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1914—1922

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Synopsis of Contemporary Reports

1923—1929

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THE
ALL INDIA REPORTER

1922

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1922

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IN GRATEFUL RECOGNITION OF

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PATNA HIGH COURT

1922

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THE

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COMPARATIVE TABLES

(PARALLEL REFERENCES.)

Hints for the use of the following Tables :—

TABLE No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1922 with corresponding references of the ALL INDIA REPORTER.

TABLE No. II.—This Table shows serially the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1922 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III.—This Table is the converse of the **First and Second Tables.** It shows serially the pages of the ALL INDIA REPORTER, 1922 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I.

Showing seriatim the pages of INDIAN LAW REPORTS, PATNA SERIES for the year 1922 with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 *denotes pages of* I. L. R. 1 PATNA.

Column No. 2 *denotes corresponding references of the* ALL INDIA REPORTER.

I. L. R. 1 Patna=All India Reporter.

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TABLE No. II.

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS of the year 1922 with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 *denotes pages of other* JOURNALS.

Column No. 2 *denotes corresponding references of the* ALL INDIA REPORTER.

1922 Patna High Court Cases = All India Reporter.

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20	„	„	47	68	1923	„	101	132	1922	„	169	218	„	„	348	321	1923	„	45
24	„	„	49	70	1922	„	362	135	„	„	555	224	„	„	554	326	1922	„	651
26	„	„	160	73	„	„	386	136	„	„	347	225	„	„	382	331	„	„	499
27	„	„	51	74	1923	„	87	137	„	„	162	228	„	„	556	336	„	„	608
29	„	„	52	75	„	„	88	142	„	„	279	229	„	„	188	337	1923	„	137
31	„	„	54	76	1922	„	376	145	„	„	106	235	„	„	378	342	1922	„	201
33	„	„	63	79	„	„	359	152	„	„	287	240	1923	„	96	347	„	„	656
39	„	„	68	81	„	„	252	154	„	„	184	241	1922	„	435	348	1923	„	33
42	„	„	70	85	„	„	104	159	„	„	40	250	„	„	577	353	„	„	130
46	„	„	73	88	„	„	13	162	„	„	284	254	„	„	549	355	„	„	41
49	„	„	19	90	„	„	161	164	„	„	205	256	„	„	563	360	1922	„	567
53	„	„	166	91	„	„	30	167	„	„	303	258	„	„	588	363	1 23	„	29
				97	„	„	269	174	„	„	181	269	„	„	507	365	„	„	150

3 Patna Law Times = All India Reporter.

PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.		
1	1922	P C	71	101	1923	P	103	197	1922	P C	142	298	1922	P	301	381	1922	P	242
13	„	P	193	103	1922	„	334	203	„	P	157	301	„	„	183	383	„	P C	94
17	„	„	224	106	1923	„	149	205	„	„	114	303	„	„	417	386	„	P	171
21	„	„	61	107	1922	„	28	209	„	„	101	307	„	„	299	396	1923	„	119
22	„	„	62	108	„	„	29	215	„	„	106	310	„	„	386	397	1922	„	565
24	„	„	318	110	„	„	47	222	„	„	17	311	„	P C	39	398	„	„	40
29	„	„	376	114	„	„	346	226	„	„	118	314	1923	P	90	401	„	„	347
32	1923	„	116	117	„	„	281	228	1923	„	84	316	„	„	86	403	„	„	289
37	1922	„	394	122	„	„	337	229	1922	P C	91	318	1922	„	162	406	„	„	315
43	1923	„	143	125	„	„	361	232	„	P	92	322	„	„	5	409	„	„	279
51	„	„	153	127	1923	„	121	238	„	„	96	327	„	„	284	413	„	„	348
52	„	„	142	128	1922	„	339	239	„	„	97	329	„	„	205	419	„	„	354
53	1922	„	9	130	1923	„	101	245	„	P C	123	332	„	„	167	422	„	„	188
60	1923	„	102	131	„	„	55	261	„	P	181	335	„	„	197	429	„	„	352
61	1922	„	256	132	1922	„	387	264	„	„	178	339	„	„	286	432	„	„	196
64	„	„	2	133	„	P C	63	268	„	„	84	342	1923	„	102	433	„	„	226
67	„	„	1	140	„	P	58	273	„	„	362	343	1922	„	384	434	„	„	544
69	„	„	269	141	„	„	55	276	„	„	104	346	1923	„	115	435	„	P C	112
80	„	„	44	142	„	„	56	279	„	P C	23	347	1922	„	296	439	„	P	560
90	1923	„	95	143	„	„	56	282	„	P	303	352	„	„	243	442	„	„	559
91	1922	„	393	146	„	„	59	289	„	„	255	362	„	„	555	445	„	„	525
93	„	„	160	147	„	„	60	291	„	„	371	363	„	P C	247	447	„	„	504
94	„	„	287	149	„	„	122	293	1923	„	113	367	„	P	356	451	„	„	291
96	1923	„	140	194	„	„	13	295	1922	P C	215	371	„	„	232	456	„	„	4
98	1922	„	492	195	„	„	8	296	„	P	542	380	„	„	197	458	1923	„	89

PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.			PLT	A. I. R.		
460	1922	P	432	525	1922	P	602	584	1922	P	566	649	1923	P	91	786	1922	P	442
464	„	„	545	526	„	„	73	585	1923	„	1	653	1922	„	619	790	„	„	387
466	„	„	493	529	„	P C	336	603	1922	„	556	704	„	„	615	792	„	„	488
467	„	„	258	533	„	P	499	605	„	P C	272	709	„	„	450	793	„	„	392
477	1923	„	58	538	1923	„	104	613	„	P	572	749	„	P C	356	795	„	„	398
483	1922	„	562	547	1922	P C	54	617	1923	„	96	754	„	P	166	797	1923	„	122
484	„	„	564	550	„	P	555	621	„	„	94	756	„	„	607	805	1922	„	527
485	1923	„	111	551	„	„	378	623	1922	„	68	757	„	„	655	807	„	„	215
487	1922	„	276	556	„	„	567	625	„	„	563	759	„	„	22	813	1923	„	28
492	„	„	364	559	„	„	532	628	1923	„	76	762	1923	„	57	816	1922	„	389
498	1923	„	114	562	„	„	562	637	„	P C	54	764	1922	„	618	818	„	„	497
499	„	„	56	563	„	„	566	638	1922	P	598	765	1923	„	45	820	1923	„	150
501	1922	„	507	565	„	„	201	643	„	„	549	771	1922	„	535	826	1922	„	13
506	„	„	63	570	„	„	557	645	„	„	382	779	„	„	484	832	1923	„	152
513	„	„	588	573	„	„	435	648	„	„	554	781	„	„	611				

23 Cr. L. J. & 64 to 68 I. C. = All India Reporter.

Cr L J & I. C.	A. I. R.	Cr L J & I. C.	A. I. R.	Cr L J & I. C.	A. I. R.	Cr L J & I. C.	A. I. R.	Cr L J & I. C.	A. I. R.

Please refer to Comparative Table No. II in A. I. R. 1922 Lahore.

TABLE No. III.

Showing seriatim the pages of the ALL INDIA REPORTER, 1922, PATNA Section with corresponding references of other REPORTS, JOURNALS and PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 *denotes pages of the* ALL INDIA REPORTER, 1922 PATNA.
Column No. 2 *denotes corresponding references of other* REPORTS, JOURNALS and PERIODICALS.

A. I. R. 1922 Patna = Other Journals.

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals.
1	3 *P L T* 67	22	1 *P* 266	49	62 *I C* 668	63	1 *P* 174
	6 *P L J* 284		65 *I C* 315	51	1922 *P H C C* 27		3 *P L T* 506
	63 *I C* 768		3 *P L T* 759		24 *Cr L J* 234		1922 *P H C C* 33
2	3 *P L T* 64	24	80 *I C* 308		71 *I C* 698		65 *I C* 266
	6 *P L J* 313	28	3 *P L T* 107	52	1922 *P H C C* 29	68	1922 *P H C C* 39
	61 *I C* 897		1921 *P H C C* 296		4 *P L T* 370		65 *I C* 277
4	3 *P L T* 456	29	3 *P L T* 108		24 *Cr L J* 277		3 *P L T* 623
	66 *I C* 780		6 *P L J* 300		71 *I C* 997	70	1922 *P H C C* 42
5	3 *P L T* 322		1921 *P H C C* 195	54	1922 *P H C C* 31		6 *P L J* 465
	23 *Cr L J* 114		63 *I C* 779	55	3 *P L T* 141		2 *P L T* 752
	65 *I C* 546	30	1922 *P H C C* 91		1922 *P H C C* 57		62 *I C* 540
8	1 *P* 260		65 *I C* 687		65 *I C* 3	73	1 *P* 242
	3 *P L T* 195	34	1 *P* 356		6 *P L J* 622		3 *P L T* 526
	1922 *P H C C* 63		4 *P L T* 10	56 (1)	3 *P L T* 142		1922 *P H C C* 46
	66 *I C* 321		69 *I C* 891		70 *I C* 378		68 *I C* 958
	23 *Cr L J* 257	36	65 *I C* 673	56 (2)	1 *P* 44		23 *Cr L J* 638
9	3 *P L T* 53	40	3 *P L T* 398		3 *P L T* 143	77	4 *P L T* 723
	1922 *P H C C* 195		1922 *P H C C* 159		1921 *P H C C* 349		1 *Pat L R Cr* 130
	64 *I C* 346		65 *I C* 1002		63 *I C* 290		24 *Cr L J* 345
12	25 *Cr L J* 546		23 *Cr L J* 218	58	1 *P* 65		72 *I C* 345
	81 *I C* 34	42	70 *I C* 486		3 *P L T* 140	84	3 *P L T* 268
13 (1)	1 *P* 384	44	1 *P* 90		64 *I C* 326		1922 *P H C C* 204
	3 *P L T* 194	F B	3 *P L T* 80	59	3 *P L T* 146		67 *I C* 205
	1922 *P H C C* 88		1922 *P H C C* 17		70 *I C* 483		23 *Cr L J* 381
	65 *I C* 675		64 *I C* 337	60	3 *P L T* 147	92	3 *P L T* 232
13 (2)	3 *P L T* 826	47	3 *P L T* 110		24 *Cr L J* 339		65 *I C* 801
	24 *Cr L J* 241		1922 *P H C C* 20		72 *I C* 339	96	1 *P* 361
	71 *I C* 785		64 *I C* 55	61	3 *P L T* 21		3 *P L T* 238
17	3 *P L T* 222		6 *P L J* 444		62 *I C* 36		67 *I C* 156
	67 *I C* 664	49	1922 *P H C C* 24	62	3 *P L T* 22	97	3 *P L T* 239
19	1922 *P H C C* 49		6 *P L J* 473		1922 *P H C C* 55		67 *I C* 195
F B	65 *I C* 335		2 *P L T* 761		65 *I C* 281		23 *Cr L J* 371

A. I. R. 1922 Patna=Other Journals.—*(Concld.)*

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585	69 *I C* 684	601	1 *P* 578	607	68 *I C* 288	618	3 *P L T* 764
	4 *P L T* 209		69 *I C* 666		1 *Pat L R* 24		71 *I C* 248
586	1 *P* 621		4 *P L T* 277	608 (1)	1922 *P H C C* 336		24 *Cr L J* 120
	4 *P L T* 44	602	3 *P L T* 525		69 *I C* 704	619	3 *P L T* 653
	71 *I C* 79		67 *I C* 882	608 (2)	1 *P* 689		65 *I C* 882
	24 *Cr L J* 31	603	1 *P* 590		71 *I C* 209	651	1922 *P H C C* 326
587	1 *P* 589		4 *P L T* 229		4 *P L T* 235		69 I C 677
	4 *P L T* 98		70 *I C* 172		1 *Pat L R Cr* 57		4 *P L T* 698
	71 *I C* 246	604	1 *P* 684		24 *Cr L J* 81		2 *P* 175
	24 *Cr L J* 118		71 *I C* 122	611	3 *P L T* 781	654	1922 *P H C C* 319
588	2 *P* 18		24 *Cr L J* 74		1922 *P H C C* 296		71 *I C* 143
F B	3 *P L T* 513		4 *P L T* 303		67 *I C* 991		4 *P L T* 301
	1922 *P H C C* 258	606	1 *P* 699	615	2 *P* 125	655	3 *P L T* 757
	67 *I C* 642		4 *P L T* 170	S B	1 *Pat L R* 1		67 *I C* 262
597	1 *P* 609		69 *I C* 624		3 *P L T* 704	656	1922 *P H C C* 347
	69 *I C* 668		1 *Pat L R* 103		1922 *P H C C* 291		4 *P L T* 134
	4 *P L T* 263		1923 *P H C C* 207		68 *I C* 700		71 *I C* 473
598	3 *P L T* 638	607	3 *P L T* 756	618	1922 *P H C C* 304		

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ALL INDIA REPORTER
1922 PATNA
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THE
ALL INDIA REPORTER
1922
PATNA HIGH COURT

A. I. R. 1922 Patna 1.

JWALA PRASAD AND ADAMI, JJ.

Braja Sundar Das—Petitioner

v.

Jaganath Dhat—Opposite Party.

Civ. R. Nos. 21 to 24 of 1920, decided on 22nd April, 1921, from an order of Jwala Prasad and Adami, JJ., dated the 15th April, 1920.

Civil P. C., O. 47, R. 1—Sufficient cause—Court can review order as to costs in proper cases.

A Court can review as to costs any proper cases but the Court will be reluctant to review an order passed in presence of both parties unless a very strong case is made out. 15 W. R 415 followed.

[P. 1, C. 2; P. 2, C. 1.]

S. A. A. Asghar—for Petitioner.

W. H. Akbari—for Opposite Party.

Judgment:—These are applications to review the decree passed by us directing the respondents to get their costs of the litigation from the appellant. The ground for the review is that the appellant succeeded in appeal in getting an important relief prayed by him in the plaint, namely, the determination of fair and equitable rent and consequently he was entitled to the costs upon the principle that costs abide the result.

Ordinarily, no doubt, the successful party is entitled to costs of the litigation but in certain circumstances the Court has discretion to pass such orders as it thinks fit regarding the costs to be borne by the parties.

The plaintiff claimed *khas* possession of the lands in suit and in the alternative for a determination of fair and equitable rent. The defendants resisting the suit objected to the maintainability of the suit on account of the aforesaid relief regarding determination of fair and equitable rent having been joined with the prayer for *khas* possession.

No specific issue was framed as to the plaintiff's rights to fair and equitable rent. The point was, however, tried in issue No. 1 which related to the maintainability of the suit. In that issue the learned Subordinate Judge held that the plaintiff was entitled to a determination of fair and equitable rent and he was also entitled to make that prayer in the present case while seeking to recover *khas* possession.

Inasmuch as he declared the plaintiff entitled to *khas* possession there was no necessity of giving the alternative relief to the plaintiff, namely, the right to fair and equitable rent. The defendants appealed to the District Judge. The learned District Judge allowed the appeal and dismissed the suit with costs.

In second appeal we confirmed the decision of the learned District Judge as to the plaintiff not being entitled to *khas* possession. We, however, came to the conclusion that the plaintiff was entitled to the alternative relief claimed by him. One of the grounds for granting this alternative relief was that the defendants did not challenge before the District Judge the finding of the Subordinate Judge in Issue No. 1. We therefore, partially decreed the appeal as to costs. We at this stage were of opinion that the principal question related to the *khas* possession obtained by the plaintiff and as the plaintiff failed to get the principal relief he ought to pay the cost of the respondents. The order was a deviation from the ordinary rule relating to the costs under which the plaintiff being a successful party was entitled to costs.

I have already said that we were influenced in making this unusual order on account of our having been under the impression that the principal question related to *khas* possession. We now find that the alternative prayer relating to the determination of fair and equitable rent was also a principal relief clearly sought for in Clause (*gha*) of the paragraphs relating to reliefs. The defendants held the large property on a nominal rent of one rupee and consequently the relief for determination of fair and equitable rent is a substantial relief in favour of the plaintiff though it is a lesser relief than the actual possession of the lands.

Considering all the circumstances we think that as both parties have succeeded partially, and probably equally in this litigation, it is desirable to modify our order as to costs by directing that each party do bear his own costs throughout.

No doubt there is great force in the contention of Mr. Akbari that the order as to costs was passed in the presence of both the parties and should not be reviewed. I agree that unless a strong case is made out for review of such an order passed in

the presence of both parties this Court will be reluctant to review it.

But no hard and fast rule can be set out, for review can be granted not only upon discovery of a new important matter but also upon sufficient cause being shown. This is wide enough to entitle the Court to review the order, if it is satisfied that the order of costs passed in the first instance was not a proper order.

There is another reason why a review in such a matter may,in the circumstances, be granted. It is this, that in an order as to costs the parties generally are, and particularly in the present case, were not heard; and the Court in delivering judgment passed the order at the end of it. No doubt the Court in passing that order and in making directions as to costs took into consideration all the circumstances, but the error in the discretion is not beyond the range of possibility and I confess that there was some misapprehension in this matter. There is no other way to rectify such matters except by review and that must always be after the decree has been prepared.

This view appears to be in consonance with that in the case of *Raja Leelanand Singh* v. *Raja Ram Narain Singh* (1). It is also in accordance with the general principle.

We, therefore, direct that the order relating to costs should be reviewed and as already stated, each party should bear his own costs. There will be no order as to the costs in these applications.

Application allowed.

(1) (1871) 15 W. R. 415.

A.I.R. 1922 Patna 2.

DAS AND ROSS, JJ.

Sashibhushan Kumar and others—Petitioners-Appellants

v.

Dwarka Prasad Marwari and others-Opposite Parties-Respondents.

A. No. 27 of 1920, decided on 28th April, 1921, from an Order of S. J., Bhagalpur, dated 5th January, 1920.

Civil P. C., O. 17, Rr. 2 and 3—Plaintiff's case failing on pleadings and plaintiff adducing no evidence—Court cannot act under R. 3.

When there are materials on the record on which Court can decide the case, the Court should proceed under Rule 3 and not under Rule 2. However where plaintiff's case fails on the pleadings and where plaintiff has adduced no evidence the Court ought not to take defendant's evidence so as to give it jurisdiction to act under Rule 3. (34 Calcutta 235) followed.

After opening of plaintiff's case his witnesses being absent a day's adjournment was allowed and on the adjourned date a fresh adjournment being applied for, was refused and the Court recorded the defendant's evidence and dismissed the suit on merits.

Held: that the dismissal under Order 17, Rule 3 is without jurisdiction as Rule 2 applied to the case.

[P. 3, C. 1.]

Sultan Ahmed and *Nirsu Narayan Sinha*—for Appellants.

Kulwant Sahay, D. N. Sircar, Jaganath Prasad—for Respondents.

Das, J.:—This is an appeal from the order passed by the learned Subordinate Judge of Bhagalpur on the 5th January, 1920, refusing to restore a suit which was dismissed by him under Order XVII, Rule 3, of the Civil Procedure Code. The application was made uuder Order IX, Rule 9.

The learned Subordinate Judge thought in the first place that an application under Order IX, Rule 9, was not maintainable inasmuch as he had proceeded under Order XVII, Rule 3. In the second place, examining the circumstances disclosed in the case he came to the conclusion that no sufficient cause was shown by the petitioner entitling him to an order for restoration of the suit.

I will first deal with the question of law raised. The order sheet shows that on the 10th November, 1919, the plaintiffs applied for adjournment of the suit which was refused by the learned Subordinate Judge. The order sheet then records the following order:—

"The case is opened. The plaintiffs apply for one day's adjournment to produce witnesses. I grant this short adjournment on the distinct understanding that the witnesses must be produced at 11 A.M. tomorrow."

Then on the 10th November, 1919, the order sheet records the following order:—

"The defendants are ready. The plaintiffs apply for time for 2 days with a wire attached to the application. I do not see why I should grant this time. A party cannot be allowed to take his own choice and produce evidence when he chooses to do so. There is no justification for the plaintiffs not being ready with witnesses in this old suit. I reject the petition as groundless."

Then it appears from the order sheet that the case was taken up the pleader for the defendants opened his case and called a certain number of witnesses after which the learned Subordinate Judge delivered judgment dismissing the suit with costs. The question arises, *viz.*, were the circumstances such as entitled the

learned Subordinate Judge to act under Order XVII, Rule 3 of the Code.

Order XVII, Rule 3, runs as follows:—

"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

The learned Government Advocate appearing for the appellant argues that he had no jurisdiction to act under Rule 3 but that he should have proceeded under Rule 2 which runs as follows:—

"Where, on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit."

Now in my view the case was one under Rule 2 and not one under Rule 3. There must be some difference between Rule 2 and Rule 3, the difference seems to me to be this: that when there are materials in the record on which the Court can decide the case the matter falls properly under Rule 3 and not under Rule 2.

In this case I will assume that the plaintiff's pleader opened the case: but he did not call any evidence but withdrew from the suit. It is true that the learned Subordinate Judge proceeded to record evidence called on behalf of the defendants but then he had no business whatever to adopt this course. If neither party adduced evidence the suit on the pleadings would fail, and, therefore, it was wholly unnecessary for the learned Subordinate Judge to direct the defendants to produce their evidence.

It seems to me that he called upon the defendants to produce the evidence in order to give himself jurisdiction to act under Rule 3. In my view the case fell under Rule 2 and he should not have called upon the defendants to adduce evidence in the case. My conclusion is supported by the decision of Mookerjee, J. in the case of *Mariannissa* v. *Ramkalapa Gorain* (1). The first point urged on behalf of the appellant must, therefore, prevail.

The second point is one of fact, namely, was there sufficient cause entitling the plaintiffs to an order for restoration. The case of the plaintiffs was that one of the plaintiff's Madan Mondal, was ill and his *karpardar* Ramdhari was in the Patna High Court.

The learned Subordinate Judge says tha Madan Mondal was only one of numerous plaintiffs and that there was no reason whatever why the others should not have been in Court to prosecute the suit; but then it may well be said that Madan Mondal was looking after the suit and that it was necessary for him to personally prosecute the same.

The learned Subordinate Judge thought that the case was an old one and the plaintiffs were not entitled to any indulgence, but I am not prepared to admit that the case was an old one. The suit was filed on the 14th November, 1918, and he dismissed it for default on the 11th November, 1919. The application was for two days time, and if he had granted the adjournment which was asked for by the plaintiffs, he could have disposed of the suit within a year of its institution. I cannot, therefore, regard the suit as an old one on the 11th November, 1919.

The other ground assigned by the learned Subordinate Judge is that "the plaintiffs were never ready before." I have carefully gone through the order sheet and it certainly does not support the conclusion of the learned Subordinate Judge. For instance, I find that on the 14th May, 1919, the case was adjourned to the 25th June, 1919, on the application of both parties. On the 25th June, 1919, it appears that the plaintiffs were ready to proceed with the suit, but that the Court was otherwise engaged and adjourned it to the 11th August, 1919.

It is perfectly clear that the plaintiffs were ready to proceed with the suit on the 25th June. On the 11th August, 1919, the plaintiffs applied for adjournment but because they applied for adjournment on the 11th August, 1919, it does not follow that the plaintiffs were never ready before. The order sheet shows that on the 25th June they were ready, and willing to proceed with the suit. Having considered the whole matter very carefully I have come to the conclusion that the learned Subordinate Judge should have granted two days time.

We set aside the order of the learned Subordinate Judge and restore the suit. The learned Subordinate Judge will fix a date peremptorily for the disposal of the suit and will dispose of it on the date fixed by him.

The appellants must pay the costs of the respondents both in this Court and in the Court below, and the costs must be

(1) (1907) 34 Cal. 235=5 C. L. J. 260.

aid on or before the date fixed by learned ubordinate Judge for the disposal of the ıit.

Ross, J:—I agree.

Order set aside.

A. I. R. 1922 Patna 4.

Ross, J.

Jitendranath Chatterjee and another—Plaintiffs-Appellants

v.

Jaku Mandar and others—Defendants-Respondents.

Appeals from Appellate Decree No. 709 of '20, 32 of 1921, decided on 29th June, 1921.

(a) *Civil P. C., O. 1, R. 3—Necessary party—peal by defendant—Only some of plaintiffs ıde parties—Appeal is incompetent.*

Where in an appeal by defendants only two of the ıintiffs were made respondents:

Held, as the two plaintiffs that were made respondents could not have maintained the suit for rent for holding, appeal against these two plaintiffs only incompetent. It seems plain that a person who is ıecessary party to a suit must also be a necessary rty to the appeal. [P. 4, C. 2.]

(b) *Lease—Construction—Rent-in-kind fixed—t value also given—Lease is a Manhunda lease.*

Where rent is fixed in a lease deed in kind, but at end of the lease, the price of the grain to be ·en is also approximately given.

Held that the rent payable is a rent-in-kind, and t the consequence of non-delivery as covenanted that the lessee is liable for the market value of crops on the date of the delivery. [P. 5, C. 1.]

Sushil Madhab Mullick, N. C. Sinha, B. N. ıtter and *S. S. Bose*—for Appellants.

Naresh Chandra Ray and *S. N. Bose*—for ıspondents.

Ross, J.:—This is an appeal by the ıintiffs in a suit in which they claimed ·. 1,349 on account of rent for 41 Bighas, Kathas of land for the years 1322 to 1325. ıe land was held by the defendants under Manhunda Settlement for 3 years from 10 to 1312 and they have been holding er. The Munsif gave a decree in full but e learned District Judge modified the cree on a construction of the lease.

The first point taken in second appeal is ıt the appeal to the District Judge was ·ompetent and his decree a nullity because e suit was brought by 4 plaintiffs while ly two of these were made respondents in e appeal. In support of this contention e cases of *Bejoy Gopal* v. *Umesh Chandra se* (1), *Dharanjit Singh* v. *Chandeshwar ısad Narayan Singh* (2) and an observation the judgment of the Privy Council in *Raj Chander Sen* v. *Ganga Das Seal* (3) have been referred to. On the other side has been cited the decision in *Upendra Kumar Chakravarti* v. *Sham Lal Mandal* (4). This decision appears to be in conflict with the other authorities and contrary to the general course of decision.

It seems plain that a person who is a necessary party to a suit must also be a necessary party to the appeal. The two plaintiffs who were made respondents to the appeal could not have maintained the suit which was a suit for rent for one holding, and the appeal against these two plaintiffs only is in my opinion incompetent.

It was attempted to support the decree on the ground that the plaintiffs are brothers governed by the Dayabhaga School of Law and that the two who were made respondents are the senior members of the family, but the decree appealed against was not a decree for specific sums in favour of each plaintiff but a single decree in favour of all. The appellants were not entitled to divide the amount of the decree by two, and to appeal against two of the plaintiffs only in respect of half of the sum decreed.

Reference was also made to Order 41, Rule 4, but that has plainly no application as it provides for an exactly opposite set of circumstances to the present. I therefore hold that the appeal was incompetent and that the decree passed in appeal is a nullity.

The second point is on the merits of the case. It is contended that on the true construction of the Kabuliyat the Munsif's decree was right. The settlement is expressed to be a Manhunda Settlement. The stipulation as to rent is as follows:—

"We shall in respect of this Kamat land deliver to the Malik Zamindar aforesaid at his place, grains, kalai and Jai, 2 Maunds per bigha on the average, total 83 Maunds 28 seers by way of rent in this way, *viz.*, each year in the month of Poos 50 Maunds of Kalai and in the month of Baishak 33 Maunds 28 seers Jai (oats)."

The term of the settlement is then set forth and provision is made for what is to be done in the case of excess or defect in the area under cultivation, the rent being increased or decreased at the aforesaid rate of 2 Maunds of Jai per Bigha. Then at the end of the lease the following words occur: "the price approximately is fixed at Rs. 2-4-9 for Kalai per maund,

1) (1902) 6 C. W. N. 196.
2) (1907) 5 C. L. J. 393=11 C. W. N. 504.
(3) (1904) 31 Cal. 487=31 I. A. 71=8 Sar. 623 (P.C.).
(4) (1907) 34 Cal. 1020=6 C. L. J. 715=11 C. W. N. 1100.

and Rs. 2-3-0 for Jai per maund," and in the schedule "approximate rent comes to Rs. 185."

Various cases have been cited on the construction of leases more or less similar to the present lease and in these cases different views have been taken. As these decisions proceeded on the terms of the contracts which were there being construed they are not of much assistance in the present case; but it may be noted that in *Baneswar Mukherji* v. *Umesh Chandra Chakraverti* (5) stress was laid in construing the document on the fact that there was an express provision relating to the delivery of paddy in the month of Poos.

A similar provision is found in the present lease. There is no doubt that the lease is a Manhunda lease and that the rent payable is rent-in-kind. There is no provision, as in some of the cases that were cited, that on failure to pay rent-in-kind, rent at a particular cash rate shall be payable. It is contended that the last clause of the lease, which I have already quoted, has this effect. It is not so expressed and in my opinion will not bear that interpretation.

In the first place this clause is not inserted along with the clause where the rent is set forth but in a different part of the lease altogether, remote from the clause providing for the payment of rent. In the second place the price at which the produce is valued is not stipulated to be payable in default of delivery of produce. Thirdly in both places where cash is mentioned the word "approximate" is used.

No one grants a lease at an approximate rent and the fact that the word "approximate" is used in connection with the terms relating to cash is a clear indication that these terms are not rent or any substitute for rent. The rent is produce deliverable in the month of Poos 50 Maunds of Kalai and in the month of Baisakh 33 maunds 28 seers of Jai. It seems to me that the clear consequence of non-delivery of produce as covenanted is that the defendants are liable for the market value of these crops at the time when they were deliverable.

I hold therefore that the District Judge has erred in his construction of this lease and that the appeal ought to have been dismissed.

The result is that the present appeal must be decreed with costs, the decree of the District Judge set aside and the decree of the Munsiff restored.

Appeal alowed.

(5) (1910) 37 Cal. 626=7, I. C. 875.

A. I. R. 1922 Patna 5

JWALA PRASAD, J.

Balkesar Singh—Petitioner

v.

King-Emperor—Respondent.

Criminal Revision No 1 of 1922, decided on 24th January, 1922 from an order of Dt. Magte., Daltongunj, dated 28th November, 1921.

(a) *Criminal P. C. S. 238 --Conviction of accused on a different charge from that for which he is tried is illegal.*

The accused was convicted under Section 457, I. P. C. though the charge of theft framed against him could not be sustained. Section 238, Cr. P.C. empowers the Magistrate to convict the accused of a different charge from what he was originally accused of, provided the accused was not in any way prejudiced by the conviction on the new charge.

An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has knowledge of this, he must be seriously prejudiced in his defence. It is the bounden duty of the Magistrate in such cases to draw up a charge (41 Cal. 743) followed : *Behari Mahton* v. *Queen Empress* (11 Cal 106) distinguished [P. 7, C. 2.]

(b) *Criminal P.C., S. 355, Cl. 2—Memorandum if not signed by the Magistrate vitiates trial.*

Where the substance of the evidence taken by the Magistrate was very careful and complete, but was not signed,

Held, that the error vitiated the trial. [P. 7, C. 1.]

(c) *Criminal P. C., S. 342—Examination of accused—Written statement will not take place of.*

The written statement filed by the accused cannot take the place of his examination after the evidence of the prosecution as required by the section. [P. 6, C. 1.]

Devaki Prasad Sinha—for Petitioner.

Assistant Government Advocate—for the Crown.

Jwala Prasad, J. :—The rule issued by a Division Bench of this Court is directed against an order of the Deputy Magistrate of Daltongunj, dated the 28th November, 1921, in a case convicting the accused of an offence under Section 457, I. P. C. and imposing upon him a sentence of three months' rigorous imprisonment.

The learned Vakil appearing on behalf of the accused impugns the aforesaid conviction and sentence upon the ground that the trial held by the Magistrate was vitiated by certain illegalities and irregularities. The first ground urged is that the Magistrate omitted to examine the accused under Section 342, Criminal Procedure Code after the close of the prosecution evidence before the accused was called upon to enter into his defence.

The learned Vakil has referred to the certified copy of the record of the case prepared in the form kept under Section 263 of the Code of Criminal Procedure, and contends

that from the copy it does not appear that there was any plea of the accused recorded far less, when he was examined, under Section 342 of the Code.

The original record does show that the accused's plea was recorded in the column headed "The plea of the accused and his examination (if any)." The heading and the entry made by the Magistrate in this column appear to have been omitted on the certified copy granted to the accused filed along with the application to this Court. The certified copy contains the columns both before and after the aforesaid column relating to the plea of the accused and his examination. The copy was applied for on the 14th December and was granted on the 21st December.

It is not possible to find out the reason how the omission of this important column in the copy granted to the accused occurred. This, however, is a matter for the Magistrate to enquire and investigate. I must take the record as it is and hold that the plea of the accused and his examination was recorded in the appropriate column. The entry in that column runs as follows :—

"The accused says 'I have not committed any offence and the case is false. I cannot say why the complainant has brought this false case. I would file the written statement.'.....Later, a written statement was filed for the accused. It is enclosed with this record." There is nothing on the record to indicate when the accused was examined namely whether before or after the close of the prosecution case. This entry is not dated. After the close of the prosecution evidence the Magistrate's signature appears at the end of the last witness for the prosecution and is dated the 16th November, 1921. Thereafter the entry of the Magistrate on that date is "Evidence for the prosecution closed. The accused is not ready with his evidence and wants his witnesses to be summoned.....Summon the abovenamed witnesses for the 28th November, 1921. The accused on bail as before. All prosecution witnesses discharged."

It appears that a written statement on behalf of the accused was filed on that very day as is mentioned in the column referred to above relating to the plea of the accused and his examination.

It has been settled by authorities that a written statement filed by an accused person cannot take the place of his examination under Section 342, *vide* the case of *Raghu Bhumij* v. *King-Emperor*(1), and the decisions referred to therein. Therefore, the written statement filed by the accused in the present case could not, absolve the responsiblity of the Magistrate to examine the accused under Section 342 of the Code. The note made in the column referred to above only shows that, first, the accused was examined and his plea was recorded, and, afterwards the written statement was filed by him. It does not appear that he was examined after the close of the prosecution case.

The learned Deputy Commissioner in his letter No. 179 dated the 12th January, 1922, addressed to the Assistant Registrar of this Court, refers in paragraph 2 to the explanation given by the trying Magistrate to the effect that there is a column in the summary trial form, headed "The plea of the accused and his examination (if any)" in which the full statement of the accused after examining the principal prosecution witnesses was recorded, adopting the procedure of the warrant case. Thus the trying Magistrate contends that this ground does not seem to prevail.

But the statement of the accused in the aforesaid column according to the trying Magistrate, was recorded after examining the principal prosecution witnesses; the Magistrate does not say, after all the prosecution witnesses. The Law requires that the examination of the accused should take place after the close of the prosecution evidence and before the accused is called upon to enter to his defence; *vide Raghu Bhumij* v. *King-Emperor* (1), in *Suraj Pande* v. *King-Emperor* (2).

The offence for which the accused was being tried was that triable in a warrant case and, therefore, the procedure for warrant cases would apply to the trial of the case though a summary one under Section 262, Criminal Procedure Code. It was pointed out in the case of *Muhammad Hussain* v. *King Emperor* (3) Calcutta, (703), that the examination of the accused under Section 342 is mandatory.

Therefore in the absence of anything on the record to show that the requirements of Section 342 were complied with, and in view of the explanation of the trying Magistrate referred to above, I hold that the trial is vitiated on account of the illegality referred to above. The record prepared in the case is further defective inasmuch as the memorandum of the substance of the evidence of each witness has not been signed by the Magistrate as is required by Section 264 of the Criminal Procedure Code.

That section prescribes the mode in which the record of the evidence of witnesses should be prepared in summary trials in cases of the off-

(1) (1920) 1 P. L. T. 241=58 I.C. 49=5 P.L.J. 430.

(2) (1920) 1 P. L. T. 641 = 58 I. C. 521 = 1920 P. H.C.C. 281.

(3) (1914) 41Cal. 743=22 I. C. 766=18 C.W.N. 1274.

ences mentioned in sub-Section (1) of Section 260, Clauses (*b*) to (*m*) when tried by the Magistrate of 1st or 2nd class. The offence in the present case was one under Section 457, I. P. C. which is one of the sections mentioned in Section 261 (i) of the Cr. P. C. Clause (1) of Section 355 says that the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

This the Magistrate has done in the present case. He has prepared a memorandum of the evidence of each witness but he has not signed the said memorandum as is required by Clause (2) of the section which says: 'Such memorandum shall be written and signed by the Magistrate with his own hand and shall form part of the record.'

It has been held that non-compliance of the requirements of Section 355 constitutes an illegality which must vitiate the trial. But for the aforesaid illegalities arising out of the non-compliance of Section 342 and 355 the record prepared by the Magistrate appears to be very careful and complete. He has recorded in sufficient detail the evidence of all the prosecution and defence witnesses, and it is, therefore to be regretted that the aforesaid errors should have been committed so as to vitiate the careful trial held by him.

The learned Vakil on behalf of the accused then submits that the conviction of the accused under Section 457, I. P. C. is bad inasmuch as the Magistrate has found that the prosecution failed to establish the intention with which the house trespass was committed by the accused, namely, for the purpose of committing theft and consequently it was not open to the Magistrate to convict the accused of an altogether different intent, namely, to commit adultery.

The case of the complainant was that the accused had entered the house with a view to commit theft and he sought to prove it by showing that the granary was broken and some grains were lying near him. He further sought to support his case by the prosecution witnesses. In the cross-examination on behalf of the accused, it was suggested that the complainant was displeased with the accused for a suspicion of having illicit connection with the wife of the former and that he had threatened the accused to implicate him in a false case. The prosecution denied the suggestion.

In the circumstances of the case, the Magistrate came to the conclusion that the intention of theft with which the accused was charged was concealed by the prosecution and that the real intention of the accused was to carry an intrigue with the wife of the complainant. The reason given by the Magistrate for coming to the conclusion appears to be sound; but the question is whether the accused could be convicted of a different intention than the one of which he was charged.

Section 238, Cr. P. C. empowers the Magistrate to convict the accused of a different charge from what he was originally accused of, provided the accused was not in any way prejudiced by the conviction on the new charge. In the case of *Karali Prasad Guru* v. *King Emperor* (4) it was held that the accused was not prejudiced inasmuch as the accused himself definitely set up the plea of having entered the house on account of previous intrigue and upon the invitation of the widow who was occupying the house in question.

Mookherjee, J., fully recognised the proposition laid down in the case of *Behari Mahton* v. *Queen Empress* (5) that " an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence: " and following the dictum of Cough, C. J. in *Reg.* v. *Govindas Haridas* (6) that the nature of the case made at the trial against the prisoner, the evidence that was given and the line of defence set up by him, are all matters to be taken into consideration.

His Lordship held in that case that in the circumstances of the case and considering more particularly the defence set up by the accused and the evidence produced by him, the accused was not at all prejudiced.

In the present case the prosecution concealed the intention and when opportunity was given to it by suggestions made in the cross-examination, it still refused to accept the suggestions. The accused did not admit that he had entered the house. He pleaded *alibi* and he denied the occurrence altogether. He simply suggested that the case was falsely lodged against him on account of the suspicion by the complainant that the accused was carrying on an intrigue with his wife.

Therefore upon the case of the prosecution and on the line adopted by the defence, the accused could not be said to have any knowledge of the charge of which he has now been convicted, namely, of having entered the house with the intent of committing adultery.

This was the view taken in an exactly similar case in *Mohammad Hossain* v. *King Emperor* (3). The observations made in that case are so appropriate that I am tempt-

(4) (1917) 44 Cal. 358 = 35 I. C. 984 = 20 C. W. N. 1075.
(5) (1885) 11 Cal. 106.
(6) 6 B. H. C. R. 76 (Cr.).

ed to quote *in extenso*:

"Then again the charge was with intent to commit theft, as alleged by the prosecution in their evidence, and in their evidence they did not aver that there was any other reason for the house-breaking. It was the defence which tried to elicit from the prosecution witnesses that their was some familiarity between the accused and a woman in the complainant's house. It is, therefore, on the defence that the conviction rests and not on the prosecution.

"There can be no doubt that when the learned Magistrate found that the charge of theft or the charge of house-breaking with a view to commit theft broke down, and it appeared that there was another object, it was his bounden duty to have given the accused notice of that by drawing up a charge clearly stating what it was that he was accused of doing. The trial appears to us to have been vitiated by these errors, and the conviction and sentence are, therefore, set aside."

The question then arises as to whether a re-trial should be ordered. Herein also I would adopt the views of their Lordships in the case referred to above: "We do not order a re-trial because the accused has already been 21 days in jail, and we consider that it is sufficient to meet the ends of justice in this case."

In the present case the accused has been in jail for two months and he was sentenced only for 3 months.

The petitioner will be released and set at liberty.

Conviction and sentence set aside.

A. I. R. 1922 Patna 8.

JWALA PRASAD, J.

Ishwar Das Varshni—Accused-Petitioner

v.

King-Emperor—Opposite Party.

Cr. Rev. No. 553 of 1921, decided on 14th December, 1921, against an order of the Addl. Dpty. Com., Dhanbad.

Railways Act (IX of 1890), S. 108—Pulling the chain—Overcrowding in Inter class by III class passengers—Pulling the chain was justified.

Where a passenger in the Inter class pulled the chain because it was overcrowded and because III class passengers had entered in,

Held: he was justified in pulling the chain and in stopping the train for enforcing his right to have the compartment vacated so as to bring down the number of passengers therein within the maximum limit prescribed by Section 63 of Railway Act.

Yunus and *S. C. Mazumdar*—for the Petitioner.

Jwala Prasad, J.:—The petitioner has been convicted under Section 108 of the Railways Act (Act IX of 1890) for having pulled the chain of his compartment which caused the train to stop.

The chain was intended to be used as an alarm signal. The reason for pulling the chain is said by the accused to be that the compartment had become overcrowded on account of 70 passengers having entered into it, whereas the compartment was marked for 27 passengers only. He stated that the compartment in question was an Inter Class Compartment, whereas most of the passengers had only 3rd class tickets. He further states that at Dhanbad when his compartment became overcrowded he complained to the Railway employees but received no attention, and then when the train started he felt suffocating sensation and consequently he pulled the chain in order to stop the train.

The facts are not disputed; but it is said that they do not exonerate the accused. The Magistrate evidently thought that there should have been a more serious case in order to entitle the accused to pull down the chain, such as that stated by the Guard, namely, murder or fire. Section 108 of Railways Act runs as follows:—"If a passenger, without reasonable and sufficient cause makes use of or interferes with any means provided by a railway administration for communication between passengers and railway servants in charge of a train, he shall be punished with a fine which may go up to Rs. 50."

It is evident that no hard and fast rule can be laid down as to what must constitute reasonable and sufficient cause and that it must depend upon the circumstances of each case whether there was such a cause as to justify a passenger interfering with the pulling of the chain. No doubt the case "murder" 'fire' stated by the Guard is an extreme case. In order to prevent any danger to the health and life of passengers the Act provides in Section 63 that the limit of passengers to occupy a compartment must be fixed and must be exhibited in some conspicuous place inside or outside the compartment, and the Railway Company is enjoined to comply with the provisions of Section 63 on pain of a fine of Rs. 20 per day under Section 93 of the Act.

A corresponding obligation has been cast under Section 109 of the Act, upon passengers to obviate entering a compartment which already contains the maximum number of passengers exhibited therein or thereon. These provisions of the Act therefore confer a right upon the occupants of a compartment to resist the entry of pas-

sengers, and in the present case the compartment had already contained the maximum number allowed under the aforesaid rules.

In order to enforce this right every passenger is entitled to invoke the aid of the Railway Officers in any station, or of the officer in charge of the train when it is in motion or is not in any station. In the present case petitioner's requests to the persons in charge of the Dhanbad Station proved abortive and therefore he had no alternative but to draw the attention of the Guard when the train moved and when he found that he was packed to suffocation.

He was therefore justified in pulling the chain and in stopping the train for enforcing his right to have the compartment vacated so as to bring down the number of passengers therein within the maximum limit prescribed. Therefore in the circumstances of the present case the petitioner did not act without reasonable and sufficient cause. Section 108 consequently does not apply.

The conviction of the petitioner is illegal and is set aside. The fine if already realised should be refunded.

The railway people were guilty of negligence in not carrying out the provisions of the Act which are meant entirely for the safety and comfort of passengers and instead of thanking the petitioner for having drawn their attention to it they prosecuted him and thus transferred their own liability to the shoulder of the petitioner.

Conviction and sentence set aside.

A. I. R. 1922 Patna 9.

MULLICK AND ROSS, JJ.

Henry Hill and Co. and another—Plaintiffs-Appellants

v.

Sheoraj Rai and others—Defendants-Respondents.

L. P. A. No. 7 of 1921, decided on 25th November, 1921, from an order of Jwala Prasad, J.

(a) *Landlord and Tenant—Rights of fishery—Pass to tenant as incidental to the lease.*

The ownership of free natural elements such as air and water and of all wild animals living therein is obtained by occupancy or appropriation. It is a right incidental to the ownership of land upon which the air or the water lies. [P. 10, C.2.]

A *raiyat* taking a lease of a fishery only cannot acquire an occupancy right therein, but if he takes a lease of a holding of which part is under water, then his right to the acquisition of occupancy rights in the entire holding, inclusive of the portion which forms the bed of the water cannot be defeated.

The landlord of course may reserve the right of fishery when letting out the land, but such a reservation is, strictly speaking, a re-grant of the right by the tenant to the landlord.

The position of *Birtdar*, who is a tenure-holder is even stronger than that of on occupancy *raiyat*; he enjoys all the rights of his lessor and as between himself and the plaintiff lessee there can be no doubt that, in the absence of any express reservation, he is entitled both to the water and to the fish.

(b) *Bengal Tenancy Act, S. 23*—Raiyat *is entitled to fishery rights on the land leased.*

The Bengal Tenancy Act secures the *raiyats* a limited ownership in the soil and unless landlord expressly reserves his rights to appropriate the water and the fish which come upon his land during the periods of inundation the *raiyat's* right to appropriate the same cannot be restricted. (13 M. I. A. 467) applied. [P. 10, C. 2.]

(c) *Limitation Act—Art. 144—Fishery—Acquisition of right to fishery—Period is 12 years.*

The right of fishery is an interest in land and the period of limitation for getting title by adverse possession is 12 years under Art. 144 and consequently user for 20 years which is required under Section 26 of the Act is not necessary for getting absolute title. [P. 11, C. 2.]

(d) *C. P. C., O. 1, R. 3—Suit by lessee of zamindar against tenant—Suit about fishing right—Zamindar is not a necessary party.*

As the lease of the entire zamindari carries with it the right to fishery unless it is reserved, the zamindar is not a necessary party to a suit by the lessee against the tenants claiming right of fishery over their own lands by virtue of adverse possession. [P. 11, C. 2.]

Manuk and *Panchanana Banerji*—for Appellants.

Kulwant Sahay and *Shambhu Saran*—for Respondents.

Mullick, J.:—This second appeal arises out of a claim to a *jalkar* or fishery in *mauza* Madhuban within the *zamindari* of the Bettiah Raj. The 1st party plaintiffs, Messrs. Henry Hill and Company, are proprietors of an indigo factory trading under the name of Turkaulia Limited. They hold *mauza* Madhuban under the Bettiah Raj by virtue of a *mukarrari*

istimurari lease. The 2nd party plaintiff is a *thikadar* under the 1st party plaintiff in respect of the *jalkar* rights in *mauza* Madhuban for the year 1325 F. S. at an annual rental of Rs. 516.

The first and 2nd party defendants are occupancy *raiyats* and the 3rd party defendant is a *Birtdar lakheraj* tenure-holder, in respect of certain plots of land in the *mauza* which become heavily flooded during the rains every year. The 2nd party plaintiff claims the right to fish in the above plots and the defendants having resisted the erection by him of *baris* and *chilwans* which appear to be machinery for catching fish, the plaintiffs seek the following reliefs:—

(1) For a declaration that they have by right of easement, prescription and custom the right to put up *baris* and *chilwans* ;

(2) For a permanent injunction restraining the defendants from interfering with them ;

(3) For damages.

The Munsiff and the 1st appellate Court dismissed the suit. There was then a second appeal which was heard by a single Judge of this Court, but before him also the plaintiffs were unsuccessful. They have now preferred the present Letters Patent Appeal.

With regard to the question whether the right of fishery in dispute belongs to the plaintiffs or to the defendants, the Munsiff held that the right belonged to the tenants. On the other hand, the District Judge on appeal accepted the proposition that—

" a right of fishery in an estate belongs to the proprietor just as the minerals below the surface belong to him and that when land is settled with a *raiyat* for the purposes of cultivation, an occupancy right which may be occurred by the *raiyat* does not include a right of fishery over the land settled, unless such right is expressly included in the settlement."

He held that the Bettiah Raj were the proprietors of the fishery and that it had not been shown that they had transferred their right to the plaintiffs.

The learned Judge of this Court on second appeal disagreed with the learned District Judge on the question of title but he agreed that the District Judge's other two grounds for dismissing the suit were sound, that is to say, firstly, that the plaintiffs were not entitled to get any declaration in the absence of the superior landlord, the Bettiah Raj, and, secondly, that they had failed to prove their possession and enjoyment of the fishery right within the statutory period of limitation.

With regard to the *Birt* lands, the learned Judge of this Court was of opinion that the plaint did not disclose any cause of action as against the *Birtdar*, and that on that ground also the suit against the 3rd party defendant had been rightly dismissed.

In the course of his argument before the learned Judge, Mr. Manuk, the learned Counsel for the plaintiffs-appellants, asked for leave to withdraw the appeal with liberty to bring a fresh suit under Order 23, Rule 1 of the Code of Civil Procedure, but the learned Judge refused that prayer.

In my opinion, the right of fishery in this case clearly belongs to the tenants. The ownership of free natural elements, such as air and water and of all wild animals living therein, is obtained by occupancy or appropriation. It is a right incidental to the ownership of the land upon which the air or the water lies, just as much as is the right to take the silt deposited by rivers or the lava thrown up by a volcano or the rain or snow falling from the sky.

The question is, what are the respective rights of the superior landlord represented in this case by his lessee, the *mukarraridar*, on the one hand and the defendants, the persons in physical possession of the land, on the other? The analogy drawn from sub-soil rights is of no avail, for here the question is, whether the right to cultivate the surface carries with it all the rights arising out of and incidental to the ownership of the surface.

Now Section 23 of the Bengal Tenancy Act declares that an occupancy *raiyat* may use the land in any manner which does not materially impair the land or render it unfit for the purposes of the tenancy but shall not be entitled to cut down trees in contravention of any local custom.

Section 90 enacts that a landlord can enter an occupancy holding under certain conditions for the purpose of measuring it and implies that he has no authority otherwise to enter without *raiyat's* permission. The Act secures the *raiyat* a limited ownership in the soil and unless the landlord expressly reserves his right to appropriate the water and the fish which come upon his land during the periods of inundation, it seems to me that the *raiyat's* right to appropriate the same cannot be restricted.

Such a restriction might be wholly inconsistent with the purpose of the tenancy, if it should affect the *raiyat's* right to drain the land for the purpose of agriculture, and the illustration to Section

7 of the Indian Easements Act, which though not applicable to this Province is based on general principles, must in my opinion contemplate that where the land is tenanted, the tenant has the right of the owner in respect of water passing or percolating over or through his land.

That the *raiyat* has substantial rights other than a mere right to cultivate is further clear from Act XI of 1825, which declares that the *raiyat* and not the landlord is entitled to alluvial accretions, and as has been observed in *Lopez* v. *Madan Mohan Thakur* (1), a deposit of silt directly upon the submerged site is at least as much an accretion and an annexation vertically to the site as it would be an accretion and annexation longitudinally to the site if it had formed the frontage to a river.

The position of the *Birtdar* who is a tenure holder is even stronger ; he enjoys all the rights of his lessor and as between himself and the plaintiffs there can be no doubt that in the absence of any express reservations he is entitled both to the water and to the fish.

English cases on this point are not perhaps of much assistance, but *Jones and others* v. *Davies* (2) is authority for the proposition that the right of fishery is part of the general right to the soil and water unless the lessor specially reserves it, and Lord Alverstone, C. J. deals with the proposition as follows :—

"I think the law on the point is correctly stated in Paterson's Fishery Laws in the passage that has been read, namely, that the right of fishery goes to the tenant under the lease and for the very good reason given by Paterson that the lessor could not without express power being reserved come on the lands or the banks of the stream to exercise the rights of fishing."

I think this is the law in India also. A proprietor can lease out a fishery without giving any rights to the soil or the bed upon which the water lies and he can then let out the land subject to the rights of the lessee of the fishery. If, on the other hand, he lets out the land first he cannot claim the right to the water and fish that come upon the land afterwards.

A *raiyat* taking a lease of a fishery only cannot acquire an occupancy right therein, but if he takes a lease of a holding of which part is under water then his right to the acquisition of occupancy rights in the entire holding, inclusive of the portion which forms the bed of the water, cannot be defeated. The landlord of course may reserve the right of fishery when letting out the land but such a reservation is, strictly speaking, a regrant of the right by the tenant to the landlord.

As to the Indian authorities cited in the Court below, it is admitted by the learned counsel for the appellants that none of them bear directly upon the point before us except the decision of Mr. Justice Sultan Ahmed in *Surendra Mohan Sinha* v. *Sarba Lal* (3) where the learned Judge sitting as a single Judge observes that the settlement of land carries with it the right to fish when there is water upon it.

The present case is, therefore, chiefly one of first impression but the result at which I have arrived is that, there being no proof of any re-grant by the tenant to the lessors of the right of fishery, the plaintiffs must fail unless they can show that they have acquired that right either by adverse possession or by custom.

Now in regard to adverse possession, the learned District Judge had not expressly determined the period for which adverse possession must be shown. In our opinion the right of fishery, in this case is an 'interest' in land and the period of limitation is 12 years under Article 144 of Schedule I of the Indian Limitation Act. It is not necessary for the plaintiff to prove user for 20 years which is required by Section 26 of the Act.

The learned District Judge seems to have been of opinion that the question of adverse possession as against the *raiyat* and *Britdar* defendants did not arise, because the ownership of the fishery being still in the Bettiah Raj, the plaintiffs could not establish any title by adverse possession without making the Raj a party to the suit.

In our opinion, this was an erroneous view and the plaintiffs were entitled to show that they had acquired a valid title as against the tenant irrespective of the title of the superior landlord. Moreover, it is expressly stated in the plaint that the plaintiffs are in the enjoyment of the entire *zamindari* right appertaining to *mauza* Madhuban and there is no allegation in the written statements that the right of fishery was reserved by the landlord.

In these circumstances, it is not clear why the Bettiah Raj is a necessary party to this suit. In my opinion, the lease of the entire *zamindari* right carries with it the fishery right as well.

Then with regard to the question of custom, the learned District Judge finds that the oral evidence adduced by the plaintiffs is insufficient but that the books and

(1) (1870) 13 M. I. A. 467=14 W. R. 11=2 Suth. 336=2 Sar. 594.

(2) (1902) 66 J. P. 439=86 L. T. 447=20 Cox, C. C. 184.

(3) (1920) 57 I. C. 69.

papers kept by the Factory show that the fishery was regularly let out to the *thikadars*.

The learned Judge, however, comes to no definite finding whether the plaintiffs have proved a custom that the right to fish in the disputed area lay, not with the tenants but with the superior landlord and his lessees. It is necessary for a proper trial of the case that there should be a clear and distinct finding upon this point also.

Here again the learned Judge was doubtless influenced by the view that in the absence of the Bettiah Raj, the question of custom could not be raised; but as I have observed in dealing with the question of adverse possession that view in my opinion was erroneous.

Mr. Kulwant Sahay on behalf of the tenants urges that no case of adverse possession or acquisition of title by custom as against the tenants was made either in the trial Court or before the learned District Judge, but in my opinion, the point is directly covered by issues 2 and 3 and there is nothing in the pleadings to show that the plaintiff claimed to have derived his rights by adverse possession against the landlord. In my opinion, the question was directly raised as between the plaintiffs and the tenants and the learned District Judge ought to have come to a finding upon it.

With regard to the *Birtdar* defendant, it is true that paragraph 6 of the plaint does not allege any dispossession from plot No. 15282 which comprises the *Birt* tenure, but in paragraph 2 the plaintiffs assert their right to fish over this plot, and in paragraph 6 they assert that the *Birtdar* defendant joined the other defendants in preventing them from fishing in plots Nos. 15285 and 15286 which comprise the holdings of these defendants. If the 3rd party defendant obstructed the plaintiffs with a view to exclude the plaintiffs from his lands also, there was a complete cause of action against him.

The result is that, in my opinion, the suit has been properly framed but there has been no proper trial in the first appellate Court of two material questions, namely, (1) whether the plaintiffs have acquired any right by adverse possession, and (2) whether they have acquired title by custom.

The appeal will, therefore, be remanded to the District Judge for a clear finding upon the evidence already recorded as to both these points. The appeal will remain on the file of this Court and will be fixed for hearing on the 1st February, 1922 by which date the findings should be returned to this Court.

Costs of this hearing will abide the result

Ross, J.:—I agree.

Case remanded.

A. I. R. 1922 Patna 12.

ADAMI, J.

Madhusudan Das and another—Petitioners

v.

King-Emperor—Respondent.

Criminal Revision Nos. 534 and 535 of 1921, decided on 20th December, 1921.

Penal Code, S. 379—Act done under a bona fide claim, whether doubtful—Conviction is not justified.

Where some persons were convicted under Section 379 for cutting certain trees and it was doubtful whether the cutting was done under a *bona fide* claim.

Held: the conviction was not justified; they must in any case have the benefit of the doubt.

Manuk—for Petitioners.

Adami, J.:—The petitioners have been convicted under Section 379, Indian Penal Code and sentenced to pay a fine of Rs. 30 each by the Deputy Magistrate of Balasore.

A complaint was laid against them that they as servants of the *Mahanth*, had cut down and removed certain trees from the complainant's holding for the purpose of the repair of the *Math*. The learned Deputy Magistrate found that four trees had been cut by the petitioners and then proceeded to discuss whether the rights in the trees belonged to the landlord or to tenant. He had some difficulty in coming to a finding on this point and then came to a decision that a finding was not really necessary because the petitioners had cut the trees on their own account and not as servants of the landlord.

Mr. Manuk for the petitioners has pointed out that from the very start the case of the complainant has been, as shown in the complaint and in the evidence of the witnesses, that these trees were cut down by the petitioners on behalf of the *Mahanth* and for the purposes of repair of the *Math* property. It is thus evident that the learned Deputy Magistrate was not justified in changing the case of the prosecution and finding that the petitioners were ordinary thieves.

As to the question of the trees there is some doubt in most parts of the province as to the possession of trees standing on tenants' holding. There have been cases in which it has been decided that, where a tenant cuts the trees

on his holding without the landlord's consent and *mala fide*, the tenant commits theft. The trees were claimed by the *Mahanth* as his and he also claimed a right to cut them. There had been some difference between the *Mahanth* and his tenants and it seems that owing to this enmity the *Mahanth* determined to exercise his rights and cut trees from the holding.

Whether there was or was not this right is one which it is difficult for a Criminal Court to decide and it may well be held that the cutting was made by the servants of the *Mahanth* on a *bona fide* claim of right to cut those trees. Under the circumstances of this case I am of opinion that the conviction of the petitioners under Section 379, Indian Penal Code was not justified. They must in any case have the benefit of the doubt on the point whether the cutting was done under a *bona fide* claim.

The petition is allowed and the petitioners will be acquitted and the fine if paid refunded.

Conviction and Sentence set aside.

A. I. R. 1922 Patna 13 (1).

COUTTS, J.

Raghubar Singh and others — Appellants

v.

Jethu Mahton—Respondent.

L. P. Appeal 3 of 1921, decided on 9th February, 1922.

Court Fees Act, S. 4—Letters Patent Appeal—No Court-fee is necessary.

Section 4 of the Court Fees Act does not entitle the High Court to levy Court-fees on Letters Patent Appeals and there being no other law under which they can be levied, such appeals must be accepted without Court-fees. [P. 13, C. 2.]

Order:—The question for decision is whether Court-fee is payable on a memorandum of appeal under Section 10 of the Letters Patent. Up to now Court-fees have been levied but it is contended that the only law under which Court-fees can be levied is Section 4 of the Court Fees Act and that this section does not contemplate payment of Court-fee in the case of an appeal from the decision of a single Judge of the High Court.

Section 4 of the Court Fees Act says "No document of any of the kinds (specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction. *Or in the exercise of its jurisdiction as regards appeals from the judgment of two or more Judges of the said Court or of a Division Court*..... unless in respect of the document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

In this High Court so far as I am aware no Division Court has ever been constituted, and in any case in my opinion, a Division Court must, under the law as it stands at present, consist of at least, two Judges for Section 108 of the Government of India Act enacts that

"(1) Each High Court may by its own rules provide, as it thinks fit, for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the High Court of the original and appellate Jurisdiction vested in the Court. (2) The Chief Justice of each High Court shall determine what Judge in each case is to sit alone, and what Judges of the Court whether with or without the Chief Justice are to constitute the several Division Courts."

Section 4 of the Court Fees Act, therefore, does not entitle the High Court to levy Court-fees on Letters Patent appeals and there being no other law under which they can be levied, such appeals must be accepted without Court-fees. I feel convinced, however, that it was never intended that Letters Patent appeals should be filed without Court-fees and I would suggest that the matter be brought to the attention of the legislature.

Order accordingly.

A. I. R. 1922 Patna 13 (2).

JWALA PRASAD, J.

Kamla Prasad Singh —1st Party-Petitioner

v.

Gobind Sahay and others —2nd Party-Opposite-Party.

Criminal Revision, 592 of 1921, decided on 23rd January, 1922.

(a) *Criminal Procedure Code, S. 145—Decree of Civil Court—Conclusive order of Civil Court as to possession is binding on the Criminal Court—No* bona fide *claim to possession—Section does not apply.*

An order of a Civil Court under Order 21, Rules 98, 99 or 101 or under Sections 33 or 37 of the Public Demands Recovery Act is, until set aside in a Civil suit conclusive and binding upon the Criminal Court or any Court which has to adjudicate upon the possession of the parties.

When the possession in law is vested in one party as against any person claiming to be in possession by reason of the writ of delivery of possession, Section 145 is not necessary. There is no *bona fide* claim of possession of the 2nd party. In other words there is no dispute in law as to the possession of property. [P. 16, C. 2; P. 17, C. 1.]

(b) *Criminal Procedure Code, S. 144—Delivery of possession under writ of Civil Court—Factum of delivery disputed—S. 144 does not apply.*

Where under a writ of Civil Court, possession of certain immoveable properties was taken from one party and given to another, but the former party disputes the factum of the delivery itself, no order under Section 144 can be passed until that is decided. [P. 16, C. 1.]

Manuk and *G. P. Das*—for Petitioner.

G. C. Pal—for the Opposite Party.

Jwala Prasad, J.:—This is an application against an order of the Magistrate, dated the 9th December, 1921, directing proceedings under Section 145 to be drawn up with respect to 652 bighas of land in Mouza Amousi and land to be attached under the emergency Clause (4) of Section 145 of the Code of Criminal Procedure.

The village in which the land in dispute is situated belonged to one Ram Bahadur Singh, whose estate was brought under the management of the Court of Wards. Babu Kamla Sahay, a leading Mukhtear of Monghyr, took *thica* of the village for a term of years 1309 to 1314 (1902 to 1908), agreeing that he would give up all *khudkasht* land acquired by him during the lease.

After the expiry of the lease, however, he refused to part with the possession of 823 bighas 1 katha 7 dhurs of land claiming that he had acquired jote therein by virtue of Hukum namas given to him by the proprietor of the village. The Hukum Namas were said to be of the year 1902.

The Court of Wards then brought an action for ejecting Kamla Sahay from the land in question and in the alternative for having a fair and equitable rent assessed thereon. By that time Kamla Sahay was dead and his father, his brother and two of his step-brothers were impleaded as parties to the suit.

The suit was resisted only by Gobind Sahay, his own brother, on the ground that Kamla Sahay, was separate from the other defendants and that after his death the interest in the land in dispute devolved upon Gobind Sahay. That litigation terminated with the judgment of the Subordinate Judge dated the 11th of June, 1918, whereby the claim of the Court of Wards was dismissed upon the ground that Kamla Sahay, though a trespasser up to the year 1320, became a non-occupancy tenant from the year 1321.

On behalf of the Court of Wards a certificate was issued with respect to the arrears of rent due from the holding on the 19th of April, 1920, under the Behar and Orissa Public Demands Recovery Act (Act IV of 1914). The holding was sold on the 19th of April, 1920 and was purchased by Kamla Prasad Singh. The sale was confirmed after the disposal of the objection raised by Gobind Sahay.

On the 19th of April, 1920, the purchaser, Kamla Prasad Singh, obtained a sale certificate and an order for delivery of possession. The writ for delivery of possession was executed by the Nazir, report whereof was made by him on the 26th of November, 1920. The possession delivered by the Nazir was with the standing crops.

The judgment-debtors however, continued to throw obstacles in the enjoyment of the property by the auction-purchaser Kamla Prasad Singh. This led to a number of information lodged to the police by the Chaukidars, and ultimately to a proceeding under Section 144 of the Code of Criminal Procedure, on the 4th of April, 1921.

On the 27th of April, the Magistrate passed the following order:—

"Considered the case of Gobind Sahai. Harsahai Lal (Tahsildar of Gobind Sahai) does not contest. The 1st party has got the land by purchase at sale certificate. He has got sale certificate and has been regularly put in possession with standing crops on 26-4-20. He appropriated the same and has since then produced the present standing crops. The 2nd party ought to have

gone to the Civil Court after having lost their certificate objection. They did not do so but are trying to harass the 1st party by setting up untenable claims. I confirm the Section 144, C.P.C. notices issued against the 2nd party (of Harsahai Lal) and cancel and withdraw those issued against the 1st party."

The trouble, however, did not cease and on the 8th of November, 1920, the Police reported for an action under Section 107 of the Code against Kamla Prasad Singh with respect to 150 bighas and Kutchery and against Gobind Sahay and others with respect to 652 bighas, the subject-matter of dispute in the present case.

The former property, that is, 150 bighas and the Kutchery in the village, was also sold at a certificate sale and was purchased by Kamla Prasad Singh. The sale certificate was, however, set aside on objection. Therefore, Kamla Prasad Singh had no right to the possession of 150 bighas and the Kutchery in the village. Dealing with the report of the police, the Magistrate recorded the following order:—

The position is made perfectly clear by the District Magistrate's order on a motion against my predecessor's order under Section 144, Cr. P. C. Kamla Prasad Singh is in lawful possession of an estate of some 650 bighas purchased by him at auction last year, of which he was given dakhal dehani. Gobind Sahay, the other party is in lawful possession of another estate of about 150 bighas, including the Kutchery, which was auctioned and bought by Kamla Prasad Singh but of which the sale was subsequently annulled. It appears from the S. I's reports that Gobind Sahay and 37 others now intend to try to loot the crops of the 650 bighas of which Kamla Prasad Singh is in possession. Issue notice under Section 144, Cr. P. C. on them all, forbidding them to enter on any part of the 650 bighas estate, as from the S. I's report it is clear that there is serious danger of a breach of the peace and urgent action is necessary . . . . . Issue notice under Section 144, Cr. P. C. on Kamla Prasad Singh, his Gomashta and servants not to enter the Kutchery or any other portion of the 150 bighas estate, as there appears to be a danger to a serious breach of the peace and immediate action is necessary. Cause against both these orders may be shown on 21-11.

On the 21st of November, cause was shown by four of the 2nd party stating that the Civil Court sale and the dakhal dehani did not put them out of possession, and the matter was ordered to be further enquired into and to be put up at the spot on the 30th of November. On the same day a petition was filed on behalf of the 1st party stating that the police were interfering with their possession, and the Magistrate passed the following order :—

"You had no orders to stop Babu Kamla Prasad and his men from going on the 652 bighas estate, but only on the 150 bighas estate. He should be allowed to cultivate the 652 bighas; *vide* my order dated 10-11. forbidding the opposite party to enter on them."

On the 30th of November, the parties were ordered to file written statement. On the 5th December written statements were filed on behalf of the 2nd party, and after hearing both the parties the order in question for drawing up proceedings under Section 145 of the Code and attachment of the land in dispute was passed on the 9th of December.

There is no dispute in the present case with respect to 150 bighas and the Kutchery, inasmuch as the 1st party does not lay claim to it, the sale having been set aside. The order in question, therefore, relates to 652 bighas only. The proceeding drawn up details the survey plots of 652 bighas. The 1st party objects to the order in question on the ground that after the dakhal dehani of the civil Court the Magistrate had no jurisdiction to open the dispute between the parties by a proceeding under Section 144 of the Code. This contention appears to be well-founded. The possession in the present case was delivered with the standing crops, and the writ of delivery of possession shows that the possession was to be delivered under Order XXI, Rule 95 of the Code of Civil Procedure under which the Court puts the purchaser into possession of the property if need be "by removing any person who refuses to vacate the same." In a delivery of possession under that rule, not only the judgment-debtor but also any other person who may be then occupying has to be dispossessed. Now, a person not bound by the decree may resist the delivery of possession and such a resistance may be inquired into under Rules 97, 98 and 99 of the Code. If, as a result of the enquiry made under the aforesaid rules, a person other than the judgment-debtor is dispossessed of the property, he may make an application to the Court complaining of such dispossession and if the Court finds that the applicant was in possession of the property on his own account or on account of some person other

than the judgment-debtor, it shall direct the applicant to be put into possession of the property (*vide* Rule 101). The party aggrieved by the order of the Court passed under the abovementioned sections may institute a suit to establish his right to the present possession of the property as is provided for by Section 103 of the Code.

That rule concludes in the following words: "But, subject to the result of such suit if any, the order shall be conclusive." Similar provisions have been made in the Bihar and Orissa Public Demands Recovery Act by Sections 33 to 37. Section 33 corresponds to Rule 103 of Order XXI of the Code. The words in both the sections are almost the same. Therefore, if the possession was delivered to the purchaser in the present case under Order XXI, Rule 95, as the writ of delivery explicitly mentions at the top of it and as the report of the Nazir of the 26th of November, 1920 clearly states, then the only remedy left to any person claiming any right to the present possession of the property was to apply to the Court which issued the writ of delivery of possession and confirmed the possession so delivered by the subsequent order of the 4th of December, 1920.

Failing the step to be taken under Section 37 of the Bihar and Orissa Public Demands Recovery Act, or Order 21, Rule 103 of the Code of Civil Procedure the next remedy left to the members of the 2nd party is to institute a suit in a Civil Court, but, subject to the aforesaid proceedings, the order of the Court confirming the possession delivered by the Nazir in December, 1920, is final and conclusive an order which must be accepted as binding upon the criminal Courts and any Court which has to adjudicate upon this possession of the parties.

The 1st party purchaser has certainly to establish that possession was delivered to him by the Nazir under the writ issued by the Court. That is a question of fact and the 2nd party had a right to dispute this fact and put the 1st party purchaser to a proof of it. In other words, if the factum of the delivery of possession was raised as an issue in the present case, then certainly no order under Section 144 could be passed until that was decided and such an enquiry could possibly have taken place under Section 145 of the Code of Criminal Procedure.

In the present case the judgment-debtor and the members of his family, his Tahsildar and other servants, and in fact those claiming under him, have no right to dispute the delivery of possession as they were parties to the certificate and the sale proceedings and it was after the disposal of their objection that the sale was confirmed and the writ of delivery of possession was issued. The remaining members of the 2nd party who claim to be under-raiyats or intermediate holders of the land in suit were not parties to the proceeding in the survey department which resulted in the sale of the property and the dakhal dehani and had a right to dispute the actual service of the dakhal dehani on the spot.

In the written statement filed in this Court (paragraphs 5 to 8) they clearly admit that they had full knowledge of the proceedings instituted by the purchaser for obtaining the possession of the property and state that the purchaser was attempting to take possession of the property and to dispossess the under tenants and that for that purpose he had actually come upon the scene and was putting up in the Kutchery of the judgment-debtor.

They further admit that they had come to know that the dakhal dehani was to be served on the spot and that prior to that they went to the police complaining of the action of the purchaser to take *khas* possession of the property with standing crops and to dispossess them thereby. The result of this dispute between the purchaser and the judgment-debtor and the persons claiming to be under raiyats seems to have been taken notice of by the police, inasmuch as the Nazir in his report says that two constables were also present at the time when he was delivering possession of the property, with standing crops, to the purchaser.

The Nazir further reports that he went from plot to plot and compared the same with the survey record of rights. There can, therefore, be no doubt that the possession in this case was publicly delivered with full notice to all the persons in possession of the property. It may be, as is alleged by the members of the 2nd party, that they were living two miles away, but that does not in the least take away the effect of the delivery of possession of which they had proper notice and knowledge.

Therefore upon the admission of the 2nd party in the written statement filed in this case the dakhal dehani is not disputed. The 2nd party do not claim any right in the property subsequent to the dakhal dehani and all their rights of possession were lost by the dakhal dehani effected by the Court and they could establish their right, if any, only by a suit in a

civil Court.

It was stated before me by Mr. Pal that they were under-tenants of the land and were holding receipts from Kamla Sahay, the original debtor. Those receipts were filed in the Court below and have now been received here. They show that they relate to a period prior to the sale of the property and the dakhal-dehani. These receipts are up to the years 1320, 1325, and 1326. They admit that they derived their right from Kamla Sahay. Kamla Sahay was only a non-occupancy tenant of the land in dispute from 1321 (1914) in accordance with the decision of a case in Suit No. 3 of 1916, dated the 11th of June, 1918. These receipts, therefore, do not at all help the 2nd party in claiming possession of the property as against the Civil Court dakhal-dehani.

Mr. Pal has also drawn my attention to a judgment of the Criminal Court, dated the 5th of October, 1921 in which two of the members of the 2nd party Righu Mahto and Mushaheb Mahto were acquitted of offences of having removed crops from 4 bighas of the land in dispute. The Magistrate acquitted them observing that he disbelieved the occurrence altogether which had not been proved.

No doubt, he answered in the affirmative an issue raised by him as to whether they were under-tenants or not on the land in question. That judgment cannot in any way affect the Civil Court dakhaldehani which is binding upon the members of the opposite party. Similarly, the order of the Criminal Court dismissing the complaint of the 1st party cannot in any way nullify the effect of the Civil Court dakhal-dehani in the present case.

Therefore, though ordinarily a dispute of land should be enquired into in a proceeding under Section 145 of the Code of Criminal Procedure, yet when the possession in the law is vested in the 1st party as against any person claiming to be in possession of the property by reason of the writ of delivery of possession, I do not think that Section 145 is at all necessary. There is no *bona fide* claim of possession of the 2nd party. In other words, there is no dispute in law as to the possession of the property.

Section 145 summarily determines the right to possession. Order XXI, Rule 95 as well as the similar provisions in the Bihar and Orissa Public Demands Recovery Act, actually puts the purchaser into possession of the property, and a person claiming a right to the present possession of the property has either to move the Court delivering the possession or to go to the Civil Court.

The previous orders under Section 144 passed on two occasions in favour of the 1st party also establish clearly that the 1st party was allowed to be in possession of the property and to maintain the possession delivered by the Civil Court. Even on the 21st of November the Magistrate clearly held that the cultivation of 652 bighas should not be prevented by the police and that was the season of cultivating the land and sowing the seeds with respect to the present standing crop on the land.

For all these reasons I set aside the order of the Magistrate in question, and direct that, if there be any danger to a breach of the peace, the Magistrate can take action under Section 107 of the Code of Criminal Procedure against the persons disturbing possession of the 1st party, the petitioner before us, who is in rightful possession of the property by means of the Civil Court dakhal-dehani. The attachment of the crops must, therefore, be released and the crops, if any, must be made over to the 1st party.

Order set aside.

A. I. R. 1922 Patna 17.

JWALA PRASAD, J.

G. I. P. Railway Company — Defendant No. 2-Petitioners

v.

Jitan Ram Nirmal Ram—Plaintiff-Opposite Party.

Civil Revision No. 309 of 1921, decided on the 29th January, 1922, against an order passed by S. J., Gaya.

(a) *Railways Act (IX of 1890), Ss. 72 to 76—Risk-note—A and B limit the ordinary liability of the Railway Company.*

The ordinary liability of the Railway Company under Sections 72 to 76 of the Act is intended to be limited by the special agreement between the Railway Company and the consignor embodied in risk-Notes A and B and the consideration for limiting the liability of the Railway Company is the reduced tariff rate. Such an agreement has been saved by Clause (2) of Section 72.

The Railway Company under the risk-note is therefore liable only for the loss of one or more complete packages due to the wilful neglect of its servants, transport agents or carriers employed by them. The plaintiff therefore in order to succeed in an action for compensation for the loss or deterioration of the goods consigned to the railway must set forth all the particulars constituting the wilful neglect or default of the Railway Company which occasioned the loss or deterioration as is required by Order 6, Rule 4 of the Civil Procedure Code. The *onus* of proving wilful neglect and default of the Railway Company and thereby fixing the liability upon it must necessarily rest upon the plaintiff. [P. 18, C. 2.]

(b) *Pro. Sm. Cause Courts Act, S. 25—Error of law—Is a ground for interference.*

When the plaintiff sued the defendant Railway Company for damages for loss of a package sent by him, and it was found that the plaintiff had executed Risk Notes in Forms A and B and the Lower Court had placed the *onus* wrongly on the defendant Company.

Held that the *onus* lay on the plaintiff to prove that the loss was caused by the wilful neglect of the defendant and the wrong-placing of the *onus* is a ground for interference under Section 25 of the Act. [P. 19, C. 2.]

(c) *Civil P. C., O. 6, R. 4—Negligence—Pleading must specifically mention all particulars.*

In an action for compensation for the loss of goods consigned to the Railway Company, the plaintiff must set forth all the particulars constituting the wilful neglect or default of the Railway Company which occasioned the loss. [P. 18, C. 2.]

S. N. Bose—for Petitioners.

Kulwant Sahay and *Kailasapati*—for Opposite Party.

Jwala Prasad, J.:—This is an application under Section 25 of the Provincial Small Causes Act against a decree passed by the Subordinate Judge of Gaya exercising the powers of a Judge of the Small Cause Court against the G. I. P. Ry. Co. for compensation on account of loss of a complete package out of a consignment of 16 bales of cotton yarn under R. R. No. 6047-11 Invoice No. 1 on the 5th June, 1920 delivered to the Railway for carriage by goods train and to be delivered to the plaintiff at Gaya.

The consignor, at the time when the goods were made over to the Railway Company at Madan Mahal, signed what is known as Risk Notes A and B. Under the risk-note the consignor paid a special reduced rate instead of the ordinary tariff rate chargeable for such a consignment and in consideration ther eof he agreed that the Railway Company shall be free from all responsibility for any loss, destruction, deterioration of, or damage to the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more of complete packages forming part of a consignment due either to the wilful neglect of Railway administration, or to theft by or to the wilful neglect of, its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith.....

"The Risk Note B further provides that the term " wilful neglect" mentioned therein shall be held not to include fire, robbery from running train or any other unforeseen event or accident." The effect of the Risk Notes A and B is to limit the ordinary liability of the Railway Company under Ss. 70 to 76 of the ndian Railways Act (IX of 1890). The Railway Company becomes a bailee under Ss. 151, 152 and 161 of the Indian Contract Act of 1872 and are common carriers under the Indian Carriers' Act.

To state briefly, the Railway Company would be liable for the loss, destruction or deterioration of any consignment either wholly or in part of any goods consigned to them, and they are required to deliver the goods so consigned to the consignee in the condition in which they were consigned to them. This ordinary liability under Ss. 72 to 76 of the Act is intended to be limited by the special agreement between the Railway Company and the consignor embodied in Risk Notes A and B and the consideration for limiting the liability of the Railway Company is the reduction of the ordinary tariff rate.

Such an agreement has been saved by Cl. (2) of S. 72 which says:—" An agreement purporting to limit that responsibility of Clause (1) shall, as far as limitation be void unless it is in writing signed by or on behalf of persons sending or delivering to the Railway administration the animals or goods, and is otherwise in a form approved by the Governor-General in Council." The Risk Notes A and B fulfil the conditions for rendering the contract valid, and therefore the parties are bound by the contract embodied in the risk notes.

The Railway Company under the risk-note is therefore liable only for the loss of one or more complete packages due to the wilful neglect of its servants, transport agents or carriers employed by them. The plaintiff therefore in order to succeed in an action for compensation for the loss or deterioration of the goods consigned to the Railway must set forth all the particulars constituting the wilful neglect or default of the Railway Company which occasioned the loss or deterioration as is required by O. 6, R. 4 of the Civil Procedure Code. The plaintiff is further required to substantiate by evidence the case of wilful neglect or default on the part of the Railway Company and its servants.

In other words, the onus of proving wilful neglect and default of the Railway Company and thereby fixing the liability upon it must necessarily rest upon the plaintiff. No doubt without the risk-note the plaintiff need not have proved beyond the loss or deterioration of his goods and the onus would have been entirely upon

the Railway Company under Sections 72 to 76. This view has now been settled by a string of authorities: *Sheobarut Ram* v. *The Bengal and North Western Railway Company* (1), *East Indian Railway Company* v. *Nilakanta Roy* (2), *The Agent, East Indian Railway Company* v. *Ajodya Prasad* (3), *East Indian Railway Company* v. *Nathmal Behari Lal* (4), *Magan Lal Purshotam* v. *The Bombay, Baroda and Central India Railway Company* (5), *Bombay, Baroda and Central India Railway Company* v. *Ambala Sewak Lal and others* (6).

The distinction between a case instituted under Sections 72 to 76 of the Indian Railways Act and that based upon the risk-notes A and B has been dealt with in almost all the aforesaid authorities. In the case of *East Indian Railway Company* v. *Kanak Behari Haldar* (7) it was held that the cases under Sections 72 to 76, *viz.*, in *Surendra Lal Chaudhri* v. *Secretary of State for India in Council* (8) and *Sesham Patter* v. *Moss* (9) do not apply to the case arising under the risk-notes A and B.

The facts of the present case appear to be exactly similar to those in *Toonya Ram* v. *East Indian Railway Company* (10) where a decision such as that arrived by the Small Cause Court Judge in the present case was set aside upon the ground that the onus was wrongly placed upon the Railway Company instead of upon the plaintiff. The Judge of the Small Cause Court in the present case appears to be under a misapprehension of the scope of the plaintiff's suit.

In the plaint no charge was laid against the Railway Company of wilful neglect or wilful default which occasioned the loss of the package in question. Far less was there any circumstance or fact disclosed in the plaint constituting wilful neglect or default such as is enjoined by O. 6, R. 4 to be stated in a suit upon wilful neglect or wilful default.

That the Judge was under a misapprehension is also apparent from the entire absence of the word wilful neglect or wilful default in his judgment. He does not come to any finding that the loss of the plaintiff's goods was due to the negligence of the defendant Company, in fact he does not refer to any evidence on behalf of the plaintiff bearing upon the loss of the goods due to the negligence of the defendants. He simply says:

"From the statement of Ram Prasad it appears that the loss was caused at Madan Mahal which is a Station of the 2nd defendant."

He further admits that the goods were covered by the risk-notes A and B, but he wrongly holds that these notes would not exonerate the Railway Company in case of a complete consignment, and this shows that the learned Judge of the Small Cause Court perhaps did not read the risk-note (Exhibit B) which deals with the loss of a complete consignment or a complete package. He has treated the case as if it was under Sections 72 to 76 of the Indian Railways Act and consequently he has fallen into the common error of throwing the *onus* upon the defendant instead of upon the plaintiff. This very point has been dealt with in the cases quoted above and there is no authority to the contrary.

I wonder whether the cases cited above were placed before the learned Judge of the Small Cause Court, or his attention was ever directed to the distinction between the cases under Sections 72 to 76 of the Indian Railways Act and the risk-notes A and B.

In terms of the order passed in the case of *Toony Ram* v. *The East Indian Railway Company* (10) I hold that the decree passed by the learned Judge of the Small Cause Court against the Railway Company is wrong in law and ought to be set aside under Section 25 of the Provincial Small Causes Act.

The rule is accordingly made absolute. In the circumstances of the case, there will be no order as to costs, each party bearing its costs throughout.

Rule made absolute.

(1) (1912) 16 C. W. N. 766=15 I. C. 56.
(2) (1914) 41 C. 576=19 C. L. J. 142=22 I. C 679 =19 C. W. N. 95.
(3) (1919) 1919 P. H. C. C. 150=49 I. C. 498.
(4) (1917) 39 All. 418=39 I. C. 130=15 A.L.J. 321.
(5) Indian Rail Cases 36.
(6) Indian Railway Cases 48.
(7) (1918) 22 C. W. N. 622=44 I. C. 691.
(8) (1917) 25 C. L. J. 37=38 I. C. 702.
(9) (1894) 17 Mod. 445.
(10) (1903) 30 C. 257=7 C. W. N. 370.

A. I. R. 1922 Patna 19.

DAWSON MILLER, C. J.

Jugeshwar Misra and others—Decree-Holders-Appellants

v.

Nath Koeri—Judgment-Debtor-Respondent.

Miscellaneous Appeals Nos. 97 and 3 of 1921, decided on 16th January, 1922, from an order of the Dist. J., Muzaffarpur.

Occupancy holding—Execution sale—Holding, though non-transferable can be sold in execution of money-decree against tenant—C. P. C., S. 60.

The transfer of the whole or a part of an interest in non-transferable occupancy holding is operative against the tenant, whether it is made voluntarily or involuntarily, *e.g.*, in execution of a money-decree obtained against him, either by the landlord or by a stranger. 43 Cal. 148 Followed. (1 P. L. J. 257) and

(2 P, L. J. 530) overruled.

[P. 20, C, 1 ; P. 21, C. 2.]

Sahai and *Prasad*—for Appellant

N. N. Singh—for Respondent.

Dawson Miller, C. J.:—These two appeals were referred to the Full Bench for final determination and were ordered to be heard together. The questions for determination are similar though not precisely the same in each case.

Miscellaneous Appeal No. 97 of 1921, arises out of an order of the District Judge of Muzaffarpur affirming an order of the Munsiff passed in execution proceedings and allowing the judgment-debtor's objection to the sale of a portion of his non-transferable occupancy holding in execution of a money-decree passed in favour of the appellant who is not his landlord.

The Munsiff and the District Judge who considered that the case was governed by the decision of this Court in *Macpherson* v. *Debibhusan* (1), allowed the objection and dismissed the execution proceedings.

On appeal a Division Bench of this Court referred the case to the Full Bench for determination and ordered it to be heard together with Miscellaneous Appeal No. 3 of 1921, which had previously been referred.

The point which arises for determination in Miscellaneous Appeal No. 97 of 1921, is whether the decree-holder not being the landlord of the holding can, against the will of the judgment-debtor and without the express consent of the landlord of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree there being no local custom of transferability.

The case of *Macpherson* v. *Debibhusan Lal* (1) does not directly determine the question arising in this appeal. The question there was between landlord and tenant, the landlord seeking to execute the money-decree against his tenant's holding and not against a portion only. The precise point however arose and was decided against the decree-holder in the earlier case of *Sadari Kunwari* v. *Palknath Rai* (2).

