified by the applicant in the manner required b law for the verification of plaints.

Such an application is necessary prior to a suit being brought under section 77 of the Registration Act, and if this is not complied with the suit is liable to be dismissed.

Udit Upadhia v. *Imam Bandi*, 24 A. 402; A. W. N. (1902) 99, followed.

An appeal to the Registrar, if it conforms to all the requirements of section 73 of the Registration Act, may be treated as an application under the Act and it may suffice to save the suit from being dismissed for non-compliance with the provisions of section 73 of the Registration Act.

A Court in the administration of justice should not refuse an application, which on the merits it ought to grant and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section. Regard should be had to the susbtance rather than to the form of the proceedings.

Bechun Sahu v. *Syed Ali Rasul*, 16 Ind. Cas. 614, relied upon.

The scope of a suit under section 77 of the Registration Act depends upon the proved or admitted facts and circumstances, and not upon the erroneous mention of a section of a Statute in an application to the Registrar. N IBRAHIM v. SUGRABAI; 7 N. L. J. 4 664

Res judicata—*Two suits against same defendants for recovery of rent for different holdings—Decree in one as consolidated rental for all lands—Dismissal of other suit—Appeal, whether competent—Plaintiff accepting decree, whether can challenge decision against them.*

Res judicata—concld.

Two suits were instituted against the same defendants for recovery of arrears of rent for different holdings at different rentals. The suits were heard together; the issues framed were common to both suits, and they were disposed of by one judgment, in which the Trial Court found that the defendants had only one holding, and not two holdings, and that the lands covered by the two suits formed one holding at one consolidated rent, for which a decree was passed in favour of the plaintiff in one suit only conditional on his paying additional Court-fees. Plaintiff paid the deficit Court fees and agreed to take a decree for the amount the rentals for the lands covered by both suits: a final decree was accordingly drawn up for this amount, the decree in the other suit was one of dismissal of suit. The plaintiff preferred an appeal against the latter decree, but preferred no appeal against the former decree: the Appellate Court reversed the decree dismissing the suit, and decreed that suit also. The defendants preferred a second appeal to the High Court:

Held, (1) that the decree in the first suit having become final operated as *res judicata* and it was not open to the plaintiffs to raise the same question again in appeal in the other suit;

(2) that the plaintiff having accepted the decree of the Munsif and having agreed to take a decree for an amount as representing the consolidated rent for the lands covered by both the suits it was no longer oden to him to challenge the correctness of the decree.

Zaharia v. *Debia*, 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861 and *Midnapore Zemindary Company Limited* v. *Nitya Kali Dasi*, 24 Ind. Cas. 243, followed.

Mariamnissa Bibi v. *Joynab Bibee*, 33 C. 1101; 4 C. L. J. 149; 10 C. W. N. 934, dissented from. Pat DHANI SINGH v. CHANDRA CHOOR DEO 570

———, *what operates as*.

It is the issue decided and not the reason for the decision which constitutes *res judicata* A KUNDAN LAL v. JAGAT RAM 108

Sale—*Non-payment of purchase-money, or inflation of purchase-money in sale-deed, effect of.*

In a sale of immoveable property the mere non-payment of the purchase-money would not prevent the passing of the ownership from the vendor to the purchaser. Similarly, where in a sale-deed the sale consideration is inflated, and there is no repudiation of the sale, nor any defect in the registration of the transaction, such inflation would not vitiate the sale, so as to deprive the vendee from acquiring a good title. A ISLAM F TIMA v. TAMIZ ALI 111

Second appeal—*Duty of Court.*

In second appeal the Court should consider whether the evidence that is brought forward to prove a custom is not only legally admissible, but where the sum total of that evidence regarded from the point of *quantum* is of sufficient weight to justify the Court coming to the conclusion that

Second appeal—concld.

the custom has been proved. A DHALA KUAR v. MATHURA SINGH, (1923) A. I. R. (A.) 341 657

——— *Findings of Appellate Court, when can be questioned.*

Unless it can be shown that the findings of an Appellate Court are wrong in law or there is no evidence to support them, such findings cannot be interfered with in second appeal. Pat RAMSUNDER KUER v. SATRUHAN PRASAD CHAUDHURI 846

——— *Finding of fact—Adverse possession, finding on question of.*

A finding on the question of adverse possession is a finding of fact, and cannot be questioned in second appeal.

Jai Chand v. *Girwar Singh*, 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814, distinguished. A BISHESHAR NATH v. ABDUL WAHID, (1923) A. I. R. (A.) 382 672

——— *Negligence—Mixed question of law and fact.*

The question of negligence is a mixed question of fact and law, and, although a finding on the facts cannot be disturbed in second appeal, yet the proper inference from those facts as to the negligence is a question of law and can be gone into in second appeal.

Chhabraji Kuar v. *Ganga Singh*, 60 Ind. Cas. 643; 43 A. 29; 18 A. L. J. 863; 2 U. P. L. R. (A.) 272, relied on. A HIRIA v. RAM ADHIN SINGH, (1923) A. I. R. (A) 335 553

——— *New point raised for first time.*

A point not raised in the Trial Court and which requires a finding on a question of fact cannot be entertained if raised for the first time in second appeal. A MAHOMMAD QASIM v. MUNICIPAL BOARD, SAHARANPUR, (1923) A. I. R. (A) 391 607

——— *Point not raised in Trial Court, effect of.*

When a point is not taken in the lower Court, that operates as a conclusive bar to an appeal to the High Court. As soon as it is established that the point ought to have been taken in the Trial Court the appeal should be dismissed. A SAMASUL HASAN v. HASAN, (1923) A. I. R. (A.) 430 612

Specific performance—*Delay in suing, effect of.*

Mere delay, which is short of the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right, is no bar to a suit for specific performance unless it is shown to have prejudiced the defendant.

Jaugal Singh v. *Ghulam Mahomed*, 67 Ind. Cas. 700; 4 U. P. L. R. (L.) 100; 3 L. 376; 32 P. W. R. 1922; (1922) A. L. R. (L.) 461 relied on. L GOPALI RAM v. DEWAK RAM, (1923) A. I. R. (L.) 694 748

Specific Relief Act (I of 1877), ss. 14, 15, 16—*Agreement to sell—Vendor unable to convey good title to whole property—Purchaser, whether can enforce specific performance of remainder—Abatement.*

Specific Relief Act—contd.

It is of the essence of specific performance that part only of an agreement should not be performed. The exceptions to this general rule are contained in sections 14, 15 and 16 of the Specific Relief Act.

Under section 14 of the Specific Relief Act, specific performance of a contract may be enforced by either the promisor or promisee, provided the part which cannot be performed is inconsiderable and may be compensated for in money and provided that such compensation is made.

Under section 15 of the Specific Relief Act, the party in default may claim specific performance without compensation, where the part left unperformed is small in value and admits of compensation, but he cannot have specific performance where such part is considerable and does not admit of compensation.

Under section 16 of the Act where a contract consists of several parts, which are separate from, and independent of, one another, and some of which cannot and ought not to be performed, such part or parts, as can and ought to be performed, may alone be specifically enforced, with a proportionate abatement in the price. This is on the principle that such a contract though nominally one, is actually divisible and where the Court enforces what is apparently a part of the contract, it really enforces an entire and complete contract.

The question whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract.

Though the difference between the property contracted to be sold and that which the vendor can actually convey may be great, the Court will generally, notwithstanding this circumstance, enforce the contract where the vendee is willing to take whatever interest the vendor has.

Jones v. *Evans*, (1848) 17 L. J. Ch. 469; 12 Jur. 664; 80 R. R. 192, *Barnes* v. *Wood*, (1869) 8 Eq. 424; 38 L. J. Ch. 683; 17 W. R. 1080, *Hooper* v. *Smart*, [*Bailey* v. *Piper*], (1874) 18 Eq. 683; 43 L. J. Ch. 704; 31 L. T. 86; 22 W. R. 943, relied on.

But if the vendee is, from the first, aware of the defendant's incapacity to convey the whole of what he has contracted for, he cannot, generally insist on having at an abated price what the vendor can convey.

Even in cases where the ascertainment of the amount of abatement cannot be certain or exact the Court proceeds to grant abatement, if it can reasonably estimate the amount of abatement from the evidence of competent persons.

Defendant agreed to sell two distinct and independent plots of land, neither of which was important for the enjoyment of the other, to plaintiff, and failed to disclose to the latter that one of the plots was owned by his wife. In a suit for specific performance.

Held, (1) that the contract was divisible and the case fell within the purview of section 16 of the Specific Relief Act;

(2) that the plaintiff was entitled to specific performance of the contract with respect to the

Specific Relief Act—concld.

plot owned by the defendant with a proportionate abatement in the price agreed upon.

Rutherford v *Acton-Adams*, (1915) A. C. 866; 84 L. J. P. C. 238, *Mortlock* v. *Buller*, (1804) 10 Ves. Jun 292 at p. 315; 32 E.R. 857; 7 R.R. 417, relied on. C KRISHNA CHANDRA DEV *v.* GRAHAM, 50 C. 700; 27 C. W. N. 693; (1923) A. I. R. (C) 694 421

——— s. 41—*Sale by minor—Suit to avoid sale—Restoration of benefit—Power of Court.*

Courts of Justice in India in the exercise of their mixed jurisdiction as Courts of Equity and Law are always at liberty to pass a conditional decree upon equitable principles to suit the exigencies of each particular case.

Amir Ali v. *Iqbal Ali*, 61 Ind. Cas. 312 at p. 314; 24 O. C. 22; 8 O. L. J 287, relied on.

In a suit for the recovery of property alleged to have been alienated by the plaintiff during his minority, on the ground that the alienation was void owing to his minority, it is open to the Court to make a decree in favour of the plaintiff conditional on his restoring, under section 41 of the Specific Relief Act, to the alienee the benefit which he had received as consideration for the alienation.

Balak Ram v. *Dadu*, 7 Ind. Cas. 1000; 76 P. R. 1910; 112 P. W. R. 1910; 98 P. L. R. 1910, followed. L KAPUR *v.* HARDIT SINGH, (1923) A. I. R. (L.) 510 261

——— s 41 *See* EVIDENCE ACT, 1872, S. 115 269

——— s 42, **proviso**, effect of *See* LIMITATION ACT, 1908, SCH. I, ART 120 41

——— s. 42, **proviso**, *object of—Suit, when barred.*

The object of the proviso to section 42 of the Specific Relief Act is to prevent a multiplicity of suits, and to prevent a plaintiff, who has obtained a declaration, from filing a fresh suit for possession. In order that a suit can be held as not maintainable by reason of this proviso, it must be shown that the defendant was in possession, and that, as against him, the plaintiff could have obtained an order for delivery of possession.

Malijya Pillai v. *Tirumalaperumal Pillai*, 12 Ind. Cas. 170; 36 M. 62; 21 M. L. J. 1022; 10 M. L. T. 277; (1912) M. W. N. 161, relied on. S MANOHERDAS *v.* RAMDAS, (1923) A. I. R. (S) 17 549

Succession Certificate Act (VII of 1889), s. 4—*Suit for value of paddy due to deceased landlord—Certificate, whether necessary—"Debt," meaning of.*

A suit to recover the value of paddy from the tenants of a deceased landlord is not a claim in respect of a "debt" within the meaning of section 4 of the Succession Certificate Act, and is maintainable without a Succession Certificate. R MA HLA KYU *v.* MAUNG NYUN, 2 Bur. L. J. 45 237

——— s 5—*Certificate, grant of—Jurisdiction.*

Under section 5 of the Succession Certificate Act, the only Court which has jurisdiction to grant a certificate is the Court within whose

Succession Certificate Act—concld.

jurisdiction the deceased at the time of his death ordinarily resided, unless at that time he had no fixed place of residence at all.

The provisions of the Act granting jurisdiction ought to be strictly construed and not so as either to enlarge or restrict jurisdiction. L B CHAN PYU *v.* CHAN CHOR KHINE, 2 Bur. L. J. 42; (1923) A. I. R. (R.) 238 225

Suits Valuation Act (VII of 1887), s. 11—*Undervaluation of suit—Appeal to Court not competent to hear it—Objection, absence of—Prejudice—Adjudication of appeal, whether null and void.*

By reason of the undervaluation of a suit, plaintiff filed an appeal against the decree of the Trial Court to the District Judge, whereas, on the correct valuation, the appeal lay to the High Court. Defendant did not object to the valuation either in the Trial Court or before the District Judge. On a second appeal being preferred to the High Court by the defendant, the undervaluation was discovered by the Stamp Reporter and both parties accepted the correct valuation pointed out by that officer. Defendant thereupon objected that plaintiffs' appeal to the District Judge was incompetent and the latter's decree was, therefore, null and void for want of jurisdiction:

Held, that, in the absence of any objection by the defendant to the undervaluation in the Trial Court or the lower Appellate Court and of anything to show that the undervaluation had prejudicially affected the disposal of the appeal on the merits, the defendant's objection could not be entertained in second appeal in view of the provisions of section 11 of the Suits Valuation Act.