So far as I am aware it has never been directly decided that an occupancy holder cannot transfer an interest in a part of his holding to another even without his landlord's consent, provided he does not abandon or relinquish the whole holding. Such a transaction does not create a new tenancy between the purchaser and the landlord without recognition but it is binding between the tenant and the purchaser and the latter has a subsisting right notwithstanding the absence of recognition by the landlord. It may be a precarious right dependent largely on the good-will of the tenant but the transaction affords no ground for ejectment under Section 25 of the Bengal Tenancy Act.

Moreover the case of *Dayamoyi* v. *Anandan Mohan Roy Choudhury* (3), upon which the respondent relies lays down in clear terms that the transfer of the whole or a part of the holding is operative against the tenant where it is made voluntarily and that where the transfer is of a part only of the holding the landlord though he has not consented is not ordinarily entitled to recover possession of the holding unless there had been (*a*) an adandonment 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.

The question therefore arises whether the tenant can be made to do involuntarily at the instance of his creditor that which he can do voluntarily. In *Agarjan Bibi* v. *Panaulla* (4), which was also relied on by the respondent the power of voluntary transfer was said to be the measure of the power of involuntary alienation. Exactly the same view had been expressed some 30 years earlier in *Dwarka Nath Misser* v. *Hurrish Chunder* (5), where it was laid down that there was no ground for distinguishing a voluntary sale from a sale in execution.

In *Agarjan Bibi's case* (4) it was however held that the purchaser of a portion of a non-transferable raiyati jote could not obtain joint possession without the landlord's consent and that the tenants other than the vendor in possession of a portion of the jote could question the validity of the transfer. The interest of the co-sharers of the jote were involved in that case which should not be lost sight of.

Assuming however that *Dayamayi's case* (3), is good law in so far as it denies the landlord's right to question a voluntary transfer of a portion of the holding except under special circumstances not arising here, it is difficult to see why that which the tenant can alienate at his will cannot be the subject of a sale in execution of a decree against him. But *Dayamayi's case* (3), further laid down with regard to voluntary transfer of the whole or a part of the holding that they were valid as against the *raiyat* only whether the *raiyat* with knowledge fails or omits to have the sale set aside.

In so deciding the Full Bench was merely applying to sales of a whole or a part of the holding the principle embodied in *Bhiram*

(1) (1918) 2 P, L. J. 530=42 I. C. 36.

(2) (1916) 1 P.L.J. 257=33 I.C. 937=3 P.L.W.104.

(3) (1915) 42 Cal. 172=27 I. C. 61=20 C. L. J. 52.

(4) (1910) 37 Cal. 687=6 I.C. 452=12 C. L. J. 169.

(5) (1879) 4 Cal. 945=4 C. L. R, 130.

Ali Sheik Shikandar v. *Gopi Kanth Shah* (6) which was to the effect that an occupancy holding was not saleable at the instance of the occupancy *raiyat* or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent.

Bhiram Ali's case (6) was decided in 1897 and for the first time laid down the proposition there broadly stated. It excluded the case of a landlord seeking to sell in execution of a money-decree but up to that time there had been no decision to the effect that the holding could not be transferred in execution where the landlord was a consenting party. Indeed from 1834, when the Sudder Dewanny Adaulat in the case of *Neel Kanth Roy* v. *Kasheenath Ghose* (7) issued construction No. 890 up to 1897 the power of transfer with the landlord's consent appears not to have been questioned; *Bhiram Ali's case* (6) was generally, though not consistently, followed by the Calcutta High Court, until 1920 when the whole question of transferability of occupancy holdings was elaborately discussed and the authorities from the earliest times as well as the statutes relating to the subject were considered by the Special Bench of the Calcutta High Court in *Chandra Benode Kundu* v. *Ala Bux* (8).

The view presented on behalf of the tenant in that case was that the right of occupancy was a personal right or privilege and not an interest in land capable of transfer, and that the only incidents attaching to the right were those conferred by the Rent Acts of 1859 and 1869 and the Bengal Tenancy Act of 1885 as subsequently amended. It was sought to explain the cases where a voluntary transfer of the whole or a part of the holding had been upheld as against the tenant, of which many instances might be cited, as founded on the doctrine of estoppel or the rule that the transfer cannot derogate from the grant, and it was argued that involuntary transfers might be explained on the ground of waiver.

It is difficult however to see how these doctrines could apply so as to validate a transfer in a case where, *ex-hypothesi*, there was nothing that could be transferred. The Special Bench consisting of the Acting Chief Justice and 6 other Judges unanimously decided that the case of *Bhiram Ali Shaik* v. *Gopi Kanth Shah* (6) was wrongly decided and overruled that and subsequent decisions based upon it. It further decided that the proposition laid down in *Dayamayi* v. *Ananda Mohan Choudhury* (3) which related to the transfer of occupancy holdings apart from local usage, required modification, and that the first proposition there laid down should be stated thus: "The transfer of the whole or a part is operative as against the *raiyat* whether it is made voluntarily or involuntarily."

This decision by establishing the validity as against *raiyat* of all cases of transfer of a whole or a part of the holding recognised the test formulated by Jackson, J. in *Dwarka Nath* v. *Hurrish Chunder* (5) in 1879, that the measure of the liability to involuntary alienation is the power of voluntary alienation, and removed all difficulty which might arise in the application of Section 60 of the Civil Procedure Code which renders saleable in execution all property of the judgment-debtor over which he has a disposing power. It further decided that the right of an occupancy holder is an interest in land and not merely a personal right.

We have been asked by the learned Vakil for the respondent to dissent from the views expressed by the Special Bench in *Chandra Benode Kundu's case* (8) and the arguments addressed to us have been along the same lines as those there advanced. In my opinion that case correctly expresses the law and the contrary view expressed by the Court in *Sadavi Konwari* v. *Palknath Rai* (2) which followed that part of *Dayamayi's case* (3) which was dissented from by the Special Bench should no longer be followed. I would answer the point of law above formulated in the affirmative. The appeal is accordingly decreed and the application for execution allowed with costs in all Courts including the costs of this reference.

Miscellaneous Appeal No. 3 *of* 1921.

This appeal raises nearly the same question but the facts are somewhat different. In this case the landlord is the decree-holder and his tenant is the judgment-debtor. The decree is a money-decree. The landlord sought to execute his decree by attachment and sale of his tenant's occupancy holding. It must be conceded in such a case that the landlord consents to the transfer. The Munsiff and the District Judge dismissed the application for execution being bound by the decision of this Court in *Macpherson* v. *Debibhusan Lal* (1).

In view of the recent decision of the Special Bench of the Calcutta High Court in *Chandra Benode Kundu* v. *Ala Bux* (8) the case was referred on appeal to this Court for decision by a Full Bench. The question for determination is whether a landlord who has sued his tenant and obtained against him a money-decree can in

(6) (1897) 24 Cal. 355=1 C.W.N. 396.
(7) (1834) S. D. 268.
(8) A. I. R. 1921 Cal. 15 S. B.=48 Cal. 184.

execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent.

This question is precisely that which arose for determination in *Chandra Benode Kundu's case* (8) and with which I have already expressed my concurrence in the above judgment. I would therefore answer the question in the affirmative and hold that *Macpherson* v. *Debibhusan Lal* (1) was wrongly decided. The appeal should be decreed and the application for execution allowed with costs in all the lower Courts including the costs of the appeal to the High Court but not of this reference in which the parties did not appear.

Appeals allowed.

A. I. R. 1922 Patna 22.

DAS AND ADAMI, JJ.

Debi Lal Sah and others—Appellants

v.

Nand Kishore Gir and others—Respondents.

Appeal No. 39 of 1919 decided on 9th January, 1922, from an order of the S. J., Muzaffarpur.

(a) *Hindu Law—Debts — Liability — Antecedent debts and debts contracted for necessity are binding on the family.*

Where five mortgage bonds were executed by the Karta of a joint Hindu family and by two of his sons, of these bonds four being for antecedent debts of the Karta of the family reasonably binding on the family and one bond being for family necessity, *viz.*, the marriage expenses of the son and daughter of the Karta of the family.

Held: that all the five mortgage debts were binding on the joint family property. [P. 22, C. 1.]

(b) *Hindu Law—Marriage of co-parcener—Expenses—Bind joint family.*

Marriage is obligatory on Hindus and the debts reasonably incurred for the marriages of a twice-born Hindu male are binding on the joint family properties. 37 Mad. 273 P. B.; 32 All 575 ; 32 Bom. 81 followed. [P. 23, C. 2.]

Jayaswal and *Janak Kishore*—for Appellants.

A. B. Mukerjee, Jha and *Sinha*—for Respondents.

Das, J.:—This was a suit by the appellants to enforce five mortgage bonds executed by Bholanath, the karta of the joint family and by Nandkishore and Bir Gir his sons. One of these bonds, namely, the bond, dated the 10th August, 1904, was executed only by Bholanath, but it appears from the subsequent bond, dated the 6th April, 1906, that Nandkishore and Bir Gir accepted the bond of the 10th August, 1904, as binding on them.

The learned Subordinate Judge found that the consideration money was advanced by the mortgagees to the mortgagors. But, taking the view that there was no legal necessity in respect of the advances made by the plaintiffs to the defendants, he has given a mortgage-decree to the plaintiffs to the extent of the shares of Bholanath, Nandkishore and Bir Gir in the properties ; he has dismissed the suit as against those members of the family who were not parties to the mortgage bonds.

On the facts, as found by the learned Subordinate Judge, the decree was far too favourable to the plaintiffs. He found that there was no legal necessity in respect of the bonds, and yet he gave the plaintiffs a mortgage-decree to the extent of the shares of the executants of the mortgage bonds in the properties. Apparently the learned Subordinate Judge was not aware of the celebrated decision of the Judicial Committee in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1).

That case establishes the proposition that where a mortgage is granted by one co-parcener on his own account over the joint family properties, it is invalid. The estate is wholly unaffected by it and it entirely stands free of it. But it has been urged on behalf of the plaintiffs-appellants that the decision of the learned Subordinate Judge on the question of legal necessity is erroneous. Mr. Jayaswal indeed argues that most of these bonds are binding upon the entire joint family on the doctrine of antecedent debt which was recognised and affirmed by the Judicial Committee in the case to which I have already referred.

It is necessary therefore to consider the evidence which has been adduced by the plaintiffs in regard to the different bonds which were executed in their favour.

The first of these bonds is dated the 1st August, 1902. That was a bond for Rs. 7,900 and was executed by Bholanath, Nandkishore and Bir Gir. The document recites that Rs. 7,600 was due by the executants to Gopal Sahu and Motilal Sahu on previous registered bonds dated the 13th December 1893, 24th May, 1896, 28th June, 1898 and, unregistered bonds, dated the 25th March, 1898 and 22nd September, 1897.

All these bonds have been produced in the case and Mr. Abani Bhusan Mukerjee does not dispute that money was in fact due to Gopal Sahu and Motilal Sahu on the foot of the bonds. If that be so there was

(1) (1917) 39 All. 437=39 I. C. 280=44 I. A. 126 (P. C.).

clearly a debt due by Bholanath to Gopal Sahu and Motilal Sahu on the date of the execution of the bond Exhibit 1. In my opinion Rs. 7,600 was clearly an antecedent debt and was binding upon the family.

The bond further recites that Rs. 300 was paid in cash to the executants for household expenses. The evidence establishes that enquiry was made on behalf of the plaintiffs as to the necessity for this sum of money and that upon enquiry it was found that the necessity was a real necessity. There is no reason to doubt that Rs. 300 was in fact required by the executants for household expenses. In my opinion the bond, dated the 1st August, 1902 is binding upon the entire joint family.

I now come to the bond, dated the 25th September, 1902, Exhibit 2. This bond was again executed by Bholanath, Nandkishore and Bir Gir. The bond recites that the money was required in order to pay off Gopal Sahu and Motilal Sahu. There is no dispute that money was in fact due to Gopal Sahu and Motilal Sahu on the date of the execution of this bond.

If that be so, then Rs. 983 out of Rs. 989 which was borrowed on the 25th September 1902 constituted an antecedent debt. So far as Rs. 6 is concerned it is a very small sum of money and may be left out of account. In my opinion the bond, dated the 25th September, 1902 is binding upon the joint family.

Now the third bond is dated the 10th August 1904 and has been marked Exhibit 3 in the case. This bond was executed by Bholanath alone; the bond recites that Rs. 859-1-3 was due to the plaintiffs on the foot of three simple bonds which had been executed by Bholanath in favour of the plaintiffs. These three simple bonds are dated the Aghan 1311, 28th Sawan 1311, and 15th Jeth 1311 respectively.

All these documents have been produced in the case and the sum of Rs. 859-1-3 undoubtedly constituted an antecedent debt. As regards the balance the evidence is that Rs. 282 was required to buy a plough, bullock and other accessories for agricultural purposes. The evidence as to the enquiry conducted by the plaintiffs in my opinion is sufficient to establish the debt as against the joint family.

The fourth bond is dated the 6th April, 1906 and has been marked as Exhibit 4 in the case. This bond was executed by Bholanath, Nandkishore and Bir Gir. The document recites that Rs. 925 was necessary for the marriage expenses of a son and a daughter of Bholanath Gir. The evidence on this point establishes that one Shewjas Singh on behalf of the plaintiffs went to the defendant's house to make an enquiry and he found that the money was required for certain marriage ceremonies in the family. Shewjas Singh has given evidence in the case and he says that he enquired from several people in the village about the necessity.

The money was borrowed for marriage of one of the defendants and his sister. This evidence receives strong corroboration from the evidence of Mahabir Puri who was examined on behalf of the defendants. He says that the barat came from Bhavanpur 12 years ago and that Bhola's daughter was married there. Now this witness was giving evidence in 1918. This supports the case of the plaintiffs that there was a marriage in the family of the defendants in 1906.

The learned Subordinate Judge apparently does not disbelieve the case of the plaintiffs that Rs. 925 was required for the marriage expenses in family, but he has come to the conclusion that marriage being a luxury and not a necessity, the debt did not bind the joint family properties. Now the authorities on this point are all one way. It is quite true that some of the earlier decisions in the Madras High Court took the view that the marriage of any of the sons by the father is not according to Hindu Law a family purpose because there is no moral or religious obligation on either the father or the coparcener to bring about the marriage, see the case of *Govindarazulu Narasumham* v. *Devarabhotla Venkatanarasayya* (2).

But this case has been overruled by a Full Bench decision of the Madras High Court in *G. Gopalakhirishnam Razu* v. *S. Venkatanarasa Razu* (3). In that case the Madras High Court held that marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi and debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties.

The same view has been adopted both in Bombay and in Allahabad, see the case of *Bhagirathi* v. *Jokhu Ram Upadhaia* (4), and *Sundarabai Javaji Dagdu Pardeshi* v. *Shivnarayana Ridkarna* (5). The decision of the Bombay High Court is a very careful one and was arrived at on a critical study of the texts on the subject. I am of opinion that the view of the learned Subordinate Judge

(2) (1904) 27 Mod. 206.
(3) (1914) 37 Mad. 273=17 I. C. 308=23 M. L. J. 288.
(4) (1910) 32 All. 575=6 I. C. 465=7 A. L. J. 667.
(5) 1908) 32 Bom. 81=9 Bom. L. R. 1366.

is entirely erroneous and ought to be overruled.

It follows therefore that the bond dated the 6th April, 1906 is binding upon the joint family properties.

The last bond is dated the 7th April, 1906 and was executed by Bholanath, Nand Kishore and Bir Gir. The document recites that the money was necessary in order to enable them to pay off prior debts incurred by Bholanath to certain other creditors. There was therefore antecedent debt binding on Bholanath on the 7th April, 1906. This bond accordingly binds the joint family properties.

I must allow the appeal, modify the decree passed by the learned Subordinate Judge and give the plaintiffs a mortgage-decree in terms of the prayers in the plaint. The period of redemption, three months from the date of this judgment. The plaintiffs are entitled to their costs in this Court as well as in the Court below.

Appeal allowed.

A. I. R. 1922 Patna 24.

JWALA PRASAD AND ADAMI, JJ.

Nirod Chandra Roy—Plaintiff-Appellant

v.

Kirtya Nanda Singh and others—Defendants-Respondents.

S. A. No. 749 of 1920, decided on 20th February, 1922.

(a) *Contract Act, S. 7—Acceptance must be unqualified—Proposal referred does not hold good thereafter.*

To convert a proposal into a promise, the acceptance must be unqualified and without condition. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal into a promise so as to create a contract. [P. 26, C. 2, P. 27, C. 1.]

(b) *Master and Servant—Reasonable notice—What is—Must be found from circumstances of each case.*

The rule of one month's notice which applies to menials, will not apply to the case of a school master. The rule as to yearly hiring extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and each case must be considered by itself, and in each case it must be decided what notice would be reasonable. (1858) (8 Exhibit 151) distinguished (44 Cal. 917) followed.

[P. 27, C. 1.]

(c) *Master and Servant—Dismissal from service—Dereliction of duty is a good ground for dismissal.*

Where a schoolmaster committed dereliction of duty and failed to obey a reasonable direction of the Managing Committee of the school.

Held that the dismissal of the schoolmaster from service was justified. [P. 28, C. 1.]

Imam, S. P. Sen, N. C. Sinha and *S. P. Roy*—for Appellant.

C. C. Das and *S. N. Palit*—for Respondents.

Adami, J.:—The plaintiff in the suit giving rise to this second appeal, sought for damages for wrongful dismissal against the Managing Committee of the Tej Narain Jubilee College, Bhagalpur.

It appears that the plaintiff-appellant was appointed Professor of History at the College on a salary of Rs. 100 per mensem in July, 1908, but, beyond the mere appointment on that salary no agreement was drawn up as to the term of the appointment or as to the conditions on which it was made. In 1909, having been offered a Professorship at St. Columba's College, Hazaribaugh, the plaintiff resigned but subsequently withdrew his resignation, and therefore drew salary at the increased rate of Rs. 120 per mensem. Meanwhile he was studying law and in July 1912 passed the B. L. examination and obtained the B. L. diploma in March 1913.

At the end of that year he was enrolled as aIPleader and obtained the permission of the High Court, Calcutta, to work as a Professor at the College while practising as a Pleader. He did not at the same time take the permission of the Managing Committee to practise as a Pleader while holding the appointment of Professor of History. On the 6th April 1914 he obtained his license to practise, and from the 8th of April began to attend the Courts at Bhagalpur.

In November 1913 the Director of Public Instruction informed the Managing Committee of the College that it was the intention of Government to make a grant of Rs. 1,000 per mensem to the College on condition that an adequate staff of teachers was maintained and those teachers were paid salaries not less than certain minima to be approved by the Government, and requested the Committee if they accepted the conditions to submit their scheme. In connection with this matter the Principal of the College in his letter, dated 13th September, 1913 (Exhibit 8) suggested that the salary of the Professor of History should be raised from Rs. 120 to Rs. 150 and noted "Professor Ray" (the plaintiff) "is leaving the institution shortly but a Professor will have to be appointed in his place" and again "Professor N. C. Roy:—has passed his B. L. and applied for license to join the Bar, will do so within a month or two."

In his letter, dated the 22nd December, 1913, the Director of Public Instruction communicated sanction to the payment of a grant of Rs. 1,000 per mensem to the College for one year with effect from June 1st, 1913, on condition among others, that a Professor

of History should be maintained on a salary of Rs. 150. At the end of May, 1914, the Managing Committee accepted the offer and in pursuance of the new system of graded salaries submitted to the Director of Public Instruction a list allowing increments with effect from June, 1913 to some of the Professors and with effect from January, 1914, to others, but allowing nothing to the plaintiff.

The reason for this attitude of the Managing Committee seems to have been that the Member had come to know of the plaintiff's intention to leave the college and join the legal profession, and also that the Committee had discovered that the plaintiff had been attending Court as a pleader without obtaining their permission.

A meeting of the Committee was held on the 31st May, 1914, and in pursuance of instructions the Secretary wrote to the plaintiff on June, 2nd:—

"It has come to the knowledge of the Managing Committee that you have taken out license and joined the local Bar. This if true would naturally stand in the way of your throwing your whole heart into the work of College which if not done with earnestness and whole-hearted devotion is bound to be ill-done.

"The Committee under the circumstances feel constrained to demand that you will either be pleased to have your license cancelled and give the Committee an undertaking that you will serve the Institution devoting your whole time to it for at least two academical years or resign your post at the College."

In reply the plaintiff wrote on the 13th June, 1914, that he agreed to give an undertaking "to stick to the College for a further and longer period," but that, as in order to qualify himself for enrolment as a High Court Vakil he would have to practise in the mofussil Courts for four years, he requested that a cancellation of his license should not be insisted on. He stated that he had already renewed his license for 1914, and was doubtful whether he could have it cancelled, while with regard to 1915, it would be optional with him to renew the license or not, but he was afraid that such renewal would be necessary in order to complete the four years' practice.

He then proceeded to insist that he should be allowed salary at the rate of Rs. 150 per mensem with retrospective effect from June, 1913, and that the Syndicate of the Calcutta University might be consulted on the question whether he should be allowed to practise as a pleader while holding the Professorship.

There was no further meeting of the Managing Committee till the 13th September 1914, and on that date the plaintiff handed to the Secretary a letter to be placed before the Committee. In that letter he stated. "As desired by you I undertake to serve the Institution devoting my whole time to it for two academical years. You have, however, desired me to cancel my pleader's license but this, I regret to point out, is not possible for me to do as there is no provision in the High Court rules for cancellation of a license already issued.

I may, however, fulfil your desire by not practising as a pleader till the end of December next and then by not renewing my license for the ensuing year." He then again asked that increment of salary might be granted with effect from June, 1913, and that the advantage of any new grade system which might be introduced should be extended to him.

After considering this letter and the letter of the 14th June, the Committee passed the following Resolution.

"Resolved that the application of Babu Nirod Chandra Ray be rejected and that he be asked forthwith to resign his post, failing which his services will be dispensed with effect from the 1st October, 1914."

The plaintiff was thus given fifteen days notice before dismissal, and was dismissed as from the 1st October, receiving Salary up to that date. He moved the syndicate and Senate of the Calcutta University, but, after some inquiry and a motion in the Senate it was decided to take no action. Similarly the Director of Public Instruction though moved, abstained from interference in the matter of the refusal to grant increment of salary to the plaintiff with retrospective effect.

The plaintiff then instituted the present suit on 31st October, 1917, asserting that the letter of the 2nd June, 1414, had contained a proposal by the Committee that he should serve them for two academical years and that, as he had accepted that proposal in his letter of September 13th, a contract had been entered into which had been broken by his wrongful dismissal on the 1st October, 1914.

He claimed salary from October, 1914, till May, 1915, at the rate of Rs. 160 per mensem and at the rate of Rs. 170 per mensem for the month of June,

1915, in all Rs. 1450. He also claimed back increment at the rate of Rs. 30 per mensem from June 1913, at Rs. 40 from June to September 1914, in all Rs. 520, and damages for travelling expenses assessed at Rs. 300. His total claim amounted to Rs. 2,270, or if he were found entitled only to salary up to the end of the session, having been dismissed in the middle of it, to Rs. 2,100.

Both of the lower Courts have agreed in dismissing the plaintiff's suit. The learned Munsif in a clear and well considered judgment found that the proposal contained in the Secretary's letter of June 2nd, 1914, was not accepted by the plaintiff in his letters either of the 14th June or the 13th September as to effect any contract between the parties, as there was no unqualified acceptance nor was there an acceptance within a reasonable time.

He held that the Committee were justified in objecting to the plaintiff's conduct as being prejudicial to the interests of the College, and that the plaintiff took no heed of the warning but continued to practise in spite of the objection which fact might have given the Committee a right to dismiss him summarily, but he was given a fortnight's notice. He decided that the plaintiff was not wrongfully dismissed.

With regard to the sufficiency of the fifteen days notice, after discussing the evidence to show that notice of fifteen days or at most a month is customary in the College, he pointed out that the plaintiff really had notice on the 3rd June that he would be called on to resign, and therefore it could not be held that sufficient notice was not given.

As to the increments of salary claimed, the learned Munsif pointed out that the plaintiff's name had been expressly excluded from the list sent to the Director of Public Instruction, and no amount was officially sanctioned for the plaintiff, nor was any trust created by the Government in favour of any of the Professors. He found the claim to be unsustainable.

On appeal the learned District Judge agreed with the Munsif and held that the plaintiff was guilty of a dereliction of duty which exposed him to summary dismissal, and that in any case one month's notice would have been ample. As to the increments, the District Judge found that the grant was made for the benefit of the College and not for that of a Professor who was known to be intending to leave his post, and that the recommendation of the Committee as to the exclusion of the plaintiff from the benefit of increment of salary was not dissented from by the Director of Public Instruction. He dismissed the appeal.

The learned Counsel for the appellant has argued that the notice given to his client was insufficient, and that there not having been any period fixed at the time of the appointment, it must be held that there was a yearly hiring, and therefore the appellant was entitled to claim salary up to the expiry of the year during which he was dismissed. He contended that the appellant ought to be paid the equivalent of his salary up to June 1915, or if not that, up to the end of the current session, that is to say, up to May 1915.

His contention in the first place is that by the letter of June 2nd, 1914, the Committee made a proposal to the appellant that he should serve the College for two academical years and that the appellant by his letters of the 14th June and the 13th September agreed to serve for two years and thus, though at the time of his first appointment no agreement was made as to its term, a new contract was effected by the plaintiff's letters of acceptance.

We need, I think, only look at the contents of the letters to see that the contention cannot be sustained. The Committee asked the appellant either both to have his license cancelled and to undertake to serve for two years or to resign. The plaintiff replied that he agreed to serve for two years, but was not ready either to cease practice or to have his license cancelled. He also insisted on an increment of his salary with retrospective effect. This was no acceptance of the proposal; to convert a proposal into a promise the acceptance must be unqualified and without conditions. By his conduct too the appellant showed that he did not accept the proposal for he continued to attend the Courts.

Again by his letter of the 13th September, the appellant, though undertaking to serve the College for two academical years, and suggesting that he might carry out the Committee's desire by not practising as a pleader till the end of December and thereafter not renewing his license, refused to get his license cancelled and furthermore again asked for increment. Besides the fact that the letter contained no unqualified acceptance, the reply was made unreasonably late, and after the practical refusal of the 14th June.

After that refusal the proposal cannot be held to have good, and

after it no acceptance could convert the proposal into a promise so as to create a contract. In support of this proposition I need only refer to the case of *Hyde* v. *Wrench* (1). It is clear then that no new contract was effected between the appellant and the Committee for the former's service for the period of two years.

In case the first contention failed the learned Counsel fell back upon the general law that where no term is expressed a hiring will be held to be a yearly hiring and argued that the appellant would be entitled to be paid up to the end of the year in which he was dismissed. He has referred us to various works on the law of Master and Servant. It is quite obvious that the rule of one month's notice which applies to menials, will not apply to the case of a schoolmaster.

The rule I have mentioned as to yearly hiring extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and, as has been pointed out in MacDonnel's "Master and Servant," page 136, each case must be considered by itself, and in each case it must be decided what notice would be reasonable.

In my opinion, in the case of a schoolmaster, especially when he was intending to leave his profession and join another, a notice of three months would be reasonable and this period was held to be reasonable in the case of Governors and Schoolmistresses in *Todd* v. *Kerrick* (2).

In the alternative the learned Counsel argued that the plaintiff-appellant was entitled to receive pay to the end of the session, that is to say, till May. He relied on a Resolution of the Syndicate of the University of Calcutta, dated the 21st January 1911 to the following effect:—

"In every case that the services of a teacher or a professor are dispensed with for reasons other than his incompetence or dereliction of duty his pay for the full period of twelve months must be paid to him," and urged that this was binding on the Committee. It is unnecessary to discuss how far this resolution bound the committee; it will be sufficient to refer to my decision later in this judgment that the real reason for the dismissal of the plaintiff was a dereliction of duty, and so the resolution does not effect the circumstances of this case.

The learned counsel also relied on the case of *Wittenbaker* v. *J. C. Galstaun* (3). In that case the plaintiff had been appointed Master at the Armenian College, Calcutta, for a term of three years in 1912, and on 26-7-1916, while he was still teaching after the expiry of his three year's term, received a notice that his services would be dispensed with on August 1st, and he was offered and received one month's salary.

It appears that his dismissal was not due to any misconduct, or dereliction of duty on his part. In the suit which he subsequently instituted the Principal of the City College deposed that it was the custom in the City College and the Schools which he knew, that the teachers or Governing Body were entitled to terminate an engagement by giving notice to terminate it with the existing session. Greaves, J. after considering what the plaintiff's position was after the expiry of the three years for which he was appointed, stated that he was inclined to think that after the three years the plaintiff's employment must be considered to continue as a yearly employment which would terminate with the end of the school year or session. He held however that the plaintiff was entitled to a reasonable notice and that a notice of three months would be reasonable.

That case can be distinguished from the present one in that the dismissal was not for any misconduct, dereliction of duty or fault of the plaintiff, and in the Armenian College the academical year is divided into three terms, while in the case of the Tej Narain Jubilee College there are not terms.

Whatever may have been deposed to be the custom in Calcutta Schools and Colleges in that case cannot affect this case, in which the evidence, including that of the plaintiff himself would seem to show that a notice of one month or even fifteen days had ordinarily been held to be sufficient. However, the learned Judge in *Wittenbaker* v. *Galstaun* (3) held, as I hold in this case, that a notice of three months would be reasonable and he considered three months to be about equivalent to a term.

In the present case the appellant was asked to cancel his license or resign by the letter of June 2nd 1914. This was practically a notice to him given four months before his actual dismissal, and thus I consider that he could not complain that he had no sufficient notice. He had full time to look for another appointment if he wanted one.

The letter of June 2nd too, informed him plainly that the committee did not approve

(1) (1840) 4 Jur. 1106=3 Beave. 334=49 E. R. 132.
(2) (1852) 22 L. J. Ex. 1=155 E. R. 1298=8 Ex 151.
(3) (1917) 44 Cal. 917=43 I.C. 11.

of his practising as a pleader, it was virtually a direction to him to cease practice, and he was informed that the Committee held that the practice was detrimental to the interests of the College.

In spite of this the appellant continued to practice and paid no attention to the warning given to him. It is quite plain that the appellant's practice in Court must be detrimental to the interests of the College to which the appellant was required to give his whole attention. The direction, therefore, contained in the Secretary's letter was a reasonable one, and the appellant wilfully paid no notice to it.

I am of opinion in agreement with the lower Court, that there was dereliction of duty on the part of the appellant and disobedience to a lawful and reasonable direction of the Committee which would have justified his summary dismissal.

I see no reason to differ from the findings of the lower Court and would dismiss the appeal. Having regard to all the circumstances of the case I am of opinion that each party should bear its own costs throughout.

Appeal dismissed.

A. I. R. 1922 Patna 28.

ADAMI AND BUCKNILL, JJ.

Rajanath Singh and others — Defendants-Appellants

v.

Wahid Khan and others—Plaintiffs-Respondents.

S. A. No. 458 of 1919, decided on 13th July, 1921.

(a) *Chota Nagpur Tenancy Act (VI B of 1908), Ss. 20 and 39*—Thiccadar—*Cannot acquire occupancy right in the land held under a* thicca.

A *Thiccadar* cannot acquire occupancy or non-occupancy right in the land that he cultivated as a *thiccadar*, under the sections [P. 28, C. 2.]

(b) *Chota Nagpur Tenancy Act, Ss.* 84 (3), *132—Record-of-Rights not conclusive proof of tenancy rights.*

Section 132 applies only to Khunt-kati lands and under Section 84 (3) a record-of-rights is not a conclusive proof of any tenancy right. [P. 28, C. 2]

(c) *C. P. C. O. 41, R. 27—Record-of-rights published after decision of lower Court—Should not be admitted—Practice—Subsequent events.*

An Appellate Court will not consider the record-of-rights published after the institution and decision of the case. [P. 28, C. 2].

Gangadhar Das and *Panchanan Banerji*—for Appellants.

Atul Krishna Ray—for Respondents.

Adami, J.:—The facts which are necessary for the purpose of the decision of this second appeal are, that the plaintiffs and defendants were co-sharer landlords in village Loharpara, and in the year 1912 there was a partition whereby they received separate *takhtas*, the lands in dispute are in the plaintiffs' *takhta*, but the defendants claim to have a *raiyati* right in them and refuse to give up possession.

In 1881 the defendants, who, it is found, had before that no connection with the lands, obtained a *thicca* lease from the proprietors for the period of nine years. In 1890 when the *thicca* ceased, they obtained a proprietary share in the village, and later on in 1898 the plaintiffs also obtained a proprietary share. The lower appellate Court has found that prior to their *thicca* the defendants had no connection with the lands.

It has looked into the evidence before the Court regarding the question whether the defendants cultivated the land as *raiyats*, and has found that they did not do so, but cultivated it as *maliks*. On these findings of fact, it seems quite clear that the defendants-appellants are concluded from succeeding in this appeal.

It has been argued before us that if in fact the defendants cultivated these lands during their *thicca* and while they were proprietors previous to 1912, they held a *raiyati* interest even though it was only a non-occupancy right. It is clear, I think, from the provisions of Ss. 20 and 39 of the Chota Nagpur Tenancy Act that on the findings this contention cannot prevail.

It is also contended that this Court should call for the record-of-rights and find out how the lands are recorded therein. The record-of-rights was finally published after the Munsiff had given his decision in the suit, but before this appeal came on for hearing before the lower appellate Court, the plaintiffs asked that it should be produced, but the lower appellate Court found that it was unnecessary to bring it into evidence at that stage.

I see no reason why under the circumstances this Court should be required to decide the case according to the entry, whatever it is, in the record-of-rights, considering that the suit was instituted and the decision given by the Munsiff before the final publication.

An attempt has been made to show that the entry in the record-of-rights is conclusive under the Chota Nagpur Tenancy Act, but the provisions of S. 132 relate only to *khuntkati* lands and in the present suit the provision, of S. 84, sub-S. (3) would apply. Under the circumstances I cannot find any reason for differing from

the findings of the learned Judicial Commissioner as they are findings of fact and would dismiss the appeal with costs.

Bucknill J, :—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 29.

JWALA PRASAD AND ADAMI, JJ.

Bisseswar Sahu-Judgment-debtor-Applt.

v.

Md. Zainal Rahman-Decree-holder-Respondent.

A. No. 88 of 1920, decided on 26th April, 1921, from an order of the J. C., Chota Nagpur, dated 1st March, 1920.

(a) *Chota Nagpur Tenancy Act (VI B. C. of 1908). Ss. 215 (3), 178 (3) and 224—Order extending time under S. 178 (3)—Appeal lies to Judicial Commissioner.*

In a suit under Section 139, Clauses (3) and (4) for arrears of rent and ejectment a decree was passed by the S. D. O. in the terms of Section 178. After the decree was fully executed the S. D. O extended the time for payment under Section 178 (3). On the question, whether an appeal lay to the Judicial Commissioner:

Held, that the order was one coming under Section 215 (3) and that, consequently the appeal from an order, such as was passed in the present case, lay to the Judicial Commissioner under Section 224. (1912) 16 C.L.J. 520 distinguished. [P. 30, C. 1.]

(b) *Chota Nagpur Tenancy Act S. 178 (3)—Ejectment executed—Time cannot be extended thereafter.*

The Power vested in the S. D. O. under Section 178 (3) is not exercisable after the decree for ejectment has been fully executed. [P. 30, C. 1]

Atul Krisna Ray—for Appellant.

Sushil Madhub Mullick and *Tribhuwan Nath Sahay*—for Respondent.

Jwala Prasad, J.:—This is an appeal against the decision of the Judicial Commissioner of Ranchi, dated the 1st of March, 1920, upsetting that of the Sub-divisional Officer of Chatra, dated the 24th September, 1919.

The respondents obtained a decree for arrears of rent, with a conditional order of ejectment if the decretal amount was not paid up within a month. The judgment was passed on the 15th of January, 1919, and the decree was drawn up on the 14th of February, stating in terms of Section 178 (2) of the Chota Nagpur Tenancy Act, that if the amount of the decree with interest and costs be paid into Court within 30 days from the decree, the decree shall not be executed. Thirty days expired without any payment, and an order for ejectment was issued on the 31st of March 1919 and possession of the land was delivered to the decree-holders on the 8th of April, 1919.

On the 9th of May, the judgment-debtor put in an application before the Sub-divisional Officer asking that the ejectment order be cancelled and the decretal amount be accepted. In that application he stated that he was not aware of the decree, and also prayed for an extension of time under Clause (3) of Section 178 of the Act. The question as to whether the judgment-debtor appellant knew of the decree passed against him or not was left undetermined by the Sub-divisional Officer, because it was admitted by the judgment-debtor that the Sub-divisional Officer had no authority to cancel his order under Section 178 (2). He, however, granted the second prayer for the extension of the period specified in the decree for payment of the decretal amount, and directed that the judgment-debtor was entitled to pay the amount up to the 27th of September, 1919.

On appeal the Judicial Commissioner held that the decree having been fully executed and possession delivered to the decree-holders, long before the application was made by the judgment-debtor for the extension of time, the Sub-divisional Officer had no jurisdiction to extend the time under Clause (3) of Section 178. He accordingly reversed the order of the Sub-divisional Officer, dated the 24th September, 1919, and restored his previous order delivering the property to the decree-holders. Against this order the judgment-debtor has come to this Court in a miscellaneous appeal.

It is contended that the appeal to the Judicial Commissioner was incompetent, inasmuch as the order of the Sub-divisional Officer, dated the 24th of September, was not an order relating to the execution of the decree and consequently no appeal lay to the Judicial Commissioner. His contention was that if there was any appeal it lay to the Commissioner, inasmuch as the Sub-divisional Officer was exercising the powers of a Deputy Commissioner.

Reliance for this contention, has been placed upon the case of *Surnnaman Singh* v. *Sham Charan Ohdar* (1). In that case the extension of time under Clause (3) of Section 178 was allowed during the pendency of the execution proceedings. Here, the execution proceedings had already terminated so far back as the 8th of April, 1919, when possession of the property was delivered to the decree-holders. That authority has, therefore, no application to the present case. On the other hand, the

(1) (1912) 16 C. L. J. 520=15 I. C. 689=16 C. W. N. 1000.

orders under Clauses (2) and (3) of Section 178 relate to the execution of the decree, for, within the time fixed under the former clause and within the time extended under the latter clause the decree cannot be executed.

In other words, the effect of the orders under those clauses is to defer the execution of the decree, and it is only on default in payment of the decretal amount within the time limited by those clauses, that the right to execute the decree accrued. Therefore, in substance and on principle, the order under Section 178 relates to execution of the decree. Such an order evidently comes under Section 215, Clause (3) of the Act and an appeal from that order would lie to the Court to which the decree was appealable. Under Section 224, the appeal from the judgment of the Sub-Divisional Officer, who was Deputy Commissioner, in a case under Section 139, lies to the Judicial Commissioner. The present suit for arrears of rent and for ejecting the defendant was brought under Clauses (3) and (4) of Section 139.

Consequently the appeal from the order such as was passed in the present case by the Sub-Divisional Officer relating to the execution of the decree was properly preferred in the Court of the Judicial Commissioner and was legally disposed of by him. The contention of the learned Vakil on behalf of the judgment-debtor-appellant before us must, therefore, fail.

It is next contended that the Sub-Divisional Officer was perfectly competent to extend the time as he did under Section 178, Clause (3), on the 24th of September 1919. This is an unsubstantial contention, inasmuch as the power vested in the Sub-Divisional Officer under Section 178, Clauses (2) and (3) was exercisable only so long as the decree was not fully executed. After the completion of the execution proceedings and the delivery of property to the decree-holder the decree ceased to exist and, therefore, there was nothing before the Sub-Divisional Officer which he could deal with on the 24th of September, 1919. This contention is also overruled.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Patna 30.

COUTTS AND ROSS, JJ.

Tara Prashad Jha Baliasey and others—Plaintiffs-Appellants

v.

Maya Debya and others—Defendants-Respondents.

A. No. 16 of 1919, decided on 10th February 1922 from the order S. J., Dunka.

Hindu Law—Partition—Evidence—No actual partition proved—But circumstances may show it.

Where there was no commensality in living and no co-worship but there were separate transactions and separate definement of shares in the Revenue records, the conclusion is irresistible that the family was separate although there had been no regular partition. [P. 33, C. 1.]

Kalwant Sahay, Lalit Mohan Ghosh, Sushil Madhab Mullick and *S. S. Bose*—for Appellants.

P. K. Sen, S. A. Sami, Harihar Prashad Sinha and *Atul Krishna Roy*—for Respondents.

Coutts, J. :—This suit was brought for a declaration of the plaintiffs' title by survivorship to certain properties specified in the Schedule to the plaint and for possession. The suit has been dismissed and the plaintiffs have appealed.

Both the plaintiffs and defendants are descendants of one Jugal Kishore Jha. Jugal Kishore had two sons. Tribeni and Kali Prasad. Tribeni married Maya Debi and by her had two daughters. Rama Debi and Bhagbatti Debi. Maya Debi, Rama Debi and Bhagbatti Debi are defendants in the suit. The second son of Jugal Kishore, Kali Prasad had two sons Tara Prasad and Baidya Nath Prasad. Baidya Nath died without issue but Tara Prasad had two sons Som Nath and Tung Nath. Tara, Som Nath and Tung Nath are the plaintiffs.

There is some discrepancy in the evidence as to the dates on which Jugal Kishore, Tribeni and Kali Prasad died, but in opening his case the learned Vakil for the appellants stated that Jugal Kishore died in 1906, Tribeni in 1911 and Kali Prasad in 1904 and as these dates are not objected to by the other side I will accept them as correct.

It appears that about 25 years before the institution of the suit when Jugal Kishore's wife died he left his ancestral home and went and lived with a mistress. Tribeni, who was then some 12 or 15 years of age, went to live with his uncle Bipro

Charan Durai; and Kali, who was an infant, went with his father and was looked after by the mistress. After living with Bipro Charan for a few years Tribeni went and lived with a married sister, he was married from her house and afterwards went and lived with his father-in-law. Kali Prasad after being with his father for a few years went to Bipro Charan's house and lived there until his marriage when he also went and stayed in his father-in-law's house till his death in 1904. Tribeni after living in his father-in-law's house for some time bought back the ancestral house which had been previously sold in execution of a decree against Jugal Kishore.

On the death of Kali Prasad he took his two sons, Tara Prasad and Baidya Nath, who were children, into his house. He kept them there for a short time and then rented a house next-door for them. Tara Prasad afterwards purchased this house and there he and his children have remained. Tribeni died in 1911, but before his death he executed a will by which he bequeathed the properties in suit to his widow and his daughters. After his death they took possession of the properties and the plaintiff's case is that the family was a joint family, the properties were joint family properties and consequently they were entitled to succeed by survivorship.

The defendants on the other hand, who, as I have already said, are widow and daughters of Tribeni, alleged that there was a disruption of the family after the death of Jugal Kishore's wife when he went to live with his mistress, that the properties in suit were self-acquired properties of Tribeni and as such they were entitled to them under the will.

The main questions for consideration in the case were (1) whether the family was a joint family and (2) whether the properties in suit were Tribeni's self-acquired properties or whether they were joint family properties; and these are the only points on which we have been addressed in this appeal. The learned Subordinate Judge has found against the plaintiffs on both points.

The first contention of the learned Vakil for the appellants is that the learned Subordinate Judge has wrongly placed the onus on the plaintiffs. What he has said is that "the presumption in Hindu law of the jointness of a Hindu family must give way, to the general principle that the one who makes a claim must prove it, in a case like this where *prima facie*, from the history of the family and the facts and circumstances that have been admitted, the family was not a joint family."

Now there can be no doubt that there is in the case of a Hindu Mitakshara family a presumption of jointness and that any one who pleads disruption must prove it; and it might seem at first sight as if the learned Subordinate Judge had taken a wrong view of the case, but a consideration of the whole of his judgment makes it clear that this is not so. He has clearly realised that the presumption is in favour of jointness but he finds that the facts of this case show that the family was separate.

I do not think therefore that the onus has been wrongly placed on the plaintiffs but the question remains whether separation has been proved. Now at the outset it must be admitted that the defendants have not been able to establish exactly when disruption took place. In the pleadings they put it at the time of the death of Jugal Kishore's wife when he went off to live with his mistress but some of the witnesses have said that the separation took place at a later date.

Very great stress has been laid on this point by the learned Vakil for the appellants and it has been urged that this of itself is sufficient to destroy the defendants' case. It is certainly a circumstance which must be taken into consideration, but in my opinion this fact is of itself not sufficient to show that the defendants' allegation that the family was separate, is a false one. It may be and it often is difficult to say exactly at what point of time a family became separate and if the contention were correct it would be almost impossible to establish separation. We must examine the circumstances of the family.

The circumstances from which separation may be deduced have been very clearly stated by Trevelyan in his Hindu Law at page 349 "Separation may be proved by acts or declarations which show an agreement and intention to separate, such as cesser of commensality, separate occupation of portions of the property, separate enjoyment of distinct shares of the profits, separate definement of shares in the Revenue records, agreement to divide the proceeds in definite shares or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others.

Mere cesser of commensality or of co-worship, division of the income, definement of shares in the revenue or land registration records, separate occupation of portions of

the property or separate collections of rents or separate dealings, are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation.

Applying these principles to the present case we find in the first place that since the death of Jugal Kishore's wife and since he went to live with his mistress there has been no commensality in the family. Jugal Kishore lived with his uncle, afterwards he lived in his fatherin-law's house and subsequently by himself in the ancestral house after he had purchased it. Kali Prasad when his mother died was an infant; he lived for a short time with Jugal Kishore's mistress, afterwards he went to live with his uncle and after his marriage he lived in his father-in-law's house until his death.

It is true that Tribeni after the death of Kali Prasad took, Tara Prasad and Baidya Nath, into his own house and subsequently rented another house close by for them, he also appears to have invested them, with the sacred thread and to have arranged their marriages, but this, is not inconsistent with his position as a separate member. *Deokisingh* v. *Musammat Anupa* (1), and it is clear that there has been no commensality in the family since the death of Jugal Kishore's wife, nor does there appear to have been community of worship.

I now come to dealings by Tribeni and Tara Prasad. If the family had been a joint family Jugal Kishore would ordinarily have been the Karta until his death. Now as I have said, he died in 1906, yet in 1895 Tribeni purchased the ancestral house(Ex. A), in 1896 he mortgaged a brick kiln which he describes as "my brick kiln" to one Udai Chand (Ex. D); in 1899 he borrowed Rs. 50 from Parbati Charan Jha Duari for household expenses and the cost of building a pacca house (Ex. F) and in 1900 he took the lease of a house from one Kalanand Parbat (Ex. 4).

All these transactions took place before the death of Jugal Kishore and they appear to indicate clearly that Jugal Kishore was not the Karta of the family and if this be so, they are very strong indications that the family was not a joint family. Subsequent to Jugal Kishore's death there are a number of transactions by Tribeni separately; namely, purchase of part of property No. 3, in the schedule to the plaint, in 1905 (Ex. K); purchase of a portion of propertyNo.3 in 1906 (Ex. C); purchase of Lakheraj property in execution of a money-decree in 1908 (Ex. S); pur-chase of property in execution of another money-decree in 1909 (Ex. R) and finally the will executed by Tribeni by virtue of which the defendants have taken possession of the properties.

All these are, in my opinion, strong evidence that there had been separation and in support of this view I may refer to the case of *Girja Bai* v. *Sadashiv Dhundiraj* (2) where their Lordships of the Privy Council remarked. "The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri* v. *Girish Chander Myti* (3) their Lordships regarded the conduct of one of the two who constituted the joint family when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin, and treated the fact of his borrowing money for his maintenance as well as making a will as indicating at all events that he himself considered that a separation "had taken place."

The conclusion was based on the inference of intention derivable from the acts and declarations of the member who, it was alleged, had separated himself, and not from the conduct or attitude of any other party." In addition to the separate transactions of Tribeni we have also separate transactions by Tara Prasad. In 1906 he purchased a house, the house in which he subsequently lived. This would appear from the evidence of the plaintiff's own witness Bipro Charan Duari who says "Tara Prasad is in a separate house purchased separately;" and also from the evidence of the defendants witness No. 1 Sambhu Charan Jha, who says "Tara Prasad purchased a house with his own money."

Again in 1911 a mortgage was executed in favour of Tara Prasad (Ex. 10). It is clear then that Tara Prasad also had separate transactions. Another piece of evidence which tends to show separation is the fact that different members of the family are shown in the Revenue records as holding separate shares (Ex. B.) This Exhibit is a certified copy of a Khewat which shows "Tribeni Panda, son of Jugal Kishore Panda 1 share. Tara Panda and Bhayya Ram Panda, sons of Kalika Panda 1 share in equal shares."

(1) (1906) 16 M.L.J., 109=10 C. W. N. 338 (P.C.).

(2) (1916) 43 Cal. 1031=37 I. C. 321=43 I.A. 151 (P. C.).

(3) (1879) 4 Cal. 434=5 I. A. 228=3 Sar. 871 (P.C.).

I now come to the matter of the division of the income. There was possibly a very small income from certain ancestral property but this is practically negligible. Jugal Kishore's income was derived from Jajmans. He was a priest and his income was from fees paid to him by Jajmans.

It is contended that this was ancestral property and that it has been never divided. Now the facts with regard to these Jajmans appear to be that Jugal Kishore and after him Tribeni attempted to keep all the fees paid by the Jajmans, but there is evidence, and it is not disputed, that on two occasions at least there was a dispute as to the division of these fees, which was settled by a Punchait and the fees were divided. It is strongly urged that this indicates that there was no separation. I am unable to accept the contention. It appears to me rather to indicate that the family was separate and that the different members were quarrelling as to the division of these fees but apart from this the fees were not in my opinion ancestral property.

In Gour's Hindu Code at p. 472 in para. 1054 he says,

"Both the Mitakshara and the Dayabhag devote a chapter each to the subject of self-acquisition. Their substance is to exempt all aquisitions made without detriment to the joint estate. The rest is merely illustrative and most of the illustrations refer to occupations now no longer pursued. Thus the Dayabhag gives the following list as constituting the "gains of science."

(3) "Fee for officiating as a priest."

It may be that the Jajmans were ancestral in the sense that Jugal Kishore and his father before him had acted as priests for the Jajmans and their fathers, but the fees were not joint family property; they were the self-acquisition of the member of the family to whom they were paid.

We have thus in the present case no commensality, no co-worship, separate transactions and separate definement of shares in Revenue records, and in my opinion the circumstances are such as to lead to the irresistible conclusion that the family was separate although there had been no regular partition.

I shall now deal with the different portions of property claimed in the plaint. The first of these is the ancestral house. Admittedly this was purchased by Tribeni. It was, as I have already said, purchased in 1895 when Jugal Kishore was still alive, there was no joint fund out of which it could have been purchased and it was clearly Tribeni's self-acquisition. The next item is a pucca house in the town of Deoghur Jhasa Gari. This was apparently ancestral property and all that Tribeni was entitled to was his share. The plaintiffs are therefore entitled to a share of this property.

The next items (3) and (4) are on the same footing; both are Lakheraj properties in the town of Deoghur purchased by Tribeni. Here again there was no joint fund out of which they could have been purchased and the circumstances indicate clearly that the defendants' case, that these were Tribeni's self-acquisition, is true. The next item is a 10 pies share in Taluk Marwa. This was admittedly ancestral property and as such Tribeni could only be entitled to his own share. The next items of property are the Jajmans and with regard to these I have already said that in my opinion the fees are are self-acquired property. The plaintiffs are therefore not entitled to any share in these.

The next item is a Milkiat in Arrah, this is ancestral property and stands on the same footing as the Marwa property. The last item is a mango garden in village Ramgarh, Taluk Rohini, which was purchased by Tribeni himself and, for the reasons I have already given in respect of the other properties purchased by him, is his self-acquired property.

In the result then I see no reason to interfere with the decision of the learned Subordinate Judge except in regard to Jhasa Gari, Marwa and Arrah properties in which the plaintiffs are entitled to a declaration of their right to their own share. They can, however, get no separate possession because there has been no prayer for partition. The respondents are entitled to their costs of this appeal.

Decree varied.

A. I. R. 1922 Patna 33.

COUTTS AND ROSS, JJ.

Nekari Ball—Defendant-Appellant

v.

Lakshimi Kantha Roy and others—Respondents.

S. A. 421 of 1920, dated 1st February, 1922.

(a) *Limitation Act, S. 142—Ejectment Suit—Plaintiff must prove possession within 12 years.*

In a suit for possession after dispossession, the plaintiff must show possession within the statutory period of 12 years. [P. 34, C. 1.]

(b) *Adverse possession—Permissive possession —Alienee from co-sharer—Possession is not necessarily permissive.*

The possession of an alienee from a co-sharer is not necessarily permissive as regards the other co-sharers. It may amount to adverse possession.

[P. 34, Cs. 1 and 2.]

S. N. Palit—(for Mullick) for Appellants.

H. Mukherji—for Respondents.

Coutts, J.:—This appeal arises out of a suit brought by the plaintiff for a declaration of their ancestral right and for possession of a moiety share in a certain village, Paura, in the Mabhum district. The plaintiff's case is that the land was originally held jointly by their father Ram Nawaz Roy and the father of the *pro forma* defendants, Kangali Charan Roy. The property was joint during their life-time and after their death the family remained joint but in the year 1314 the principal defendant fraudulently got a Kebala executed in his favour by the *pro forma* defendants. At first he did not get possession, as Ram Nawaz Roy, the father of the plaintiffs, was still alive, but on his death the plaintiffs were minors and taking advantage of their position he did obtain possession.

For this reason the suit has been brought. The suit was contested by the principal defendant who alleged that Ram Nawaz Roy and his brother Kangali Charan Roy were separate; that Kangali Charan Roy was in separate possession of this property, in 1309 he mortgaged it, subsequently in 1314 he sold it to him, and since 1309 he has been in undisturbed possession. The suit has been decreed in both the trial Court and the lower appellate Court. The principal defendant has appealed.

It has been found as a fact by both the Courts below that Ram Nawaz Roy and Kangali Charan Roy were joint, that in 1309 Kangali Charan Roy executed an usufructuary mortgage in favour of the principal defendant and subsequently in 1314 he executed a Kabala in his favour. It has further been held that since 1309 the principal defendant has been in possession at first by virtue of the usufructuary mortgage and afterwards under the Kabala.

Now the suit being one for possession, after dispossession the plaintiffs must show possession within the statutory period of 12 years and the contention in appeal is that the principal defendant having been in possession since 1309 the plaintiffs' suit is barred by limitation. Both the Courts below have dealt with this point somewhat inadequately. As I understand it, their view is that the *pro forma* defendants being co-sharers the mortgage made the possession of the defendant permissive so far as the plaintiffs were concerned.

This, however, is not necessarily so and it is clear that the point has not been properly considered. The question requires a consideration of evidence and as we cannot do this in second appeal I would set aside the decree of the learned Subordinate Judge and remand the appeal for rehearing.

Ross, J.:—I agree.

Case remanded.

A. I. R. 1922 Patna 34.

COUTTS AND ROSS, JJ.

Ganga Singh and others—Plaintiffs-Appellants

v.

Prithi Chand Lal Choudhury—(Objector)-Respondent.

Appeal from Original Order No. 108 of 1921, decided on 25—1—1922, from an Order of S. J. Bhagalpur dated 31—5—1921.

(a) *Jurisdiction—Consent—Submission may give jurisdiction.*

Where in a suit by the plaintiffs for an injunction restraining the defendants from executing certain decrees got in another Court, the defendant appeared and contested the suit.

Held: the conduct of the defendants amounted to submission to jurisdiction and that the Court had therefore jurisdiction to pass an order for temporary injunction. [P. 35, C. 2.]

(b) *C.P.C., O. 39, R. 1.—Suit on basis of compromise decree not binding on minors—Compromise apparently beneficial to minor.*

Temporary injunction restraining execution of decree should not be given (I. L. R. 36 Cal. 233) Dis. (21 Bom. L. R. 963) Foll. [P. 36, C. 1.]

Manuk Kulwant Sahay and *Sailendra Nath Palit*—for Appellants.

Sultan Ahmad and *Sd. Muhammad Tahir*—for Respondents.

Coutts, J.:—This appeal arises out of an application made for a temporary injunction to restrain the defendants first party from executing two mortgage decrees. The petitioners brought a suit to set aside these decrees on various grounds. The defendants first party obtained the decrees on compromise and their principal allegations are that they were minors and were not properly represented, that the procedure adopted was illegal and that there was nothing to show that the Court considered whether the compromise was for the benefit of the minors or not. For these

and other reasons they asked for a declaration that they were not bound by the decrees and that they should be set aside.

The suit was filed in December, 1920, and in February, 1921, the plaintiffs made the petition with which we are now concerned, asking for a temporary injunction restraining the defendants from executing their mortgage decrees. The application has been dismissed by the learned Subordinate Judge on the ground that he has no jurisdiction and that no good reason has been shown for granting the injunction. The plaintiffs have appealed.

Two points arise in the appeal (1) whether the Court had jurisdiction to grant the injunction and (2) whether in the circumstances of the case an injunction should be granted. In regard to the question of jurisdiction the learned Subordinate Judge has relied on the cases of *Vulcan Iron Works* v. *Bishumbhur Prasad* (1); *Jumna Dass* v. *Harcharan Dass* (2) and *Begg Dunlop&Co* v. *Jagannath Marwari* (3). As the latter two cases are based on the decision in the case of *Vulcan Iron Works* v. *Bishumbhur Prasad* (1), it is necessary to consider that case.

The case was decided on the authority of the *Carron Iron Co.* v. *Maclaren* (4) and the learned Judge who decided it relied on certain remarks in the judgment of Lord Brougham, that jurisdiction is limited to cases where the party sought to be restrained is within the limits of jurisdiction of the Court, for the only remedy for breach of the injunction is by way of process for contempt which, being proceedings of a quasi criminal nature, could not be enforced against a party resident out of the jurisdiction; and following this decision Fletcher J., remarks that,

"The Court can only restrain a person from proceeding with a suit in a Foreign Court if the person ought to be restrained is within the jurisdiction of the Court."

This suit was one in which the plaintiffs had asked for an order on the defendants to restrain them from proceeding with a suit which had been instituted by them in the Court of the Subordinate Judge of Farruckabad, the plaintiffs having sued the defendants on the original side of the Calcutta High Court. The application for injunction was rejected on the ground of want of jurisdiction.

It is not clear from the report of the case whether the defendants in the case in the Calcutta High Court had appeared and submitted to the jurisdiction of the Court and this was a point which was never considered in that case. In Halsbury's Laws of England, Vol. XVII, p. 263, it is said that "a foreigner who has appeared to an action in an English Court gives jurisdiction to the English Court to restrain him from proceeding to litigate the same subject matter in the Courts of his own country."

In support of that dictum the authority of *Dawkins* v. *Simonetti* (5) was quoted. In his Conflict of Laws (1908 Edn.) p. 45 Dicey says:

"The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction, or in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction" and again at p. 48 he says "The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought an action or suit. This again is in strict conformity true with the principle or test of submission."

The true test then would appear to be a submission to jurisdiction and it is to be noticed that in the case of *Carron Iron Co.* v. *Maclaren* (4), on which Fletcher, J., based his decision in the case of *Vulcan Iron Works* v. *Bishumbhur Prasad* (1), the Scottish respondents were not respondents to the English action nor did they claim the benefit of the administration decree, in other words, they did not submit to the jurisdiction of the Court. This was a question which, as I have already said, was not considered by Fletcher J., in his decision and it is not clear from the reports of that case whether in fact the defendants had submitted to the jurisdiction or not.

In the case now before us the defendants have submitted to the jurisdiction by appearing to the suit of the plaintiffs and by so doing they have given the Court jurisdiction. This same matter was very fully considered in a judgment of Marten, J., in the case of *Mulchand Raichand* v. *Gilland Co* (6), in which the learned Judge took the view of the matter I have already expressed. In my opinion, then, the Subordinate Judge had jurisdiction to grant an injunction.

It remains to be considered whether

(1) (1909) 36 Cal, 233=1 I.C. 927=13 C.W N. 346.
(2) (1911) 38 Cal. 405=11 I.C. 416=16 C.W.N. 346.
(3) (1912) 39 Cal. 104=14 C.L.J. 228=11 I.C. 417 =16 C.W.N. 402.
(4) (1855) 24 L.J. Ch. 620=5 H.L.C. 416=3 W. R. 597.
(5) (1881) 50 L. J. P. 30=29 W. R. 228=44 L.T. 266.
(6) (1920) 44 Bom. 283=53 I. C. 518=21 Bom. L.R. 963.

jurisdiction should be exercised in this particular case or not. In my opinion it should not. The contention in support of the application is that the proceedings of the Court which led up to the *ex-parte* decrees being obtained by the defendants were not in accordance with law. The orders of the Subordinate Judge on the order sheet which refer to the making of the *ex-parte* decrees are as follows:

"23 1-18. On the application of the guardians *ad litem* of the minor defendants for permission to compromise the case with the plaintiff it is ordered 'permission granted.' On the same day there is this final order "Both sides file a petition of compromise. I order the suit be decreed on compromise. All the lines of the petition of compromise should be embodied in the decree.

The first point urged is that there is nothing in either of these orders to show that the learned Subordinate Judge considered the question whether the compromise was for the benefit of the minors and on the authority of *Gobinda Chandra Pal* v. *Kailash Chandra Pal* (7). It is contended that the order is illegal.

The second point urged is that before the defendants had filed written statements the case was submitted to arbitration and it was in pursuance of that arbitration that the compromise was arrived at, consequently the arbitration was not in accordance with Schedule II of the Civil Procedure Code and was illegal. Now what happened appears to be this. After the suit was filed but before the defendants filed their written statements both parties with the knowledge of the Court submitted their difference to the District Judge and the Collector and it was arranged that they should settle the dispute. These two officers arranged a settlement, a compromise petition in accordance with it was filed and the decree was passed.

In these circumstances I am unwilling to believe that the compromise was not in fact for the benefit of the minors. It may be that there was some irregularity in the procedure adopted by the parties and possibly by the Court and I refrain from expressing any opinion as to whether on account of this irregularity the plaintiffs may succeed in their suit, but I am not satisfied that in the circumstances of the case their interests were not properly considered and therefore I would not grant an injunction.

I would dismiss this appeal with costs.

Appeal dismissed.

(7) A. I R. 1922 P. C. 186=48 Cal. 994=48 I. A. 241 (P. C.)

A. I. R. 1922 Patna 36.

DAS AND ADAMI, JJ.

Krishna Kishor Adhikari and others—Appellants v.

Kusunda Nyadi Collieries Ltd. — Respondents.

A. No. 72 of 1919, decided on 10-2-1922, from a decision of the S. J., Manbhum.

(a) *T. P. Act, Ss. 3 and 58—Immoveable property—Royalty is not moveable property.*

Royalty is in reality the price paid for a portion of the soil the payment whereof is distributed over a number of years. If that be so, then the interest in the royalty cannot constitute an interest in immovable property which can be dealt with by way of a mortgage. [P. 37, C. 2.]

(b) *Mortgage—Elements—Test for mortgage is to see if interest runs.*

An important test to apply when a question is raised whether a transaction is a mortgage or not is to see whether any interest is to run upon the money due by one party to the other in consideration of which the transaction is entered into. [P. 37, C. 1.]

Sinha and *Ghosh*—for Appellants.

Sami, Mullick, Battacharji and *Bose*—for Respondents.

Das, J.:—On the 6th February, 1901, the defendant No. 2 and the predecessors-in-interest of defendants 3-6 gave a mining lease in respect of 100 bighas of coal land in Kusunda to one Phillips on certain terms as to payment of minimum royalty and commission which are set out in the document creating the title in favour of Mr. Phillips. Mr. Phillips has subsequently conveyed his interest to the Kusunda Nyadi Collieries Ltd., and the company is now liable to pay the minimum royalty and commission in respect of the lease to defendants 2-6. Defendants 2-6 borrowed various sums of monies from Mr. Smith who has been cited in the action as defendant No. 7 and on the 4th March, 1908, the sum due and owing by defendants No. 2-6 to Mr. Smith amounted in all to Rs. 35,000. On the 24th March, 1908, defendants Nos. 2-6 executed a document in favour of Mr. Smith which is the subject matter of the dispute between the parties.

The document is as follows:—

"This Jat Meadi Tamasak is executed to the following effect: that we have borrowed already Rs. 30,000 from you, as per items noted herein below, and borrow Rs. 5,000 this day, in all Rs. 35,000. In order to pay off this sum without interest, we execute Jat Meadi in respect of half of the commission on the under-ground coal of the 100 bighas of land, as described in the boundaries given below, within 12 annas of the entire Mauza Kusunda appertaining to Parganna jharia and Katras.

"You shall continue to satisfy the sum borrowed, by realising the commission

every month, from year to year, from the ensuing month of April of the current year. You shall continue to realise half of the commission till that month of that year until which the entire amount is paid up. This Jat Meadi commission shall continue to be realised, by us directly from that month and that year on which your money will be paid up. You or your heirs or representatives shall not be competent to raise any claim, plea, or objection to the same. If the income from the commission be stopped owing to the exhaustion of coal, or on any other ground, and if the entire amount due to you be not realised therefrom, and something is left due, you shall not be competent to realise the same from our persons, or other properties. You shall remain bound to give up the same."

The question which we have to determine is whether this document operated as a mortgage of immoveable property. If it did operate as a mortgage of immoveable property, it is unenforceable in law inasmuch as it was not attested in accordance with Section 59 of the Transfer of Property Act. The plaintiff, who took a conveyance of the interest of Mr. Smith on the 28th March, 1908, contends that the document operated as an assignment or as a mortgage of moveable property and that accordingly it was not necessary to have the document attested in the manner required by the Section 59 of the Transfer of Property Act.

In my opinion, the document did not operate as a mortgage and certainly did not operate as a mortgage of immoveable property. A mortgage implies a debt and I am satisfied that the document extinguished the debt which was due by defendants 2-6 to Mr. Smith. The document expressly states that the transaction was entered into in order to pay off the sum of Rs. 35,000 due by the defendants 2-6 in favour of the plaintiff.

A very important test to apply, whenever the question is raised whether a transaction amounts to a mortgage or not, is to see whether any interest is to run upon the sum of money that may be due by one party to another in consideration of which the transaction is entered into. If no interest is payable by the debtor to the creditor and if the document expressly states that the transaction is entered into for the purpose of paying off the sum due by the debtor to the creditor, it is difficult to understand how the transaction can be regarded as a mortgage.

In the next place it is important to take note of the condition which expressly provided that even if Mr. Smith failed to realise any commission owing to the exhaustion of coal or on any other ground the defendants 2-6 would not be liable for any sum of money that might be still due to Mr. Smith. In other words, the execution of this document put an end to the liability of defendants 2-6 to the plaintiff. No doubt there are certain expressions used in the document to which the learned Subordinate Judge refers which if read apart from the context seem to suggest that the liability still continued; but the document must be read as a whole, and in my opinion when it is read as a whole, it establishes that the liability of defendants 2-6 was at an end by the execution of the document.

In the next place if it was a mortgage at all, it was a mortgage of the commission which was due to the defendants 2-6 from the company. Now I cannot regard the interest which the defendants 2-6 had in the commission as an interest in immoveable property. It has been held in cases too numerous to mention that royalty is in reality the price paid for a portion of the soil the payment whereof is distributed over a number of years. If that is so, then the interest in the royalty cannot constitute an interest in immoveable property.

In my opinion the position is this; defendants 2-6 had a claim to a beneficial interest in the commissions which was not in their possession either actual or constructive. That beneficial interest could not be regarded as an interest in immoveable property. Defendants 2-6 transferred their claim to that beneficial interests to Mr. Smith and Mr. Smith in his turn transferred it to the plaintiff. In my opinion, the transaction is not one which required attestation in accordance with the provision of Section 59 of the Transfer of Property Act.

I would allow the appeal, set aside the judgment of the learned Subordinate Judge and remand the case to the learned Subordinate Judge for decision according to law. The plaintiffs are entitled to the costs of the appeal. The costs incurred in the Court below will abide the result and will be disposed of by the learned Subordinate Judge.

Adami, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 38.

COUTTS AND ROSS, JJ.

Srimati Sabitri Thakurain—Petitioner

v.

Fredric Ammie Save—Opposite Party.

Civil R. N. 312 of 1921, dated 13th January, 1922.

C. P. C., S. 115—Jurisdiction—Exercised properly—High Court will not interfere.

Where a Hindu widow brought a suit questioning the will of her husband and therein applied for interim grant of maintenance, and the lower Court granted a maintenance on the basis of what the will gave to the widow as maintenance:

Held: that the lower Court exercised its jurisdiction properly in taking the wish of the testator as the basis of his decision and that the High Court cannot interfere. [P. 39, C. 1.]

Sultan Ahmed, Jayswal and *Murari Prasad*—for Petitioner.

Manuk and *S. N. Palit*—for Opposite Party.

Coutts, J.:—This application is against the order of the Officiating Subordinate Judge of Monghyr, passed on an application of Srimati Sabitri Thakurain praying for maintenance. It appears that the petitioner had brought a suit for recovery of her late husband's estate after a declaration that the will executed by him, of which probate has been granted, is not genuine and valid and this application was for *ad interim* maintenance during the pendency of the suit at Rs. 3,000 a month for her personal and other expenses and for a sum of Rs. 15,000 for arrears of maintenance and for meeting the expenses of the suit.

The learned Subordinate Judge has granted *pendente lite* maintenance at the rate of Rs. 150 a month and Rs. 50 a month for making arrangements for residence, in all Rs. 200 a month, and it is against this order that the lady has made this application in revision.

The present litigation has a long history beginning with the death of the lady's husband, Babu Woogra Mohan Thakur, who died in 1914. He was a considerable Zemindar of Bhagalpur and the will, of which probate has been granted, is dated the 10th of May, 1913. By this the defendant No. 1 was appointed executor and the property, subject to other gifts, was bequeathed to his nephew Surjya Mohan Thakur, a minor who was also a defendant in the suit.

By this document Rs. 100 a month was provided for the maintenance of the widow of the testator and no provision was made for her residence. Very shortly after the death of Babu Woogra Mohan Thakur the defendant No. 1 in the present suit, the executor, filed an application for grant of probate and soon afterwards the widow applied for letters of administration. The application for grant of probate was made before the District Judge of Bhagalpur and the application for letters of administration was made before the Calcutta High Court and the application before the Calcutta High Court was made on the basis of another document which was said to be the real will of Babu Woogra Mohan Thakur.

An application was also made in the Calcutta High Court by the lady for transfer of the Bhagalpur case to the Calcutta High Court. This application was refused but the proceedings in the case were stayed. The letters of administration case then came on for hearing in the Calcutta High Court and the application was rejected. The probate case in Bhagalpur then proceeded and probate was granted to defendant No. 1, the executor. The lady then preferred appeals in both the probate and letters of administration cases to the Calcutta High Court.

The appeal in the Bhagalpur case was dismissed and the appeal in the Calcutta High Court case was also dismissed after a fruitless attempt to be allowed to sue *in forma pauperis*. The lady then filed two applications for appeal to the Privy Council. These were refused by the Calcutta High Court and applications to the Privy Council were made for special leave to appeal. This was refused in the letters of administration case but granted in the probate case. After hearing, however, the probate appeal was also dismissed in the Privy Council. The lady during the pendency of her appeal in the Privy Council, filed a plaint, exactly similar to the plaint in the present suit, before the Calcutta High Court and asked to be allowed to have the case tried there.

At the same time she also made an application exactly similar to the application now before us for *pendente lite* maintenance. The application for maintenance was heard first and was rejected and on the same day the plaint was also rejected and the lady was directed to prosecute her suit in Bhagalpur. In accordance with this order the lady has filed her plaint there and she has made the application, with which we are now concerned, for *pendente lite* maintenance. Her prayers are for *pendente lite* maintenance at Rs. 3,000 a month for her personal and other expenses, provision for her residence during the pendency of the suit, a sum of Rs. 10,000 for arrears of maintenance and a further sum of Rs. 5,000 to meet the expenses of this suit.

As I have already said the application has been allowed to the extent of Rs. 200 by the learned Subordinate Judge. The application now before us is that the whole money demanded should be allowed.

The point taken before us is that the learned Subordinate Judge has exercised his jurisdiction with material irregularity in not allowing larger maintenance. It is urged that the income of the estate is more than a lakh of rupees and that this being so it is a whimsical exercise of jurisdiction to allow the lady only Rs. 200 a month out of this sum.

The learned Subordinate Judge has passed his order on the fact that the amount which has been allowed by the testator in the will, of which probate has been granted, is Rs. 100, but he has increased the amount, because of the increase in the costs of living. He has also found that although there is no provision in the will for residence the lady is entitled to residence and as she declines to live in a house which has been offered her by the executor at Bhagalpur he has granted her Rs. 50 a month to live elsewhere.

That the learned Subordinate Judge was right in basing his decision on what appeared to be the wishes of the testator, cannot I think be disputed. This is the view taken in a series of cases beginning with the case of *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth Mullick* (1), and it cannot be said that the learned Subordinate Judge exercised jurisdiction whimsically in taking the wish of the testator as the basis of his decision. Nor does it appear that on any other grounds the learned Subordinate Judge would have been justified at this stage in granting more maintenance.

The lady has been unsuccessful in every Court even in the Privy Council and when her application was filed in the Calcutta High Court she refused an offer of Rs. 1,000 a month for maintenance made to her by the defendants which was described by the learned Judge who heard that application as a very fair and generous offer. Moreover it appears that the estate is burdened with heavy debts and it is impossible to say at present with any certainty what the income of the estate really is.

It has been urged that if the maintenance is not increased the lady will starve. The contention does not impress me. The lady has, as I have already said, been defeated in every Court up to the Privy Council and she has again brought this suit questioning the validity of the will.

(1) 5 Indian Appeals 55.

It is not disputed that under the Hindu Law irrespective of the will she is entitled to suitable maintenance and if her suit had been brought for maintenance it could have been taken up and decided quickly without any necessity for *ad interim* maintenance, but she has chosen again to question the will and has raised many technical points with the result that the litigation is being protracted. I do not suggest that she is not entitled to bring the present suit or that if she can establish her case she is not entitled to succeed; but it appears to me that if she had been in such dire need of maintenance as is suggested, she would have brought her suit in another form.

In all the circumstances of the case it seems to me that the learned Subordinate Judge has exercised his jurisdiction with due discretion and I would dismiss this application with costs. Hearing fee 5 gold mohurs.

Ross, J.:—I agree.

Application rejected.

A. I. R. 1922 Patna 39.

JWALA PRASAD, J.

Jangi Mahto and others—Plaintiffs-Petitioners

v.

Muni Mahto and others—Defendants-Opposite Party.

Civil Revision No. 328 of 1921, decided on 24th January, 1922.

Prov. Sm. C. C. Act, S. 25—Grounds for—Wrong appreciation of evidence—High Court will interfere.

Where the Small Cause Court dismissed plaintiff's case on the ground that he avoided going into witness-box and without properly considering the evidence in the case, the High Court reversed its decision.

[P. 40, C. 1.]

B. N. Mitter and *Ray, B. B. Saran*—for Petitioners.

H. B. Mukherji—for Opposite Party.

Jwala Prasad, J.:—This is an application under S. 25 of the Provincial Small Cause Court Act against the decision of the Small Cause Court Judge of Saran dated the 22nd June, 1921. The plaintiffs' suit was based on a hand-note executed by the father of defendants 1 and 2 and by brother of defendant No. 3. It purported to bear the thumb impression of the executant. The finger-print expert as observed by the Court below proved that the thumb impression, though slightly blurred, was that of Etwari Mahto. The

signature on the hand-note of the executant appears to have been made by the pen of his son, Muni Mahto, defendant No. 1. Muni's signature on Exhibit 2-B seems to resemble his signature on the hand-note. The Court below, however, thought otherwise.

The case was decided by the Court below against the plaintiffs upon the ground that plaintiff No. 3 had deposed in a former case that he had not got any hand-note bearing the thumb impression of Etwari. That deposition is dated the 28th January, 1918. The Court below, therefore, infers that hand-note in question was not in existence; but he failed to appreciate that the question was asked in the cross-examination on behalf of Etwari himself, the suggestion being that such a hand-note was executed by Etwari and was in the possession of the plaintiff.

That was a suit for the redemption of a mortgage bond with respect to a land which was purchased by the plaintiffs.

The plaintiffs' case in that case was that the money due under the mortgage bond was paid off. The defendants' case was that the money due under the mortgage bond was paid off. The defendants' case was that the money was not paid and whatever money was received was covered by the hand-note in question. The plaintiff who was examined as a witness in that case therefore, thought that if he had admitted the hand-note in question, his redemption case would be prejudiced.

Apart from this, the deposition is not capable of this sole interpretation that no hand-note was executed. Another reason given by the Court below for disbelieving the plaintiffs' case is that the plaintiff No. 3, although summoned as witness by the defendants, did not appear in Court and deny the statement contained in his deposition of the 4th April, 1918, referred to above.

Plaintiff No. 3 was a party to the suit, and the Court had ample power to direct his personal appearance under Order 3, Rule 1, C. P. C., failing which he could have been dealt with properly in the case. The whole case has been decided on the aforesaid considerations, and the oral evidence in the case relating to the execution of the hand-note in question was therefore lost sight of and has not been dealt with. The decision of the Small Cause Court Judge should therefore be set aside.

The parties, however, do not want a remand of the case and have come to terms in this Court. They have filed a petition of compromise whereby it has been agreed that the suit be decreed in favour of the plaintiffs for Rs. 100, each party bearing its costs throughout. The case must therefore be decided in accordance with the terms of the compromise petition and decree prepared embodying the terms.

There will be no order as to costs in favour of any of the parties incurred in any of the Courts.

Decreed as per compromise.

A. I. R. 1922 Patna 40.

COUTTS AND ROSS, JJ.

Lachhmi Lal—Appellant

v.

King-Emperor—Opposite Party.

Death reference No. 2 of 1922, Cr. Appeal No. 7 of 1922, decided on 8th February, 1922, against an order of the Judicial Commissioner, Chota Nagpur.

(a) *Pardanashin Lady—Appearance in Magistrate's Court—Examination behind purdah in Sessions Court not to be allowed.*

A lady who has appeared before the Committing Magistrate should not be allowed to be examined behind a parda in the Sessions Trial. [P. 41, C. 2.]

(b) *Criminal trial—Evidence on commission in serious trial should be deprecated.*

The issue of a commission for the examination of an important witness in a serious criminal trial is a procedure which is much to be deprecated and which should never be adopted except for the most cogent reasons. [P. 41, C. 2.]

(c) *Criminal P. C., S. 288—Deposition before Committing Magistrate cannot be put on record of Sessions Court without drawing witness's attention to it.*

The deposition of a witness before the committing Magistrate should not be put in evidence in the Sessions Court without the attention of the witness being drawn to the portion of the statement which it is desired to use. [P. 42, C. 1.]

(d) *Criminal P. C., S. 162—Statement of witness written by Police Officer is not admissible.*

The Police Officer can under certain circumstances depose to what a witness deposed to him, but the statement written by the Police Officer is not admissible in evidence. [P. 42, C. 1.]

Patel—for Appellant.

The Advocate-General—for the Crown.

Coutts, J.:—The appellant in this case, Lachhmi Lal, has been convicted under Section 302 of the Indian Penal Code for the murder of one Nanhak Lal and has been sentenced to death by the Judicial Commissioner of Chota Nagpur. Lachhmi Lal is a relation of Nanhak and the case for the prosecution is that Nanhak was returning home from Mirzaguni Bazaar on the 27th of

August last when at about 6 P. M. he was attacked by Lachhmi Lal with a sword. The attack was made on a footpath in village Jaggernathdih where both the appellant and the deceased lived. Three persons are said to have witnessed the occurrence or some part of it, namely, M. Thagni Barhin, Dilo Singh and M. Laro Kumari, Nanhak's sister M. Munshi Kumari heard a cry that Lachhmi had cut Nanhak with a sword and on going out she saw Lachhmi running away.

She then found her brother lying severely wounded on Kartik Lal's Bari. She took him home on a Khatia, called the villagers and the Chowkidar. The Chowkidar gave an information to the thana three miles off at about 1 A. M. the Sub-Inspector came at once. Nanhak was sent to the hospital and died there on the 3rd of September.

I do not propose to discuss the evidence which has been adduced in this case, because the trial has been of such a perfunctory nature and there have been so many irregularities committed in the course of the trial by the learned Judicial Commissioner that the learned Government Advocate has said that he is compelled to ask for a re-trial and that if his prayer be not granted he does not propose to try and support the conviction.

The course he has adopted is, in my opinion, a very right one and the only course which was really open to him. We are therefore only concerned with the question of whether we should acquit the accused as we are asked to do by the learned Counsel for the appellant or to order a re-trial.

The main grounds on which the prayer for a re-trial is based are three:—(1)that the evidence of the eye-witnesses Mussammat Thagni and Dilo Singh has been so perfunctorily recorded that it is impossible to say from evidence whether they really saw the occurrence or not; (2) that the evidence of one of the most important witnesses, namely, Mussammat Laro is not on the record and is therefore not available to the Crown; and (3) that the statement which was made to the Sub-Inspector of Police by Nanhak before his death and recorded by him has not been properly brought on the record.

In regard to the first point a mere glance at the evidence of Mussammat Thagni and Dilo Singh is sufficient to show that the comment on this evidence which has been made by the learned Government Advocate is justified. Thagni's examination-in-chief consists of five lines of print and Dilo's of about double this.

It is impossible to discover from Dilo's evidence where he was when he saw the part of the occurrence to which he deposes or whether in fact he could have seen any part of it. The same remark applies to Mussammat Thagni's evidence and it is also impossible to discover where she was working or how she happened to see the occurrence. It may be that the witnesses are perfectly good witnesses whose evidence can be accepted but it is so sketchily recorded that it is impossible to come to any conclusion on this point.

The next matter is in regard to the witness Mussammat Laro Kumari. Here the learned Judicial Commissioner adopted a very extraordinary procedure. An application was made by the lady to be examined behind a parda. This is a very ordinary request which is made in the case of a pardanashin woman and the usual procedure is for the woman to be brought into Court in a Palki and examined by the Judge. If this had been done there would have been nothing to be said although the request was one which probably should not have been granted as she appears to have been examined in the ordinary way before the committing Magistrate; the learned Judicial Commissioner, however, treated the application as one for examination on commission and directed commission to issue to one Mr. Friend Pereira apparently a Magistrate of the first class.

In the first place the issue of a commission for the examination of an important witness such as an eye-witness in a serious criminal trial is a procedure which is much to be deprecated and which should never be adopted except for the most cogent reasons, yet not only, in this case, were there no cogent reasons but there was no application for issue of commission and no reason at all for the issue of commission was given. Further no writ of commission appears to have been issued and there is no return to the commission. The woman's evidence is merely placed on the record without comment.

For these reasons alone I would not be prepared to take her statement into consideration but there is another reason why it cannot be accepted in evidence; namely that the identifier of the lady does not appear to have been put on his oath so that there is no certainty

that the woman who has been examined is Mussammat Laro. There is another matter in connection with Mussammat Laro's evidence to which it is necessary to refer. Her deposition before the Committing Magistrate has been put in.

There is nothing to show under what section this has been done, but presumably it has been put in under Section 288. To put in such evidence is permissible but it has been repeatedly laid down and it is now settled law that such statements should not be put in without the attention of the witness being drawn to the portion of the statement which it is desired to use. We are informed by the learned Government Advocate and by the learned Counsel for the appellant that this practice is not generally followed and if this is so I would suggest that the attention of the Courts be drawn to the matter.

The last point is the use which has been made of Nanhak's statement to the Sub-Inspector. The Sub-Inspector has put in the statement and it has been used by the learned Judicial Commissioner. The prosecution was under certain circumstances entitled to examine the Sub-Inspector as to what Nanhak had told him, but the statement of Nanhak recorded by the Sub-Inspector could not be evidence and it is somewhat surprising that Judge of the experience of the learned Judicial Commissioner should have fallen into this error.

There are other matters in respect of which the procedure adopted by the learned Judicial Commissioner is open to criticism but the points which I have referred to are sufficient for the purpose of indicating that it is necessary that there should be a re-trial.

The learned Counsel for the appellant has urged that we should acquit the accused and this would in ordinary circumstances I think be the correct course to pursue but in the peculiar circumstances of the present case I would accede to the learned Government Advocate. There is evidence, some of which has been so perfunctorily recorded, that it is impossible to say whether it is of value or not and there is also evidence which is not properly on the record.

Possibly this may be partly due to the fault of the prosecution but it is also due to the fault of the trial Court. What the value of this evidence may be we cannot say, as not being on the record we cannot consider it. I would therefore, as I have already indicated, accede to the request of the learned Government Advocate and set aside the conviction and sentence and direct that the appellant be re-tried.

Ross, J. :—I agree.

Retrial ordered.

A. I. R. 1922 Patna 42.

DAWSON MILLER, C. J. AND BUCKNILL, J

Iswari Prasad Singh and another—Plaintiffs-Appellants

v.

Sahodra Kumari and another—Defendants-Respondents.

F. A. No. 13 of 1919, decided on 8th February, 1922.

Specific Relief Act of 1877, S. 42—No applicability to Santal Parganas—Court having jurisdiction in the Santal Parganas cannot grant mere declaratory relief.

The Specific Relief Act does not apply to the Santal Paragannas and there is nothing in the law apart from that Act which would entitle the Court to grant a mere declaratory decree. 2 P. L J. 379; 19 W.R. 171; 23 W.R. 314 followed. [P. 44, C.1.]

Dawson Miller, C. J. :—This is an appeal from a decision of the Subordinate Judge of Jamtara, a place situate in the Santal Parganas, and the only question which arises for decision in this appeal is whether a Court having jurisdiction in the Santal Parganas has power to grant a decree giving declaratory relief where no consequential relief is prayed for or could be obtained. The suit was instituted as long ago as the year 1907 the plaintiff claiming to be the reversioner of the estate of one Harri Narayan after the termination of the life-interest of his widow.

It appears that many years after the death of her husband the widow who is the first defendant in the suit adopt-

ed a son Mukhdeo Singh who is the second defendant in the suit. The plaintiff as reversioner shortly afterwards instituted the present suit claiming a declaration that the adoption was invalid and not binding. The case was the subject of a compromise but later on the defendant Mukhdeo Singh brought suit seeking to have the compromise set aside on the ground that it could not bind him, he being a minor at the time the compromise was entered into, that compromise having been entered into by his guardian *adlitem* who had clearly not taken proper care to protect his interests at the time.

The compromise was set aside by the High Court at Calcutta on appeal and the case was ordered to proceed. It came before the learned Subordinate Judge who dismissed the suit. From that decision the appellant has appealed.