Ledgard v. *Bull*, 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.), *Rajlakshmi Dasee* v. *Katyayani Dasee*, 12 Ind. Cas. 404; 38 C. 639, distinguished. Pat KESHO PRASAD SINGH *v.* LAKHU RAI 4 P. L. T. 525; (1923) Pat 258; (1923) A. I. R (Pat) 581 205

Summary Settlements Act (Bom. Act VII of 1863), s. 7 **proviso**—Sanad *describing temple lands as private property of temple servants, effect of*—Caukar, *whether debarred from establishing that lands were* devasthan *lands—Suit for recovery of possession—Cause of action.*

Where lands are conveyed to temple servants by a *sanad* under the Bombay Summary Settlement Act, the lands being described in the *sanad* as the private property of the holders, the *sanad* would not negative the right of a person to eastablish, if he can, that the lands are really *devasthan* lands and not private property.

The fact of the *sanad* having been granted would not constitute a cause of action upon which to maintain a suit. B VITHAL DHONDJI DEVLI *v.* SURYAJI RAMCHANDRA NAIK, 24 Bom. L. R. 902; (1922) A. I. R. (B.) 438 617

Tort—*Dangerous and unprotected pit on Railway platform—Platform not lighted—Injuries caused by fall in pit—Railway Company, liability of.*

Tort—concld.

The plaintiff while he was waiting for a train on the platform at a Station of the defendant Railway Company, on a dark night, fell into an unprotected and unlighted pit on the platform when he was endeavouring to use the urinal near it and sustained serious personal injuries. None of the lights on the platform was lighted. The plaintiff who was an active young man became a cripple for two months and a partial cripple for many months more. In a suit for damages against the defendant Company:

Held, that the Company were guilty of negligence in keeping the platform in total darkness and in keeping a dangerous place unprotected and were, therefore, liable in damages. **M** MACK *v.* MADRAS AND SOUTHERN MAHARATTA RAILWAY CO., LTD., 45 M. L. J. 424; 33 M. L. T. 66; (1924) A. I. R. (M.) 154 **250**

Transfer of Property Act (IV of 1882), ss 5, 6, 43, 95—*Feeding grant by estoppel, principle of—Assignment by person with defective title—Subsequent acquisition of interest, effect of—Contract void ab initio, whether validated—Mortgage of charge, whether valid—Sub-mortgage—Notice to original mortgagor, necessity of—Charge, creation of—Acquisition of possession.*

The principle of section 43 of the Transfer of Property Act is a principle of law generally known as feeding the grant by estoppel and is well established in England and there is nothing to prevent its being given effect to by Courts in India.

Tilakdhari Lal v. *Khedan Lal*, 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J. 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139; 22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N. 49; 28 M. L. T. 224; 32 C. L. J. 479; 13 L. W. 161; 2 P. L. T. 101; 47 I. A. 239 (P. C.), relied on.

If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment.

Cuthbertson v. *Irving*, (1859) 4 H. & N 742; 28 L. J. Ex. 306; 5 Jur. (N. S.) 740; 157 E. R. 1034; 33 L. T. (O. S.) 328; 118 R. R. 726 and *Pairidge* v. *Ward*, 1910) 2 Ch. D. 342; 79 L. J. Ch. 746; 103 L. T. 421, followed.

A contract which is void *ab initio* cannot be validated by the provisions of section 43 of the Transfer of Property Act. If a contract, therefore, purports to transfer property which the law makes inalienable, that contract cannot be given effect to with reference to another property which the transferor may subsequently acquire.

Gangabai v. *Basvant*, 5 Ind. Cas. 66; 34 B. 175; 2 Bom. L. R. 143 and *Pandiri Bangaram* v. *Karumoory Subbaraju*, 8 Ind. Cas. 388; 34 M. 108; 8 M. L. T. 2[illegible], distinguished.

The doctrine of constructive notice is no part of the law of estoppel. It is enough that the person estoppe has made the representation to the other party of an existing fact and the other party has believed in the truth of the representation and acted on it.

Transfer of Property Act—contd.

Bloomenthal v. *Ford*, (1897) A. C. 156 at p. 162; 66 L. J. Ch. 253; 76 L. T. 205; 45 W. R. 449; 4 Manson, 156, relied on.

In equity the benefit of a lien or a charge may be assigned with the debt in respect of which it is claimed.

Bull v. *Faulkner*, (1848) 2 De G. & Sm. 772; 13 Jur. 93; 79 R. R. 367; 64 E. R. 346, followed.

The right to hold immoveable property as a security for the re-payment of a loan and the further rights corresponding with the rights of a mortgagee are "property" within the meaning of sections 5 and 6 of the Transfer of Property Act.

A mortgage of a chargee's rights, if made, would be valid in law.

Where a person acquires not only the incorporeal right of a charge-holder but also enters into possession of the property, the charge becomes a possessory lien and is capable of being transferred devised and inherited.

Asher v. *Whitlock*, (1866) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 25; 13 L. T. 254; 14 W. R. 26; 148 R. R. 598 and *Wajid Khan* v. *Dargahi Khan*, 9 O. C. 161, relied on.

It is a well-settled principle of law that if a sub-mortgagee gives no notice to the original mortgagor of an assignment of the mortgagee's rights in his favour, the original mortgagor would be justified in paying the debt wholly or in part to the assignor, thereby extinguishing the original mortgage altogether, and on such an extinction taking place, the sub-mortgagee has no remedy left against the property.

In re Lord Southampton's Estate, Allen v. *Lord Southampton, Banfather's Claim*, (1881) 16 Ch D. 178 at p. 187; 50 L. J. Ch. 218; 43 L. T. 687; 29 W. R. 231 and *Dixon* v. *Winch*, (1900) 1 Ch. 736; 69 L. J. Ch. 465; 48 W. R. 612; 82 L. T. 437; 16 T. L. R. 276, relied on.

The acquisition of possession, constructive or actual, is a condition precedent to the creation of a charge under section 95 of the Transfer of Property Act.

As a general rule, there is no lien at law without possession and this rule of Common Law seems to have been adopted by the Legislature for the purpose of section 95 of the Transfer of Property Act. **O** MOHAN SINGH *v.* SEWA RAM, 10 O. & A. L. R. 217; 10 O. L. J. 424 **579**

——— **s. 6—*Partnership—Right to recover past profits—Mere right to sue.***

The right to recover past profits of a partnership on taking accounts is not a mere right to sue under section 6 of the Transfer of Property Act but is an actionable claim which is capable of transfer.

Churamoni Mondal v. *Rajendra Kumar Singh*, 42 Ind. Cas. 390, applied. **N** SHRINATH *v.* KANHIYALAL **817**

——— **s. 6 (a)—*Specific Relief Act (I of 1877), s. 18—Alienation of reversionary rights—Executory contract.***

Sect on 6 (*a*) of the Transfer of Property Act makes a transfer of a right in expectancy, such as a reversionary right, absolutely null and void as barred by Statute.

Transfer of Property Act—contd.

Kabal Shah v. *Muhammad Baqa*, 73 Ind. Cas 120, followed.

Gujar v. *Aulya*, 23 Ind. Cas. 835; 78 P. R. 1914; 184 P. L. R. 1914; 119 P. W. R. 1914, dissented from.

A transfer of reversionary rights made in the form of a sale may be valid as an executory contract which will take effect when a title to the property has opened out to the vendor both by a rule of equity and by the application of section 18 of the Specific Relief Act.

Bhagwati v. *Chaoli*, 55 Ind. Cas. 898; 2 U. P. L. R. (L.) 79; 2 L. L. J. 689, followed.

The true test of the operation of a sale of reversionary rights is, that it deals with non-existent property and that it, therefore, creates no rights *in praesenti*, but at the same time it establishes against the vendor an equity from which he cannot escape and which may be enforced by the vendee against him by the operation of section 18 of the Specific Relief Act when the vendor's title to the property matures.

The consent of a single reversioner does not in any way increase the power of a widow with a limited life-interest to make an alienation. A sale made by her is in no way validated by such consent, and, therefore, no specific share of the property sold is conveyed to the alienee by the action of the consenting reversioner. **Pesh** ZABTA KHAN *v.* SAID HABIB 246

——— s. 8—*Execution sale of Distillery buildings—Vats, copper pipes and copper stills if pass under sale—Fixtures, test of—English Law, applicability of.*

Certain properties were proclaimed for sale in execution of a money-decree and were described in the sale proclamation as "Distillery Buildings, Door No. 3, Brighton Road Barracks, Peramboor, bearing Re-Survey Number, etc." The buildings were originally used as a distillery but sometime before the sale no business had been carried on there:

Held, that what was sold was only the building and nothing more, and that the pipes, stills and the vats therein and used in the distillery business did not pass to the purchaser.

In cases of sales of premises in which business is carried on, and not of the business as a going concern or the premises together with the fixtures or machinery, *prima facie* all that the purchaser is entitled to are the buildings.

The technical English Law of Fixtures is not applicable to India.

Mojis Sheikh v. *Rasik Lal Ghosh*, 6 Ind. Cas. 796; 37 C. 815; 14 C. W. N. 952; 12 C. L. J. 246, followed.

In the case of houses, the primary consideration in determining whether the items claimed are fixtures under section 8 of the Transfer of Property Act should be, whether the articles are provided for the permanent use of the house, and whether they can be said to be articles which are necessary or which are provided for the more beneficial enjoyment of the property; machinery brought into the house for the purpose of carrying on business cannot be included in the term 'fixtures;

Transfer of Property Act—contd.

Hobson v. *Gorringe*, (1897) 1 Ch. 182; 66 L. J. Ch. 114; 75 L. T. 610; 45 W. R. 356, *Reynolds* v. *Ashby*, (1904) A. C. 466; 73 L. J. K. B. 946; 91 L. T. 607; 53 W. R. 129; 20 T. L. R. 766, *Monti* v. *Barnes*, (1901) 1 K. B. 205; 70 L. J. K. B. 225; 83 L. T. 619; 49 W. R. 147; 17 T. L. R. 88 and *Holland* v. *Hodgson*, (1872) 7 C. P. 328 at p. 334; 41 L. J. C. P. 146; 26 L. T. 709; 20 W. R. 990, considered. **M** NARAYANA SAH *v.* BALAGURUSWAMY NADAR, 45 M. L. J. 385; 18 L. W. 928; (1924) M. W. N. 43; 33 M. L. T. 227 888

——— s. 43, *applicability of—Sale by Hindu widow as owner—Sale-deed signed by sons—Sons, whether bound—Hindu Law—Widow, transfer by—Transfer void or voidable.*

A Hindu widow having only a limited estate transferred as owner certain property of her deceased husband. The document of transfer was also signed by her two major sons. In a suit challenging the sale after the death of the widow the transferee urged that, even if the sale by the widow was void, he acquired under section 43 of the Transfer of Property Act title to the shares of the sons who had signed the document:

Held, that, inasmuch as the sons did not make any erroneous representation and did not profess to transfer, the section in question did not apply and the transferee did not acquire any title *qua* their shares.

A transfer by a Hindu widow having a limited interest is not void but voidable at the hands of the reversioners and no body except the said reversioners or persons claiming through them has any right to question the validity of the transfer. **C** JABEDALI *v.* PRASANNA KUMAR NAG, 27 C. W. N. 433; (1923) A. I. R. (C.) 423 281

——— s. 52—*Civil Procedure Code* (*Act V of* 1908), *Sch. III, r.* 11—*Leases* pendente lite, *validity of—Test.*

Under section 52 of the Transfer of Property Act and rule 11 of the Third Schedule to the Civil Procedure Code leases *pendente lite* cannot be avoided if the granting of them was an ordinary and reasonable incident of *interim* beneficial enjoyment, *i.e.*, if it can be shown that they are of such a nature that the lessor would have granted them even if he had known that he was to continue indefinitely as the owner of the property.

Sri Gajapati Radhikapatta Mahadevi Garu v. *Sri Gajapati Radhamani Mahadevi Garu*, 7 M. 961; 2 Ind. Dec. (N. S.) 652, followed. **M** KARU *v.* PANDIA 874

——— s. 53—*Fraudulent transfer—Intention of transferee—Transfer in good faith and for consideration—Civil Procedure Code* (*Act V of* 1908), *O. XXI, r.* 63—*Title suit—Burden of proof.*

The provision contained in section 53 of the Transfer of Property Act though not specifically applicable to the Punjab, is applicable in principle.

Lakhmi Narain v. *Tara Singh*, 6 P. R. 1901; P. L. R. 1900 p. 513; *Champo* v. *Shankar Das*, 14 Ind. Cas. 232; 74 P. R. 1912; 165 P. L. R. 1912; 148 P. W. R. 1912, followed.