By the terms of the Specific Relief Act of 1877 the provisions of that statute are applied to the whole of India except Scheduled districts as defined in Act XIV of 1874. The Santal Pargannas are comprised within the Scheduled districts and therefore the Specific Relief Act does not apply to Courts having jurisdiction to try cases arising within the Santal Pargannas. The jurisdiction to grant declaratory decrees was first given to the Courts in India by the Act of 1877 except in so far as that power had been given by the Civil Procedure Code, the Code in force at that time being that of 1859.

By Section 42 of the Specific Relief Act it is provided that "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief."

Then there is a proviso with which we are not concerned and one of the cases set out in the illustrations to the section is the case of a Hindu widow in possession of property who adopts a son to her deceased husband and it states that person presumptively entitled to the property on her death without a son may in a suit against the adopted son obtain a declaration that the adoption was invalid. It is quite clear therefore that a suit of this nature was one of the very class which was provided for specifically by Section 42 of the Specific Relief Act. Under Section 15 of the Civil Procedure Code of 1859 it was provided "that no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

That section is very broad in its terms and it follows the similar statute relating to the same matter in England, *viz.*, 15 and 16 Vic., C. 86, Section 50, but the powers there given have by a long course of decisions both in England and in this country been limited to cases where, in addition to the declaration sought for, some present consequential relief might also be obtained either in that or in some other Court.

This question has been the subject of consideration on more than one occasion by the Judicial Committee of the Privy Council. In the case of *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (1), it was laid down that where a declaratory decree is sought without consequential relief in the same suit the Court must see that the declaration of right might be the foundation of relief somewhere. That means that there must, at the time when the suit is brought, be some relief which the plaintiff can obtain in addition to his declaration either in the same or in some other Court but it must be present relief, and if there should be any doubt as to that proposition it is only necessary to refer to a later decision of their Lordships in the case of *Strimathoo Moothoo Vijia Ragoon adah Ranee Kolandapuree Natchiar* v. *Dorasinga Taver* (2).

The same question came up for decision and it was there held that the mere quieting of doubtful titles is not sufficient reason for a declaratory decree and it appeared to their Lordships to have been very reasonably ruled in India that the Court would not try questions of title as to future interests where neither claimant has a right to present possession, especially questions of

(1) (1873) I.A. Supt. Vol. 163=11 B.L.R 203=19 W.R. 171=3 Sar. 229 (P.C.).
(2) (1874) 2 I.A. 169=23 W.R. 314=15 B.L.R. 83=3 Sar. 456 (P. C).

title which may never arise

The same matter was considered by this Court in the case of *Kumar Satya Niranjan Chakravarty* v. *Dwarka Nath Sadhu* (3) and precisely the same point was raised in that case as is argued before us to-day. That was a question as to whether notwithstanding that the provisions of the Specific Relief Act are not applicable to the Santal Pargannas, nevertheless a Court having jurisdiction to try cases arising there could grant declaratory relief. That was an even stronger case than the present case.

In that case consequential relief might have been asked for, although in fact it was not, and it was there held, which is not now disputed, that the Specific Relief Act did not apply to the Santal Pargannas and it was further held that having once arrived at that conclusion there was nothing in the law apart from the Specific Relief Act which would entitle the Court to grant the declaratory decree claimed and it was pointed out, as I have already endeavoured to do, that before 1877 the powers of the Courts in such cases were governed by the provisions of the Civil Procedure Code subject to a condition precedent that there were circumstances which might justify the grant of consequential relief. That case has been followed in more recent cases in this Court and I can see no reason whatever to differ from the conclusion arrived at there.

The result is that this appeal must be dismissed and the respondents are entitled to their costs.

Bucknill, J.:—I agree.

Appeal dismissed.

(3) (1918) 1 P. L. W. 738=40 I. C. 174=2 P. L. J. 379.

A. I. R. 1922 Patna 44.

(FULL BENCH.)

DAWSON MILLER, C. J., MULLICK AND JWALA PRASAD, JJ.

Raj Kumar Mahton—Defendant-Appellant

v.

Ram Khelawan Singh—Plaintiff-Respondent.

Second Appeal No. 543 of 1919, decided on 24th November, 1921, from the decision of Sub-J., Arrah.

(a) *Civil P. C., O 23, R. 1—Court not be satisfied as to existence of grounds* (a) *and* (b) *of section—Court has no jurisdiction to pass an order for withdrawal.*

Where the Court is not satisfied that the circumstances contemplated in the rule exist, then it has no jurisdiction to make the order for withdrawal with liberty. In all cases, however, where an order under the rule is made, it must be presumed in the absence of proof to the contrary that the Court was satisfied that the conditions in one or other of the sub-rules (*a*) and (*b*) existed. In order successfully to challenge the jurisdiction it is not sufficient merely to point out that no reasons are assigned by the Court in making the order. [P. 46, C. 1.]

(b) *C. P. C., S. 11—Prior decision cannot be challenged in collateral proceeding.*

Where jurisdiction is conferred to determine a particular question and the Court having jurisdiction determines it, it can hardly be disputed that the decision is binding upon the parties, whether right or wrong, until it is set aside by some process known to the law in that suit. This may be done either by review of judgment or by appeal or revision where such procedure is permitted by law in the particular case. It cannot be done in a collateral proceeding. To hold otherwise would be to destroy the finality of all legal proceedings and to render a determination of rights by a Court of law impossible.

Per *Mullick, J.*—The Court trying a subsequent suit is not competent to enter into the question whether the Court which granted the permission to bring a fresh suit had properly made such order. 48 Cal. 138 (F. B.) Followed; 44 Cal. 367; (1 P. L. T. 300) reported (1920) P. H C. C. 232, dissented. [P. 46, C. 1 ; P. 47, C.1]

(c) *C. P. C., S. 115, O. 23, R. 1—Order under O. 23 R. 1. whether revisable*

Per *Mullick, J.*—Whether the order of a Court which has given leave to withdraw with permission to bring a fresh suit in contravention of the terms of Order XXIII, Rule 1 can be revised under Section 115, C P. C., if the section is strictly construed, is a matter of some doubt But the practice of the Court has been to interfere either under the powers conferred, by Section 115 C. P. C. or by the Government of India Act. [P. 47, C. 1.]

W. H. Akhbari—for Appellant.

Parmeshwer Dayal—for Respondent.

Dawson Miller, C. J.:—The suit out of which this reference arises was instituted by the respondents before the Munsif at Arrah claiming possession of certain lands on the ground that they were their *zarait* and not the kasht lands of the defendants. They were met by the objection that the matter was *res-judicata* on the ground that the plaintiffs claimed the same relief against the same defendants in a previous suit before the Munsif at Sassaram

and had withdrawn that suit, and that although leave had been given on that occasion to institute a fresh suit such leave was granted without jurisdiction and could be treated as a nullity in any subsequent proceedings.

It appears from the record of the earlier suit that during the hearing a petition was presented by the plaintiffs under Order XXIII, Rule 1, of the Civil Procedure Code to the following effect :—

"In this suit there were some legal defects for which reason there is difficulty in maintaining the suit. For this reason I pray that permission may be granted to withdraw the suit with liberty to bring a fresh suit."

The Munsif allowed the application and passed an order in these terms:—

"Suit allowed to be withdrawn with permission to bring fresh suit subject to limitation. Defendant will get costs."

Subsequently the present suit was instituted and the objection mentioned was taken. It was urged that no reason had been given in the order made by the Munsif in the previous suit and that the Court was entitled in the subsequent suit to consider whether in fact the conditions mentioned in Clauses, (*a*) and (*b*) of Order XXIII, Rule 1 (2) existed. The Munsif held that he could not question the legality of the order made in the previous suit and overruled the objection. He also found for the plaintiff's on the other issues and made a decree in their favour.

On appeal the Subordinate Judge considered that the order permitting the plaintiffs to withdraw the previous suit with permission to bring a fresh suit was irregular as it did not disclose the grounds on which the permission was given and that it was open to him to consider whether there were sufficient grounds for giving the permission. In the result he considered that there was a formal defect within the meaning of Order XXIII, Rule 1 (2) (*a*) and dismissed the appeal.

The defendants appealed to the High Court and contended that the present suit was not maintainable inasmuch as the order pormitting the plaintiffs to withdraw the previous suit with liberty to institute a fresh suit was without jurisdiction. The case came before a Division Bench consisting of Das and Adami, J., who were of opinion that the procedure adopted by the Subordinate Judge could not be supported as it was not within the competency of the Court trying the subsequent suit to consider whether the order made under Order XXIII, Rule 1, in the original suit was properly made.

The Division Bench considered that whether the order was right or wrong the Court had jurisdiction to make it and it could not be called in question in a subsequent suit. They accordingly were of opinion that the appeal should be dismissed. A different view, however, had been expressed in two earlier cases in this Court, *Satyabadi Gountia* v. *Bedeadhar* (1) and *Rama Singh* v. *Janak Singh* (2). The Division Bench therefore referred the case to a Full Bench for decision formulating the following points of law for consideration:—

(1) Can an order granting the plaintiffs permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit be said to be an order without jurisdiction, if it is passed under circumstances not contemplated by Order XXIII, Rule 1 of the Code ?

(2) Can such an order be treated as a nullity in a subsequent suit between the parties in respect of the subject-matter of the first suit ?

Order XXIII, Rule 1 provides as follows:—

(1) At any time after the institution of a suit the plaintiff may as against all or any of the defendants withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied :—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

The first question formulated for our decision assumes that the order was passed "under circumstances not contemplated by Order XXIII, Rule 1 of the Code." By this I understand that the circumstances there referred to are confined to those mentioned in Clauses (*a*) and (*b*) of Rule 1, Sub-Rule (2) of the order, and do

(1) (1918) 3 P. L. J. 404=46 I. C. 392.
(2) (1920) I P. L. T. 300=56 I. C. 697=1920 P. H. C. C. 232.

not include a case where the Court making the order is not satisfied that the circumstances mentioned in Clause, (*a*) and (*b*) exist.

If the Court is not satisfied that the circumstances contemplated in the rule exist then in my opinion it has no jurisdiction to make the order, as the jurisdiction is only conferred where the Court is so satisfied. If this condition is not fulfilled I think it is clear that the jurisdiction does not arise. In all cases, however, where an order under the rule is made it must be presumed in the absence of proof to the contrary that the Court was satisfied that the conditions in one or other of the sub-Rules (*a*) and (*b*) existed. Otherwise it is hardly conceivable that it would have made the order. In order successfully to challenge the jurisdiction it is not in my opinion, sufficient merely to point out that no reasons are assigned by the Court in making the order.

In the present case the Munsif acted with the petition before him and it must be presumed, in the absence of any evidence to the contrary, that the circumstances mentioned in the rule existed at least to his satisfaction. Once this is conceded, as I think it must be, it follows in my opinion that the Munsif had jurisdiction to make the order and it is not open to the Court in the subsequent suit to question the propriety of his decision, or to consider whether in fact there existed a formal defect or other sufficient ground for the order.

Where jurisdiction is conferred to determine a particular question and the Court having jurisdiction determines it, it can hardly be disputed that the decision is binding upon the parties. whether right or wrong, until it is set aside by some process known to the law in that suit. This may be done either by review of judgment or by appeal or revision where such procedure is permitted by law. In the particular case it cannot be done in a collateral proceeding. To hold otherwise would be to destroy the finality of all legal proceedings and to render a determination of rights by a Court of law impossible.

There was formerly some conflict of opinion in the High Court at Calcutta as to how far an order made under Order XXIII, Rule 1 (2) could be called in question in a subsequent suit brought in pursuance of the leave granted by the order; but in the most recent decision of that Court the authorities were reviewed and it was laid down by a Full Bench consisting of the Acting Chief Justice and four Judges that the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the permission to bring a fresh suit had properly made such order; *Hriday Nath* v. *Ram Chandra* (3).

It is important to bear in mind that in that case the Court found that the Judge who made the order in the previous suit was satisfied, rightly or wrongly, that circumstances existed which justified such an order and held that jurisdiction arose if he was so satisfied and added "It is plain that, however erroneous the order may be, it is not an order made by a Court without jurisdiction; it is on the other hand an order made by a Court of competent jurisdiction acting with material irregularity in the exercise of its jurisdiction. The order cannot consequently be deemed null and void. The party aggrieved may directly impugn the order, and may in an appropriate proceeding invoke the aid of a superior tribunal to set aside the order.....but till it has been so vacated it is operative between the parties and cannot be ignored or challenged collaterally in a different proceeding."

I entirely concur with the view expressed by the learned Acting Chief Justice in that case and in my opinion the decision in the earlier case of *Kali Prosanna* v. *Panchanan* (4) and the decisions of this Court in *Satyahadi Gountia* v. *Bederdhar* (1) and *Rama Singh* v. *Janak Singh* (2) which followed it cannot be supported. To the questions submitted in this reference I am of opinion that assuming the Court making the order was satisfied that the circumstances contemplated in Clauses (*a*) and (*b*) of Order XXIII, Rule 1 (2) existed the answer should be in the negative.

I find that the Court was so satisfied in the present instance and I would dismiss the appeal with costs including the costs of this reference.

Mullick, J.:—I agree that the appeal should be dismissed with costs including the costs of this reference. Whether the order of a Court which has given leave

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(3) (1920) 48 Cal. 138=24 C.W.N. 723=53 I.C. 806=31 C.L.J. 482.

(4) (1916) 44 Cal. 367=23 C.L.J. 489=33 I.C. 670=20 C.W.N. 1000.

to withdraw with permission to bring a fresh suit in contravention of the terms of Order XXIII, Rule 1 can be revised under Section 115, C.P.C. is, in my opinion, if the section is strictly construed, a matter of some doubt ; but the practice in this Court has been to interfere either under the powers conferred by Section 115, C. P. C., or by the Government of India Act and the defendant's proper remedy therefore was to move the High Court to set aside the order granting leave in this case.

The order was in no sense a nullity and could not be questioned in a collateral proceeding.

Jwala Prasad, J.:—I agree that the appeal should be dismissed with costs including the costs of this reference.

Appeal dismissed.

A. I. R. 1922 Patna 47.

DAWSON MILLER, C. J. AND COUTTS, J.

Md. Abdul Kasim and others—Defendants-Appellants

v.

Chaturbhuj Sahai—Plaintiff-Respondent.

Letters Patent Appeals Nos. 109, 110 and 111 of 1919, decided on 25th May 1921 from the decision of Adami, J., dated 20th November 1919.

Limitation Act. S. 5—Ex-parte *admission—Respondent not aware of it—Procedure is irregular—Respondent can object in appeal.*

The admission of the appeal subject to objection was irregular. An appellate Court ought not to interfere with the discretion exercised by the Court below, merely because, upon the material before it, it might have arrived at a different conclusion. But where no discretion at all is exercised it is certainly open to the party aggrieved to raise the question on appeal. 41 Mad 412; 45 I. A 25 (P C.). [P. 48, Cs. 1 and 2.]

W. H. Akbari and *Harihar Prasad Sinha*—for Appellant.

Sundar Lal—for Respondent.

Dawson Miller, C. J.:—These appeals are preferred under the Letters Patent from a decision of a single Judge of this Court, dated the 20th November, 1919. The appellants are respectively the defendants in three suits instituted by the same plaintiff claiming a declaration that certain entries in the record-of-rights in favour of the defendants who were his tenants were not correct. The plaintiffs succeeded in each of the suits in the trial Court. The decree was passed on the 13th September, 1917. On the 27th September the defendants in each case presented a memorandum of appeal, which, had the memorandum been accompanied by the necessary documents would have been within time.

It appears, however, that no copy of the decree was attached to the memorandum of appeal or filed in the appellate Court. Therefore the memorandum could not be taken as having been properly presented. This matter, however, was drawn to the attention of the appellant and four days' time was allowed within which to supply the necessary documents. The 28th September was the last date of the term in the lower Court and the vacation continued until the 30th October. According to the rules, therefore, the last day for filing a proper memorandum of appeal accompanied by the decree would be the 31st October. No copy of the decree, however, was in fact filed on that date.

It appears that on the 5th November the appellant's Vakil was informed that no copy of the decree had been filed and that the copy should be supplied. No steps were taken apparently by the 10th November and accordingly on the 10th November the case was struck off. That means that the memorandnm of appeal was rejected. That was done by the order of the District Judge. Subsequently on the 19th November, long after the time for presenting the appeal, the appellants tendered a copy of the decree and at the same time presented a petition setting out certain facts which they relied upon as sufficient reason for not having presented their appeal properly in time. Upon that petition the learned Judge made an order,

" Admit subject to objection,"

By which, I take it, it was meant that the appeal should be admitted subject to any objection, which must be taken at the hearing of the appeal. Now, up to that time the respondents were not and could not have been present before the learned District Judge, the proceedings being entirely *ex parte*, and it does not appear that any notice or intimation of any sort was given to the respondents that the appeal had been admitted out of time subject to any objection they might take at the hearing.

So far as the respondents could gather any information from the documents which they might have in the case all that would appear would be that the memorandum of appeal was presented on the 27th September which is clearly within time

and, therefore, not open to any objection on their part on the ground of limitation. When the appeal came on for hearing the learned District Judge after considering the merits of the case allowed the appeal but not a word was said by anybody as to the admission of the appeal being out of time nor was any objection taken by the respondents and there is nothing whatever to show that the respondents had any intimation that the appeal had not been presented quite regularly and within time.

Subsequently they appealed to this Court and the case came, as I said, before a single Judge, and the question of limitation was raised. The learned Judge took the view that the admission of the appeal subject to objection by the lower Court was irregular and that in fact upon the materials disclosed in support of the application to extend the time there was no sufficient reason whatever for allowing the memorandum to be presented after the time had expired, and allowed the appeal.

Now in appeal before us it is contended that the learned Judge of the lower appellate Court was justified in adopting the procedure he did and admitting the appeal subject to objection and that in fact in taking that course he was exercising his discretion under section 5 of the Limitation Act in favour of the then Appellants and, he having exercised that discretion, it did not lie within the power of this Court to interfere with that discretion, which, it was contended, had been properly exercised by the District Judge. I quite agree that an appellate Court ought not to interfere with the discretion exercised by the Court below merely because upon the material before it, it might have arrived at a different conclusion.

But it seems to me that in the present case no discretion at all was exercised by the learned Judge. He merely postponed the consideration of the matter until the trial and, even then, as no notice was given to the respondents, the question was never considered. Consequently, even assuming that the order was in first instance a proper one it never became necessary for him to exercise any discretion on the question of limitation.

In acting in the way he did, the learned Judge was taking a course which has been severely condemned by the Privy Council on the ground that such a course might lead to a useless expenditure of money and unprofitable waste of time and thus create considerable embarrassment, and in the present case I may further add another reason for not adopting that course, that if an order such as this, when made, is not communicated to the opposite party, the opposite party may never have an opportunity of raising any objection at all.

That is exactly what happened in this case. If, however, it could be shown that the Opposite Party had an opportunity of arguing the question before the lower appellate Court and failed to take advantage of it, then different consideration might arise but such was not the case. It may be that the admission of the appeal subject to objection was not such an irregularity as to vitiate the judgment notwithstanding that the practice is objectionable; but where no discretion has been exercised as to whether an extension of time for appealing should be allowed it is certainly open to the party aggrieved to raise the question on appeal.

In the case of *Krishnaswami Panikondar* v. *Ramaswami Chettiar* (1) it was distinctly laid down, in a case where a similar order to that now under consideration had been made, that the respondents were entitled to an opportunity of raising the question of limitation: "But this order of admission," say their Lordships, "was made not only in the absence of Ramaswami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must therefore in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to re-consideration at the instance of the party prejudicially affected, and this view is sanctioned by the practice of the Courts in India.

It is, therefore, in my opinion clearly open to the present respondents to contest the propriety of having had the appeal admitted out of time. The

(1) (1918) 41 Mad 412=43 I.C. 493=45 I. A. 25 (P. C.).

learned Judge before whom the appeal came took the same view and he went into the merits as to whether or not any good cause has been shown for admitting the appeal out of time, and I must confess that it would be difficult to arrive at any other conclusion than that at which the learned Judge arrived.

I have already given the dates which show that the decree was only filed in Court something like 19 days after the proper time, and the only evidence, if one can call it evidence, in support of the application for indulgence, is a petition presented by the appellants, unverified and not accompanied by any affidavit, which merely states that the petitioner's karperdaz was seriously injured by rioters in a riot case, and that he was sent to hospital and remained senseless for several days, that the petitioner did not know that a copy of the decree was not filed as ordered by the Court that when the petitioner came to enquire about the date the petitioner learnt about the striking off on account of the copy of the decree not being filed within the time given by the Court. His appeal was in the hands of his karperdaz and he was lying in hospital. That was the only material the Court had before it. There is not a word in that petition to show that even if the karperdaz was ill the pleader could not have done what was necessary and what in fact he ought to have done in the first instance, namely, file a copy of the decree with the memorandum.

Again there is not a word to show when the karperdaz was ill or whether in fact his illness put it out of his power to assist the pleader if he required his assistance in supplying a copy of the decree on the 27th September. In fact there is no material at all upon which one can act in a petition of that sort, and in my opinion the learned Judge from whose decision this appeal is brought arrived at the right conclusion in saying that the appellants must fail upon the merits.

The appeals must in my opinion be dismissed with costs.

Coutts, J. :—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 49.

DAS AND ADAMI, JJ.

Bar Kuarin Alak Manjari Kuari—Defendant-Appellant v.

Sircar Barnard and Co.—Plaintiffs-Respondents.

A. No. 179 of 1918, decided on 13th June, 1921, from an order of Sub-Judge, Ranchi.

T. P. Act, S. 59—Attesting witness—Must have seen execution and also subscribed as witness.

The party who sees the will executed is in fact a witness to it ; if he subscribes as a witness he is then attesting witness. (49 I. C. 278) Followed. Attestation does not consist merely in seeing the execution of a document. It requires a further act, that is subscribing the name of the witness on the document as having seen the execution. 1 P. L. J. 1129 Approved. [P, 50, C. 1.]

Where a person does not purport to sign the document as an attesting witness and the document established that he signed the document as giving his approval to the transaction, and not as attesting witness he is not an attesting witness. [P. 51, C. 1.]

A. P. Upadhyay and *Murari Prasad*—for Appellant.

Manuk, Susil Madhub Mullick and *Bankim Chandra De*—for Respondents.

Das, J. :—This was a suit instituted by the respondents against the appellants to enforce a mortgage bond executed by the latter on the 6th April, 1908. The suit was contested by the appellants on two grounds: first, on the ground that the mortgage bond not having been attested according to law was not enforcible against them, and, secondly, on the ground that the mortgage was not intended to be acted upon and that the plaintiff company, by an agreement entered nto by and between them and Maharaj Kumar Jagat Mohan Nath Sahi Deo the husband of the defendants, in consideration of a license granted by the Maharaj Kumar to the plaintiffs, exonerated the defendants from all liabilities under the deed of mortgage. The learned Subordinate Judge has rejected the contentions advanced on behalf of the defendants and has given the plaintiffs a decree for the full amount claimed.

I will first examine the contention based on Section 59 of the Transfer of Property Act. That section provides that :—

"Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the

mortgagor and attested by at least two witnesses."

The meaning of the word "attested" has been considered in various cases. It is sufficient to refer to *Burdett* v. *Spilbury* (1) where the Lord Chancellor stated the law in these words, "The party who sees the Will executed is in fact a witness to it; if he subscribes as a witness, he is then attesting witness."

It will appear then that two conditions must be satisfied before the validity of the document is established as against the mortgagor, first there must be at least two persons who see the document actually executed, and secondly these persons must subscribe as witnesses. As Abdur Rahim, J. said in *Muniappa Chettiar* v. *Suma Vellachmy* (2). Attestation does not consist merely in seeing the execution of a document. It requires a further act, that is, subscribing the name of the witness on the document as having seen the execution.

In the case before His Lordship, the mortgage bond was executed by two persons. One of them executed it in his own house in the presence of two attesting witness. Afterwards the document was taken to the jail, when the other executant executed it. The attesting witness who had already attested the document, went to the jail and saw the execution of it by the other executant, but they did not subscribe their names again as attesting witnesses after the document was executed by the second executant in jail. It was held by His Lordship with the concurrence of Oldfield, J. that the mortgage bond could not be enforced as against the executants.

It seems to me that if, as has been suggested, the rule stated by the Lord Chancellor in *Burdett* v. *Spilsbury* (1) and recognized in Section 59 of the Transfer of Property Act, was deliberately adopted to serve as a barrier against perjury and fraud. See *Ellis* v. *Smith* (3). It must be established that the persons alleged to be attesting witnesses, not only saw the execution of the document, but also subscribed their names on the document as having seen the execution. Any other view would open the door to fraud and perjury and enable a party to produce witnesses to the factum of execution in their presence when their names do not appear in the document as attesting witnesses. This is at the bottom of the rule enunciated in *Ram Bahadur Singh* v. *Ajodhya Singh* (4) that a person whose name appears on the deed merely as scribe is not such a witness as is required by Section 59 of the Transfer of Property Act, although he may have actually seen the deed executed.

Now, how does the case stand on facts? On a mere inspection of the document, it does not appear that it was attested by at least two witnesses. The point is of such vital importance to the plaintiffs that I think it necessary to set out that portion of the document which contains the signatures on the margin. That portion is as follows:—

"Signature.—Srimati Alapkamanjari Kueri Barkuerain Sahib. By my own pen.

"Signature.—Srimati Mohan Manjri Kueri Chotkurain Sahib. By my own pen.

"Signature.—Maharaj Kumar Jagat Mohan Nath Sahi Deo of Chotanagpur.

Witnessed by.—Sarbal or Saphal."

(This is due to the inability of the translator to read the name correctly in the vernacular).

The first two signatures are of the appellants, the actual executants of the document. The third signature is of their husband, and the last signature is of the attesting witness. *Prima facie*, the document was attested by only one witness, Sabral or Saphal: but it was urged on behalf of the appellants that, as the Maharaj Kumar was not one of the executants, he must have signed the document as an attesting witness.

The answer of the defendants to this argument is that he does not purport to sign the document as an attesting witness as Sabral or Saphal does; and they rely upon the recital in the mortgage bond as conclusively establishing that he put his signature on the document in another capacity. That recital which has been more correctly translated in the judgment of the learned Subordinate Judge runs as follows:—

"The deed is executed by us with consent and permission of our husband so that he may not in future raise objection to realisation of debt by sale of

(1) (1842) 10 Chand Fin. 340=8 E. R. 772=59 R.R. 105

(2) (1918) M. W. N. 853=49 I. C. 278=9 M. L. W. 5.

(3) (1874) 1 Ves. Jur. 11=30 E. R. 205.

(4) 1 P. L. J. 1129=34 I. C. 370=3 P. L. W. 93.

mortgage property (villages). Our husband signed as witness in the bond in evidence of the above fact."

In my judgment, this recital conclusively establishes that the Maharaj Kumar did not sign the document as an attesting witness, but as giving his consent to the transaction.

It was strongly contended on behalf of the respondents that, as the evidence establishes that the Maharaj Kumar signed the document after seeing the execution of the document by his wives, it must follow that he signed as an attesting witness. The evidence on this point is conflicting, but I entirely accept the evidence of Mr. Ambler that the Maharaj Kumar took the document to the ladies who sat behind the purdah and brought it back after execution to the Sub-Registrar. It was open to the learned Subordinate Judge on this evidence to find as he has found, that the Maharaj Kumar saw the execution of the document by the ladies..

I will also accept the finding of the learned Subordinate Judge that the Maharaj Kumar signed the document after execution of the same by the ladies. But these findings of fact do not, in my judgment, establish that the Maharaj Kumar was an attesting witness to the document. In the first place, he does not purport to sign the document as an attesting witness. In the second place, the document establishes that he signed the document as giving his approval to the transaction, and not as an attesting witness. I cannot distinguish this case from the case of a scribe who signs a document after seeing its execution by the executants.

To hold otherwise would be to open the door to perjury and fraud which it was the intention of Section 59 of the Transfer of Property Act to prevent. I hold that the Maharaj Kumar not having subscribed as a witness, is not an attesting witness. It follows that the mortgage bond was not attested by at least two witnesses, and that it cannot be enforced against the mortgagors.

[Judgment then proceeds to deal with facts.]

Adami, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 51.

JWALA PRASAD, J.

Athar Hussain and another—Accused-Petitioners v.

King-Emperor—Opposite Party.

Cr. Rev. No. 94 of 1920, decided on 8th April, 1920, from an order of Honorary Magistrate, Dinapore, dated 27th January 1920.

Criminal Trial—Local inspection—Notes of inspection must be recorded.

Though there is no provision in the Code of Criminal Procedure for making local inspection or for keeping a note of the inspection if made, it has been settled by authorities that a Magistrate must invariably put on record a note of his inspection. 37 Cal. 340 followed. [P. 52, C. 1,]

Akbari K. Hussain and *Ragho Prasad*—for Petitioners.

Nawal Kishore Prasad—for Opposite Party.

Jwala Prasad, J.:—The petitioners have been convicted and sentenced to one month's rigorous imprisonment each by the Honorary Magistrate of Dinapore under Section 323, I. P. C. The petitioner No. 1 is the father of petitioner No. 2. The complainant Asgar Hussain is the brother of petitioner No. 1. Between the two brothers there is no love lost. The complainant had on previous occasions brought cases of theft and assault against the petitioner No. 1, which were however dismissed.

The present case was brought by the complainant on the allegation that on the 27th September last at 7 A.M., the petitioners waylaid the complainant while he was going on an Ekka to Manair Thana to lodge an information against the petitioners of having committed theft in his house on the night previous, in order to prevent him from going to the thana. The complainant received nine injuries on his person. The Magistrate held that the complainant proved his case of assault against both the petitioners and accordingly convicted them.

The petitioners contend that the order of the Magistrate is vitiated by the fact that he did not keep on record any note of the result of the local inspection which he held. It appears that after the close of the case for the prosecution and the defence, and at the request of the prosecution the Magistrate inspected the place of occurrence and has referred to it in his judgment after discussing the evidence of the prosecution in the following words: "I

inspected the scene of occurrence and I am convinced that Asgar was first beaten near the Imambara and then down the lane."

In his explanation the Magistrate says that he did not import anything in the judgment which is not in the evidence and therefore did not think it necessary to write an inspection report and that there is no provision in the Code of Criminal Procedure making it obligatory on a Magistrate to do so.

In the evidence of the prosecution witnesses it was stated that the place of occurrence is west of the inhabited portion of the village, particularly the houses of the complainant and the petitioners, and that there is a ditch to the west of it. It is contended on behalf of the petitioners that the complainant's case, that he was going towards the west from the place of occurrence to thana, is impossible inasmuch as the Ekka could not possibly cross the ditch and that there was no wheel track for an Ekka towards the west to the thana but to the west of the village, the way by which the Sub-Inspector himself is said to have come to the village on an Ekka after the information was lodged.

The petitioners in para. 7 of the petition to this Court say that they showed this to the Magistrate when he was inspecting the locality. The Magistrate disposed of it by his observation in the judgment in the passage quoted above. Though there is no provision in the Code of Criminal Procedure for making local inspection or for keeping a note of the inspection if made, it has been settled by authorities that a Magistrate must invariably put on record a note of his inspection, *vide Babbon Sheikh* v. *Emperor* (1).

The passage quoted above clearly shows that the Magistrate has used the knowledge derived by him from his inspection of the locality. The accused has, therefore, been prejudiced by the omission of the Magistrate to place on record a note of his inspection. I would, therefore, set aside the conviction and order a retrial of the accused by the same Magistrate from the stage just before he inspected the locality. The Magistrate will again inspect the locality in the presence of the parties and make a note of what is pointed out to him by the parties particularly whether an Ekka could go towards the west of the village to the thana as alleged by the prosecution and challenged by the defence.

The learned counsel on behalf of the accused urges that the retrial ordered by this Court should not be held by the same Magistrate, but by some other Magistrate. I do not see any reason for acceding to this suggestion for there is nothing to show that the Magistrate has shown any bias against the accused. The omission to place on record a note of his inspection was only an error of judgment.

After the local inspection, the Magistrate will hear the parties and then record a fresh judgment in the case. In the meantime the petitioners will remain on the same bail.

Retrial ordered.

(1) (1910) 37 Cal. 340=14 C.W.N 422=5 I. C. 365=11 C. L. J. 335.

A. I. R. 1922 Patna 52.

SULTAN AHMED, J.

Ramdhari Ahir and another—Petitioners

v.

King-Emperor—Opposite Party.

Cr. Rev. No. 1 of 1920, decided on 12th April, 1920 against an order of Dist. J., Saran, dated 13th January, 1920.

Criminal Procedure Code (Act V of 1898), Ss. 195, Cl. (6) and 476—Appellate Court can take additional evidence and direct prosecution under S. 476.

An appellate Court under Section 195 (6) has got ample powers to examine any number of witnesses, or to take any additional evidence, if he thinks fit in order to satisfy itself whether it should or should not grant sanction or direct the re-prosecution of any person. 53 I. C. 826, distinguished. [P. 53, C. 2.]

P. K. Sen, S. P. Warma and *H. N. Sahay*—for Petitioners.

Manohar Lal—for the Crown.

Judgment.:—This is an application against an order of the Sessions Judge of Saran, dated the 13th January, 1920, directing the prosecution of the petitioners under Section 476 of the Criminal Procedure Code, for an offence under Section 193 of the Indian Penal Code.

The circumstances under which this application has come to be made to this Court are as follows.

A certain decree was obtained in the Court of the Second Munsif of Chapra, against one Umrao Nonia. In execution of that decree notices under Order XXI,

Rule 22 and Order XXI, Rule 66, were issued. The sale proclamation was issued and the sale was held in execution of that decree.

An application was then filed by the son of Umrao Nonia named Ramdhan Nonia for the cancellation of all the execution proceedings and a declaration that the sale was a nullity because those execution procedings were against a dead man and were taken fraudulently. He therefore applied for sanction to prosecute the petitioners under Section 193, I. P.C. There were also other persons against whom the application for sanction was directed but we are not concerned with them in the present application.

The learned Munsif came to the conclusion that the application should not be granted and accordingly rejected it.

An appeal having been preferred against that order to the learned Sessions Judge under Section 195, Clause (6), the learned Judge refused the application under Section 195, but directed the prosecution of the petitioners under Section 476 of the Code of Criminal Procedure. Hence the present application to this Court.

Mr. Sen appearing on behalf of the petitioners has mainly contended that the Sessions Judge had no jurisdiction to pass the order which he has done after recording fresh evidence in the appeal under Section 195, Clause (6).

It appears that the only witness to prove Umrao Nonia's death before the Munsif was Ramdhan Nonia who spoke to his father having been dead before the execution proceedings. In appeal the learned Judge on having been informed that the death of Umrao Nonia had been reported at the thana where there was an entry in the death register with respect to his death, called for the chowkidar who reported the death of Umrao Nonia to the thana, called for the register in which there was an entry with respect to his death, and also examined the Head Constable who had made that entry.

Mr. Sen contends that the learned Judge had no jurisdiction to take this evidence. It is needless to consider in any detail the elaborate arguments which he has advanced in support of this proposition, because in my opinion, so far as the law on the point is concerned, it is determined by the authorities. The case reported in *Budhu Lal* v. *Chhatu Gope* (1) is conclusive on the point. This decision has been followed in this Court, and it seems to me to be too late in the day to contend that a Sessions Judge in appeal exercising his powers under Section 195 (6), cannot take fresh evidence before granting sanction. In my opinion therefore the contention of Mr. Sen on this point fails.

It has been contended that on the facts of the present case the learned Sessions Judge was not justified in taking the fresh evidence; and he relies upon a decision of Mr. Justice Das in the case of *Jagdeo Lal* v. *Ramlagan Singh* (2). It may be noted that that case was under Order XLI, Rule 27, and it was laid down there by Mr. Justice Das that Order XLI, Rule 27 of the Code of Civil Procedure, does not provide that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence may be admitted in appeal. It only provides that where it is impossible to pronounce judgment at all on the evidence, the Court might admit additional evidence.

Whatever may be the law under Order XLI, Rule 27, the Court exercising its powers as an appellate Court under Section 195 (6), has got ample powers to examine any number of witnesses, or to take any evidence it thinks fit in order to satisfy itself whether it should or should not grant sanction, or direct the prosecution of any person. It would be lamentable if the Court's powers to satisfy itself before granting sanction were in the least curtailed.

What, as a matter of fact, has been done in this case is, that the appellate Court had the evidence of only one witness to prove Umrao's death before it, and it therefore called further evidence to satisfy itself whether the statement made by the one witness in the case was acceptable or not. Whether that evidence is sufficient for the purpose of conviction of the accused or not is neither here nor there; it will be for the trial Court now to find out whether it will rely upon this evidence, act upon it, and convict the accused.

The sole question before the learned Sessions Judge was whether the bar to the prosecution of the petitioners should be removed or not; and having satisfied himself as the learned Sessions Judge has done, I think this Court ought not to interfere with the order that he has

(1) (1916) 44 Cal. 816=25 C.L.J. 193=39 I. C. 465=21 C. W. N. 269.

(2) (1919) 53 I. C. 826.

passed.

Under these circumstances I discharge the rule and uphold the order of the learned Sessions Judge.

The learned Assistant Government Advocate has asked for costs. I decline to accede to his prayer.

A. I. R. 1922 Patna 54.

ROE AND COUTTS, JJ.

Sheo Narain Singh and others—Petitioners

v.

Rampertab Rai—Opposite Party.

Cri. Rev. No. 66 of 1919, decided on 24th March, 1919, against an order of S.-Judge, Shahabad, dated 10th February, 1919.

Criminal P.C. (Act V of 1898), Ss. 203 and 204 (3)—Dismissal under—Further Judicial enquiry ordered by Sessions Judge—Whether accused entitled to notice—Issue of summons without holding judicial enquiry is illegal.

In the case of a dismissal under Section 203 or Section 204 (3) notice to the other side is not desirable. The other side has never had notice, the proceedings not having reached the stage of summoning them as accused persons, and in this regard such cases are distinguished from cases in which accused persons have been tried and discharged. Until the accused has been brought before the Court either by summons or by warrant he should not be allowed to come before the Court at all. A party who is not being tried for an offence is not an accused person. 32 Cal, 1085 followed. [P. 54, C. 2.]

P. C. Manuk and *N. Sinha*—for Petitioner.

M. Yunus and *S. P. Varma*—for Opposite-Party.

Judgment:—The petitioners in this case are aggrieved, firstly, by an order of the Sessions Judge directing a further judicial enquiry upon which the District Magistrate directed a specified Deputy Magistrate to hold that judicial enquiry; and secondly by the further proceedings in which the Deputy Magistrate ignored both the orders of the Sessions Judge and the District Magistrate and summoned the accused to answer charges which everybody who had looked into the matter at all had declared either to be largely exaggerated or wholly false as regards a number of the accused who have been summoned.

Two grounds are taken, firstly, that the order passed by the Sessions Judge was without notice to the accused and secondly that the Deputy Magistrate had no jurisdiction to issue summonses until a judicial enquiry had been made. The whole case-law with regard to notice has been clearly and fully stated by our brother Jwala Prasad.

It is sufficient for us to say that the view taken by the Full Bench in Calcutta in the case of *Haridas Sanyal* v. *Saritulla* (1), was that in the case of a dismissal under Section 203 or Section 204 (3) notice to the other side is not desirable. The other side has never yet had notice, the proceedings not having reached the stage of summoning them as accused persons and in this regard such cases are distinguishable from cases in which accused persons have been tried and discharged. Action in contravention of that Full Bench decision should not, we respectfully think, have been taken without further reference to a Full Bench. We see no reason to refer this matter to a Full Bench of this Court for the reason that we accept the argument suggested by the Full Bench of the Calcutta High Court.

It seems to us illogical that an accused should not be allowed to appear in proceedings under Section 202 (and this is the settled practice of this Court frequently and forcefully laid down) but that he should be allowed to appear in proceedings purporting to revise proceedings under Section 202 and that, if under that section the proceedings are continued, he should again be precluded from appearing. It seems to us far better that until the accused has been brought before the Court either by summons or by warrant he should not be allowed to come before the Court at all. The view taken in *Sat Narain Tewari* v. *Emperor* (2) that a party who is not being tried for an offence is not an accused person is clearly the correct view.

As regards the merits of the learned Sessions Judge's original order we feel that it, as framed by him and interpreted by the District Magistrate, was a sound order. The police had desired a further investigation and the complainant had prayed for a further investigation. We can see no objection to

(1) (1888) 15 Cal. 608 (F. B)
(2) (1905) 32 Cal. 1085=10 C. W. N, 51.

the form of the orders made by the heads of the District. We regard the proceedings of the Deputy Magistrate Mr. Kaviraj as a defiance of the orders of his official superiors. He should not have issued these summonses until he had made a judicial enquiry; and we are of opinion that in the circumstances of the case the issue of the summonses against all the accused was outside his powers.

We therefore cancel the order instituting proceedings against the accused named by Mr. Kaviraj and direct that no summons or warrant be issued until a judicial enquiry has been made and *prima facie* case disclosed against them.

Rule made absolute.

A. I. R. 1922 Patna 55.

COUTTS AND ROSS, JJ.

Nazir Rai—Defendant-Appellant

v.

Kesho Pd. Singh Bahadur—Plaintiff-Respondent.

A. No. 882 of 1919, decided on 23rd June 1921, from a decision of the Dist.-J., Shahabad dated 9th August, 1919.

Bengal Tenancy Act, S. 105—Rent settled thereunder after Road Cess return was given —Bengal Cess Act, S. 20 is no bar to recovery of rent settled.

The rent settled under Section 105 of the Bengal Tenancy Act being lawfully settled subsequent to the lodging of the Road Cess return is final and it is not open to the defendant to dispute it.

[P. 55, C. 2.]

Atulkrishna Ray—for Appellant.

Kulwant Sahay and *Nisu Narain Sinha* —for Respondent.

Coutts, J.:—This matter comes before us on second appeal from the decision of the District Judge of Shahabad. The suit was instituted by the landlord for arrears of rent which had been settled under Sections 105 and 109(A) of the Bengal Tenancy Act in 1915. The defence set up by the defendants was that in the year 1901, the plaintiff had filed a road cess return wherein the jama was stated to be less than that settled in 1915; and they contended that under Section 20 of the Cess Act the landlord was not entitled to recover at a higher rate than that set out in the road cess return.

The suit was decreed in the Court of first instance and this decree was affirmed by the learned District Judge on appeal on the ground that when the rent has been settled under Section 105 of the Bengal Tenancy Act, it did not matter what might have been recited in a previous road cess return and that the decision under Section 105 of the Bengal Tenancy Act operated as *res judicata*.

The main point taken before us in appeal is the same as that which was taken throughout the case, namely, that Section 20 of the Cess Act is a bar to the plaintiff recovering more than the amount stated in the road cess return. With this contention I am unable to agree. Section 20 of the Cess Act runs as follows:—

"Every holder of an estate or tenure in respect of which a return has been made as required by this Chapter shall be precluded from suing for or recovering rent at any higher rate than is mentioned in such return, for any land, holding or tenure included in such return, unless it be proved that the rent of such land or tenure has been lawfully enhanced subsequently to the lodging of such return."

The present case comes under the last portion of Clause (b). By Section 105 of the Bengal Tenancy Act the rent was lawfully enhanced and this enhancement was subsequent to the lodging of the road cess return. Consequently there is no bar to the plaintiffs recovering at the higher rate on account of Section 20 of the Cess Act. By Section 107 of the Bengal Tenancy Act it is enacted that:—

"In all proceedings under Section 105 (A) and Section 106, the Revenue Officer shall, subject to rules made by the Local Government under this Act, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits: and his decision in every such proceeding shall have the force and effect of a decree of a Civil Court in a suit between the parties and subject to the provisions of Section 108 and 109 (A) shall be final."

The rent settled, therefore, under Section 105 of the Bengal Tenancy Act in this case is final and it is not open to the defendant to dispute it.

I would accordingly dismiss this appeal with costs.

Ross, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 56 (1).

COUTTS AND MACPHERSON, JJ.

Deonath Sahai—Plaintiff-Appellant

v.

Radha Kant Prasad—Defendant-Respondent.

S. A. No. 842 of 1919, decided on 14th July, 1921.

(a) *Court Fees Act, S. 6—Appeal memo—Deliberate payment of deficient stamp—Payment of deficit after limitation will not save limitation.*

In a case where deficit Court-fee on a memo of appeal is deliberately paid and limitation goes, the memo would be barred by limitation notwithstanding the deficit is paid up afterwards. [P. 56, C. 2.]

(b) *Civil P. C. (1908) O. VII, R. 11—Plaint insufficiently stamped—Deficiency made up within time wanted by the Court—Limitation gone by that date—Suit is not time-barred.*

In the case of a plaint insufficiently stamped the Court is bound under Order VII, Rule 11, to give the plaintiff time to make good deficiency. It is doubtful whether the Legislature intended that time should be given as a matter of course, even where the plaintiff has deliberately and without any excuse paid an insufficient Court-fee. The Court has discretion in the matter of allowing time for making up deficient Court fee and time having been granted the suit is within time under Order VII, Rule 11. [P 56, C. 2.]

Gangadhar Das and *Bhusan Mukerjee*—for Appellant.

T. N. Sahai Kailshpathi, Shiveshwar and *Nawalkishore Pd.*—for Respondent.

Coutts, J.:—This appeal arises out of the suit brought for recovery of certain money due on a handnote. The suit was dismissed by the Munsif on the ground that the handnote was not genuine or for consideration and that the suit is barred by limitation. Against this decree there was an appeal to the District Judge who, without considering the question of the genuineness of the handnote, dismissed the appeal on the ground of limitation alone.

The question of limitation arises in the following way. Plaintiff filed his plaint on the 18th February, 1918, on a Court-fee of ten rupees only. It was found that there was a deficit Court-fee of Rs. 47-12, and the Munsif directed that this should be paid within a week. It was paid within a week and the suit was then registered and heard. Both the Courts below have found that the plaint had been deliberately filed on an insufficient Court-fee, and that when the deficit Court-fee was paid the suit was barred by limitation, and on the authority of (3 P. L. J. 74), they found that the suit was barred by limitation. There appears to be some misapprehension in the mind of both the Courts below in regard to this matter.

The case of *Ram Sahay Ram Pande* v. *Kumar Lachmi Narayan Singh* (1) was a case referring to a deficit Court-fee on a memorandum of appeal and with regard to this the law is settled, so far as this Court at all events is concerned, that in such a case as the present the memorandum of appeal would be barred by limitation. But it is not so in the case of a plaint. As was remarked by Chamier, C. J. in that case.

"It has been held that in the case of a plaint insufficiently stamped the Court is bound, under Order VII, Rule 11, to give the plaintiff time to make good the deficiency. I doubt whether the Legislature intended that time should be given as a matter of course, even where the plaintiff has deliberately and without any excuse paid an insufficient Court-fee, but it is too late to question the rulings on this point."

The Munsif, therefore, had discretion in this matter, and time, having been granted the suit was within time under Order VII, Rule 11. In these circumstances the decree of the lower appellate Court must be set aside and the appeal remanded for re-hearing on the other points involved. Costs will abide the result.

Coutts, J.:—I agree.

Case remanded.

(1) (1917) 5 P. L. W. 18=42 I. C. 675=3 P. L. J. 74.

A. I. R. 1922 Patna 56 (2).

DASS AND ROSS, JJ.

Basant Kumar Bose—Plaintiff-Appellant

v.

Chairman of Giridia Municipality—Defendant-Respondent.

A. No. 250 of 1920, decided on 4th August, 1921, from an Appellate Decree of the Sub.-J., Giridia.

(a) *Bengal Municipal Act, Ss. 241, 237—Bye-law prohibiting erection of boundary wall is* ultra vires.

Erection of a wall apart from its erection as part of a scheme for the erection of the house itself, does not fall within Section 241 and a bye-law prohibiting the erection of a compound wall, is therefore *ultra vires* of the Municipality. [P. 58, C. 2.]

(b) *Practice—Judgment—Judge declining to consider cases cited—Acts improperly.*

Where the lower appellate Court refused to consider cases cited by the appellant and reversed the decision of the trial Court on flimsy grounds.

Held : that it was the duty of the lower appellate Court to consider the cases cited and that his refusal to do so was improper. [P. 57, C. 2.]

Sushil Madhub Mullick—for Appellant.

Bankim Chandra De—for Respondent.

Das, J. :—This appeal arises out of a suit instituted by the appellant against the Chairman and the Commissioners of the Giridih Municipality for a declaration that the bye-law framed by the defendant Municipality prohibiting the erection of any boundary wall within five feet of any public road is *ultra vires* and that the plaintiff has absolute right to erect this boundary wall on the edge of his land abutting on the public road.

The Court of first instance in a careful and able judgment came to the conclusion that the plaintiff was entitled to succeed. The lower appellate Court in a judgment which ought to be characterised as superficial and perfunctory has come exactly to the opposite conclusion.

Before dealing with the points which arise in the appeal, I deem it my duty to record my emphatic protest against the manner in which the learned Subordinate Judge in appeal disposed of this question.

Certain cases were cited before him which it was his duty to consider and to distinguish if he could. The reasoning employed by the learned Subordinate Judge for declining to consider those cases may be given in his own words.

" The judgment of the learned Munsif shows that the plaintiff materially changed his case at the trial. In the plaint the plaintiff never made the case that the word 'building' occurring in the bye-law cannot be intended to cover a bare compound wall of certain height and thickness and that the prohibition contained in the bye law was not applicable to the erection for which plaintiff sought sanction. That being so, I should not be at pains to discuss the decisions reported in *Corporation of Calcutta* v. *Benoy Krishna Bose* (1) and *Corporation of Calcutta* v. *Jageshwar Laha* (2). In the present case I should not enquire whether the wording 'building' should be taken in its derivative sense or to mean a habitation. For the purpose of the present suit I should hold that the bye-law No. 13 (i) is not *ultra vires* and that plaintiff is not entitled to the declaration he seeks."

Now in my opinion even if the plaintiff had, to use the expression of the learned Subordinate Judge, "changed his case" as to the meaning of the word "building" or in other words, given another interpretation to a word used in the Bengal Municipal Act, it was still the duty of the learned Subordinate Judge to consider the cases which were cited before him by the learned Pleader appearing on behalf of the plaintiff. He could not have recourse to so frivolous an excuse for avoiding the difficulty of the position; but as a matter of fact, the allegations in the plaint are as clear as they can be.

These allegations are that the Municipality has passed a bye-law preventing the erection of any boundary wall within five feet of any public road without its sanction and that the bye-law in question is *ultra vires* and cannot operate to the prejudice of the plaintiff's right to erect a boundary wall on the edge of his land abutting on the public road.

Coming now to the question at issue between the parties, I think that the plaintiffs are entitled to succeed. Section 237 provides that :—

" Everybody who intends to erect or re-erect any house not being a hut, shall given notice in writing of his intention to the Commissioners, and shall accompany such notice with a description of the building which he intends to erect, and of the provision he intends to make in respect of drainage and laterine accommodation ; and the Commissioners may, within six weeks after the receipt of such notice, either refuse to sanction the said building or may sanction the said building either absolutely or subject to any written directions which

(1) (1910) 12 C. L. J. 476=7 I. C. 890= 15 C. W. N. 84.

(2) (1908) 8 C. W. N. 487.

the Commissioners may deem fit to issue in accordance with the rules, if any, made under Section 241: Provided that the Commissioner shall make full compensation to the owner for any damage which he may sustain in consequence of the prohibition of the re-erection of any house, or of their requiring any land belonging to him to be added to the street."

The expression

"erect or re-erect any house not being a hut," has for the purpose of Section 238 and Section 239, been defined to mean (*a*) any material alteration or enlargement of any building, (*b*) such alterations of the internal arrangements of a house as affect an alteration of its drainage or sanitary arrangements, or affect its stability.

Now in my opinion Sections 238 and 239 carry us back to Section 237 and, therefore, in order to succeed on the question that erection of a boundary wall means erection of any house not being a hut, it must be established that the erection of a boundary wall is (*a*) any material alteration or enlargement of any building, (*b*) or that it amounts to such alteration of the internal arrangements of a house as effects an alteration of its drainage or sanitary arrangements or affects its stability. I do not think that it can for a moment be argued that it falls within (*b*). The only question is, is it any material alteration or enlargement of any building?

In my opinion material alteration or enlargement of any building must mean erection of anything on a site attached to or detached from any buildings standing on it so as to alter the structure of the house with all the buildings standing on that site; See *Keshub Chandra Sen* v. *Calcutta Municipal Corporation* (3). In my opinion it cannot be argued that erection of a wall, apart from its erection as part of a scheme for the erection of the house itself, does not fall within Section 237 at all and therefore it does not fall within Section 241. I quite agree that if a person is building a house for the first time or is re-building it then the boundary wall which he proposes to build being part of the scheme of the house which he is erecting or re-erecting must fall within the scope of Section 237 and therefore of Section 241.

(3) (1902) 7 C. W. N. 374.

In such a case the Commissioners may require any land belonging to the owner to be added to the street provided that they make full compensation to the owner for any loss caused to him, but when he is neither building nor re-building the house, the erection of a boundary wall does not, in my opinion, fall within the scope of Section 237, that being so, the Commissioners had no power to frame a bye-law under Section 241 relating to the erection of a boundary wall apart from its erection as a part of the scheme of erection or re-erection of the house itself.

This view is supported by the decision of Mookerjee, J., in *Corporation of Calcutta* v. *Benoy Krishna Bose* (1). I would allow this appeal, set aside the judgment and decree of the Court below and restore the judgment and decree of the Court of first instance. The plaintiffs are entitled to their costs throughout.

Ross, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 58.

DAS AND BUCKNILL, JJ.

Nazirul Haq—Defendant-Appellant

v.

Abdul Wahab Khan and others—Respondents.

App. Nos. 554 and 555 of 1920, decided on 22nd November, 1921, from the Appellate Decree of the District Judge, Monghyr.

(a) *Evidence Act* (1 of 1872), S. 36, Kistwari *Map—Statements as to possession—Are relevant.*

A Survey map presumably prepared in the presence and to the knowledge of the parties is evidence between the parties *quantum valeat*. Primarily it is evidence of possession, which is always evidence of title. 10 W. R. 300 followed; 19 W. R. 202 referred to. [P. 59, C. 1.]

(b) *Evidence Act, S. 83*—Kistwari *Maps—Correctness is presumed.*

Court may not only presume the correctness of the physical features represented in the map but also the correctness of the statements as to the possession. [P. 59, C. 1.]

Sultan Ahmed and *S. M. Tahir*—for Appellant.

S. M. Mullick and *N. N. Sen*—for Respondents.

Das, J.:—The point that has been argued before us is that the learned Judge in the Court below erred in relying upon matters of description in the *Kistwari* Map. The plaintiff bases his title upon the *Kistwari* map which bears the signature of Mr. Watson, who was at that time the Assistant

Superintendent of Survey. The map shows that there existed in the *Mauza* in question two blocks of lands constituting two *jagirs*, one of which was in the possession of Lala Gurdayal, the other being in the possession of Purai Choudhary, heir of Tikaram Sipahi.

Mr. Sultan Ahmed on behalf of the appellants has argued before us that we may, if we like, presume the correctness of the physical features represented in the map, but we are not entitled to presume the correctness of the statements as to the possession of Purai Chowdhary and Lala Gurdayal Singh in the map. I am unable to agree with this contention. Section 36 of the Evidence Act provides that—

"Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

There are decisions, too numerous to mention, that the Survey map is evidence between the parties *quantum valeat*. Primarily it is evidence of possession, but as has been pointed out, evidence of possession is always evidence of title. See *Shosee Mukhee Dassee* v. *Bissessuri Debee* (1). It has been pointed out that co-operation of the parties interested in the measurement is required to be sought by the Survey Officer and that it is reasonable to presume that the parties were present at, and had notice of, the survey proceedings. There is, therefore, good reason for receiving survey maps in evidence on the question of possession between the parties.

It has been argued that to receive these maps is evidence on the question of possession is to allow a surveyor to usurp the functions of a Civil Court. In my opinion the argument is wholly unsustainable. It is true that a surveyor has no authority to decide any question of title between the parties, but as has been pointed out, he has authority to see what are the boundaries and bearings and also, I may add, as to who is in actual possession of the land.

It is unnecessary to go through the cases which have been decided with reference to the question which has been argued before us. I may however, usefully refer to *Koomodinee Debi* v. *Poorno Chunder Mookerjee* (2), *Shusee Mookhee Dossee* v. *Bissessuree Debee* (1), *Ram Narain Doss* v. *Mohesh Chunder Banerjee* (3), *Prosonno Chunder Roy* v. *Land Mortgage Bank of India Limited* (4) and *Satcowri Ghosh Mondal* v. *Secretary of State* (5).

I must dismiss these appeals with costs.

Bucknill, J.:—I agree

Appeal dismissed.

(1) (1868) 10 W. R, 343.

(2) (1868) 10 W. R. 300.
(3) 19 W. R. 202.
(4) 25 W. R. 453.
(5) (1895) 22 Cal. 252.

A.I.R. 1922 Patna 59.

COUTTS AND ROSS, JJ.

Ram Bhujhwan Prasad Singh—Judgment-debtor-Appellant

v.

Natho Ram and others—Decree-holders-Respondents.

Misc. A. No. 43 of 1921, decided on 4th January, 1922.

(a) *Court Fees Act, S.11—Mortgage-decree for larger amount than that on which Court-fee was paid—Section does not apply.*

Where in a suit on a mortgage, a decree was passed for a larger amount than that on which Court-fee had been paid and the decree was sought to be executed without paying Court-fee on the excess amount decreed.

Held; that the mortgage-suit cannot be treated as a suit for execution and that Section 11 does not apply. [P.60, C. 1.]

(b) *Civil P. C. (Act V of 1908), Ss. 2 (2) and 47—Admission of execution application—Order is appealable.*

A question in execution as to whether the execution can proceed or not, is an order under Section 47 and is therefore appealable. [P. 60, C. 1.]

Bhimala Charan Sinha—for Appellant.
Shiveshwar Dayal—for Respondents.

Coutts, J.:—This is an appeal against an order of the Subordinate Judge of Patna disallowing an objection in an execution matter. It appears that a suit was brought by the decree-holder on a mortgage for a sum of Rs. 32,000. He obtained a decree for Rs. 236 only and.

appealed against this decree to the High Court.

The High Court granted him a decree for a lakh of rupees. The decree-holder then attempted to execute his decree and the judgment-debtor objected to that, as Court-fee on Rs. 32,000 only had been paid, under the provisions of Section 11 of the Court Fees Act, the decree could not be executed until the full Court-fee on the total amount decreed had been paid.

The objection, as I have already said, has been disallowed and the execution has been ordered to proceed. A preliminary objection has been taken by the decree-holder that no appeal lies as the question is purely one of admission of an execution application which does not come within the definition of "decree" as laid down under Section 2 of the Civil Procedure Code. I am unable to accept this contention. The question is not one of Court-fee but a question in execution as to whether the execution can proceed or not.

On the merits, however, the appeal must fail. Section 11 of the Court Fees Act refers to suit for immoveable properties, mesne profits and accounts and the contention in this case is that the suit is one for an account. No authority has been shown to us for this contention and, in my opinion, the suit is clearly not one for an account.

I agree with the view which has been taken by the learned Subordinate Judge in regard to this matter and would dismiss this appeal with costs.

Ross, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 60.

BUCKNILL, J.

Mahadeb Marwari and others—Accused. Petitioners

v.

Kishun Lal Marwari—Complainant. Opposite-Party.

Cr. Mis. Case No. 95 of 1921, decided on 24th November, 1921.

Criminal P.C. (V of 1898), S. 526—Magistrate expressing final opinion on guilt of accused—Case should not be re-tried by same Magistrate.

Even though there is ample authority for saying that because a Magistrate has tried some other case involving somewhat similar facts, possibly between the same parties, the case should not be remanded to him for re-trial, still it is highly desirable that such a re-trial should not be taken by the officer who has already expressed his final opinion upon the matter. [P 61, C. 1]

Manku, Yunus and *P. C. Roy*—for Petitioners.

Bankim Charan De—for Opposite-Party.

Bucknill, J.:—This is an application for the transfer of a case from the file of William Raha, Magistrate of Dhanbad with second class powers, to the cognizance of some other competent Magistrate in the same place under the following circumstances.

The petitioners here were tried before Mr. Raha for offences under Sections 323 and 448 of the Indian Penal Code and were sentenced to various penalties. There was, however, an appeal against this decision, made to the Deputy Commissioner of Dhanbad who, finding that the proper legal procedure, particularly with reference to Section 342 of the Criminal Procedure Code, had not been complied with by Mr. Raha, remanded the case to him for re-trial from the point from which proceedings had begun to be irregular.

I may also mention incidentally that another case (which is here described as the counter-case between these parties or some of them) had also been tried and disposed of by Mr. Raha in the early half of this year (that is to say, in April, 1921) while his present judgment was dated the 18th of July last. I have read the judgment which Mr. Raha gave in July, and no doubt he has expressed a very strong opinion upon the guilt of the accused persons. The application is now made to me that it is desirable and fair in the interests of the accused persons that the matter should go back for a re-trial to some officer other than Mr. Raha who has already convicted and sentenced these applicants and had as well dealt with another case between the parties.

It is pointed out to me, by the learned Vakil for the respondents here, that there is ample authority for saying that because a Magistrate has tried some other case involving somewhat similar facts possibly between the same parties, that in itself does not constitute neces-

sarily any ground why a case should not be remanded to the same Magistrate for re-trial by him. Similarly too, I am far from saying that because a Magistrate has already convicted a person of an offence and the accused, for some reason or other, has to be re-tried, that Magistrate is incompetent to try the case over again.

On the other hand, I think that, where it is possible, it is highly desirable that such a re-trial should not be taken by the officer who has already expressed his final opinion upon the matter. It is quite true that an endeavour may be made (and no doubt is made) to keep the mind entirely free from bias, and to eject from it any preconceived ideas which may have been formed in general by what has taken place at the earlier trial. But those are after all counsels of perfection, and, I am bound to say, that if I was in the position of having been convicted and sentenced of an offence by an individual, I should feel the greatest apprehension if my case was remanded to the same person for a re-trial.

I am satisfied that in this case the fairest and the most proper thing for all concerned will be to allow the application and to have the case re-tried by some other competent Magistrate in the Dhanbad Sub-division and I order accordingly.

Case transferred.

A. I. R. 1922 Patna 61.

JWALA PRASAD, J.

Harbans Sahu and others—Appellants

v.

Lal Moni Koer and another—Respondents.

Reference under S. 5 of the Court Fees Act, decided on 10th March, 1921.

(a) *Specific Relief Act, S. 42—Further relief—Suit for declaration of waste by widow—Appointment of Receiver is consequential relief.*

Where a reversioner sued for a declaration of waste by a widow and for the appointment of a Receiver,

Held that the prayer for the appointment of a Receiver was a prayer for consequential relief. [P. 62, C. 1.]

(b) *Court Fees Act, S. 7, Cl. (iv) (c)—Suit for declaration and consequential relief—Court fee must be paid on the consequential relief as valued by plaintiff.* [P. 61, C. 2.]

Narendra Nath Sen—for Appellants.

Jwala Prasad, J.:—This is a reference under Section 5 of the Court Fees Act.

The plaintiffs are the appellants, their suit in the Court below having been dismissed. The prayers in the plaint are:—

(1) That it may be adjudicated that the defendant No. 1, in collusion and agreement with defendant No. 2, her brother, is wasting the heritage of Sheogulam deceased and (2) that either the plaintiffs or any other fit person may be appointed Manager or Receiver so that the heritage of Sheogulam may be preserved.

The value of the suit originally given in the plaint was Rs. 41,500. The appeal was filed at first in the Court of the District Judge, valuing the appeal at Rs. 2,100. The appeal was returned by the order of the District Judge, dated the 9th August, 1920, for presentation to this Court as the value of the property in suit was beyond the pecuniary jurisdiction of that Court (District Judge). If the value were allowed to be reduced in the first Court and the case were heard upon that valuation, then the appeal to this Court would be incompetent. But if the value in the first Court was Rs. 41,500 the plaintiffs have no right to reduce the value with a view to escape the payment of Court-fee.

The next question is whether the plaintiff's suit is only for declaration or also for consequential relief.

The first relief referred to above is clearly a declaratory one. It comes under Section 42 of the Specific Relief Act, Illustration (e) of which runs as follows:—

"The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property, if he survives her, may in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was, therefore void beyond the widow's life-time."

The question for determination is whether the second relief, in which the plaintiffs claimed for their own appointment or for the appointment of any other person as Manager or Receiver of the properties in the possession of widow, so that the heritage of Sheogulam may be preserved, is a consequential relief flowing from the

declaration sought for in the first relief.

The real test is whether the second relief comes under Section 42 of the Specific Relief Act. By no manner of construction can it possibly come under that section. It asks the Court to disturb the possession of the widow and to take the property out of her hands and place it in the hands of the plaintiffs or any other person. The widow is entitled to possession of the property. She can only be disturbed if committing waste detrimental to the interest of the reversionary heirs. In order to deprive her of her legal right to possession, the plaintiff sought in the first relief the declaration that she was committing waste of the property to their prejudice.

The second relief, therefore, is in consequence of the declaration sought for in the first and is to my mind, a consequential relief. The order of a Division Bench of this Court in second appeal No. 206 of 1917, dated the 15th November, 1917, does not give the full facts of the case and it cannot, therefore, be ascertained whether that case is on all fours with the present one. The view taken by me is supported by the case of *Lakhmi Das* v. *Musammat Daropoti* (1) and I feel that it is supported primarily by the construction of Section 42 of the Specific Relief Act.

I would therefore answer the question raised by the Taxing Officer as above.

Answer accordingly.

(1) (1913) 93 P. R. 1913=134 P.W.R. 1913= 19 I. C. 859=232 P.L.R 1913.

A. I. R. 1922 Patna 62.

DAS AND ADAMI, JJ.

Basudeo Narain—Defendant-Appellant

v.

Radha Kisan (Plaintiff) and *Dabindra Missir and others*—Defendants-Respondents.

S. A. No. 82 of 1921, decided on 23rd July, 1921, against the decision of the Sub-J., Muzaffarpur.

Bengal Tenancy Act (VIII B. C. of 1885), S. 22, Cl. (2)—Occupancy holding—Purchased by a co-sharer landlord—Collectorate partition—Holding allotted to another co-sharer—Holding does not cease to exist.

Where the holding of an occupancy tenant was purchased by a co-sharer landlord and the same was allotted to another co-sharer on Collectorate partition.

Held: tenancy right does not cease to exist. There is no foundation in the Tenancy Act for his argument. 24 Cal. 143 and 32 Cal. 38, followed. [P. 63, C. 1.]

C. C. Das and *C. S. Banerjee*—for Appellant.

S. N. Ray—for Respondents.

Das, J.:—The plaintiff and the defendant first party were co-sharers in an estate in which one Mithan Jha had an occupancy holding. Sometime in 1899 or 1900 defendant No. 1 brought a suit against Mithan Jha and purchased the occupancy holding and has continued to be in possession of the holding which had belonged to Mithan Jha. There has recently been a Collectorate partition between the plaintiff and defendant No. 1 and on such partition the lands in question have been allotted to the share of the plaintiff. The plaintiff, taking the view, that upon the purchase of the occupancy holding by defendant No. 1 that holding became the *bakasht* of the plaintiff and defendant No. 1, claimed to be put in possession of the land in dispute. The Courts below agreeing with the view of the plaintiff have decreed his suit.

It is necessary to remember that in dealing with the question we are governed by the Bengal Tenancy Act of 1885 and we have nothing whatever to do with the amendment of the Act in 1907. Now Section 22, Clause (2) of the Bengal Tenancy Act, as it existed before the amendment in 1907, ran as follows:

"If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or the permanent tenure-holder, it shall cease to exist but nothing in this sub-section shall prejudicially affect the rights of any third person."

The question was debated so far back as the year 1896 as to the position of a co-sharer proprietor purchasing an occupancy holding. It was ruled in the case of *Jawadul Huq* v. *Ram Das Saha* (1) that:—

"There is no law which prevents one of the several co-proprietors from holding the status of a tenant, under the other co-proprietors, of land which appertains to the common estate and that the effect of the purchase, by one co-owner of the land of the occupancy right, is not that holding ceases to exist, but only the occupancy right which is an incident of the holding."

According to the decision of the Full

(1) (1897) 24 Cal. 143=1 C.W.N 166.

Bench.

"There was nothing in the sub-section inconsistent with the continuance of the holding divested of this right of occupancy which attached to it."

The point again came up for consideration before the Calcutta High Court in case of *Ram Mohan Pal* v. *Sheikh Kachu* (2). The Full Bench in that case agreed with the decision of *Jawadul Huq's case* (1) Mr. Justice Ghose in the course of his judgment pointed out that since the Bengal Tenancy Act contemplated a class of *raiyats* different from *raiyats* with right of occupancy, namely, non-occupancy *raiyats*, and since Section 22 of the Bengal Tenancy Act deliberately stated that the occupancy right shall cease to exist, it followed that the holding did not cease by virtue of the purchase by the co-sharer landlord. In his view the holding still continued notwithstanding the purchase by the co-sharer landlord.

Now if this be correct then something must happen subsequent to the acquisition of the holding by the co-sharer landlord to put an end to the holding. It is suggested that the partition between the co-sharer landlord puts an end to the holding, but in my judgment there is no foundation for this argument in the Bengal Tenancy Act and we have not been referred to any cases which support the argument put before us by the learned Vakil on behalf of the respondent. I do not desire to express any opinion on the question as to what the position will be under the Amending Act of 1907.

In my judgment the view taken by the Courts below is incorrect, and I would allow the appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's action with costs throughout.

Adami, J.:—I agree.

Appeal allowed.

(2) (1905) 32 Cal. 386=1 C.L.J. 1=9 C. W. N. 249 (F. B.).

A. I. R. 1922 Patna 63.

DAWSON MILLER, C. J. AND COUTTS, J.

Kali Dayal—Plaintiff-Appellant

v.

Umesh Prasad and others—Defendants-Respondents.

L. P. A. No. 104 of 1920, decided on 14th December, 1921, from a decision of Das, J.

(a) *Civil P. C. (Act V of 1908) S. 11—Parties and Representatives—Auction-purchaser is representative of judgment-debtor, and will be bound by previous litigation between judgment-debtor and another.*

The auction-purchaser is the representative of the judgment-debtor and seems to be on the same footing as the person claiming under him. A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by state or common law he can have no better title than the person through or under whom he claims and to such a case Section 11 of the Civil Procedure Code applies. [P. 67, C. 2; P. 68, C. 1.]

(b) *Evidence Act, S 115—Estoppel and* res judicata—*Difference.*

Estoppel is a rule of evidence precluding a person from denying the truth of that thing which he has induced another person to believe to be true whereas *res judicata* is founded on the principle that there should be an end to litigation when once it has been decided between the parties. [P. 65, C 1.]

(c) *Bombay High Court Rules, R. 35—No translation of document provided—Document cannot be referred to.*

An appellant who wishes to rely upon any documents is bound under the rules to have provided translations of them for the Court and in the absence thereof, the said documents cannot be referred to by the appellant in argument. [P. 66, C. 1.]

(d) *Execution sale—What passes under—Only passes the title of the judgment-debtor.*

The general rule applicable to sales in execution of decrees is that no man can transfer to another a better title than he himself possesses. [P. 67, C. 1.]

S. N. Sahay—for Appellant.

C. C. Dass for *S. M. Mullik*—for Respondents.

Dawson Miller, C. J.;—This is an appeal under the Letters Patent by the plaintiff from a decision of Das, J., setting aside the decree of the Officiating District Judge of Bhagalpur and restoring that of the Munsif dismissing the

suit.

The suit was instituted in 1916 by the plaintiff, the auction-purchaser, at an execution sale of a holding measuring 35 acres 72 decimals against the landlords claiming (1) to set aside a rent decree obtained by the landlords against the previous tenants and (2) a declaration that the rent of 11 annas per bigha is payable upon a measurement expressed in bighas according to the *kamarkhole* system, *viz*, 57 bighas 3 cottahs and not as claimed by the landlords according to the *kamar band* system which amounts to 70 bighas. The previous tenants were also added as second party defendants but are not directly interested in the litigation and have taken no part in this appeal.

The present appeal is concerned only with the second part of the claim above-mentioned, and the question for determination is whether the plaintiff's suit is barred by the doctrine of *res judicata*, the issue having been determined in a previous litigation between the plaintiff's predecessors-in-title and the landlords who are the first party defendants in this suit.

The facts giving rise to the dispute are as follows:—In 1911 the landlords brought a suit (No. 495 of 1911) in the Court of the Munsif at Bhagalpur against the second party defendants, who may be referred to as the tenants, claiming (i) recovery of possession of the land in question which they described as measuring 70 bighas according to the *kamar band* system or alternatively (ii) assessment of a fair rent. Shortly afterwards in 1912 the tenants sued the landlords in title suit No. 62 of 1912 in the same Court for a declaration that the same lands measuring according to the *kamarkhole* system 57 bighas 3 cottahs were their *lakheraj* lands.

These suits were tried together and decided by the same judgment. The tenants' suit failed and was dismissed. The landlords' suit also failed in so far as it sought for *khas* possession but succeeded on the question of assessment of rent which was assessed at 11 annas per bigha. The judgment did not in terms decide the area in bighas upon which rent should be payable, but in the decree signed in pursuance of the judgment the rent was stated as Rs. 48 annas 2, being 11 annas on 70 bighas, the measurement claimed by the landlords.

In 1914 the landlords sued the tenants for rent in rent suit No. 111-31 of 1914 claiming at the rate of 11 annas on 70 bighas or Rs. 48-2-0 altogether. In that suit an issue was raised as to the number of bighas upon which the rent was payable, the tenants alleging that the area properly assessable to rent was 57 bighas 3 cottahs according to the *kamarkhole* system and not 70 under the *kamar band* system with a total rental of Rs. 35-1-0 after deducting 6 bighas as not fit for cultivation.

That suit including the said issue was decided on the 13th May, 1915 in favour of the landlords and against the tenants.

Subsequently on the 20th July, 1915 the holding was brought to sale by the landlords in execution of their decree for costs in the litigation of 1911 and 1912 and was purchased by the plaintiff. The attachment process and the sale certificate in that sale indicated that there was a charge upon the holding for the amount of the rent decree obtained by the landlords in the rent suit No. 111-31 of 1914. The landlords then put in execution that rent decree and again put the property up for sale.

The plaintiff, after an objection by him under Order XXI, Rule 58 of the Civil Procedure Code had been disallowed, deposited the decretal amount under the provisions of Section 170 of the Bengal Tenancy Act and shortly afterwards, in 1916, instituted the present suit claiming, as already stated, to set aside the decree obtained by the landlords in the rent suit of 1914, on the ground of fraud, and asking for a declaration that the proper area of the holding was that arrived at according to the *kamarkhole* measurement, *viz.*, 57 bighas and not 70 bighas as previously decided.

The sale in execution of the rent decree was then stayed pending the hearing of the suit. In answer to the claim the landlords pleaded, *inter alia* that it was barred by the doctrine of *res judicata* as well as by estoppel and 5th and 6th issues framed were stated in general terms thus:—5. Is the suit barred by the doctrine of *res judicata*? 6. Is the suit barred by the principle of estoppel? The learned Munsif considered that the doctrine of *res judicata* did not apply, but that the plaintiff, having purchased the property with full knowledge of the charge for the rent, *viz.*, Rs. 48-2-0 decreed in the rent suit No. 111-31 of 1914,

could not afterwards turn round and be permitted to question the validity of that decree and further that as the rent had also been settled in the title suit No. 469 of 1912, although this might not operate as *res judicata*, the plaintiff not having been a party to it, it was strong evidence against him and that in any case the principle of estoppel precluded him from raising the question of area and rental. In the event he dismissed the suit with costs.

It is manifest that the learned Munsif was labouring under some confusion as to the principle underlying the doctrine of estoppel and *res judicata*, as has been pointed out by the learned District Judge before whom the case went on appeal. The learned District Judge came to the conclusion that the Munsif was wrong in applying the doctrine of estoppel and that if there was anyestoppel it was an estoppel by judgment which is the same thing as *res judicata*. With this part of his decision I entirely agree.

The doctrine of *res judicata* is sometimes treated in text-books as a branch of the doctrine of estoppel and is referred to as estoppel by judgment. The doctrine of estoppel, properly so called, is dealt with in Section 115 of the Evidence Act. There is, however, a difference in the principle upon which the two doctrines are based. *Res judicata* in this country is founded on the principle that there should be an end to litigation as to any issue between the parties when once that issue has been directly determined between them by a Court of competent jurisdiction ; and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It bars fresh litigation at the outset.

Estoppel is a rule of evidence based on the principle that a man who by his acts or statements has induced another to believe a thing to be true should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced.

In the present case no facts are disclosed which would bring the doctrine of estoppel into operation, but if the plaintiff is bound by the judgment in the previous litigation then the doctrine of *res judicata* applies. The learned District Judge considered that if the present suit had been between the landlords and the previous tenants the latter would have been effectually met by the plea of *res judicata* and with this part of his decision I am again in agreement.

He was of opinion, however, that a purchaser at an execution sale who purchased the right, title and interest of the judgment-debtor was not a person claiming under the latter and was therefore not bound by the rule of *res judicata*, and might again, in a suit between himself and the landlords, re-open the matters already decided between his predecessor-in-title and the landlords. He then found as a fact that the *kamarkhole* system of measurement prevailed in the Mouzah in which the land is situated and that the area upon which rent was payable, expressed in bighas, was 57 bighas 3 cottahs and not 70 bighas.

He accordingly allowed the appeal to that extent but dismissed that part of the claim which sought to set aside the rent decree as he found it was not obtained by fraud and with that we are no longer concerned.

From this decision the landlords appealed to this Court and contended that the claim was barred by the rule of *res judicata*. The learned Judge before whom the appeal came decided that the plaintiff, as auction-purchaser of the holding sold in execution of a money-decree, was bound by the result of the previous litigation between his predecessors-in-title and the landlords and that the plea of *res judicata* was a bar to the suit. He accordingly set aside the decree of the District Judge and restored that of the Munsif. From that decision the present appeal is brought by the plaintiff.

It was contended by the learned Counsel on his behalf, in the first place, that the auction-purchaser who buys in execution of a money-decree is not bound as between himself and the landlord by any previous litigation between the landlords and the tenants whose interest he has purchased, and secondly, that the only decision, pleaded in the written statement as a bar was the judgment in suits No. 496 of 1911 and No. 62 of 1912, which were tried together, and that the question of the proper measurement of the land was left undecided in that judgment notwithstanding the decree.

It is convenient to dispose of the second point first. It is not disputed that a direct issue was raised

upon the question of measurement in the rent suit of 1914 which was decided in the landlords' favour and against the plaintiff on the 13th May, 1915 before tenants acquired his interest. But it is said this judgment was not pleaded as a bar. We have not seen the pleadings in the suit as they form no part of the record before us on appeal. But if the appellant wished to rely upon those documents it was his duty under the rules to have provided translations of them for the Court, which he has not done.

We are unable therefore to say how far his instructions are accurate when he says that the only decision pleaded as *res judicata* was that came into the litigation of 1911 and 1912. It appears, however, from the judgments of both the Munsif and the District Judge in the present case, which are before us, that not only the judgment in those suits but also the judgment in the rent suit No.111—31 of 1914, where the point was determined, were relied upon and dealt with as supporting the defendants' plea and the issue framed was, as already stated, in general terms and not confined to any particular judgment.

It seems clear therefore, whatever the exact form of the pleading may have been, that the judgment in the rent suit was relied upon without objection at the trial and on appeal before the District Judge, and when the matter came before Mr. Justice Das it does not appear from his judgment that the point was ever taken that the judgment in the rent suit could not be relied upon. Had objection been taken to the evidence of the decision in the rent suit at any stage of the proceedings a formal amendment of the written statement, if infact it was defective, would doubtless have been allowed, and even at this late stage I should be inclined in the circumstances mentioned to allow such an amendment, if I thought it necessary, as by so doing the nature of the suit would in no way be altered nor would any further evidence be necessary to determine the real issue between the parties.

I do not, however consider such a course necessary. The High Court Rules in Chapter IX specify the papers which shall be printed in the paper book in first appeals and in second appeals where the value exceed Rs. 50. These include, *inter alia*, the plaint and written statement. In a second appeal not exceeding Rs. 80 in value, which this is, the paper book which is prepared by the Court free of charge to the parties does not contain the pleadings, but under Rule 35 the appellant must before the hearing of the appeal serve on the respondent a copy or translation of any document upon the construction of which he considers the determination of the appeal depends and provide another copy or translation for the use of the Bench, and if he fails to do so he shall not without special leave of the Bench refer to such document at the hearing.

The appellant throughout the case has raised no objection until now that the judgment in the rent suit should not be taken into consideration, and has allowed the plea raised in the written statement to be treated as if it were properly framed so as to admit of evidence of that judgment. If in fact it is defective, an amendment would cure the defect and in view of the attitude of the appellant, who even now has not provided a translation of the document, he relies upon, I think, leave to refer to it should be refused.

The other point raised by the appellant depends on whether the previous tenants whose interest the appellant purchased at the execution sale are parties under whom he claims within the meaning of Section 11 of the Civil Procedure Code. The appellant relies upon a dictum of Lord Justice James in pronouncing the judgment of the Judicial Committee in *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* (1). That appeal was determined on the facts in favour of the respondent, it being found that the mortgage relied on by the appellant as the foundation of his title was made after the attachment of the property in pursuance of a decree in execution of which the respondent purchased.

It was therefore unnecessary to determine what the rights of the parties would have been if the attachment had been posterior to the mortgage. Their Lordships, however, expressed the opinion that even in the latter case, the execution purchaser, who took without notice of the encumbrance thinking he had an absolute title and who held possession for 12 years as absolute owner, was not in the same position as the mortgagor or a person claiming under a voluntary alienation

(1) (1870) 14 M. I. A. 101=8 B. L. R. 122= 16 W. R. 19=2 Suth. 457=2 Sar. 698 (P. C.).

from him. On the assumption that no notice of the mortgage was proved, their Lordships thought that the possession of the purchaser was the possession of a person claiming to be owner and that he could plead the limitation regulations by which he could set up a title by adverse possession against the mortgagee.

This dictum, however, does not decide that the execution purchaser in all cases acquires a better title than the previous owner. It seems to me it is merely an exception to the general rule and should not be extended so as to destroy the effect of the rule in all cases of a sale in execution of a decree. Other exception may arise by statute as in the case of sales in execution of a rent decree under the Bengal Tenancy Act, or under the Law merchant in England in the case of sales in market overt. But I apprehend that the general rule is that no man can transfer to another a better title than he himself possesses.

The next case relied on by the appellant was *Musst. Imrit Kooer* v. *Lalla Debee Pershad Singh* (2) in which Sir Richard Couch, C. J., held that the execution purchaser, the defendant in the suit, was not bound by statements made by the judgment-debtor on a previous occasion as he was not in the position of a person who takes a conveyance direct from the parties. It is not quite clear from the judgment how far the learned Chief Justice meant to rule that the doctrine of estoppel would not apply in such a case.

There is nothing in the report to show that the statement made by the defendants' predecessor was one which the plaintiffs had acted upon so as to place themselves in any worse position. Nine years later in 1881, *Direndranath Sannial* v. *Ramkumar Ghose* (3), it was decided by the Judicial Committee and it was held that the purchaser in execution "notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and free from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution."

It will be observed that the alienations and incumbrances which do not bind the purchaser are expressly limited to those arising after attachment. From the date of attachment, the judgment-debtor's powers of disposal are of no effect as against the purchaser who by operation of law takes adversely to the judgment-debtor at least from the date of attachment. The execution-purchaser is therefore in a better position than the purchaser by private treaty, but only to the extent to which the law operates in his favour from the date of the attachment. These decisions have been taken in some later cases as authority for the proposition that the execution purchaser was not the representative of the judgment-debtor so as to bring him within the rule of estoppel. [See *Lala Parbhu Lal* v. *Mylne* (4).]

This view however can, in my opinion, no longer be supported in face of the judgment of the Judicial Committee delivered by Sir Richard Couch in *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (5) in which it was laid down that where the principle of estoppel applied as against the judgment-debtor the execution purchasers were in the same position and were equally bound by it as they purchased only his right, title and interest.

More recently in 1909 the Calcutta High Court held in *Debendra Nath Sen* v. *Mirza Abdul Samad Seraji* (6) that the purchaser at the execution sale is bound by the same rule of estoppel as the judgment-debtor on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage and that the contrary view is not supported by authorities nor is defensible on principle. If then the execution purchaser as the representative of the judgment-debtor is bound by the doctrine of estoppel in cases, where the latter would have been bound, what is his position with regard to the application of the doctrine of *res judicata* in similar circumstances.

No argument has been adduced why we should differentiate the two cases. The representative of the judgment-debtor in the one case seems to me to be on the same footing as the person claiming under him in the other. A person claims through or under another when he derives his title

(2) (1872) 18 W. R. 200.
(3) (1881) 7 Cal. 107=8 I. A. 65=4 Sar. 213 (P. C.).
(4) (1887) 14 Cal. 401.
(5) (1895) 22 Cal. 909=22 I. A. 129=6 Sar. 583.
(6) (1909) 10 C L. J 150=1 I. A. 264.

through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by statute or common law he can have no better title than the person through or under whom he claims.

In my opinion Section 11 of the Civil Procedure Code applies to the facts of this case as to bar the appellant's suit and this appeal should be dismissed with costs.

Coutts, J. :—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 68.

DAWSON MILLER, C. J. AND COUTTS, J.

Chandra Mohan Dutta and others—Defendants-Appellants

v.

Sasibala Dasi and others—Plaintiffs-Respondents.

Letters Patent Appeal No. 63 of 1920, decided on 21st June, 1921, from a judgment of Sultan Ahmed, J., in S. A. No. 184 of 1919, dated 10th May, 1920.

(a) *Deed—Construction—Two ladies to hold certain property for life, and the plaintiff to get it after death of both of them—On death of one of the ladies, plaintiff cannot claim half the property.*

Where a compromise provided that two ladies should get and hold certain property for their lives and after the death of both of them the plaintiff should get the same.

Held : that the ladies are joint tenants of the property and the plaintiff is not entitled to recover possession of any portion of the properties until the death of both the ladies. After the death of both of them the plaintiff will take possession of the lands. [P. 69, C. 2.]

(b) *C. P. C., S. 100—New point in second appeal, cannot be allowed.*

A new point taken for the first time in second appeal before High Court without having any evidence on record or any finding to support it should not be allowed to be raised. [P. 70, C. 1.]

A. B. Mukerjee—for Appellants.

S. Mullick and *N. N. Sen*—for Respondents.

Coutts, J. :—This is an appeal from the decision of a Judge of this Court sitting alone in second appeal. The suit was brought by two ladies—Srimati Sasibala Dasi and Srimati Nistarini Dasi for recovery of *khas* possession of the whole of certain properties mentioned in Schedules *Ka* and *Ga* of the plaint and for possession of half the property mentioned in Schedule *Kha* of the plaint, by ejectment of defendant No. 1 who was in wrongful possession. There was also a claim for mesne profits and costs.