Where a transfer is attacked as having been made to defeat and delay creditors, it is the knowledge and intention of the transferee which is the determining factor as to the validity of the transfer. If the transferee buys in good faith and for valid consideration, his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying his creditors. In each case it is a question of fact as to whether or not the transferee has bought in good faith and without knowledge of the transferor's object or selling.

Bhagwant Appaji v. *Kedari Kashinath*, 25 B. 202; 2 Bom. L. R. 986, relied on.

A person who claims property which has been attached in pursuance of an execution decree, must in a suit brought under r. 63 of O. XXI of the Civil Procedure Code give *prima facie* evidence of the genuineness of the document of sale and once he has shown a *prima facie* title the onus is shifted to the judgment-creditor to prove that the transfer was fraudulent and unreal.

Nannhi Jan v. *Bhuri*, 30 A. 321; 5 A. L. J. 601, A. W. N. (1908) 125, relied on. L IBRAHIM v. JIWAN DAS 1043

——— s. 55 (d)—*Conveyance— Vendee's duty— Vendee receiving rents and profits— Vendee's duty to pay interest on unpaid purchase-money.*

It is the duty of the vendee to prepare a conveyance and submit it to the vendor.

When a vendee is in actual possession or receipt of the rents and profits, he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for execution of the deed of sale. N DINKAR RAO v. AYUB, (1923) A. I. R. (N.) 37 889

——— s. 55 (1) (g)—*Vendor of lease-hold— Liability to pay rent up to date of sale.*

A vendor of lease-hold property is bound under section 55 (1) (g) of the Transfer of Property Act to pay the rent accrued due up to the date of sale where the rent became due during the tenancy of the vendor or of a person through whom he claimed otherwise than by purchase. Pat HUL KUER v. RAMBHANJAN SINGH 975

——— s. 55 (2)—*Sale—Guarantee of title— Caveat emptor, applicability of.*

Though the Transfer of Property Act does not extend to the Punjab, the fundamental principles laid down therein have generally been adopted by the Courts of the Province as affording proper rules of decision.

The rule of *caveat emptor* has become obsolete by reason of the provision contained in section 55 (2) of the Transfer of Property Act, and where the consideration for a sale fails, the vendor is bound to return the purchase-money to the purchaser, even where there is no covenant in the deed of sale guaranteeing his title. There is always an implied covenant of title under section 55 (2) of the Transfer of Property Act.

Vellayappa Kowthen v. *Bava Kowthen*, 29 Ind. Cas. 747; *Subbarayа Reddiar* v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T. 240;

(1914) M. W. N. 376, *Chidambaram Pillai* v. *Sivathasamy Thevar*, 15 M. L. J. 396, *Shaligram Sadasheo Pande* v. *Narain*, 45 Ind. Cas. 669, *Lachhman Das* v. *Jowahir Singh*, 70 Ind. Cas. 250; 44 P. L. R. 1922, *Bhattu Ram* v. *Ganga Prasad Gope*, 47 Ind. Cas. 37; 3 P. L. J. 358, *Vatakka Chathilingath Tavazhi* v. *Ramaswami Patter*, 27 Ind Cas. 889; 2 L. W. 155 *Rajagopalan* v. *Tirupananthal Tambiran*, 17 M. L. J. 149, relied on. L KANSHI RAM v. JAIMAL SINGH, (1923) A. I. R. (L.) 590; 6 L. L. J. 31 562

——— s. 69—*Mortgage in Punjab—Power of sale without intervention of Court, validity of— Company Mortgage — Sale by mortgagee— Purchase by debenture holder, validity of.*

The provisions contained in the Transfer of Property Act are not applicable to the Punjab and there is no positive enactment in force in that Province which prohibits the insertion of a clause in a mortgage-deed conferring a power of sale on the mortgagee without the intervention of the Court.

Therefore, there is nothing to prevent a limited Company in the Punjab issuing debentures and securing them by a mortgage in favour of trustees with the power of sale.

Bhuwani Churn Mitr v. *Jykishen Mitr*, (1847) S. D. A. 354; 8 Ind. Dec. (O. s.) 326, *Keshavrav Krishna* v. *Bhavanji*, 8 B. H. C. R. (A. C. J.) 142, distinguished.

A person in a fiduciary position cannot sell to himself property which he holds in his fiduciary character, the principle being that the interest of the seller to get the highest price and that of the buyer to offer the lowest price should not be centred in the same person.

This principle, however, is inapplicable to the case of a sale of the property of a limited Company effected by the trustees for the debenture-holders of the Company, under a power of sale conferred upon them, where the property is purchased by one of the debenture-holders, inasmuch as the sale being on behalf of the Company it is the duty and interest of the trustees to secure as high a price as possible and there is no conflict of interests. P G KANHAYA LAL v. NATIONAL BANK OF INDIA LTD., (1923) A. I. R (P. C.) 114; 45 M. L. J. 497; 33 M. L. T. 349; 25 Bom. L. R. 1248; 4 L. 284 7

——— ss. 77, 101—*Mortgage—Prior and subsequent mortgagee—Prior mortgagee acquiring rights of mortgagor, status of.*

The shield of a subsequent mortgagee, who acquires the rights of a prior mortgagee, is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of a mortgagor or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation, for he cannot be required to sue for the recovery of the money due on his mortgage from his own property.

Transfer of Property Act—contd.

Gokaldas Gopaldas v. *Puranmal Premsukhdas*, 10 C. 1035 at p. 1046; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), relied on.

Athan Kutti v. *Matavil Illoth Sutarjamam*, 37 Ind. Cas. 758 (1917) M. W. N. 9; 5 L. W. 461; 32 M. L. J. 17, distinguished. A RAM SARUP *v.* RAM LAL, 20 A. L. J. 596, (1922) A. I. R. (A.) 394; 44 A. 659 472

——— s. 101—*Sale subject to mortgage—Another mortgage created by vendee—Subsequent sale by vendee to original mortgagee—Suit on mortgage executed by vendee—Priority—Charge—Dead mortgage, whether can be used as shield.*

Property belonging to plaintiff, which was subject to a mortgage in favour of defendants Nos. 2 and 3 was sold to the first defendant; and the latter first mortgaged it to the plaintiff and later on sold it to defendants Nos. 2 and 3 who undertook in the sale-deed to pay the mortgage amount due to the plaintiff. In a suit by the plaintiff on his mortgages defendants Nos. 2 and 3 pleaded in respect of their own mortgage priority over the plaintiff's;

Held, (1) that the plaintiff was entitled to have the mortgaged property sold free of any claim by defendants Nos. 2 and 3 on their mortgage;

(2) that the covenant in favour of the first defendant could be enforced in the plaintiff's suit itself where all the parties were before the Court, and when first defendant asked the Court to enforce it without driving the parties to a separate suit.