The land is in Mouza Ranguni and it appears that two annas of that Mouza belonged originally to one Srishtidhar Dutta the husband of plaintiff No. 1, Srimati Sasibala Dasi. Srishtidhar had two brothers, the father of Chandramohan Dutta who is defendant No. 1 and Prasanna Kumar Dutta who is now dead and whose widow Srimati Sumitra Dasi is the second defendant. After the death of her husband, plaintiff No. 1 was dispossessed of her husband's property and in 1902 she instituted a suit for recovery of *khas* possession after partition by metes and bounds. The suit was compromised.

By the terms of the compromise the property claimed by the plaintiff was divided into the three portions which are described in Schedules *Ka*, *Kha* and *Ga* of the present plaint, the plaintiff's title was admitted but it was agreed that she should get *khas* possession of the property mentioned in Schedule *Ka* only. Her mother-in-law, Sunayana Dasi, and the defendant No. 2 in the present suit, the widow of Prasanna Kumar Dutta, were to hold possession of the lands described in Schedule *Kha* for life as maintenance and the plaintiff No. 1 and her mother-in-law Sunayana Dasi were to have joint possession of the *Ga* schedule property.

Subsequently to the compromise decree Sunayana, the mother-in law of the plaintiff No. 1 died and the case of the plaintiff No. 1 is that she came into possession of the whole of the lands in Schedule *Ga* and half the lands in Schedule *Kha*. A rent suit was then instituted by the landlords against her in respect of a portion of the property. They obtained a decree and took out execution and a proclamation for sale issued in respect of the whole of the two annas.

Thereupon the defendant No. 1, who, as I have said, is the nephew of the plaintiff No. 1's husband, in order to protect whatever rights he might have, deposited the decretal amount, namely, Rs. 37. He then filed an application under Section 6, Reg. XX of 1890, he was put in possession and was in possession of the property for the years 1322 and 1323. Meanwhile, however, the plaintiff No. 1 had leased a portion of the property to her mother,

the plaintiff No. 2 and in 1323 when the latter tried to take the produce of the lands she was prevented from doing so by the defendant No. 1.

A criminal case was brought by the plaintiff No. 2 which failed on the ground that the question was in the nature of a civil dispute and the defendant No. 1 remained in possession. The plaintiff No. 1 accordingly brought this suit for recovery of possession and ejectment on the ground that the amount deposited by the defendant No. 1 has been fully realized and that the plaintiffs are therefore entitled to recover possession.

The only part of the property with which we are concerned in this appeal is the half share of the Schedule *Kha* lands claimed by the plaintiff. In regard to this the defendants' contention is that under the compromise the plaintiff is not entitled to a half share on the death of Sunayana and further that he has not been holding possession of this property as statutory mortgagee as alleged by the plaintiff but that the defendant No. 1 has been holding the lands under the defendant No. 2 by virtue of a settlement from long before the year 1322.

The suit was decreed in the Court of first instance but, so far as half the *Kha* lands were concerned, on appeal to the District Judge the suit was dismissed. On second appeal to this Court half the *Kha* lands were decreed to the plaintiff and it is against this decision that the defendant No. 1 has filed this appeal.

In the appeal before the learned Judge of this Court the first contention was that by the terms of the compromise the plaintiff was, on the death of Sunayana, entitled to possession of half the *Kha* lands. This was the main ground of the appeal and it was successfully urged, but it was further urged and held by the learned Judge of this Court that the plaintiff No. 1 having actually got possession of half the *Kha* lands and the defendant No. 1 not having a better title than the plaintiff and the Rs. 37 which he deposited in Court having been paid off, the plaintiff was entitled to succeed.

Now with regard to the first of these points. The relevant portion of the compromise decree runs as follows:—"Defendant No. 2 Srimaty Sunayana Dasi and the widow of late Prasanna Kumar Dutta will take into possession the lands of Schedule *Kha* for maintenance for life. The defendants Nos. 1 and 3 will have no objection to this. After the death of both of them the plaintiff will take possession of the lands to which defendants Nos. 1 and 3 will have no objection." It appears to me that there can be no doubt as to the construction of this term of the compromise. It is clearly a grant of this land to the two ladies for life as maintenance, that is to say, they are joint tenants of the property and even on the first sentence of this portion of the compromise alone I would be prepared to hold that the plaintiff was not entitled to recover possession until the death of both the ladies.

But if there were any doubt that doubt is set at rest by the last sentence: "After the death of both of them the plaintiff will take possession of the lands." This is a clear statement that it is only after the death of both ladies that the plaintiff will get possession and in my view there can be no possible ambiguity. This was the view which was taken by the learned Subordinate Judge in First Appeal and in my opinion there can be no doubt on the point.

I now come to the next point, namely, that the plaintiff having actually come into possession of half the *kha* lands on the death of Sunayana and the defendant No. 1 not having been able to show a better title than the plaintiff and the amount which the defendants deposited having been recovered, the plaintiff is entitled to succeed. If the facts were correct the conclusion would also be correct, but there appears to have been some misapprehension as to the facts in the mind of the learned Judge of this Court.

To establish the fact of the plaintiff's actual possession after the death of Sunayana he has relied on the pleadings and he says that the allegation of the plaintiff's possession was distinctly made in the plaint and was not controverted in the written statement. This, however, is hardly correct, for in his written statement the defendant has distinctly stated that the defendant No. 1 does not hold possession as a statutory mortgagee but that the plaintiff No. 1 is in possession by virtue of a settlement from defendant No. 2. This is clearly a denial of the plaintiff's possession in her

own right and there is no finding of any of the Co rts on the point. The fact is that this point was a new one taken for the first time in appeal to this Court and there was no evidence on the record and no finding to support it.

In these circumstances it cannot be assumed that the plaintiff was in possession except by virtue of a settlement from defendant No. 2 and this being so the contention fails.

For the reasons I have given I would decree this appeal with costs.

Dawson Miller, C. J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 70.

DAS AND ADAMI, JJ.

Mt. Hira Bibi—Defendant-Appellant

v.

Ramdhan Lal and others—Plaintiffs-Respondents.

Appeal from Original Decree No. 35 of 1918, decided on 10th June, 1921, from a decision of the Dist. J., Gaya.

(a) *Transfer of Property Act (IV of 1882), S. 59—Proof of attestation is not necessary where execution is admitted by defendant—Evidence Act, S. 70.*

Attestation of a mortgage-deed within the meaning of Section 59 of the Transfer of Property Act must be made by the witnesses signing their names after seeing the actual execution of the deed and that mere acknowledgment of signature by the executant is not sufficient. When the witnesses say that they signed the document as witnesses on the admission of one of the executants such attestation is wholly insufficient. 44 Cal. 345; 22 C. W. N. 444; 4 P. L. J. 511 followed.

The admission of the defendant in a mortgage-suit renders it unnecessary for the plaintiffs to prove that document was executed and attested in the manner required by Section 59 of the Transfer of Property Act. [P. 71. C. 2; P. 72, C. 2.]

(b) *Pardanashin lady—Knowledge of transaction—Independent advice—Absence of, is not of itself fatal to validity of deed.*

Inability to prove that the lady had independent advice is not of itself fatal to the validity of the deed. The legal protection which the law gives to a pardanashin lady cannot be transmuted into a legal disability. It is a question of fact in each case whether the obtaining of independent advice would really have made any difference to the executant. If upon a review of the facts, which include the nature of the thing done and the training and habit of mind of the grantor as well as the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, the deed ought to stand [P. 72, C. 2]

(c) *C. P. C., O. 34, R. 4—Mortgage-suit—Plaintiff is entitled to decree against all executants.*

In a mortgage action the plaintiffs are entitled to a mortgage-decree against the executants of the mortgage. It is entirely foreign to the scope of the suit to consider what is the exact interest possessed by each of the defendants. [P. 73, C. 2.]

S. Ahmed, N. N. Sen and *Siveshwar Dayal*—for Appellant.

Manuk, Gangadhar Das, S. M. Mullick Sivnandan Rai and *Sant Prasad*—for Respondents.

Das, J.:—This was an action by the plaintiffs respondents to enforce a mortgage bond executed in their favour by defendant No. 1, the appellant before us, and by the other defendants who are respondents before us. The learned District Judge has granted a decree for the full amount claimed, as against defendant No. 1, but he has dismissed the suit as against the defendants other than defendant No. 1.

The mortgage bond was executed by defendant No. 1 by her adult son defendant No. 2, by her minor sons defendants Nos. 3 to 5, by the minor son of defendant No. 2 and by defendant No. 7, the husband of defendant No. 1. This mortgage bond was executed on the 17th August, 1906, as a security for an advance of Rs. 29,000 made by the plaintiffs to the defendants. It appears, however, that Rs. 4,700 were subsequently returned by the defendants to the

plaintiffs so that the principal sum claimed in his action is Rs. 24,300.

It is the common case that the properties which were secured by the mortgage bond of the 17th August, 1906 belong to defendant No. 1, who has an interest in these properties under the will of one Madan Mohan Lal. This Madan Lal, to whom the properties originally belonged, died sometime in 1882 leaving a will, dated the 21st December, 1881, whereby he appointed defendant No. 7 as the executor of the will. He devised the properties to one Ratan Bibi, the mother of defendant No. 1 for her life and upon her death to defendant No. 1 for her life and after her death to her descendants. Ratan Bibi died on the 14th October, 1903, and it is undisputed that at the time when the mortgage bond was executed defendant No. 1 was entitled to these properties for her lifetime.

On behalf of the appellants two questions have been argued before us ; first, that the mortgage bond was not attested in the manner required by Section 59 of the Transfer of Property Act, and secondly, that the mortgage bond cannot be enforced as against defendant No. I inasmuch as she is a pardanashin lady and was entirely under the influence of her husband defendant No. 7, and inasmuch as the learned District Judge has found that in entering into the transaction she did not receive any independent advice and that her husband defendant No. 7 mismanaged the estate and that one of the objects of the transaction was to exonerate defendant No.7 from the effects of his mismanagement.

I will first consider the question whether the mortgage bond was validly attested. Section 59 of the Transfer of Property Act lays down that, where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. It has been laid down by the Judicial Committee that attestation of a mortgage deed within the meaning of Section 59 of the Transfer of Property Act must be made by the witnesses signing their names after seeing the actual execution of the deed and that mere acknowledgment of her signature by the executant is not sufficient.

As has been said on very high authority, "attest" means that the person shall be present and see what passes and shall when required, bear witness to the facts. The Lord Chancellor summed up the conclusion at which he arrived in these words :—" The party who sees the will executed is in fact a witness to it ; if he subscribes as a witness he is then an attesting witness." (*Burdett* v. *Spilsbury*) (1).

How then does the present case stand on facts ? The document itself does not show that it was attested in the manner required by Section 59 of the Transfer of Property Act. There are indeed numerous persons who have subscribed their names as witnesses but each and every one of them subscribed his name as a witness on the admission of due execution by the executants.

Mr. Manuk, on behalf of the plaintiffs-respondents suggests that the form as used by the witnesses is admittedly incorrect because they undoubtedly saw the execution of the document by at least the male executants of the same. That may be so but so far as the form is concerned, it certainly does not satisfy the requirements of Section 59 of the Transfer of Property Act.

When we come to the actual evidence of these witnesses the case stands on no better footing. The plaintiffs have examined five witnesses on this point and they all say that they signed the document as witnesses on the admission of one of the male executants. This is wholly insufficient and if there was nothing else in the case I would be compelled to dismiss it.

But it was argued that it was wholly unnecessary for the plaintiffs to prove the execution of the document, as defendant No. 1 in her evidence has admitted execution of it. There can be no doubt that defendant No. 1 in her evidence admitted having executed the document and the question which we have to consider is this: Does this admission render valid that which according to the decision of the Judicial Committee is invalid? Section 70 of the Evidence Act provides as follows:—

" The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him though it be a document required by law to be

(1) (1843) 10 Ch. and Fin. 340=8 E. R. 772.

attested."

It has been held that provided the admission is made during the course of the trial it will dispense with the necessity of calling the attesting witnesses and of proving due execution of the document. The learned authors of Woodroffe on Evidence say as follows:

"Attestation is only a form of solemn proof required in certain contested cases by special legislative enactments and it is difficult to understand why witnesses should be called to prove a document against a party who formally admits that it is a valid document as against him."

This view has been accepted in a series of cases. In the case of *Satish Chandra Mitra* v. *Jogendra Nath Mahalnobis* (2), it was held that the effect of Section 70 is that the proof by calling attesting witnesses is dispensed with when the party executant admits execution of the document. In the case of *Nibaran Chandra Sen* v. *Ram Chandra Sen* (3), it was held that admission of execution of an attested document by the executant or by a person representing his interest is sufficient proof of its execution against the person making such admission. These cases were followed in this Court in the case of *Nageshwar Prashad* v. *Bachu Singh* (4).

If the matter were *res integra* I should doubt whether the admission of a party can render valid that which is invalid. The question is: Is the rule enunciated in Section 59 of the Transfer of Property Act, a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting the proof of the document? If it be a rule of evidence the question becomes one of proof and the admission of a party would be in circumstances quite sufficient. But if it be a rule of law then it is difficult to understand how the admission of a party, helps the solution of the problem.

My own view is that Section 70 of the Evidence Act operates only where the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor. If for instance the mortgagor admits the execution of the document in the written statement it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. But the matter would stand on an entirely different footing if the mortgagee produces his evidence of execution and that evidence establishes that the document was not attested in the manner required by Section 59 of the Transfer of Property Act.

I am, however, bound by the decisions of the Calcutta High Court and of this Court. In accordance with those decisions I must hold that the admission of the defendant renders it unnecessary for the plaintiffs to prove that the document was executed and attested in the manner required by Section 59 of the Transfer of Property Act.

I now come to the next question argued on behalf of the appellant. The learned District Judge has found that the appellant did not receive any independent advice in the matter. He has also found that by this document her husband defendant No. 7 is exonerated from the effects of his mismanagement and that this bond has thrown the burden of the debts on the estate itself.

It has been held by the Judicial Committee in the case of *Kali Baksh Singh* v. *Ram Gopal Singh* (5) that inability to prove that the lady had independent advice is not of itself fatal to the validity of the deed. Lord Shaw in the course of his judgment put the whole law on the subject in this form. "The legal protection which the law gives to a pardanashin lady cannot be transmuted into a legal disability.

As I understand the law, it is a question of fact in each case whether the obtaining of independent advice would really have made any difference to the executant. If upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor as well as the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, the deed ought to stand.

In order then to test the validity of the argument we have to enquire into the nature of the transaction. As I have said there was an advance of Rs. 24,300 made on this document. Now as the document says this mortgage-debt was

(2) (1916) 44 Cal. 345=24 C.L.J. 175=34 I.C. 862=20 C. W. N. 1044.
(3) (1917) 22 C. W. N. 444=44 I.C. 984.
(4) (1911) 4 P. L. J. 511=53 I.C. 79.
(5) (1913) 36 All. 81=21 I.C. 985=41 I. A. 23 (P. C.)

incurred in order to enable the mortgagors to pay off certain debts apparently on the mortgagors. I will take these antecedent debts one by one in order to see what the independent advice would have been had the defendant No. 1 taken such independent advice.

The first is an item of Rs. 5,119-3 due to one Mathura Persad on a decree. It appears that Mathura obtained a mortgage-decree against the present defendants on the foot of a mortgage executed by Baijnath Persad as executor under the Will of Madan Mohan Lal. The present appellant contested that suit on the ground that her husband had no authority to mortgage the properties. But the learned Subordinate Judge who heard that suit decreed the claim of Mathura Persad as against all the defendants. The money advanced by the plaintiffs was paid to Mathura Persad on the date when the property was put up for sale on execution of the decree obtained by Mathura.

There is little doubt that this decree was binding upon the appellant and that no one could have advised her not to pay off this decretal amount. The next item is an item of Rs. 3,386 due to Sri Kaller Sukul on the foot of a mortgage-decree obtained by Sri Kaller Sukul against the present defendants on the 14th February, 1905. It was impossible for the appellant to resist this decree. The next item is one of Rs. 4,684 paid to discharge the claim of Upendra Nath Sirkar against the present defendants. Upendra Nath Sirkar obtained a mortgage decree against the defendants and in execution of the mortgage-decree put up the properties mortgaged for sale. The next item is one of Rs. 3,514 due to Ambika Persad on a mortgage executed by the present defendants in his favour on the 8th December, 1905.

It appears from the recitals in the mortgage bond that the money was borrowed from Ambika Persad in order to save certain properties from sale in execution of decree obtained against the defendants. It is impossible to say that this mortgage bond was not binding upon defendant No. 1. The next item is one of Rs. 9,912 due on the foot of a mortgage executed by the present defendants in favour of Amrit Singh on the 1st August, 1904. The recitals in the mortgage bond show that there were considerable litigations between defendant No. 1 and her mother Mussammat Ratan Bibi and that it was further necessary for the defendants to institute a suit in order to avoid a *thika patta* granted by Ratan Bibi in favour of one Lachman Singh. I am unable to say that this bond was not binding on defendant No. 1.

It is unnecessary to deal with the other items because these cover the amount actually advanced by the plaintiffs to the defendants. It has, in my opinion, been established that the document was read and explained to the lady and as the lady took part in all the previous transactions which were binding on her it is impossible to say that any one whose advice she may have sought would have advised her not to execute this mortgage bond.

I am of opinion, therefore, that the absence of independent legal advice does not render the mortgage bond unenforcible in such a case as against defendant No. 1. I must, therefore, dismiss this appeal with costs.

There is a cross-objection on behalf of the plaintiffs-respondents. They urge that the suit should have been decreed as against all the defendants and not merely as against defendant No. 1. This contention, is, in my opinion, entitled to prevail. We are not in this action concerned with the question of construction of the will under which the defendant No. 1 takes a life-estate. This is a mortgage action and the plaintiffs are entitled to a mortgage-decree against the executants of the mortgage. It is entirely foreign to the scope of the suit to consider what is the exact interest possessed by each of the defendants.

I would allow this cross-objection. The result is that the plaintiffs will be entitled to a mortgage-decree against all the defendants. Period of redemption six months from the date of this judgment.

Adami, J. :—I agree.

Appeal dismissed and cross-objections allowed.

A.I.R. 1922 Patna 73

DAS AND BUCKNILL, JJ.

Bazari Hajam and another—Accused-Appellants v.

King Emperor—Respondent.

Cr. A. No. 176 of 1921, decided on 20th December, 1921, against the judgment of Offg. S. J., Shahabad, dated 30th September, 1921.

Criminal trial—Evidence—Thumb impression of accused taken in Court for comparison—Conviction based on such comparison by expert—Is highly irregular—Evidence Act, S. 73.

A Court should not convict a person of a serious crime solely and entirely upon similarity of thumb-marks or finger prints, without any corroborative circumstances to support this evidence. The very fact of the taking of a thumb impression of an accused person for the purpose of possible manufacture of the evidence by which he could be incriminated, is in itself sufficient for setting aside the conviction upon the understanding and upon the assumption that such was not really a fair trial.

There is no law by which an accused person can be, either by words or by gestures or by exposing himself to certain physical treatment, made to implicate himself in the crime with which he is charged. When he is on trial such an idea is highly repugnant to all thoughts of the proper administration of justice in this or in any other British Country. [P. 74, C. 1 ; P. 75, C. 2.]

P. P. Varma—for Appellants.

Nandkeolyer—for the Crown.

Bucknill, J.:—This is an appeal by two persons named Bazari Hajam and Barhmdeo Kahar who were convicted by the Officiating Sessions Judge of Shahabad on the 30th of September of this year and sentenced respectively to three years' rigorous imprisonment: the first accused for false impersonation under Section 82 (c) of the Indian Registration Act and the second accused under Section 82 (d) of the same Act.

The circumstances under which these convictions were recorded are somewhat unusual and the assessors both thought that the evidence was not sufficient to justify the accused being condemned.

In the first place it must be admitted and is indeed admitted by the Officiating Sessions Judge that with one exception there was no material against either of the accused. The story upon which the prosecution was based was that a certain deed purporting to have been executed by one Ram Prasad Pande at the Koilwar Sub-Registry Office at the end of March of this year, was not in fact executed by that individual but was executed by the first accused who represented this Ram Prasad Pande and incidentally placed his thumb impression upon the document. That is all.

Now when the accused was brought before the Court; both in the Magistrate's Court and in the Sessions Court, an altogether unusual practice, and one which I cannot but too strongly deprecate, was followed of (in some way or other, I do not understand how) obtaining a thumb-print of the accused, and, then, after having done so a gentleman from the Finger-print Criminal Department, was called in each Court who, thereupon, by means of his codes of finger-prints, declared to the Magistrate and to the Officiating Sessions Judge that the thumb-marks on the deed and on the paper which had been marked by the accused in Court were identical.

This is the only piece of evidence of any cogency whatever against the accused. I think that, apart from the fact that I should be rather sorry without any other corroborative circumstances to convict a person of a serious crime solely and entirely upon similarity of thumb-marks or finger-prints, the very fact of the taking of a thumb impression from an accused person for the purpose of possible manufacture of the evidence by which he could be incriminated, is in itself, sufficient to warrant one in setting aside the conviction upon the understanding and upon the assumption that such was not really a fair trial.

I know of no law by which an accused person can be, either by words or by gestures or by exposing himself to certain physical treatment, made to implicate himself in the crime with which he is charged. When he is on trial such an idea is highly repugnant to all thoughts of the proper administration of justice in this or in any other British country.

I think, therefore, that it is impossible that these convictions and sentences should be supported, that they must be set aside and the accused must be enlarged.

Das, J.:—I agree. I ought to add that the balance of the evidence, in my opinion, is entirely in favour of the appellants. It is not denied that Ram Prasad had in fact executed a sale-deed in favour of his step-mother Mussammat Anandia and his wife Mussammat Etwaro Kuer. It is of course suggested that the document was taken from him by undue influence or by force; it does not matter which; but the important fact is that the

execution of the document by Ram Prasad, is not denied.

The sole question which the learned Sessions Judge had to try was, did Ram Prasad himself present the document for registration before the Registration authority; or, the appellant Bazari impersonated Ram Prasad before the Registration authority. The prosecution case is based on two important facts, that first, Ram Prasad was a minor and that it is highly improbable that any Registration authority would have registered a document presented (as it must have been) by a minor; and, secondly, that Ram Prasad was so ill at that time that it is highly improbable that he could have presented the document before the Registration authority.

The learned Sessions Judge discussed both these points. On the first point he came to the conclusion that the evidence on behalf of the prosecution was unsatisfactory and that it did not establish that Ram Prasad was in fact a minor on the 29th of March 1921. On the second point again the learned Sessions Judge has recorded a finding that the prosecution evidence is unconvincing. Therefore, it seems to me that it was dangerous to convict the appellants or the sole testimony of the finger-print expert.

Now the learned Sessions Judge considered the point whether the evidence of the finger-print expert received any corroboration. He conceded that the appellants could not be convicted without such corroboration but he has recorded a finding to the effect that the evidence of the finger-print expert had received corroboration.

Now the view of the learned Sessions Judge is this: He says first of all that the accused are residents of the village with which the executants of the document, that is to say, Ram Prasad and Ram Chandra Pande, are connected. The learned Sessions Judge thinks that this evidence corroborates the testimony of the finger-print expert. Secondly the learned Sessions Judge was impressed by the fact that the complainant mentioned the name of the accused very early in the proceeding. He also took that as another corroborating circumstance.

I wholly disagree with the view of the learned Sessions Judge. This evidence, in my opinion, does not at all corroborate the evidence of the finger-print expert. I agree with my learned brother that it was extremely dangerous to take the finger-print impression of an accused person in a Court of law.

I agree that the convictions are unsustainable and that the convictions and sentences of the accused persons must be set aside.

Conviction set aside.

A. I. R. 1922 Patna 75.

DAS AND ADAMI, JJ.

Raja Nil Kanth Narain Singh—Plaintiff-Appellant

v.

Niharan Chandra Sarkar and another—Defendants-Respondents.

F. A. No. 166 of 1919, decided on 10th February, 1922.

(*a*) *Lease—Construction—Condition about payment of any tax or road cess does not include income-tax on Royalty.*

Where a clause in a *kabuliyat* ran as follows:—"In respect of land covered by this *Kabuliyat* or any portion thereof or in respect of coal business, if any tax or road cess be assessed on you by Government, then I shall pay the same"

Held: the lessee was liable to make good to the lessor the road cess and the Health Board cess also; Section 10 of the Bengal Act (V of 1912) referred to.

No doubt royalty is one of the sources of the income on which the income-tax is levied: but income-tax is a personal tax and, therefore, the lessor has no right to recover the amount of the Income-tax from the lessee under the above clause. [P. 76, Cs. 1 & 2.]

(*b*) *Landlord and Tenant—Mines and Minerals—Royalty.*

Royalty represents the lessor's share of the profits made from the business. [P. 76, C. 1.]

N. C. Sinha—for Appellants.

S. K. Bhattacharjee and *B. C. De*—for Respondents.

Das, J.:—We are concerned in this appeal with the construction of the 19th paragraph of the *kabuliyat* executed by the defendant in favour of the plaintiff. That paragraph runs as follows:—"in respect of the land covered by the *kabuliyat* or any portion thereof or in respect of the coal business, if any tax or road-cess be assessed on you by Government, then I shall pay the same." The plaintiff contends that the defendant is bound to pay him the road cess, the

Health Board cess, and the Income-tax which the Government has imposed on him in respect of the royalty receivable by him from the defendant. The learned Subordinate Judge has come to the conclusion that the plaintiff would be entitled to recover from the defendant the Road cess and the Health Board cess levied on him by the Government but for the fact that he has not given any evidence as to the actual assessment.

So far as the income-tax is concerned, the learned Subordinate Judge has negatived the plaintiff's claim. The plaintiff has appealed against that portion of the judgment which has dismissed his claim; the defendant has presented a cross-objection and contends that the learned Subordinate Judge erred in holding that the plaintiff, if he had given evidence as to the actual assessment, would be entitled to recover the road cess and the Health Board cess levied on him by the Government.

I will first deal with the question of road cess. It was urged on behalf of the defendant that he is not liable to make good to the plaintiff the road cess levied on him by the Government, inasmuch as that cess has been levied in respect of the royalty receivable by the plaintiff from the defendant, and not in respect of the land covered by the *kabuliyat* nor of the coal business. It was argued that royalty is in reality the price paid for a portion of the soil, the payment whereof is distributed over a number of years; but it seems to me that the royalty represents the lessor's share of the profits made from the coal business. In my opinion, the learned Subordinate Judge has correctly decided the question of liability against the defendant.

It was then urged on behalf of the plaintiff that the learned Subordinate Judge could have given him a decree by a mere arithmetical calculation. It was pointed out that there was evidence before the Court as to the royalty receivable by the plaintiff for the period in suit, and it was argued that all that the Court had to do was to calculate the sum payable by the defendant to the plaintiff at the rate of one anna per rupee. But under the agreement, the defendant is liable to make good to the plaintiff the road cess assessed on him by the Government. We do not know what the assessment was, and arithmetic will not solve the difficulty. The decree passed by the learned Subordinate Judge on this point must stand.

The question of the liability of the defendant for the Health Board cess stands exactly on the same footing. Section 10 of the Bengal Act (2 of 1912) provides that the expenses of the Mines Board of Health shall be charged to all owners of mines and all persons who receive royalties. The discussion again turns on whether royalty can be regarded as the lessor's share of the profits made from the coal business. If, as I hold, it can be so regarded, then it is clearly a tax levied on the plaintiff in respect of the coal business. In my opinion the decision of the learned Subordinate Judge on this point is right and must be affirmed.

The only other point is as to the income tax levied on the plaintiff. I am unable to agree with the plaintiff that any income-tax was levied on the plaintiff in respect of the coal business. Income-tax is a personal tax. No doubt the royalty represents the lessor's share of the profits made from the coal business, and it is one of the sources of the income on which the income-tax is levied; but it is one thing to say that royalty is one of the sources of income on which the income tax is levied; and quite another thing that the income-tax is levied in respect of the royalty.

In my opinion, the clause in the agreement on which reliance is placed by the plaintiff was intended to apply, and apply only, to such taxes as might be levied either in respect of the land, the subject matter of the lease, or in respect of the local business. It was not argued that the income-tax was levied in respect of the land which is the subject-matter of the lease. In my opinion, it was not levied in respect of the coal business, though, in assessing the tax, the income-tax authorities were entitled to take into consideration the income made by the plaintiff from the coal business. The plaintiff's contention on this point fails and must be overruled.

I would dismiss this appeal with costs. The cross-objection must also be dismissed.

Adami, J.:—I agree.

Appeal and cross-objections dismissed.

A. I. R. 1922 Patna 77.

JWALA PRASAD, J.

Basawan Pandey — 2nd Party-Petitioner

v.

Tilak Gope and others — Opposite-Party.

Criminal Revision No. 46 of 1922, decided on 17th February, 1922, from an order of the Magistrate, Samastipur dated 14th December, 1921.

(a) *Criminal P. C. (V. of 1898), S. 145—Non-compliance with requirements of Cl. (3)—Amounts to grave irregularity.*

In a proceeding purporting to be under Section 145, Criminal Procedure Code (V. of 1898), notice was not served upon the parties or their pleaders, nor was it served upon the locality, as is required by Section 145, no written statement was filed by parties nor any evidence, oral or documentary, was adduced.

Held, that the non-compliance of the aforesaid requirements constituted such a grave irregularity that, when it has caused a failure of justice or a prejudice to any party, will make the order under Section 145 vitiated and the jurisdiction of the Magistrate is affected and that the High Court has jurisdiction to set aside the Order. 4 P.L.W. 183, followed. [P. 78, C. 2.]

(b) *Practice—Trial—Hasty disposal is deprecated.*

A reasponable expedition in the performance of one's work is no doubt commendable, but an attempt to cut too short the procedure prescribed by law would amount to an inexcusable haste and perfunctoriness. [P. 79, C. 1.]

Manohar Lal and *S. N. Rai*—for Petitioner.

Janak Kishore—for Opposite-Party.

Jwala Prasad, J.:—This is an application against an order of the Magistrate of Samastipur dated the 14th December, 1921, under Section 145 of the Code of Criminal Procedure.

In the proceeding Tilak Gope, Chhedi Gope and Musammat Bhikuni, wife of Chhedi Gope, figure as the 1st party and Basawan Pandey as the 2nd party. The dispute relates to three bighas odd kathas of land which was sold in execution of a rent decree, and was purchased on the 8th of April, 1919 by the 2nd party. He obtained delivery of possession from the Civil Court on the 9th of June, 1921, (corresponding to the 19th of jaith 1328).

Upon an information lodged by the Chawkidar on the 9th of October, the junior Sub-Inspector of Police submitted a report, dated the 23rd of October, 1921, holding that the land was in possession of the 2nd party and asking for a notice under Section 144 of the Code of Criminal Procedure against the members of the 1st party, and also for taking action under Section 107 of the Code. The Senior Sub-Inspector also enquired into the matter and submitted his report on the 31st of October, 1921, pending that of the junior Sub-Inspector. In that report also the Police found that the 2nd party was in possession of the property in dispute and the 1st party "seemed to be aggressive" and were trying to dispossess the 2nd party by force. He, therefore, asked for a notice under Section 144 to be issued against the 1st party, and a proceeding under Section 145 to be instituted "to clear off the future disturbance."

On the 10th of November, the Magistrate called upon 1st party to show cause, why a proceeding under Section 107 of the Code should not be drawn up against that party. Cause was shown by the members of the 1st perty on the 1st of December separately. Tilak Gope filed one petition and Chhedi and his wife filed another petition. Tilak in his petition alleged that he had taken settlement of the land from Basawan Pandey, the 2nd party, some three years ago, namely, one bigha six kathas, at an annual rental of Rs. 5, and since then he has been in possession of the property. He objected to the proceeding under Section 107 on the ground that the dispute was concerning land, and consequently a proceeding under Section 145 should be instituted. Before that, another petition by Tilak was filed on the 29th of October to the same effect. We are not concerned with the petition filed by Chhedi Gope and his wife in the present case.

On the 2nd of December the Magistrate heard the parties, and Chhedi's wife was directed to produce copies of certain *sudbharna* deeds by the 8th of December. On the 8th of December the case was adjourned to the 13th of December. On the 13th of December the Magistrate passed the following order: "Heard parties. Draw up a proceeding under Section 145 and put up to-morrow". The next day, that is, on the 14th December the Magistrate passed the following order: "Orders passed." In the order in

question; he has upheld the Civil Court *dakhaldehani* in favour of the 2nd party Basawan Pandey, and against Chhedi Gope and his wife musammat Bhikuni, members of the 1st party. Chhedi Gope was the judgment-debtor in the Civil Court decree. Neither he nor his wife now dispute the order of the Magistrate. The order must therefore stand so far as they are concerned.

The 2nd party challenges the order with respect to 1 bigha 6 kathas claimed by Tilak in respect of which the Magistrate has declared the possession of Tilak under Section 145 of the Code. The Magistrate has shown no cause. Tilak has appeared in this case and has opposed the application of the 2nd party through a vakil. It is obvious that the order of the Magistrate cannot be sustained for a minute.

On the 13th of December the Magistrate directed proceedings to be drawn up and the case to be put up the next day. The order sheet does not show for what purpose the case was to be put up and what was to be done the next day. There appears to be a proceeding drawn up in the record purporting to be under Section 145 of the Code of Criminal Procedure.

This proceeding was not served upon the parties or their pleaders, nor was it served upon the locality as is required by Section 145, Clause (3) of the Code. No written statement was filed by the parties, nor any evidence, oral or documentary seems to have been adduced by them. It is contended on behalf of Tilak, one of the members of the 1st party, that the parties were present on the 13th of December, and the order to draw up a proceeding under Section 145 was passed in their presence, and consequently there was no necessity of a copy of the proceeding to be served upon them under Clause (3) of Section 145 of the Code.

He cannot advance a similar argument in favour of dispensing with service of notice on the spot. His argument with respect to the non-compliance of the aforesaid clause of Section 145 is that at best it is only an irregularity and does not vitiate the trial or affect the jurisdiction of the Court which passed the order under Section 145. The clause in question 3 of Section 145 was newly added in the present Code of Criminal Procedure (1898), in order to give the parties full opportunity of putting in their claims and also to any other person who may be interested in the subject-matter in dispute.

The first is intended to be achieved by directing the service of notice upon the parties, and the second by service of the proceeding upon a conspicuous place at or near the subject-matter of dispute. The Legislature has not added this provision in vain, and the reason of this addition has been fully discussed by me in the case of *Ram Sahay Chowdhury* v. *Deonandan Prasad* (1). I have also in that case discussed the history of this change in the law, its effect and the authorities bearing upon it whatever difference there may be as to whether the non-compliance with the requirement of Clause (3) of the section is an illegality or an irregularity.

There has been a consensus of view upon the point that the non-compliance of the aforesaid requirement constitutes such a grave irregularity as, when it has caused a failure of justice or a prejudice to any party the order under Section 145 is vitiated and the jurisdiction of the Magistrate is affected. As a result of my investigation into the authorities, I observed in that case that all the Judges agreed that the High Court had jurisdiction to set aside the order, when the provisions in Clause (3) of Section 145 were not complied with and the parties were prejudiced thereby. Taking the proviso at its lowest there can hardly be any doubt that its non-compliance in the present case has gone to the root of the jurisdiction of the Magistrate.

Basawan Pandey, 2nd party-petitioner before us, has had in his favour the Civil Court writ of delivery of possession of such a recent date as the 9th of June, 1921. Tilak claims through Basawan on the basis of an alleged permanent settlement 3 or 4 years ago. The police reported that he has no document in his favour, no receipt of payment of rent and no evidence of possession. His settlement was not admitted. It lay upon Tilak, who claims possession of the land as against the Civil Court *dakhaldehani*, to prove

(1) (1918) 4 P. L. W. 183=43 I. C. 103.

that he took a valid settlement of the land from Basawan and that he actually cultivated and grew the crop in question.

No evidence was given by him in this case. The learned Magistrate talks of having heard the parties and considered their evidence. I wonder what that evidence is. Surely it cannot be any evidence oral or documentary under the Evidence Act. The Magistrate does not particularise that evidence in his judgment. The only reason, why he thinks that Tilak, a member of the 1st party, is in possession of the land, as stated by the Magistrate to be, is that the possession was delivered by the Civil Court on the 9th of June, 1921 and it was too late for the 2nd party to cultivate the land and grow *makai* and *marwa*. This is not evidence but a surmise.

The real issue before him was as to who cultivated and grew the crops upon the land in question. Unless it was admitted by Basawan, the 2nd party-petitioner, the Magistrate was not in a position to hold that the 1st party must have necessarily cultivated it without any evidence of witnesses to prove it. He does not also refer to any document, if any, which would conclusively shew the crops on the land were grown by the 1st party. The 2nd party has, therefore, been seriously prejudiced by the order in question, and the order must be set aside.

The Magistrate has not even considered the effect of a permanent settlement set up by the 1st party. Such a settlement is not admissible without a registered document; whereas Basawan who was not the decree-holder purchased the property at an auction sale only recently. His right to settlement would arise after his purchase and *dakhaldehani*.

To draw up a proceeding on the 13th December and to pass a final order on the 14th December is an extraordinary feat that could be performed only by the Magistrate in question. He is capable of doing so is obvious from a similar procedure adopted by him in Criminal Revision No. 17 of 1922. A reasonable expedition in the performance of one's work is no doubt commendable, but an attempt to cut too short the procedure prescribed by law would amount to an inexcusable haste and perfunctoriness. The Magistrate has not, it seems to me, properly apprehended the procedure laid down in Section 145 of the Code. It is summary but it cannot be cut too short. I have, therefore, no hesitation in setting aside this order of the Magistrate. The rule is made absolute.

I do not think the Civil Court *dakhaldehani* which the Magistrate has upheld in this case, so far as Chhedi and his wife two members of the 1st party are concerned, can be so lightly treated as the Magistrate has done so far as Tilak is concerned. The police reports upon which the action was taken by the Magistrate and which were the only documents before him at that stage clearly showed that the Civil Court *dakhaldehani* was given effect to and that the 2nd party was in possession of the land, and Tilak was only creating troubles.

In case of future dispute, I have no doubt the Magistrate will take proper action to prevent a breach of the peace.

Rule made absolute.

A. I. R. 1922 Patna 79.

DAWSON MILLER, C. J. AND BUCKNILL, J.

Jugal Kishore Marwari and others—Plaintiffs-Appellants

v.

Babu Homeshwar Singh and others—Defendants-Respondents.

F. A. No. 10 of 1919, decided on 4th February, 1922.

(a) *Contract—Construction—License to cut trees and make sleepers on payment of royalty—Whole document should be considered to find out the true intention of parties.*

The appellants entered into a contract with the respondents who were the owners of certain lands whereby the appellants undertook to cut 15,000 sleepers every month for 9 months and after they were counted by the respondents, pay the latter the royalty thereon, that if through negligence the appellants do not cut the said amount of sleepers, they should nevertheless pay up the royalty on 1,35,000 sleepers for the said 9 months and that a breach of the terms of the contract by the appellants would entitle the respondents to re-enter the land and put an end to the contract. The appellants failed to cut the necessary number of sleepers for two months. The respondents also did not count the number of sleepers that had been cut and the appellants did not pay the respondents any royalty.

Held: that considering the document as a whole the intention of the parties was that the right to re-enter arose only on the non-payment of the price of sleepers actually cut and not on the failure to prepare the necessary number. Further the liability to pay for the sleepers cut depended on the respondents having counted them. Therefore, as the respondents had not counted the sleepers, the appellants were not bound to pay therefor and the respondents could not put an end to the contract. [P. 83, C. 2.]

(b) *Contract Act, S. 73—Damages—Profits that would be made if contract subsisted is the measure.*

The principle of assessment of damages is that the party entitled thereto is to recover the profits which he would have made, if the contract had not been cancelled. [P. 83, C. 2.]

P. C. Manuk, A. Sen and *J. Prasad*—for Appellant.

S. S. Ahmad, N. C. Sinha and *N. C. Ghosh*—for Respondents.

Dawson Miller, C. J.:—This is an appeal by the plaintiffs from a decree of the Subordinate Judge of Bhagalpur dated the 21st November, 1918.

The appellants who are contractors carrying on business at Bhagalpur instituted the suit on the 10th May, 1916, against Maharaj Kumar Atmaj Babu Ekradeshwar Singh, the proprietor of an estate at Madhipura in the Bhagalpur district of this province, claiming damages for breach of contract. Alternative relief was claimed in the plaint but this has been abandoned and is not the subject of this appeal. The defendant died after the suit was instituted and his three sons the present respondents were substituted as defendants in his place.

On the 23rd May, 1915, the appellants entered into a contract in writing with the respondents' father, who may conveniently be referred to as the landlord, whereby they acquired the right for a term of just over four years to cut sakhua trees in the jungles of certain villages in the landlord's estate for the purpose of making sleepers, upon which a royalty was payable by the contractors at certain named rates. The deed recites that the first party (the landlord) at the request of the second party (the contractors) has agreed to sell to them for the term named the jungles for the purpose of making sleepers.

The contract is not strictly a sale and it is not contended that it is a lease. It is in the nature of a license to cut trees and make sleepers on payment of a royalty at certain rates, varying according to the dimensions of the sleepers. When work had been in operation for a short period the landlord cancelled the contract and re-took possession. This he was entitled to do, provided the contractors had not fulfilled certain conditions specified in the contract.

The main question for determination in this appeal is whether the contractors committed a breach of the conditions which would entitle the landlord to cancel. The third clause is important, as it is mainly upon the construction of this clause that the landlord's right to cancel depends.

It reads as follows:—"We, the second party, shall, during the term [each year from the month of Kartik up to the end of Assarh] get 15,000 sleepers of every measurement prepared every month and shall, after they are counted according to the contract, pay to the first party the price thereof, according to the rates mentioned above, without any objection to this; neither we, the second party, nor our representatives shall raise any objection. If we do so, the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below, without waiting for the expiry of the terms of this agreement. Be it noted that during the term (of the lease) every year from the month of Sravan to the end of Aswin, we, the second party, shall try our best to cause as many sleepers of different measurements to be prepared as possible, and after getting them counted according to the contract, pay the price thereof, in accordance with the rates mentioned above, to the first party on taking receipt therefor.

The second party shall on no account without sufficient reason willingly stop the preparation of sleepers during these three months. Let it be known that we, the second party, will have to prepare 1,35,000 (one lakh and thirty-five thousand) sleepers of different measurements every year during the nine months from Kartik to Assarh in accordance with the terms specified above. If through negligence on the part of us, the second party, we fail to prepare so many sleepers, no plea, regarding deficiency in the number of sleepers put forward by us, shall be entertained and we, the second party, shall be held

liable to pay on demand the price of the entire number of one lakh and thirty-five thousand sleepers to the first party."

The contract is dated the 23rd May, 1915 which corresponds to the 24th Baisak 1322 F. The months, from Kartik which is the second month in the Fusli year up to the end of Assarh, are roughly speaking the dry season of the year, although the rainy season begins generally about the beginning of Assarh which corresponds to the middle of June.

Whatever be the exact interpretation of this clause, it is clear that the obligation of the contractors was to cut 15,000 sleepers a month, during the nine months from the beginning of Kartik to the beginning of Assarh, making 1,35,000 altogether, and that, during the other three months from Srawan to Assin, they were to do the best they could without any express obligation to cut any particular quantity. (Here the contents of Clauses 4, 5 and 6 are given in brief which are not material).

It is not disputed that the contractors failed to prepare during the month of Kartik 15,000 sleepers, and that the work had not progressed as rapidly as has been anticipated, although by the end of the second month, Aghan or the beginning of the third month, Pous the out-turn was rapidly improving. On the 2nd of Pous corresponding to the 23rd December, 1915 the landlord wrote to the contractors terminating the agreement.

Up to this time about 20,000 sleepers had been prepared according to the appellants but rather less than half that number according to the respondents. It is admitted that those which had been prepared had not been counted and sealed and numbered in accordance with Clause 5 of the agreement and no payments had been made. (Here evidence regarding the course followed up by each party leading to termination of contract is discussed.)

I think there can be no dispute that under the terms of the contract the appellants were not liable to pay for any sleepers, until the same had been counted and sealed by the landlords' men. As the sleepers differed in dimensions and the rates payable varied with the dimensions, it follows that the amount payable could not be ascertained until there had been a counting by the landlord in accordance with the contract.

The respondents' case is that they were prevented from counting by the action of the appellants, and that in any event, whether the sleepers were counted or not, the appellants were liable to cut and pay for a minimum of 15,000 sleepers each month from Kartik to Assarh and that they had failed to pay for any. As to the first part of this contention, I am satisfied that the appellants did not prevent the respondents from counting in accordance with the contract the number of sleepers actually cut (Evidence on this point is then discussed).

The second part of the respondents' contention depends upon the interpretation of the contract. The construction of this document is by no means free from difficulty. The main question which arises is whether the first part of Clause 3 coupled with Clause 6 gives the landlord the right to cancel the contract, if during the first or any succeeding month from Kartik to Assarh the contractors should fail to prepare and pay for 15,000 sleepers; or whether the right to cancel arises, only in the event of the contractors objecting to pay for the sleepers actually prepared and counted during each month.

In determining this question I think it is necessary to consider the document as a whole, as the other provisions appear to throw some light upon the true intention of the parties. It was clearly a matter of some anxiety to the landlord that there should be no mistake about his right to monthly payments for the sleepers actually cut and counted during the month, and that in any event, if through negligence the contractors should not prepare 1,35,000 sleepers in the 9 dry months from Kartik to Assarh, he should be paid for that quantity. He safeguards his right as to payment in several ways. First of all by Clause 3 he might certainly cancel the contract, if the contractors objected to pay for the monthly out-turn when counted.

This is not disputed by the contractors. He could also stop the further cutting of the trees, and by Clause 5 it is stipulated that the contractors are not entitled to take away the sleepers after they have been counted, sealed and numbered unless they first pay the price. Clause 6 deprives the contractors, in the event of a failure to pay for the months, out-turn, of the right to cut any trees in the succeeding month, and further in

the same event gives the zamindar the right to take possession, at the end of the succeeding month, of all the trees and the right to claim damages for any loss suffered and to declare the deposit forfeited.

It will be observed that, both under Clause 5 and under Clause 6, the rights of the landlord and the restrictions imposed on the contractors, only arise in the event of non-payment of the price of sleepers actually prepared each month and not in the event of a failure merely to prepare the stipulated number and pay for them. It is obvious, however, that if the contractors neglected to fulfil their undertaking to cut 15,000 sleepers during each of the dry weather months or 1,35,000 each year during these months, the total payments would fall short and the landlord would suffer a loss of income.

It is, therefore, stipulated at the end of Clause 3 that, if through negligence the contractors should fail to prepare so many sleepers, they should nevertheless be liable to pay on demand the price of the entire number of 1,35,000. It seems to me that it was intended by this clause that, if at the end of the 9 months the total number cut during those months should fall short of 1,35,000 the contractors should be liable to pay for that quantity on demand, if, and only if, the deficiency was due to their negligence. This part of the clause indicates that the obligation to cut and prepare at the rate of 15,000 each month was not an absolute obligation, carrying with it the liability to cancelment of the deed, if, for any reason whatever, the actual number should fall short of the stipulated number.

If however the respondents' interpretation of the first part of Clause 3 be accepted, it would follow that, if for any reason the number of sleepers prepared during any of the 9 months should fall short of 15,000 ,the contractors' liability to pay for 15,000 would arise, whether they were counted or not and whether the deficiency was due to his negligence or any other reason. I cannot accept this interpretation as expressing the intention of the parties, nor do I think that it is the natural interpretation of the first part of Clause 3. That clause imposes two obligations upon the contractors (1) to prepare in each year of the term 15,000 sleepers every month from Kartik to Assarh and (2) after they are counted to pay the price thereof.

It will be noticed that the right to cancel only arises if the contractors object to do something. As I read the clause, this can only mean, if they object to pay for the sleepers prepared and counted. They certainly did not object to cut them. They may have failed to do so, but their liability to pay for those which they failed to cut is controlled by the latter part of Clause 3 and depends upon whether or not the deficiency is due to their negligence. This question moreover only arises, if there is a deficiency for the whole 9 months from Kartik to Assarh, in other words, if during these months they fail to cut and prepare 1,35,000.

This seems to imply that they may during that period make up in subsequent months any deficiency there may have been in an earlier month or months. If therefore the liability to pay for the deficiency only arises at the end of Assarh and in the event of negligence, the earlier part of the clause can only be read consistently with the latter part by confirming the right to cancel cases in which the contractors object to pay for those sleepers which have been actually prepared and counted during the preceding month.

If the respondents' contention is right, then the contractors had to pay, for sleepers not counted and passed by them. But, as no sleepers could be taken away by the contractors until counted and sealed, it would follow that the contractors would have to pay and yet await the landlord's pleasure before they could deliver a single sleeper to their customers. I think the landlord's obligation to count and seal and the contractors' obligation to pay must be treated as reciprocal, and that the landlord had no right to demand payment, until the sleepers were counted and sealed and their sizes ascertained. Until this had been done the exact sum payable could not be determined and the contractors could not remove them.

The matter may be tested in another way. Suppose the contractors were to cut say 4,000 sleepers only during the month. If these consisted entirely of the two larger dimensions, say in equal moieties the royalty on which was 17 and 14 annas respectively, their liability

would be Rs 3,875 for those cut. If the contractors paid this sum and refused to pay for any more then, on the respondents' construction, the landlord could cancel.

Suppose however that they had cut none at all during that month what would then be their liability? It is conceded on behalf of the respondents that the contractors were not bound to cut the larger sleepers first. If they had the option of cutting the small sleepers first, they would not be liable for more than 15,000 at the smallest rate *viz.*, 3 annas per sleeper, if that number remained still uncut. The liability in that case would be Rs. 2,818-8-0 or less than the sum actually paid, and yet in the case supposed the contract could, according to the respondents, be cancelled.

In case there should be any doubt as to the meaning of Clause 2 of contract, it is important to state that the respondents concede that the words, "of the length of 10 ft. and of the other length in order as mentioned above," in the translation marked Exhibit 1 did not impose an obligation to cut the sleepers in the order mentioned in the schedule of rates and their own translation at page 220 of the paper book makes this clear. That translation reads thus:—"But the second party ought first to have sleepers prepared of the length of 10 ft., and the other respective lengths mentioned above."

The learned Subordinate Judge took the view with which I agree, that the mere failure to cut 15,000 sleepers in the month would not entitle the respondents to terminate the contract. He was of opinion however that the non-preparation of the stipulated number coupled with non-payment of the price thereof would enable to cancel the contract. He further thought that the appellant's liability, if they failed to prepare the stipulated number, was the royalty payable on 15,000 sleepers of the largest dimensions.

With great respect to the learned Judge, I think he failed to give proper weight to those terms in the contract, which to my mind make it essential for the landlord to count and seal the sleepers before the liability could be either ascertained or demanded. I further think that in the event of failure to prepare the stipulated number, the liability could in no case be more than the value of the smallest sleepers remaining uncut. There is a conflict of evidence as to the number which were cut by the end of Kartik and the learned Judge gave preference to the evidence of the respondents in this respect.

But one of the main objects of having the sleepers counted by the landlord was to obviate any conflict between the parties on this point so that the liability could be ascertained; and this operation was in my view, essential before any liability at all arose. In the view I take, it follows that the landlord improperly terminated the contract and dispossessed the appellants and rendered himself liable to damages.

It was strenuously urged, however, by the learned Government Advocate on behalf of the respondents that under Clause 6 of the contract the landlord was entitled to re-take possession at the end of the second month, if the price of the sleepers prepared during the first month was not paid in full; and that, as no payment had in fact been made, this clause immediately came into operation. This argument however in my opinion fails to take into consideration the other conditions of the contract, which provided that payment shall only be made after the sleepers had been counted according to the contract and that the obligation to count lay upon the landlord.

It was argued however that, as under Clause 5 the contractors had the option of counting the sleepers for themselves, if the landlord failed to do so, they could not rely upon the fact that no counting had taken place. Clause 5 however does not impose any obligation to count upon the contractors but merely gives them an option to do so, which they may exercise or not as it suits their convenience.

If they were anxious to get the sleepers removed in order to fulfil their engagements, they might take advantage of the option contained in Clause 5; if on the other hand they were in no hurry to get the sleepers removed there was no obligation upon them either to count them or to pay the price, and they committed no breach of duty which would entitle the landlord to the benefit of Clause 5.

The learned Subordinate Judge found that, if damages were to be awarded, the appellants were entitled to recover the profits which they would have made, if the contract had not been cancelled. It

is conceded that this principle of the assessment of damages is the correct one but it is contended that the appellants had not made out that they would necessarily have made a profit of Rs. 6,17,876-12-0 set out in Schedule E of the plaint.

The evidence given by the appellants as to damages stands uncontradicted and I am satisfied that the prices claimed by them as those at which the sleepers could have been sold during the years in question, are not in excess of the market rates prevailing. The evidence of Sarat Kumar Roy an Assistant Engineer in the Public Works Department at Bhagalpur proves the rates payable by his Department for similar classes of unwrought sleepers during the years in question and, taking the lowest rate, *viz.*, Rs. 2-8-0 per cubic foot for similar timbers, it is obvious that the rates claimed in Schedule E of the plaint work out very much lower, in fact very little more than half the prevailing rates.

For instance sleepers 6' X 8" X 4½" at Rs. 2-8-0 per cubic foot would come to 3-12-0 per sleeper, whereas the rate claimed is Rs. 2-0-0; 10' X 10" X 5" at Rs. 2-8-0 per cubic foot would come to Rs. 8-10-10, whereas the rate claimed is Rs. 4-4-0, and the other charges for the other sleepers work out at about the same proportion. These rates are those at which the sleepers were offered to the Bengal and North Western Railway. It is proved that the Railway Company did not cavil at the rates but were not in want of sleepers at the time when the offer was made, and it cannot be assumed that the contractors had any firm offer at these rates.

They were however as already stated, certainly not in excess of the prevailing market rates. The *rokars* of the contractors showing the actual expenses incurred have been produced and the expenses deducted in Schedule E are not shown to conflict with the actual expenses appearing in the *rokars*. It is not clear however that anything has been allowed for cartage from the jungle to the Madhipura railway station, the prices claimed being free on truck at Madhipura, and something ought to be allowed for this. Some allowance should also be made for the chapter of accidents.

The contract extended over four years, and the damages claimed are based on the assumption that everything went smoothly and that the contractors were able to dispose of the whole of their stock of sleepers. Whether they could have done so or not must remain a matter of conjecture. Moreover the expenses necessary to turn out the requisite number of sleepers per month, must have been considerably increased, and one cannot assess the damages with anything like mathematical accuracy in a case of this sort. The personal energies of the plaintiffs released from the contract could also be directed into other channels of enterprise. Taking all these matters into consideration, it seems to me that the sum of Rs. 2,00,000 would amply compensate the plaintiffs for the loss they have suffered by the defendants' breach of contract.

I would allow the appeal, set aside the decree of the trial Court and enter a decree in favour of the plaintiffs for the sum of Rs. 2,00,000 with proportionate costs here and in the Court below.

Appeal allowed.

A. I. R. 1922 Patna 84.

JWALA PRASAD, J.

Parmeswar Rai and others—Accused-Petitioners

v.

King Emperor—Opposite Party.

Cri. Rev. No. 37 of 1922, decided on 15th February, 1922.

(a) *Criminal P. C. (V of 1898), S. 144 (3)—General order—Order not to hold new* hat *in same day as the old* hat *is not a general order and is valid.*

Although a general order under Section 144 of the Criminal Procedure Code (V of 1898) restraining the holding of a *hat* or market is not permissible, an order, prohibiting the holding of the market on the same days as the old market with a view to prevent a breach of the peace, is legal. *Kuntram Shaha Roy and others* v. *Meajan* (18 W. R. Cr. 47) and *Nagendranath Biswas* v. *Rakhal Das Sinha* (23 C. W. N. 141) followed. [P. 86, C. 1.]

(b) *Penal Code, S. 188—Disobedience of order under S. 144—Offence only when, annoyance, injury or obstruction is caused thereby.*

Disobedience of an order under Section 144, Criminal Procedure Code is punishable only when the disobedience of the order of the Magistrate caused any annoyance, injury or

obstruction. [P. 87, C. 1.]

(c) *Cr. Pro. Code, S. 476—Order to prosecute —Not setting forth all the elements of offence —Is illegal.*

In giving direction for a prosecution the Court is bound to find that there is a *prima facie* case with respect to all the elements which are essential to constitute the offence with respect to which the order is passed. An order not setting forth all the elements of the offence is without jurisdiction. [P. 87, C. 2.]

G. C. Pal—for Petitioner.

Asst. Government Advocate—for the Crown.

Jwala Prasad, J.:—This rule relates to an order of the Magistrate, dated the 14th January 1922, directing the prosecution of the petitioners under Section 188, I. P. C.

On a report of the Police, dated the 18th of November, 1921, a notice was issued under Section 144 of the Code of Criminal Procedure against certain persons, forbidding them to hold a new bazar and to interfere with the long-standing old Gondra Bazaar. This order was disobeyed and the offenders were prosecuted and convicted under Section 188, I. P. C.

The Police on the 13th of December, 1921, reported that, in spite of the conviction of the aforesaid persons, their friends and helpers are threatening "to break again the old Gondra Bazaar" and are determined to hold a new Bazaar quite close to it and are ready to create a serious breach of the peace. Accordingly he prayed for a general notice against the people, preventing them from going to the particular plots, where the new bazaar was proposed to be held and to persuade customers to sit on the new bazaar. As prayed by the Police, the Magistrate directed a general notice to be issued on the public and served on the spot, in the following order:—

"Issue a general order directed to the public frequenting the new market, or attending it to buy or sell, requiring them not to do so for the space of 2 months from date of service, and not to help in any way the continuance of the new bazar, so that thereby there may be a speedy remedy to prevent an imminent breach of the peace between the old bazar people and those sitting up and continuing the new one."

On the 20th of December, the Sub-Inspector of Police reported against the present petitioners, stating that in spite of the order of the Magistrate under Section 144, these persons "set the orders at defiance and did not care for the legal orders duly promulgated. They persuaded people and customers to sit in the new bazar, though they were quite willing to obey the orders and go to the old bazar." Says the Sub-Inspector, "They have deliberately disobeyed the orders, and I therefore pray that they may be prosecuted under Section 188, I. P.C. for such disobedience."

The Magistrate called upon the petitioners to show cause, why they should not be prosecuted for the disobedience of the order under Section 144 lawfully promulgated. On the 4th of January, 1922, the petitioners showed cause. They denied that they ever held the market and also that any market was held on the land in question, or that they kept any shop thereon. They also attacked the order of the Magistrate and the notice issued against them on various legal grounds. In short, they disclaimed any connection with the new bazaar or the plot on which it was held. They also denied having in any way disobeyed the order of the Magistrate.

The Magistrate on the same day considered that objection and held that no sufficient reason was shown, as to why the order under Section 476 of the Code of Criminal Procedure should not be passed directing their prosecution. He held that, "the notice was a general notice directed to the public under Clause (3) of Section 144, Cr. P. C., in order to prevent an imminent likelihood of a breach of the peace between the people connected with the two bazaars, the old and the new, meeting at the same place and on the same days of the week."

Continuing the Magistrate says that "Every member of the market, going to the bazaar, prohibited under the said order, which was duly promulgated by beat of drum, and helping by his presence to continue the bazar in defiance of the said order which was a lawful one, is liable to prosecution for disobedience of order under Section 188, I. P. C. The local Police has reported that these men after the proclamation persuaded the people and the customers to sit on, in the new bazaar."

It was contended that the order of the Magistrate under Section 144 was wholly illegal and without jurisdiction,

inasmuch as it was a general order prohibiting no new market to be held in the vicinity of the old market, and such an order was calculated to interfere with the lawful exercise of the right of the people owning and possessing the land on which the new market was held.

It is true that the general order under Section 144 of the Code restraining the holding of a hat or market is not permissible: *Rakhal Das* v. *Emperor* (1). But the notice in the present case, which has been read to me, shows that the prohibition related only to the holding of the market on the same days as the old market is held and the object of the prohibition is to prevent a breach of the peace. The order passed by the Magistrate and the notice issued under Section 144 in the present case are covered by the decision of a Full Bench in the case of *Bykantram Shaha Roy and others* v. *Meajan* (2) and also by the decision in the case of *Nagendra Nath Biswas* v. *Rakhul Das Sinha* (3), which has been quoted by the Magistrate in his explanation submitted to this Court.

The last ruling has discussed the previous authorities in the case and has held that the order, such as the one that was passed in the present case under Section 144 is legal. It is also clear that the disobedience of such an order is punishable under Section 188, I. P. C., prosecution for which might start either by the sanction given under Section 195 of the Code of Criminal Procedure, or by an order passed under Section 476 of the Code. This view is also supported by the case of *Projapat Jha* v. *Emperor* (4).

I therefore hold that there is no defect or want of jurisdiction in the order passed by the Magistrate under Section 144 of the Code of Criminal Procedure. It is not a general order, but it only prohibits the holding of the new market on the same days as those on which the old market is held. The prohibition, against any person going to the place and sitting there for the purpose of holding the market or for the purpose of helping others and customers to carry on the market, seems to me to be covered by Section 144 under which a Magistrate may direct "any person to abstain from a certain act."

The fact that the petitioners have no concern with the land in question in the sense that they do not own or possess it, does not absolve them from the responsibility of obeying the prohibition enjoined upon them under Section 144 and directing them to abstain from doing the aforesaid act. Their contention would have applied had the order of the Magistrate been "to take certain order with certain property" in the possession or under the management of those persons under another clause of Section 144. Therefore in agreement with the view of the learned Government Advocate, I hold that the petitioners cannot plead in their defence that they are not liable for prosecution under Section 188, I. P. C. because they do not own or possess the land in question.

The order under Section 144 was therefore valid and a disobedience of that order is punishable under Section 188 I. P. C. and, if the petitioners in defiance of the order of the Magistrate under Section 144 went to the place and persuaded people and customers to sit in the new market, they disobeyed the order of the Magistrate; but the disobedience of such an order itself is not punishable under Section 188, unless that disobedience "causes or tends to cause obstruction, annoyance or injury to any person lawfully employed." In other words, the petitioners would not come within the purview of Section 188, unless the disobedience of the order of the Magistrate caused any annoyance, injury or obstruction to the old Bazar, which was being held in the vicinity. The petitioners deny in their petition, showing cause, having committed the offence.

Now, let us see whether the order of Magistrate under Section 476 of the Code of Criminal Procedure does in any way take into account the fact that there was no obstruction, annoyance or injury caused to the rival market. The order of the Magistrate is silent upon the point. It stops short with holding that the petitioners disobeyed the notice promulgated under Section 144 of the Code of Criminal Procedure. The report of the police is also silent upon the point, and the only ground urged by the police for an action to be taken under Section 188, I. P. C. is that the petitioners "did not care for the legal orders duly promulgated." It

(1) (1915) 19 C. W. N. 248=15 I.C. 655.
(2) 10 B L R. F. B. 434=18 W. R. Cr 47.
(3) (1919) 23 C. W. N 141=49 I.C. 97.
(4) (1910) 14 C. W. N. 234=5 I.C. 154.

appears to me that neither the Police nor the Magistrate directed their minds to the most essential element for constituting an offence under Section 188, I. P. C., namely, that the disobedience complained of must cause, or tend to cause, obstruction, annoyance or injury to any person lawfully employed. Now, if a conviction had taken place in the absence of the aforesaid element requisite for an offence under Section 188, the conviction would have been set aside; *Brojo Nath Ghose and another* v. *Empress* (5).

It may be urged, and it has been urged by the learned Government Advocate in this case, that the previous reports of the Police clearly indicated that there was a serious danger to a breach of the peace and the order of the Magistrate passed under Section 144 also sets forth the said fact; but that is not enough. That was a condition required to be fulfilled for the initiation of the proceeding under Section 144 and for the notice to be issued under that section, under which a Magistrate can assume jurisdiction, only when there is a danger to a breach of the peace. The prosecution for the disobedience of an order can only lie, when the subsequent disobedience of the order promulgated under Section 144 was likely to cause annoyance, obstruction or injury to a person lawfully employed.

The reply to the argument of the learned Government Advocate was given by Prinsep, J. in the case of *Brojo Nath Ghose and another* v. *Empress* (5) in the following orders: "Now, there is not only no evidence as to the probable result of disobedience to the order under Section 144, but there is no sufficient ground upon which such a finding could have been arrived at. No doubt, within our experience the establishment of a rival *hat*, at a place near to an old *hat* and to be held on the same day, has often led to a breach of the peace, but it would not be safe or proper that such occurrences do sometimes take place should alone form a sufficient ground for a conviction under Section 188, I. P. C. It would be as well to consider, the prevalence of a crime in a particular locality was evidence that the accused did commit such a crime without any evidence thereof."

(5) (1900) 4 C. W. N. 226.

The present case has not reached the stage of conviction, but only has reached the direction, by the Magistrate ordering under Section 476 of the Code of Criminal Procedure; but the principle of the aforesaid decision should apply to the case in its present stage also, inasmuch as in giving direction for the prosecution the Court is bound to find that there was a *prima facie* case with respect to all the elements which are essential to constitute the offence with respect to which the order under Section 476 of the Code is passed. An order, which does not set forth all the elements of an offence covered by it, is therefore without jurisdiction.

Under similar circumstances their Lordships of the Calcutta High Court in the case of *Projapat Jha and others* v. *Emperor* (4) referred to above, set aside the sanction given by the Magistrate for a prosecution under Section 188, I. P. C. Their Lordships observed.: "A Magistrate should not sanction a prosecution under Section 188, unless he thinks that all the elements necessary for a conviction are present. In the judgment of the Magistrate and in the subsequent order of the Sessions Judge, there is nothing to show that either officer ever applied his mind at all to the question whether the disobedience of this order caused, or tended to cause annoyance, injury, obstruction or a riot. In the explanation (as in the present case) submitted by the Magistrate he has entirely ignored the two grounds on which the rule was issued and has confined himself to discussing other points in the petition with respect to which he was not consulted. We therefore derive no assistance from his explanation in dealing with this point. There is nothing to show, as we have stated, that the Magistrate thought that disobedience to his order tended to cause a riot. That being so, we think the sanction is wrong, and must be set aside."

Accepting the soundness of the aforesaid view, I set aside the order passed in this case against the petitioners under Section 476 of the Code of Criminal Procedure. The proceedings are quashed.

Order set aside.

A. I. R. 1922 Patna 87.

DAS AND ADAMI, JJ.

Babu Raghunath Prasad Singh and others—(Defendants)-Appellants.

Rameshwar Singh Bahadur (Plaintiff) and *Ram Bishen Singh and others*—(Defendants)-Respondents.

F. A. 80 of 1919 and S. A. 733 of 1919, decided on 9th February, 1922.

Compromise—Agreement to be bound by survey map—Is binding on parties—Evidence Act, S. 35.

Where the parties consent to be bound to regard the boundary line as laid by the survey authorities as conclusive, they cannot afterwards question the correctness of the same. [P, 88, C, 2]

Sultan Ahmed, S. M Mullick, N. N. Sen and *Jagannath Prasad*—for Appellants.

Hasan Imam, P. N. Sinha and *Murari Prasad*—for Respondents.

Das, J.:—The only point which arises in this appeal is, whether the Revenue Survey line showing the boundary between the plaintiff's Mouzah Bhowa Parwal and the defendants, Mouzah Nagrah as laid by the Revenue Survey authorities on the cadastral survey map of Bhowa Parwal is binding upon the defendants. It appears that, in the course of the cadastral survey, there arose a a boundary dispute between the parties sometime in 1905. The parties agreed that the Revenue Survey boundary line should be the boundary between the two mouzahs.

They filed a petition before the Survey authorities, asking that the boundary between the two mouzahs "may be fixed according to the Revenue Survey map of Mouzah Bhowa Parwal of 1846 and of Mouzah Baijnathpur Jaidev otherwise called Nagrah of 1847." The documents show that the Assistant Superintendent of Surveys laid the boundary according to the compromise between the parties. The decision of the Assistant Superintendent of Surveys is dated the 6th February, 1905, and the proceedings show that the line was actually laid according to the Revenue Survey map of the two mouzahs and in the presence of the parties.

Mr. Sultan Ahmad on behalf of the defendants-appellants, has urged before us that his clients are undoubtedly bound by their consent to the effect that the Revenue Survey maps should decide the question between them: but he argues that he has never consented to accept the boundary line as laid down by the Survey authorities as correctly representing the Revenue Survey boundary line.

Now the whole object of the proceedings of 1905 was to end the dispute between the parties as to the boundaries of their villages; and, in my opinion, the consent of the defendants amounted to this, that they bound themselves to regard the boundary line as laid by the Survey authorities as conclusive between the parties. This is the view of the learned Subordinate Judge, and in my opinion that view is correct.

But the point still arises whether the defendants 11 and 12 are bound by the decision of the Survey authorities. It appears that they are recent purchasers and that their predecessor-in-title having a one anna share in the Mouzah was not a party to the petition which was filed before the Assistant Superintendent of Surveys. It is urged by Mr. Sultan Ahmad that so far as the defendants 11 and 12 are concerned, they are entitled to dispute the correctness of the line as laid down by the Survey authorities.

It appears, however, that they do not claim any proprietary title to the soil. In the partition proceedings which took place between the co-sharers of Mouzah Nagrah, they were allotted Touzi No. 3294 which lies to the south of the Mouzah. In their written statement they do not put forward any title to the actual soil but then they say that they have got a right of ferry. No doubt it is open to them to challenge the title of the plaintiff to the soil, but then the plaintiff produces the decision of the Revenue authorities, based on the compromise between all the co-owners, who are interested in the soil. That being so, it is not open to them to challenge the decision, based as it was, on the compromise between the parties who had the title to the soil.

In my opinion the decision of the learned Subordinate Judge is correct and must be affirmed.

I would dimiss this appeal with costs.

Adami, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 88.

COUTTS AND ROSS, JJ.

Ajodhya Prasad Singh and another—Appellants

v.

King-Emperor—Opposite-Party.

Criminal Appeal Nos. 181 and 186 of 1921.

Criminal Trial—Grounds for conviction—Case vague as to time of occurrence—Unreliable evidence—Accused is entitled to acquittal.

Where the prosecution case was vague and the findings of the Sessions Judge were not as clear as they might be as to the time when the alleged offences had been committed, and where the prosecution evidence was that of a servant who was not what might be called a particularly respectable witness

Held, that the accused was entitled to be acquitted. [P. 90, C. 2 and P. 91, C. 1]

No inference of complicity in crime can be drawn from the fact of friendship between accused who are co-villagers, and because of their being co-villagers it was quite natural that they should know each other. [P. 91, C. 2.]

P. K. Sen, G. C. Pal and *K. N. Chaudary*—for Appellant.

The Asstt. Government Advocate—for the Crown.

Coutts, J.:—The appellants in these cases are Bejoy Kumar Chakraburty, Assistant Station Master at Bhabhua Road Railway Station on the East Indian Railway, and Thakur Ajodhya Prasad Singh, a small Zamindar of the Shahabad district, residing at village Mohania close to the Bhabhua Road Station. Bejoy has been convicted under Section 477-A of the Indian Penal Code for intentionally falsifying what is known as the blank card register and also under Section 408 of the I. P. C. for dishonestly disposing of tickets Nos. 0723 and 0724 in violation of his trust as a servant of the East Indian Railway Company. He has been sentenced to three years' rigorous imprisonment under each of the Sections.

Thakur Ajodhya Prasad Singh has been convicted of being dishonestly in possession of the aforesaid tickets knowing that they were property in respect of which criminal breach of trust had been committed and has been convicted under Section 411 of the I. P. C. He has also been convicted of abetting the criminal breach of trust of which Bejoy has heen convicted under Section 408 read with Section 109, I. P. C. and has been sentenced to two years' rigorous imprisonment under each of these Sections. The sentences have been made to run concurrently.

The prosecution case, as will presently appear, is somewhat vague, and the findings of the learned Sessions Judge are not as clear, as to the time when the alleged offences had been committed, as they might be; but, as I understand the prosecution case, it is shortly as follows. The appellant Bejoy, as the Assistant Station Master of the Bhabhua Road station, was in possession of a series of blank return tickets for issue to passengers when necessary. The blank return tickets are printed in the following form:—

Outward half INTER CLASS	Return half INTER CLASS
Bhabhua Road to ——— Miles..... Fares Rs. ———	——— to Bhabhua Road Return journey to be completed. within——days from midnight of date of issue.

and when a ticket is issued to a passenger an entry is made in a register which is known as the blank card register. This register shows the date of issue of the ticket, the destination, the number of the ticket and the price paid.

The prosecution case is that on the 19th of May, 1920, Bejoy took from his series of blank intermediate class tickets ticket Nos.: 0723, 0724 and 0725. He left these tickets blank but entered them up in the register to which I have already referred as being issued to a station Saryidraja close to Bhabhua Road station for which the fare was a few annas. Ajodhya wished to travel to Hardwar and on the 12th of June, he went to the Bhabhua Road station with two servants and there he got from the Assistant Station Master, Bejoy, the tickets which had already been entered up in the register as having been issued for Saiyidraja station.

The tickets, however, were filled up for Dehra Dun which is a long and expensive journey from Bhabhua Road. Ajodhya then travelled with his two servants to Hardwar on these tickets. As they did not go as far as Dehra Dun but got out at Hardwar which is one or two stations short of Dehra Dun, they did not have to give up the tickets, because they were able to say that they were breaking their

journey there. The reason for not proceeding to Dehra Dun is that if they had, the tickets would have had to be given up; they would then have been sent back to the Audit Office and checked there with the return halves of blank tickets issued from Bhabhua and other Railway stations and it would at once have been discovered from the numbers of the tickets that a fraud had been committed and that these tickets which had been entered in the register for a short distance had in fact been used for a long journey.

Ajodhya, however, got ill at Hardwar and was treated by a certain Hakim called Dindeyal. Hakim Dindeyal wanted to return to Allahabad but before going, apparently he wanted a fee from Ajodhya. Ajodhya was hard up, so in lieu of a fee he presented Hakim Dindeyal with the return halves of the tickets on which he had travelled to Hardwar, namely, tickets Nos: 0723 and 0724 and told him to travel on these. Hakim Dindeyal with his grand son then started off for Allahabad. Shortly before they got to Lucknow, however a ticket examiner came to examine tickets and looked at the return halves of the tickets which Dindeyal presented to him.

As intermediate return tickets under the Oudh and Rohilkhand Railway rules could only be issued to soldiers, the ticket examiner asked Dindeyal where he obtained the tickets, and Dindeyal told him that these return halves had been given to him by Ajodhya Prasad of Hardwar in lieu of a fee for medical advice. Dindeyal by so doing admitted that he had committed an offence and he was prosecuted and fined under Section 114 of the Railway Act.

The matter, however, did not end here and enquiries were set on foot with regard to the tickets with the result, that it was discovered that Ajodhya and his servants had travelled to Hardwar on tickets which, from the entry in the Bhabhua Road Station blank card register, appeared to have been issued for Sayidraja. It is on these facts that the two appellants have been prosecuted and sentenced.

There appears to have been some doubt in the mind of the prosecution and also in the mind of the learned Sessions Judge as to when the offences, with which these accused persons have been charged, were committed; and that this is so will appear from the charges and from the statement of the prosecution case which I have given above. The first charge against Bejoy, of which he has been convicted, is that he on the 19th day of May, 1920, falsified the blank card register. This is correct according to the prosecution case as now presented, but the second charge is that he committed the offence of criminal breach of trust in regard to the tickets on the 19th of May also.

This is incorrect, because according to the prosecution story as now given the offence was not committed on the 19th of May but on the 12th of June. The charges against Ajodhya are that he committed the offence under Section 411 on or about the 19th May and the 9th June, 1920, and that he committed the offence of abetting criminal breach of trust on the 19th May. Here again according to the prosecution story the dates are incorrect. The offences are now alleged to have been committed by him on the 12th of June, 1920.

It will thus appear, as I have already said, that there has been some doubt both in the mind of the prosecution and of the learned Sessions Judge as to when the offences were committed, and I am not altogether satisfied that on this ground alone the appellants would not be entitled to succeed. But apart from this I am not satisfied that the charges have been established. A good deal of evidence has been taken and a very elaborate judgment has been written, a great portion of which is taken up with the investigation and the duties of the different officers on the Railway; but when we come to consider what in fact the evidence against these accused persons is, it will at once appear, that the convictions are unsustainable.

So far as Ajodhya is concerned the evidence against him is (1) that he was in possession of the tickets; (2) that his servant Bindheswari has given evidence that at the time Hakim Dindeyal was arrested Ajodhya confessed that he had committed a fraud in respect of these tickets in collusion with the Assistant Station Master; (3) that somewhere about April 1920 Ajodhya had been found at Dehri-on-Sone travelling with a blank ticket which had been filled up from Howrah to Bhabhua and (4) that he is a friend of the Assistant Station Master.

So far as the first point is concerned, there is no doubt but it in no way shows that Ajodhya was privy to any fraud that may have been committed, if indeed there were such a fraud.

We next come to Bindheswari's evidence and it is admitted by the learned Assistant Government Advocate that it is on this evidence that the prosecution case must stand or fall. The learned Sessions Judge has believed this witness. I am afraid, however, that I am unable to place the same reliance on his evidence as the learned Sessions Judge has done. Bindheswari was at the time of the alleged fraud temporarily a cook in the service of Ajodhya, but he has since then joined a Ramlila party and it appears that he often has to earn his livelihood by begging. He is therefore not, what might be called, a particularly respectable witness.

His evidence is that he went first to the Railway station and that Ajodhya came just before the train started with the tickets and that at the time of Dindeyal Hakim's arrest he made the confession already referred to. Now Ajodhya says that he sent Bindheswari ahead to buy the tickets and he did so. Ajodhya is a small Zamindar and, so far as we know, a respectable person. It is a case of one person's word against another and where we have the word of such a person against the word of a witness of the class of Bindheswari, there can, I think, be no reasonable doubt that the statement of Ajodhya is preferable.

It would in my opinion be in the highest degree unsafe to accept the evidence of a witness such as Bindheswari without corroboration. Moreover it is very unlikely that Ajodhya would have confessed to such a person, unless in fact that person were an accomplice ; and if he be an accomplice it is settled law in this country that his evidence should not be accepted without corroboration. I next come to the Dehhri-on-Sone incident. This rests on the uncorroborated statement of the Assistant Station Master of Dehhri on-Sone, that on some occasion (he does not know the date) he saw Ajodhya at this Railway Station and Ajodhya showed him a blank ticket which had been filled up from Howrah to Bhabhua. The learned Sessions Judge has placed much reliance on this evidence.

In the first place, the evidence is of a such vague character and the witness know so little about other tickets which he has seen that I have grave doubts as to the truth of his evidence ; but apart from this even if it were true, I fail to see how it assists the prosecution, for Ajodhya may have been travelling, if in fact he were travelling at all, on a perfectly good ticket. It is true that there is no entry in the blank card register of any ticket having been issued from Bhabhua Road to Howrah about that time, but it might very well be that if in fact Ajodhya were travelling, he was travelling on a ticket which had been issued from Howrah.

The incident therefore would not assist the prosecution in any case ; and as I have already said, I have also very great doubt as to the truth of the evidence. The last point is the friendship between Ajodhya and Bejoy. As has been said by the learned Sessions Judge, no inference of any kind can be drawn from this, because they are co-villagers, and being co-villagers, it was quite natural that they should know each other.

I now come to the case of the appellant Bejoy Kumar Chakraberty. The case against him is that he falsified the blank card register on the 19th of May and that he committed criminal breach of trust by giving the tickets Nos. 0723 and 0724 to Ajodhya. There is no direct evidence that Bejoy made the entry in the register on the 19th May, but even assuming that he did so it does not follow that he has committed any offence. Bejoy says that the tickets must have been issued on that date and he cannot remember whether he issued them himself or not.

He also says that, if the tickets were issued in a hurry at the last moment, he might have made a mistake and the return halves of the tickets might not have been filled up, and that subsequently the fraud was committed either by Ajodhya or by some one else. The explanation is not an improbable one and it gains probability from the fact that the only evidence we have, namely the evidence of Bindheswari, is to the effect that Ajodhya came to the station at the last moment. Moreover there is nothing on the record to show that the tickets were got from the Assistant Station Mas-

ter on the 12th of June and not on the 19th of May 1920, except the fact that the impressed date stamps on the tickets are the 12th June 1920. How this date on the 12th of June got on to the tickets we do not know, but it is not less likely that this date was fraudulently obtained than that Bejoy made a false entry in his register.

It has been suggested by the learned Counsel for the appellant that the tickets are not the tickets which were issued by Bejoy on the 12th of June, but that somehow a duplicate set of tickets got into the series which was with Bejoy, and that they have been abstracted and used by some one else. This is a suggestion which I am unable to accept. I believe the tickets to be the tickets which were entered up in the register of the 19th of May 1920, and it is clear that a fraud has been committed in connection with them, but that the fraud was committed by Bejoy is mere surmise.

In this connection I would note that the only evidence with regard to the writing on the tickets is that it is not the hand writing of Bejoy. If this evidence is believed, and no reason has been shown why it should not be believed, it is clear that Bejoy cannot be convicted.

In the result then, after a careful consideration of the cases against both the appellants, I am satisfied that the charges against them have not been established. I would accordingly set aside the conviction and sentences and acquit the appellants.

Ross, J. :—I agree.

Conviction set aside.

A. I. R. 1922 Patna 92.

DAS AND BUCKNILL, JJ.

Mohamad Musa—(Defendant No. 17) Appellant

v.

B. Edal Singh and others—Plaintiffs-Respondents.

A. No. 61 of 19 8 decided on 23rd Nov. 1921, from an order of Sub-J., Patna.

(*a*) *Civil P.C., O. 34, R. 5—Final decree does not put an end to—Mortgage lien.*

A mortgage lien must not in law be considered to have been extinguished by the final decree passed in the mortgage suit. The settled view of equity is that, though a personal covenant is extinguished by a judgment upon it, the charge remains notwithstanding the judgment, which does not determine the security or put an end to the charge. 22 Ch. D. 98, 31 Cal. 863—referred to. [P. 93, C. 2.]

(*b*) *T. P. A., S. 101—Subrogation—Person paying off mortgage-decree is entitled to stand in the shoes of the mortgagee.*

A mortgaged properties to B, and subsequently sold a portion of it to C. B. obtained a final decree for sale as against A and C Thereafter A borrowed from D and paid off mortgage-decree

Held : that D. was entitled as against C, to stand in the shoes of B and enforce his rights against the properties purchased by C.

[P. 94, C. 2 and P. 95, C. 2.]

Purnendu Narain Sinha and *Nitai Chandra Ghosh*—for Appellants.

Kulwant Sahey and *Rai Guru Sharan Persad*—for Respondent.

Das, J.,—I am of opinion that this appeal must be dismissed. In order to understand the point that has been argued before us it is necessary to state the following facts : On the 28th October, 1904, the mortgagor-defendants executed a mortgage bond in favour of one Munshi Singh in respect of certain properties including a 2 *as*, 15 *dam* share in *mouza* Deojibagh, which is the subject-matter of the present appeal. By two subsequent transactions, one dated the 22nd June, 1910, the other dated the 12th November, 1912 the defendant No. 17, the appellant before us, acquired a good title to a 2 *as* 15 *dam* share in *mouza* Deojibagh, subject to the mortgage in favour of Munshi Singh.

In 1913 Munshi Singh sued upon his mortgage and cited defendant No. 17, as a defendant in his action. He got the usual mortgage decree on the 22nd December 1913 and the final decree on the 28th January 1915. Defendant No. 17, it will be noticed, did not appear in the action nor did he make any attempt to save the property which he had purchased. But the mortgagor defendants, with a view to save the properties from sale, borrowed Rs. 13,000 from the plaintiffs and, as a security for the loan, executed a mortgage bond in favour of the plaintiffs in respect of certain properties with which defendant No. 17 is not concerned.

It was found, however, that there was a much larger sum of money then due to Munshi Singh, and Munshi Singh proceeded to sell the mortgaged properties, including the property in which defendant No. 17 was interested, in execution of his mortgage-decree. The mortgagors defendants then applied to have the sale set aside under Order XXI, Rule 90 of the Cobde, ut before the application could be heard and disposed

of, they raised further loans from the plaintiffs, discharged the debt due to Munshi Singh, and induced the auction-purchaser to consent to have the sale set aside. These loans were raised on the 29th October, 1915, and 3rd December, 1915, respectively on the security of certain properties including 2 *as.* 15 *dam* share in Deojibagh in which defendant No. 17 was interested. The present suit was brought to enforce the securities of the 25th October, 1914, 29th October, 1915, and the 3rd December, 1915 respectively.

We are in this appeal concerned only with the question whether the plaintiffs are entitled to a decree in respect of 2 *as.* 15 *dam* share of Deojibagh. The position taken up by the appellant is this, that his purchase being antecedent to the transaction of the 29th October, 1915, and the 3rd December, 1915, respectively his interest in the property purchased by him cannot be affected by these transactions. I am unable to agree with this contention.

Defendant No. 17, was a defendant in Munshi Singh's action, and had the right and opportunity to redeem the mortgages. He did not, however, avail himself of that opportunity but left it to the mortgagors-defendants to redeem the mortgages. Upon such redemption, the mortgagor defendants became subrogated to the position of Munshi Singh in relation to defendant No. 17 and became entitled to enforce the mortgages as against defendant No. 17 just as Munshi Singh could. But, in order to pay off Munshi Singh, the mortgagors-defendants had to borrow money from the plaintiffs. In my opinion, the plaintiffs stand exactly in the position of Munshi Singh or the mortgagors-defendants in relation to defendant No. 17.

The proposition, in the form in which I have stated it was not contested by the learned Vakil for the appellant, but he argued that neither the mortgagors-defendants nor the plaintiffs could claim the right to enforce the security as against defendant No. 17, as it must in law be considered to have been extinguished by the final decree passed in Munshi Singh's action on the 28th January, 1915. If the learned Vakil be right in his contention, then it must be conceded that the position of the plaintiffs is one of difficulty.

But there is neither principle nor authority for the view which has been strenuously pressed before us by Mr. Purnendu Narin Sinha on behalf of the appellant. So far as principle is concerned, it will be found in the settled view of equity that, though a personal covenant is extinguished by a judgment upon it, the charge remains notwithstanding the judgment, which does not determine the security or put an end to the charge See *Popple* v. *Sylverster* (1). The question is also covered by authorities, see *Bibijan Bibi* v. *Sachi Bewah* (2).

On the last mentioned case, an ingenious argument was advanced to us by Mr. Sinha. It was argued that, however correct the decision might have been under Section 89 of the Transfer of Property Act, the position now is different under the Civil Procedure Code. The only basis of the argument is that section 89 of the Transfer of Property Act now finds its place in the Civil Procedure Code as Order 34, Rule 5. Section 89 of the Transfer of Property Act ran as follows:—

"If in any case under Section 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in Section 94, the defendant shall (if necessary) be put in possession of the mortgaged property but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property and the Court shall then pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with, as is mentioned in Section 88, and thereupon, the defendant's right to redeem and the security shall both be extinguished."

The question constantly arose in the Law Courts as to whether there was any right in the mortgagor judgment-debtor to stop the sale of the mortgaged property by payment of debt before the sale actually took place, although an order absolute for sale might have

(1) (1883) 52 L. J. Ch. 54=31 W. R. 116=47 L. T. 329=22 Ch. D. 98.
(2) (1904) 31 Cal. 863=8 C. W. N. 684.

already been passed.

The Civil Procedure Code conceded that right to the judgment-debtors, but it used to be argued that as the right to stop the sale by payment of the debt was in fact the right of redemption, such a right could not exist after an order absolute for sale has been passed, as Section 89 of the Transfer of Property Act provided that upon an order absolute for sale, the defendant's right to redeem and the security shall both be extinguished.

The difficulty in the construction of Section 89 led to a conflict of decisions, but that conflict was put an end to by the decision of the Special Bench of the Calcutta High Court in the case already cited. The Calcutta High Court took the view that the concluding words of Section 89, *viz.*,

"Thereupon the defendant's right to redeem and the security shall both the extinguished"

related to the actual sale and distribution of the proceeds and not to the order absolute for sale. In other words the defendant's right to redeem and the security remain in full force until the actual sale and the distribution of the proceeds.

Section 89 of the Transfer of Property Act has now been repealed and re-enacted in Order 34, Rule 5 of the Code, but there is this important matter for consideration, that the concluding words of Section 89 to which I have already referred have not been re-enacted.

I regard the omission to re-enact the concluding words of Section 89 as deliberate. It marks the sense of the legislature that those words were capable of being misunderstood as in fact they were misunderstood. In my opinion, the provision of Order 34, Rule 5 is far more unfavourable to the appellant than the provision of Section 89 of the Transfer of Property Act.

It was, however, argued that the mortgagor judgment-debtor may have the right to stop the sale by payment of the debt before the sale, but that is a right which is now conferred on him by the Code and not by the law of mortgage. In other words, the right to stop the sale is in no sense a redemption of the mortgage. In my opinion, the problem is not solved by a reference to the Code; but I do not appreciate the distinction between the right to redeem and the right to stop the sale by payment of the judgment debt. In order to solve the problem, we must examine the view which equity took of a mortgage transaction. That view will be found in the judgment of Fry. L. J. to which I have referred.

I hold that the final decree passed in Munshi Singh's action did not extinguish the security, and that the plaintiffs, by virtue of the advance made to the mortgagor defendants, who, for their own protection, were obliged to discharge the mortgage debt of the appellant to Munshi Singh, are subrogated to the position occupied successively by Munshi Singh and the mortgagor-defendants in relation to the appellant, and are entitled to enforce the security as against the appellant.

I would dismiss this appeal with costs.

Bucknill, J.:—This was an appeal from a decision of the Subordinate Judge of the Second Court of Patna, dated the 22nd of December, 1917. The circumstances under which this litigation took place were very simple; but in order to understand exactly how this appeal arises, it is necessary to refer to them very shortly.

Some of the defendants in the action had borrowed money from one Munshi Singh on mortgage. After this transaction these defendants sold to one Maulvi Muhammad Musa, who was the 17th defendant in these proceedings and who having since died is here duly represented, a certain portion of the property mortgaged. It is stated that Maulvi Muhammad Musa did not in fact have, at the time of his purchase, a notice of the encumbrance upon the property which he brought; whether this is really true or not, does not seem to be here very material.

In 1913 Munshi Singh brought an action upon his mortgage; in that suit Maulvi Muhammad Musa was joined, with many others, as one of the defendants; amongst those others was the present plaintiff. Munshi Singh obtained a preliminary decree and this decree was made absolute in 1915. The properties were sold and purchased by certain persons but possession was never granted to the auction-purchasers, because an agreement was come to under which Munshi Singh's claim was satisfied. What, so far as here is material, really took place in connection with this compromise is that the present plaintiff, Babu Edal Singh, made arrange-

ment primarily with the judgment-debtors to pay off the amount due to Munshi Singh and, for the security of what he advanced for this purpose, took certain mortgages from the judgment-debtors of the properties which included, that property which had been purchased by Maulvi Muhammad Musa, subject to Munshi Singh's prior encumbrance.

In 1916, the plaintiff brought the present suit upon his mortgage bonds; again many persons interested were joined as defendants and, as I have stated before, Maulvi Muhammad Musa, and, now his representative since his death, was the 17th defendant. He obtained a decree; but Maulvi Muhammad Musa or his representative at the trial and here on appeal contends that the plaintiff cannot sell the property which had been purchased originally by him (Musa). I find it somewhat difficult to understand exactly what was the legal proposition put forward by the learned Vakil for the appellant.

But, so far as I could gather, it seems to have been contended that the appellant was not a party to the agreement by which the plaintiff paid off the debt due to Munshi Singh and that in consequence Munshi Singh's encumbrance was by the compromise permanently taken off the property which the appellant had purchased from them, because by the payment by the plaintiff of the judgment-debtor's debt to Munshi Singh the appellant had had his title cleared of any burden. In order to see whether there is any force in his contention, one must endeavour to ascertain exactly what really took place.

It must, in the first place, be admitted for both legal and equitable purpose here that the appellant's purchase was undoubtedly subject to Munshi Singh's mortgage; when Munshi Singh brought his suit the appellant was joined as a defendant; he had obviously then an opportunity of paying off the amount due in order to protect his encumbered ownership of the property which he had bought. But apparently he did nothing for it would seem that he did not appear at the hearing of the suit and a decree was passed against him, as it was against several other defendants, *ex parte*.

What was the effect of this; there was thus a decree against him which was in due course made absolute. The property was then put up for sale and was actually sold; but, before the delivery of possession, the arrangement to which I have referred already was come to. We have not unfortunately got before us the full record of the execution proceedings, but, it would appear that, on the 1st of December, 1915, the compromise petition was filed whilst on the 4th of the same month the order sheet of the Subordinate Judge reads:—

"The parties have filed a solehnama. The case need not be tried; the case is disposed of according to the solehnama."

It is difficult to see what attitude could possibly have been taken up by the appellant with reference to this compromise which would have been effective to protect his interest, unless he did come forward either at the trial of the case (which he did not) or as an auction-purchaser (which he did not) or as one who was ready to undertake the obligation undertaken by the plaintiff.

I do not know whether he was actually served with the final petition for compromise which was ultimately effected. I am inclined to assume that he was, and, to think that even if he was not, it makes no difference to his position. The plaintiff, to my mind, when he had paid off the judgment-debtor's indebtedness to Munshi Singh, satisfied the decree and, what is more important, the Subordinate Judge finds as a fact that it was the intention of the judgment-debtors and of the plaintiff that the plaintiff should be (as he was) placed in the position in which Munshi Singh had been (and no doubt in a better position supplementarily with regard to encumbrances upon the judgment-debtor's property).

It is suggested that the plaintiff cannot in equity be thus subrogated to Munshi Singh's status, but I cannot see that there is any force in this contention. Where a person in agreement with judgment-debtors undertakes to relieve them from their debt to the judgment-creditor on the condition that he takes over from the judgment-creditor the security which that judgment-creditor possesses, it, in my opinion, constitutes a subrogation, the validity of which does not allow serious argument.

The appellant had his rights throughout the course of the proceedings; he never chose to exercise them in any

way; he allows judgment to go against him *ex-parte*; and, therefore, has permitted his right, which, after all, was no more than an equity of redemption, to be extinguished by operation of law. With the subsequent compromise it seems to me that he was in no way concerned and that it would be absurd to suggest that having never, when he could availed himself of his equities, he should be now heard to say that having not done so, his equity should be given effect to.

I think that the Subordinate Judge was correct in his view and that the appeal must fail. I, therefore, consider that the appeal should be dismissed with costs.

Appeal dismissed.

A. I. R. 1922 Patna 96.

DAS AND ADAMI, JJ.

Digambar Mahton — Defendant No. 2-Appellant

v.

Dhanraj Mahton and others— Plaintiffs-Respondents

F. A. No. 121 of 1919, decided on 1st February, 1922.

Hindu Law—Partition —Son v. father—Grandsons are not necessary parties—C.P.C., O 1, R. 3.

Under the Hindu Law it is open to the grandsons to claim partition as against their grandfathers. In a suit of partition by sons against their father grandsons are proper, but not necessary parties [P. 96, C. 2]

Nirsu Narain Sinha—for Appellant.

Siva Narain Bose—for Respondents.

Das, J.:—This appeal is directed against a preliminary decree in an action for partition. The only question which has been argued before us is, that the plaintiff did not cite as parties to the action certain persons who would be entitled to a share on partition.

Now the plaintiffs are the sons of defendant No. 1, and defendant No. 2 is also a son of defendant No. 1. It is argued before us that the plaintiffs should have brought on the record their sons and the sons of defendant No. 2. The learned Subordinate Judge has taken the view that grandsons are not entitled to claim partition as against the grandfather. I am not prepared to uphold the view of the learned Subordinate Judge in this respect. No doubt a Full Bench of the Bombay High Court in the case of *Apaji Narhar Kulkarni* v. *Ram Chandra Ravji Kulkarni* (1), took the view that it is not open to a grandson to maintain an action for partition against a grandfather, but all the other High Courts have dissented from that view, see *Jogul Kishore* v. *Shib Sahai* (2), *Rameshwar Pd. Singh* v. *Lachmi Pd. Singh* (3), and *Subba Ayyar* v. *Ganesa Ayyar* (4).

In my opinion, it was open to the grandsons to claim partition as against the defendant No. 1. But the question in the present action is somewhat different, namely, whether these grandsons were necessary parties in an action for partition. In my opinion, the distinction between a proper party and a necessary party is not always recognised. It may be that the grandsons were proper parties in the present action, but I am not prepared to admit that they were necessary parties. They were fully represented in the action by their father and there is no prejudice to their interest by the decree which has been pronounced by the learned Subordinate Judge.

But the learned Vakil on behalf of the appellant makes a grievance, and I think that the best course to adopt in this matter would be to bring the grandsons on the record as parties to the suit. The learned Vakil for the plaintiffs undertakes to present an application to the Court below for the purpose of bringing the sons of the plaintiffs and the sons of defendant No. 2 on the record as party defendants. The names of these added parties will be mentioned in the decree and the Commissioner will proceed to make the partition in accordance with the decision of the learned Subordinate Judge. If however, the added defendants wish to have shares allotted to them, they must apply to the Court for that purpose, and in that case the learned Subordinate Judge will give the necessary directions to the Commissioner.

Subject to this variation, this appeal will stand dismissed, but without costs.

Adami, J.:—I agree.

Order accordingly.

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(1) (1891) 16 Bom. 29.
(2) (1883) 5 All. 430=1883 A. W. N. 102 (F. B.).
(3) (1903) 31 Cal. 111=7 C. W.N. 688.
(4) (1895) 18 Mad. 179.

A. I. R. 1922 Patna 97.

JWALA PRASAD, J.

Bir Narayan Singh—Petitioner

v.

King-Emperor—Opposite-Party.

Cr. Rev. No. 612 of 1921, decided on 22nd January, 1922, against an order of Deputy Magistrate, Daltonganj, dated 17th September, 1921.

(a) *Practice—Judgment of acquittal—Opinion casting slur on accused also noted after judgment is complete—The opinion is irrelevant and should be expunged.*

No suggestions of any kind can be made against accused when a verdict of not guilty is recorded except that of establishing his complete innocence.

(b) *Police Manual, Chap. XII, para. 314—Object of—Rule does not apply to Magistrates trying the case.*

The object of Police Manual, Chapter XIII, para. 314, is to have a record of the opinion of the Magistrate upon the first information reports and final reports in cognizable cases received from stations and outposts. The rule does not apply to Magistrates trying the case.

[P. 98, C. 2.]

The High Court has power to expunge irrelevant matter in the order under its general superintendence under the Government of India Act

[P. 89, C. 2 & P. 100, C. 2]

Sambhu Saran—for Petitioner.

H. L. Nandkowlyar—for the Crown.

Jwala Prasad, J. :—This rule was issued by Adami and Bucknill, JJ., against the following order passed by the Magistrate of Daltonganj, dated the 17th September, 1921 :—

" At the same time my impression after going through all the evidence and Police papers, etc., in the case is that the case is not false. I do not believe that any money was extorted from Ram Pratap Singh, but it seems to me that the other two complainants were made to pay some money before they were let off, but on account of their being influenced by Ram Pratap Singh and Jai Prakash Singh, who wanted to improve upon the facts, they have not told a genuine story and have mixed up facts and thus made their evidence untrustworthy and unsafe. Enter true ; Sections 384 and 384-114, I. P. C."

The petitioner is the Sub Inspector of Police and was called upon to stand his trial before the Magistrate upon charges under the aforesaid Sections 384 and 384-114, I. P. C. along with, one Mahadeo Puri, for having extorted money from three persons, namely, Ram Pratap Singh (P. W. 1) Badri Dusadh (P. W. 2) and Bhukhan Dusadh (P. W. 3) of village Sundipura, in connection with an enquiry into a case of wrongful confinement, assault, etc., alleged before the Sub-Inspector by a woman, Deomonia Mallahin, against 24 persons of the village.

The defence in the case of the accused was that the entire case was false and concocted, having been engineered by a veteran enemy of the accused. The trial ended in the acquittal of the accused of all the charges. The Magistrate examined the facts of the case and the evidence in a very great detail.

The case of the prosecution and the witnesses on behalf of the prosecution was that money was paid to the accused persons on the 6th day of their arrival in the village. To rebut this the defence filed diaries of the case of Deomonia Mullahin from the 16th to the 20th of April, showing that the Sub-Inspector reached village Sundipura on the 16th of April, at 11 A.M., and left the village at 4 P.M., on the 20th, and thereby proving that he could not be in the village on the date on which the extortion is said to have taken place.

In support of this, the Sub Inspector also filed the personal diary of the Head Constable, Abdul Rashid. The learned Magistrate accepted the defence case to be true and stigmatised the case of the prosecution to be false in the following words :—

" Thus there can be no doubt that the statement that money was paid to the accused persons at Sundipura on the sixth day of their arrival there (on the 21st April, 1921) is false."

Similarly he characterised the statement of the witnesses on the point in the following words :—

" That it was perhaps forgotten that the witnesses thereby rendered their evidence valueless by their statements being shown to the contrary to facts."

The learned Deputy Magistrate, proved by means of documentary evidence, stated by him in his judgment that Ram Pratap Singh complainant had perjured himself at every material point of the case. He relied upon the bail bonds (Exhibits G. H. I. J. and K.) containing the thumb impressions of the bailors, showing that those persons were present in Daltonganj Court on the 19th of April and consequently " if any pay-

ment was made, it must have been made on or before the 19th of April."

As to the persons named above having been called upon by the Sub-Inspector for the purpose of negotiation at or about the time the search of the house was made, the learned Magistrate accepted the version of the accused that the houses were searched by the head constable and that the Sub-Inspector was examining the complainant and the witnesses on the 18th and 19th and took bail from the accused on the 5th day. This he arrived at also upon a reference to the documentary evidence in the case, and came to the following conclusion :—

"The prosecution evidence on this point has already been shown to be unreliable and the prevaricating statements made by the prosecution witnesses on these points clearly show that they were not speaking the truth. I hold that the defence version on this point is the correct one."

As regards the actual payment and the motive for payment, the learned Magistrate devoted three typed pages of his judgment in order to show the material contradictions and improbabilities in the story told by the complainants and their witnesses of their having been threatened to be tied by ropes and having made the payments alleged by them to the Sub-Inspector. He held that Ram Pratap Singh and his cousin Jai Prakash Singh were the most influential men in the village and were clever men and could not easily be duped into doing a thing they did not like.

As a result of the close investigation and scrutiny of the evidence upon the point of payment by the three persons Ram Pratap Singh, Badri Dusadh and Bhukhan Dusadh, the learned Magistrate recorded clear and a definite finding in the following words :—

"It will be seen from the above that the prosecution evidence is discrepant and self-contradictory almost at every point regarding payment and time and motive. The diaries of the case of Deomonia conclusively show that all the prosecution witnesses have told lies regarding the date of payment."

He also criticises the attitude of Ram Pratap Singh and Jai Prakash Singh in the matter. He closes his examination of the evidence in the following words :—

"From the above it will be seen that the prosecution evidence is insufficient and unconvincing and having been rebutted in material details by the much more convincing defence evidence in the form of documents cannot be accepted. Coupled with the nature of the evidence, there are the irregularities in the proceedings, and the effect of all these taken together is to make the case a failure.

The result is that I hold that the prosecution has failed to prove its case and I find that none of the two accused is guilty of the charges framed against him. I accordingly acquit them under Section 258, Cr. P. Code."

The trial of the case and the enquiry into the charges of the accused ended here. The only issue before the Court upon the charges was whether the prosecution proved its case or not against the accused, or to put it shortly, whether the accused were guilty or not of the offences charged. All the points that arose in connection with the charges for the determination of the Court were set forth in the preceding paragraphs of his judgment and his decisions were recorded thereon seriatim with detailed reasons for those decisions. The judgment, therefore, was complete, and after the aforesaid verdict of acquittal was recorded no other point arose before the Magistrate.

It is said that the remark in question was added obviously for the purpose of administrative entry of the case being true or false, under paragraph 314, *Chapter XII of the Police Manual*. Now the object of this rule is to have a record of the opinion of the Magistrate upon the first information reports and final reports in cognizable cases received from stations and outposts. Clause (d) of the rule requires the entry of the case to be in the form of one of the following in the general register :—true, intentionally true, mistake of law, mistake of fact, non-cognisable or not investigated, and the order, with respect to the entry, is to be made by the Magistrate of the district, the Magistrate in charge of criminal cases at Sadar and the Magistrate in charge of sub-divisions [*vide* Clause (d).

This rule does not apply to Magistrates trying the case. The register has to be filled in by the classes of Magistrates mentioned above, and he is obviously to do that upon the result of the case. The Magistrate trying the case may

not necessarily be one of the three kinds of Magistrates, namely, the District Magistrate, the Magistrate in charge of Criminal Cases in Sadar or the Sub Divisional Magistrate, as is contemplated by the rule. Therefore, it was not the judicial function of the Magistrate, who tried this case, to record this order in his judgment of the case. That judgment was a judgment of acquittal, and on a perusal of that judgment another Magistrate (whose duty was to record an entry in the register) was to find out what should be the nature of the entry. The entry in question is purely executive and administrative, and after the case had ended in the acquittal of the accused, the Magistrate had nothing more to decide as to what his personal impression was as regards the guilt or innocence of the accused. The judgment recorded in the present case by the Magistrate was a judgment entirely in favour of the accused. Nowhere throughout the judgment he suspected the defence made by the accused.

On the other hand, he accepted all the counter-versions of the case, at each stage, made by the accused. In the present case the accused being a responsible officer, namely, the Sub Inspector of Police chose to give evidence and his own version of the case. He took upon himself the responsibility of disclosing what truly happened. He did not content himself with only throwing doubt upon the case of the prosecution to obtain an acquittal by reason of the benefit of the doubt, as is often done by an accused in an ordinary position. He went further and laid his own case in order to show what the truth was. The investigation of the Magistrate, and, I may observe, a careful and searching investigation, led to the conclusion that the prosecution case was improbable, false and concocted at every stage, and that the version of the accused was true in its substance.

In vain have I ransacked the judgment of the Court to find out a single sentence about doubt and suspicion thrown upon the case of the defence. It was, as I may be able to say, an honourable acquittal. Even a judgment of acquittal, merely upon the benefit of doubt being given to the accused by reason of suspicious circumstances in the case of the prosecution is entitled to be regarded as a complete exoneration of the accused. A judgment of the type, recorded by the Magistrate in the present case, stands on a still higher footing and is a verdict of an honourable exoneration of all the charges and stigma cast upon the accused.

Still with a view to make a record of an executive character the Magistrate thought it best to give his own impression and an impression derived, as he says (1) from the evidence generally which he had already discussed in detail and come to the conclusion that the prosecution case was false and the version of defence was true, (2) an impression derived from the Police papers, most of them may not be relevant and the accused had not the opportunity to meet and (3) an impression derived from what he says "etc," which is too vague to find place in the judgment. The Magistrate was not entitled to use all these kinds of expressions against the accused, in order to give him a character which may injure the accused and which may throw a suspicion upon the careful judgment that he had already recorded just preceding the paragraph in question.

The leading case of *King* v. *Plummer* (1) is an authority for the proposition that no suggestions of any kind can be made against the accused when a verdict of not guilty is recorded except that of establishing his complete innocence. Bruce, J., in that case observes :—

"As to the note by Mr. Greaves in Russell on Crimes, 4th Ed., Vol. III, Page 146, referred to in the judgment of Wright, J., where it is suggested that a verdict of not guilty is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove the guilt, I think, it is a very dangerous principle to regard, a verdict of not guilty, as not fully establishing the innocence of the person to whom it relates."

This decision has been followed in a number of cases in India, *Emperor* v. *Noni Gopal Gupta* (2), *Pulin Behari Das* v. *King-Emperor* (3)

(1) (1902) King's Bench Division 339=20 Cox. C. C. 243=71 L.J K.B 805=51 W.R. 137.
(2) (1911) 38 Cal. 559=15 C. W. N. 593= 10 I.C. 582=12 Cr. L. J. 286.
(3) (1912) 16 C.W.N 1105=15 C. L. J. 517= 16 I. C. 257=13 Cr. L. J. 609.

and *Rajendra Narain Singh* v. *Emperor* (4). Judgments of acquittal are not admissible in evidence even in a case where the character of the person is directly under enquiry under Section 110 of the Code of Criminal Procedure; far less can it be permitted to be used by the Magistrate in this case for the purpose for which he recorded it in his judgment, namely, to throw a slur upon the character of the Sub-Inspector for executive or administrative purposes, that is, to complete a record or register as required under the Police Manual. Even assuming for the sake of argument that the trying Magistrate in the present case could under the Police Manual make an entry as to the case being false or true, his direction to enter the case "true" is against his clear finding that it is false.

Now, what is the meaning of the words "Enter true Sections 384 and 384-114, I. P. C." recorded by the Magistrate? An entry made under the said rule of the Police Manual of the falsity of a case, such as "Enter false" has been interpreted to mean a discharge of the accused or a dismissal of the complaint even where the word "dismissal" was not recorded under Section 203 of the Code of Criminal Procedure. Therefore, the true interpretation of the words "Enter true. Sections 384 and 384-114, I. P. C." means that the case of the complainants of a particular charge of extortion, which formed the subject matter of specific charges against the accused, was true.

This is wholly inconsistent with what the learned Magistrate has himself recorded in his judgment that the case of the prosecution was not proved and was concocted and false. The principal charges under Sections 384 and 384-114, I. P. C., which the Magistrate now wants to be recorded as true, were held by him to be false. Therefore, this entry, if it has any Judicial meaning, is inconsistent with the considered judgment of the Magistrate and is sought to be supported only upon his impressions. As a judicial order it is, therefore, illegal, and is not in accordance with his judgment.

No reason has been given and therefore, it must not stand in the judgment. As an executive order, it has no business to be there in a judicial pronouncement, without giving proper opportunity to the accused of meeting those impressions. The privilege of passing an opinion in a case of this kind has been over-stepped. Non-compliance with the strict provisions of the law took away the privilege which was given to the Magistrate against the subject. Such an entry has been interpreted by certain authorities as an entry of a purely executive character. If it is so, the Magistrate exercising the judicial functions has to divest himself for a moment of his executive powers and has to forget himself that he has to deal with the person before him as an executive authority.

What he would have done in his executive capacity, we are not concerned with. What he will do in his executive capacity we do not want to know, nor can we stand in his way; but we do not want that a judicial pronouncement should be disfigured, and the judicial functions exercised by a Magistrate should be blurred in the manner in which the Magistrate has done in the present case. We do not at all want to enter into a general enquiry into the character of the Sub-Inspector. He may or may not be habitual offender; all the specific charges brought against him have been held not to be true and he has been acquitted without any suggestion of misconduct.

It has also been argued that this Court cannot interfere with the order in question. I have clearly shown that if it is a judicial order, this Court has power to deal with it. If it is an executive order, it must not remain in the judgment. Taking any view of the case, this Court has jurisdiction in the case. It has been said that Section 439 of the Code of Criminal Procedure does not intend to cover a case of this kind, where the order passed is not based upon the evidence but upon an impression, the order being to enter true. When the order is deleted, the reasons in the preceding paragraph must also go.

The High Court has also power to deal with a case of this kind under its general superintendence under the Government of India Act. The power of the High Court to delete irrelevant orders of this kind has been upheld in the case of *Emperor* v. *Thomas Pellako* (5) where the irrelevant remarks and the Judge's opinion on certain matters contained in the judgment were ordered to be expunged and deleted on the

(4) (1912) 17 C. W. N. 238=18 I. C. 149=16 C. L. J. 467=14 Cr. L. J 5

(5) (1912) 14 I. C. 643.

ground that they were "ill-judged and should not have found a place in a judgment in a criminal trial." This case is stronger than that.

I would, therefore, direct that the order of the Magistrate, whether it is executive or judicial in the two concluding paragraphs of his judgment should be expunged.

Rule made absolute.

A. I. R. 1922 Patna 101.

DAWSON MILLER, C. J. AND ROSS, J.

Government Advocate—Appellant

v.

Gopal Bandu Das—Accused-Respondent.

Govt. Appeal No. 1 of 1922, decided on 1st March, 1922, against the order of the acquittal, dated 21st November, 1921.

Penal Code, S. 499—Defamation—Publication of unjustifiable matter—No imputation against specific person or persons—No offence is committed.

However reprehensible and morally unjustifiable the words complained of may be, they must, to be actionable, contain an imputation concerning some particular person or persons whose identity can be established. An imputation against an association or collection of persons jointly may also amount to defamation within the meaning of the Section 499, I. P. C., but at the same time it must be an imputation capable of being brought home to a particular individual or collection of individuals as such. [P 103, C. 2.]

H. L. Nandkeolyar—for the Crown.

Dawson Miller, C. J.:—This is an appeal under Section 417 of the Criminal Procedure Code against the acquittal of Gopa Bandhu Das who was tried before Mr. S. C. Bose, Magistrate of the First Class stationed at Khurda Sub-division in the Puri District. The charge upon which the respondent was tried was that of publishing a defamatory libel under Sections 499-500 of the Indian Penal Code. The complainants are 4 constables stationed at the Begunia Police Station in the Puri District who allege that they have been brought into contempt and hatred and their characters seriously defamed by the publication of the libel in question.

The respondent is alleged to be the editor, and is proved to be the printer and publisher of a weekly newspaper named the "*Samaj*" printed in the Oriya language and published from Satyabadi in the Puri District. The article complained of appeared in the issue of the 13th August, 1921. It is headed "Serious if true" and after stating "We hear that last week a boy with a labourer was going through Begunia taking his young adult sister to her mother-in-law's house," it proceeds to describe how the boy just before evening left his sister by the roadside some distance from the Begunia *hat* at the call of nature and the labourer having also left her to purchase betel, two constables afterwards dragged the woman away and shut her up in a room not far off locking the door and sitting outside with the key in their possession. On his return the boy not finding his sister began to cry and made enquiries of various people.

It then continues "Some boys were playing near by. They had seen the two constables drag the woman away. Having got the information from them, the brother went to the constables. On asking the constables about his sister they replied in the negative. He entreated them in various ways to open the door. The constables in return gave him a good beating while the boy was coming crying after being beaten, he saw Ajoy Babu, the S. D. O. of Khurda coming in a motor car. He ran to him, threw himself on the road and besought him. Ajoy Babu stopped the motor-car and went to the place of occurrence. He asked the constables for the key to open the room.

The constables having refused he broke open the door with kicks and entered into the room. He found the young woman naked and strangled to death by hanging herself with her wearing cloth. All this happened within an hour. He has sent up the dead body and the constables. We hear that certain higher police officers have been sent up. But we do not know the real facts of the case."

There can be no dispute that this article contains very serious charges of misconduct against two constables which, if true, would show that they were totally unfitted to act as such and were guilty of gross impropriety. On the evidence it is abundantl proved that there is not a word of truth from beginning to end in the whole of this story. The complainants contend that

the article in question is an imputation against their character they being the only 4 constables stationed at Begunia thana.

It is also proved that the immediate effect of this article was to lead people to believe that the misconduct referred to in the article had been committed by some or other of the police constables stationed at Begunia. The people at the *hat* treated them with contempt and despite their disclaimer would not believe that the allegations were not true, having been published in the *Samaj*. The constables in question also received numerous letters and postcards from their friends and relatives enquiring about the affair and asking if it were true.

It is also certain that the publication of an article of this sort must have caused considerable anguish of mind to the complainant who undoubtedly were for sometime, at all events, treated by many of the people in the neighbourhood with ridicule and contempt. If this was the object of the writer of the article there can be no doubt that from his point of view it was successful as the complainants were insulted and abused by the villagers for having committed an act for which there was no shadow of foundation in truth.

As soon as it was brought to their notice the police made searching enquiries but could elicit nothing as to how the rumour got about. Neither the police nor any of the witnesses who were called at the trial ever heard of such a rumour before it appeared in the respondent's paper. The respondent, who states that he is a leader of what is known as the non-co-operation movement in Orissa and that his paper, the *Samaj* is considered an influential organ of the movement has not deigned to give any evidence as to how he came to publish this unfounded rumour in his newspaper or to disclose the source from which he derived the information.

He takes up the attitude that to enter upon any defence in this case would be contrary to his principles as a non-co-operator. The tenets of the political creed to which he subscribes, however, have not prevented him from putting in a long written statement covering about 3 pages of closely printed matter in which he admits printing and publishing the paragraph after reading it and seeks to justify his conduct on the ground of the discharge of journalistic duties that all cases of injustice and oppression should be published with a view to drawing to them the attention of the authorities and of the public to set matters right or to take such action as the situation may demand.

It does not appear to have occurred to him that the publication of such an article was bound to have the effect of seriously injuring the reputation of the police in the neighbourhood and more particularly those stationed at Begunia and to subject them to insult and annoyance; nor does it appear that he ever stopped to consider whether there was any foundation of truth for the rumour which he alone and those connected with his newspaper appear to have heard. His attitude appears to be, judging from the argumentative matter disclosed in the written statement that every-rumour, however ill-founded and however much pain it may give to those concerned, which comes to the ears of the editor of a newspaper should at once be published broadcast to the public, provided, the paper states it does not vouch for the truth of the story.

This he contends is acting in good faith and for the public good in the discharge of his journalistic duties as the publication of the paragraph, made in the manner in which it was, would lead people to doubt the truth of report and would go a great way in saving the reputation of those who had been damaged by the wide currency of the rumour. The matter was drawn to the attention of the respondent by a letter from Mr. Guise, the Superintendent of Police at Puri, written on the 23rd August to the Editor of the *Samaj* in which he states that he would be obliged if the editor could supply him with the name of the correspondent of the original report who brought the matter to his notice, this information being required for the purpose of a departmental enquiry into this serious allegation.

The reply to this, written by the manager on the 1st September was a regret that owing to the absence of the editor from the station a reply could not be sent in time but added that the paragraph referred to contains sufficient material

for an enquiry either judicial or departmental for the disclosure of the whole truth about the report, and that the letter was being sent to the editor for a further reply. A further letter, dated the 3rd September from Mr. Guise asking for further information in reply to the previous letter was answered by the Manager on the 24th September referring Mr. Guise to an article appearing in the issue of the paper of that date. This article refers to an earlier paragraph in the issue of the 27th August which stated that "the truth or otherwise of the rumour about the Begunia incident which appeared in the *Samaj* of the 13th last has not yet been known. We are enquiring about it. On receipt of information we shall publish in due time."

The article of the 24th September then proceeds in a manner which, if anything, aggravates the original offence. It says "we heard of the occurrence from various people. It was of course a rumour. But considering the form which this rumour assumed in various places in the mufassil, we thought it our duty to publish it in the paper to ascertain the truth or otherwise thereof. Rumours are not always unfounded. Indeed many hidden truths are often found in rumours. In publishing this rumour in the paper we expected that the real facts would be forthcoming from the local authorities and the public.

In the meantime, we, too, were not idle. However it appears from our enquiries that this rumour originated in the following manner. At the time when this occurrence took place a Punjabi was found at Jatni taking away a woman of Begunia side and he went away leaving her there. A few days before this a murder has been committed in Bolgarh side. Babu Ajoy Chandra Das the S.D.O. of Khurda was then inquiring into it. To a combination of these two events may be traced the origin of the rumour."

It apparently did not occur to the editor or publisher to ascertain the truth or otherwise of the rumour from the police station at Begunia or by making enquiries on the spot before jumping to the conclusion that it was their duty to publish it in order to find out the truth. The slightest enquiries on the spot and from the police would have put the respondent in possession of the facts which would at once have shown him that his duty lay, certainly not in publishing the rumour, but, in contradicting it, if any action at all on his part would appear necessary.

Having read the article complained of and the evidence in the case one is driven to the conclusion that its publication was altogether unjustifiable and cannot be excused on any supposed ground of journalistic duty. A very little reflection I feel sure, ought to convince the respondent that to publish without regard to the feeling of those against whom it is directed every foul rumour that may be reported to him cannot be justified by any recognised standard of editorial duty; and especially is this case when, as here, the untruth of the rumour could easily have been established by a few simple enquiries on the spot. I cannot help regretting that even after enquiries had been made and its untruth demonstrated there is no expression of regret either in the written statement or in the subsequent articles published in the newspaper for the publication of this false rumour.

It does not follow however that its publication necessarily amounts to an offence under Section 499 of the Indian Penal Code. However reprehensible and morally unjustifiable the words complained of may be they must, to be actionable, contain an imputation concerning some particular person or persons whose identity can be established. An imputation against an association or collection of persons jointly may also amount to defamation within the meaning of the section but at the same time it must be an imputation capable of being brought home to a particular individual or collection of individuals as such. The article in question is not directed against the constables of the Begunia thana collectively so that they, as a body, could assert that each and all of them had been libelled.

Nor can it be said that any two ascertained individuals have been the object of the attack. It is unnecessary that the person whose conduct is called in question should be described by name it is sufficient if on the evidence it can be shewn that the imputation was directed towards a particular person or persons who can be identified. In the present case the

imputation complained of was directed against two constables only and it would be impossible in my opinion upon the facts disclosed to ascertain with any degree of certitude who those two constables were. They may have been, and in fact were taken by the villagers to have been, two constables attached to the Begunia thana but there is nothing to indicate which were the two in question.

Had the attack been directed towards all four of the constables at Begunia so that they could be identified, I think they would have had a collective cause of complaint which would have been sufficient to found a charge of criminal libel. It is not even certain that the persons aimed at were any of the constables stationed at Begunia but even could a legitimate inference be drawn to this effect it would in my opinion afford no ground for a charge of publishing a defamatory libel.

Certain cases have been drawn to our attention by the learned Assistant Government Advocate in support of this appeal to show that whatever the intention of a person charged if the defamatory words can reasonably be considered as applying to a particular individual or individuals an action will lie but in each of those cases the individuality of the person or persons attacked has been proved and I am not aware of any modern case which has decided that an action will lie for defamatory words written concerning one or other person out of a particular class unless his identity can be established. The respondent has not been represented in this appeal and we have therefore not had the assistance of any argument on his behalf and the old cases all seem to shew that an action will not lie for defamatory words which might apply equally to any one or more persons out of a larger class.

In *Sir John Bourn's case* (1) where a party in a cause said to three men who had just given evidence against him "one of you three is a perjurer" it was held that no action lay. In *James* v. *Rutlesh* (2) it was said if the defendant said to a master "one of thy servants hath robbed me" in the absence of special circumstances no one could sue, for it is not apparent who is the person slandered; and there are many other cases to the same effect. The rule is that if the words used contain no reflection upon a particular individual or individuals but may equally well apply to others although belonging to the same class an action will not lie.

"So if the words reflect impartially upon either A or B or upon some one of a certain number or class and there is nothing to shew which one was meant no one can sue. Where the words reflect on each and every member of a certain class each or all can sue" Odgers on Libel and Slander, 5th Ed. (147.)

In the present case I am reluctantly driven to the conclusion that it is impossible in the circumstances for any two of the complainants to show that they were the individuals aimed at by the article in question and however morally unjustifiable that article may be I think this appeal must be dismissed.

Ross, J. :— I agree.

Appeal dismissed.

(1) (1596) Cro. Eliz. 497=78 E. R 747.
(2) (1599) 4 Co. R. C. P. 170=76 E. R. 900.

A. I. R. 1922 Patna 104.

DAS AND ADAMI, JJ.

(*Maharaj Kumar*) *Jagat Mohan Nath Sah Deo*—Appellant

v.

Kalipado Ghosh—Defendant-Respondent.

F. A. from Original Decree No. 163 of 1919, decided on 1st February, 1922, against the decision of the Dist.J., Ranchi.

(a) *Tort—Defamation—Privilege—Suit for damages against Vakil for words used in argument does not lie.*

Plaintiff alleged that in course of arguments defendant, a vakil, used very abusive language against plaintiff and described him as a liar and swindler without justification and out of sheer personal grudge and malice against him with the malicious intent of lowering him in estimation of public.

Held: with regard to counsel, the question of malice, *bona fide* and relevancy cannot be raised. The only question is whether what is complained of has been said in the course of the administration of the law If it is so, the case against the counsel must be stopped at once. [P. 106, C. 1.]

(b) *Practice—Justice—Equity and good conscience to be applied where no statutory directions exist.*

In all cases for which no specific statutory directions are given in India, Judges are bound to act according to justice, equity and good conscience and the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding rules of the Common Law of England (10 Mad. 28) followed.

[11 Q. B. D. 588.] *(24 C.W. N. 982) referred to. [P. 106, C. 1.]

Yunus, P. Dayal, A. P. Upadhya and *Murari Prasad*—for Appellant.

B. N. Mitter, S. M. Mullick and *B. C. De*—for Respondent.

Das, J.:—This was an action by the appellant for recovery of Rs. 1,00,000 as damages from the respondent. The learned District Judge without going into the evidence has dismissed the suit on the ground that the plaint disclosed no cause of action. We accordingly assume for the purpose of our decision that the allegations made in the plaint are correct. The question which we have to determine is that, assuming that the allegations in the plaint are correct whether the plaintiff is entitled to recover damages for defamation as against the defendant.

The defendant is a vakil practising in the District Court of Ranchi. The plaintiff alleges that owing to some report made by him to the Maharaja of Chota Nagpur, whose vakil the defendant is, the defendant began to act against the interest of the plaintiff. He further alleges that he was examined as a witness in a certain action brought by Messrs. Sarkar Barnad and Co., against the plaintiff's wives and that in the course of his argument on behalf of the plaintiffs in that case the present defendant, who appeared as the vakil on behalf of Messrs. Sarkar Barnard and Co., "used very abusive language against the plaintiff and described him as a liar and swindler without any justification and out of sheer personal grudge and malice against him with the malicious intent of lowering the plaintiff in the estimation of the public."

These are the allegations of the plaintiff and we have to determine whether on these allegations the plaintiff is entitled to claim any damages from the defendant.

The leading case in England is *Munster* v. *Lamb* (1). In that case it was admitted on behalf of the plaintiff that so long as an advocate acted *bona fide* and said what is relevant, owing to the privileged occasion, defamatory statements made by him did not amount to libel or slander, although that would have been actionable if they had not been made whilst he was discharging his duty as an advocate.

(1) (1883) 11 Q. B. D. 588=32 W. R. 248=52 L. J.Q.B. 726.

But it was contended that an advocate cannot claim the benefit of his privilege, unless he acts *bona fide*, that is for the purpose of doing his duty as an advocate and unless what he says is relevant. Precisely the same argument has been advanced before us by Mr. Yunus who has argued the appeal on behalf of the appellant. Brett, M. R., after discussing the cases which establish that an action would not lie either against Judges or witnesses although they speak maliciously and without reasonable or probable cause, said as follows:

"If upon the grounds of public policy and free administration of the law the privilege be extended to Judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes, Judge, witness, and counsel, it seems to me that a counsel has a special need to have his mind clear from all anxiety.

A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows: he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do, is to argue as best as he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of that rule covers a counsel even more than a Judge or a witness.

"To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting *bona fide*, may not be in danger of having

actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsels are included who have been guilty of malice and misconduct", and then the learned Judge laid down the law as follows:—"with regard to counsel, the questions of malice, *bona fides* and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once."

It is admitted in this case that the words complained of were uttered by the defendant in the course of the administration of law. That being so, the action could not be maintained against the defendant if the question as between the plaintiff and the defendant arose in England.

But it has been urged by Mr. Yunus that the rules of English Common Law are not applicable in this country and that we are bound in the administration of the law in this country by the rules formulated by the Indian Penal Code. To this argument a conclusive answer has been given by the Full Bench of the Calcutta High Court in the case of *Satish Chandra Chakravarti* v. *Ram Dayal De* (2) Mukherji, A. C. J., delivering the judgment of the Full Bench said as follows.

It is necessary to emphasise that in this country, questions of civil liability for damages for defamation and questions of liability to criminal prosecution for defamation do not, for purpose of adjudication, stand on the same basis; as regards the former, we have no modified law; as regards the latter, the relevant provisions are embodied in the Indian Penal Code."

That learned and distinguished Judge then pointed out that in all cases for which no specific statutory directions are given, Judges are bound to act according to justice, equity and good conscience and that there is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England.

(2) A. I. R. 1921 Cal. 1=48 Cal. 388.

Mr. Baikuntha Nath Mitter who appeared on behalf of the respondent has convinced us by his very able and lucid arguments that the principles embodied in *Munster* v. *Lamb* (1) are equally applicable to this country and that to depart from the rule enunciated in England would be to affect the administration of justice in this country. The decision of the Madras Full Bench in the case of *Sullivan* v. *Norton* (3) completely supports the arguments of Mr. Baikuntha Nath Mitra.

I have considered all the decisions on the point, and I am not prepared to differ from the decision of the Madras High Court in the case to which I have referred. In my opinion the view taken by the learned District Judge is right and ought to be affirmed. I would dismiss this appeal with costs.

Adami, J.:—I agree.

Appeal dismissed.

(3) (1887) 10 Mad. 28 (S. B.).

A. I. R. 1922 Patna 106.

JWALA PRASAD, J.

East Indian Railway Co.—Defendant-Petitioner v.

Kali Charan Ram Prasad—Plaintiff-Opposite Party.

Civ. Rev. No. 367 of 1921, decided on January 27th, 1921, against the decree of the Sub-Judge, Gaya dated 12th July, 1921.

(a) *Railways Act, S. 72—Risk Note Form B—Railway Co. guilty of wilful neglect—Risk Note is of no avail.*

Where the loss of goods consigned to a Railway administration is due to its wilful neglect, the risk note cannot be pleaded as freeing it from all responsibility. [P. 107, C. 2.]

(b) *Railways Act, S 77—No notice necessary in case of non-delivery of goods.*

Section 77 requires notice to be given to the Ry. Co., only in cases of "Loss destruction or deterioration" of goods consigned to it. Notice will not be necessary in cases of non-delivery. [P. 109, C. 1.]

(c) *Railways Act, S. 77 & 140—"Railway administration — Agent assigning power to G. T. M.—Notice to G. T. M. is sufficient.*

Where the Agent of a Railway Company has assigned his powers to deal with claims, to the General Traffic Manager,

Held; that notice to the latter is notice to the "Railway administration" 42 M. L. J. 202 Foll. [P. 110, C. 1.]

(d) *Prov. Sm. C. Courts Act, S. 25—No injustice in Court below—High Court will not interfere.* [P. 110. C 2,]

Siva Narayan Bose—for Petitioner.

Shiveshwar Dayal and *Brij Kishore Prasad*—for Opposite Party.

Jwala Prasad, J.:—This is an application by the defendant (the East Indian Railway Company) under Section 25 of the Provincial Small Cause Court Act against a decree, dated the 12th of July, 1921, passed in favour of the plaintiff by the Subordinate Judge of Gaya in the exercise of his powers as a Small Cause Court Judge.

The plaintiff despatched from Howrah a consignment of 7 packages of red lead, soda and other miscellaneous articles to be delivered to him at Warsaliganj, a station on the South Bihar Railway. Four of these packages were delivered to the plaintiff and the remaining 3 were not. Consequently the suit out of which this application has arisen was instituted by the plaintiff on the 2nd of April, 1921, for recovery of price of the said articles as compensation for their non-delivery to the plaintiff.

The defendant resisted the claim of the plaintiff and pleaded;

(1) that the plaintiff's suit was barred by the terms of an agreement embodied in what is known as the Risk Note Form B (Appendix E of Railway Act IX of 1890) executed by the plaintiff;

(2) that there was no wilful neglect on the part of the railway administration or its servants or any theft of the goods in question by the servants of the Railway Company, on the other hand the goods in question were lost on account of robbery from the running train; and

(3) that the plaintiff's suit is barred by Section 77 of the Railway Act on account of any notice not having been served in due time upon the Railway administration or Company as is required by the said section.

All these objections have been overruled by the Court below and decided against the defendant. These grounds have been reiterated in this Court on behalf of the defendant and it is urged that the findings of the Court below on all these points are erroneous in law.

The Court below has found that the goods in question were lost not on account of a running train robbery, nor on account of any theft, but on account of "the wilful neglect on the part of the defendant's servants." This is a finding of fact. It is however, urged that this finding is vitiated on account of the onus of proof having been wrongly laid upon the defendant, and not upon the plaintiff, as the Court below ought to have done in view of the Risk Note B executed by the plaintiff. This contention is wholly unjustificable, and the following passage from the judgment of the Court below is a complete answer to it: "I also do not doubt that having given Risk Note B the burden of proof was on the plaintiff to prove wilful neglect of the Company's servants."

This rule is well established by a series of decisions. The Court, therefore, laid the onus upon the plaintiff to prove wilful neglect on the part of the defendant. Upon the evidence on behalf of the plaintiff the Court records the finding that "the wilful neglect of the defendant's servants is responsible for the non-delivery of the articles." Upon the evidence offered on behalf of the defendant the Court has held that the defendant's servants were negligent in not putting "any lock to the door" of the wagon and thereby affording sufficient temptation to thefts by the Railway servants."

The evidence on behalf of the defendant has been fully considered in great detail by the Court below and, as a result of the consideration of the evidence of both sides the Court has held that there was no theft or running train robbery by strangers, but that the goods were lost on account of the wilful neglect on the part of the defendant's servants.

Upon this finding of the Court below the risk note in question is of no avail to the defendant. The defendant company cannot plead the Risk Note in question, as freeing the defendant from all responsibilities when the loss of the property in question is due to the wilful neglect of the Railway administration or theft or neglect of its servants, or as is expressly mentioned in the exception contained in the Risk Note. The proviso in the Risk Note does not apply, as the Court below has expressly held, that there was no robbery from the running train. We cannot in revision dispute the finding of fact of the Court below and the finding of fact arrived at in this case disposes of the first two grounds.

To my mind the Risk Note in question has no application to the present case. The suit of the plaintiff is not on account of " any loss, destruction or deterioration of" or damage to " the consignment in question to which only the Risk Note in question applies. His suit is for compensation on account of non-delivery of the goods consigned to the Company which the defendant was bound to deliver to the plaintiff. Ever since the company failed to deliver the articles to the plaintiff, he in all his letters to the various officers of the Railway administration, including the Agent of the East Indian Railway Company had been demanding the goods back or the price thereof.

The Company never replied to his letters saying that the goods were lost or destroyed. Rather the letter of the 2nd of February from the Claims Superintendent, Howrah therein he asked for the original *Bijak* from the plaintiff, shows that the Company's case never was that the goods was lost or destroyed. It is expressly stated in paragraphs 2 and 3 of the plaint that the plaintiff's case was based upon non-delivery of the goods.

It was for the first time alleged in the written statement that from enquiry the defendant had come to know that loss was due to robbery on the running train. The lower Court has disbelieved the plea set up by the defendant of the loss of the goods in the manner alleged by the Company and has expressly held that it was a case of non-delivery of the goods to the plaintiff by the Railway Company. Therefore the Risk Note in question does not apply to the case.

The last ground urged on behalf of the defendant is that the plaintiff's claim is barred by Section 76 of the Railway Act, for want of a proper notice in due time, to the Railway administration or the Company. On behalf of the plaintiff it is urged,

(1) that no notice was required to be served in this case upon the defendant under Section 76 of the Act, and

(2) that due notice was given to the defendant. I have fully considered the arguments on both sides and the law on the subject and I think that both the contentions of the plaintiff must prevail. Section 77 requires notice to be given only in case of a claim for "compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried." The Court below has found that the plaintiff's claim for compensation has been made on account of the " non-delivery" of the articles and not for the loss, " destruction or deterioration" of the same, and consequently the Court has held that Section 77 does not apply to the present case.

In the view of the Court below the distinction drawn by it between the claim for non-delivery and the claim for " loss destruction or deterioration" of property in charge of a carrier is a real one and finds support from the wordings in Sections 30 and 31 of the Indian Limitation Act. Section 30 refers to a claim against a carrier for compensation for losing or injuring goods, that is, for loss, destruction or deterioration of goods and Article 31 refers to a claim against a carrier for compensation for non-delivery or delay in delivering goods.

The view taken by the Court below is supported by the history of how Article 31 was for the first time introduced in the present Limitation Act of 1889 in order to cover the case of non-delivery as distinguished from a case of loss, destruction or deterioration of property in the hands of a career, such as, the Railway Company. There was a difference of opinion as to whether a case of non-delivery of goods would come under Articles 49, 115, or 30 of the Limitation Act.

Now, in the case of a claim for loss, destruction or deterioration to the property, the limitation would run from the date when the loss or injury occurred to the goods, and in the case of non-delivery from the time when the goods ought to have been delivered and were not delivered. This led to the difference of opinion that Article 30 would not apply to the case of non-delivery and possibly Article 49 or 115 should apply. There is again a cardinal difference between the " non-delivery" and the "loss, destruction or deterioration" of goods while in charge of a career, such as, the Railway Company.

In the former there is a deliberate withholding of the property from the person entitled to its delivery and in the latter the loss, destruction or deterioration takes

place on account of certain extraneous causes. In the latter case, there is no deliberate withholding of the property though there may be wilful neglect in not taking proper care of the goods. Articles 30 and 31 apply to the Railway Company as carriers of goods and therefore the distinction recognized in those Articles applies to the goods made over to a Railway Company for transit.

Sections 72 to 77 of the Act apply to the case of "loss, destruction or deterioration" of goods made over to a Railway Company for transit. Their responsibility is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act of 1872, as expressly laid down in Section 72 of the Railway Act. Clause (2) of the Section provides for an agreement whereby the aforesaid responsibility can be limited Risks Notes inForms A and B in Appendix E are in accordance with this clause (2). Section 77 requires a notice of the claim arising out of "loss, destruction or deterioration" of goods delivered to be carried by a Railway Company, to be given to the Railway administration within six months from the date of delivery of goods for carriage.

This is obviously with a view to enable the Railway administration to make an enquiry and investigation as to whether the loss, destruction or deterioration was due to the plaintiff's laches or due to the wilful neglect of the Company or its servants, or due to the theft or robbery committed by the servants of the Company. Unless notice of the loss, destruction or deterioration is given promptly, the enquiry would be prejudiced and therefore Section 77 prescribes that notice must be given within six months from the date of the delivery of the goods. But in a case of non-delivery such an enquiry will not be necessary. In this view also Section 77 has no application and the Company is not entitled to a notice in case of non-delivery.

The plaintiff expressly stated in the plaint that the defendant was not entitled to any notice inasmuch as the claim is for non-delivery of the goods. Still notice was given to the Agent of the Railway Company and also to the Traffic Manager "who settles all claims and to whom the Agents also refers claims for disposal." It will appear that in this case proper notice was given to the RailwayCompany. The goods was despatched on the 27th of April, 1920. On the 23rd of July, 1920, the plaintiff preferred his claim to the Divisional Traffic Manager, East Indian Railway Company, Howrah, giving the details of the packages which were not delivered to him, with the price of the same.

He did not receive any reply to that. He therefore wrote another letter, dated the 7th October, 1920, claiming the delivery of the property to him or its price, failing which, he said, he would be compelled to take assistance of the Court. This also was not attended to. On the 3rd November he addresses another letter numbered 108, to the Agent of the East Indian Railway Company repeating the claim and intimating that in case of not getting redress from him, he would seek his remedy in Court.

In this letter he referred to the previous letters (Exhibits 2A and 2B addressed to the Divisional Traffic Manager, Howrah. This letter was received by the Agent on the 5th November. This also was not attended to. On the 14th December, 1920, the plaintiff sent a letter through his pleader addressed to the Agent of the East Indian Railway Company; and this letter bears an endorsement of the Agent to the effect "G. T. M. for disposal.

It does not appear how it was disposed of and the plaintiff appears to have written another letter No. 16 R. K., dated the 19th January, 1921, to which he received the following reply from the Claims Superintendent, East Indian Railway Company, dated the 2nd February, 1921: "Will you please send me the original *Beejak* in this case under a registered cover for inspection and return". What happened thereafter does not appear, and the plaintiff then instituted the suit on the 2nd April, 1921.

The notice to the Agent is, no doubt, a few days beyond six months, but the notice to the Traffic Manager was promptly given, namely, within 2 months.

The plaintiff states in his plaint that notice was given to the Traffic Manager "who settles all claims and to whom the Agent also refers claims for disposal." On behalf of the plaintiff it is urged that this fact has been proved in this case, namely, that the Traffic Manager is the person who settles all claims and to whom the Agent refers claims for disposal, and consequently

the notice given to him was sufficient. It appears that the plaintiff substantiated his case by evidence which evidence was neither challenged in cross-examination nor was it rebutted by any substantive evidence on behalf of the defendant, in spite of a number of witnesses examined on behalf of the defendant.

On the other hand, upon the notice given by the plaintiff to the Agent on the 4th of December, 1920, the Agent endorses thereon the following order: "G.T.M. for disposal." This shows that the "G. T. M." had the full power to settle the claim of the plaintiff and materially corroborates the case of the plaintiff that the General Traffic Manager is the person to whom power has been assigned by the Agent. Therefore the plaintiff has proved in the present case that there was an assignment of the power of settling claims to the General Traffic Manager and the notice given to him was therefore proper.

Section 77 requires a notice to be given to Railway administration. "Railway administration" as defined by Section 3 (6) means the "Railway Company" in case of a Railway administration by Railway Company such as the East Indian Railway Company. A notice to be served upon the Railway administration may be served upon the Agent of the Railway Company. There are authorities to show that when an assignment is proved, notice to the General Traffic Manager is sufficient; vide *M. Seshachallam Chetty* v. *Traffic Manager, His Highness the Nizam's Guaranteed State Railway Company, Limited*, (1), *Madras and Southern Maharatha Railway Company Limited* v. *Bhimappa* (2), *Radha Sham Basak* v. *Secretary of State*(3), *V. Woods, Agent to the Assam-Bengal Railway Company* v. *Mehar Ali Bepari* (4), *Secretary of State* v. *Dip Chand Puddar* (5), *vide* also the recent decision of a Full Bench of the Madras High Court in *Mahadeva Aiyar* v. *South Indian Railway Company Limited* (6).

Therefore if any notice was necessary I think, in the present case upon the evidence, the notice to the General Traffic Manager was sufficient. The Full Bench of the Madras High Court in the case referred to above discussed all the cases on the point and held that it was open to the paintiff to show that by its rules or course of conduct the Railway Company held out to the public that notices might be given to an officer, such as, the District Traffic Superintendent, instead of to the Agent

Lastly, although no notice according to law is necessary, the plaintiff in the present case had given ample notice not only to General Traffic Manager but also to the Agent of the East Indian Railway Company as already detailed in the earlier part of this judgment. I, therefore, agree with the view of the Court below that Section 77 does not bar the plaintiffs obtaining a relief against the Railway Company in respect of the non-delivery of the goods in question.

In the circumstances of the case, on account of the inexplicable conduct of the servants of the Railway Company and on account of their not attending to any of the requests of the plaintiff, it is obvious that the plaintiff's case was in the main true as it has been found by the Court below. In the circumstances of the case justice lies on the side of the plaintiff and this Court will not exercise the discretionary power under Section 25 of the Small Cause Court Act unless any injustice is done by the Court below. When justice is on the side of the plaintiff, this Court will be slow to interfere on a technical point like notice being short by a few days, even if there were any substance in that contention. The words of his Lordship Farran, C. J., in the case of the *Poona City Municipality* v. *Raghunath Ramji* (7) may fitly be appropriated to the present cases.

In the second place, the defendants have no merits on their side. According "to the finding of the Small Cause Court, which has not been challenged, and which there is no reason to distrust, the goods imported into Poona in this case have actually become the property of Government, and the plaintiff is on the merits entitled to the refund which he has obtained, though from the certificate alone he may not be able to prove his right, and he has not taken

(1) (1913) 36 Mad. 65=10 M. L. T. 236=12 I. C. 76=(1911) 2 M. W. N. 195.
(2) (1912) 23 M. L. J. 511=17 I. C. 419.
(3) (1915) 44 Cal. 16=34 I. C. 130=20 C. W. N. 790.
(4) (1908) 13 C. W. N. 24=3 I. C. 479=4 M L. T. 427.
(5) (1897) 24 Cal 306.
(6) A. I. R. 1922 Mad. 362=45 Mad. 135 (F, B.).
(7) (1897) 21 Bom 250.

the precautions which entitle exporters under Rules 14 to 17, inclusive, to a refund." In *Agent and Manager of the South Indian Railway Company* v. *Vengu Pattar*(8) his Lordship Mr. Justice Phillips declined to set aside a decision of the Small Cause Court under the Act upon the ground that there was no merit in the plaintiff's case. To do that, his Lordships said, would be to do injustice in the case.

In terms of the aforesaid decision I dismiss the rule with costs. Hearing fee one gold mohur.

Rule discharged.

(8) (1911) 11 M L. T. 380=12, I. C. 169.

A.I.R. 1922 Patna 111.

DAS AND ADAMI, JJ.

Chandrama Kuer and another—Defendants-Appellants

v.

Ram Gayan and others—Plaintiffs-Respondents.

A. No. 25 of 1919, decided on 24th January 1922, from an original decree of the Sub-Judge, Shahabad.

(a) *Practice—Appellate Court—Should see if trial Court misdirected itself.*

An appellate Court ought not to differ from the trial Court on questions of fact unless there are strong and weighty reasons for doing so. The appellate Court has, however, certain responsibilities, as an appellate Court and it is bound to examine the evidence with a view to see whether the trial Court in giving its judgment did not misdirect itself. [P 112, C. 1.]

(b) *Evidence Act (I of 1872—S. 32 (2)—Entries in a deceased illiterate Chaukidar's diary not in his hand are not admissible.*

Entries made in the diary of a deceased illiterate Chaukidar not by the Chaukidar himself but by other persons at his instance, are not admissible under Section 32 (2) of the Evidence Act ; 2 P. L. J. 42 followed. [P. 113, C. 1.]

(c) *Hindu Law—Adoption—Authority from husband—Evidence—Appreciation of.*

Where the plaintiffs sued for a declaration that a widow had no authority to adopt and that she did not adopt and the evidence in the defendant's side which was more valuable and weighty than that of the plaintiffs showed that the widow had asked for Police help at the time of adoption.

Held: that the adoption must be held to be established.

Kulwant Sahai and *Sambhu Saran*—for Appellants.

Sivanarain Bose—for Respondents.

Das, J.:—This appeal raises the question whether any authority was given to Musammat Chandrama Kuer, one of the defendants-appellants by her deceased husband, Brij Nandan Singh, to adopt a son to him and whether Musammat Chandrama Kuer did in fact adopt defendant No. 2, the other appellant before us, as a son to her deceased husband. The plaintiffs, who are the respondents before us, claim to be the reversioners of Brij Nandan Singh, and their case is that Brij Nandan Singh died suddenly on the 24th *Baisak* 1308 corresponding with 27th April, 1901 and that he gave no authority to his widow to make any adoption to him.

Their case further is that there was in fact no adoption and that they are entitled to a declaration to the effect that the widow was neither entitled to, nor did she in fact, make an adoption to her deceased husband. The defendants resist the plaintiffs' action and they contend that Brij Nandan was ill for about twenty-four days and that on the 21st *Baisak* 1308 corresponding with the 24th April 1901, that is to say, three days before his death, he gave authority to Musammat Chandrama Kuer to adopt a son to him and that Musammat Chandrama Kuer did in fact, in pursuance of the authority given to her by her deceased husband, adopt the second defendant as a son to him on the 17th May 1916.

On the pleadings, the learned Subordinate Judge framed the following issues :—

1. Is the suit as framed tenable ?

2. Have the plaintiffs right to sue ? Are they reversionary heirs to Brij Nandan Singh ?

3. Whether defendant No. 2 has been adopted as alleged by defendant No. 1 ?

4. Did Brij Nandan Singh give defendant No. 1 authority to adopt ?

5. Is the suit barred under Section 42 of the Specific Relief Act ?

6. Is the adoption of defendant No. 2 illegal and invalid and without the

permission of Brij Nandan Singh?

7. Is the suit tenable against the principle of *factum valet*?

8. Are the plaintiffs entitled to any relief?

The learned Subordinate Judge has found that plaintiff No. 1 was the reversionary heir of Brij Nandan Singh and was entitled to maintain the action. He thought that Section 42 of the Specific Relief Act did not bar the suit and accordingly answered issue No. 5 in the negative and issue No. 1 in the affirmative. He considered issues Nos. 4 and 6 together as in fact they raised the same question and answered those issues in favour of the plaintiffs.

On a review of all the evidence in the case he came to the conclusion that Brij Nandan Singh did not give any authority to his widow to adopt a son to him and he also came to the conclusion that the widow did not in fact make any adoption. In the result he decreed the plaintiffs' suit and made the declarations in favour of plaintiff No. 1 substantially as claimed by him in the plaint.

The questions raised in this appeal are questions of facts and I entirely agree with the learned Vakil for the respondents that we ought not to differ from the trial Court, unless there are strong and weighty reasons for doing so. We have, however, certain responsibilities as an appellate Court and we are bound to examine the evidence with a view to see whether, in giving judgment in favour of the plaintiff No. 1, the learned Judge did not misdirect himself.

Now the way in which the learned Judge dealt with the whole case has been severely criticised by Mr. Kulwant Sahay on behalf of the appellants. It was pointed out that although the learned Judge refused to consider the evidence of Musammat Chandrama Kuer, and Musammat Jagatraj Kuer, the sister-in-law of Musammat Chandrama Kuer, on the ground that they were interested witnesses, he strongly relied upon the evidence of Ram Gavan Singh plaintiff No. 1 and Keshwar Singh another of the plaintiffs although they were far more interested in the result of the suit than the witnesses whose names I have just mentioned.

Now in supporting the case of adoption Musammat Chandrama Kuer was really asserting that she had divested herself of any proprietary interest in the estate of her deceased husband. There is therefore no *prima facie* ground for rejecting her evidence which was really against her pecuniary interest. On the other hand, the result of the suit would have serious effect on the fortunes of the reversioners. This was the first argument of Mr. Kulwant Sahay on the judgment itself.

Next he argued that the witnesses examined on behalf of the defendants deserved some consideration, whereas the learned Subordinate Judge dismissed them with the remark that some of them were relatives of Brij Nandan Singh, whereas others were partisans of Gokhula Prasad Singh, the father of defendant No. 2. It was pointed out that there is absolutely no evidence in the record to establish that any of the witnesses examined on behalf of the defendants is a partisan of Gokhula Singh and that to be a relative of Brij Nandan Singh is no disqualification whatever, since a relative of Brij Nandan Singh is likely to know the facts of the case.

But as a matter of fact, out of 17 witnesses examined on behalf of the defendants only 4 are relatives of Brij Nandan Singh defendant No. 4 who is the brother of Musammat Chandrama Kuer; defendant 12 who says that he is a relative of Brij Nandan Singh, but does not say what the relationship is; Gokhula Prasad Singh, the nephew of Brij Nandan Singh and the father of defendant No. 2, and Jagatraj Kuer, the widow of his brother. In my opinion, the learned Subordinate Judge has not dealt fairly with the evidence which was adduced on behalf of the defedants.

But it is remarkable that although he rejected the testimony of witnesses examined on behalf of the defendants on the ground that they were relatives of Brij Nandan Singh, still he made it a matter of comment that the defendants did not examine any of the gotias of Brij Nandan Singh residing in the village. The failure to examine the gotias who resided in the village is capable of a very simple explanation It is not likely that the gotias could contemplate with equanimity the prospect of the property passing out of the family to the family of the sister's son of Brij Nandan Singh.

It is not unreasonable to assume that they would have a great deal of sympathy with the

reversioners. In regard to the witnesses examined on behalf of the defendants, it may be pointed out that they were mostly men of wealth, position and respectability and were not in the slightest degree interested in the result of the suit.

[Here the learned Judge examined the correctness of an entry in the diary of a deceased illiterate Chowkidar sought to be used as documentary evidence by the plaintiffs]

In the next place I have very grave doubt whether the entry was at all admissible in evidence. It was argued by the learned Vakil for the respondents that it was admissible under Section 32 (2) of the Evidence Act, but that clause is clearly not applicable. It was held by the late Chief Justice of this Court and Roe, J. in the case of *M. Naina Koer* v. *Gobardhan Singh* (1) that entries made in the diary of a deceased illiterate Chowkidar, not by the Chowkider himself but by other persons at his instance, are not admissible under Section 32 (2) of the Evidence Act.

Had the entry in this case been made by Bilat Ahir, then no doubt it would be admissible under Section 32 (2) ; but it was not; and it has not been established that it was the duty of Ramlagan in the ordinary course of business to record these matters. But in the view which I take of the entry, the question of law does not arise.

[The learned Judge then examined the oral evidence of some of the witnesses to find out the cause of the death of Brij Nandan.]

It is unnecessary to go through all the evidence adduced on behalf of the defendants. It is sufficient to say that it appears to us to be reliable and of a class superior to that to which the witnesses called on behalf of the plaintiffs belong. Their evidence receives strong corroboration from the account book which has been adduced in the case and there is no reason , whatever why it should not be acted upon. I ought to mention that the evidence of the ladies who were examined on commission have made a deep impression on me. They seem to have given their evidence in a straightforward manner and there is no *prima facie* reason to reject their testimony. I quite concede that if Chandrama Kuer had attempted by adoption to benefit her father's family her evidence might be open to very grave suspicion ; but the adoption which she sets up is that of the son of a nephew of her husband. The adoption was a natural one and against her pecuniary interest.

There is no suggestion in the case that there was any enmity between her and the plaintiffs and there is no reason at all why she should have divested herself of her proprietary interest in the estate in favour of one who did not belong to her father's family, but was a relation of her husband ; specially as there is no suggestion that there was any enmity between her and the plaintiffs.

The learned Subordinate Judge thought that the surrounding circumstances stood against the case of an adoption. The learned Subordinate Judge accepted the following facts for his decision on the point. Brij Nandan had no issue by his first wife though he had lived with her for 12 years from the time of the marriage. He then married defendant No 1 and his married life with Chandrama Kuer did not last more than 6 or 7 years.

In the opinion of the learned Subordinate Judge it is improbable that Brij Nandan should have given an authority to his wife to adopt a son as there was no reason why he should not have a child by her before his death. If the case of the plaintiff s that Brij Nandan died suddenly be accepted, then there may be something in the view which has been taken by the learned Subordinate Judge; but in my opinion the plaintiffs have entirely failed to establish that Brij Nandan died suddenly.

I accept the case of the defendants that Brij Nandan had a protracted illness lasting for 24 days. If that be so, then what are the facts ? first, that Brij Nandan married Chandrama Kuer obviously with the intention of having a son by her, secondly he was seriously ill and it may be that he took the view that he will not recover. It is not possible to say what was in the mind of Brij Nandan as he lay ill for 24 days ; but in my opinion, there is nothing improbable in the story set up by Chandrama Kuer that after an illness lasting for 24 days Brij Nandan gave authority to adopt a

(1) (1919) 2 P. L. J. 42=37 I. C. 424=(1919) P. H. C. C. 352.

son to him.

The learned Subordinate Judge thought that, as on the evidence of defendants, the condition of Brij Nandan had not materially changed on that critical day, namely, the 21st *Baisak* it is improbable that he could have given her permission that day. That is the first line of attack adopted by the learned Subordinate Judge. The question in my opinion is not what view the defendants and their witnesses took of the illness of Brij Nandan, but what view Brij Nandan himself took of it. As to that there can of course be no evidence.

The learned Subordinate Judge, then changing his line of attack, thought that Brij Nandan must have had brain complications on the 21st *Baisak*, and therefore he was not in a proper state of mind to give any authority to his wife to adopt a son. The foundation for this opinion is that there are entries in the book of account showing that *Kasturi* and *Attar* were purchased on the 20th and 21st *Baisak*. The learned Subordinate Judge says that everybody knows that *Kasturi* and *Attar* are given to patient when there are brain complications and that accordingly if the defendants' account book be genuine, Brij Nandan was suffering from brain complications on the 21st *Baisak*.

In my opinion the reasoning is far too speculative to merit any examination. It may be that these articles were purchased for future use, if occasion arose for them ; but no conclusion can be founded on the sole fact that *Kasturi* and *Attar* were purchased on the 20th and 21st *Baisak*. In my opinion having regard to the fact that Brij Nandan had lived through at least 18 years of married life without having a son the story told by the defendants becomes inherently probable. I hold that Brij Nandan did give authority to Chandrama Kuer to adopt a son to him.

The next question is, did Chandrama Kuer adopt a son in pursuance of the authority which was given to her? Now, on this point the evidence is all one way but the learned Subordinate Judge has come to the extraordinary conclusion that there was no adoption by the widow. Now it may be pointed out that, if in fact Chandrama Kuer wanted to set up defendant No. 2 as her husband's adopted son, there is no reason at all why she should not have gone through the ceremony of adoption. The question would have stood on a different footing had it been raised after the death of Chandrama Kuer. There is absolutely no reason to hold that there was in fact no adoption when it was in the power of Chandrama to go through the ceremony of adoption. The evidence in my opinion is conclusive on the point.

It appears that before the adoption, Chandrama Kuer took the precaution for asking for police help as she thought that the plaintiffs might create disturbances. Exhibit A is a personal diary of Sub-Inspector B. K. Roy and his report shows that he "left the police station for Burdiha with constables Suleman and Sukhdeo Missir to see that no breach of the peace takes place at the time of adoption of a son to Chandrama as ordered by the Magistrate."

The Sub-Inspector has given evidence in the case and he says that he did go to Burdiha in order to preserve peace. The learned Vakil for the respondents has argued that his evidence is not evidence of adoption for he does not say that he was present at the ceremony of adoption. This is true but the evidence of the Sub-Inspector proves that Chandrama Kuer had made preparations for the adoption. In my opinion, it is impossible to say that no adoption in fact took place if Chandrama Kuer had in fact asked for police and was prepared to go through the ceremony of adoption. With what object, it may be asked, would Chandrama Kuer not go through that ceremony if it was her desire to do so?

There is no evidence on the other side worth considering. They were admittedly not present at the adoption and their evidence cannot possibly establish anything. In my opinion there is abundant evidence to establish that defendant No. 2 was in fact adopted by defendant No. 1 on the 17th May, 1916.

I would allow this appeal, set aside the judgment and decree passed by the learned Subordinate Judge and dismiss the plaintiffs' suit with costs in this Court and in the Court below.

Adami, J.:—I agree. *Appeal allowed.*

A. I. R. 1922 Patna 114.

DAWSON MILLER, C. J. DAS AND ADAMI, JJ.

Jugeshwer Misra and others—Decree-holders-Appellants v.

Nath Koeri—Judgment-debtor-Respondent.

Mis. Appeal No. 97 and 3 of 1921, decided on 16th January, 1922, from an order of District Judge, Muzaffarpur.

Bengal Tenancy Act—Non-transferable occupancy holding—Sale of the holding in execution of the money-decree against the holder is valid.

A decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree. Further a landlord who has obtained against his tenant a money-decree can, in execution thereof sell the non-transferable occupancy holding without the tenant's consent.

[P. 115, C. 2; P. 117, C. 2.]

Kulvant Sahey and *Bhagwan Prasad*—for Appellant.

Nisru Narain Sinha—for Respondent.

Das, J.:—The question raised in this appeal is a very important one. It has been consistently held in this Court that except under certain circumstances non-transferable occupancy holdings cannot be sold. The decisions of our Court are admittedly based on the decision of the Full Bench of the Calcutta High Court in what is known as *Dayamayi's case* (1). The Special Bench of the Calcutta High Court in the case of *Chandra Benode Kundu* v. *Sk. Ala Bux* (2) has considerably modified the first rule laid down in *Dayamoyee's* case (1).

It in effect says that the tenant cannot object to a sale if the landlord consents to it. In the case before us it is the landlords who have brought the occupancy holding to sale and the question is whether the tenants can object to the sale of the occupancy holding. On the decisions of the Patna High Court, based as they are on *Dayamoyee's* case (1) the tenants can object, but on the decisions of the Special Bench of the Calcutta High Court in case (2) the tenants cannot object."

We are at present unable to say that the decision in *Dayamoyee's* case (1) is erroneous, but we consider the point as of very great importance as cases of this nature are always coming before us. We think that the question ought to be decided by the Full Bench of this Court.

Place the matter before the learned Chief Justice for his orders.

Dawson Miller, C. J.:—These two appeals were referred to the Full Bench for final determination and were ordered to be heard together. The questions for determination are similar though not precisely the same in each case.

Miscellaneous Appeal No. 97 of 1921 arises out of an order of the District Judge of Muzaffarpur affirming an order of the Munsif passed in execution proceedings and allowing the judgment-debtor's objection to the sale of a portion of his non-transferable occupancy holding in execution of a money-decree passed in favour of the appellant who is not his landlord.

The Munsif and the District Judge who considered that the case was governed by the decision of this Court in *Macpherson* v. *Debi Bhusan Lal* (3) allowed the objection and dismissed the execution proceeding.

On appeal a Division Bench of this Court referred the case to the Full Bench for determination and ordered it to be heard together with Miscellaneous Appeal No. 3 of 1921 which had previously been referred.

The point which arises for determination in Miscellaneous Appeal No. 97 of 1921 is whether the decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord of which there is no evidence, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree, there being no local custom of transferability.

The case *Macpherson* case (3) does not directly determine the question arising in this appeal. The question there was between landlord and tenant, the landlord seeking to execute the money-decree against his tenant's holding and not against a portion only. The precise point, however, arose and was decided against the decree-holder in the earlier

(1) (1914) 42 Cal. 172=18 C. W. N. 971=27 I.C. 61=20 C.L.J. 52 (F. B.).
(2) A.I.R. 1921 Cal. 15=48 Cal. 184 (S.B.)
(3) (1917) 2 P.L. J. 530=42 I. C. 36.

case of *Sadavi Kunwari* v. *Palaknath Rai* (4).

So far as I am aware it has never been directly decided that an occupancy holder cannot transfer an interest in a part of his holding to another even without his landlord's consent, provided he does not abandon or relinquish the whole holding. Such a transaction does not create a new tenancy between the purchaser and the landlord without recognition, but it is binding between the tenant and the purchaser; and the latter has a subsisting right notwithstanding the absence of recognition by the landlord. It may be a precarious right dependent largely on the good will of the tenant but the transaction affords no ground for ejectment under Section 25 of the Bengal Tenancy Act.

Moreover the case of *Dayamayi* v. *Ananda Mohan Roy Chaudhury* (1) upon which the respondent relies lays down in clear terms that the transfer of the whole or a part of the holding is operative against the tenant where it is made voluntarily and that where the transfer is of a part only of the holding 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 tenancy.

The question, therefore, arises whether the tenant can be made to do involuntarily at the instance of creditor that which he can do voluntarily. In *Agarjan Bibi* v. *Panaula* (5), which was also relied on by the respondent the power of voluntary transfer was said to be the measure of the power of involuntary alienation. Exactly the same view had been expressed some 30 years earlier in *Dwarka Nath Misser* v. *Harrish Chandra* (6), where it was laid down that there was no ground for distinguishing a voluntary sale from a sale in execution.

In *Agarjan Bibi's* case (5), it was, however, held that the purchaser of a portion of non-transferable *raiyati jote* could not obtain joint possession without the landlord's consent and that the tenants other than the vendor in possession of a portion of the *jote* could question the validity of the transfer. The interest of the co sharers of the *jote* were involved in that case which should not be lost sight of. Assuming, however, that *Dayamayee's* case (1) is good law, in so far as it denies the landlord's right to question a voluntary transfer of a portion of the holding, except under special circumstances not arising here, it is difficult to see why that which the tenant can alienate at his will cannot be the subject of a sale in execution of a decree against him.

But *Dayamayee's* case (1) further laid down with regard to involuntary transfers of the whole or a part of the holding that they are valid as against the *raiyat* only where the *raiyat* with knowledge fails or omits to have the sale set aside. In so deciding the Full Bench was merely applying to sales of a whole or a part of the holding the principle, embodied in *Bhiram Ali Shaikh Shaikdar* v. *Gopi Kanth Shaha* (7) which was to the effect that an occupancy holding was not saleable at the instance of the occupancy *raiyat* or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. *Bhiram Ali's* case (7) was decided in 1897 and for the first time laid down the proposition there broadly stated.

It excluded the case of a landlord seeking to sell in execution of a money decree, but up to that time there had been no decision to the effect that the holding could not be transferred in execution where the landlord was a consenting party. Indeed from 1834, when the Sudder Dewanny Adaulat in the case of *Neel Kanth Roy* v. *Kasheenath Ghose* (8) issued Construction No. 890 up to 1897 the power of transfer with the landlord's consent appears not to have been questioned. *Bhiram Ali's* (7) was generally, though not consistently, followed by the Calcutta High Court until 1920, when the whole question of the transferability of occupancy holdings was elaborately discussed and the authorities from the earliest times as well as the statutes relating to the subject were considered by the Special Bench of the Calcutta High

(4) (1916) 1 P. L. J. 257=33 I. C. 937=3 P. L. W. 104.
(5) (1910) 37 Cal. 687=14 C. W. N. 779=6 I. C. 452=12 C. L. J. 169.
(6) (1879) 4 Cal. 915.
(7) (1897) 24 Cal. 355=1 C. W. N. 396.
(8) (1834) Sudder Dewanny 268.

Court in *Chandra Benode Kundu* v. *Ala Bux* (2).

The view presented on behalf of the tenant in that case was that the right of occupancy was a personal right or privilege and not an interest in land capable of transfer, and that the only incidents attaching to the right were those conferred by the Rent Acts of 1869 and the Bengal Tenancy Act of 1885 as subsequently amended. It was sought to explain the cases where a voluntary transfer of the whole or a part of the holding had been upheld as against the tenant, of which many instances might be cited, as founded on the doctrine of estoppel or the rule that transferor cannot derogate from the grant and it was argued that involuntary transfers might be explained on the ground of waiver.

It is difficult, however, to see how these doctrines could apply so as to validate a transfer in a case where, *ex hypothesi*, there was nothing that could be transferred. The Special Bench consisting of the Acting Chief Justice and six other Judges unanimously decided that the case of *Bhiram Ali Shaik Shaikdar* v. *Gopi Kanth Shaha* (7) was wrongly decided and overruled that and subsequent decisions based upon it. It further decided that the proposition laid down in *Dayamayi* v. *Ananda Mohan Chaudhury* (1), which related to the transfer of occupancy holding apart from local usage, required modification and that the first proposition there laid down should be stated thus:

"The transfer of the whole or a part is operative as against the *raiyat*, whether it is made voluntarily or involuntarily."

This decision by establishing the validity as against the *raiyat* of all cases of transfer of a whole or a part of the holding recognised the test formulated by Jackson, J., in *Dwarka Nath Misser* v. *Hurrish Chunder* (6) in 1871 that the measure of the liability to involuntary alienation is the power of voluntary alienation and removed all difficulty which might arise in the application of Section 60 of the Civil Procedure Code, which renders saleable in execution, all property of the judgment-debtor over which he has a disposing power. It further decided that the right of an occupancy holder is an interest in land and not merely a personal right.

We have been asked by the learned Vakil for the respondent to dissent from the views expressed by the Special Bench in *Chandra Benode Kundu's* case (2) and the arguments addressed to us have been along the same lines as those there advanced. In my opinion that case correctly expresses the law and the contrary view expressed by this Court in *Sadavi Kunwari* v. *Palaknath Rai* (4), which followed that part of *Dayamayi's* case (1), which was dissented from by the Special Bench, should no longer be followed. I would answer the point of law above formulated in the affirmative. The appeal is accordingly decreed and the application for execution allowed with costs in all Courts including the costs of this reference.

Miscellaneous Appeal No. 3 of 1921.

This appeal raises nearly the same question but the facts are somewhat different. In this case the landlord is the decree-holder and his tenant is the judgment-debtor. The decree is a money-decree. The landlord sought to execute his decree by attachment and sale of his tenant's occupancy holding. It must be conceded in such a case that the landlord consents to the transfer. The Munsif and the District Judge dismissed the application for execution being bound by the decision of this Court in *Macpherson* v. *Debi Bhusan Lal* (3).

In view of the recent decision of the Special Bench of the Calcutta High Court in *Chandra Benode Kundu* v. *Ala Bux* (2), the case was referred on appeal to this Court for decision by a Full Bench. The question for determination is whether a landlord who has sued his tenant and obtained against him a money-decree, can in execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent.

This question is precisely that which arose for determination in *Chandra Benode Kundu's* case (2) and with which I have already expressed my concurrence in the above judgment. I would, therefore, answer the question in the affirmative and hold that *Macpherson* v. *Debi Busan Lal's* case (3) was wrongly decided. The appeal should be decreed and the application for execution allowed with cost in all the lower Courts including the costs of the appeal to the High

Court, but not of this reference in which the parties did not appear.

Das, J.:—I agree.

Adami, J.:—I agree.

Appeals allowed.

A. I. R. 1922 Patna 118.

COUTTS AND MACPHERSON, JJ.

Brij Behari Lal—Plaintiff-Appellant

v.

Chairman, Daltonganj Municipality—Defendant-Respondent.

S. A. No. 897 of 1920, decided on 2nd August, 1921, from the appellate decree of the Dist. J., Daulatganj.

Bengal Municipal Act, Ss. 237 and 241—Building of a Chhapari is an erection requiring sanction—Sub-sanction with reservation in the absence of rules under S. 241 is ultra vires.

The building of the *verandah* is an erection or re-erection within the meaning of Section 237 of the Bengal Municipal Act, and, therefore, sanction is necessary But unless rules are made under Section 241, the Municipality must either grant or refuse sanction without reservation where no such rules are framed, a sanction with reservation is *ultra vires* and can be disregarded. [P. 118, C. 2; P 119, Cs. 1 and 2.]

Kailaspathy and *Shiveshwar Dayal*—for Appellant.

Kulvant Sahay—for Respondent.

Coutts, J.:—This was a suit for declaration that the plaintiff had a right to build a *verandah* on his house in the Daltongunj Municipality and for a permanent injunction restraining the Municipality from demolishing it or any part of it.

It appears that the plaintiff had an old house which he pulled down and in the year 1910 he obtained sanction to build a two-storeyed house in its place. In 1918 he applied for sanction to build the *verandah* in question in this suit and sanction was given with the reservation that it was not to extend towards the road beyond a certain line marked AA in the map. The plaintiff disregarded the reservation and built the *verandah*. The Municipality then ordered him to demolish it and it is on account of this order that the present suit has been brought The suit was dismissed by the Munsif and on appeal to the District Judge that decision was upheld. The plaintiff appeals to this Court on two grounds:—

(1) that the building of the *verandah* is not an erection or re erection within the meaning of Section 237 of the Bengal Municipal Act, and, therefore, no sanction is necessary, and

(2) that the reservation in the sanction is *ultra vires* and the plaintiff is entitled to disregard it.

So far as the first point is concerned there is no difficulty. The *verandah*, it is true, was erected on the site of an old *verandah* but that the old *verandah* had disappeared even before 1910. We have been referred to *Chairman of Gaya Municipality* v. *Sham Lal Gupta* (1) but the circumstances of that case were entirely different to those of the present case which clearly comes within the provisions of Section 237. This contention, therefore, fails.

The second point, however, is a more difficult one and on this, I am of opinion that the appellant must succeed. Section 237 enacts that the Commissioners

"may sanction the said building either absolutely or subject to any directions which the Commissioners may deem fit to issue in accordance with the rules, if any, made under Section 241."

In the Daltongunj Municipality no rules have been framed under Section 241 and the contention is that this being so, the Commissioners must either refuse or grant sanction absolutely and without reservation. There can, I think, be little doubt that this is so. It is urged on behalf of the respondent Municipality that if the Commissioners can sanction absolutely they can certainly sanction subject to reservation. This at first sight seems plausible, but if it were the correct view, the words "to issue in accordance with the rules, if any, made under Section 241" would be superfluous.

It is further urged that the words "if any" mean that if no rules are made under Section 241 the Commissioners may make any reservation they like. I am unable to accept this interpretation because if it were correct there would be no object in the Commissioners making rules under Section 241 and thus fettering their discretion. The question is by no means free from doubt, but in my opinion the correct interpretation of the law is that unless rules are made under Section 241 the Municipality must either grant or refuse sanction without reservation.

Lastly it is contended on behalf of the respondents that the plaintiff having

(1) (1917) 3 P. L. J. 33=2 P. L. W. 190=141 I.C. 713=(1917) P.H.C.C. (Sup.) 338.

accepted the sanction subject to the reservation, he is not entitled now to say that the reservation is *ultra vires*. This cannot be so, because if the restriction is *ultra vires* he is not bound by it and is entitled to disregard it; so that the whole question depends upon whether the restriction is *ultra vires* or not. In the present case, in the absence of rules made under Section 241, I am of opinion that it was *ultra vires*.

For this reason, therefore, I would set aside the decrees of the lower Courts and I would decree the suit with costs. The plaintiff-appellant will have a declaration that he is entitled to erect buildings in accordance with his notice under Section 237 (1) and the defendant will be restrained by injunction from demolishing such buildings on the plea that they have been or are being constructed in contravention of a legal order of the Commissioners passed under Section 237 (1).

Macpherson, J.:—I agree. The appellant fails on the first point because in building the *verandah* and rooms he certainly erected or re-erected house within the meaning of the enactment. But his second contention succeeds. The appellant duly gave notice to the Commissioners under Section 237 (1), the Commissioners accorded sanction to the erection, not absolutely but subject to "written directions"; the only clog on a sanction which is contemplated by that section, consists of "written directions" issued "in accordance with the rules if any made under Section 241;" the existence of rules under Section 211 regulating "the erection or re-erection of house, not being huts" is, therefore, a condition precedent to the issue of "written directions" under Section 237 (1); no such rules having been made by the Commissioners of the Daltongunj Municipality, the order of the Commissioners upon the appellant's notice was not a "legal order" within the meaning of that expression in Section 238 (1) since, having failed to utilize the enabling Section 241, they could only either refuse or sanction absolutely. As he had not contravened "a legal order" no action could be taken by the Commissioners against the appellant under Section 238 (1).