Chidambara Nadan v. *Musuvathi Muni Nagendrayyan*, 58 Ind. Cas 813 39 M. L. J. 445: (1920) M. W. N. 534; 12 L. W. 393; 28 M. L. T. 300, *Govindaswami Thevan* v. *Doraiswami Pillai*, 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390, relied on.

Jamna Das v. *Ram Autar Pande*, 13 Ind. Cas 304; 34 A. 63; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (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.), distinguished.

Per *Krishnan, J.*—If a person buys property over which he has a mortgage himself and the mortgage in consequence becomes discharged by merger or by the terms of the sale, he can nevertheless use that mortgage as a shield against any puisne incumbrancer who attempts to enforce his claim against the property, unless his intention to extinguish the mortgage is clear otherwise. That is the principle of section 101 of the Transfer of Property Act. The buyer cannot be credited with the intention of altogether extinguishing his mortgage for all purposes when it is found to be to his benefit to keep it alive, merely because in the deed of purchase a part of the purchase-money is treated as going in discharge of his mortgage. Whether the purchase is statedly of the whole property for a price made up of the price of the equity of redemption and of the mortgage amount or whether it is, statedly, of the equity of redemption only, the transaction is substantially the same; and as it is for his benefit to keep the first mortgage alive, one cannot necessarily assume the existence of an intention on his part to extinguish it, even in the former case. But where he expressly covenants to pay the mortgage amount of the puisne incumbrancer, the position becomes different, and he cannot afterwards deny his liability.

Per *Venkatasubba Rao, J.*—An undertaking by a prior incumbrancer, who purchases the mortgaged property, to pay off a puisne incumbrancer, is inconsistent with an intention to keep alive his own mortgage in the sense that it is to prevail over the mortgage of the puisne incumbrancer.

A mortgage which is dead in fact cannot be used as a shield against a subsequent incumbrance. Section 101 of the Transfer of Property Act only enacts that a mortgage which in fact exists must not in law be deemed to be extinguished by reason of the merger in the same individual of the two interests, the interest of the mortgagee and the interest of the owner of the equity of redemption. But a mortgage which has become extinguished cannot, on principle, be held to spring into existence to be enforced against the puisne incumbrancer. M GARUDAPPA PERIA THIRUVADI *v.* POOKUTTI JANAKI, 18 L. W. 530; 45 M. L. J. 693; (1923) A. I. R. (M.) 103 1016

——— s. 106. *See* LANDLORD AND TENANT 105

U. P. Court of Wards Act (IV of 1912), s. 55, *applicability of—Disqualified proprietor—Manager of endowed property, status of.*

Section 55 of the U. P. Court of Wards Act has no application where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to property which he owns and not to that which he holds as trustee. The manager of endowed property is not the owner of that property, nor does he hold any beneficial interest therein. He cannot be regarded as a disqualified proprietor in respect of that property and the idol in whom the endowed property is supposed to be invested, cannot be treated as a ward within the meaning of section 55 of the Act above quoted. A THAKURJI *v.* HIRA LAL, 20 A. L. J. 609; 44 A 634; (1922) A. I. R. (A.) 408 335

U. P. Land Revenue Act (III of 1901), s. 56—*Cess—Amount payable by weavers for occupation of* abadi *site, nature of*—Wajib-ul-arz, *entry in, effect of.*

The amount payable by the weavers of a village to the *zemindar* in respect of each handloom kept by them is in the nature of ground rent for the occupation of the site of the *abadi*.

Abdul Hai v. *Nathua*, 1 A. L. J. 537, followed.

The *wajib-ul-arz* of a village contained the following clause: "*Mohtarifa* is realised from *raiyats* carrying on profession according to the agreement and is taken into account of the village income." The *zemindar* of the village sued certain weavers to recover the amount payable by them under this clause in respect of certain handlooms kept by them;

Transfer of Property Act—concld.

U. P. Land Revenue Act—concld.

Held, (1) that the suit was one for the recovery of ground rent for the occupation of the *abadi* site;

(2) that even if the amount sued for be regarded as a "cess" the clause in the *wajib-ul-arz* amounted to a sanction for realisation of the cess. A BAKHSHI *v.* HYDER KHAN, (1923) A. I. R. (A.) 571 270

——— s. 111 (1) (c), (3)—*Partition proceedings—Objection to title of applicant—Assistant Collector, order of—Appeal to Civil Court.*

Where an objection regarding title is filed in a partition proceeding, three courses only open to an Assistant Collector, (1) to decline to grant the application for partition until the question is determined by a competent Court, (2) to require any party to the case to institute a suit in the Civil Court, or (3) to proceed to inquire into the merits of the objection. If the Assistant Collector follows neither of the first two courses he must be taken to have followed the third course under section 111 (1) (c) of the U. P. Land Revenue Act and as such his order is appealable to the Civil Court under clause (3) of the section. The defective and perfunctory nature of the inquiry cannot take the matter out of the jurisdiction of the Civil Appellate Court. O BHAGWAN DUT *v.* BRIJ BHUKHAN, 9 O. & A. L. R. 885 868

U. P. Local and Rural Police Rates Act (II of 1906), s. 14—*Rural Police rates, liability for—Contract, meaning of.*

The term "Contract" as used in section 14 of U. P. Local and Rural Police Rates Act of 1906 means a contract between the landlord and the under-proprietor or permanent lessee, as the case may be, and means further a contract in its legal sense, presupposing the existence of two parties thereto. O ALI ABBAS *v.* KUNWAR SHER BAHADUR SINGH, 9 O. & A. L. R. 815 267

U. P. Local Rates Act (I of 1914), s. 8 (a). *See* U. P. LOCAL AND RURAL POLICE RATES ACT, 1906, S. 14 267

U. P. Municipalities Act (II of 1916), ss. 96, 97—*Contract—Municipal Board, acceptance by, of contract as valid—Third party, whether can question validity.*

Where a Municipal Board accepts the validity of a contract, made otherwise than as provided in section 96 of the U. P. Municiplaties Act, and its liability thereunder, it is not open to a third party to challenge the validity of the contract. A MOHAMMAD QASIM *v.* MUNICIPAL BOARD, SAHARANPUR, (1923) A. I. R. (A.) 371 607

——— ss. 267, 180, 184—*Building, construction of, with sanction—Power of Municipality to order demolition—"Estoppel," meaning of.*

A Municipal Board is not debarred from taking action under section 267 of the U. P. Municipalities Act in the interests of public health solely because it has previously given sanction to the construction of a building under section 180 of the Act. Under section 184 no sanction operates as an estoppel or confers or extinguishes any right or disability. The term 'estoppel' used in section 184 is not confined to an estoppel against a plea of title to property, but also includes estoppel raised against a Municipal Board on the ground of its having granted any sanction under the preceding sections.