The provision applicable is Section 238 (2) and the Commissioners having neglected or omitted within six weeks after the receipt of appellant's valid notice under Section 237 (1) to make and deliver to appellant any legal order, that is, an order of refusal or of absolute sanction in respect of his notice, they are deemed to have sanctioned the proposed "house" absolutely. On the above finding Section 242 (A) also has no application at all. The Commissioners have, therefore, no right to interfere with the erection of the *verandah* and rooms, so long as it is in accordance with the plaintiff-appellant's notice under Section 237 (1). *Appeal allowed.*

A. I. R. 1922 Patna 119.

DAWSON MILLER, C. J. AND COUTTS, J.

Kamla Prasad Chaudhuri—Plaintiff-Applicant v.

Kunj Behari Mander—Defendant-Opposite Party.

Civil Rev. No. 2 of 1920, decided on 22nd March, 1920.

Civil P. C. (Act V of 1908), O. 47, R. 1—Review—Omission to raise a point of law is not an error apparent on face of the record and cannot afford sufficient reason for review.

A mere omission to raise a point of law, which, had it been raised, might and probably would, have brought about a different result, is not necessarily "a mistake or error apparent on the face of the record" for which a review can be claimed. Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in Order 47, Rule 1, yet from the earlier part of the clause it is clear that a point which might have been but which is not discovered at the trial by the exercise of due diligence, is not intended by the section to afford any sufficient reason for review 20 C.W.N. 1099, distinguished. 13 Cal. 62, followed. [P. 120, C. 2.]

C. C. Das and *S. N. Bose*—for Applicant.

Dawson Miller, C. J.:—This is an application by the plaintiff for a review of a decision of this Bench, dated the 2nd February, 1920. The decision, which it is sought to review, decided that a transfer of an occupancy holding, which was only transferable with the consent of the landlord, was liable to be set aside at the instance of the landlord to the extent of his proprietary share. It appears from the facts of the case that the holding was mortgaged to the 12 annas proprietors of the mauza, and was sold after a mortgage-decree had been obtained by them against the occupancy holder, not

in pursuance of that decree, but privately to the plaintiff in the suit, who was the holder of the other four annas proprietary share in the *mauza*.

It is contended before us in support of this application that the sale of the holding was really a sale in order to pay off the mortgage-debt due by the occupancy holder to his mortgagees, and that the money was used for that very purpose, and that therefore any objection by the landlords who were the mortgagees to the sale of the property in these circumstances would be a clog upon the equity of redemption. No authority has been quoted to us in support of the proposition that in the case of a mortgage to the landlords of a *raiyati* holding, where the holding is not transferable without the consent of the landlords, they are bound to permit the mortgagor to transfer the holding to anybody whom he may choose in order to put himself in funds to pay off the mortgage; but even assuming that this was a point of law which would probably be decided in favour of the present applicant, we have to consider in this case whether he has in fact disclosed any reason for allowing the present petition for review.

The facts of the case were known from the very start. The case itself is a very old one. It was instituted in 1911. It was remanded by the High Court at Calcutta for decision upon certain questions relating to the transferability of the holding and whether the defendants were estopped from questioning the plaintiffs' title. That was some years ago, at all event before the year 1916, and the case came up after remand to this Court on appeal; and throughout that period it has never been suggested by anybody that the refusal of the defendants, the 12 annas proprietors, to assent to the transfer of the property was a clog upon the equity of redemption. After all these years, when much money has been spent upon the litigation and after a decision has been given by this Court, we are asked to allow the plaintiff an opportunity of reviewing that judgment in order that he may put forward and argue this point of law.

In support of his application he has referred to the case of *Nuri Mian* v. *Ambica Singh* (1). That case appears to me to have gone very far. No special reason is assigned for granting the application for review in the judgment of the Chief Justice, but in the judgment of Mr. Justice Mookerjee it is laid down that, where a point of law might have been, but was not, raised in the Court below, that is good reason for allowing a review; and he goes further and says that in such a case "the alleged error, if it be an error, is apparent on the face of the record."

It may be that cases such as that ought in certain circumstances to be reviewed, but I cannot accept it as a rule of universal application, nor do I think that it necessarily follows, that in such cases it is an error apparent on the face of the record. It may be that in certain cases an application for review on the grounds which I have just referred to may be justified by the words in Order 47, Rule 1, which provide that a review may be granted "for any other sufficient reason." But I am not satisfied that the mere omission to raise a point of law, which, had it been raised might and probably would have brought about a different result, is necessarily a "mistake or error apparent on the face of the record" for which a review can be claimed.

There have been other decisions, one of which is of the Bombay High Court, in which a review was allowed also on the ground that an important question of law had not been raised in the case and it was a matter which affected the general commercial community of Bombay. In such a case it may well be that there were "other sufficient reasons" for allowing a review within the meaning of Order 47, Rule 1. But in the case of *Gopal Chandra Lahiri* v. *Solomon* (2) the Chief Justice, Sir Richard Garth, decided that although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason in Section 623 of the Civil Procedure Code of 1882 (which corresponds now to Order XLVII, Rule 1), yet from the earlier part of the clause it is clear that a point which might have been, but which was not discovered at the trial by the exercise of due diligence, was not intended by the section to afford any sufficient reason for review.

It is obvious in this case that, if there is any real substance in the point which has now been urged before us

(1) (1916 44 Cal. 47=20 C. W. N. 1099= 34 I.C. 869=24 C. L. J. 140.

(2) (1886) 13 Cal. 62.

that point might easily have been discovered and indeed ought to have been discovered by due diligence during the long and protracted course of this case; but nobody up to the present moment has ever considered the question or argued the point in any of the Courts before which the case has come; and it certainly does not appear to us that the matter is one of such general importance to the agricultural community of this province that we ought on that ground to admit the present application.

In my opinion, although there are cases where an application of this sort ought to be allowed, I do not think that the mere fact that a point of law which might have been raised was not raised in the case is necessarily in itself sufficient to entitle the applicant to have his case reviewed, and it would be a dangerous precedent if we were to lay down a general rule that in all such cases a review ought to be granted. There are no other special reasons that I can see in the present case which would entitle the applicant to have the case now re-opened. It does not affect the interests of anybody else except those immediately concerned. The question is not one which is, likely to crop up very frequently in the future and if it does then the matter can be decided.

In the present case it seems to me that no satisfactory reason has been made out for granting this application and it must be refused.

Coutts, J. :—I agree.

Application refused.

A. I. R. 1922 Patna 121.

ROE AND JWALA PRASAD, JJ.

Ramghulam Singh and others—Plaintiffs-Petitioners

v.

Sheodeonarain Singh—Defendant-Opposite-Party.

Civ. Rev. Nos. 226 to 229 of 1918, decided on 14th March, 1919, against an order of Sub-J., Muzafferpur dated 19th August, 1918.

Civil P.C. (Act V of 1908), O. IX, R. 13—Application under dismissed for default—Petition to set aside does not lie—Noron it be treated as a review application—Nor does S. 153 of the code apply—Civil P. C., O. 47, R. 1, S. 153.

No application under Order IX will lie against an order under Order IX. 4 P. L. J. 135 (F. B.) followed.

Order XLVII does not apply in a case, where the order passed under Order IX was made by an officer other than the officer who made the original order under Order IX, Section 153 also cannot apply to the matter, as the dismissal order was not an error or defect in the proceedings, and it may have been an erroneous order as made on the merits. The only remedy open to the aggrieved minors is to appeal against the original order made under Order IX. [P. 121, C 2.]

Lachmi Narain Singh—for Petitioners.

Khurshed Hussain—for Opposite-Party.

Judgment:—The facts of this case are that a suit was decreed on contest against certain defendants and *ex parte* against certain other defendants, who, it appears, were minors. The minors applied to have the *ex parte* decree made against them set aside. They made default in appearance and their application under Order IX was rejected.

Thereupon they made a further application under Order IX, asking that the dismissal of their former application under Order IX for default should be set aside. The lower Court has made that order after going into the merits of the case. In appeal it is contended that the order was made without jurisdiction inasmuch as Order IX has no application to applications under Order IX.

Having regard to the Full Bench decision in the case of *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal* (1). We must hold that in this Court at least no applications under Order IX will lie against an order made under Order IX. The order made by the lower Court is therefore set aside. We are asked to regard the order as made under Order XLVII. That we cannot do for it was an order made by an officer other than the officer who made the original order, nor can we say that Section 153 has any application to the matter. The dismissal order was not an error or defect in the proceedings, it may have been an erroneous order as made on the merits. The only remedy open to the aggrieved minors is to appeal against the original order made under Order IX.

The application is therefore allowed with costs and the order restoring the

(1) 4 P. L. J. 135=49 I. C. 619=(1919) P. H. C. C. 75 (F. B.)

original application under O. IX is set aside. The original applications will stand dismissed for default subject to any appeal that may be made against them. This order will govern the analogous cases. We give a consolidated hearing fee of three gold mohurs. The record may be sent down as early as possible.

A. I. R. 1922 Patna 122.

DAS AND BUCKNILL, JJ.

Kumar Kalikanand Singh and others—Defendants-Appellants.

v.

Shiva Nandan Prasad Singh and others—Plaintiffs-Respondents.

A. Nos. 85 and 86 of 1918, decided on 19th July, 1921, from the appellate decree of Sub-J., Monghyr.

(a) *Hindu Law—Joint family—Manager—Debt incurred for purchasing property for benefit of estate—Lender not acting* mala-fide *—Debt is binding on family.*

The *karta* of a joint family is entitled to borrow money in order to purchase property under certain circumstances. If the lender is shown to have acted *mala fide*, he cannot ask the Court to uphold the charge in his favour against the heir, grounded on a necessity which his wrong has helped to cause. The lender cannot act merely upon the representation made to him by the manager but he is bound to make an honest enquiry into the necessity of the loan with reference to the parties with whom he is dealing, that is to say, with reference to the representation made to him by the parties with whom he is dealing. The necessity for the enquiry, is an equitable rule framed for the protection of the lender. If the lender does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the charge and the lender is not bound to see to the application of the money. A complete codification of the evidence that would, in all cases, establish a case of *mala fides* against the lender is impossible. Provided that the transaction is one into which a prudent owner would enter, the manager of a joint family is entitled to bind the joint family properties by a mortgage executed by him. It is wholly immaterial whether the minors join in the mortgage or not. As a matter of law, they cannot join in the transaction; the transaction binds the joint family properties, although there be no registration, and consequently no execution on behalf of the minors. [P. 126, C. 2; P. 135, C.1, 2; P. 136, C 2; P 143, C. 1; and P. 144, C 1.]

(b) *Evidence Act, S. 114—Presumption must be against party suppressing accounts.*

Where the creditors of a family *prima facie* established that a purchase by the manager was for the benefit of the family but the defendants asserted that the property was not yielding a proper income and that therefore it was an improvident transaction.

Held: it was for the defendants to establish their case by production of their account books, when they are sought to be suppressed every presumption consistent with facts must be made against the defendants. [P. 130, C. 1, 2.]

(c) *Evidence—Proof of document can be waived by parties but not relevancy.*

The question of relevancy of a document is a question of law and can be raised at any stage but the question of proof is a question of procedure and can be waived by the parties. [P. 143, C. 1,]

(d) *Deed—Construction—All parts must be construed harmoniously—Erroneous addition to previous correct description will not vitiate latter.*

The best construction of deeds and the one most satisfactory to the Courts is to make each part expound the other, so as to make all parts agree and if a doubt arises as to the construction of a grant and the doubt can be removed by construing the deed adversely to the grantor, this will be done. As soon as there is an adequate and sufficient definition of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it. [P. 145, C. 1; P. 146, C. 1.]

(e) *Hindu Law — Debt—Antecedent debt, doctrine of, is applicable only when relationship of father and son exists.*

The doctrine of antecedent debt in Hinduism exists only when the relationship of father and son exists. [P. 153, C. 1.]

Manuk, S. N. Sahai, Hari Bhusan Mookerji, Kulwant Sahay, S. N. Palit, D. N. Sircar and *Baikunth Nath Mitter*—for Appellants.

P. K. Sen, C. C. Das, A. C. Sen, Syed Hyder Imam, Purnendu Narain Sinha, Naresh Chandra Sinha and *Abani Bhusan Mookerji*—for Respondents.

Das, J.:—The substantial question which we have to decide in these appeals is, whether the plaintiffs are entitled to enforce the mortgage bonds executed in their favour on 18-7-1904, and on 7-11-1912, against the minor sons of the executants. The bond of 18-7-1904, forms the subject-matter of Suit No. 464 of 1914 and of Appeal No. 85 of 1918; the bond of 7-11-1912, forms the subject-matter of Suit No. 465 and of Appeal No. 86 of 1918. The material facts are as follows:—

Kumar Srinandan Singh, the *Malik Zemindar* of extensive properties known as Srinagar Raj, died sometime in 1880 leaving a widow, Jugrama Koer, and three minor sons, Nityanand Singh, Kamalanand Singh and Kalikanand Singh. Nityanand was the son of Srinandan by a predeceased wife, and Kamalanand and Kalikanand were his sons by Jugrama Koer. In 1882, the Court of wards took up the management of the estate on behalf of the minor proprietors and continued to be in possession of the estate until the year 1891 when Nityanand, having attained his majority, took over the

management from the Court of Wards. In the same year, Rani Jugrama Koer, as the next friend of her minor sons Kamalanand and Kalikanand, instituted a partition suit against Nityanand, and, on the 30th June, 1892, a final partition decree was by consent passed awarding one third of the estate to Nityanand and, two-thirds of the estate to Kamalanand and Kalikanand jointly.

It is important to remember that this decree did not effect a division of the properties by metes and bounds, but that it provided for separate collection of the rents, issues and profits according to the shares of the parties which were defined and acknowledged in the decree. It is also important to remember that the Banaily Raj and the Srinagar Raj (originally consittuting one Raj) are tenants-in-common in most of the properties which formed the subject-matter of the partition suit, and that the share allotted to Nityanand was 2 *annas* 4 *pies* in the properties constituting the Srinagar and Banaily Raj.

On the 14th June, 1894, Nityanand borrowed Rs. 2,00,000 from the plaintiffs on the security of his the 2 *annas* 8 *pies*, in Tuppa Jamalpur, Nawhatta, and in twenty-two other items of properties, and executed a mortgage bond in favour of the plaintiffs agreeing to pay interest on the money advanced at the rate of 7½ per cent. per annum. On the 6th March, 1899, he borrowed a sum of Rs. 3,50,000 from the Banaily Raj, on the security of the entire share allotted to him on partition and executed a mortgage bond in favour of the Banaily Raj, agreeing to pay interest at the rate of seven per cent. per annum with half yearly rests.

In 1901, the Banaily Raj, sued upon the security of the 6th March, 1899 and, on the 11th March, 1902, obtained a mortgage-decree against Nityanand. By the 12th September, 1903, the claim of the Banaily Raj against Nityanand on the foot of the mortgage-decree of the 11th March, 1902, amounted to Rs. 4,89,679. On that date, a very important transaction took place which it is necessary to mention at this stage. Kamalanand and Kalikanand, both of whom were now of age, purchased the decree obtained by the Banaily Raj against Nityanand for the sum of Rs. 4,89,679 and, as a security for the payment of the purchase-money as well as for an advance of Rs. 11,000 made on that date by the Banaily Raj to Kamalanand, and Kalikanand, they executed a mortgage bond in favour of the Banaily Raj agreeing to re-pay the sum of Rs. 5,00,000 with interest thereon at 6 per cent. per annum with half-yearly rests " on the expiry of one year from the date of the bond," that is to say, on the 12th September, 1904. It appears that the sum of Rs. 579 was paid in cash by Kamalanand and Kalikanand to the Banaily Raj.

That was the first step taken by Kamalanand and Kalikanand to prevent the family properties from going into the hands of strangers. The next step, obviously, was to purchase from Nityanand such interest as he still had in the properties, namely, his equity of redemption; and this they did on the 28th October, 1903, for the sum of Rs. 60,000, out of which they paid Rs. 6,000 in cash to Nityanand and retained the balance in their hands agreeing to pay Rs. 300 per month to him during his natural life.

By the purchase of the 28th October, 1903, Kamalanand and Kalikanand made themselves liable to discharge the debt due by Nityanand to the plaintiffs on the mortgage of the 14th June, 1894. On 18th July, 1904, the position was as follows :—

The plaintiffs claim on the foot of the mortgage of the 18th July, 1904, amounted to Rs. 4,33,135. Banaily's claim on the foot of the mortgage of the 12th September, 1903, amounted to Rs. 5,25,·15. On that date, Kamalanand and Kalikanand took a loan of Rs. 3,00,000 from the plaintiffs and discharged the mortgage of the 12th September, 1903, in favour of Banaily Raj by the payment of Rs. 3,00,000 and by the execution of a fresh mortgage in its favour for the balance still due to it, that is to say, for Rs. 2,25,000, Rs. 815 apparently having been paid by them out of their own funds. They also discharged the mortgage of the 14th June, 1894, executed by Nityanand in favour of the plaintiffs by executing a fresh mortgage in favour of the plaintiffs binding themselves in the sum of Rs. 7,33,135 which included the sum of Rs. 3,00,000 advanced to them by the plaintiff on that date.

On the 18th July, 1904, therefore, two important transactions took place; first, in con-

sideration, of the sum of Rs. 4,33,135 on that date due and owing to the plaintiffs by Nityanand, whose equity of redemption had meanwhile vested in Kamalanand and Kalikanand, and in consideration of a present advance of Rs. 3,00,000 made by the plaintiffs to Kamalanand and Kalikanand, the latter executed a mortgage bond in favour of the former agreeing to pay interest on the sum due at the rate of 6 per cent. per annum with half-yearly rests; secondly, in consideration of the sum of Rs. 2,25,000, which still remained due and owing by Kamalanand and Kalikanand to the Banaily Raj, the former, in substitution of the security of the 12th September, 1903, created a fresh security in favour of the latter and agreed to pay interest at the rate of six per cent. per annum with half-yearly rests. The mortgage bond executed by Kamalanand and Kalikanand on the 18th July, 1904 in favour of the plaintiffs is the subject-matter of suit No. 464 of 1914 and Appeal No. 85 of 1918.

Kamalanand died on the 14th April, 1910 leaving three sons, Ganganand, born on the 24th September, 1893, Ambikanand, since deceased, and Achutanand, born on the 31st March, 1907. He did not in his life-time take any steps to discharge the debt due to the Banaily Raj on the security of the 18th July, 1904. On the 7th November, 1912, the total sum due to the Banaily Raj was Rs. 3,34,000.

On that date, Kalikanand for self and as guardian of his minor sons and nephews borrowed another sum of Rs. 3,00,000 from the plaintiffs and discharged the debt due to the Banaily Raj. It appears that they paid out of their own funds Rs. 34,000 to the Banaily Raj. The mortgage which they executed in favour of the plaintiffs on the 7th November, 1912 is the subject-matter of Suit No. 465 of 1914 and Appeal No 86 of 1918.

The only serious defence put forward to the claim of the plaintiffs was by the minor sons of Kamalanand and Kalikanand who contended that the joint family properties could not be affected by the transactions of 18th July, 1904, and the 7th November, 1912. The defence was one which is familiar to the Courts of law in this country, namely, that there was no justifying necessity for the loan, and, as it conferred no benefit on the joint family, the properties belonging to the joint family are not answerable for the claim of the plaintiffs. There were certain other points raised in the written statement of the defendants which it will be our duty to consider; but the substantial question raised is one of fact, namely, were the debts incurred for a justifying family necessity or in order to confer a benefit on the joint family ?

The learned Subordinate Judge dealt with the question in a judgment of great ability and fairness. He thought that the question of legal necessity or benefit did not really arise, as the securities sued upon were given in order to enable Kamalanand and Kalikanand to discharge obligations not only antecedently incurred but incurred distinct and separate, or in other words, apart from the security sued upon. Dealing then with the question of fact, he came to the conclusion that, though there was no legal necessity for the loans, still the securities were enforceable against the joint family as the debts were incurred for the benefit of the joint family.

According to the view of the learned Subordinate Judge, it was a distinct advantage to the joint family to retain Nityanand's one-third share in the family and as that share was worth more than sixteen lakhs of rupees, and as Kalikanand and Kamalanand paid Rs. 9,67,000 for it, the transaction was intrinsically beneficial to the family.

Examining the case from another standpoint, the standpoint of the actual profit made by the joint family from the transaction, the learned Subordinate Judge found that though the joint family had to pay Rs. 60,000 a year as interest on the debts incurred by Kamalanand and Kalikanand, Nityanand's share was worth at least Rs. 95,000 a year. As there may be some doubt as to the actual finding of the learned Subordinate Judge on this point, it is as well to explain that, according to the learned Subordinate Judge, Nityanand derived a profit of at least Rs. 80,000 a year from his share of the properties after meeting the Government demands, rent payable to superior landlord and establishment charges, of which the last item cost Nityanand Rs. 15,000 a year. As there is evidence

on the record from the side of the defendants themselves that the joint family did not incur any additional expenditure in respect of establishment charges by the purchase of Nityanand's share beyond Rs. 30 per month, the learned Subordinate Judge thought that that is a matter which ought to be taken into consideration in estimating the benefit that accrued to the joint family. In the result, the learned Subordinate Judge gave the plaintiffs mortgage-decrees for the full amount claimed by them.

It was not contended by Mr. Manuk in this Court that the full consideration was not paid by the plaintiff in respect of the securities which the plaintiffs are seeking to enforce against the defendants. Nor was it contended that the money advanced by the plaintiffs did not go in full to discharge the prior obligation of Kamalanand and Kalikanand. It is not the case of the defendants that the money advanced by the plaintiffs was paid into the hands of Kamalanand and Kalikanand and was wasted and dissipated by the latter in immoral and extravagant living.

Indeed, the evidence is conclusive that after satisfying their own claims in respect of the transaction of the 14th June, 1894, the plaintiffs paid the balance of the money advanced directly into the hands of the Banaily Raj, first in reduction of its claim against Kamalanand and Kalikanand on the mortgage of the 12th September, 1903, and then in satisfaction of its entire claim against Kamalanand and Kalikanand.

It was, however, contended by Mr. Manuk that justifying necessity there was none for the loans, and, as for benefit, however beneficial, the transaction might have been to Kamalanand and Kalikanand, it has not, in its result, benefitted the joint family as a whole.

I propose first to consider whether the transaction of the 12th September, 1903, was binding on the joint family; for if it was, then the plaintiffs start with an initial advantage in their favour for it is conceded that as to part of the charge in one appeal, and the whole of the charge in the other appeal, they were created by substitution of new securities for old ones. It is therefore, of the utmost importance to consider the binding character of the transaction of the 12th September, 1903.

Mr. Manuk's argument is, that that transaction was an improvident transaction into which no prudent owner would enter. He accordingly argues that the charge must fail in its entirety, and the plaintiffs' suit dismissed.

Now, what was the transaction of the 12th September, 1903? It will be remembered that by the compromise decree passed on the 30th June, 1892 (Exhibit 60) there was a disruption of the joint family consisting of Nityanand on the one hand and Kamalanand and Kalikanand on the other. That decree did not effect a division of joint family properties, but it did provide for the separate collection of rents, issues and profits by the parties in proportion to their shares in the joint family properties.

Nityanand, in the course of his management of one-third share, incurred heavy liabilities both to the plaintiffs and to the Banaily Raj. Banaily Raj obtained a mortgage-decree against Nityanand for Rs. 4,57,159 12-6 on the 11th March, 1902. On the 12th September, 1903 the liability of Nityanand, on the foot of the decree obtained by the Banaily Raj amounted to Rs. 4,89,679-3-9. On that date, Kamalanand and Kalikanand, in order ultimately to buy up the share of Nityanand, purchased the decree obtained by the Banaily Raj against Nityanand for the sum of Rs. 4,89,679-3-9, and taking a fresh advance of Rs. 10,320-12-3 executed a mortgage bond in favour of the Banaily Raj for Rs. 5,00,000, on the 28th October, 1903, Kamalanand and Kalikanand obtained a transfer to them of the equity of redemption that was in Nityanand in consideration of a sum of Rs. 6,000 paid to Nityanand in cash and an annuity of Rs. 3 600 a year during the term of his natural life which was valued at Rs. 54,000.

Now, in my view, the mortgage of the 12th September, 1903 (Exhibit 35) and the purchase of the 28th October, 1903, (Exhibit 52) must be considered as one transaction. It is necessary to remember that the share of Nityanand purchased by Kamalanand and Kalikanand on the 28th October, 1903, was subject to charges, first, in favour of the plaintiffs, secondly in favour of the Banaily Raj, and, lastly in favour of his mother Jugrama Koer.

The plaintiffs' claim against Nityanand on foot of the mortgage executed by Nityanand in favour of the plaintiffs on the 14th June, 1895 amounted, at this date, to about four lakhs of rupees. Banaily Raj's claim, as has been mentioned, was Rs. 4,89,679. His mother was entitled to get Rs. 333-5-4 per month which at fifteen years' purchase may be capitalized at Rs. 60,000. The consideration money paid or agreed to be paid to Nityanand was Rs. 60,000.

It will appear, therefore, that Kamalanand and Kalikanand paid rupees 10 lakhs for the share of Nityanand. The question which we have to decide is, was the transaction a prudent one on the part of Kamalanand and Kalikanand.

It was argued by Mr. Manuk that Hindu Law does not permit the *karta* of a joint Hindu family to charge the joint family properties except in the case of a justifying necessity, and as justifying necessity there was none for the transaction of 1903, that transaction was not binding on the joint family. In my view, the argument is wholly inadmissible in view of the decisions of the Judicial Committee.

It is sufficient to refer to two cases, the earliest and the latest, decided by the Judicial Committee. In the celebrated case of *Hunooman Prasad Panday* v. *Musammat Babooee Munraj Konweree* (1) Lord Justice Knight-Bruce laid down the law as follows:—

"Upon the third point, it is to be observed that under the Hindu Law, the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto*, with the *de jure* title."

And again:—

"The power of the manager for an infant heir to charge an estate, not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

In the case of *Manna Lal* v. *Karu Singh* (2), decided by the Judicial Committee on the 29th July, 1919, the question at issue was, whether the mortgagee was entitled as against the joint family to enforce a mortgage executed by the *karta* to raise a loan in order to enable him to pay a premium on a lease which the *karta* had taken for the benefit of the family. The Judicial Committee answered the question in the affirmative. Incidentally, it decided that the *karta* of a joint family was entitled to borrow money in order to purchase property.

I have next to consider whether the transaction was for the benefit of the family, as to which question, the *onus* is undoubtedly on the plaintiffs. It will be remembered that there was a mortgage by Nityanand in favour of the plaintiffs so far back as the 14th June, 1894, and Raja Kamaleswari Prasad, one of the plaintiffs, swears that, at that time, he ascertained that the income which Nityanand derived from his one third share was Rs. 1,50,000.

Now there is no question that the evidence of the plaintiffs on this point must be accepted, for it is admitted in the written statement of the minors that the income derived by Kamalanand and Kalikanand in respect of two thirds share of the family properties was "not less than three lakhs of rupees." Naranath Jha, one of the witnesses examined on behalf of the defendants said that "the income of Kumar Nityanand was about rupees 1½ lakhs."

Now, the question which the plaintiffs have to answer is this: would a prudent owner give 10 lakhs of rupees for a property which yielded an income of 1½

(1) (1855) 6 M. I. A. 393=2 Suth. 29=1 Sar. 552 (P. C.).

(2) (1919) 1 P. L. T. 6=56 I.C. 766=13 M.L. W. 652 (P.C.).

lakhs? As a business man, Raja Kamaleshwari had no difficulty in answering the question in the affirmative. He makes three points in his evidence as to the benefit conferred on the family by the purchase: *first*, (to quote his own words) the purchase was cheap at the price; *secondly*, no additional establishment charges were incurred by the family by this purchase; and, *lastly*, there would have been insurmountable difficulties in the way of the family, if Nityanand's share had passed into the hands of strangers.

The first point needs no argument. The learned Subordinate Judge has shown that the value of Nityanand's share was at least 16 lakhs of rupees and that the transaction was *prima facie* beneficial to the family. The conclusion of the learned Subordinate Judge on this point is far too favourable to the defendants, for I have no doubt whatever, as I shall presently show, that the value of Nityanand's share was over twenty lakhs of rupees.

The second point is not so clear; but as the learned Subordinate Judge has accepted Raja Kamaleshwar's evidence on this point; and as it is corroborated by the evidence of the defendants' witness, Zahurul Hussain, I ought not to differ from the learned Subordinate Judge on this point. That evidence is agaiu inherently probable, as it does not require two persons to collect rent from the same tenant.

It will be remembered that the compromise decree in the partition suit did not effect a division of the properties; it merely provided for the separate collection of rents, and it is probable, as the plaintiff says, and as Zahurul Hussain admits and as the learned Subordinate Judge has found, that no additional establishment charges were incurred by the family as a result of the purchase. Now the acceptance of this evidence has important results for the value of Nityanand's share must be far greater to the defendants than to Nityanand.

The third point, to my mind, is perfectly clear. The share of Nityanand was part of the Srinagar Raj. It consisted not only of the *Zemindari* properties; but valuable *kamat* and *jote* lands and 41 villages comprised in 7 *putni mahals*, and 6 villages comprised in one *darputni mahal*, I have said before, but it is necessary to repeat, that the partition between the brothers did not effect a division of the properties. It was manifestly undesirable to let in strangers into the land. The question was not merely one of sentiment; but one of imperative necessity. The Raj Banaily had advertised Nityanand's share for sale in execution of its mortgage-decree against Nityanand.

It is improbable that, at the auction-sale, one purchaser could have been found for Nityanand's share. Banaily Raj was obviously unwilling to purchase, for it sold the decree to the defendants. Now if the integrity of that share had been broken up at the auction sale, complications of the worst kind would have arisen in the management of the two-thirds share which was in the defendants. This does not require any argument; it is a matter of experience, and, in my opinion, the plaintiffs were entitled to assume that the transaction was one into which any prudent owner would enter.

The plaintiff's evidence, therefore, raised a *prima facie* case of necessity and benefit, and it was for the defendants to rebut that case by cogent evidence. Now the evidence on behalf of the defendants may be placed under two heads; first, that the transaction was the result of impulse and not of forethought on the part of Kamalanand who carried it through in defiance of the advice of Kalikanand and of numerous friends whom he consulted; and secondly, that the transaction has, in fact, not benefited the joint family.

On the first point much reliance was placed on the opinion given by Babu Jogendra Nath Mukherji, Vakil, and on his evidence. The opinion (Exhibit A) was given on the 6th September, 1901, and was with reference to the purchase not of the entire share of Nityanand, but of his interest in Pargana Dhapur. The case for opinion showed that the transaction could not be a profitable one and the Vakil had no difficulty in advising his client not to enter into the transaction.

The only point established by this document is that Kamalanand accepted the advice of his Vakil and declined to purchase the share of Nityanand in Pargana Dhapur. Now in his evidence, it was sought to establish that his opinion related to the purchase

of Nityanand's share which took place exactly two years from the date of the opinion. Now this is obviously not so, as the opinion itself shows. It was with reference to his opinion that he gave his evidence and in his examination-in-chief he stated that he did not consider the purchase beneficial at the price named, and that he gave his reasons in the opinion which had just been exhibited.

In his re-examination, however, he gave another reason for advising against the purchase, not the reason of the lawyer but the reason of the friend of the family. That reason may be given in his own words :—

"Judging from the past management of the estate," so his evidence runs, "by the then proprietors and the manner in which they were spending money, they would not be able to pay off the debt that might arise in consequence of the purchase, but they would go on spending whatever they could, leaving the debt as a further burden on their already encumbered estate."

Now, he admits that this was a reason that operated on his mind and that he did not convey it to the proprietors. That, in my opinion, is entirely irrelevant. The case for opinion showed that the purchase of Parganna Dhapur could not be a beneficial one ; he said so in his opinion, and his advice was accepted by the proprietors. If, as was suggested, he gave another opinion at the time of the purchase of the entire share of Nityanand that opinion has not been produced, and we cannot speculate as to what his opinion was.

If he was against the purchase, it is certainly remarkable that his name should appear as a witness to the transaction by which Nityanand conveyed his share to Kamalanand and Kalikanand. A lawyer may witness a document, though he may be opposed to the transaction ; but then he gives his opinion on the facts that are placed before him ; but a friend of the family, for such he has been described by Mr. Manuk, does not usually witness a transaction which he does not approve of. The evidence of Babu Jogendra Nath Mukherji is entirely irrelevant, except in so far as it establishes that the advice as regards the purchase of Parganna Dhapur was accepted by Kamalanand.

The next evidence is that of the defendant, Kalikanand. He says that there were various consultations before the purchase, and that they were always of opinion that the purchase would not be a beneficial one. He admits, however, that Mr. Weatherall was strongly in favour of the purchase. Now, Mr. Weatherall was the manager of the estate under Kamalanand and Kalikanand, and was the Receiver of Nityanand's one-third share. He was, therefore, pre-eminently in a position to give correct advice in regard to the purchase.

Now, the prominent argument employed by Kalikanand in the discussions with his brother was that the income from the property was not sufficient to pay the interest on the loan. Now this is absolutely false, as I shall presently show. The argument was that the estate was already encumbered. Now, as to this, the only reliable evidence is the plaint filed by the Maharaja of Darbhanga against the family to enforce a mortgage bond executed by Kamalanand Singh and Kalikanand Singh on the 7th May, 1900, to secure an advance of Rs. 3,50,000 made by the Maharajah to the executants.

We do not know what the defence of the defendants was to the suit, nor do we know whether the Maharaja has recovered judgment against the defendants. But Kalikanand's evidence is that that was an entirely immoral debt not binding on the joint family. If, at the time of the transaction in suit, Kalikanand believed that the debt due to Maharaja of Darbhanga was an immoral debt and was not binding on the joint family, he could hardly have told his brother that there were various encumbrances affecting the jointly family properties.

I altogether disbelieve his evidence that he ever advised against the purchase. He could easily have prevented the transaction by refusing to execute the necessary documents. But he did execute all the documents and it is not open to him to suggest that he was altogether opposed to this transaction.

The next important evidence is that of Jainandan Jha, the present manager of the defendants. His evidence establishes that there were protracted consultations before the transaction was concluded and that *hisab kitab* took place in the house of Babu Jogindra

Nath Mukerji, as a result of which Babu Jogindra Nath gave a written opinion against the purchase. That written opinion has not been produced, and we have the undoubted fact that Babu Jogindra Nath was a prominent witness to the transaction. Now the *hisab kitab* would disclose the fact (as I shall presently show) that the transaction would be an exceedingly profitable one to the family.

I need not pursue the subject any further but I ought to refer to the evidence of two other persons, Madho Ram who has been strongly relied upon by Mr. Manuk and Padrath Jha. Madho Ram is a rich jeweller and cloth merchant of Benares and it appears that he used to be extensively patronised by Lady Curzon. He is in addition, a money-lender who has still to get about three lakhs from the defendants. He says that he has been a friend of the family for a long time and that Rani Jugrama sent for him and his uncle when negotiations were taking place for the purchase of Nityanand's share.

The advice which he gave to the family was that the transaction would be an unprofitable one as the income of the property to be purchased would not be sufficient to pay the interest on the loan. Now the value of his evidence must depend on whether the argument which he advanced had any foundation in fact. If in point of fact every one knew that the income was largely in excess of the interest to be paid on the loans that argument could not possibly have been put forward by him or by any one else. Quite apart from this the evidence of this friend of the family must be received with caution.

According to his evidence he knew that the family was in involved circumstances ; and yet he does not scruple to go year after year to Srinagar to sell his wares. He knew that the debts incurred by Kamalanand were all for immoral purposes ; and yet he never hesitated to lend money to Kamalanand at high rates of interest, I have no doubt whatever that he is an interested witness, for the chance of his recovering his three lakhs of rupees is somewhat remote, unless the plaintiffs' claims in these actions fail.

The evidence of Padarath Jha establishes that there were various persons who were in favour of the purchase, Mr. Weatherall, Nand Kishore Chowdhry Naranath Jha and Jai Chedan Jha. He adds, however, that he was himself opposed to the purchase.

My conclusions on this point are as follows:—

1. The transaction was the result of much deliberation and anxious consideration. Not only did Kamalanand take advice of many persons, but he went into the question of accounts and took the opinion of his pleader on this point.

2. That opinion not having been produced, we must assume that it was in favour of the purchase, especially as the examination of the accounts would establish that the transaction would be a profitable one for the family. It is probable that the Vakil supported the transaction, as he was a witness to it ; and we know that when, two years previously, the Vakil advised Kamalanand not to purchase Parganna Dhapur, he acted on the advice.

3. Mr. Weatherall was the most competent person to advise in the matter, and his advice was undoubtedly in favour of the purchase.

4. The evidence on which Mr. Manuk has relied, is wholly unconvincing as it fails at a crucial point, namely, in establishing that the income available from Nityanand's share was not sufficient to pay the interest on the loan.

I now come to the next point, namely whether the transaction has in fact benefited the joint family. None on this point, the most material evidence would be the account-books, but these have not been produced by the defendants. Mr. Manuk, however, contended before us that the issue of benefit or no benefit being upon the plaintiffs, it was not his duty to produce the books of account. I quite agree that it was for the plaintiffs to establish that the transaction was entered into for the benefit of the family, but the plaintiffs, in my judgment, have given sufficient evidence to throw the burden on the defendants.

The defendants meet the evidence of the plaintiffs by the substantive case that the income from Nityanand's share purchased by Kamalanand and Kalikanand was not sufficient to pay the interest on the loans taken by them to enable them to buy

that share. In my view it was for the defendants to establish that case by the production of their books of account. The following observations of Lord Justice Knight Bruce in the case already cited [*Hunoomanpersad Panday* v. *Musammat Babooee Munraj Koonweree* (1)] are peculiarly applicable to this question:—

"Consequently, this *dictum*," said the learned Lord Justice referring to the *dictum* of the Sudder Dewani Adawlat at Agra on the question of *onus* of proof in a case which need not be cited, "may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But the case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded.

"Their Lordships think that the question, on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. 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 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 mortgagee was not a party to the transaction which we are at present considering, that is to say, the transaction of 1903. The defendants, from their books of account, have an accurate knowledge as to the truth of the allegation made by them, namely, that the income from Nityanand's share was not sufficient to pay the interest on the debts incurred by Kamalanand and Kalikanand. The proof of facts is accordingly to be looked for from the defendants who possess this accurate knowledge. I am of opinion that the books of account having been suppressed by the defendants, we are bound to make every presumption consistent with facts against the defendants.

The learned Subordinate Judge has found that the nett income available to Nityanand was at least Rs. 80,000 a year and that as the interest payable by the defendants on the debts incurred by them for the purpose of acquiring the share was Rs. 60,000 a year, the transaction was undoubtedly a beneficial one to the family, a transaction into which a prudent owner would enter.

The learned Subordinate Judge has also found that the establishment charges cost Nityanand Rs. 15,000 a year and that the defendants after their purchase saved this amount as they incurred no additional expenditure in respect of establishment charges. On the finding of the learned Subordinate Judge, therefore, the nett income available to the defendants from Nityanand's share was at least Rs. 95,000 a year. The conclusion at which the learned Subordinate Judge arrived was based on the admissions made by the defendant's witnesses.

It does not require much ingenuity to see that the transaction must have been a profitable one to the defendants, as they had to pay Rs. 60,000 as the interest on the loans.

The finding of the learned Subordinate Judge was attacked before us by the appellants as well as by the respondents. On behalf of the appellants it was urged that the oral admission made by their witnesses should not have been relied upon by the learned Subordinate Judge, but that he should have acted upon the Report of the Survey and Settlement operations of Srinagar Estate which took place in the year 1887—88.

The argument is a bold one, seeing that it was within the power of the defendants to give accurate and precise information to the Court as to the income derived by them from Nityanand's share. But I agree that if the Survey and Settlement Report make it impossible for us to accept the conclusion of the learned Subordinate Judge on this point, we ought not to accept it.

I must not be understood, however, to suggest that the learned Subordinate Judge did not consider the Report of the Survey and

Settlement Operation. He did consider it and thought that this conclusion received strong corroboration from that Report.

Mr. Manuk's whole argument is based on the table at page 40 of the Report which shows that the total rent demand of the 16 annas Srinagar Raj was Rs. 2,79,418 and that the actual profit was Rs. 1,97,380 8 8¼ after taking into account the Government revenue and the *putni* rent payable by the estate, but not the establishment charges which, according to Mr. Manuk, must have been at least Rs. 45,000 a year. He accordingly argues that the nett profit of the entire estate could not have exceeded Rs. 1,50,000 and that the nett profit from Nityanand's share could not have exceeded Rs. 50,000 a year.

But, as has been pointed out by the learned Subordinate Judge, there are materials in the Report itself which conclusively establish that the position must have altered considerably between 1887-88 and 1903. For instance, the report shows at page 72 that the Banaily Raj and Srinagar Estate held between them 10,568 acres of cultivated, but not rent paying, land as *sir* land and 84,867 acres of uncultivated land as roads, waste land, etc.

Now the Srinagar Raj had admittedly 8 annas share in all these lands, so that apart from the actual rent demand, the Raja must have received a considerable income from these lands which must have considerably increased as waste lands were gradually brought under cultivation. Mr. Manuk has contended before us that the profit derived from the *sir* lands must have been taken into consideration in giving the share of the rental which went to the Srinagar Estate, and that there is no evidence, that the waste lands have been brought under cultivation.

On the first point, Mr. Manuk relies upon the statement which appears at page 40 of the Report to the effect that the rent include receipts from *halhasli* and *jaidadi* lands estimated at Rs. 1 8-0, per acre. Mr. Manuk's point is that the *halhasli* and *jaidadi* lands are part of the *sir* land mentioned at page 72 of the Report and that the rental shown in the table at page 40 included such profits as were made from the *sir* lands. In my opinion there is no foundation for the argument that *halhasli* and *jaidadi* lands are part of the *sir* lands mentioned at page 72 of the Report.

Now *halhasli* and *jaidadi* lands are rent paying lands, as the Report at page 48 shows. They are peculiar to the Bhagalpur District and are found chiefly in the Khubkhand Parganna of Bhagalpur. It is not correct to refer to the lands as *halhasli* or *jaidadi*. These are names given to a special tenure existing between landlord and tenant in Bhagalpur District and particularly in Khubkhand Perganna of Bhagalpur. Now the *sir* lands mentioned at page 72 of the Report are expressly stated to be not rent-paying and it will be found that they are not confined to Bhagalpur, but are distributed amongst the different districts in which the Srinagar Raj is interested.

On the second point, I quite agree that there is no evidence that the waste lands mentioned at page 72 of the Report were brought under cultivation before the year 1903. But that is entirely irrelevant. The plaintiffs do not rely upon the Settlement Report, Exhibit M, at all. It is the defendants who rely upon it. It is their case that this Report conclusively establishes that the nett income available to Nityanand could not have exceeded Rs. 50,000.

It is sufficient for the plaintiffs to say in reply that the Report cannot be accepted as a safe guide as to what the position was in 1903. The Report makes it perfectly clear at page 41 that all this waste land, (21-21 per cent. of the area actually settled with the proprietors), was available for settlement with *raiyats*.

There are other points which emerge from the Report which make it impossible for us to rely upon it as showing the nett income available to Nityanand in 1903. The statements at page 30, page 33, page 34, page 35 and page 36 show that there was a large percentage, of lands which were culturable but not cultivated.

In other words, they were all available for immediate settlement. Then, again, it appears that there were large tracts of lands which were not taken up for settlement and were not included in the statement appended to the Report. For instance, 7,654 acres in 11 villages in Haveli Parganna, in which the Srinagar Raj had a small share, were

altogether excluded from the Report (see paragraph 11, page 27). So also were 23 villages in Daphur Parganna, as they were not under cultivation and were covered with grass and jungle (see paragraph 11, page 27). So also were 9,188 acres as there were adverse decisions in boundary dispute cases.

I do not suggest for a moment that all these lands became profitable lands in 1903. But I do suggest that all the different circumstances to which I have referred make it impossible for us to rely upon the report as showing what was the nett income available to Nityanand in 1903.

Mr. P. K. Sen on behalf of the respondents has contended before us that the estimate of the learned Subordinate Judge on the question of income is far too favourable to the defendants. He says that the nett income available to Nityanand was far in excess of Rs. 95,000 a year.

It must be said in favour of the learned Subordinate Judge that he made no attempt to arrive at a precise figure. His finding is that the nett income available to Nityanand was at least Rs. 80,000 a year and that in purchasing the share, Kamalanand and Kalikanand made a further saving of at least Rs. 15,000 a year, as they incurred no additional expenditure in respect of establishment charges.

Now, in my view, it is possible to arrive at a conclusion as to the nett income on the admitted evidence in the case. First, there can be no possible room for controversy that the gross income of 16 annas Srinagar Raj is 4½ lakhs. That was the common case of the parties up to a particular date. The plaintiff in his evidence states that Rs. 1½ lakhs was the income from Nityanand's share.

The defendants in their written statement admit that Rupees 3 lakhs was the income of two thirds share in the possession of Kamalanand and Kalikanand. Durga Prasad, the *mukhtar-am* of the Srinagar Raj, supports in his evidence the written statement of the minor defendant as to the income. Naranath Jha, who served the Srinagar Raj in various capacities and was examined on behalf of the defendants, admits that the income of Nityanand's share was Rupees 1½ lakhs.

We are, therefore, on safe ground in accepting Rupees 4½ lakhs as the gross income of the entire Raj. In order now to arrive at the nett income, we must deduct, first, the amount payable in respect of Government revenue and cesses, secondly, the amount payable to the superior landlords in respect of the *putni mahals* and lastly, the expenses incurred for the management of the estate. Now, the Settlement Report (Exhibit M.) shows that the Government revenue in respect of the entire estate was Rs. 58,142 and that the *putni* rent payable by the proprietors was Rs. 23,859

In regard to establishment charges no difficulty arises, as it is the defendants' case that it cost the proprietors Rs. 45,000 a year under this head. Then only remains the question of cesses, and this is merely a matter of calculation. We know from the Statute that one anna per rupee is payable on the gross income; and, on the hypothesis that the gross income of the entire Raj was Rupees 4½ lakhs, the cess payable by the proprietors must be Rs. 28,125. Now, these figures receive strong corroboration from the admitted evidence in the case.

It will be seen that, on these figures Rs. 86,267 was payable by the Raj in respect of Government revenue and cesses. Jainandan Jha, a relative of the defendants and the Assistant Manager of the Raj, said in his evidence that Rs. 85,000 to Rs. 86,000 was payable on account of land revenue and cesses. Naranath, who is also intimately connected with the Raj, says that the entire revenue payable by the Srinagar Raj inclusive of cesses is between Rs. 80,000 and Rs. 90,000.

These admissions are most important for they establish that the cesses payable by the Raj must be about Rs. 28,000 for there can be no controversy that the Government revenue is Rs. 58,142. If once we get the cesses, there is no difficulty in ascertaining the income of the Raj.

In whatever way you may look at the evidence, there can be no doubt whatever that the gross income of the Raj is Rs. 4,50,000 and that the cesses payable by the Raj amount to Rs. 28,125.

By a simple arithmetical calculation it is possible to say, with tolerable certainty, that the nett income of the entire Raj must be Rs. 3,39, 874 or thereabout, and that Nityanand's share of this income must have been Rs. 1,13,000.

We are now in a position to say whether the transaction has in fact benefited the family. The capitalized value of Nityanand's share at twenty years' purchase is Rs. 22,60,000, and for this the family gave Rupees ten lakhs. I may point out that the learned Subordinate Judge, with his local knowledge, took the value of his share at twenty years' purchase, and Mr. Manuk in his argument before us, did not assail this method of valuation.

We may look at it from another point of view. In calculating the nett savings effected by Kamalanand and Kalikanand, we must, as I have shown before, add the sum of Rs. 15,000 to Rs. 1,13,000. In other words, the nett income available to Kamalanand and Kalikanand was Rs. 1,28,000 a year. Out of this sum they had to pay Rs. 60,000 a year by way of interest, and Rs. 4,000 a year to Rani Jugrama for and by way of her maintenance. This left them with a clear profit of Rs. 64,000 per year.

In my opinion, it cannot be suggested for one moment that in this particular instance, the charge is not one that a prudent owner would make. On the one hand, a very large profit was made by the joint family as a result of this transaction; on the other hand, the family not only consolidated the ancestral properties, but averted a danger, a real danger, by this transaction. Had Nityanand's share passed as it might, to ten different persons, a partition suit would of necessity have followed and, apart from the uncertainty as to allotment which such a suit would have involved and the loss of income during the pendency of such a suit, the costs of prosecuting such a suit would have been a serious burden on the estate.

I am of opinion that the charge in favour of the Banaily Raj was created honestly for the safety and the benefit of the estate and that the transaction was binding on the joint family.

There is one argument of Mr. Manuk which I must not omit to consider. He says that Rani Jugrama purchased certain properties belonging to Nityanand in execution of her decree against him and that, in calculating the income available to the defendants by the purchase of Nityanand's share, we ought to ignore the income of these properties which passed to Rani Jugrama, Mr. Manuk relies upon Exhibits J and J-1. Exhibit J shows that Rani Jugrama, on the 8th October, 1901, purchased two different lots of properties belonging to Nityanand for Rs. 505 each, each of which she valued at Rs. 500. Exhibit J-1, shows that on the 11th August, 1900, she purchased three lots of properties belonging to Nityanand, one which she valued at Rs. 300 for Rs. 500, the other which she valued at Rs. 500 for Rs. 900, and the third which she valued at Rs. 800 for Rs. 1,460.

It is sufficient for me to say that the properties are so insignificant in value that their income, whatever it may be, may be safely ignored. But I quite agree with the learned Subordinate Judge that there is no reliable evidence that Rani Jugrama ever got possession of these properties.

I hold that the charge created by Kalikanand and Kamalanand in favour of the Banaily Raj on the 12th September, 1903 was operative against the joint family of which Kamalanand was the *karta*.

I now come to the mortgage (Exhibit II) executed by Kamalanand and Kalikanand in favour of the plaintiffs on the 18th July, 1904, the subject matter of one of the appeals before us. It will be remembered that, so far back as the 14th June, 1894, Nityanand had executed a mortgage (Exhibit 1) in favour of the plaintiffs, and that Kamalanand and Kalikanand, by the transaction of the 28th October, 1903 (Exhibit 52) had undertaken, as they were bound in law, to discharge Nityanand's debt to the plaintiffs.

It will also be remembered that Raj Banaily had a large claim against the defendants on the foot of the mortgage (Exhibit 35) executed by Kamalanand and Kalikanand in its favour on the 12th September, 1903. On the 18th July, 1904, the position was as follows:—Rs. 4,333,135 was found to be due to the plaintiff on the foot of the mortgage (Exhibit 1) of the 14th June, 1894, and Rs. 5,25,815 was found to be due to Raj Banaily on the mortgage (Exhibit 35) of the 12th September, 1903.

On the 18th July, 1904, a new arrangement took place to which the plaintiffs, the defendants and the Banaily Raj were parties. The defendants took a loan of Rs. 3,00,000 from the plaintiffs executed a mortgage bond (Exhibit II) in favour of the plaintiffs for Rs. 7,33,135 thus extinguishing the debt due by Nityanand

to the plaintiffs, paid the entire sum borrowed by them from the plaintiffs to Banaily Raj, and (Exhibit 2) executed a fresh mortgage bond in favour of the Banaily Raj for Rs. 2,25,000.

The transactions of the 18th July, 1904 were essentially substitutions of new securities for the old ones. The security created in favour of the plaintiffs, on the 18th July, 1904 forms the subject-matter of one of the appeals before us, the security created in favour of Raj Banaily on that date or rather the security which was again substituted in its place form the subject-matter of the other appeal before us.

Now, in considering the binding character of the security created in favour of the plaintiffs on the 18th July, 1904, we have to examine, first, the validity of the Nityanand's mortgage in favour of plaintiffs on the 14th June, 1894, and, secondly, the validity of the defendant's mortgage in favour of Raj Banaily on the 12th September, 1903. Now, so far as Nityanand's mortgage is concerned, no question, in my opinion, can possibly arise. Nityanand was the sole male member of the family after his separation from his brothers.

In this case we have not these familiar figures of our Law Courts, the *Mitakshara* sons, to dispute the validity of the security created by him in favour of the plaintiffs. The defendants took his share not by survivorship, but by purchase, and the defence ordinarily available to the members of a joint family is not open to the defendants. The defendants by their transaction with Nityanand expressly undertook to discharge his liability to Nityanand. Notwithstanding the purchase, the properties which Nityanand had mortgaged to the plaintiffs were still liable for the plaintiff's claim against Nityananad; and, I can see no answer to the argument that, if the purchase of Nityanand's share by the defendants stands good, the mortgage of the 18th July, 1904, in favour of the plaintiffs cannot fail, at least as regards the advance made to the defendants in order to enable them to discharge Nityanand's obligation to the plaintiffs.

It was argued, however, by Mr. Manuk that the new security included joint family properties, whereas the old security consisted only of Nityanand's share in certain properties and that the *karta* should not have nvolved the joint family properties in such an undertaking. But the question arises only because the joint family properties have been involved. If, indeed, the *karta* had not included the joint family properties in the security created in favour of the plaintiffs, the question of necessity or benefit could not possibly arise; for, on the hypothesis that the purchase of Nityanand's share was a purchase made by Kamalanand and Kalikanand and not a purchase by the joint family of which Kamalanand was the *karta*, the joint family could have no *locus standi* to contest the transaction.

The question of necessity or benefit only arises because the joint family properties were included in the security created in favour of the plaintiffs. In my opinion, the validity of the security must depend on the validity of the transaction by which the family purchased the share of Nityanand in the joint family properties. That question, I have already considered, and I have come to the deliberate conclusion that the transaction of 1903 is binding on the joint family. That being so, the deed of the 18th July, 1904, must stand as a security for at least Rs. 4,33,135, the sum which was found due and owing by Nityanand to the plaintiffs on the 18th July, 1904.

I now come to the balance of the consideration paid on the mortgage of the 18th July, 1904, Rs. 3,00,000, which went to the r. duction of Banaily's claim against the defendants on the mortgage of the 12th September, 1903. The question must again depend on the validity of the transaction of the 12th September, 1903, and I have already recorded my opinion that the transaction of the 12th September, 1903, was binding on the joint family.

Mr. Manuk, however, has argued that, though the transaction of the 12th September, 1903, may stand, that of the 18th July 1904, is not operative against the joint family, as the plaintiffs knew or should have known if he had made any enquiry at all, that Kamalanand and Kalikanand were wasting and dissipating the estate, and that their only object was to get an additional income to waste on their extravagance. It was not argued by Mr. Manuk that they dissipated the money which they actually borrowed from the plain-

tiffs, for the evidence is conclusive that every pie which the plaintiffs advanced to the defendants went first to extinguish their claim against Nityanand and then to the reduction of Banaily's claim against the defendants.

But it was argued by Mr. Manuk that if, in fact, Kamalanand and Kalikanand were not only mismanaging the estate but were actually leading a life of dissipation and debauchery, the plaintiffs lent money to them at their own risk and cannot make the joint family properties responsible for the debts incurred by them; and he strongly relied upon the following passage in the judgment of the Judicial Committee in the case of *Hunooman Persad Panday* v. *M. Babooee Munraj Koonweree* (1):—

"Their Lordships think that the lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that Manager is acting in the particular instance for the benefit of the estate."

In my judgment, the passage cited gives no support to Mr. Manuk's argument. The Judicial Committee laid down two propositions which it is impossible either to misread or misunderstand. *First*, where, in the particular instance, the charge is one that a prudent owner would make; and the prudent owner would make a charge either in the case of necessity or for the benefit of the estate:—the *bona fide* lender is not affected by the precedent mismanagement of the estate; *secondly*, if the lender is shown to have acted *mala fide*, he cannot ask the Court to uphold the charge in his favour against the heir, grounded on a necessity which his wrong has helped to cause.

The passage relied upon merely asserts that the lender cannot act merely upon the representation made to him by the Manager but that he is bound to make an honest enquiry into the necessity of the loan with reference to the parties with whom he is dealing, that is to say, with reference to the representation made to him by the parties with whom he is dealing.

The necessity for the enquiry, it seems to me, is purely for the protection of the lender; it is an equitable rule framed for the protection of the lender, so that he may not be met with the case that there was no necessity at all for the loan, or that the money lent was wasted and dissipated by the Manager; for the Judicial Committee in the next passage made it quite clear that if the lender does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the charge and that the lender is not bound to see to the application of the money. But if the lender does see to the application of the money, as he has in the case before us, the question of enquiry becomes perfectly immaterial.

I am, therefore, not disposed to agree with Mr. Manuk that the lender is bound to take into consideration what has been described as "the psychology of the situation." It is impossible according to Mr. Manuk to regard the intrinsic merit of the transaction as an isolated matter apart from the temperament, character, and the mode of living of the borrower; and if a consideration of these extrinsic matters suggest the inference that the transaction could not possibly be beneficial to the joint family, then the transaction, so Mr. Manuk argued, ought not to stand, however intrinsically meritorious it may appear to be.

I confess that the argument is an attractive one, but to accede to it is to reduce the transaction into a speculative one and to place the lender in an almost impossible situation. According to the Judicial Committee, in the case already cited, the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. In my view, we must examine the transaction to see whether, in the particular instance, there was a benefit to be conferred by it on the family.

I quite agree, however, that if a case of *mala fides* is established against the lender and such a case is established where it is shown that the lender must have known when he lent the money, that transaction was bound to involve the family in ruin, and that in entering into it the borrower was acting in his own interest and for his own benefit and not in the interest and for the benefit of the family, the security cannot be enforced against the family.

I will first examine the evidence to see whether any case of *mala fides* has been established against the plaintiffs,

I will then deal with " the psychology of the situation " and see whether, on facts Mr. Manuk is entitled to succeed, assuming that he is right as to his interpretation of the law.

Now, on these questions it is important to consider the arguments of Mr. Manuk. He says that Kamalanand began to live a life of debauchery and vice almost as soon as he attained his majority, that so long as he had money to spend on his extravagance and folly, he did not scruple to sacrifice the interest of the family, and that he had made himself notorious in three cities of which Monghyr, where the plaintiffs live, was one.

So far as Kalikanand is concerned, it was not suggested that he has ever led a life of vice and debauchery but it was suggested that his particular hobby was to buy pedigree dogs and motor cars and to start perfectly useless ventures, for the manufacture of soap and cutlery at the expense of the joint family.

A few dates will not be out of place here. It appears that Srinandan, the father of Nityanand, Kamalanand and Kalikanand, died in the year 1880, when his widow Rani Jugrama became, for short period, the manager of the estate under Act XL of 1858. In the same year, the Court of Wards took up the management and relinquished it in July 1891, when Nityanand attained his majority. It is quite certain that the estate was solvent when the Court of Wards made over possession to Nityanand.

In 1891 Rani Jugrama, as the next friend of her minor sons instituted a partition suit against Nityanand and on the 30th June, 1892, the final partition decree was passed by consent awarding one-third share in the estate to Nityanand. From 1892 to 1896, Jugrama managed the two-thirds share of the estate on behalf of her minor sons, and her management was so good that she actually made a saving out of the income which she made over along with the estate, to Kamalanand when he attained his majority in 1896.

On the 7th May, 1900, Kamalanand and Kalikanand borrowed Rs. 3,50,000 from the Maharaja of Darbhanga and executed a mortgage bond in his favour. On the 12th September, 1903, Kamalanand and Kalikanand purchased the mortgage-decree for Rs. 4,89,679 which Banaily had obtained against Nityanand on the 11th March, 1902, and being unable to pay the purchase money, executed a mortgage bond in favour of Banaily on the same date. On the 28th October, 1903, they purchased from Nityanand his share in the family estate, subject to three charges, that is to say, charge in favour of the plaintiffs for about four lakhs, charge in favour of Banaily for Rs. 4,89, 679 and charge in favour of his mother for Rs. 335-5-4 per month.

On the 18th July, 1904, they borrowed Rs. 3,00,000 from the plaintiffs and executed a mortgage-bond in their favour for Rs. 7,33,135 thereby extinguishing the plaintiff's claims against Nityanand. On the same date they paid Rs. 3,00,000 to Banaily and executed a mortgage-bond in its favour for Rs. 2,25,000, thereby satisfying the mortgage-bond of the 12th September, 1903. Kamalanand died on the 14th April, 1910, without having paid off the debt due either to the plaintiff or to Banaily. On the 7th November, 1912, Kalikanand borrowed Rs. 3,00,000 from the plaintiffs and executed another mortgage-bond in favour of the plaintiffs. This sum together with another sum of Rs. 34,000, he paid to Banaily and satisfied its mortgage of the 18th July, 1904.

This, in brief, is the history of the transactions of Kamalanand and Kalikanand, and Mr. Manuk has contended before us that the very recital of these events in a chronological order is sufficient to establish that Kamalanand and Kalikanand were wasting and dissipating the estate, and that the plaintiffs must have known that they were wasting and dissipating the estate. It will be noticed, however, that, apart from the Darbhanga bond, every debt incurred by the family is referable to the purchase of Nityanand's share by them.

I will assume for the moment that they were leading a life of reckless extravagance regardless of the interest of the family, but the question which we are investigating for the moment is, has a case of *mala fides* been established against the plaintiffs. Now it would be impossible nor it is desirable, to attempt a complete codification of the evidence that would, in all cases, establish a case of *mala fides* against the lender. Each case must depend on its own facts, but,

speaking broadly, there must be evidence in the case from which the irresistible inference would follow that the lender knew, when he advanced the money, that the borrowers were so reckless and extravagant that it would be impossible for them to discharge the debt incurred by them, that the lender knew that the object of the borrowers in purchasing the property was not so much to benefit the family as to get an additional income for themselves, and that in giving the loan, the lender had for his object, not so much the return of his money as the acquisition of the properties mortgaged to him.

This, I think, must be established by the family before they can be heard to say that a transaction which, as an isolated matter, is undoubtedly beneficial to the family, is still not binding on it. I do not for a moment suggest that the same consideration will apply when the transaction itself is not beneficial to the family. But here the transaction, as a matter of cold calculation, was undoubtedly for the benefit of the family. But the family says that, though on paper, the transaction may appear to be an attractive one, still, as their managers threw away the entire income on a life of reckless folly and extravagance without ever attempting to reduce the debts incurred by them, it has not, in its result, benefited it and ought not to bind it.

The answer to the argument is that, if the validity of a transaction is to depend on the future conduct and mode of living of the manager, then an amount of risk and uncertainty is introduced so as to make the transaction a speculative one. But the case would be entirely different if *mala fides* is established against the lender.

Now, it is remarkable that in the lengthy cross-examination of *Raja* Kamaleshwari there is not one question to suggest a case of bad faith against him. I have read his evidence over and over again, and I can find nothing even remotely suggesting a case of bad faith. I think this is important, and ought to be carefully remembered in dealing with the case of *mala fides*. But Mr. Manuk's argument is, it does not very much matter whether his case on this particular point was or was not put to Raja Kamaleshwari ; but, if he has established that Raja Kamaleshwari Prasad knew only too well what sort of life Kamalanand was leading, he has made out a case of *mala fides* against Raja Kamaleshwari.

Here, again, the evidence is wholly insufficient. There is no doubt a mass of evidence that Kamalanand had two women in his keeping, and that he spent large sums of monies on them and that he was fond of shooting, and that he spent lavishly in indulging in that particular hobby of his, but there is not an atom of evidence which even remotely suggests that Raja Kamaleshwari knew of his vices or that he encouraged him to indulge in those vices. Amongst the mass of evidence that has been adduced on behalf of the defendants, there is just one passage ; the only one which I have been able to discover ; which was strongly relied on by Mr. Manuk. That passage will be found in the evidence of Zahurul Hussain, and is as follows :—

During the *Holi* dancing and singing took place and all the town people were there, including the plaintiff Raja Sahib ; that took place in 1907 or 1909. In other years during the *Holi* the Kumar used to go to his Deori."

Now, it is perfectly idle to say that this evidence establishes a case of *mala fides* against Raja Kamaleshwari *Holi* festivals are recognized festivals in Behar when dancing and singing take place and it is part of the duty of a rich Zemindar to entertain friends on such a festive occasion.

It was then argued that Kamalanand was so lost to all sense of shame and decency that he made himself notorious in three cities, Purnea, Bhagalpur and Monghyr, and that his reputation must have reached the ears of Raja Kamaleshwari. Here, again, the evidence does not support the argument. We are, for the moment not concerned with his doings in Purnea and Bhagalpur for the plaintiffs resided and have their place of business in Monghyr. Now, Jainandan Jha makes it perfectly clear that Kamalanand did not go to reside in Monghyr until the year 1905 or 1906, that is to say, not till long after the execution of the bond of the 18th July, 1904.

On the question whether Kamalanand had any sense of shame or decency, it is sufficient to refer to the evidence of Kalikanand himself, of Jainandan Jha and Madho Ram, all examined on behalf of the defendants.

Kalikanand says that Kamalanand did not do any "immoral action" in his presence. Jainandan says that Kamalanand never associated with prostitutes in his presence. Madho Ram says that Rajeswari, one of the women in his keeping, used to come to the Kothi after sunset; and then he adds:—

"Kamalanand felt ashamed to appear with them in public."

It is perfectly clear, then, that Kamalanand did not make himself as notorious as Mr. Manuk would have us believe; and this is a convenient place to investigate what enquiry was made by the plaintiffs before they consented to lend money to the defendants, as the question is intimately connected with the question that we are at present considering.

The actual enquiry was conducted on behalf of the plaintiffs by Mahabir Prasad; who has given evidence in the case and Bhagbat Prasad, who is dead. Mahabir says in his evidence that he, accompanied by Bhagbat, went to Bhagalpur, Purnea, and Srinagar. At Bhagalpur, they met Raja Bahadur Sheo Shankar Sahai, the Manager of Banaily Raj, and a gentleman of considerable importance in Behar. They learned from him that the family of the defendants was benefited by the transaction by which they had purchased Nityanand's share.

They also ascertained that Kamalanand and Kalikanand were men of good moral character. Their enquiry at Purnea and Srinagar elicited the same facts. At Purnea they made enquiries from Ram Prasad Lal, a Pleader, who has acted on behalf of the defendants in the present case, and from three or four Pleaders in the Bar Library. At Srinagar they made enquiries from Khublal *Khajanchi* and Jainandan Jha, both in the service of the defendants.

Mahabir explains in his evidence that he was especially asked by the plaintiff, Raja Kamaleswari, to enquire if Kamalanand and Kalikanand were of good moral character and what was their previous debt and if the debt was for legal necessity. He ascertained that they were of good moral character, that the previous debt arose as a result of the purchase of Nityanand's share, and that the family was considerably benefited by the transaction. He reported the result of his enquiries to Raja Kamaleshwari and Raja Kamaleshwari swears that he especially questioned Mr. Weatherall and Rai Bahadur Lachmi Prasad, who were respectively, the Manager and assistant Manager of the Srinagar Raj as to the truth of the statements made to him by Mahabir Prasad, and that

"They corroborated the facts reported by Babu Mahabir Prasad and Babu Bhagbat Prasad."

Rai Bhadur Sheo Shankar Sahai is dead, and he could not, of course, be called by the defendants to contradict the story told on behalf of the plaintiffs. But all the other persons named by Raja Kamaleshwari and Mahabir are alive, and, in my judgment, it was the duty of the defendants to call them, if it be their case (as has been contended before us by Mr. Manuk) that the whole of the story told by Raja Kamaleshwari and Mahabir on this point is false. One of the persons named by Mahabir, Jainandan Jha, was indeed called by the defendants, but no question was put to him as to the enquiry alleged to have been made by Mahabir from him. The others were not called, though, at the date of the trial, they were all alive.

In these circumstances, it is quite impossible to ignore the testimony of Mahabir and Raja Kamaleshwari. The consequence is far reaching. It establishes that Kamalanand and Kalikanand, however immoral and extravagant they might have been, were not so flagrantly immoral and extravagant that the report of it must have reached the ears of the plaintiffs.

There is another point that ought to be mentioned here. When it is argued that the plaintiffs were actuated by bad faith and that their whole object was to get the property and not the return of their money it must not be forgotten that they reduced the rate of interest considerably on the transaction of the 18th July 1904. The interest on Nityanand's mortgage in favour of the plaintiffs was seven and a half per cent with quarterly rests The transaction of the 18th July, 1904, was largely a substitution of a new security for Nityanand's security. The rate of interest on this transaction was six per cent. per year with half yearly rests.

As was said by the Judicial Committee in *Hanooman Prasad Panday's case* (1) this was a transaction *prima facie* for the

benefit of the estate. I have taken the trouble to ascertain at what rate of interest the defendants have borrowed money from other money-lenders. I find that the interest on the loan of Rs. 3,50,000 advanced by the Maharajah of Darbhanga ran at the rate of 7½ per cent. with half-yearly rests (Exhibit H 1), that the interest on the loan for Rs. 7,00,000 advanced by Prithi Chand Lal ran at the rate of 7½ per cent. per annum with half-yearly rests (Exhibit H), that Olao Babu charged ten per cent, and Madho Ram 9 per cent. (see Madho Ram's evidence). I hold that it has not been established that the plaintiffs were actuated by bad faith in entering into the transaction.

I will now deal with question whether Kamalanand and Kalikanand were actually dissipating the estate, not because I think that the question is at all relevant, but because the question has been argued at great length before us. Now, in considering this question, the date that must be regarded is the 12th September, 1903, for the transactions sued upon have all arisen out of the transactions of the 12th September, 1903. But I do not think that it makes the slightest difference if we regard the 18th July, 1904, as the critical date for the consideration of this question.

Now, there can be no doubt that both Kamalanand and Kalikanand were thoroughly negligent as to the affairs of their estate and that they spent their life in high, and, indeed, reckless living. But the question which we have to investigate is, did they look to the income of the estate for the satisfaction of their whims and caprices? If, indeed, they borrowed the money which they spent on their pleasure, then, so far as the estate is concerned, it has nothingto complain.

That would be a personal question between themselves and their lenders without the slightest embarrassment to the estate, for it is well established that such debts are not binding on the estate. Now, on this point, Jainanandan Jha, who has long been associated with the Srinagar Raj and is at present the Manager of the Raj, says that:—

"The amounts which Kumar Kamalanand Singh used to spend extravagantly on immoral purposes used to be raised by him on loans."

He also says that Kumar Kamalanand "had also to borrow money for his *Shikar* parties."

Kalikanand in his evidence says that he was indebted to the extent of five or six lakhs before the purchase of share of Nityanand and that all these debts were incurred to quote his own words.

"To meet our luxurious desires, immorality, and hunting purposes."

To the same effect is the evidence of Zahurul Hussain. The evidence established conclusively that, though at times Kamalanand took money from the Mofussil, the bulk of the money spent by him for immoral purposes was borrowed by him from various persons. Now, so far as we know, there is only one debt which he incurred on the security of joint family properties before the transaction in suit, the debt in favour of Maharaj of Darbhanga. All the other debts were apparently personal debts which do not affect the joint family properties.

In my opinion, this view of the matter has an important bearing on the case. It may be that the creditors from whom Kamalanand and Kalikanand borrowed money could have obtained personal decrees against them, and then compelled a partition of the joint family estate; but the irresistible inference is that, so far as Kamalanand and Kalikanand are concerned, they left the joint family properties severely alone and preferred to borrow money on their personal securities. If I am right in my conclusion on this point, the income of the joint family properties would always be available to discharge the debt due to the plaintiffs.

Mr. Manuk has, however, argued that the fact, the undoubted fact, is that the joint family properties will be sold up in execution of the plaintiffs' decrees should he be fortunate enough to obtain them. That in my view, is entirely a matter of speculation. The fact that the suits are contested does not decide that there is not available to the defendants sufficient funds to discharge the debts due to the plaintiffs. That question could only be solved by the production of the account books of the estate; and these books have been carefully suppressed.

On this question, as well as on the question of the income derived by the family from Nityanand's share, the following observations of Lord Shaw in the case of *Murugisam Pillai* v. *Manickavasaka Desika*

Gnana Sambanda Pandara Sannadhi (3) are peculiarly applicable :—

" A practice has grown up," said his Lordship, " in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the *onus* of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit, but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

The present is a good instance of this bad practice. It is proved in the case by the first witness that, "the *Mutt* has regular fair day books: they are not now before the Court; ledgers are also maintained in the *Mutt*." These ledgers and day books were in the possession of the defendants or those of them who were heads of the institution, and they are not put in evidence. The proposition that these defendants challenged was that the expenses incurred had been incurred for the *Mutt* and were necessary for its purposes. The best assistance to a Court of Justice would have been a scrutiny of these documents, and their Lordships feel free to conclude that if they had been by their entries confirmatory of the defendants' view the defendants would have brought them into Court."

Coming now to the actual evidence of extravagance and waste prior to the date of the first bond sued upon, we have to consider what are the charges made against Kamalanand and Kalikanand. Kamalanand is said to have been thoroughly immoral; he is further said to have organized large shooting parties in which money was lavishly spent. The evidence, in my opinion, fails to establish that he had shown any particular tendency in those directions prior to the 18th July, 1904. The defendants have, indeed, produced a large number of letters written by two women, Shahzadi and Rajeshwari, to Kamalanand. Those letters do not fix the date at all; and, if they establish anything, they establish that his relation with them was purely a matter of business.

Apart from the letters, there are three documents Exhibits G-3, G-5, and G 6, which throw considerable light on the question. They are drafts of *ekrarnamahs* which Kamalanand and Shahzadi proposed to execute in each other's favour. These *ekrarnamahs* were, of course, not executed, but they show that the parties looked upon the arrangement between them purely as a matter of business.

Mr. Manuk has, however, argued that Kamalanand borrowed between five and six lakhs prior to the 18th July, 1904, and that it must follow that his career of extravagance had already commenced. The only documentary evidence on this point is the mortgage bond executed in favour of the Maharaja of Darbhanga on the 7th May, 1900, for Rs. 3,50,000. Now, the bond itself has not been produced in the case, but the plaint filed by the Maharaja has been produced.

We do not know what the defence of the defendants was or whether the Maharaja has recovered decree against the defendants on the mortgage of the 7th May, 1900. If we go by the allegations made in the plaint filed by the Maharaja, then it will appear that there was a justifying necessity for the loan. In any event, I am not prepared to regard a debt of Rs. 3,50,000 as conclusive evidence of waste and extravagance.

The defendants say that apart from the loan taken from the Maharajah of Darbhanga, they took loans from Ulao Babu, Chetnarain, and Dharam Chand. Durga Prasad gives two other names, Debi Marwari and Ram Chand Marwari. There is, however, no documentary evidence on this point; and though it may well be that Kamalanand and Kalikanand took various loans from time to time from various persons, I am not prepared to accept the oral evidence that all these loans were taken prior to the 18th July, 1904.

So far as Kalikanand is concerned, it has been suggested that he wasted nearly three and a half lakhs, on dogs, motor cars, horses, and in machineries for the manufacture of soap, knives, etc. In my opinion, the evidence is wholly unreliable. In the first place, it is

(3) (1917) 40 Mad. 402=39 I.C. 659=44 I. A. 98 (P. C.).

admitted by Kalikanand that the account books will not show any expenditure in respect of his extravagance.

Now, I can imagine the account-books being silent on the question of money from time to time paid to Shahzadi and Rajeswari; but I am wholly unable to believe that the money paid for buying machineries or motor cars would not be entered in the books of account. There is no reason to doubt that Kalikanand, like others in his position, had motor cars, horses and dogs; but it is one thing to say that, from time to time, he bought motor cars, horses and dogs, and quite another that, in respect of these extravagances, he spent nearly three lakhs and a half.

I wholly disbelieve that he ever spent money in respect of machineries, for I find it difficult to believe that, if he incurred any expenses in connection with his ambition to learn how soap and knives are manufactured, they should not be entered in the books of account, unless it be that he regarded the enterprise as his personal enterprise in which case, of course, the estate has nothing to complain. Kalika does say in his evidence that he never took any money from the estate for these purposes but that he always took loans. If he did, his conduct was meritorious in that he made no attempt to learn an art at the expense of the estate. On his own evidence, he did not impoverish the estate to any extent by the zeal which he is supposed to have shown in acquiring a very useful knowledge.

My conclusions on this point are as follows:—

(1) there can be no doubt that Kamalanand was both immoral and extravagant; but, for the most part, he indulged himself, not at the expense of the estate, but by borrowing money from different persons;

(2) there is no reliable evidence that he began his career in this direction prior to the 18th July, 1904;

(3) so far as Kalikanand is concerned, there is no reliable evidence that he was at any time extravagant.

It must follow, therefore, that the security of the 18th July, 1904, is enforceable as against the joint family.

I have now to deal with the validity of the mortgage of the 7th November, 1912 executed by Kalikanand in favour of the plaintiffs. It will be remembered that, at this date, Kamalanand was dead. The transaction of the 7th November, 1912 amounted to the substitution of a new security for the security of the 18th July, 1904 created by Kamalanand and Kalikanand in favour of Banaily which itself was substituted for the security of the 12th September, 1903 in favour of Banaily. The presumption of law, therefore, on the authority of *Hunooman Prasad Panday's case* (1), is *prima faice* to support the charge. Their Lordships in the case cited said as follows:—

"Consequently, if, as is the case here, as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."

On the authority of the Judicial Committee, there is ground to raise a *prima facie* presumption in the plaintiffs' favour of a consideration that binds the estate. The case of the defendants, again, is the same, namely, that they are not bound by a transaction entered into by one who has throughout lived a life of reckless folly. But the transaction of the 7th November, 1912 was entered into by Kalikanand, and not by Kamalanand; and, if I am right in my conclusion, there is no reliable evidence that Kalikanand was at any time guilty of waste and extravagance.

But, then, say the defendants, though Kalikanand may actually have entered into the transaction, it was made inevitable by the waste, and extravagance of Kamalanand. To this, there is this answer; that if you are going to trace the transaction of the 7th November, 1912 to its origin, there is no reliable evidence that, on the 12th September, 1903, Kamalanand had begun his career of waste and extravagance, and that the transaction of the 12th September, 1903, if I am right in my conclusion, was undoubtedly for the benefit of the joint family.

Quite apart from these considerations, there is not the slightest evidence that the plaintiffs or any of them knew or had reason to believe that, though the transaction was *prima facie* beneficial, it would not, in its result, benefit the family because of the character, tempera-

ment, and mode of life of Kamalanand, I am, therefore, unable to see how the validity of the transaction of the 7th November, 1912, can at all be questioned.

There is, in my opinion, another argument in favour of the validity of the mortgage of the 7th November, 1912. The evidence makes it perfectly clear that Banaily was about to sue on the mortgage of the 18th July, 1904, and that the plaintiffs found the money for the defendants just in time to prevent the suit. Now, it seems that, though the bond was executed on the 7th November, 1912, there was delay in paying the money to Banaily. On that date we have the following letter (Exhibit 13) from Kalikanand to Raja Kamaleshwari:—

"My dear Rajah Saheb,

"I thank you very much for your kindly helping me with the money to pay off the Banaily bond, for which I was in great difficulty.

"I further assure you that from now the interest of both of your bonds will be paid very regularly to every six monthly due and if I fail to fulfil my promise, you are at liberty to take any action you will take and for this, I will not blame you.

With kindest regards,
Yours very sincerely,
(Sd.) Kalikanand Singh."

On the 11th November, 1912, Rai Bahadur Lachmi Prasad Sinha who was at that time the Manager of the Srinagar Raj, wrote the following letter to Raja Kamaleshwari:—

"My dear Raja Bahadur,

"We have arranged to pay up all the Banaily dues except the fifty thousand rupees as arranged.

"To-morrow the Civil Courts will reopen and so we must reach Bhagalpur to-night and pay off the money before 10 A.M., to-morrow, else I hear Shiva Babu will positively file the suit in the first hour. I, therefore, request that you will kindly send your man with the money this evening by the Loop Mail. They will stop with me at Bhagalpur to-night. There is no any earlier train to-morrow except one which leaves here at 10 A.M., and reaches Bhagalpur 1 o'clock which I think will be too late.

Trusting you are well.

Yours sincerely,
(Sd.) Lachmi Prasad Sinha."

On the same day the following telegram was received by Raja Kamaleshwari from Nishikanta Sen.

"To Raja Kamaleshwari Prasad Singh Monghyr.

Please pay your money otherwise suit inevitable: balance is being arranged, no fear when we are helping Srinagar, no anxiety when we take six lakhs, wire.

Nishikanta Sen."

Nishikanta Sen, it may be mentioned, held a general power-of-attorney from the defendants which was executed in his favour at the time of the execution of the mortgage bond in favour of Prithi Chand Lal, that is to say, 30th October, 1912. There is, therefore, *prima facie* proof of the representations made by Kalikanand in the mortgage bond of the 7th November, 1912, which are to the effect that Banaily was about to institute a suit on foot of the mortgage of the 18th July, 1904, and that, if the claim of Banaily was not immediately satisfied, there was likely to be considerable loss to the family.

As the Judicial Committee said in the leading case [*Hunooman Persad Panday* v. *Musammat Babooee Munraj Koonweree*(1)], the representations by the manager accompanying the loan as part of the *res gestoe* and as the contemporaneous declaration of an agent, though not actually elected by the principal, have been held to be evidence against the heir. The correspondence to which I have referred furnish *prima facie* proof of such representations.

Mr. Manuk, whose robust advocacy is always of the greatest assistance to the Court, objected that the documents which I have set out were not proved according to law. Now it appears that Raja Kamleshwari, in the course of his evidence on commission, produced these documents. They were then tendered in evidence, and, as the defendants did not object to them they were marked as exhibits by the Commissioner.

This took place on the 19th September, 1915, though, according to the practice in the Mofussil, they were actually filed in Court so far back as the 18th May, 1915. On the 5th December, 1917, when the arguments in the case had commenced the defendant filed a petition objecting to the admissibility of these documents. The learned Subordinate Judge passed no order on this petition.

Mr. Manuk's argument is that the

refusal of the learned Subordinate Judge to pass an order on his petition was tantamount to his rejecting these documents. In my opinion the argument is wholly without foundation. It was not in the power of the learned Subordinate Judge to reject documents which had been admitted without protest.

Mr. Manuk does not seem to appreciate the distinction between the relevancy of document, and the proof of a document. The question of relevancy is a question of law, and can be raised at any stage; but the question of proof is a question of procedure, and is capable of being waived. I hold that the question of proof of these documents was waived by the defendants, and can no longer be urged before us.

Now, if we are at liberty to consider these documents, they undoubtedly establish that there was necessity, and an urgent necessity, for the loan of the 7th November, 1912. There is no doubt that Banaily was about to sue on the mortgage of the 18th July, 1904; there was no defence to the suit, and Kalikanand, as the *karta* of the family, was entitled to exercise his discretion on the question whether it was better for the family to submit to a decree or to take a further loan to discharge the debt due from the family.

He did exercise his discretion and applied for a loan to the plaintiffs to enable them to discharge the debt due to Banaily. I am of opinion that, when the discretion of the managing member is exercised *bona fide* and, as he conceives for the benefit of the estate, it should not be narrowly scrutinized by the Court.

It was lastly argued that there was no enquiry made by the plaintiffs as to the transaction of the 7th November, 1912, and, indeed, as to any of the transactions on which the present actions have been brought. I confess that it is difficult to appreciate what enquiry could have been made by the plaintiffs. They ascertained that the original transaction by which the defendants purchased Nityanand's share was undoubtedly for the benefit of the estate. They knew that, in purchasing the share the defendants had to take a loan from Banaily. They enquired into the moral character of Kamalanand and Kalikanand, and the result of the enquiry was wholly satisfactory. They paid the money not into the hands of Kamalanand and Kalikanand but to Banaily, and thus satisfied the loan given by Banaily to enable the defendants to acquire the share of Nityanand.

In other words, they saw to the application of the money, and took the precaution to recover from Banaily the mortgage-bond of the 12th September, 1903, and 18th July, 1904, executed in its favour by the defendants. They saw that there was a pressing necessity for the defendants to take a further advance on the 7th November, 1912, as Banaily was about to sue on the mortgage of the 18th July, 1904. In my judgment, such enquiry as was made by them was quite sufficient, in view of the fact that they saw to the application of the money. In my opinion, the mortgage of the 7th November, 1912, is enforceable as against the family.

In view of my finding on this point, it is quite unnecessary to deal with the question of antecedent debt.

There remain three other questions which were argued before us on behalf of the appellants. It was contended that the personal remedy against Kalikanand on the transaction of the 18th July, 1904, is barred by limitation. The only question is, whether the part payments upon which the plaintiffs rely have been established. It is sufficient for me to express my entire concurrence with the reasonings employed by the learned Subordinate Judge in coming to the conclusion that the personal remedy is not barred.

The next point is as to the validity of the registration. The argument is this: the mortgage bond of the 18th July, 1904, was executed by Kalikanand and by Kamalanand in two capacities, first on his own behalf and secondly, as the father and guardian of Ganganand and Ambikanand. The document was presented for registration by Lachmi Prasad under a power of attorney executed in his favour by Kamalanand and Kalikanand.

It was argued before us that there was no valid presentation on behalf of Ganganand and Ambikanand and accordingly, the document is invalid as against them. It was not made clear to us how Ganganand and Ambikanand, who were minors, could either have executed a power of attorney in favour of Lachmi Prasad or presented the document themselves, for registration. The argument is wholly unsubstantial. The

only argument which is open to Mr. Manuk, on the admitted facts, is that there was no valid execution by the minors; but then, nobody suggests that there was. If it was, then the document would bind them and the question of benefit and legal necessity would not arise.

It is only because the security was brought into existence by the managers of the joint family that the question of necessity and benefit has arisen. I apprehend that, provided that the transaction is one into which a prudent owner would enter, the manager of a joint family is entitled to bind the joint family properties by a mortgage executed by him. It is wholly immaterial whether the minors join in the mortgage or not.

As a matter of law, they cannot join in the transaction. The transaction must stand or fall on the determination of the question whether the transaction was one into which a prudent owner would enter. If it was, then the transaction must bind the joint family properties, although there was no registration, and consequently, no execution on behalf of the minors. If it was not, then the transaction fails, and it is wholly immaterial whether there was registration and consequently execution on behalf of the minors. I must overrule Mr. Manuk's argument on this point.

These are all the questions that arise in connection with First Appeal No. 86 of 1918. In my opinion the arguments advanced by Mr. Manuk are unsustainable, and I would accordingly dismiss First Appeal No. 86 of 1918 with costs.

In connection with First Appeal No. 85 of 1918, another question arises, and it will be my duty now to deal with it. The question is, what are the parcels intended to be secured by the document of the 18th July, 1904? The 19th clause of the mortgage bond runs as follows:—

"For the payment of the loan, principal, interest and compound interest, and of costs in case of institution of a suit, we do hereby mortgage and hypothecate our shares in *mauzas* entered in Schedule No. 1, allowing the mortgage lien created by the bond, dated 3rd June, 1894, to stand good, as also shares in *mauzas* entered in Schedules Nos. 2 and 3 with all rights and appurtenances, appertaining thereto which belong to us or may hereafter belong to us. Until the payment of the loan, principal, interest and compound interest, we shall not have the right to transfer the mortgaged properties in any manner, directly or indirectly, on any allegation whatever. The mortgage in favour of the said *Raja Bahadur* shall have preference and shall take effect from the 3rd June, 1894."

It is necessary to state that the date, 3rd June, 1894, is a mistake for 14th June 1894, and that the bond of 14th June, 1894, which was expressly kept alive by this transaction, was the bond executed by Nityanand in favour of the plaintiffs, whereby he mortgaged each portion and whole of 2 annas, 8 pies share in 16 annas of each of the *mauzas* in Tappa Jamalpur.

The schedule at the foot of the bond is in three parts. Specification No. 1 deals with Nityanand's share in the villages appertaining to Tappa Jamalpur purchased by the family on the 28th October, 1903, and it expressly keeps alive the security created by Nityanand in favour of the plaintiffs by the bond of the 14th June, 1894. Then there is the description of the property mortgaged which runs as follows:—

"Tappa Jamalpur, Pargannah Pharkia, Police Station and Sub-Registry Office of Gogri *asli mahal*, the *dakhli mauzas* of which are given below with *kamat* lands."

Then there follows a list of 52 *dakhli* villages the total value whereof would be very insignificant. It is conceded that the enumeration is entirely false in the sense that there are numerous *dakhli* villages which find no place in the list. It is also conceded that not a single *mauza* finds a place in the enumeration. But it is argued that that enumeration of *dakhli mauzas* must be read as restrictive of the general description of the properties mortgaged, that conveyed by the expression.

"Tappa Jamalpur, Pargannah Pharkia, Police Station and Sub-Registry Office of Gogri."

Specification No. 2 deals with the two-thirds share of the family in Tappa Jamalpur. It is conceded that if Mr. Manuk's argument with reference to Specification No. 1 is right, he must equally succeed on his argument as to Specification No. 2. No question arises

as to Specification No. 3, as Mr. Manuk conceded that all the villages appertaining to Taluka Nauhatta have been validly mortgaged.

In my opinion, there is no difficulty whatever in construing the schedule. Now, the best construction of deeds, and the one most satisfactory to the Courts, is to make each part expound the other, so as to make all the parts agree ; and, if a doubt arises upon the construction of a grant, and the doubt can be removed by construing the deed adversely to the grantor, this will be done especially where the deed is executed, as here for valuable consideration. This rule, however does not come into operation until a doubt has arisen upon the construction of the deed.

Now, the critical question is, whether the description by enumeration ought to be rejected as inaccurate or false or whether it ought to be read as restrictive of the general description contained in the schedule. Now, there are two important considerations which ought not to be ignored. First, the document makes it perfectly clear both in the operative part and in the schedule, that the security created by the mortgage bond of the 14th June, 1894, was to be kept alive and not extinguished.

Now, the security created by the bond of the 14th June, 1894, was in respect of each and every village appertaining to Nityanand's 2 annas 4 pies of Tappa Jamalpur. The plaintiffs held the security in their favour by the transaction of the 18th July, 1904. The defendants, who had meanwhile taken a conveyance of Nityanand's share in the entire family properties, and therefore, in 2 annas 4 pies of Tappa Jamalpur, discharged the debt due by Nityanand to the plaintiffs by taking a fresh loan from the plaintiffs on the security, according to the plaintiffs, of the 2 annas 4 pies of Tappa Jamalpur, and according to the defendants, of 52 *dakhli mauzas* appertaining to the 2 annas 4 pies of Tappa Jamalpur.

The question is, who is right. In my opinion, the fact that the plaintiffs expressly kept alive the security of the 14th June, 1894, suggests the inference that all the villages appertaining to the 2 annas 8 pies of Tappa Jamalpur which once belonged to Nityanand were intended to be mortgaged. Now, the whole object in keeping alive a security is to enable a party to hold that security as a shield against a hostile attack upon that security.

Now, a shield without a sword would be perfectly useless to the party ; in other words, if the transaction which we are at present considering did not intend to create a security in respect of the entire 2 annas 4 pies of Tappa Jamalpur which once belonged to Nityanand so as to give a right to the plaintiffs to enforce the security in respect of that 2 annas 4 pies of Tappa Jamalpur, it would be perfectly useless for the plaintiffs to be told that they can use the security of the 14th June, 1894, as a shield against a hostile attack.

The other consideration is that we have details in the schedule which suggest that the entire 2 annas 8 pies of Tappa Jamalpur was intended to be mortgaged. First, we have the extent of the mortgaged share, 2 annas 8 pies ; 2 annas 8 pies in what ?

The document says, 2 annas 8 pies in Tappa Jamalpur, Parganah Pharkia, Police Station and Sub-Registry Office of Gogri. Then we have the *touzi* number ; *touzi* number of that ? Not of the few *dakhli* villages which are enumerated in the schedule which cannot have any *touzi* numbers but of the entire *mahal*, Tappa Jamalpur. Then we have the mention of the *sadar jama*, not of the 25 *dakhli* villages, but of the 2 annns 8 pies of Tappa Jamalpur.

It was then argued by Mr. Manuk that it was clearly unnecessary to enumerate the 52 *dakhli* villages, unless they were intended to be restrictive of the general description.

Now, in my opinion, it is one thing to say that I am conveying the *dakhli mauzas*, a list of which is given below, appertaining to my Tappa Jamalpur, and quite another that I am conveying my Tappa Jamalpur of which the *touzi* number is this and the *sadar jama* is so much, the *dakhli mauzas* of which are as follows. Now, it is quite true that :—

" If there is some land wherein all the demonstrations are true and some, wherein part are true and part false, they shall be intended words of true limitation to pass only these lands wherein all the circumstances are true."

Take, for instance, a grant of " all these messuages, etc., in the occupation of B, in the City of W, formerly belong-

ing to the Hospital of W. Now there may be messuages in the occupation of B, in the City of W, but not belonging to the Hospital of W. Under the rule just stated they will not pass if there are:—

"Lands wherein all the circumstances are true."

But here the enumeration is confessedly inaccurate; and I am of opinion that the case falls under the other rule stated in the books, namely, whenever there is, in the first place, a sufficient certainty and demonstration, and afterwards an accumulative description and it fails in point of accuracy, it will be rejected. That rule has also been stated in this form: as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it. *Lewellyn* v. *Jersey* (*Earl of*) (3), *Morrell* v. *Fisher* (4). In *West* v. *Lawday* (5).

Lord Westbury, L.C. stated the rule in these words:—

"That maxim to which I refer," referring to the maxim of false demonstration, "Is applicable to a case where some subject-matter is devised as a whole under a denomination which is applicable to the entire land and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent universal or generic denomination. The ordinary principle and rule of law, which is perfectly consistent with common sense and reason, is this, that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift."

In my opinion, the passage cited is entirely relevant to the present enquiry. Here some subject-matter has been mortgaged as a whole under a denomination, Tappa Jamalpur, with a definite *touzi* number and a definite *saddar jama* which is applicable to the entire land including the *dakhli* villages and then the words of description that include and denote the entire subject-matter, namely, Tappa Jamalpur with a definite *touzi* number and a definite *sadder jama*, are followed by words which are added on the principle of enumeration, namely the fifty-two *dakhli* villages, but do not completely enumerate and exhaust all the part culars which are comprehended and included within the antecedent universal or generic denomination, namely, Tappa Jamalpur.

It must follow that the entirety which has been expressly and definitely mortgaged, namely, Tappa Jamalpur shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the mortgage.

I must dismiss First Appeal No. 85 of 1918 with costs.

Bucknill, J.:—These two First Appeals were appeals from a decision of the Additional Subordinate Judge of Monghyr, dated the 22nd December, 1917. The litigation concerns a sum of money amounting to approximately twenty lakhs of rupees. Although the documentary and oral evidence is very extensive the facts are very simple and are capable of being summarized very shortly.

One Kumar Srinand Singh was the proprietor of a large estate known as the Srinagar Raj situated in this Province near the Nepal border, it seems, with the closely connected domain known as the Banaily Raj, to comprise about 4,50,000, acres, *i. e.*, approximately 700 square miles.

Kumar Srinand Singh, who died in 1880, had more than one wife. By the first he had one son, Nityanand Singh who was born about 1870. By the second he had two sons, Kamalanand Singh and Kalikanand Singh, the former born in 1875 and the latter in 1877. Kamalanand died in 1910 leaving three sons, (1) Ganganand Singh, born in 1898, who is here the second defendant; (2) Ambikanand Singh, born in 1903, who was the third defendant, but who died during the course of this litigation, and (3) Achitanand, born in 1907, who is the fourth defendant.

Kalikanand is alive and is the first defendant; he, too, had three sons, (1) Abhayanand, who is the fifth defendant, (2) Bigayanand, the sixth, and (3) Jainand, who also died during the course of this litigation.

(4) (1843) 11 M. and W. 183=152 E. R. 767 =12 L. J. Ex 243
(5) (1849) 4 Ex. 591=19 L. J. Ex. 273:
(6) (1865) 11 H. L. C. 375=13 L. T. 171= 11 E. R. 1378.

Shortly after Kumar Srinand Singh died, it is stated, that disputes arose between the two widows, *i. e.*, the mother of Nityanand and the mother of Kamalanand and Kalikanand, with the result that in 1882 the management of the estate was placed under the Court of Wards. The property was thus and well looked after until 1891 when Nityanand Singh, coming of age, took over the control of the Raj. The estate was at this date in a very flourishing condition.

For some reason, it has been suggested that she was apprehensive as to his management. The mother of Kamalanand and Kalikanand brought on their behalf in 1891 against Nityanand a partition suit which resulted in a compromise decree in 1892 under which Nityanand received one-third and Kamalanand with Kalikanand two-thirds of the Raj. From 1892 to 1896 (when Kamalanand attained his majority) his mother looked after her two son's joint two-thirds share but in the latter year Kamalanand, then being of age, was naturally placed in charge.

In 1898 Kalikanand came of age.

Nityanand appears to have led an extravagant and careless life, and though his estate had a revenue of what is said to have been roughly 80,000 rupees per annum he seems quickly to have run into debt. His two step brothers were also doubtless improvident, for, though in receipt of extremely handsome revenues from their property, their mode of living was so luxurious and their expenses great that they, too, seem to have found their income inadequate to provide for the large sums spent by them, partially in entertaining and hunting, and had recourse to borrowing.

None of the three kinsmen appear to have taken any personal part in the management of their domains but to have been content to leave it in the charge of others and merely to receive and spend their revenues.

It is from the string of borrowing transactions indulged in by these three gentlemen that the present litigation emanates. The following is a short history of these arrangements :—

1. On June 6th, 1894, Nityanand, who had no son, borrowed from one Babu Kamaleshwari Prasad (who was the father of the first plaintiff in these suits) two lacs of rupees ; as security he mortgaged (the mortgaged bond is Exhibit 1).

"each portion and whole of my 2 annas 8 pies share in my proprietorship and possession in 16 annas of each of *mouzas* in Tappa Jamalpur, *etc. asli* with *dakhili*, specifications whereof with Parganah, Police Station, Registry Office, and *sadar jama* are entered at the foot of this bond with all rights, *Kamat* lands and *Zemindary Kutchery etc.*"

In this deed Nityanand recites that :—

" It is necessary for me and incumbent on me, on account of heavy interest and repeated demands to re-pay Rs. 1,54,677 7-10 principal and interest due under *rokas*, dated 6th December, 1893, 7th December, 1893, 28th January, 1894, and 25th May, 1894, executed by me in favour of Anant Ram Marwari of Bazar Sujaganj, etc., as also under *bahikhata* accounts due to Kalu Malu, a *Mahajan* of Benares, and on account of fees of B. Grishchandra Banerji, Vakil of Adampur, a quarter of Bhagalpur (torn) I require Rs. 45,322-8-2 for preparation (torn) and purchase of stamp of this bond and for other domestic purposes, and there does not appear to be any other means of repayment and of meeting the necessary expenses than borrowing."

The rate of interest was 10 annas per hundred rupees per month, *i. e*, 7½ per cent., but it was compound interest with rests at the end of every four months. Nityanand does not appear to have paid the interest as it fell due but to have allowed it to accumulate.

2. On March 6th, 1899, Nityanand executed another mortgage bond in favour of Kumar Kamalanand Singh, and Kumar Kirtvanand Singh. In it he recited that he had become involved in heavy debts of which he gives a schedule ; that his properties were held in mortgage on account of several debts; that various decrees had been obtained against him and that, in execution of certain of such, some of his properties had been advertised for sale and that, without borrowing money for the satisfaction of all these debts, there was no hope of saving the properties from being sold.

The mortgagees were relatives of Nityanand, being descendants from a recent common ancestor ; they were the minor sons of one Raja Lilanand Singh Bahadur and were represented in this

transaction by Rani Sita Pati, their mother and guardian. This branch of the family has been referred to in this litigation as the " Banaily Raj."

Nityanand borrowed under this deed 3½ lacs at 7 per cent. compound interest with half-yearly rests (the mortgage-bond is Exhibit 45). In the schedule of the debts given, the loan of June 6th, 1894, to Babu Kamleshwari Prasad is included ; with the accrued interest, the total then due seems to have been Rs. 2,90,000. Nityanand furnished as security and mortgaged :—

" my Zemindari, *patni*, *istimrari*, *durpatni*, and *lakheraj* rights, etc., to all the immoveable properties in the District of Bhagalpur Monghyr, Darbhanga, Maldah and Purnea."

Some of these properties (which were contained in a schedule) had already been mortgaged ; others had not.

3. On May 7th, 1900, Kamalanand and Kalikanand (the former then having one son born in 1894) borrowed from the then Hon'ble Maharaja Sir Rameshwar Singh Bahadur, G. C. I. E., proprietor of the Darbhanga, Raj, 3½ lacs at 7½ per cent. compound interest with half-yearly rests. Kamalanand and his son and Kalikanand were members of a joint Hindu family which was governed by the Mitakshara School of Hindu Law. Kamalanand was its *karta*. We have not had any copy of this bond placed before us but from Exhibit H-1 which is a certified copy of a plaint in a Mortgage Suit No. 172 of 1916, brought on the 24th April 1916 by the Maharaja against Kalikanand and his then two living sons and the two (then living) sons of Kamalanand Singh, who had, as I have mentioned before, died in April 1910, a certain amount of information can be gleaned as to its nature.

In paragraph 4 of this plaint it is recited that Kamalanand and Kalikanand, the adult members of the joint family, were in 1900 in need of about 3½ lacs of rupees for the purpose (*a*) of paying off joint family debts due to different creditors on *hat chitha* and on demand notes, etc., and incurred on account of the marriages of Kalikanand and of his relations and those of Kamalanand Singh, as also for the performance of the *Namkaran* ceremony of the children of the said Kamalanand, and (*b*) or meeting the expenses of the marriages of the daughters of Kamalanand which were about to take place in the near future, and (*c*) also for the purchasing of property for the benefit of the joint family.

Kamalanand, and Kalikanand as security for this loan mortgaged a considerable quantity of their properties belonging to their joint family. Apparently there was a covenant by them in the mortgage-bond that they would pay off the whole of the principal and the interest within a period of 19 years and that if the arrears due on account of interest exceeded at any time the sum of Rs. 40,000 the mortgagee was to be at liberty forthwith to sue for the entire principal, interest and compound interest due. As a matter of fact, only a very small amount was paid off by the mortgagors.

4. On the 11th March, 1902, Kumar Kamalanand Singh and Kumar Krityanand Singh, from whom Nityanand had borrowed 3½ lacs obtained a decree against him under the mortgage, for the sum of Rs. 41,286-4-0 which represented the amount due on the original loan plus the interest due. On the 12th September 1903, these decree-holders by a deed of transfer sold to Kamalanand and Kalikanand all their rights under the decree for the sum of Rs. 4,89,679-3-9.

This deed of transfer is Exhibit 36. In it, after reciting how the decree-holders had lent 3½ lacs to Nityanand and how and why they had obtained their decree against him, it is indicated that as the properties in the Srinagar Raj belonged as to one-third part to Nityanand and as to two-thirds to the transferees but had not been partitioned, the transferees had, under such circumstances and for their own benefit, decided to buy all the rights and interests possessed by the transferors under their mortgage bond on the basis of which the decree had been obtained.

The transferees did not pay cash for their purchase, but entered into a mortgage-bond with the transferors under which they borrowed from the transferors 5 lacs of rupees. From this sum was deducted the purchase price, Rs. 4,89,679-3-9. This mortgage-bond is Exhibit 35 and was entered into by the mortgagors, Kamalanand and Kalikanand on behalf of their joint family. This bond recites that they purchased the mortgagee's decree from the decree-

holders for the benefit of the joint family, 'with the advice of friends and well-wishers,' but that, as the mortgagors had no money in cash at present to pay the price of the said decree as well as to meet other necessities, the loan of 5 lacs had accordingly been arranged.

The money carried 6 per cent, compound interest with six-monthly rests and was to be paid back on the expiration of one year from the date of the bond. As security the mortgagors hypothecated a large amount of their family property which is detailed in long schedules.

5. On the 28th October, 1903, Kamalanand and Kalikanand bought by deed from Nityanand what he describes, as the whole and the entire interest that I have got together with the right of redemption, with respect to what may be shortly described as his share in the Srinagar Raj. This deed is Exhibit 52 and is a somewhat curious document.

It recites the connection between himself and his two step-brothers; how he had encumbered his property and had been unable to pay his debts; the different charges to which the property was subject and how he feared that if he was given any considerable lump sum he might spend the whole amount. The consideration was a sum of Rs. 60,000 but this was, with the exception of the sum of Rs. 6,000 which was to be utilised to pay off certain petty debts which he had contracted, to be doled out to him in the shape of a monthly allowance of Rs. 300.

There can be no doubt that Kamalanand and Kalikanand made this purchase on behalf of their joint family in order to round off the previous transaction by which they had acquired the right in the decree obtained by the Banaily Raj under its mortgage against Nityanand's property.

6. It will be remembered that under the mortgage of the 12th September, 1903, it was nominally incumbent upon Kamalanand and Kalikanand to re-pay to the Banaily Raj at the end of the year the 5 lacs which they had borrowed from it. They were not in a position to do so and accordingly a new arrangement was come to with the present first plaintiff Raja Kamaleshwari Prasad Singh.

7. Kamalanand and Kalikanand on the 18th July, 1904, entered on behalf of their joint family into a mortgage-bond which is Exhibit 11 which is the first bond sued upon; this is the bond sued upon in Suit No. 464 of 1914 which is the subject-matter of the present Appeal No. 85 of 1918. Both the date and the bond itself are of very great importance.

It recites at great length the circumstances which had given rise to the position as it stood that day. Under the mortgage of the 3rd July, 1894, Rs. 4,33,135-8-0 were due to the mortgagee whilst to the Banaily Raj under that of the 12th September, 1903, the amount due was Rs. 5,25,815. The mortgagors accordingly borrowed from the plaintiff Rs. 7,33,135 8-0. This sum represented first of all the amount due on the bond of the 3rd June, 1904 and secondly the sum of rupees 3 lacs which was utilised in paying of a portion of Rs. 5,25,815 due by the mortgagors to the Banaily Raj. This large sum carried 6 per cent compound interest with six-monthly rests. As security the mortgagors hypothecated their share in a large number of properties over such of which however as were already pledged under the mortgage of the 3rd June, 1894, the lien of that charge being declared to have preference.

There is no doubt that this mortgage was entered into on behalf of joint family. The interest was never properly paid by the mortgagors in respect of this transaction and on the date when the plaintiff brought his suit, *i.e.*, in 1914, the claim in respect of principal and interest had already amounted to Rs. 12,15,045-7-9.

8. On the same date, *viz.*, the 18th July, 1904, Kamalanand and Kalikanand executed a mortgage-bond in favour of the Banaily Raj. This mortgage deed only really constituted a re-arrangement of the previous mortgage of the 20th September, 1903. Under the mortgage the amount due was Rs. 5,25,815.

With the money borrowed from the plaintiff, the mortgagors had paid off 3 lacs of this amount and in addition another small sum, and they now gave a fresh mortgage for the balance, *viz.*, Rs. 2,25,000, after having made some adjustments with regard to the properties which they gave as security for the new substituted loan. The

loan bore compound interest at 6 per cent. with six monthly rests.

9. The last transaction, which concludes the series, was entered into on the 7th November, 1912. On that date Kalikanand, purporting to act on behalf of the joint family, (Kamalanand being then dead) executed a mortgage in favour of the first plaintiff. The effect of this bond was to extinguish the bond of the 18th July, 1904, executed by Kamalanand and Kalikanand in favour of the Banaily Raj, and to substitute the first plaintiff in its place.

The amount of the debt due under that bond had reached Rs. 3,34,000. The sum now borrowed from the first plaintiff was 3 lacs which was utilised (together with the sum of Rs. 34,000 otherwise provided) to pay off the amount due under the mortgage of the 18th July, 1904, to the Banaily Raj, and much property was given by the mortgagors as security for the loan. This bond forms the basis of Suit No. 465 of 1914, and of appeal No. 86 of 1918. The amount claimed in respect of principal and interest under the bond was Rs. 3,41,029-3-0.

The Officiating Subordinate Judge of Monghyr, by his decision, dated the 22nd December, 1917, decreed both suits in full in favour of the plaintiffs with costs. The arguments which were put forward before this Court were very numerous and very lengthy, but it will be seen that the whole subject-matter of the two suits can rightly and conveniently be divided into three headings:—

(1) That part of the mortgage of the 18th July, 1904, (Exhibit 11) executed by Kamalanand and Kalikanand in favour of the first plaintiff which relates to the payment of the Rs. 4,33,135 due under the mortgage of the 6th June, 1894, which was secured on Nityanand's separate share in the property.

(2) That, part of the same mortgage, Exhibit 11, which related to the payment to the Banaily Raj of 3 lacs of rupees in respect of the Rs. 5,25.815 then due to it under the mortgage of the 12th September, 1903, made by Kamalanand and Kalikanand in its favour in respect of the purchase of that Raj's decree for Rs. 4,89,679 as a result of its mortgage over Nityanand's share made on the 6th March, 1899.

(3) The mortgage of the 7th November, 1912, (Exhibit 17) which is again in relation to the payment of what still remained then due to the Banaily Raj in respect of the same transaction mentioned in heading (*b*).

With regard to (1), it is quite clear that when Kamalanand and Kalikanand bought on behalf of the joint family on October 28th, 1903, the rights remaining in his property of their step-brother Nityanand they purchased the estate subject to the encumbrance created by the mortgage of June 6th, 1894, but at that date they incurred no direct obligation to the plaintiff as the liability was then only upon the land and upon Nityanand.

The crucial date is, of course, July 18th, 1904, when Kamalanand and Kalikanand on behalf of joint family paid off the sum of 4,33,135 rupees, at which sum the liability under the mortgage of June 6th, 1894, then stood, borrowing money on the security of the joint family property so to do.

Now, how can such a transaction be justified or supported?

It is urged here that it can be on three different grounds :—

(*a*) On the ground of family necessity.

(*b*) On the ground of family benefit.

(*c*) On the doctrine of antecedent debt.

As to (*a*), family necessity. Now, what was the real nature of the transaction? It was simply part of the purchase of Nityanand's property.

Now, although this purchase may have been very desirable and convenient both from a practical and sentimental point of view—practical, because it brought together once more properties which were being separately administered, and sentimental, because it prevented the falling into the hands of strangers of a large portion of what had once been the old ancestral domain of the Srinagar Raj—I cannot bring myself to regard it as in any way a family necessity; so obvious do I consider this fact that I do not propose to discuss this point further.

With regard to (*b*), family benefit. This is a far more debatable question.

It has to be considered whether the purchase was really for the family benefit; and it is on this point that the main part of the lengthy arguments have been addressed to us.

The contentions put forward on behalf

of the minors have been presented to us upon two general lines.

(A) That, having regard to what has been frequently designated the 'psychology' of this case, the plaintiff must have known that the transaction would not actually enure to the benefit of the family.

(B) That, in fact the transaction was a bad bargain for the joint family at the date of the loan [18th July, 1904].

I think it is as well to point out as a preliminary that it must be always borne in mind that, although large sums are being dealt with in connection with all these loans, and this litigation, the principal figures, *i.e.*, Nityanand, Kamalanand, Kalikanand and the Kumars of the Banaily Raj, were and some still are landed proprietors of great wealth and considerable importance.

There was adduced before the Court below a great quantity of evidence much of which has been read before us and of which I have no doubt a certain amount is true to show that the three sons of Srinand Singh were of very extravagant habits, and that Nityanand and Kamalanand were in addition dissolute and immoral.

I am quite prepared to accept the view that all three were always very careless about money, that Nityanand and Kamalanand lived, at times, what, by more respectably minded people, would be regarded as profligate and sinful lives, that very large amounts were at times expended upon hunting parties, sporting or luxurious hobbies or pursuits, entertainments, and even upon courtezans and other parasites; and, indeed, there is no doubt that, generally speaking, these young men succeeded for a long time in living beyond their handsome incomes and failed to perform, to their position or their inheritance, those duties which they quite wrongly, thought beneath their dignity.

All these features may be very lamentable, but the salient fact remains that on the date of the mortgage, *i.e.*, 14th July, 1904, Kamalanand (then 29 years of age) and Kalikanand (then 27) who were the proprietors of an estate worth perhaps 40 lacs, had, so far as we clearly know, only encumbered their estate, apart from the purchase of their step-brother's property, by borrowing in May 1900, 3½ lacs from the then Maharajah of Darbhanga (Exhibit 41); and that loan was contracted, so far as we know legitimately, for various beneficial or necessary family purposes.

I do not think that such an encumbrance is of any material importance assuming even (as I do for the moment) that it was known to the first plaintiff in this case.

It is also important to notice that the money borrowed for paying off the mortgage of June 6th, 1894, did not go into the pockets of Kamalanand and Kalikanand.

The fact that, as it has turned out, little attempt was made, apparently, to pay off the principal or even interest on the loan contracted on 18th July, 1904, seems to me to be not very material. I think that it would be throwing far too great a burden upon one who lends money to the *karta* of a joint Hindu family subject to Mitakshara Law to demand from him a correct prophecy at the date of the transaction as to whether it will not turn out beneficial to the family.

Whilst, no doubt, if the transaction does, in fact, later, show advantage, his position is thereby strengthened if not actually substantiated (one may be sure it would never be repudiated), the converse is not, necessarily, the case; there may be innumerable reasons why an affair which at the date of its inception promises well subsequently emerges unsuccessful.

This line of argument cannot really be put higher than by way of suggesting that the habits of the borrowers were so notoriously bad that the lenders must or ought to have known that there was no likelihood of the brothers attempting to meet their obligations under the bond and that their real object in entering into the transaction was merely to gain an immediate increase of their income from the revenues of the purchased property with the object of indulging further in their thriftless modes of life.

I do not think that this is an argument which can really be supported. I do not think, that at the date of the transaction, there existed any ground which would justify this Court in saying that the lenders were merely pandering to improvident persons. The truth is, that one must be thrown back, in order to express a proper opinion, upon a

consideration of whether in fact the bargain at the date of the loan was one beneficial, so far as a prudent person could say, to the interest of the family. It may here be pointed out that the transaction was apparently carried out under the advice of Mr. Weatherall, the Manager of the Raj, and not in haste or without investigation and consideration.

A great deal of ingenuity has been displayed and much detailed matter placed before this Court in an endeavour to show that the bargain was *prima facie* a bad one ; but I feel that this effort has on the whole quite failed. I feel satisfied that the revenue derived from the property was far more than adequate to meet the interest payable and that the value of the estate was very much more than was paid for it by the borrowers. In my view, therefore this part of the transaction was justifiable as being for the benefit to the family.

This being my view, it seems hardly necessary to express any opinion as to whether this part of the loan could be supported, as is argued, on ground [c], *i.e.*, by the application of the doctrine of antecedent debt; but I think, perhaps, that it is desirable that I should do so even if very cursorily.

It appears to me that when the two brothers bought on October 28th, 1903, from Nityanand his estate, it is clear that they then took upon themselves and incurred that debt which Nityanand owed under the mortgage of June 3rd, 1894, and became liable at any rate to indemnify Nityanand in respect thereof. They thus incurred a liability which, so far as the relative part of the transaction of the 18th July, 1904, was concerned, might in law be regarded as to its antecedent debt and on that ground capable of supporting the corresponding material portion of the loan now under consideration.

We next have to deal with heading No. 2, *i.e.*, the other portion of the transaction of July 18th, 1904. It consists of the borrowing by Kamalanand and Kalikanand of 3 lacs from the first plaintiff for the purpose of paying off to the Banaily Raj a substantial portion of what was owing by them to that Raj under the mortgage of September 12th, 1903. Kamalanand and Kalikanand had borrowed this money in order to pay for the purchase of the decree obtained by the Banaily Raj against Nityanand and the present transaction constitutes to my mind a typical instance of the *kartas* of a joint Hindu family governed by Mitakshara Law charging the family property with an encumbrance for the purpose of paying off an antecedent debt.

This antecedent debt was certainly not incurred for immoral purposes but for the purposes of buying the decree which the Banaily Raj had obtained against Nityanand's property and though it may be that this antecedent debt was itself secured by a mortgage on the family property, yet we are bound by the recent decision of the Full Bench of this Court in Second Appeal No. 370 of 1919, *Mathura Misra* v. *Raj Kumar Misra* (7) The two debts are clearly dissociated both in time and in fact. On this ground, therefore, it seems to me that this portion of the transaction is unassailable.

But, apart from this, this part of the transaction is also one actually attached quite as closely as was the other portion to the acquisition by the two brothers of Nityanand's estate ; and if that part of the transaction first dealt with is capable, as I have stated that I thought it was, of being supported on the ground of family benefit there is no reason why this other portion of the transaction should not be similarly upheld. For the above reasons, I am of the opinion that the plaintiffs should succeed on this bond in their suit.

We now come to (3), that is to say, the transaction which is identified with the mortgage bond of November 7th, 1912 (Exhibit 17) which formed the basis of Suit No. 465 of 1914. Now, here, the circumstance surrounding and the date of this bond were different to those connected with the transaction of the 18th July, 1904.

First of all, the money, 3 lacs, is borrowed to pay off the amount still remaining due to the Banaily Raj under the mortgage by Kamalanand and Kalikanand executed on the 18th July, 1904 in favour of the Banaily Raj. The amount was the balance due under the old transaction of 1903 under which the brothers had bought the decree of the Banaily Raj which it had obtained against Nityanand. But Kamalanand had died on April 14th, 1910, and this bond (Exhibit 17) now sued on is execu-

(7) A. I. R. 1921 Pat. 447 (F. B.)

ted by Kalikanand as *karta* of the family on behalf of himself, his three sons and the three sons of the deceased Kamalanand.

It is not contended that the doctrine of antecedent debt can be applied in the case of this transaction, nor could it, indeed, have been successfully urged; for the reason that Kalikanand's nephews would not be amenable to the incidences of the doctrine which is only applicable where the relationship of father and son exists; and, though, if Kalikanand and his sons had alone been affected by the transaction, the doctrine might well have been called in aid by the plaintiff, the existence of the nephews, whom Kalikanand purported to bind as their *karta*, prevent it from being unutilized.

The liability of Kalikanand and his sons under the doctrine of antecedent debt cannot be supported if other mortgagors (here the nephews) are not liable under the same doctrine; it is not legally possible to split the liability of mortgagors in any such way as this.

But it is contended that though it is admitted that the doctrine of antecedent debt cannot be applied here yet it was open to Kalikanand to bind his nephews (Kamalanand's sons) if the transaction was either for family benefit or family necessity. It is strongly urged for the respondent that in this transaction both elements of family benefit and family necessity were present and these contentions must both be carefully examined.

Firstly, then, as to family benefit. At the date of the loan (1912) was the transaction really a beneficial one to the family? A good deal had taken place since 1904, Kamalanand had died after living a froward and no doubt extravagant existence; the interest on the Banaily Raj's loan had not been fully paid and rather more than a lac had accumulated and was due. The old loan had been made at 6 per cent. compound interest with half-yearly rests; the new loan was on the same terms. Was there any advantage, then, in substituting the first plaintiff for the Banaily Raj?

In the first place, it is said that the Banaily Raj was threatening to sue on its mortgage; and it is no doubt true that this was so. It may be said that to avoid this suit which could not but be followed by a sale of the property, the new arrangement for the family benefit; and though this argument has been addressed more fully towards the contention that there was family necessity, it is not possible to consider the question of family benefit disassociated from this pressure or threat of litigation. Eight years had elapsed since the loan by the Banaily and during that period the amount due under the bond had swollen, owing to the fact that the interest had been but irregularly paid, from 2,25,000 rupees in 1904 to 3,34,000 rupees in 1912. The Banaily Raj could only have sold, in execution of any decree which it might have obtained under its mortgage, such properties as were mortgaged to it.

The effect of the new transaction on the family property was that Kalikanand pledged to the plaintiff more property than had been hypothecated to the Banaily Raj to secure a sum less than that due to the Raj by Rs. 34,000. Such a transaction, considered without further factors, would not *prima facie* be for the family benefit; but if it was entered into for the purpose of saving the sale by the Banaily Raj of the family property mortgaged to it, the transaction may very well be regarded as for the benefit of the family.

True it is, that more of the family property had to be charged, but that was to the non-payment of interest in the past and was a fact which, however regrettable, had to be faced. True, too, it may be that, in the interval, the conduct of the brothers had been marked by extravagance but, unless it can be shown that the first plaintiff was here, in making this loan, deliberately and *mala fide* merely indulging Kalikanand in his desire to be extravagant, or knowing as a prudent man from Kalikanand's past unbusinesslike and careless habits that the transaction could not, within any reasonable probability, turn out to the family's benefit, I do not think that either the passing of the years with the brother's conduct in the interval between 1904 and 1912 or the accumulation of interest are very material factors, if it is clear that, as I consider was the case, the object of the new arrangement was to save the family property from being sold. I do not consider that there is any evidence adequate to saddle the plaintiff with any such imputation.

I think, therefore, that, under all the circumstances, the transaction must be regarded as having been for the benefit

of the family.

As I have already expressed my view that the transaction was for the benefit of the family, it may seem somewhat redundant to give any opinion as to whether the transaction was for family necessity; but the point was strenuously argued and I do not like to pass it over.

I have already said that I did not think that the question of family benefit could fairly be dealt with separately and apart from the factor which is here urged as constituting family necessity. There is, to my mind, ample evidence to show that the Banaily Raj had been pressing the mortgagors to make payments due under the bond of July 18th, 1904; and further, that defendants were aware that that Raj was on the verge of commencing a suit against them (Exhibits 14 and 15).

The fact is incidentally referred to in the mortgage-deed itself where in Section 7 it is recited that "the Banaily Raj was inclined to institute a suit."

Nor is it a matter for surprise as for sometime nothing material had been paid under the bond to the Raj.

Now, if a person who has lent money to a *karta* on the security of joint family property gives clear evidence of the intention of forcing the re-payment of the loan and if the borrower sees no means of paying back the loan to the lender without sacrificing the family property, are such circumstances, circumstances which can be called "family necessity" justifying the borrower making arrangements with some third person ready to pay off the loan and as it were to be substituted as lender.

I have no doubt but that it should be in general so regarded. Nor do I feel any doubt that it was the pressure form, and the threatening attitude of, the Banaily Raj which led the defendants to make the new arrangement with the plaintiff.

I, therefore, consider that there were conditions of family necessity here present which justified a re-arrangement and the execution of the new bond, and that the plaintiffs should succeed in their suit upon it.

Before concluding my observations I think it desirable that I should take notice of the fact that there were certain minor points which were argued before us for the appellants in connection with portions of their appeal.

These were three in number.

(1) A contention that in connection with the transaction of the 18th of July, 1904 any personal remedy against Kalikanand was barred by limitation. I need only say with regard to this contention that I felt satisfied that there had been periodical payments which take the question of limitation outside the region of any practical argument. These payments were, in my opinion, satisfactorily established and although it was suggested that they had not really been made on behalf of the mortgagees, I think that there can be no doubt whatever that they were in fact payments made on behalf of the debtors in the ordinary course.

(2) It was contented that the registration of the bond of the 19th July, 1904, was not made on behalf of the minors and that, therefore, as far as they were concerned, the bond did not bind them. I have had the advantage of reading the judgment of my learned brother on this point and I entirely agree with the conclusion at which he has arrived, namely, that as the bond was executed by the *kartas* on behalf of the joint family so a registration by the *kartas* would, whether the minors were at the registration mentioned by name or not, be effective in binding the minors.

(3) The third question which arose was as to the extent of the property which passed as security under the mortgage of the 18th May, 1904. Here, again, I have had the advantage of perusing my learned colleague's observations upon this point. There is no doubt that the schedule is somewhat misleading when read with Clause 19 of the bond.

On the other hand, when the document is considered as a whole, it seems to me that it is quite clear that my learned colleague has taken the correct view of what passed under the mortgage, and, to what he has stated, I do not think I need add anything except to say that I am in agreement with him.

Appeal No. 85 dismissed.

A. I. R. 1922 Patna 154.

ADAMI AND BUCKNILL, JJ.

Ramjanam Singh and others—Defendants-Appellants

v.

Kunj Behari Singh—Plaintiff-Respondent.

A. No. 460 of 1919, decided on 25th July, 1921, from the appellate decree of Sub-J., Shahbad.

Mortgage—Prior and subsequent puisne mortgagee allowing foreclosure of prior mortgage without redeeming does not lose right to sue mortgagor on personal covenant.

A puisne incumbrancer who voluntarily submits to a foreclosure order absolute being made without insisting upon his right to have a time allowed within which to redeem a prior incumbrance does not thereby preclude himself from suing on the covenant for payment in the mortgage-deed and recovering his debt.

[P. 156, C. 1.]

Sushil Madhub Mullick, Kulvant Sahai, S. S. Lal and *T. N. Sahai*—for Appellants.

L. N. Singh and *S. N. Ray*—for Respondent.

Adami, J.:—The facts of the case are, shortly stated, as follows.

Sometime prior to September, 1903, defendant No. 1 executed a simple mortgage of certain shares in five out of the seventeen villages composing Mahal Gamhari in favour of Brij Mohan Singh, a nephew of the plaintiff.

On the 16th September, 1903, defendant No. 1 executed an usufructuary mortgage of the same five villages in favour of the plaintiff in consideration of a payment of Rs. 837, and the plaintiff entered into possession as usufructuary mortgagee, and his name was registered as such in the Collector's Register.

Thereafter the shares of defendant No. 1 were put up to sale in execution of a money-decree obtained against him, and were bought by one Sadhu Singh, who in 1905 sold them to the plaintiff who thus became proprietor of the shares in the whole *mahal* and was registered as such, but the entry of his usufructuary title in respect of the five villages still remains recorded.

In 1911 Brij Mohan Singh, the prior mortgagee instituted a suit on the basis of his mortgage and joined the plaintiff with defendant No. 1 as defendants. He obtained a decree, in the execution of which the mortgaged properties were put up to sale and purchased by Ramdhani Tewari on the 8th of June, 1913. The plaintiff made no attempt to redeem the prior mortgage. On the 6th February, 1914 possession was delivered to Ramdhani Tewari, and the plaintiff was dispossessed. He then instituted the suit giving rise to this second appeal against his mortgagor defendant No. 1, claiming repayment of the debt of Rs. 837 with interest.

The defendants contended that the plaintiff had by his own acts extinguished his rights under the mortgage and could not now claim a money decree; that by his failure to redeem the prior mortgage he had forfeited the security he held and that as soon as he made the purchase from Sadhu Singh his mortgage rights merged in his proprietary rights.

The learned Subordinate Judge found that the two mortgage bonds were genuine and for consideration and were executed for legal necessity, that what Sadhu Singh purchased and sold to the plaintiff in 1905, was merely the equity of redemption, that the plaintiff by the purchase had not merged his usufructuary right in the proprietary right, as by the purchase he had not obtained absolute ownership, but only the equity of redemption, and in any case it was to his benefit to keep his usufructuary right separate from his proprietary right. As there was a personal covenant in the mortgage bond to pay the debt in the event of dispossession he granted the plaintiff a decree.

On appeal to the District Judge it was contended that there was a merger at the time of the purchase in 1905, and that the suit for money was therefore barred, and also that there had in fact been no dispossession as Ramdhani was in reality the *farzidar* of the plaintiff. It was found that Ramdhani was not in fact the *farzidar* of the plaintiff and that the plaintiff had been dispossessed in 1914.

The learned District Judge agreed on the other points with the Subordinate Judge and dismissed the appeal. In a cross-appeal as to interest from the date of suit to the date of the decree, the lower Court allowed interest for that period at the rate of 6 per cent. per annum.

The term of the *zurpeshgi* mentioned in the plaintiff's bond is seven years ending in 1317, F. S., or 1910, and there is a condition in the bond "should the *zurpeshgidar* or his representatives be in any way dispossessed of the whole or a portion of the *zurpeshgi* properties then the said *zurpeshgidar* and his heirs and

representatives shall be competent to bring the *zurpeshgi* properties into their possession by taking such steps as they like, or to realise the said *zurpeshgi* debt with interest thereon at 1½ per cent. per mensem from the date of their dispossession to that of realisation from the *zurpeshgi* properties or from my person and other properties or those of my heirs and representatives, by taking such steps as they think proper."

It has been strenuously contended on behalf of the appellants, defendants, firstly; that by his failure to redeem the prior mortgage in the suit instituted in 1910, the plaintiff lost all rights against the mortgagor, not only the rights against the property mortgaged but also his rights against the mortgagor personally, that in fact his mortgage debt was altogether extinguished.

Mr. S. M. Mullick even suggested that the knowledge that the subsequent mortgage existed would lead intending purchasers at the auction sale in execution of the prior mortgage-decree to offer a proportionately smaller sum, and thus the mortgagor would be mulcted for the subsequent mortgage debt and could not be asked to pay it again.

Secondly it is urged that by his purchase in 1905 the plaintiff merged his usufructuary rights into his proprietary rights and thus ceased to be *zurpeshgidar*, so that having lost the security of the property, any rights he had against the person of the judgment-debtor accrued in 1905 and the present suit for money must be barred by limitation.

Thirdly, it is argued that the defendant lost all his rights and interest in the mortgaged properties when the *Mahal* was sold in execution of a money-decree to Sadhu Singh, and it is suggested that it was in 1905 or thereabouts that the plaintiff was dispossessed.

With regard to the first point, I think I may safely take as my guide the case of *Worthington & Co., Limited* v. *Abbot* (1). There it was held that a puisne incumbrancer who voluntarily submits to a foreclosure order absolute being made without insisting upon his right to have a time allowed within which to redeem a prior incumbrancer does not thereby preclude himself from suing on the covenant for payment in the mortgage-deed and recovering his debt from the residuary legatees and devisees of the deceased mortgagor.

Mr. Justice Eve, in delivering judgment conceded that it had been determined in a series of cases "that if the mortgagee by voluntarily doing something which he is unauthorized to do, either by the express terms of the contract between him and the mortgagor or by implication arising from that express contract puts it out of his power to reconvey the mortgaged premises to the mortgagors on payment, he cannot afterwards sue on the covenant."

He then looked into the question whether the conduct of the mortgagees in that case fell within that principle. In that case the subsequent mortgagees in a suit brought by the prior mortgagees to foreclose their mortgage, being under the impression that the mortgagor was without means and unable to make any payment under the covenant in the mortgage, consented to stand debarred and foreclosed from all right, title and interest and equity of redemption of, in, and to, the mortgaged premises. The object was to save the delay that would otherwise be necessary for taking accounts and to save the subsequent mortgagees from the costs the taking of accounts would have entailed.

The learned Judge says "It is conceded that if he (the subsequent mortgagee) incurs the costs and puts the prior incumbrancer to the expense of taking and verifying the accounts; although he never intends to redeem, he is still entitled to his remedy under the covenant, and I cannot see on principle why he should be placed in a worse position simply because he averts unnecessary delay and expense and says at once that he never intends to redeem and does not ask for an opportunity of doing that which he never intends to do.

The only effect of the conduct of which complaint is now made was that the puisne incumbrancers abandoned their right to redeem, and, I must assume, did so because they were satisfied that it was a right of which they had no intention of availing themselves. I do not myself see how in doing so they in any way prejudiced the mortgagor: I do not think there is anything in the conduct of the mortgagees

(1) (1910) 1 Ch. D. 588=54 S. J. 83=79 L. J. Ch. 252=101 L. T. 895.

which disentitles him to sue on the covenant. I hold therefore, that the right to sue on the covenant is subsisting.

In the present case I cannot see that the puisne mortgagee voluntarily did anything which he was unauthorised to do either by the express terms of the contract between him and the mortgagor, or by implication arising from that express contract. He was not bound to redeem, and he did nothing which his contract did not allow him to do. The covenant was to the effect that if he were dispossessed, the mortgagee might sue for repayment of the debt. He was dispossessed and had a right to sue.

The next question is whether the plaintiff ceased to have any *zurpeshgi* right in 1905 when he purchased the property. His vendor had purchased only the right, title and interest of the mortgagor which was merely a right of redemption and that was all that the plaintiff obtained by his purchase. The property was subject to the charge of the prior mortgage. Sadu Singh never obtained possession and the plaintiff's possession as *zurpeshgidar* was not disturbed. He continued to possess the lands in usufruct, and in any case was entitled to retain that usufructuary right separate from the proprietary right since it was for his benefit.

In 1911 when the prior mortgagee instituted his suit the plaintiff was still in usufructuary possession. By his failure to redeem he of course lost his security but, as found above had still a right against the mortgagor personally. It would, further not be equitable that the plaintiff's mere failure to redeem should absolve the defendant No. 1 from liability to pay a debt justly due.

With regard to limitation I have found that the plaintiff remained in possession as *zurpeshgidar* up to the date of suit, and he was still holding as such when dispossessed. His dispossession was in 1914, and therefore a suit brought in 1916 was not out of time. The dispossession gave him a right to sue for the debt under the terms of the bond.

I would dismiss the appeal with costs.

There is cross-objection to the effect that, as the rate of interest agreed to in the bond is 1½ per cent. per mensem, that rate should have been allowed by the lower Court, and not the rate of 6 per cent. per annum for the period subsequent to the institution of the suit up to the date of the decree. The amount of interest to be granted for this period was at the discretion of the lower Court, and I see no reason to interfere.

I would dismiss the cross-objection with costs.

Bucknill, J. :—I agree.

Appeal and cross-objections dismissed.

A. I. R. 1922 Patna 157.

JWALA PRASAD, J.

Deo Narain Mahto—Complainant-Petitioner

v.

Chhatoo Raut and others—Accused-Opposite Party.

Cr. Rev. No. 603 of 1921, decided on 27th February, 1922, against an order passed by Dist. Mag., Muzaffarpur.

Criminal P.C., S. 250 proviso, and 367, 424 —Proviso mandatory and non-compliance vitiates order—Appellate Court must record proper judgment.

The direction in the proviso of Section 250 is mandatory, the non-compliance whereof vitiates the order of the Magistrate directing compensation to be paid by the complainant. Appellate Court is bound to record a proper judgment setting forth the points of determination, the objections of the appellant, his decision thereon, and the reasons for his decision. [P. 158, C. 1, 2.]

N. Kishore Prasad—for Petitioner.

Janak Kishore—for Opposite Party.

Jwala Prasad, J. :—This is an application against an order of the Magistrate, dated the 9th August, 1921, directing that the complainant should pay compensation of Rs. 10 to each of the seven accused, under Section 250 of the Code of Criminal Procedure. The order was upheld by the District Magistrate on the 17th of September, 1921.

The petitioner impugns the validity of both the orders of the trial Court as well as of the lower appellate Court. The order of the trial Court is assailed on the ground that the Magistrate did not record and consider the objection urged by the complainant to his making the direction to pay compensation to the accused. While acquitting the accused, the Magistrate called upon the complainant to show cause why he should not pay Rs. 10 as compensation to each accused person.

Cause was shown by the complainant by means of a written peti-

tion. The Magistrate did not state in his order what the objection of the complainant was, nor does he appear to have considered the objection. He simply says that, "the complainant filed a petition showing cause and the cause shown is not reasonable at all."

The petition has been read to me and the complainant has urged therein a number of objections. None of these objections set forth in the petition seem to have been considered by the Magistrate nor have they been recorded by him. Proviso (*a*) to Section 250 of the Code clearly states that—

"the Magistrate shall record and consider any objection which the complainant or informant may urge against the making of the direction."

The direction in the said proviso is mandatory, the non compliance whereof has vitiated the order of the Magistrate directing compensation to be paid by the complainant. This was the view taken in the case of *Shekh Janab Ali* v. *Hira Lall Pasban* (1), as well as by Hayward, J. C., in the case of *Minhomal Lilaram* v *Emperor* (2).

The order of the lower appellate Court is assailed upon the ground that the judgment written by the District Magistrate disposing of the appeal of the complainant is not in accordance with law. This ground appears to be substantial. The learned District Magistrate has simply stated that there was trouble between the complainant and the accused, Gokhul, and that after reading the judgment and evidence he considered that the decision of the lower Court was correct and the compensation was rightly awarded.

This is not disposing of the objection of the complainant as to the order of the Magistrate directing compensation to be paid by the complainant. The judgment of the District Magistrate has failed to comply with the directions contained in Section 367 of the Code of Criminal Procedure, which applies by reason of Section 424 to an appellate judgment also.

It has, however, been contended that both these Sections 367 and 424, of the Code do not apply to a judgment passed by an appellate Court in an appeal from an order directing the complainant to pay compensation. There is no substance in this contention. Section 250, Clause (3) expressly provides for an appeal to the District Magistrate from an order of a Magistrate of the 2nd or 3rd Class to pay compensation to an accused person. The appeal to the District Magistrate was, therefore, presented under Chapter XXXI, which lays down the procedure for an appeal "from any judgment or order of a Criminal Court"; (*vide* Section 404 of the Code). Section 423 lays down the power of an appellate Court in dealing with an appeal from a judgment as well as from an order.

Section 424 relates to a judgment passed by an appellate Court dealing with either an appeal from acquittal or conviction or an appeal from an order, such as the one in question. The District Magistrate was, therefore, bound to record a proper judgment, setting forth the points for determination, the objections of the appellant, his decision thereon, and the reasons for his decision. The judgment of the lower appellate Court in the present case lacks in all the aforesaid details and is, therefore, not in accordance with law.

Therefore, the orders of both the Courts below are bad in law and must be set aside, and the case sent back to the trial Court to be disposed of in accordance with law, as was done in the case of *Minhomal Lilaram* v. *Emperor* (2) referred to above.

Case remanded.

(1) (1906) 11 C. W. N. 62 N.
(2) (1914) 8 S. L. R. 25=25 I. C. 994.

A. I. R. 1922 Patna 158.

COUTTS AND ADAMI, JJ.

Mitarjit Singh and others—Accused-Petitioners

v.

King Emperor—Opposite Party.

Cr. Rev. No. 280 of 1921, decided on 14th July, 1921.

Criminal P. C. (Act V of 1898), S. 342—Object of—"Examined" includes cross-examination and re-examination—Provisions of section are mandatory and non-compliance vitiates trial.

The word "Examined" in Section 342 includes cross-examination and re-examination. The purpose of the examination of an accused under Section 342 is to enable him to explain any circumstances appearing in the evidence against him: it is a provision for the benefit

of the accused; and, to enable him to obtain the full benefit of the section, it is clear that he must be examined after the cross-examination of the prosecution witnesses is over. Until the witnesses have been cross-examined and re-examined, it cannot be said what the exact case that the accused will have to meet is, and, if he is forced to disclose his defence before cross-examination, it might very well be that the prosecution witnesses would be on their guard and the value of the cross-examination to a great extent destroyed.

[P. 160, C. 1.]

The provisions of Section 342 are mandatory and the Magistrate has no option but to examine the accused after cross-examination of all prosecution witnesses. If he does not do so he omits to do something in regard to which he has no discretion and consequently he commits an illegality and not merely an irregularity. [P. 160, C. 2.]

K. N. Choudhury and *G. C. Pal*—for Petitioners.

Manohar Lal and *P. C. Manik*—for Opposite Party.

Coutts, J.:—This is an application in revision made in respect of an order passed by the Sessions Judge of Bhagalpur upholding convictions of the petitioners under Sections 147 and 148, I.P.C.

The first point urged in support of the application is that the provisions of Section 342 of the Criminal Procedure Code have not been complied with in this case.

It appears that after the prosecution witnesses had been examined-in-chief the question was put to each of the accused whether they had committed offences under Sections 147 and 148. They each replied "no," and further each stated that he would file a written statement. Subsequently the prosecution witnesses were cross-examined but after the cross-examination and before the accused were called on to enter on their defence there was no further examination of the accused.

The question is whether this examination of the accused before cross-examination of the prosecution witnesses is a compliance with the provisions of Section 342 of the Criminal Procedure Code. The point is one of some difficulty and so far as I know it has not yet been decided. There are a series of decisions of this Court with reference to Section 342, *Raghu Bhumij* v. *King Emperor* (1), *Fatu Santal* v. *King Emperor* (2) and *Gulam Rasul* v. *King Emperor* (3).

(1) (1920) 5 P. L.J. 430=58 I. C. 49=1 P.L.T. 241.
(2) A. I. R. 1921 Pat. 109.
(3) A. 1 R. 1921 Pat. 11.

But in these cases there was no examination of the accused at all and it is now settled law that in such cases the section being man datory the trial is bad.

In the present case there has been an examination of the accused under Section 342 but it was before the prosecution witnesses were cross-examined and the question is whether it was also necessary to examine them again after cross-examination.

Section 342, Clause (1) runs as follows:—

"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 inquiry 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."

It is with the last portion of this clause that we are concerned, and on behalf of the petitioners it is contended that "examined" here includes cross examination and re-examination, while on the other hand it is contended that cross-examination is part of the defence and that "examined" refers only to the examination-in-chief. It appears to me that the latter contention is unsustainable. If we look at Chapter XXI which deals with the trial of warrant cases, we find in Section 256 the following provision:—

"If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence."

It is clear then that the accused does not enter on his defence until the wit-

nesses have been examined, cross-examined and re-examined.

It is contended, however, that, even if this be so, still Section 342 does not definitely provide that the examination of the accused shall be made after the cross-examination and re-examination of the prosecution witnesses, and that it leaves it to the discretion of the Magistrate to examine the accused at any time after the examination-in chief and before he is called on to enter upon his defence.

It is urged that if this were not so the words "cross-examination and re-examination" would have been added in Section 342. I am unable to accept this contention. Section 137 of the Evidence Act defines examination-in-chief, cross-examination and re-examination as follows:—

"The examination of a witness by the party who calls him shall be called his examination-in-chief."

"The examination of a witness by the adverse party shall be called his cross-examination."

"The examination of a witness subsequent to the cross-examination by the party who called him, shall be called his re-examination."

"Examination" then in the Evidence Act includes "examination-in chief," "cross-examination" and "re-examination", and that this is also so in the Criminal Procedure Code would appear from Chapter XXIII-E which deals with the trial of cases before High Courts and Courts of Sessions, where examination has been given the same meaning. "Examined" then in Section 342 in my opinion includes cross-examination and re-examination. Nor on general principles do I think it could be otherwise.

The purpose of the examination of an accused under Section 342 is to enable him to explain any circumstances appearing in the evidence against him; it is a provision for the benefit of the accused, and, to enable him to obtain the full benefit of the section, it is clear that he must be examined after the cross-examination of the prosecution witnesses is over. Until the witnesses have been cross-examined and re-examined it cannot be said what the exact case that the accused will have to meet is, and if he is forced to disclose his defence before cross-examination it might very well be that the prosecution witnesses would be on their guard and the value of the cross-examination to a great extent destroyed.

Considering then both the wording of the section and its intention it seems to me clear that the Court must question the accused generally on the case after the cross-examination and re-examination of the prosecution witnesses.

It has been further urged, however, that even if this view be correct in the particular case before us the failure of the Magistrate to examine the accused at this stage was merely an irregularity because he examined them at a previous stage and they stated that they would file written statements; it is contended that this being so, the Magistrate has committed nothing more than an irregularity in not examining them at the later and proper stage.

I am unable to accept this contention The portion of the section with which we are concerned is mandatory, and, if the view which I have taken of the law is correct, the Magistrate had no option but to examine the accused at the stage I have indicated; if he did not do so he omitted to do something in regard to which he had no discretion and consequently he has committed an illegality and not merely an irregularity.

This contention therefore fails and for the reasons I have given the convictions and sentences must, in my opinion, be set aside. I would remand the case for rehearing from the stage at which the trial became illegal.

Adami, J.:—I agree.

Case remanded.

A. I. R. 1922 Patna 160.

BUCKNILL, J.

Raghupat Sahay—Petitioner

v.

King-Emperor—Opposite Party.

Cr. Rev. No. 547 of 1921, decided on 1st December, 1921, against an order passed by District Magistrate, Moti Hari, dated 24th October, 1921.

(a) *Penal Code, S. 211—Complaint found true by one Court and false by appellate Court—Sanction should not be given.*

Where there are split opinions of two different tribunals, it may be taken as generally a normally safe guide to suggest that definite expressions as to the malice of either party or probably somewhat undesirable for a purpose to institute proceedings for malicious prosecution.

[P. 161, C. 1.]

(b) *Cr. P. C., S. 476—Difference of opinion between two different tribunals—Action under S. 476 is not justifiable.*

Where one sees split opinions of two different tribunals, it may be taken as

generally a normally safe guide to suggest that definite expressions as to the malice of either party are probably somewhat undesirable.

[P. 161, C. 1.]

(c) *Cr. P. C., S. 439—Revisional powers will be exercised when circumstances require it*

The High Court should not hesitate to exercise discretion in its revisional jurisdiction whenever circumstances seem clearly to justify its so doing.

[P. 161, C. 2.]

Shiveshwar Dayal and *Brij Kishore Prasad*—for Petitioner.

Sultan Ahmad—for Opposite Party.

Bucknill, J.:—This is an application in Criminal Revisional Jurisdiction made by one Raghupat Sahai under the following circumstances. He charged early in this year two men with having committed theft in his house. They were arrested and were convicted by the Sub-Deputy Magistrate of Bettiah; however, they appealed and as a result of their appeal the District Magistrate of Champaran came to quite a different conclusion to that which had been come to by the Sub-Deputy Magistrate of Bettiah and allowed their appeal and quashed their convictions; but he did rather more than that for he formed the opinion that the applicant had commenced these prosecution proceedings maliciously, and subsequently indeed he issued notice on the petitioner to show cause why a prosecution under Section 211, I. P. C. should not be instituted against him.

I dare say that there may be something wrong in the applicant's behaviour, but at any rate his proceedings against the two men were of such a character that he was able to convince one Court that they were guilty whilst another Court, which did not see the witnesses but was an appellate Court, came to the conclusion that they were innocent. The matter is a very petty one, and where one sees split opinions of two different tribunals, it may be taken as generally a normally safe guide to suggest that definite expressions as to the malice of either party are probably somewhat undesirable. Of course it must be realised that in giving instructions for a prosecution to be instituted against a person on a ground that he himself instituted malicious prosecution, the Magistrate, who directs the prosecution, is endowed with considerable discretionary powers.

At the same time, this Court should not hesitate to exercise discretion in its revisional jurisdiction whenever circumstances seem clearly to justify its so doing.

I must accordingly set aside the order of prosecution on the above ground.

Rule made absolute.

A. I. R. 1922 Patna 161.

COUTTS AND MACPHERSON, JJ.

Kangali Charan Mukerji—Plaintiff-Appellant

v.

Surja Narain Sah—Defendant-Respondent.

A. No. 830 of 1920, decided on 27th July, 1921, from the Appellate Decree of the District Judge, Manbhum, dated 2nd August, 1920.

Evidence Act, S 115—Ghatwal granting an ijara *creating permanent tenancy cannot deny its permanent character*—Bemiadi *patta is not inconsistent with permanency of tenancy.*

The doctrine of estoppel applies to the case of a Ghatwal who has himself granted a permanent lease and he cannot allege that the *ijara* did not create a permanent right. If a lease is a *bemiadi* one it will not necessarily mean that it cannot be permanent. [P. 162, C., 1.]

A. K. Ray—for Appellant.

Abanibhusan Mukerjee—for Respondent.

Coutts, J.:—This was a suit by a *ghatwal* for *khas* possession of Mouza Lapsadih in Pargana Patkum. The plaintiff's case is that the *Mouza* was originally held by one Bodh Singh Mura on a *bemiadi ijara patta*, dated the 9th *Jaith*, 1300. His interest was sold for arrears of rent and was purchased by the plaintiff who sold it to one Nilkamal Mandal by a registered *kabala* in 1315. Nilkamal defaulted in payment of rent. The property was again sold and purchased by defendant's father.

The plaintiff in this suit contended that the defendant's right was only that of a tenant from year to year, and accordingly asked for *khas* possession. The defendant contended, that standing in the shoes of Nilkamal Mandal and Bodh Singh Mura, he had a heritable, permanent and transferable right. Both the Courts below found that the defendant had a permanent right in the *Mouza*.

The point raised in this appeal on behalf of the plaintiffs is that being a *ghatwal* he was incompetent to create a permanent tenure, and that therefore the *ijara* which he granted to Bodh

Singh was not a heritable, permanent and transferable right. Now the *ijara* having been granted by the plaintiff he is estopped from alleging that the *ijara* did not create a permanent right if what it purported to grant was such a right.

It is necessary to see therefore what the right created, purported to be. The *ijara* is described as a *bemiadi ijara* and it is contended by the learned Vakil for the appellant on the authority of *Parshan Kuer* v. *Tulsi Kuer* (1) that a permanent tenure cannot be created by a *bemiadi Patta*. This contention, however, is by no means supported by the judgment referred to. In that case what happened was that the defendant pleaded that because the *Patta* was a *bemiadi* one, it created a permanent right but the learned Judges held that a *bemiadi Patta*, or lease without a term, did not necessarily create such a right; and on a consideration of the terms of the lease itself they came to the conclusion that it was not a permanent lease.

That is a very different matter to saying that, because a lease is a *bemiadi* one, it cannot therefore be a permanent lease. This contention therefore is unsustainable and so far as the present case is concerned we find it definitely stated in the Settlement Report of the Patkum Pargana that *bemiadi ijaradars* hold permanent tenures with rent liable to enhancement, and in the record-of-rights this defendant has been described as a *bemiadi ijaradar*.

The findings of the lower Courts, that the defendant holds a heritable, permanent and transferable right are clearly correct. I would accordingly dismiss this appeal with costs.

Macpherson, J.:—I agree. In view of the *kebala* executed by him in favour of Nilkamal in whose shoes defendant stands, plaintiff at least cannot recover Lapsadih from defendant. Still less could he recover, if, as he avers (it is not necessary to decide with what truth) defendant stood in the shoes of Bodh Singh Mura, whose tenancy, was at the lowest a *bemiadi ijara* of the class which in Pargana Patkum is a permanent tenure, and at the highest a *mundari khutkati* tenancy situated in plaintiff's *ghatwali* tenure.

Appeal dismissed.

(1) (1917) 2 P. L. J. 180=1 P. L. W. 447=39 I. C. 658=1918 P. H. C. C. 11.

A. I. R. 1922 Patna 162.

DAS AND ROSS, JJ.

Inder Chand Bothra and another—Appellants

v.

Surendra Narain Singh—Judgment-debtor-Respondent.

Mis. A. No. 226 of 1920, decided on 24th March, 1922, against an order of District Judge, Purneah, dated 6th October, 1920.

Decree—Putni Mahal—*Decree for rent—Purchaser of* putnidar's *right, and title after decree, is not personally liable.*

Where a person purchased the right, title and interest of the *putnidar* of a *putni mahal* after a decree for rent had been passed against the *putnidar*,

Held: the purchaser is not personally liable for the decree if the property passes out of his hands to a third party before the institution of the execution proceedings. For rent accruing due prior to the transfer, a transferee of a tenure is not personally liable. [P 165, C. 1.]

Manuk, S. P. Sen and *C. S. Banerjee*—for Appellants.

P. K. Sen, C. M. Agarwala and *B. N. Mitter*—for Respondent.

Das, J.:—All the material facts giving rise to this appeal are stated with precision in the judgment of the learned Subordinate Judge; and, when these facts are properly understood, the point which we have to decide in this appeal arises free from all complications.

The point is this: whether the appellant, who in 1896 obtained a decree for rent against one Chatrapat Singh in respect of a *putni mahal* known as lot Sahebgunj situate within the ambit of the appellants' *zemindari* known as Pergana Habeilie, is entitled to execute the decree against the respondent who in September, 1902, purchased the right, title and interest of Chatrapat Singh in the *putni mahal*, notwithstanding the fact that prior to the institution of the proceedings, which have given rise to this appeal, the *putni mahal* passed from the hands of the respondent into the hands of one Forbes.

The learned Subordinate Judge has found against the appellants on the main question that was argued before him. In my opinion, the decision of the learned Subordinate Judge is right and ought to be affirmed.

Dhanpat Singh was the *zemindar* of Perganna Havelie. As I have said before, Chatrapat Singh was the *putnidar* of lot Sahebgunj situate within Pergana

Haveli. Mr. Forbes held a *darputni* interest under Chatrapat Singh. Dhanpat Singh died on the 21st July, 1896, and the appellants are the trustees of his estate under a deed of trust executed by Dhanpat prior to his death.

On the 27th June, 1893 Dhanpat Singh sold Pergana Haveile to Musammat Bhagwanbati. On the 21st September, 1893 he instituted a suit against Chatrapat for recovery of rent that accrued due to him prior to the 27th June, 1893. On the 10th July, 1896, the Calcutta High Court passed a decree in favour of Dhanpat as against Chatrapat in 1900. Chatrapat failed to pay the *putni* rent to the new landlord, Musammat Bhagwanbati the lady took proceedings under the *putni* regulation, whereupon Mr. Forbes, for the protection of his *darputni* interest, deposited the rent in full and took possession of the *putni mahal* under Section 13 (4) of the *putni* regulation.

In September, 1902,the respondent purchased the *putni mahal* in execution of a money-decree against Chatrapat and became liable by such purchase to make good to Mr. Forbes the money deposited by him in the proceedings instituted by Musammat Bhagwanbati against Chatrapat. The position in September 1902 was therefore this: there was a decree for rent against Chatrapat Singh ; but the *putni mahal*, in respect of which the rent decree had been obtained, was then the property of the respondent, though Mr. Forbes, the *darputnidar*, was actually in possession of the *putni mahal* under Section 13 (4) of the *putni* regulation.

It is obvious that both Mr. Forbes and the respondent were interested in resisting the execution proceedings which had been started by the appellants against Chatrapat Singh in 1897,and they resisted the execution proceedings on the ground that the decree that had been obtained by Dhanpat against Chatrapat was a money-decree and not a rent decree. It will be necessary now to trace the history of the execution proceedings ; but, before doing so, I should mention that Mr. Forbes instituted a suit as against the respondent for recovery of the money which had been deposited by him in the proceedings taken by Musammat Bhagwanbati, under the regulation, against Chatrapat, and that on the 18th May, 1916, he got a decree as against the respondent for Rs. 57,166, the decree providing that, if the respondent failed to pay the decretal amount to Mr. Forbes, the *putni* itself should be sold.

The Respondent failed to satisfy Mr. Forbes' decree, and, as a result of his failure, the *putni* was put up for sale on the 3rd July, 1917 and was purchased by Mr. Forbes for Rs. 2,000. It is necessary to remember that the respondent was at no time in possession of the *putni*, and that the title to the *putni* which had accrued to the respondent in September 1902 by virtue of his purchase in execution of a money-decree against Chatrapat, passed away from him on the 3rd July, 1917.

I now come to the execution proceedings ; and it will appear that the question, whether the decree that had been obtained by Dhanpat against Chatrapat was a rent decree or a money-decree, was early raised and was long debated. The point arose on the admitted fact that Dhanpat brought his suit for arrears of rent against Chatrapat after he had parted with all his interest in the Zemandari in favour of Musammat Bhagwanbati ; and, as will presently be seen, it was contended, first, on behalf of Chatrapat, then on behalf of respondent, and lastly on behalf of Forbes, that the right to proceed for sale under Section 65, Bengal Tenancy Act, was dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law was sought to be enforced and that as the appellants were not the landlord at the time they started the execut on proceedings, they were not entitled to execute the decree as a rent decree.

In 1897, the appellants started execution proceedings against Chatrapat, and the objection put forward on behalf of Chatrapat to the execution of the decree as a rent decree was rejected by the Courts in India. The execution proceedings, however, for some reason which has not been made clear to us, failed to produce any result, and in 1904, the appellants presen ed another application for execution. The respondent, who was now the *putnidar*, objected that the decree was a money-decree and not a rent decree, and that the *putni* was not liable to be sold in execution of that decree.

A similar objection was put forward on behalf of Mr. Forbes, who

also insisted that having deposited the amount of the arrears under Section 13 of the Regulation in the proceeding commenced by Musammat Bhagwanbati against Chatrapat, he had a first charge on the *putni* for the sum so deposited by him. The objections were disallowed by the Courts in India. In 1905 the respondent instituted a suit for a declaration that Dhanpat's decree against Chatrapat was a money-decree and that the *putni* could not be sold in execution of that decree.

The Courts in India decided, against the contention of the respondent, the date of the decision of the High Court being the 8th April, 1908 The respondent then applied for, and obtained leave to appeal to His Majesty in Council, but that appeal subsequently failed for non-prosecution. Mr. Forbes also instituted a similar suit and, though the Courts in India decided against him, he carried his appeal to the Judicial Committee where his contention prevailed.

By its decision, which was pronounced on the 4th March, 1914, and which is reported in *Forbes* v. *Maharaj Bahadur Singh* (1) the Judicial Committee held that the right to bring the tenure to sale under Section 65, Bengal Tenancy Act, exists only so long as the relationship of landlord and tenant exists, and appertains exclusively to the landlord and that a person, to whom rents are due and who obtains a decree for them after he has parted with the property on which the tenancy is situate, has no such right.

The position then is this: as between the appellants and Mr. Forbes, the decree must be regarded as a money-decree and not as a rent decree, but as between the appellants and the respondent the decree must be regarded as a rent decree.

It is not necessary to follow the fortunes of the different execution proceedings that were from time to time commenced by the appellants. I come to the application of the 22nd January, 1915, when the appellants applied to have the decree treated as a money decree and the respondent added as a judgment-debtor. It will be remembered that the position then was that the respondent was the *putnidar* and Mr. Forbes was the *darputnidar* in actual possession of the *putni mahal*.

On the 19th March, 1915, the appellants presented another application to the Execution Court. They stated in their petition that the Judicial Committee has held that the decree obtained by them against Chatrapat was a money-decree. They submitted that it was not possible to recover the amount of the decree without proceeding against the properties other than that in respect of which the decree had been obtained, and they applied for attachment and sale of certain properties belonging to Chatrapat.

This application was presented on the 19th March, 1915 ; but it will be remembered that they had already on the 22nd January, 1915, applied to have the respondent added as a judgment-debtor in the execution proceedings. On the 27th March, 1915, the respondent objected to being added as a judgment-debtor. He contended that, as he was neither the judgment-debtor nor the legal representative of Chatrapat, the decree-holders could not proceed against the *putni mahal* in his hands.

Before this application was heard and disposed of the *putni mahal* passed into the hands of Mr. Forbes. The decree-holders abandoned their application of the 19th March, 1915, and on the 23rd November, 1918, they presented an application for attachment and sale of certain properties belonging to the respondent. It is this application which has given rise to this appeal.

Mr. Manuk, on behalf of the decree-holders appellants, contends that the decree obtained by Dhanpat Singh against Chatrapat Singh must be regarded as a rent decree so far as the respondent is concerned and that it was open to him to proceed against the *putni mahal* in the hands of the respondent. I have no doubt whatever that, had the appellants proceeded against the respondent at any time between September, 1902 and July, 1917, during which period the title to the *putni mahal* was in the respondent, there could be no answer to the claim of the decree-holders.

It having been held in proceedings between the appellants and the respondent that the decree obtained by Dhanpat was a rent decree, the appellants had a charge on the tenure so

(1) A. I. R. 1914 P. C. 111=41 Cal. 926=23 I. C. 632=41 I. A. 91=18 C. W. N. 747 (P. C.).

long as the tenure was in the hands of the respondent, and it was plainly impossible for the respondent to resist the claim of the appellants. But the tenure has now passed from the hands of the respondent to the hands of Mr. Forbes. Mr. Manuk contends that if the respondent has allowed the tenure to go into the hands of a third party, he must be personally liable for the decree. In my opinion, there is neither principle nor authority for this contention. It was, in my opinion, open to the decree-holders to proceed against the tenure in the hands of Mr. Forbes.

It was argued by Mr. Manuk that he could not take this course having regard to the decision of the Judicial Committee in the suit between the appellants and Mr. Forbes that the decree was a money-decree. That may be so; but Mr. Forbes as the purchaser of the *putni mahal* from the respondent was in an entirely different position. As the representative-in-interest of the respondent, Mr. Forbes would be bound by the decision in the suit as between the appellants and the respondent.

By that decision the decree was held to be a rent decree and as involuntary alienations stand on the same footing as voluntary alienations, the appellants could, in my opinion, follow the *putni mahal* in the hands of whomsoever it might be under a title derived from the respondent.

Mr. Manuk next contends that the respondent must be regarded as the representative-in interest of Chatrapat Singh and is therefore personally liable to satisfy the decree obtained against Chatrapat Singh. In my opinion, there is no warrant for the proposition. The decree was not obtained against the respondent. It may be that, as the result of the litigation between the appellants and the respondent, it must now be held that so long as the *putni mahal* was in the hands of the respondent there was a charge upon the *putni mahal* for the decretal claim of the appellants against Chatrapat Singh.

But it has been held that a transferee of a tenure is not personally liable for rent which accrued due prior to the transfer. See *Jogemaya Dassi* v. *Girindra Nath Mukherjee* (2). The recent decision of the Judicial Committee in the case of *Nanku Prasad Singh* v. *Kamta Prasad Singh* (3) pronounced on the 19th January supports this contention. That was a case in which it was sought to make the purchasers of mortgaged properties personally liable for the mortgage-debt.

The Judicial Committee, in a very short judgment, said as follows :—" Their Lordships have considered this case, and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption, who, their Lordships understand, are defendants Nos. 2 to 11, of whom only five are respondents here. Their Lordships therefore think that the decree of the High Court was right and that the point made by the appellant fails."

The position occupied by the respondent is in no way different from the position which a purchaser of the equity of redemption occupies. The utmost that can be said in favour of the appellants is that they had a charge upon the tenure in the hands of the respondent. The respondent was the purchaser of the tenure which was already subject to a charge in favour of the appellants. He is in the same position as the purchaser of an equity of redemption, and, in my opinion, no personal liability was incurred by him by such purchaser.

In my opinion the decision of the learned Subordinate Judge is right and must be affirmed. I would dismiss this appeal with costs.

Ross, J. :—I agree.

Appeal dismissed.

(2) (1900) 4 C. W. N. 590.

(3) P C. Case decided on 19—1—22 (unreported.

A. I. R. 1922 Patna 165.

JWALA PRASAD, C. J. AND DAS, J.

Jai Krishna Puri—Plaintiff-Appellant

v.

Bhukal Gope and others—Defendants-Respondents.

S A. Nos. 592 and 593 of 1919, decided on 29th June, 1921, from a decision of the Dist. J., Bhagalpore, dated 13th March, 1919.

Hindu Law—Mahant—Position is like that of a manager of a joint family—Transaction in ordinary course of management is binding on the math—*Religious endowment*

There is no difference at all between the case of a *Mahant* and the manager of a joint Hindu family. The *karta* of a joint family must have a large discretion in the matter of granting leases and his discretion ought not to be fettered unduly The same

rule applies to a *Mahant*. The Court, of course, must be satisfied that he entered into the transaction in the ordinary course of management. In such a case the transaction is binding.

[P. 166, C. 2.]

L. N. Sinha and *B. N. Mitter*—for Appellant.

Hassan Jan—for Respondents.

Das, J.:—These analogous appeals arise out of suits instituted by the appellant to eject the respondents from certain lands which are specified in the plaint. The plaintiff is the *Mahant* of the Marona *Math* and his case is that his predecessor-in-title, Mahant Bisseswar settled these lands in perpetuity with the defendants. He says that Mahant Bisseswar was not entitled to settle these lands in perpetuity as there was neither necessity for such settlement nor any benefit which accrued to the *Math* in question.

The Court of first instance agreed with the contentions put forward on behalf of the plaintiff and decreed the suits. The learned Judge in the Court below has differed from the Court of first instance and has dismissed the suits.

Now the learned Judge has found that the lease was not a perpetual lease; secondly that it was not a lease at fixed rent. He has further found that the late *Mahant* granted these leases in the ordinary course of management and that therefore they are binding upon his successor-in-interest. Mr. Lachmi Narain Sinha on behalf of the appellant argues that the learned Judge in the Court below has not displaced in the finding of the Court of first instance, *viz.*, that these lands were in the cultivating possession of the *Mahant* and that they yielded him a profit of 10 to 15 maunds per bigha and he strongly relies upon the case of *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (1).

In that case the *Mahant* sold a piece of land and lent the sale proceeds at a remunerative rate of interest to somebody else and the Judicial Committee held that it was not the ordinary course of business for a *Mahant* of an institution to engage in a money-lending business. That case is entirely distinguishable. In this case it was for the *Mahant* to decide whether it was profitable for him to cultivate the land himself or to let it out to tenants and I can see no difference at all between the case of *Mahant* and the case of the manager of a joint family.

I have always entertained the view that the *karta* of the joint family must have a large discretion in these matters and that we ought not to fetter his discretion unduly. We must of course be satisfied that he entered into the transaction in the ordinary course of management. That is the test which was laid down by the Judicial Committee in the leading case of *Hunoomanpersad Panday* v. *Mt. Babooee Munraj Koonwaree* (2). That is the test which we must apply to this case. Did the *Mahant* let these lands to the defendants in the ordinary course of business?

The lower appellate Court has found that he did. I agree with the decision of the learned Judge of the Court below and would accordingly dismiss these appeals with costs in Appeal No. 592.

Jwala Prasad, A. C. J.:—I agree.

Appeal dismissed.

(1) (1917) 40 Mad. 709=39 I. C. 722=44 I. A. 147 (P. C.).

(2) (1856) 6 M.I.A. 393=2 Suth. 29=18 W. R. 81 N.=1 Sar. 552 (P. C.).

A. I. R. 1922 Patna 166.

DAWSON MILLER, C. J. AND JWALA PRASAD, J.

Gopal Rai and others—Judgment-debtors-Appellants

v.

Rambhanjan Rai and others—Decree-holders-Respondents.

L. P. A. No. 9 of 1921, decided on 18th January, 1922, against the judgment of Das, J.

Civil P. C., O. 21, R. 2—Decree satisfied by one judgment-debtor and certified—Payment over again by another, under mistake—Executing Court has power to refund it—Civil P. C., S. 47—Execution

Where after the satisfaction of the decree by one judgment-debtor by deposit of money and taking certificate, another judgment-debtor unknowingly deposited the decretal amount and after the discovery of the satisfaction of the decree applied for refund of the money.

Held: notwithstanding the fact that the decree had already been executed, the execution Court has jurisdiction to entertain the application.

[P. 167, C. 2.]

S. N. Roy—for Appellants.

L.N. Singh—for Respondents.

Dawson Miller, C. J.:—In my opinion this appeal ought to be allowed. The appellant is one of the judgment-debtors in a suit in which the respondent was the plaintiff. A decree for Rs. 95 was made in favour of the respondent. One of the defendant settled the matter

out of Court by paying to the decree-holder the full amount of his claim on the 21st May, 1915. After the decree-holder had been paid a petition was presented to the Court in accordance with the provisions of Order XXI, Rule 2 of the Civil Procedure Code certifying that the full decretal amount had been paid. Subsequently the appellant in this suit, not knowing that the decree-holder's claim had been satisfied, paid the money into Court and this was subsequently taken out by the decree-holder.

The appellant afterwards discovered that the decree had previously been satisfied by one of his co-debtors. He thereupon made an application to the executing Court for a refund of the money which had been taken out of Court by the decree-holder. In that application the facts were not in dispute. It was admitted by both sides that the decree had been satisfied before the decree-holder took the money out of Court which is now claimed back and indeed the petition certifying the payment is signed by the decree-holder himself.

The Court therefore which had the record before it must have been aware that the payment of the debt had been properly certified within the meaning of Order XXI, Rule 2. The learned Munsif, however, came to the conclusion that as the matter had been disposed of sometime before it was too late then to apply to the executing Court to have it set right.

The matter then went on appeal to the District Judge and the District Judge took the same view and dismissed the appeal.

When the case came on second appeal to this Court the learned Judge did not deal with the question which had been raised in the lower Courts but found that even assuming the appellant to be right upon the contention previously raised by him in the lower Courts still the position here was different because he said it had not been proved that any payment or adjustment had been certified as provided by Order XXI, Rule 2 and that therefore even if the money had been paid to the decree-holder there was nothing to show that it had been certified and therefore the executing Court was not entitled under Order XXI, Rule 2, sub-Rule 3 to recognise the payment.

With great respect to the learned Judge I think that he was in error in introducing this matter. It was admitted in both the lower Courts that the facts were not in dispute and it was never suggested that the payment had not in fact been certified within the meaning of Order XXI, Rule 2. That was taken for granted

On appeal to this Court under the Letters Patent, the appellant has produced a certified copy of the petition which was before the executing Court showing quite clearly that the decretal amount had been paid before the appellant had paid the same sum into Court and that this had been accepted by the decree-holder in full satisfaction of his debt.

The result is that the decree-holder has very cunningly obtained payment twice over a thing which he was clearly not entitled to do. The only question therefore which arises before us is whether seeing that the decree had in fact been executed it was the proper procedure which was adopted, that is to say, whether the judgment-debtor could have this matter determined by the executing Court, or whether he was bound to bring a separate suit.

In the case of *Collector of Jaunpur* v. *Bithal Das* (1) it was laid down that an application to recover property which has been improperly sold in excess of the decretal amount was a matter relating to the execution, satisfaction or discharge of the decree and further that executing Court was the proper Court in which to have the matter decided notwithstanding that the decree had already been executed sometime before.

I see no reason to differ from the opinion there expressed which is supported by other cases and in my opinion this appeal ought to be allowed. The orders of the lower Courts will be set aside and the case will be sent back to the executing Court and re-instated on the file to be tried according to law. The appellant is entitled to his costs of this appeal and in all Courts below.

Jwala Prasad, J.:—I agree.

Appeal allowed.

(1) (1902) 24 All. 291=1902 A. W. N. 67.

A. I. R. 1922 Patna 167.

COUTTS AND ROSS, JJ.

Jag Sahu and others — Plaintiffs-Appellants

v.

Mt. Ram Sakhi Kuer and others—

Defendants-Respondents.

A. No. 1030 of 1920, decided on 23rd January, 1922, from an appellate decree of the District Judge, Saran, dated 31st March, 1920.

Mortgage—Date for payment fixed in usufructuary mortgage—Mortgagee can sue for sale on default of payment on due date—T. P. Act, S. 98.

Where a due date is fixed for payment of the mortgage-money in a mortgage-deed the mortgage is not a pure usufructuary mortgage and the mortgagee is entitled to sue for sale immediately after the due date has passed even though he still remains in possession of the property. [P. 169, C 1.]

(b) *Civil P. C., S. 100—Tender—Question as to sufficiency of, cannot be raised for the first time in second appeal.*

Whether the sum tendered to satisfy a mortgage is sufficient or not is a question which cannot be allowed to be raised for the first time in second appeal Similarly the question whether the money was kept ready after tender for payment is a question which requires consideration of evidence and cannot be allowed to be raised for the first time in second appeal [P. 169, C. 1.]

K. P. Jayaswal and *Sunder Lal*—for Appellants.

Ram Prasad, Harnarain Prasad, Shiveshwar Dayal and *Judubans Sahay*—for Respondents.

Coutts, J. :—This is an appeal against a decision of the District Judge of Saran dismissing an appeal against the order of the Subordinate Judge of Saran partially decreeing a suit which was brought on a *Zarpeshgi* deed and a simple mortgage bond. The so-called *Zarpeshgi* deed is dated the 21st of September 1905 and was for a sum of Rs. 1,850. The simple mortgage bond is dated the 7th of June 1911 and was for a sum of Rs. 400 advanced on a security of the same property as was mortgaged by the previous deed of the 21st of September, 1905.

The deeds were both executed by one Kanchan Singh, the husband of the defendant No. 1 Musammat Ram Sakhi Kuer in favour of the plaintiff No. 1, Jag Sah, and Ram Sahai Sah, ancestor of the other plaintiffs. The defendants Nos. 2, 3 and 4 purchased the mortgaged property from the defendant No. 1 on the 7th of November, 1914, the arrangement being that out of the consideration money the sum of Rs. 652 was to be kept for payment of the mortgage-debt due on the bond of the 7th of June, 1911 and the sum of Rs. 1,850 for the payment of the debt due on the deed of the 21st September, 1905.

The defendant's case was that at the time they purchased the mortgaged property they tendered the sum of Rs. 652 to the plaintiff No. 1 in payment of the mortgage-debt, but the plaintiff refused to accept the money and claimed a right of pre-emption in the property. The defendants then waited for a year until a suit for pre emption would be barred and deposited the amount in Court.

On these allegations the defendants contended that the plaintiffs' mortgage debt had been satisfied by the amount of Rs. 652 which was deposited by them and they further contended that as the plaintiffs were in possession of the property mortgaged, by the deed of the 21st of September 1905, they were not entitled to sue for sale of the property as they had done in this suit.

In the Court of first instance it was decided that the plaintiffs, on the allegations of the defendants which were accepted, could claim no interest beyond what was included in the Rs. 652 ; and with regard to the claim to sell the property to satisfy the debt of Rs. 1 850 a curious order was passed by which the suit was decreed in the plaintiffs' favour "only so far as, if he has been really dispossessed, he can take possession."

What this may mean I do not know. On appeal to the District Judge the decision of the first Court in regard to interest was upheld and in regard to the claim on the deed of the 21st of September, 1905 for sale of the mortgaged property, the learned District Judge held that as the plaintiffs had not been dispossessed they were not entitled to sue for sale of the mortgaged property. In the result the whole suit was dismissed. The plaintiffs have appealed to this Court.

Three points are urged before us. The first is that the tender of Rs. 652 was less than the total amount due and that consequently it was not a valid tender and the plaintiffs were not bound to accept it. The second point urged is that assuming that a valid tender had been made still the defendants must establish that the amount tendered had been kept always available for payment and they not having established this the tender was not a valid tender.

The third point urged is that the so-called *Zarpeshgi* deed of the 21st of September, 1905 was not a pure usufructuary mortgage inasmuch as a due date for

payment had been fixed on the bond, it was an anomalous mortgage and that in such a case the plaintiffs were entitled to sue for sale of the mortgaged property.