Municipality of Sholapur v. *Abdul Wahab*, 61 Ind. Cas. 428; 45 B. 797; 23 Bom. L. R. 244, distinguished. A BABU LAL *v.* MUNICIPAL BOARD, FARRUKHABAD, 21 A. L. J. 828; 9 O. & A. L. R. 1053; (1924) A. I. R. (A.) 157 777

Usurious Loans Act (X of 1918), s. 3—*Unconscionable bargain—Illiteracy and ignorance of legal technicalities, whethe a ground of relief.*

A Court of Equity may grant relief to a debtor who has entered into an unusual, hard and unconscionable bargain by reason of his illiteracy and ignorance of legal technicalities.

Ghansham Singh v. *Bhola Singh*, 74 Ind. Cas. 411; 21 A. L. J. 465; (1923) A. I. R. (A) 490; 45 A. 506, distinguished.

A stipulation to pay interest at 2 per cent. per mensem compoundable with monthly rests is unconscionable. A SHYAM LAL *v.* BADRI 784

Vendor and purchaser—*Contract to sell—Specific performance—Damages.*

Defendant told a friend that he wanted to sell a house and communicated to him the terms on which he was willing to sell it. The latter arranged for the sale of the house and wrote to the former that plaintiff had agreed to purchase the house on the terms proposed and was sending a certain sum as earnest-money. Defendant received the sum, and promised to send a formal receipt by registered post. This he failed to do, and ultimately refused to sell the house on the ground that it belonged to his wife who was not willing to sell it. Plaintiff, thereupon, brought a suit for specific performance and in the alternative for damages:

Held, (1) that there was a completed contract for the sale of the house between the parties;

(2) that specific performance could not, under the circumstances, be decreed;

(3) that the plaintiff was entitled to damages for breach of the contract, the measure of damages being the difference between the market-value of the house and the contractual price. A PANNA LAL *v.* HUSAIN BEG, 21 A. L. J. 428 460

——— *Principal and agent—Property in possession of seller or agent—Delay in taking delivery—Seller or agent's power to sell—Notice to purchaser or principal—Contract Act (IX of 1872), s. 107.*

Plaintiffs who carried on business at *P.* as commission agents, purchased certain goods from the defendants, who carried on business at *S.* As the defendants did not want immediate delivery, the goods remained in the plaintiffs' godowns for about six months when the plaintiffs wrote to the defendants asking for instructions as to the despatch of the goods, saying that if they did not receive a reply immediately they would despatch the goods to *S.* The defendants who up to that time had not received the account for the goods

Vendor and purchaser—contd.

wrote back a letter the material part of which was as follows:—

"I wrote you to get the account adjusted. I will send all the dues on hearing from you. What you write now is not acceptable to me. O, brother, no fall in the market is yet in sight within five or seven days. It is not proper to bring one under clutches in this way. I am ready to give you damages nor do I propose to cause loss to you. If I would have got the goods here, I would not have suffered loss. Considering this you will get the account adjusted."

At the time of this letter the market price of the goods in question at all events at *P* had fallen below the prices current at the date of purchase. About a fortnight after the receipt of the defendants' letter the plaintiffs without any intimation to the defendants sold the goods at *P*. and brought a suit to recover the difference between the sum realized and the purchase price :—

Held, (1) that if the plaintiffs were to be regarded as sellers they were governed by section 107 of the Contract Act and were not entitled to sell the goods without giving notice that unless the defendants took delivery they would sell the goods for what they would fetch ;

(2) that if the plaintiffs were to be regarded as the agents of the defendants their business was to hold the goods at the disposal of their principals and unless they had express authority to sell them, they were not entitled to sell them without either requesting payment or asking the defendants to take delivery and giving notice that in the event of their failure to do so they would sell the goods for their account ;

(3) that there was nothing in the letter of the defendants which could possibly be interpreted as an authority to the plaintiffs to sell. The letter really appealed to the generosity of the plaintiffs not to enforce their right of dispatching the goods immediately, but to wait and possibly to wait a little longer for payment and the mere fact that the defendants said that they were willing to bear the loss or suffer any damage that may arise could not mean anything more than that at the loss was theirs and did not really concern the plaintiffs ;

(4) that, therefore, the plaintiffs could not recover anything from the defendants and that their suit must fail. **Pat** DHANRAJ *v.* FIRM SANEHI RAM-PANNA LAL 928

——— *Privity of contract—Money left in hands of purchaser for payment to mortgagee, whether attachable as belonging to latter.*

One Harnam Singh mortgaged a house to Hira Singh for Rs. 700 and subsequently sold the house to one *G* out of the sale price Rs. 700 were left with *G* for payment to Hira Singh. *G* then sold the house to defendant, and again out of the sale price a sum was left with the defendant for payment to Hira Singh. The latter realised the mortgage-money direct from Harnam Singh. Subsequently, he obtained a money-decree against Harnam Singh and in execution of that decree brought to sale the sum left in deposit with the defendant for payment to himself. The deposit was purchased by plaintiff who now sued to recover the amount :

Held (1) that Harnam Singh having paid off Hira Singh could claim to step into his shoes ;

(2) but that Hira Singh not having been a party to the contract between *G* and the defendant could not enforce that contract and consequently there was no sum in the hands of the defendant attachable as belonging to Hira Singh or Harnam Singh, and the plaintiff's suit was, therefore, liable to be dismissed **L** CHET KAUR *v.* GURMUKH SINGH, (1923) A. I. R. (L.) 459 940

Vendor and purchaser—concld.

——— *Purchase from person without title—Debt of vendor paid by purchaser—Suit by real owner for possession, purchaser whether entitled to re-imbursement.*

A person who purchases property from one who has no title to sell, and who, to save the property from sale in execution of a decree against the latter, pays the amount of the decree, is not entitled upon dispossession by the real owner of the property, to be reimbursed the amount of the decree paid by him. **A** GAYA PRASAD *v.* METHAI LAL, (1923) A. I. R. (A.) 404 624

——— *Sale of moveable property—Notice of encumbrance—Burden of proof—Priority of title.*

Where a purchaser of moveable property alleges that he purchased without notice of an encumbrance on the property, the onus of proof that he had no notice lies on him. Where he fulfils that onus the fact that he has obtained possession would give him prior title. **R** MAUNG CHIT U. *v.* BANSI DHAR BAZAZ, 2 Bur. L. J. 63; (1923) A. I. R. (R.) 153 328

Wajib-ul-arz, *whether record of contract—Settlement Officer, whether agent of landlord*

A *Wajib-ul-arz* may be a record of a contract though generally it is treated as a record of custom founded either on the investigation made by the Settlement Officer or the opinions of the body of the proprietors of the village.

A Settlement Officer cannot be regarded as an agent of the landlord so as to represent him as one of the parties to a contract embodied in the *wajib-ul-arz*. **O** ALI ABBAS *v.* KUNWAR SHER BAHADUR SINGH, 9 O. & A. L. R. 815 267

Will—*Administration—Appointment of Panchas*—Panchas, *powers of.*

Where by a Will certain persons are appointep *Panchas*, of whom one was to supervise the work of administration, and the *Panchas* were given power to appoint other *Panchas*, the power of appointment can only be exercised by the whole body of *Panchas*. An appointment, therefore, by one of the *Panchas* of a successor to himself by his Will is invalid. **B** SHANKAR GANPAT LELE *v.* DAMODAR BHUKANDAS, (1923) A. I R. (B.) 216 569

———*Circumstances of suspicion—Duty of Court* —Onus *of proof.*

Circumstances of suspicion regarding the alleged execution of a Will demand the vigilant care and circumspection of a Court in investigating the case and examining the evidence in support

Will—contd.

of the Will. Such evidence must remove the suspicion and establish affirmatively to the satisfaction of the Court that the Will put forward was the Will of the testator.

Where the instrument of a Will is inofficious, *i.e.*, not consonant to the testator's natural affections and moral duties, stringent proof of its execution is demanded.

Jagrani Koer v. *Durga Parshad*, 22 Ind Cas. 103; 36 A. 93; 16 O. C. 386; 12 A. L. J. 125; 26 M. L. J. 153; 15 M. L. T. 125; (1914) M. W. N. 137; 19 C. L. J. 165; 18 C. W. N. 521; 16 Bom. L. R. 141; 1 O. L. J. 57; 41 I. A. 76 (P. C.), Williams on Executors, 1921, Volume I, page 50, re'ied on.

There is no inflexible rule as regards the nature of the evidence required in any particular circumstances, but the evidence in favour of a Will propounded after a long lapse of time must extend to clear proof of execution **M** ROSA MARIA B I *v.* JACOBA SOUZA, (1923) M. W. N. 647; 18 L. W. 58, (924 A. I. R. (M) 151 **881**

————, *construction of*—Malik *and* Kabir, *meaning of—Legatee not heir—Intention to convey a solute estate—Presumption.*

The expressions "*malik*" and "*kabiz*" used in a Will convey an absolute ownership to the legatee

Harilal Pranlal v. *Bai Rewa*, 21 B. 306; 11 Ind. Dec. (N. S.) 253 and *Maulal Mithalal* v. *Advocate-General of Bombay*, 11 Ind. Cas. 547; 35 B. 279; 13 Bom. L. R. 471, relied on.

The fact that an only daughter of a Hindu testator who, in the absence of a Will, would have had the estate for life, has been bequeathed the estate should be taken into consideration in estimating the intention of the testator. In such a case the presumption is that an absolute estate was intended to be conveyed.

Jateh Chand v. *Kup Chand*, 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 411; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 567; 26 C. L. J. 18; 43 I. A. 183 (P. C.) and *Surajmani* v. *Rabi Nath Osha*, 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 230; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; M. L. T. 144; 35 I. A. 17 (P. C.), distinguished. **N** BHAVARAM *v.* NAHU 802

————*Execution—Delay of twenty years in applying for Probate—Delay unexplained, effect of —Evidence Act (I of 1872), s. 90, applicability of.*

An application was made for Probate of a Will some twenty years after the Will was alleged to have been executed, and the witnesses who purported to have attested the execution of the Will were dead; no explanation was forthcoming as to the delay in bringing the Will into Court for

Will—concld.

purposes of Probate, nor any evidence as to the custody of the Will before it was produced in Court, and the only evidence of execution offered was, that of persons who professed to identify the signatures on the Will

Held that the execution of the Will had not been satisfactorily proved, and that the provisions of section 90 of the Evidence Act could not be applied to the case. **N** CHANNULAL *v.* JUNA, (1923) A. I. R. (N.) 169 **660**

———— *Two executors—Application for Probate by one—Renunciation of executorship by other—Probate, grant of—Subsequent application for withdrawal of renunciation, whether competent.*

H, one of the two executors appointed under a Will, appeared on notice of an application for Probate by the other executor, and stated that he did not agree to be an executor under the Will. He prayed that his objections to the Will might be noted and the suit might be decided. Eventually, Probate was granted to the applicant. Sometime afterwards *H* applied to withdraw his previous application renouncing the executorship and prayed that he might be appointed executor along with the other person. This application having been rejected *H* appealed:

Held that inasmuch as the grant of Probate had already been made at the time when the appellant asked to withdraw his renunciation of the executorship that application came too late and the appellant was not entitled to any relief. **C** HARI RAM *v.* RAM RAM SINGH CHOUDHURY, 7 C. W. N. 285, (1925) A. I. R. (C.) 444 **218**

Workman's Breach of Contract Act (XIII of 1859), *as amended by Act VII of 1920), s. 2 enquiry under—Transfer—Criminal Procedure Code (Act V of 1898), ss. 4 6, 526.*

An enquiry by a Magistrate under the Workman's Breach of Contract Act against a labourer is an enquiry by a Magistrate or a Criminal Court within the meaning of section 6 of the Criminal Procedure Code, and as such is subject to the operation of section 526 of that Code, even though the object of the enquiry is merely to issue coercive orders, and if necessary, to enforce the same by a sentence of imprisonment

The definition of enquiry given in section 4 clause (k) of the Criminal Procedure Code is not exhaustive Any enquiry by a Magistrate or a Criminal Court subordinate to the High Court can be the subject-matter of a transfer by the High Court. **A** BANSI *v.* LAKSHMI DAS, (1924) A. I. R. (A.) 76; 45 A. 700; 25 CR. L. J. 72