With regard to the first of these points it was never suggested either in the Court of first instance or before the lower appellate Court that the sum tendered, Rs. 652, was insufficient at the time of tender and it is impossible at this stage without going into the evidence to say whether the amount was sufficient or not. This is a second appeal and the question of sufficiency or insufficiency cannot be gone into at this stage.

With regard to the second point urged, here again the contention must fail because it was never suggested that the money was not kept available by the defendants although it is necessary that a mortgagor should after tender keep the money ready for payment. It is a matter which involves a consideration of the evidence whether in fact the money was kept ready or not and both the Courts below having assumed that all the provisions of the law in respect of the tender had been complied with, we cannot allow this point to be taken at this stage.

The third point urged is that a due date having been fixed for payment of the mortgage-money under the deed of the 21st of September, 1905, the mortgage was not a pure usufructuary mortgage and therefore the plaintiffs were entitled to sell immediately after the due date was passed even though he still remained in possession of the property.

In support of this proposition the decisions in *Pargan Pandey* v. *Mahtam Mahto* (1), *Pitambar Purkait* v. *Madhu Sudan Mandal* (2) and *Dattambhat Rambhat Joshi* v. *Krishnabhat Bin Govindbhat Joshi* (3) are relied on and it seems to me that this is the correct view of the law. The question was very fully discussed in *Pitambar Purkait* v. *Madhu Sudan Mandal* (2) in which the mortgage was one in exactly the same terms as the mortgage in the case with which we are at present concerned, and in that case the learned Judges said " it is well-settled that when an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent and the mortgagee may sue for sale although he may have given up possession and the right accrues immediately after the due date is passed."

The same view was taken in the other cases to which I have already referred and, as I have already said, this in my opinion is the correct view of the law.

In the result then I would modify the decree of the lower appellate Court. The parties are agreed that the sum due is Rs. 1,675. I would accordingly direct that the plaintiffs be allowed to sell the mortgaged property for this sum, the defendants being allowed six months' time to pay up the amount. Costs in proportion to the success of the parties.

Ross, J. :—I agree.

Decree varied.

(1) (1907) 6 C. L. J. 143.
(2) (1910) 6 I C. 153.
(3) (1910) 34 Bom. 462=7 I. C. 446=12 Bom. L. R. 491.

A. I. R. 1922 Patna 169.

JWALA PRASAD, A. C. J. AND ROSS, J.

Sukhraj Rai—Plaintiff Appellant

v.

Ganga Dayal and others—Defendants-Respondents.

S. A. No. 469 of 1920, decided on 23rd July, 1921, from a decision of the Dist. J., Purneah, dated 21st February, 1920.

B. T. Act, S. 52 (B) and S. 38—Suit for rent—Diluvion or deterioration of land—Tenant can plead abatement of rent, in defence.

According to the ordinary rules of law if a tenant agrees to pay a certain amount of rent, he is exempt from the payment of the whole rent if the whole of the land be washed away or of a portion of the rent if a portion be washed away. Under Section 38 of the Act the plea of abatement can be taken in a suit for recovery of rent and it is not essentially necessary that the tenant should himself institute a suit for the abatement of his rent. Section 18 of Act (X of 1859) referred to. [P. 171, C. 1.]

Manuk and *H. L. Nandkeolyar*—for Appellant.

Guru Saran Prasad—for Respondents.

Jwala Prasad, A. C. J. :—This appeal arises out of a suit to recover rent for the years 1321 to 1324. The Courts below disallowed the plaintiff's claim for the years 1322 to 1324 on the ground that the land was under water and not fit for cultivation.

The plaintiff has therefore come to this Court in second appeal and contends

that he is entitled to rent for the year 1324 upon the finding of the Court below. That finding is that the land was washed away in the years 1322 and 1323 and re-appeared in 1324. Mr. Manuk contends that as the land re-appeared in 1324 his client was entitled to rent for that year inasmuch as there was no diminution in the area of the holding under Section 52 (*b*) of the Bengal Tenancy Act under which alone the defendant is entitled to raise a plea of abatement in a suit for rent.

He concedes, however, that such a question might be raised by the tenant in a suit properly instituted by him under Section 38 of the Bengal Tenancy Act. He refers to Section 18 of Act X of 1859 for the purpose of his contention that although it was permissible under the old law for a tenant to raise the plea of his non-liability on the ground of a permanent deterioration of the land it is not so under the present law. That section runs as follows:—

"Every *raiyat* having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise, or if the value of the produce or the productive powers of the land have been decreased by any cause beyond the power of the *raiyat*, or if the quantity of land held by the *raiyat* has been proved by measurement to be less than the quantity for which rent has been previously paid by him."

The provisions of that section have been split up into two portions in the present Rent Law of 1885, *viz.*, Sections 38 and 52 (*b*). Section 38 says that an occupancy raiyat holding at a money-rent may institute a suit for the reduction of his rent on the grounds set forth in that section, one of the grounds being that the soil of the holding has without the fault of the raiyat become permanently deteriorated by a deposit of sand or other specific cause, sudden or gradual. Section 52 (*b*) says that a tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him.

Mr. Manuk contends that in the case of the submersion of land under water the tenant is entitled in a suit for rent to take the plea under Section 52 (*b*) that his rent should be abated on account of the deficiency of the area originally held by him but he says that when the land is not under water but as in the present case has re-appeared and is covered with sand and other deposits rendering it unfit for cultivation, such a plea of the tenant is not available under Section 52 (*b*) but can only be entertained in a suit brought under Section 38.

The argument seems to me to be fallacious. A tenant is entitled to institute a suit whether his case comes under Section 52 or under Section 38. Whatever be the reason for splitting up the provisions of Section 18 of the old Act into two sections in the present law, it is obvious that the arrangements in the present law have been most convenient.

Section 52 deals with the alteration of rent on alteration of area and it entitled both the landlord and the tenant to apply under that section for the alteration of the rent, the landlord on account of an increase in the area and the tenant on account of a decrease in the same.

Section 38, to my mind, was not set apart in the present law to, in any way, take away the right that the tenant possessed under the old law. That section only enables the tenant to institute a suit for the reduction of his rent on the ground of permanent deterioration, etc., but does not go far enough to say that the tenant shall not be entitled to claim a reduction of rent on the ground of permanent deterioration otherwise than by a suit.

Section 18 of the old law also did not in any way affect the right of the tenant to claim abatement of rent on the grounds mentioned therein. Both the present and the old law seem to recognise the undoubted right of a tenant to claim abatement of rent when he is prevented from using the land from causes beyond his control. Section 38 refers only to occupancy tenants but the right to claim abatement in the circumstances mentioned in that section exists in all tenants irrespective of their status.

The case of *Sheikh Enayutoolah* v. *Sheik Alaheebuksh* (1) recognised this principle and also held that the right is based upon natural justice and equity, a right which was

(1) (1864) W. R. (Act X Rulings) 42.

enunciated under the rule laid down in Bacon's Abridgment, 7th Edn., Vol. VII at p. 63 under the title "Rent" quoted in the decision of Sir Barnes Peacock, C. J. It is well to quote *in extenso* here that rule:—

"In this place we are to consider whether the tenant shall pay the whole rent though part of the thing demised be lost, and be of no profit to him, or though the use of the whole be for sometime intercepted or taken away without his default, and here it seems extremely reasonable, that, if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract, and therefore if part of the land be surrounded or covered with the sea, this being the act of God, the tenant, shall not suffer by it, because the tenant, without his default wants the enjoyment of part of the thing, which was the consideration of paying the rent, nor has the lessee reason to complain, because if the land had been in his own hands, he must have lost the benefit of so much as the sea has covered.

This view was also expressed by Sir Barnes Peacock, C. J., in the earlier case of *Afsuroodeen* v. *Mt. Shorooshi Bala Dabee* (2). There that learned Judge says:—"If a man stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of the land rented; and, independently of Section 18, Act X of 1859, we are of opinion that according to the ordinary rules of law if a Tallookdar agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent if the whole of the land be washed away or of a portion of the rent if a portion only be washed away. According to English law, a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in a suit brought by the landlord for arrears of rent."

This observation is a direct reply to the contention of Mr. Manuk. The plea therefore can be taken in a suit for recovery of rent and it is not essentially necessary that the tenant should himself institute a suit for the abatement of his rent. The aforesaid view finds support in the case of *Rajendra Kumar Roy* v. *Maharajah Manindra Chandra Nandi* (3). Reference may also be made to the cases of *Maharajah Dheraj Mahtab Chand Bahadur* v. *Chittro Coomaree Bibee* (4) and *Gouri Pattra* v. *H. R. Reily* (5).

Mr. Manuk then contended that a plea of this kind should not be allowed to be raised in a simple suit for arrears of rent. As to this kind of plea Sir Romesh Chunder Mitter in the case of *Jour Kishore Chunder* v. *Bonomalee Choudhry* (6) observed, "I do not think this contention is valid. A plea of abatement can be adjudicated upon in a suit for arrears of rent with as much facility as in a suit for abatement of rent."

I therefore overrule this contention of Mr. Manuk's that it was not open to the defendant to take the plea of abatement in the present case so far as the rent for 1324 is concerned, the finding of the Court below being that in that year the land was totally unfit for cultivation." The appellant is not entitled therefore to the rent for the year 1324 also.

The appeal is consequently dismissed with costs.

Ross, J.:—I agree.

Appeal dismissed.

(2) (1863) Marshall's Rep. 558=2 Hay. 664.

(3) (1916) 24 C.L.J. 162=34 I.C. 464.
(4) 16 W.R. 201.
(5) (1892) 20 Cal. 579.
(6) 22 W.R. 117.

A. I. R. 1922 Patna 171.

DAWSON-MILLER, C. J. AND ADAMI, J.

W. M. Grant and others—Plaintiffs-Appellants

v.

Eklal Jha and others—Defendants-Respondents.

L. P. A. Nos. 109 to 111 of 1921, decided on 9th May, 1922, from the decision of Ross, J., dated 22nd November, 1921.

(a) *Bengal Tenancy Act, Ss. 23 and 178—Contract after 1885 to grow indigo crop only for benefit of landlord is void—Agreement to pay enhanced rent for non-existent obligation is also void.*

Under Section 23 of the Act the tenants are entitled to use the land for any purpose they choose, provided it is consistent with the provisions of that section and the agreement to pay enhanced rent in consideration for the release of a non-existing obligation is void under the provisions of Section 178 (3) (*b*). A contract to grow a particular crop like indigo on a portion of the holding for the benefit

of the landlord when such an obligation was not fastened to the tenancy before 1885 is void after the passing of the Act (1885).

[P. 175, C. 1 ; P. 176, C. 2.]

(b) *B. T Act, S. 29—Obligation arising before Act—Agreement to pay enhanced rent for release thereof is valid*

Where under *kabuliats* before 1885 the tenants bound themselves to grow a particular crop only for the benefit of the landlord in consequence of which a low rent was fixed and in 1902 the tenants promised to pay enhanced rent in consideration of the release of the obligation to grow the particular crop

Held : that the restrictions imposed by Section 29 of the B. T. Act upon the freedom of contract had no operation before the B T Act (1885) came in force. The word "specially" in proviso (iii) of Section 29 of the B. T. Act has no reference to the *quantum* of reduction of rent allowed for the consideration there mentioned but merely requires that owing to special circumstances, *viz*, the agreement to grow a particular crop, the rent is lower than it otherwise would have been. In order to bring an enhancement within proviso (iii) of Section 29 of the B. T. Act three factors must be present.

(1) The *raiyat* must have held the land at a low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord,

(2) He must have been released from an existing obligation of cultivating this crop.

and (3) He must have deemed that the rent which he agreed to pay was fair and equitable

Mere proof that the rent was a low rent would not be sufficient to comply with the section, unless it were also proved that the low rate was arrived at in consideration of cultivating a particular crop. But once it is proved that this is the case then the actual amount, whereby the rent is reduced below what it otherwise would have been if no such obligation had existed, is not a matter to be taken into consideration in deciding whether the proviso had been complied with.

[P. 175, C 1. 2 ; P. 176 C. 1, 2,].

(c) *Contract Act, Ss. 23, 24—Distinct agreements in same instrument—One being void will not make the other also void.*

Where in the same instrument there was an agreement to pay additional rent for increase in area and an agreement to pay enhanced rent for release of an obligation by the tenant and the former agreement was void.

Held that the validity of the latter agreement is not affected. Where in the same instrument there are distinct engagements by which a party binds himself to do certain acts some of which are legal and some illegal the performance of those legal can be enforced. [P 177, C 2. ; P 178, C. 1,]

Manuk, Imam, S. M. Mullick, Nirode Chandra Ray and *S. C. Roy*—for Appellants.

Kulwant Sahay and *Sambhu Saran*—for Respondents.

Dawson-Miller, C. J. :—These three appeals are brought under the Letters Patent from a decision of Mr. Justice Ross, dated the 22nd November last year reversing the decision of the lower appellate Court.

The suits out of which the appeals arise were tried together along with three others of a similar nature before the Munsif at Bhagalpur and determined by the same judgment. The plaintiffs, who are the proprietors of the Lattipur indigo factory at Narainpur, are the same in each case. The defendants, who are the same in two cases but different in the other, are tenants holding under the factory and the same questions for determination arise in each of the cases.

The claim of the plaintiffs, who are the appellants before us, is for the recovery of rent payable under the terms of certain *kabuliats* executed by the defendants respectively in the year 1909, whereby they agreed to pay an enhanced rent amounting to about 4 annas in the rupee in excess of the rent formerly payable under the earlier *kabuliats* in consideration of being released from the obligation imposed by the earlier *kabuliats* of cultivating indigo on a portion of their holdings.

It is the plaintiff's case that the defendants held their land at specially low rate of rent before the date of the *kabuliats* sued on in consideration of cultivating indigo for the landlords' convenience within the meaning of the third proviso of Section 29 of the Bengal Tenancy Act, and that in consideration of being released from that obligation, they agreed to pay the increased rent which they deemed fair and equitable. Section 29 of the Act in so far as it is material reads as follows:—

"The money rent of an occupancy *raiyat* may be enhanced by contract, subject to the following conditions.

* * *

(b) The rent must not be enhanced so as to exceed by more than 2 annas in the rupee the rent previously payable by *raiyat*.

Provided as follows :—

(iii) When a *raiyat* has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord, nothing in Clause (b) shall prevent the *raiyat* from agreeing in consideration of his being released from the obligation of cultivating that crop to pay such rent as he may deem fair and equitable."

It is the defendants' case that there is no proof that they held their lands at a specially low rate of rent in consideration of cultivating a particular crop within the meaning of the proviso and, that therefore, although they executed the *kabuliats* agreeing to pay the rent claimed, such

an agreement cannot be enforced as the enhancement was in excess of the maximum allowed under Clause (*b*) of Section 29 of the Act. The defendants further rely upon Sections 23 and 178 (3) (*b*). The former section gives occupancy *raiyats* the right to use the land in any manner which does not materially impair its value or render it unfit for the purposes of the tenancy, whilst the latter section provides that nothing in any contract made between the landlord and the tenant after the passing of the Act shall take away or limit that right.

It is important to bear in mind that the Bengal Tenancy Act was passed in the year 1885, before which date it is conceded that the restrictions imposed by Section 29 upon the freedom of contract had no operation. The first *kabuliats* of which there is any evidence in the case are dated the 3rd June, 1888. These documents refer to the lands settled as *sabek jote nij*, but when the lands were first settled upon the defendants or their predecessors, there is nothing to show. It has been found however, that the defendants are occupancy *raiyats*.

The *kabuliats* in the case of each of the defendants are of the same tenor. Those of 1888 are for a period of 10 years from 1295 to 1304 F. They provide in paragraph 6 that—

"I, the *raiyat*, will from year to year till the expiration of the term of this *kabuliat* sow indigo only or indigo with certain mixed crops such as linseed and mustard, upon one-fourth of the said holding after taking indigo seeds from the factory without payment of any price for the same, according to the choice of the *sahebs* and *amlas* of the Lattipur indigo concern."

Then follow certain stipulations as to the landlord's rights if this obligation is not complied with and to the harvesting of the indigo and the price to be paid for it. Paragraph 7 says :

"The conditions in paragraph 6 above are according to the old custom of the village and upon these conditions the rent of the holding has been fixed. If I, the *raiyat* refuse in any year to set apart one-fourth of the land at the time of measuring the same for the purpose of sowing indigo I, the *raiyat*, will pay excess rent at the rate of Re. 1 per *bigha* for the entire area of the holding from that year until the expiration of the term of this *kabuliat*.

Paragraph 9 provides :—

"In the beginning of the year when the term of this *kabuliat* will expire I shall appear before you, the *patnidars*, and shall put in a *kabuliat* for a fresh settlement and shall obtain a *patta* for the same and if I do not put in a *kabuliat* and obtain a *patta* then until I obtain a settlement I shall pay rent at the rate of Re. 1 in excess for the entire area as provided by paragraph 7 hereof."

When these *kabuliats* expired they were renewed for a further term which expired in 1315 F. that is, in September 1908. A few months later on the 14th January, 1909, fresh *kabuliats* were executed after a fresh measurement of the land. These were for 9 years from 1317 to 1325 F. inclusive.

It was found by the method of measurement adopted that there had been an increase in the area, in excess of the area mentioned under the previous *kabuliats* and for this the tenants agreed to pay an additional rent. They further agreed to pay an enhanced rent at rate which worked out at about 4 annas in the rupee. The stipulation as to growing indigo finds no place in these *kabuliats*. Clause 14 provides as follows :

"Be it known that for my having grown indigo on one-fourth of my *nagdi* holding the *maliks* had settled the land with me at a low rate, but the *maliks* have now closed the indigo business, therefore, the excess rate which has been assessed upon my *nagdi* holding according to my wish, neither I, nor my heirs and representatives have or will have any objection to pay."

One of the questions which arose for determination by the Munsif was whether in fact under these *kabuliats* the area had been properly measured. The *lagga* used as stated in the *kabuliats* themselves was a *lagga* of 5¾ cubits, whereas the tenants contended that the standard *lagga* in use in the village was 6½ cubits, and when measured by this standard no increase in area had in fact taken place.

This question was decided by the Munsif in favour of the defendants and the additional rent proportionate to the excess area was disallowed. The learned Munsif also came

to the conclusion that the agreement to enhance the rent in excess of 2 annas in the rupee was in contravention of Section 29 (b) of the Bengal Tenancy Act and was not taken out of the operation of the section by the third proviso.

He considered that although it was proved that the rent was low in consideration of growing indigo, it was not shown that it was specially low. He further held that the *kabuliats* of 1888 were executed in respect of lands held by the tenants previously, and that there was nothing to show that there was any obligation upon them to cultivate indigo at the inception of the tenancy and unless this could be shown the proviso had no application. He also found that there was nothing to show that the defendants deemed the rent agreed upon to be fair and equitable.

I may mention here that in some of the other cases which are not subject of this appeal where similar *kabuliats* were proved showing the original settlements with the tenants he found upon exactly the same evidence that the rent was specially low and that the tenants deemed the enhancement to be fair and equitable. A further point was taken and decided against the landlords that the *kabuliats* sued on represented a *bona fide* settlement of a dispute for rent between the parties and should not, therefore, be treated as a case of enhancement.

The plaintiffs appealed from this decision to the District Judge, who affirmed the decision of the Munsif as to the claim for excess area, but allowed the appeal in so far as it claimed an enhancement in respect of the area allowed, being of the opinion that on the evidence the case came within the terms of the third proviso of Section 29. There was no direct evidence to show whether the obligation to grow indigo was one binding on the tenants at the inception of the tenancy, but the learned Judge considered that as the origin of the tenancy was lost in obscurity he was entitled to consider the surrounding circumstances and the conduct of the parties and the inferences to be drawn from the *kabuliats* themselves in determining whether the obligation to grow indigo was an incident attaching to the tenancy at its inception.

The fact that the *kabuliats* as far back as 1888 recited an obligation to grow indigo on a fourth part of their holdings according to the custom of the village, he considered, indicated that no new obligation was then imposed but that it was pre-existing and in accordance with custom and usage, and the conduct of the parties in agreeing to pay an enhanced rent in 1909 and for several years afterwards complying with that agreement was also indicative of the nature of the tenancy in its origin.

He further relied upon a petition in connection with a fresh settlement with one of the defendants in 1905 as showing that indigo cultivation was one of the purposes for which the land was settled. He also found upon the oral evidence as well as from the defendants' own admissions in the *kabuliats* that the lands had been settled with the tenants at a specially low rate in consideration of growing indigo and that the new rate was fair and equitable.

On second appeal to this Court by the tenants, the learned Judge before whom the appeal came reversed the decision of the learned District Judge. The evidence upon which the lower appellate Court's decision was based, in so far as it was given orally, was not before the learned Judge in second appeal, but he referred to certain passages in the Munsif's judgment in which some of the oral evidence was dealt with and arrived at the conclusion that this was no proof that the *raiyats* held their land at a specially low rate of rent in consideration of cultivating indigo.

He further considered that the admission that they had previously held at a low rate, in consideration of this obligation contained in the *kabuliats* sued on, could not be relied upon, as the *kabuliats* themselves were repudiated as void, and that, in these circumstances the admission itself would not prove the truth of what it states. He further considered that the admission itself was not sufficient, as it did not show that the purpose of the tenancy was the growing of a particular crop or that in consideration thereof the rent was specially low.

He considered, however, that at the time of the *kabuliats* in 1888 a less rent was fixed than would otherwise have been fixed because the proprietors wanted indigo on one-fourth of the land. He also considered that although there was an obligation to grow indigo under the *kabuliats* of 1888 and

again under the renewal in 1902 this obligation came to an end with the *kabuliats* of 1902 and had ceased to exist when the new *kabuliats* agreeing to the enhanced rent were executed.

It would follow, therefore, under Section 23 of the Act that the tenants were then entitled to use the land for any purpose they chose consistent with the provisions of that section and the agreement to pay enhanced rent in consideration for the release of a non existing obligation was void under the provisions of Section 178 (3) (*b*).

The determination of these appeals ultimately depends upon the answer to the question whether there was evidence to support the conclusions of fact arrived at by the first appellate Court. The findings must be accepted in second appeal unless it can be shown that there was no evidence to support them. In the present case the evidence was both oral and documentary. The *kabuliats* which were relied upon by both parties in support of their respective contentions have been placed before us, but we are not in a position to deal with the oral evidence nor can we say to what extent it justified the findings except in so far as appears from the judgment of the Munsif and the learned District Judge.

Had either of the parties intended to raise the point that there was no oral evidence to justify the findings in so far as they are based thereon, it was their duty to have placed that evidence on the record to enable the Court to decide this question and not merely to rely upon certain references thereto in the judgment of the lower Courts.

I should have had little hesitation in coming to the conclusion that the findings of the lower appellate Court could not be disturbed but for the fact that the learned Judge of this Court in second appeal has taken a different view and considers that there was no evidence upon which those findings can legally be supported. His opinion is entitled to all respect.

He concisely states the question for decision when he states that the enhancement being in excess of that allowed by Section 29, the agreement by the tenants to pay the enhanced rent is void, unless it is protected by the third proviso, and that, in order to bring it within that proviso, three factors must be present: (1) the *raiyat* must have held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of his landlord, (2) he must have been released from an existing obligation of cultivating this crop, and (3) he must have deemed that the rent which he agreed to pay was fair and equitable.

The learned Judge thought that neither of the first two factors existed upon the evidence andthatit was unnecessary,therefore, to consider the third. With regard to the first point the two earlier *kabuliats* contain an admission that the tenants are under an obligation to grow indigo on a part of their holdings according to the old custom of the village and that upon these conditions the rent of the holdings has been fixed. They further agree that if they refuse in any year to set apart a fourth of the land for the purpose of sowing indigo they will pay an excess rent at the rate of one rupee per *bigha* for the entire area of the holding.

It appears from the Munsif's judgment that the plaintiff's witnesses said that the tenants were under an obligation to grow indigo and three of them stated that the rent was low in consideration of so doing. They do not appear, however, according to the Munsif to have stated that the rate was specially low. The learned District Judge on the other hand found in these words:—

"The former rates at which the respondents held are specially low as appears from the oral evidence as well as from their own admissions in the *kabuliats*."

I may mention here that in the *kabuliats* of 1909 there is a further admission that in consideration of growing indigo the *maliks* had previously settled the land at a low rate. In my opinion, this evidence was amply sufficient to justify the finding that the land was previously held, that is to say, under the *kabuliats* of 1888 and 1902, at a specially low rate of rent in consideration of cultivating a particular crop within the meaning of the third proviso of Section 29.

The word specially, as used in the section has, in my opinion, no reference to the *quantum* of the reduction of rent allowed for the consideration there mentioned, but merely required that owing to special circumstances, *viz.*, the agree-

ment to cultivate a particular crop, the rent is lower than it otherwise would have been. Mere proof that the rent was a low rent would not be sufficient to comply with the section, unless it were also proved that the low rate was arrived at in consideration of cultivating a particular crop.

But once it is proved that this is the case, then the actual amount whereby the rent is reduced below what it otherwise would have been, if no such obligation had existed, is not a matter to be taken into consideration in deciding whether the proviso has been complied with. I may also point out that this appears to have been the view of the learned Munsif, although it would seem that in deciding the question he subsequently lost sight of it. In considering this point he first of all says :—

" The first thing to be shown is that the defendant in this case has been holding at a specially low rate of rent or in other words at a rate lower than what it would have been if there were no obligation to grow indigo."

But in considering the evidence in order to ascertain whether it proved such a state of affairs, he found that it did not, merely because the witnesses did not use the words " specially low," and as already pointed out in one of the other cases, not now on appeal before us, in which he came to a different conclusion of fact he says :—

" The *kabuliats*, however, do not state expressly that the rent was fixed at a specially low rate of rent in consideration of this obligation but that a specially low rate of rent was partly the consideration for the settlement is clear."

It would appear, therefore, that upon precisely the same evidence he came to two diametrically opposite conclusions of fact. In my opinion, the decision arrived at by the learned District Judge upon this question was amply justified by the evidence, even if it be taken to have gone no further than what appears from the judgment of the learned Munsif.

The decision of this question, however merely goes to the state of affairs existing from 1888 onwards and it still remains to consider whether in 1909, when the new *kabuliats* were executed after the old ones had expired, the obligation to grow indigo still existed. If it did not, there was no consideration for the agreement to pay enhanced rent beyond that prescribed by the statute and any obligation undertaken by the tenants to do so would not be binding upon them.

Whether that obligation existed or not depends upon whether either at the inception of the tenancy or at least at sometime before 1885 when the Bengal Tenancy Act was passed, the tenants were under an obligation to grow indigo. I think it must be conceded that it is not necessary to go back to the inception of the tenancy. If at any time before 1885 this obligation was a part of the terms under which the tenants held, then it would be a binding obligation as there was no law to prevent the freedom of contract.

It is conceded that there is no direct evidence as to the terms upon which the tenants held before 1888 and the question for consideration is whether the learned District Judge was justified in drawing the inferences from the evidence contained in the *kabuliats* themselves and from the acts of the parties that the obligation was one of old standing and not newly created by the *kabuliats* of 1888. I have already stated the grounds upon which the learned District Judge arrived at his finding upon this question.

The reference in the earlier *kabuliats* to the custom of the village, the agreement by the tenants to pay an enhanced rent of one rupee per *bigha* if they failed to comply with their obligation and the fact that in 1909 they willingly agreed to pay excess rent after due consideration and without any coercion on the part of the landlord, which was found as a fact in the case, coupled with the admission in the *kabuliats* of that date that the *maliks* had settled the land with them at a low rate for having grown indigo, all seem to me to lead to the inference that the obligation was not imposed for the first time in 1888 but was in existence at all events before the passing of the Bengal Tenancy Act in 1885.

It will be observed that the admission referred to speaks of the land being settled with the tenants upon certain terms and, to my mind, this clearly points to the original settlement. There were other matters also referred to by the learned District Judge arising on the evidence but which we are not in a position to deal with as the evidence is not before us and which

pointed towards the same conclusion, *viz.*, that indigo cultivation was one of the purposes for which the land was settled. Added to this there is not a scintilla of evidence adduced by the defendants to show that the obligation arose for the first time under the *kabuliats* of 1888. In my opinion, therefore, the findings of the learned District Judge on these two points were in fact supported by the evidence.

The only other question is whether the tenants can be said to have deemed as fair and equitable the enhanced rent which they agreed to pay. The mere fact that they entered into a formal written agreement with the landlord to pay it is insufficient to raise the presumption that they deemed it fair and equitable. There is nothing in the rate enhanced which militates against this view, and the parties were dealing at arms' length and without any coercion on the part of the landlord. The question was one of fact and in the circumstances I can see no ground upon which the finding can be disturbed.

The learned Judge of this Court whose decision is now under appeal took the view that the admission contained in the *kabuliat* of 1909 could not be regarded as evidence because the *kabuliat* itself was challenged as void. If the *kabuliat* was valid, as I have found it to be, this question does not arise, but in any case I am unable to follow the learned Judge's reasoning that, because a document may not be valid for the purpose for which it was intended, it cannot be used as evidence of an admission by the person executing it when its execution has been admitted or proved.

The admission therein contained, that the lands were previously held at a low rent, was made by the tenants without coercion and even if the document as an agreement to pay enhanced rent should not be binding, I cannot see any reason why it should be rejected as an admission of the facts stated.

A further question was raised before us in argument by the learned Government Pleader on behalf of the respondents which was not taken in any of the Courts below. It was contended that the whole agreement of 1909 was void because one of the considerations for paying an enhanced rent, *viz.*, an increase in the area had been found not to exist and even if the other consideration, *viz.*, the release from the obligation should be valid, the promise to pay an enhanced rent could not stand. Reliance was placed upon Sections 23 and 24 of the Contract Act. It was contended that part of the consideration for the enhancement of rent was the increased area shown to exist by the form of measurement adopted, whereas in fact it was found that the area had not increased at all, a wrong method of measurement having been employed.

It was argued that in this state of affairs, a part of the consideration for the enhancement of rent having failed, it must be treated as unlawful under Section 23 of the Contract Act as, if permitted, it would defeat the provisions of Section 29 (b) of the Bengal Tenancy Act relating to enhancement. I agree that under Section 24 of the Contract Act if one of the several considerations for a single object is unlawful the agreement is void, but even assuming that the consideration in the circumstances stated was unlawful it would appear that the increase of area alleged to exist was no part of the consideration for the enhancement of rent.

As this point had never been taken in any of the lower Courts the schedule attached to the *kabuliats* of 1909 had not been placed in evidence before us, but we were informed by the learned Counsel for the appellants, and it was not contradicted, that the schedule clearly shows how the rent was arrived at. It sets out the original area and the original rent and the additional area and additional rent, and then shows the enhancement of rent in consideration of the release from the obligation.

The additional rent was disallowed by the lower Courts and although there was a cross-appeal by the plaintiffs on that question to this Court, the cross-appeal was not pressed as no point was taken about separating the legal from the illegal part of the consideration. The engagements to pay additional rent and enhanced rent are entirely separate and distinct. One cannot ask the Court to make a new contract in place of that which is illegal, but where in the same instrument there are distinct engagements by which a party binds himself to do certain acts some of which

are legal and some illegal, the performance of those which are legal can be enforced although the performance of those which are illegal cannot.

Section 29 of the Bengal Tenancy Act has no application to an increase in the amount of rent by reason of an increase in the area. It applies only to an increase in the rate of rent, and the engagements by the defendants to pay additional rent for an additional area and an enhanced rent for release from an obligation are entirely separate and distinct. The tenants are not entitled to say because we have undertaken to pay additional rent for an additional area which cannot be enforced, therefore, we shall not pay enhanced rent in consideration of being released from an existing obligation although that consideration is perfectly good.

I am further of opinion that at this stage, although the question raised is one of law, we ought not to entertain it in the particular circumstances which have arisen. The present appellants, who were respondents in the Court below, entered a cross-appeal in that Court challenging the findings as to the additional rent and further contending that the *kabuliat* sued on represented a *bona fide* settlement of a dispute for rent between the parties and the case should not be treated as one of enhancement, but as no point was taken before Mr. Justice Ross about separating the legal from the illegal part of the consideration they were content not to press their cross-appeal.

For both these reasons, I think, that this question should be determined against the respondents and in favour of the appellants. In my opinion, this appeal should be allowed, the decree appealed from should be set aside, and that of the District Judge restored. The appellants are entitled to their costs of this appeal and of the appeal of the defendants before Mr. Justice Ross.

Adami, J. :—I agree.

Appeals allowed.

A. I. R. 1922 Patna 178.

JWALA PRASAD, A. C. J. AND DAS, J.

Ram Padarath Singh and another—Defendants-Appellants

v.

Mahanth Basdeo Das and others—Plaintiffs-Respondents.

S. A. Nos. 902 and 1161 of 1919, decided on 4th July, 1921, from a decision of Dist. J., Darbhanga.

(a) *Hindu Law—Religious Endowment—Mahanth's interest is that of life tenant—Alienations by Mahanth prejudicial to interest of* Math *can be avoided by successor.*

The head of a *mutt* cannot enter into a transaction the effect of which is to destroy the trust property altogether nor is he competent to alienate the endowed property except for the benefit of the endowment The real owner of the property is the deity or the charitable purpose for which the endowment was created. His interest in the property is that of a life-tenant. A Mahant cannot enter into a compromise which is prejudicial to the interest of the endowment and his successor-in-office is entitled to avoid it. The *shebait* of an idol has no sort of an estate in the properties endowed whereas the head of the institution has a life-estate in the properties which are the subject-matter of the endowment. It is doubtful if the Mahanth of the endowment should be described as a trustee. [P. 180, C. 2.]

(b) *Limitation Act (IX of 1908), S. 10 and Art. 134—Suit to avoid alienation by previous Mahant—Time runs from his death.*

The limitation for a suit for possession of endowed property by a successor-in-office of a Mahant who alienated the endowed property runs from the date of the latter's death, as the Mahanth had a life-estate in the endowed properties and time did not begin to run until his death. [P. 181, Cs. 1, 2.]

Kulwant Sahay, Baikuntha Nath Mitra and *Sambu Saran*—for Appellants.

Sharoshi Charan Mitter—for Respondents.

Jwala Prasad, A. C. J. :—Appeal No. 902 is by defendants Nos. 1 and 3. Appeal No. 1161 is by the defendant No. 2. Defendant No. 1 is the son of one Mahant Ram Banwari Das. Defendant No. 2 is the purchaser of 1 anna of the property in dispute namely, a 3 annas share of a village called Chaktola, Tauzi No. 1315, from defendant No. 1 under a sale-deed, dated the 7th May, 1912. Defendant No. 3 is the purchaser of 10 *gandas* of the said share in an auction sale in execution of a decree obtained against defendant No. 1 on the basis of a bond executed by Ram-Banwari Das. Defendant No. 1 is in possession of the remaining 1 anna 10

gandas. The defendants are thus in possession of the said 3 annas share of the village. The entire village was granted by Maharaja Mahendra Singh of Darbhanga to one Prasadi Das by a *sanad* (Exhibit 2), dated the 2nd *Magh Badi* 1157 F. (1750). The land granted was described in the *sanad* as *sri priti* land.

The object of the grant was to maintain the donee and for the purpose of making gifts to *Sadhus* and *Sants*. The property was held in possession of the successive *Mahants* of the *Asthal* of *Bairagis* of the Chhaterbhuj sect situate in Rarhi, of which Prasadi Das was the *Mahant* at the time of the grant. Ram Banwari Das was the sixth *Mahant* in descent from Prasadi Das. He was a married man and by his married wife had one son, defendant No. 1. He had also two *Chelas* Ram Das and Basdeo Das, the plaintiff, Ram Banwari Das, died in the year 1907 leaving his son, the defendant No. 1 and the aforesaid two *Chelas*. In 1880 Ram Banwari Das sold 16 annas of the village to his brother Dukharon Jha. In 1887 Dukharan Jha sold back 15 annas of the village to Ram Banwari Das retaining 1 anna to himself. In 1903 Banwari Das sold 12 annas to defendant No. 3 and retained the remaining 3 annas to himself. There is no dispute as to the 12 annas share.

We are concerned in this litigation only with the 3 annas share. After the death of Ram Banwari Das there was a dispute between the defendant No. 1, his son, and Ram Das, his *Chela*, in the Land Registration Department. The dispute was referred to the Civil Court under Section 55 of the Land Registration Act and was decided in favour of defendant No. 1. Ram Das then instituted a Civil Suit against the defendant No. 1 for a declaration that the property was an endowed property belonging to the *Math* and for recovery of possession. That case was settled by a compromise between the parties, which was incorporated in the decree, dated the 22nd September, 1909.

By the compromise Ram Das declared the defendant No. 1 to be the owner of the property, stating that it was not an endowed property and had nothing to do with the *Asthal* or *Math* Ram Das was given 1 *bigha* 15 *cattahs* of land out of the village by this compromise. He died in *Bhado* 1318 F. (1911) and was succeeded by his spiritual brother Basdeo Das, plaintiff in this case.

Basdeo commenced this action on the 11th April, 1917 for a declaration that the property in dispute was a *debutter* property appertaining to the *Asthal* of Rarhi and that defendant No. 1, the son of Ram Banwari Das, had no right in or concern with it. Upon these declarations he prayed for recovery of possession of the property by ejecting the defendants.

All the defendants resisted the claim of the plaintiff and filed separate written statements. Their defence gave rise to, among others, the following principal issues:—

(1) Is the suit barred by limitation?

(2) Is the compromise effected by Ram Das and defendant No. 1 on 22nd September, 1909 genuine or fraudulent and binding on the plaintiff?

(4) Is the disputed property *debutter*?

All these issues were decided in favour of the plaintiff, with the result that the suit was decreed.

The defendants have, therefore, come to us in second appeal. Mr. Kulwant Sahai on their behalf has strenuously urged that the property in dispute was not an endowed property attached to the *Asthal* of Rarhi but that it was the personal property of Ram Banwari Das and consequently the plaintiff as Mahant of the *Asthal* is not entitled to it. The lower Court has construed the *sanad* (Exhibit 2) of 1157 F. as endowing the property for religious and charitable purposes.

This interpretation has been challenged by Mr. Kulwant Sahai and we have been referred to the terms of the document in detail. The land covered by the grant has been described as *sri priti* land, which literally means land endowed to the goddess Sri. The purpose of the grant as observed above was that the grantee would appropriate the produce to maintain himself and to feed *Fakirs* and mendicants.

The denomination of the document with the purpose indicated therein leaves no manner of doubt that the donor created a trust for charitable and religious purposes. The subsequent document of 1160, (Exhibit A) no doubt, does not refer in express terms to the charitable purposes of feeding mendicants and *Sadhus* and refers only to the personal object of maintaining the

donee himself, but this document does not in any way purport to destroy or affect the terms of the original grant.

On the other hand it purports to have been granted in terms of the original grant, as it expressly states " by way or help to support himself in the term of the *sanad*." This document is only a confirmatory one and the omission of the charitable purposes expressly detailed and described in the first document does not in any way show that the grant was for earthly and not for religious purposes. In the year 1838 (1245 F.) the village was held to be assessable to Government revenue under Regulations II of 1819 and III of 1828.

That was a case decided in the presence of Mahant, Bali Ram Das. The *robkari* refers to the terms of the two *sanads* and to the mode of enjoyment by the successive *Mahants*. It, however, does not declare the land to be exempted from Government revenue upon the ground, not that there was no valid creation of a trust for religious and charitable purposes, but on the express ground that under Schedule II, Section 3 of Regulation IV of 1825, —" the *Amlas* of *Zemindars* are not at all competent to grant release from the payment of Government revenue."

None of these documents, therefore, in any way affect the clear terms of the original *sanad* whereby an express trust for charitable and religious purposes was created.

The next contention of Mr. Kulwant Sahai was that assuming that the property in question was *debutter* property, yet by the terms of the compromise of the 22nd September, 1909 the said property was declared to be the personal property of Ram Banwari Das and to have been inherited by his son, the defendant No. 1, and the plaintiff is not entitled to succeed in the present suit.

In short it is contended that the compromise in question settled a *bona fide* dispute between the predecessor-in-interest of the plaintiff and the defendant No. 1 and is, therefore, binding upon the plaintiff. The rights of the *Mahants* to deal with an endowed property have been fully discussed by the two very eminent Judges of the Madras High Court, Subramania Aiyar, O. C. J. and Bhashyam Ayyangar, J., in the notable case of *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1).

It was held in that case that the head of a *Math*, is not a mere trustee but a " corporation sole " having an estate for life in the permanent endowments of the *Math* and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution. His power to alienate or charge the *corpus* of the endowment is limited to purposes necessary for the maintenance of the *Math*, and alienations or charges will not be binding on the *Math* or on his successors merely because they have been made for general religious and charitable purposes appropriate to the head of a *Math*.

It is needless to enter into any discussion to show how the (aforesaid) force of the proposition was established, for we entirely agree with the view taken by those learned Judges. The natural deduction from the aforesaid principle is that a Mahant is not competent to alienate the endowed property except for the benefit of the endowment. The Hindu Law on endowments was fully reviewed and the aforesaid proposition was established in the case of *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (2).

Whether the position of a *Mahant* is that of a limited owner or analogous to a guardian of an infant son, it appears to me that he cannot enter into a transaction the effect of which is to destroy the trust property altogether. His interest in the property is that of a life-tenant. The real owner of the property is the deity or the charitable purpose for which the endowment was created. He can justify his alienations only as being in the interest of the endowment itself. Looked at from this point of view, the compromise in the present case does not appear to have been in the interest of the endowment.

As held by the trial Court, the entire *debutter* land or trust property was abandoned in favour of defendant No. 1 for the sake of only 1 *bigha* odd. The trial Court characterises the compromise as being dishonest and fraudulent." The lower appellate Court has used an equally strong expression

(1) (1904) 27 Mad. 435=14 M. L. J. 105.
(2) (1896) 23 Cal. 645.

when it said that the compromise was

"a monstrously unfair arrangement, extremely injurious to the trust and Ram Das had no power to enter into it."

Upon the findings of the Court below and upon a consideration of the terms of the compromise and also upon the history of the previous litigation between the parties, it cannot be urged that the compromise was with a view to settle a *bona fide* dispute between the parties. The plaintiff as the present occupant of the *Asthal* is not at all bound by such a compromise entered into by his predecessor-in-interest, Ram Das, and is entitled to avoid it, provided his claim is not barred by limitation.

This leads us to the consideration of the last argument of Mr. Kulwant Sahai that the suit of the plaintiff is barred by limitation. This contention is based upon the sale-deed executed by Ram Banwari Das in the year 1880 in favour of his brother Dukharan Jha. It is said that Ram Banwari Das then asserted his own personal right as against his right as a trustee of the property and as the *Mahant* of the Asthal to which the property was endowed. Such an assertion on behalf of Ram Banwari Das is said to create in him an adverse title in his personal capacity as against his position as a Mahant of the Asthal.

The property in this case was an express trust, and Mr. Saroshi Charan Mitter has succeeded in showing that no question of limitation can arise in a case of this kind and that a trustee cannot claim a right by adverse possession in himself. In this view he is supported by the authority quoted by him in the case of *Sreenath Bose* v. *Radha Nath Bose* (3), and *Bhurabhai Jamnadas* v. *Bai Rukmani* (4). Apart from this the effect of the transaction of 1880 was qualified by the subsequent transaction in 1887 whereby Ram Banwari Das got back 15 annas of the property including the 3 annas in dispute. Since then Banwari Das was in possession of the disputed 3 annas up to the time of his death in 1907.

Again he being a limited owner, limitation for a suit for possession would really run from the date of his death, namely, 1917. Therefore, the suit of the plaintiff is not in any way barred by limitation. The view taken by the Court below appears to be correct and these appeals are dsmissed with costs.

Das, J. :—I agree that these appeals should be dismissed with costs. I am not quite certain whether the *Mahant* of an endowment should be described as a trustee. In the celebrated case of *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1), the distinction between the head of an institution and the *shebait* of an idol was pointed out. The *shebait* of an idol has no sort of an estate in the properties endowed, whereas, the head of an institution has a life-estate in the properties which are the subject matter of the endowment. On the question of limitation I prefer to rest my decision on the ground that the *Mahant* had a life-estate in the properties and that time did not begin to run until his death.

Appeals dismissed.

(3) (1883) 12 C L. R. 370.
(4) (1908) 32 Bom. 394=10 Bom. L.R. 540.

A. I. R. 1922 Patna 181.

DAS AND ADAMI, JJ.

Ram Narain Lal and another—Appellants.

v.

Sahadeo Singh and others (Plaintiffs) and *Sidheshwar Nath and others*—Defendants-Respondents.

F. A. No. 115 of 1919, decided on 17th January, 1922, from the decision of the Sub Judge, Patna.

Mortgage—Subrogation—Sale in execution of decree on prior mortgage set aside—Mortgagor borrowing money to deposit—Lender's position—Presumption of intention to keep alive prior charge

Where a creditor advanced money to the mortgagor to get the sale set aside under Order 21, Rule 89, Civil Procedure Code.

Held, the charge was kept alive which was manifestly to his advantage, by paying up the first mortgage which could be used as a shield.

[P. 182, C. 1]

S. M. Mullick and *Shiveshwar Dayal*—for Appellants.

Kalwant Sahay and *J. P. Singh*—for Respondents.

Das, J. :—The only question raised in this appeal is whether the defendants Nos. 3 and 4 who are the appellants before us are not entitled to priority in respect of 4 annas share in a property bearing *Tauzi* No. 126. The material facts are as follows :—

On the 22nd December, 1905, one Bisheshwar, the father of defendants

Nos. 1 and 2, borrowed a sum of money from one Ram Lagan and executed a mortgage in his favour in respect of 4 *annas* share in a property known as *Mauza* Parmanandpur bearing *Tauzi* No. 126. Bisheshwar executed two further mortgages one, dated the 19th June, 1911 and the other dated, the 27th April, 1913 in favour of the plaintiffs. In 1912 Ram Lagan brought a suit to enforce his mortgage and on the 24th September, 1912, he recovered a decree as against Bisheshwar.

Thereafter the mortgaged properties were put up for sale and were in fact purchased by Ram Lagan. On the 14th December, 1914, Bisheshwar along with two other persons borrowed a sum of Rs. 4,935 from the appellants and executed a mortgage in favour of the appellants in respect of certain properties including 4 *annas* share in *Mauza* Parmanandpur bearing *Tauzi* No. 126. The mortgage in favour of the appellants recited that Ram Lagan had recovered a decree as against them and that it was absolutely necessary for them to deposit the decretal money in Court in order to have the sale in favour of Ram Lagan set aside.

On the 15th December, 1914, Rs. 4,192-11-9 was actually deposited by Bisheshwar in Court and a receipt was granted to the appellants by Bisheshwar in respect of the money which was advanced by the appellants to Bisheshwar in which it was distinctly stated by Bisheshwar that out of the money which was advanced by the appellants to Bisheshwar he had deposited the decretal money due to Ram Lagan Singh, decreeholder. There cannot be the slightest doubt that the money actually advanced by the appellants went to satisfy the mortgage bond of Ram Lagan. The question, therefore, arises, was the charge in favour of Ram Lagan extinguished, or was it kept alive by the transaction which took place between the appellants and Bisheshwar.

In my opinion, there cannot be the slightest doubt that the charge was kept alive. It was manifestly to the interest of the appellants that the charge should be kept alive and there is no reason at all to hold that they did not intend that which was manifestly to their advantage and for their benefit.

The learned Subordinate Judge has taken the view that the allegation that Ram Lagan's debt was satisfied out of the consideration money of the appellant's bond is not supported by any reliable evidence. In my opinion, it is supported by the recitals of the bond and also by the receipt Exhibit A, to which I have already referred. Then the learned Subordinate Judge says that there is no agreement in the appellants' bond that the debt of the appellants will have priority over the plaintiffs' mortgage. Of course there is no such agreement nor could there be any such agreement.

The question that the learned Subordinate Judge should have considered was this: was the mortgage bond of Ram Lagan extinguished or kept alive; and had the learned Subordinate Judge referred to the numerous authorities on the point, he would have had no sort of difficulty in coming to a proper conclusion on this point.

It was lastly argued by the learned vakil for the respondents that the Judicial Committee in the case of *Het Ram* v. *Shadi Ram* (1), has taken the view that upon an order absolute for sale being passed under Section 89 of the Transfer of Property Act, the security is entirely extinguished and cannot be kept alive for any one's advantage.

It is of course conceded in this case that an order absolute for sale was passed in Ram Lagan's suit and that thereafter a sale of the property actually took place. If the decision of the Judicial Committee in *Het Ram* v. *Shadi Ram* (1), be the last word on the subject, then there can be very little doubt that respondents will be entitled to succeed. But this case was considered by the Judicial Committee in the case of *Suki* v. *Ghulam Safdar Khan* (2).

It was pointed out that various cases which have taken the opposite view were not brought to the notice of the Board in *Het Ram's case* (1) and that whatever the difficulty might have been under the Transfer of Property Act, the position is entirely different now that we are governed by the Civil Procedure Code

(1) (1918) 40 All. 407=45 I. A. 130=5 P.L.W. 88=12 Bur. L. T. 73=9 L. W. 550=22 C. W. N. 1033=20 Bom. L.R. 798=(1918) M. W. N. 518=28 C. L. J. 188=35 M.L.J. 1=24 M. L. T. 92=16 A.L.J. 607=45 I.C. 798 (P. C.).

(2) A. I. R. 1922 P. C. 11=43 All. 469=48 I.A. 465=42 M.L.J. 15=14 L.W. 162=(1921) M.W.N. 445=26 C. W. N. 279=65 I. C. 151=24 Bom. L. R. 590.

and not by the Transfer of Property Act. Their Lordships in the course of their judgment said as follows:—

"Now the words being gone,"

namely the concluding words in Section 89 of the Transfer of Property Act, which gave rise to a conflict of authorities on the subject,

"their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, namely that an owner of the property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee who is not bound by the sale of the decree on which it proceeded, to set up the first mortgage as a shield."

In my opinion, this decision is conclusive on that point.

I hold that the decision of the learned Subordinate Judge on the question that has been argued before us cannot be supported. I must accordingly modify the decree which has been passed by the learned Subordinate Judge and direct that the sale of 4 *annas* share in *Mauza* Parmanandpur bearing *Tauzi* No. 126 must be subject to the prior mortgage lien of the appellants to the extent of Rs. 4,192-11-9.

The appellants will be entitled to their costs both in this Court and in the Court below from the plaintiffs.

Adami, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 183.

JWALA PRASAD, J.

Rampartap Lal—Accused-Petitioner

v.

Barh Municipality—Complainant-Opposite Party.

Cr. Rev. No. 563 of 1921, decided on 5th June, 1922.

Bengal Municipal Act (III B. C. of 1884), Ss. 271, 178—Objection filed to notice not properly disposed of—Prosecution under S. 271 is not justified.

A prosecution under Section 271 of the Act is not justified unless the objection is disposed of according to terms of the law laid down under Section 178. A person need not comply with the orders mentioned in the notice under Section 178 if he has filed an objection. If the objection is decided in his favour then the notice is cancelled. If it is decided against him, then the decision cannot have the retrospective effect of punishing him for the default committed by him with respect to the first notice. [P. 184, C. 1.]

M. Yunus—for Petitioner.

Jwala Prasad, J.:—This is an application against the conviction of the accused under Section 271 of the Bengal Municipal Act (Act III of 1884).

On an application, dated the 26th of February, 1921, made by Saukhi Lal of Barh and on a report drawn by the Sanitary Inspector, dated the 2nd of March, 1921, a notice, dated the 4th of March under Section 224 of the Municipal Act was served upon the petitioner to remove a new latrine which he had constructed upon his premises without the permission of the Municipality within 15 days. On the 7th of March, the petitioner filed an objection (Exhibit 7) before the Municipality against the said notice, and on a report of the Sanitary Inspector and the Vice-Chairman, the Chairman recorded the following order upon the back of the petition:—

"Please prosecute the man if you are satisfied that the privy is objectionable and erected without permission."

On the 28th of April, the Vice-Chairman passed the following order (Exhibit 8):—

"Instruction was given to him to settle the matter amicably, but he failed. The privy was built without permission. However, prosecute him."

This order is said to have been verbally communicated to the petitioner by the Vice-Chairman. The petitioner was thereafter prosecuted and convicted. He has been directed to pay a fine of Rs. 15 for not having pulled down the privy within 15 days of 4th of March, 1921, that is, within the 19th of March, 1921, and annas 2 for every day subsequent to that till the said privy is removed. This order has been passed under Section 271 of the Bengal Municipal Act.

Mr. Yunus contends that his objection filed on the 7th of March, was not disposed of in terms of Section 178 of the Act, nor was any time specified within which the requisition was to be carried out. On the other hand, the Magistrate holds that the order of the Chairman, dated the 6th April, and of the Vice-Chairman, dated the 28th of April, had the effect of making the requisition

absolute and that the time of 15 days mentioned in the first requisition was a sufficient compliance with the requirements of Section 178.

It is, however, conceded that no order in terms of Section 178 was recorded and the orders of the Chairman, dated the 6th of April, and of the Vice-Chairman, dated the 28th of April, cannot be construed to be a record of the disposal of the objection of the petition filed by the petitioner. Even if those orders can be construed as such they should have specified the time within which the requisition was to be carried out. The fact that 15 days time was mentioned in the original notice served on the 4th of March does not absolve the Municipal authorities from the obligation of again specifying, after the disposal of the objection uuder Section 178, the time within which the requisition shall be complied with.

The original notice of the 4th of March spent itself on the 19th of March and became nugatory after the objection of the 17th of March was filed by the petitioner under Section 178. The objection under Section 178 may be withdrawn by recording a formal order, and if made absolute the person affected thereby is entitled to a fresh time within which to comply with the order of the Municipality.

He objected to the first notice and the right of the Municipality to require him to demolish his latrine, and therefore, he did not comply with that notice. The law permits him not to comply with the notice in the circumstances, that is, when he files an objection. If the objection is decided in his favour, then the notice is cancelled. If, on the other hand, it is decided against him, then the decision cannot have the retrospective effect of punishing him for the default committed by him with respect to the first notice and imposing a fine with retrospective effect from that date, as has been done in the present case.

It is also clear from the concluding words of Section 271 of the Act, which imposes a daily fine during the continuance of the default after the service of requisition on him. If no objection is made, then the default after the service of notice will bring him under this clause. If, on the other hand, he makes an objection, then the default after the service of a fresh requisition and after the disposal of the objection, will make him liable for the disobedience of that requisition. Therefore, the contention of Mr. Yunus appears to be substantial, though I fully agree with the view of the Magistrate that it is a technical one.

The conviction and the sentence are set aside. The Municipality will be at liberty to proceed afresh after the service of notice under Section 178 and after recording a formal order.

Conviction set aside.

A. I. R. 1922 Patna 184.

MULLICK AND ATKINSON, JJ.

Sadanand Tewari and others—Plaintiffs-Appellants v.

Deb Nath Manjhi and others—Defendants-Respondents.

Appeals from Appellate Decrees Nos. 2549, 2763, 2764 and 2765 of 1915 and 30 of 1916, decided on 7th December, 1916, against the decision of Officiating District Judge, Manbhum, dated 24th June, 1915.

(a) *Chota Nagpur Tenancy Act (VI B. C. of 1908), S. 225—Rent suits, value of one above Rs. 100 and others below Rs. 100—Appeals preferred in latter suits to Deputy Commissioner and transferred under S. 225 to Judicial Commissioner—Judicial Commissioner has jurisdiction to try them.*

One, out of the rent suits tried by the Deputy Collector, was of the value of above Rs. 100 and the others were below Rs. 100 No question relating to title to land or to some interest in land was involved in any of the suits. An appeal was filed before the Judicial Commissioner in the suit which exceeded Rs. 100 in value and the other appeals were preferred to the Deputy Commissioner but under Section 225 of the Chota Nagpur Tenancy Act of 1908 were transferred to the Court of the Judicial Commissioner and all the appeals were heard and decided by him

Held: the Judicial Commissioner had jurisdiction to deal with the transferred appeals [P. 185, C. 2.]

(b) *Civil P. C., S. 102—Provincial Small Cause Courts Act, Art. 8, Sch. II—Rent suit—S. 102 does not apply.*

Suits for recovery of rent other than house rent being excepted from the cognizance of a Court of Small Causes the provisions of Section 102 of the Civil Procedure Code do not apply to them. [P. 185, C. 2.]

(c) *Practice—Finding without issue is bad.*

Where execution of a *kabuliat* is admitted and the defendant does not plead that there is fraud, coercion or undue influence.

Held: it is not open to the Courts below without a special issue upon the point to find that the defendant in executing the *kabuliats* was not aware of their contents. [P. 186 C. 1.]

(d) *Rent—Paddy and ghee also made payable as part of the rent—Payments therefor are not* abwab—Abwab.

Where from the contracts between the parties it was clear that the consideration for the occupation of land was rent in cash and the price of certain quantities of paddy or ghee or both and these items were to constitute the whole rent payable by the defendants, and the price of paddy and ghee was not in any case intended to be an imposition independent of the rent of the land leased by the landlord.

Held : the amounts claimed for ghee and paddy were part of the total rent of the land and not *abwab* to which objection could be taken.

[P. 187, C. 1.]

Atul Krishna Ray—for Appellant.

Abanibhushan Mukherjee—for Respondents.

Mullick, J. :—Appeal No. 2549 arises out of Suit No. 1872 before the Deputy Collector of Manbhum, the appeal before the Judicial Commissioner in that suit is No. 10. Second Appeal No. 30 of 1916 arises out of Suit No. 1882, which corresponds to Appeal No. 45 before the Judicial Commissioner. Second Appeal No. 2763 corresponds to Suit No. 1848 and first Appeal No. 40 ; and Second Appeal No. 2765 corresponds to Suit No. 1878 and First Appeal No. 42. All these five suits were based upon a registered *kabuliyat* executed in Suits Nos. 1848 and 1872 by the defendants themselves, and in the remaining suits by the predecessors of the present defendants.

The plaintiffs claim rent of five holdings amounting to various sums in cash, and including certain quantities either of paddy or of *ghee* or both the money value of which is alleged to be part of the contract of tenancy executed at the time of the execution of the *kabuliyats*. The defendants pleaded, first of all, payment ; secondly, that the rate of rent was incorrect ; thirdly, that the lands had not been properly described, and fourthly, that the suits were bad for misjoinder.

The plea of payment had been found against the defendants. But on the substantial question of what is the rate of rent, the Court held that the plaintiffs had not been able to prove the contract alleged by them, and decreed the suits at the rents admitted by the tenants. There was an appeal in all the suits except 1872 to the Deputy Commissioner and in suit 1872 there was an appeal to the Judicial Commissioner. The appeals to the Deputy Commissioner's Court were transferred under Section 225 of the Chota Nagpur Tenancy Act of 1908 to the Judicial Commissioner, with the result that all the five appeals were heard by the last named officer and dismissed. The present second appeals have been preferred to us by the plaintiffs.

The first point taken before us by the learned Vakil for the respondents is one as to jurisdiction. He urges that the appeals in respect of Suits Nos. 1878, 1882, 1848 and 1870, which are below Rs. 100 in value, did not lie to the Judicial Commissioner at all, and that, if the first appeals had been heard by the Deputy Commissioner, the Deputy Commissioner's order would have been final. He urges that if the Judicial Commissioner had no jurisdiction, then we in Second Appeal have no jurisdiction.

But he disregards the fact that these suits were transferred to the file of the Judicial Commissioner under the provisions of Section 225 of the Chota Nagpur Tenancy Act, and that therefore the Judicial Commissioner had jurisdiction to deal with the appeals, although the subject-matter was less than Rs. 100 in value. The question then arises whether in these suits there is any Second Appeal to us against the decision of the Judicial Commissioner.

The learned Vakil for the respondents falls back upon Clause 2 of Section 223 of the Chota Nagpur Tenancy Act, and contends that as the suits were of a Small Cause Court nature and less than Rs. 500 in value no Second Appeal lies to us by reason of the provisions of Section 102 of the Civil Procedure Code.

Now, if these suits had been suits of a Small Cause Court nature this contention would have prevailed, but the suits being rent suits were not cognizable by a Court of Small Causes, and therefore they did not come within the provisions of section 102 of the Civil Procedure Code. A Second Appeal clearly lies to us against the decree of the Judicial Commissioner in these four suits.

With regard to Suit No. 1872 in which the subject-matter was over Rs. 100 in value, the only ground urged by the learned Vakil for the respondents is, that it falls within the provisions of Section 102 of the Civil Procedure Code and that no Second Appeal lies. I have already decided that this is not a suit of Small Cause Court nature, and therefore this contention must also fail. Therefore the

plea of jurisdiction as regards all these five appeals had no substance.

Coming now to the merits of the cases, the first argument addressed to us is, that the registered *kabuliyats* containing the contract are invalid, and the learned Vakil points to the finding of the learned Judicial Commissioner which is to the effect that the *kabuliyats* were never acted upon. It is true that both the Courts of first instance and the Court of first appeal found various reasons for believing that the executants of the *kabuliyats* were not aware of their contents.

But I am unable in Second Appeal to go into any of these matters for the simple reason that I find that no issue as to these *kabuliyats* having been executed without the knowledge of the defendants was ever raised at the trial. The defendants never pleaded that there was fraud, coercion or undue influence; and execution being admitted it was not open to the Courts without a special issue, upon the point, to find that the defendants in executing the *kabuliyats* were not aware of their contents.

The learned Vakil for the respondents relies upon a condition in the *kabuliyat* which is to the effect that the defendants are liable to ejectment on notice, and he contends that so hard a condition could never have been imported into the document with the knowledge of the executants. But as I have already said, there is nothing to show that the defendants challenged this document in the issues, and it seems to me that if they had done so the plaintiffs might quite possibly have adduced evidence to show that this term of the contract was made with their full knowledge and consent.

In any event a complete answer to the learned Vakil's contentions is, that as no issue was raised on the point whether the defendants were or were not aware of the contents of the documents, the finding of the Judicial Commissioner cannot debar the plaintiffs from succeeding in this suit.

Then the learned Vakil for the respondents goes further and urges, that the *kabuliyat* was in itself altogether invalid, and he relies upon Section 79 of the Chota Nagpur Tenancy Act for the purpose of showing that a contract which bars a tenant from acquiring occupancy rights is a totally invalid contract. Now, referring to the *kabuliyat*, I nowhere find that there is any agreement barring the tenants from acquiring occupancy rights. The contracts were executed in 1303 F.S., that is 1895, at a time when the present Chota Nagpur Tenancy Act was not in force in the District of Purulia, and for all I can see the term as to ejectment was a perfectly valid contract under Act X of 1859, which was the Act applicable to the contract at the time.

There is not a word in the *kabuliyat* to show that the defendants were at that time occupancy *raiyats*, and in my opinion Section 79 of the Chota Nagpur Tenancy Act has no application to the case. Therefore the finding of the learned Judicial Commissioner that the *kabuliyat* was not operative is in my opinion wholly erroneous.

Then the learned Vakil for the respondents contends that although the cash rents for the enforcible, the price of paddy and *ghee is* not enforcible, because these payments are *abwabs*, and he relies upon Section 10, Act X of 1859, which directs that no illegal cesses are recoverable from a tenant. Now, the test, as to whether such payments are *abwabs* or not, has been laid down in many cases, of which one of the latest is *Kalanandan Singh* v. *Eastern Mortgage Agency Co., Ltd.* (1) and the learned Judges observed there "that if a particular sum specified in the lease or agreed to be paid is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent although not described as such, the landlord would be entitled to recover the same, and the whole question in the case is, whether the items, claimed are really part of the rent which was the consideration for the letting out of the land."

To like effect is the opinion of Maclean, C. J., in *Radha Charan Rai Choudhury* v. *Golok Chandra Ghosh* (2) and there the learned Chief Justice observes, "to my mind each of these cases depends upon its own particular circumstances, and we must look at the contract to see whether the payment which the tenant agrees to make is in reality part of the rent as opposed to what is known as an *abwab*."

(1) (1913) 18 C. L. J. 83=19 I. C. 701.
(2) (1904) 31 Cal. 834=8 C. W. N. 529.

Now, applying that test to the cases before us it is quite clear that upon the contracts entered into by the defendants the consideration for the use and occupation of the lands was a certain amount of rent in cash and the price of certain quantities of paddy or *ghee* or both, as the case may be, and that the total of these two items was to constitute one whole rent or *jama*, which was payable by the defendants.

The total rental shown in the *kabuliyats*, was clearly the consideration payable by the tenants for the settlement made with him by the landlord. There is no indication whatever that the price of paddy and *ghee* was in any case intended to be an imposition independent of the rent of the land which the Defendant was leasing from the landlord.

In this view the amounts claimed for *ghee* and paddy were part of the total rent payable for the land, and the objection on the ground that the *zamindar* is claiming an *abwab* is not tenable. This disposes of all the points raised before us in the agrument.

We threw out a suggestion to the learned Vakil for the appellant, that possibly he might see his way to allowing the decree of the lower appellate Court to stand for the years in suit, provided he got a declaration from us that for future years he was entitled to claim rent at the full contract rate. But he has not been able to accept our suggestion.

In these circumstances he will get a decree for the full amount. We will set aside the decree of the learned Judical Commissioner and substitute therefor a decree in each suit allowing the plaintiffs the full amount of rent claimed in the plaint, together with interest at 12 per cent. on the arrears. But the question of costs is within our discretion and having regard to the dilatory conduct of the plaintiffs, we direct that they get no costs in either Courts.

Atkinson, J.:—With regard to the point taken by the Vakil for the respondents, namely, that under the Provincial Small Cause Courts Act no Second Appeal lies in this case, the value of the appeal being under Rs. 500, Section 15, sub-Section 1 defines the jurisdiction of a Court of Small Causes. It expressly says that no Court of Small Cause shall take cognizance of the suits specified in the Second Schedule, as suits excepted from the cognizance of a Court of Small Causes. And in the Second Schedule under Clause 8 one of the classes of suits exempted is a suit for recovery of rents other than house rent. This being an action for the recovery of rent other than house rent would be *prima facie* excluded by the operation of Section 15 and Schedule II of the Act.

The learned Vakil for the respondents this morning in the course of the delivery of the judgment of this Court by my learned brother referred for the first time to a case *Soundaram Ayyar* v. *Sennia Naicken* (3) and he endeavoured to insinuate that the case had some application to the facts of the present case.

A very cursory glance at the judgment will completely satisfy any observer that that case has decided nothing to controvert our decision and its accuracy as delivered by the judgment of my learned colleague. The head-note of the case is somewhat misleading and is as follows:—

"A suit for recovery of rent other than house rent is a suit of the nature cognizable in Courts of Small Causes within the meaning of Section 586 of the Code of Civil Procedure, and no Second Appeal lies from decision therein when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees."

It is well to observe that in that case power was given under Section 15 of the Act to the Local Government Board to extend to the Court of Small Causes jurisdiction in cases of rent other than house rent, and it was upon that basis that the Court decided the case. In the case under reference it would appear that all the Courts of Small Causes in Madras had power to grant decrees in respect of claims for rent other than house rent, and it is only necessary, to clear up the matter, to refer to the judgment at p. 555.

It was Full Bench decision presided over by Sir Arnold White, Chief Justice. The learned Judge deals with Section 15 and describes the jurisdiction it confers, and then says, "The same section empowers the Local Government, subject to the exceptions in the Schedule and the provisions of any enactment for the time being in

(3) (1900) 23 Mad. 547=10 M. L. J. 329 (F. B.).

force, to direct that all suits of a civil nature of which the value does not exceed Rs. 1,000 shall be cognizable by the Court of Small Causes. Amongst excepted suits specified in the Schedule are suits for the recovery of rent other than house rent unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto."

By a notification, dated the 24th January, 1888, the Madras Government has invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction "to try on their Small Cause side all suits for rent falling within the pecuniary limits of their special jurisdiction."

The grounds of that decision and its *ratio decidendi* are obviously plain. The authority cited has no application to the present case.

I concur in the judgment of my learned colleague.

Appeals allowed.

A. I. R. 1922 Patna 188.

JWALA PRASAD AND BUCKNILL, JJ.

Amrit Lal and another—Decree-holder-Appellants

v.

Murlidhar and others—Judgment-debtors-Respondents

Mis. A. No. 221 of 1921, decided on 9th May, 1922, from appellate order of Sub-J., Gaya.

(a) *Civil P C. (Act V of 1908), Ss. 6 and 39—Application for transfer of decree for execution—Decree cannot be transferred to Court having no pecuniary jurisdiction over the value of the suit.*

If a Court has no pecuniary jurisdiction to entertain and try an original suit it is incompetent to execute the decree in that suit. The suit therefore, cannot be transferred to it for execution under Section 39 of the Civil Procedure Code. Section 39, Clause (2) of the new Code which modifies Section 223 of the old Code requires that when the Court sends a decree *suo motu* to another Subordinate Court, the latter must be a Court "of competent jurisdiction." The competence cannot be determined irrespective of its pecuniary jurisdiction. [P. 189, Cs. 1, 2.]

(b) *Limitation Act, Art. 182, Cl. 5—Application for transfer of decree will be a step-in-aid only when it is in accordance with law.*

An application for the transfer of a decree for execution to another Court is a step-in-aid of execution but it will not save limitation, if the application is not in accordance with law, within the meaning of Article 182 (5) of the Limitation Act. The expression 'applying in accordance with the law' means applying to the Court to do something in execution, which, by law, the Court is competent to do. It cannot mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from the presumed knowledge of the law, he must have known the Court was incompetent to do. [P. 188, C. 2; P. 191, Cs. 1, 2.]

(c) *Practice—Patna High Court—Calcutta High Court to be followed in case of conflict of decisions prior to 1916.*

The Patna High Court, will follow the rulings of the Calcutta High Court, unless they are decidedly wrong, if there is a conflict of judicial opinion prior to the establishment of the Patna High Court in 1916. [P. 190, C. 2.]

Atul Krishna Ray and *Harihar Prasad Sinha*—for Appellants.

Purnendu Narain Sinha and *Netai Chandra Ghosh*—for Respondents.

Jwala Prasad, J.:—The only question for determination in this appeal is whether the application of the appellants for execution of their decree filed on the 29th May, 1920, is barred by limitation or not.

The solution of the question depends upon whether the application of the decree-holders, dated the 24th August 1917 whereby the decree in question was transferred to the Court of the 1st Munsif for execution was a step-in-aid of execution under Article 182, Clause (5) of the Limitation Act.

The decree in question was passed by the Subordinate Judge of the Second Court, Gaya, in a suit, the value of which was stated to be Rs. 5,000. The suit was therefore, beyond the jurisdiction of the Munsif to whom the decree was transferred for execution in pursuance of the application of the decree-holder of the 24th August, 1917.

Now it has been concluded by authorities that an application for the transfer of a decree for execution to another Court is a step-in-aid of execution. *Ramachandra* v. *Krishna Lal* (1); but in order to save limitation such an application must also be an application in accordance with law within the meaning of Clause 5 of Article 182. If the Munsif to whom the decree was sent for execution was competent to execute it then undoubtedly the application of the decree-holder, dated the 24th August, 1917 was in accordance with law and can be taken advantage of by the decree-holder in order to save the present application for execution from being barred by limitation. If, on the other hand, the Munsif had no jurisdiction to execute the decree the Subordinate Judge had no power to trans-

(1) A. I. R. 1922 Pat. 301=1 Pat. 328.

fer the decree to him for execution and therefore, the application of the 24th August, 1917 asked for a relief which the Subordinate Judge was not competent to grant. In that view the application of the 24th August, 1917, would not be an application in accordance with law and, therefore, would be of no avail to him.

There has been a sharp division of opinion in the several High Courts in India as to whether a Court not having jurisdiction over an original suit can execute a decree obtained in that suit or not. The Madras High Court as early as in the year 1884 held that it is not necessary that the executing Court should also have been competent to try the original suit, see *Narasayya* v *Venkatakrishnayya* (2). A note of dissent was struck in the Bombay High Court in the year 1887 in the case of *Shri Shidheswar Pandit* v. *Shri Harihar Pandit* (3).

The matter then came to be dealt with by the Calcutta High Court in 1889 in the case of *Gokhul Krishto Chunder* v. *Aukhil Chunder Chatterjie* (4), where a Division Bench of that Court presided over by Piggot and Beverley, JJ., agreed with the view taken by the Bombay High Court and held that the Court executing the decree should also be a Court competent to try the original suit so far as the pecuniary jurisdiction was concerned. Mr. Justice Muttusami Ayyar who was a party to the decision in *Narasayya* v. *Venkatakrishnayya* (2), above quoted, adhered to his view in the case of *Shanmuga Pillai* v. *Ramanadhan Chetty* (5). In the judgment delivered by him he tried to meet all objections raised by the Bombay and the Calcutta High Court to the view expressed by him in the case in *Narasayya* v. *Venkatakrishnayya* (2).

The aforesaid decisions relate to a period prior to the present Code of Civil Procedure of 1908, but the law on the subject does not appear to have been materially altered by the present Code. The only alteration is in the power of the Court which passes a decree to transfer *suo motu* a decree for execution to any Court subordinate to it. In the Code of 1882, Section 223, the clause on the point empowered the Court which passed the decree to send it of its own motion for execution to any Subordinate Court.

The corresponding provision in the Code of 1908, Section 39, Clause (2), has added the words " of competent jurisdiction " to the words "Subordinate Court" occurring in the former Code ; in other words, under the present law it has been expressly made clear that a Court which passes a decree can send it of its own motion for execution to any Subordinate Court " of competent jurisdiction."

Mr. Atul Krishna Ray submits that the present case is governed by Clause 1 of Section 39 under which on the application of the decree-holder the Court which passed the decree may send it for execution to another Court in the circumstances and for the reasons set forth in Clauses (a) to (d) of the section. He contends that those Clauses (a) to (d) do not in any way restrict the transfer of a decree for execution to a Court only of competent jurisdiction.

He says that on the application of the decree-holder in this case the Court which passed the decree could send it for execution to any Court, whether that Court be of competent jurisdiction or not. Plainly speaking his contention is that there is nothing in Section 39 to prevent the Subordinate Judge, who passed the decree, from sending it for execution to the Court of the Munsif not having the pecuniary jurisdiction to try the suit in which the decree was passed.

He also refers to Section 6 of the Code of Civil Procedure which runs as follows :—

" Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits, the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

The words in this section are virtually the same as in the corresponding section of the old Code. Mr. Ray contends that this section applies only to suits and not to execution proceedings. He has also referred to provisions in the Code relating to the transfer of suits from one Court to another set forth in Sections 22 to 24 of the Code and says that the Legislature has expressly made it clear that a suit can only be transfer-

(2) (1884) 7 Mad. 397.
(3) (1887) 12 Bom. 155.
(4) (1889) 16 Cal. 457.
(5) (1894) 17 Mad. 309=4 M. L. J. 91.

red for trial to a Court of competent jurisdiction.

He contends that there is no such provision in Section 39 of the Code which relates to the transfer of a decree for execution. He, therefore, says that the Legislature evidently meant that a decree should be sent for execution to any Court where it can with facility be executed by reason either of the property of the judgment-debtor being situate within the jurisdiction of a particular Court or of the judgment-debtor residing therein regardless of whether that Court had jurisdiction to try the original suit or not and irrespective of whatever pecuniary or territorial jurisdiction of that Court may have been.

Mr. Ray says that there can be no doubt that a decree may be sent for execution to a Court which may not be competent to try the original suit; for instance a decree for money obtained in a Court in Patna on a hand-note or a bond against defendant residing in Patna may be transferred for execution to a Court in the United Provinces by reason of the property of the judgment-debtor being within the jurisdiction of that Court even though that Court was not competent to try the original suit inasmuch as neither the cause of action arose in the jurisdiction of the Court nor the defendant resided therein.

Mr. Purnendu Narain Sinha, on the other hand, contends that though in the circumstances set forth in the illustration given above, the decree may be executed by a Court not being competent to try the suit, yet a Court in the United Provinces executing the decree should have the pecuniary jurisdiction to try the original suit: in other words, he makes a distinction between pecuniary and territorial jurisdiction. He says that although for the purpose of execution a Court executing a decree may not have the territorial jurisdiction to try the suit yet it must have the pecuniary jurisdiction to try it in order to be competent to execute the decree.

He has also referred to Section 42 of the Code of Civil Procedure and has contended generally that the executing Court may have to decide many questions relating to the execution, discharge or satisfaction of the decree, and those questions might involve disputes of a larger value much beyond the pecuniary limit of the Munsif to try and consequently the Court of the Munsif should not be allowed to execute a decree passed by the Court of the Subordinate Judge. He has also referred to the provisions of appeals, namely, that the decisions of the Munsif are appealable to the District Judge whereas the decisions of the Subordinate Judge may be appealable to the High Court directly and, therefore, he contends that in questions decided by the Munsif in the course of the execution of decrees, appeals might lie to the District Judge whereas they ought to be cognizable by the High Court alone.

Mr. Ray has practically adopted the reasons given by the Madras Court and Mr. Purnendu Narain Singh has adopted on the other hand the reasons given by the Calcutta High Court. The question came before the said Courts even after the present Code of Civil Procedure came into operation and both the High Courts have struck to their own views; vide *Ylasorath Vibulav Sayed Ghulam Ghouse Sha Sahib Kadiri* v. *Sunni Lal Agarwala* (6), *Shamshundar Shaha* v. *Anathu Bandu Sahah* (7) and *Abdulla Sahib* v. *Ahmad Hussain Saheb* (8).

It is obvious that the point for determination is somewhat difficult and that equally weighty reasons can be advanced in support of both views. The last ruling of the Calcutta High Court was the case of *Shamsunder* v. *A. B. Saha* (7) above quoted.

In a case of this kind we think that we ought to follow the Calcutta ruling unless we are satisfied that that ruling is decidedly wrong. This principle was laid down as early as in May 1917, shortly after the establishment of the Patna High Court, *vide* the case of *Haji Abdul Ghani* v. *Raja Ram* (9) and has ever since then been repeated on various occasions; vide *Shaikh Khoda Baksh* v. *Bahadur Ali* (10), *Kanizzohara* v. *Bundi Sahu* (11) and *Sheobaran Mahto* v. *Mt. Bhogia* (12).

There can hardly be any question that upto 1916 before the establishment of this

(6) (1910) 5 I C. 155=7 M L. T. 132.
(7) (1910) 37 Cal 574=6 I. C. 97=14 C.W.N. 662.
(8) (1914) M. W. N. 97=22 I. C. 275=15 M. L. T. 148
(9 (1916) 1 P. L. J 232=3 P. L. W. 62=35 I. C. 468=20 C. W N. 829.
(10) (1918) 3 P.L J, 285=45 I.C. 203=4 P.L.W. 324.
(11) (1915) 39 I. C. 83=1 P .L. W. 73.
(12) (1918) 3 P. L. J. 639=46 I. C. 881.

Court the Subordinate Courts in Gaya were governed by the decisions of the Calcutta High Court according to which the Munsif of Gaya was not competent to execute the decree passed on the 23rd March, 1907, by the Subordinate Judge of Gaya ; in other words, as laid down by Sir Lawrence Jenkins in the case reported in *Shama Sunder* v. *A. B. Saha* (7) at page 577 the order of the Subordinate Judge transferring the decree for execution to the Court of the Munsif was without jurisdiction. Adopting the principle laid down by Sir Lawrence Jenkins in the aforesaid case we are inclined to agree with the view taken in the Calcutta High Court that the Munsif of Gaya had no jurisdiction to execute the decree passed by the Subordinate Judge of that district. There could not be any question of a *bona fide* mistake on the part of the decree-holder in the present case.

Mr. Ray says that the view taken in the Madras High Court in *Abdulla Sahib* v. *Ahmad Hussain Sahib* (8) was believed by his client to be the correct view in preference to the view taken in the Calcutta High Court and therefore, on the 24th August, 1917, just after the constitution of this Court the appellant filed his application for transfer of the decree to the Court of the Munsif. But the appellant must be presumed to have known the Calcutta rulings, and, therefore, he had no right to put in his application in direct contravention of the authorities in Calcutta. If once it is held that the Munsif had no jurisdiction to execute the decree, then the application of the decree-holder of the 24th August, 1917, praying for the transfer of the decree to the Court of the Munsif for execution was not in accordance with law.

It was pertinently pointed out in the case of *Chatter* v. *Newal Singh* (13) that the necessary consequence of adopting a contrary view would be to hold that any application however absurd a decree-holder might make to a Court, would be sufficient to render his application one in accordance with law. I think the term 'applying in accordance with law' means applying to the Court to do something in execution which by law that Court is competent to do. I do not think that it means applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law he must have known the Court was incompetent to do.

As observed above, the decree holder in this case must be presumed to have had knowledge of the law as laid down by the Calcutta High Court that the Munsif had no jurisdiction to execute the decree in question and that the Subordinate Judge was not competent to transfer the decree for execution and consequently the application in question of the 24th August, 1917, was not in accordance with law.

We, therefore, agree with the view taken by the Court below that the application of the 24th August, 1917, is of no avail to the decree-holder and consequently the present application for execution filed on the 20th March, 1920, and registered on the 14th June, 1920, is barred by limitation. The view taken by the Calcutta High Court appears to be correct.

Our attention has been drawn to certain cases in which mistakes or defects either in the application for execution or in the order of the Court have been condoned in favour of a decree-holder ; for instance in the case of *Bipin Behari Mitter* v. *Bibi Zohra* (14) an application for execution of a decree made under the influence of a *bona fide* mistake against a dead person was held to be an application in aid of execution.

But there the decree was passed on the 1st April, 1903 and the application was made on the 1st March, 1906, the judgment debtor had died on the 25th May, 1903, but the decree-holder had not come to know of the death until the 26th April, 1906, that is, long after the filing of the application for execution, and soon after he came to know of it he made an application praying for the substitution of the names of the legal representatives of the deceased judgment-debtor. That case was decided upon its own merits and until the decree-holder had known of the death of the judgment-debtor he had to regard the judgment-debtor on the record as the person against whom the execution could proceed.

In the case of *Keshwa Surendra Sahi* v. *Mt. Mulakrani Koer* (15) the application was made without having applied

(13) (1889) 12 All. 64=1889 A. W. N. 200.

(14) (1908) 35 Cal. 1047.

(15) (1918) 4 P. L. J. 35=48 I. C. 415.

for the appointment of a guardian *ad litem* of the minor judgment-debtor. There the application was made in accordance with law inasmuch as there was no defect in the application and the application for the appointment of the guardian could be made at a later stage during the course of the execution.

In the case of *Kunjbehari Singh* v. *Tarapada Mitter* (16) the decree was sent for execution direct to a subordinate Court of another district instead of through the District Court of that district. The mistake was of the Court and not of the decree-holder. Therefore, it was held that the decree-holder could not suffer on account of the mistake of the Court inasmuch as his application for the transfer of the decree was in accordance with law without any defect whatsoever.

In conclusion we direct that this appeal be dismissed, but in the circumstances we make no order as to costs.

Bucknill, J.:—This was an appeal from a decision of the District Judge of Gaya dated the 18th July, 1921, affirming an order of the Subordinate Judge of the same place dated the 15th of November in the previous year. The circumstances under which the appeal came before this Bench are very simple, but they raise a question to which the answer is not very easy.

The plaintiff's obtained three decrees against the defendants in a suit No. 161 of 1905 which was brought before the Subordinate Judge of Gaya. One of these decrees appears to have been for possession of certain properties a second for costs and the third for mesne profits. It is admitted that the value of the subject-matter of the suit was outside the jurisdiction of any Munsif of the District. Various attempts seem to have been made by the decree-holders, most of them apparently very half-hearted to execute their decree but for various apparent and non-apparent reasons into which it is not necessary to go here, no execution appears to have been really effective and the last execution application made before the Subordinate Judge was dismissed on the 25th July, 1916.

On the 24th August, 1917, the plaintiff applied to the Subordinate Judge and obtained a transfer of the execution of the decree to the Court of the 1st Munsif of Gaya. It seems to have been registered there on the 1st September, 1917, and was dismissed, I do not know why, on the 20th September, of the same year. After that came the present application to the Subordinate Judge for execution filed on the 29th May, 1920. Now the respondents here contend that the last execution proceedings in the Subordinate Judge's Court having been dismissed on the 25th July, 1916, and the present application having been filed on the 29th May, 1920, the application is barred by the three years rule of limitation.

On the other hand, the appellants maintain that the application for transfer which was made by them on the 24th August, 1918, was a definite step in the execution proceedings which has kept their rights alive and which prevents the operation against them of the limitation of three years running as from the 25th July, 1916. It is common ground that an application for transfer is primarily a step which saves limitation.

For that proposition there is ample authority; but it is urged that the transfer in order to be effective in that direction must be one which can be properly made and that if it was not competent for the Subordinate Judge to have made such a transfer order then there was no step in fact taken recognised by law which would in any way save the commencement of the running of the limitation period, nor is this proposition in itself seriously contested.

What, however, is the real point is as to whether in this case the Subordinate Judge could legally make the order such as he did, that is transferring to the Munsif for execution a decree concerning a subject-matter greater in value than the Munsif had power to deal within a suit. The authorities are in direct conflict on this question. The Madras High Court has consistently held that a Munsif has jurisdiction to execute a decree relating to subject-matter of greater value than that which he had power to deal within a suit; the Calcutta High Court has always been of the contrary opinion.

I am not prepared to suscribe altogether to the view that this Court must slavishly follow the decisions of the Calcutta High Court or of any other High Court, but after having listened to the arguments in this case very carefully and having read all the cases quoted in these proceedings, I have come to the conclusion that the Calcutta rulings are correct. I

(16) (1919) 1 P. L. T. 386=58 I. C. 220.

therefore, agree with my learned colleague that this appeal should be dismissed.

Appeal dismissed.

A. I. R. 1922 Patna 193.

JWALA PRASAD, A. C. J. AND DAS, J.

Nandkishore Singh and others—Plaintiffs-Appellants v.

Mathura Sahu and others—Defendants-Respondents.

L. P. A. Nos. 116 and 117 of 1920, decided on 5th July, 1921, against the judgment of Adami, J., dated 12th August, 1920

(a) *Bengal Tenancy Act (VIII B. C. of 1885), S. 22, Cl. (2)—Occupancy holding—Purchase by a co-sharer landlord—Collectorate partition—Holding allotted to* takhta *of another co-sharer—Purchaser cannot be ejected.*

A co-sharer landlord, who by purchase of an occupancy holding becomes liable to pay proportionate rent to the other co-sharers under Section 22 (2) of the B. T. Act is not liable to be ejected from the holding purchased by him when, upon a subsequent Collectorate partition it is allotted to the *takhta* of another co-proprietor.

[P. 195, C 2]

(b) *Bengal Estates Partition Act (V, B C. f 1897), Ss. 49, 119*—'kasht' *and* 'bakasht' *are terms of art denoting possession of proprietors and tenants—Record-of-Rights and* Batwara Khatian *showing plaintiff's possession—Dispossession—Suit for possession is not barred by S. 119.*

Where the Record-of-Rights showed the plaintiffs to be in possession of the purchased holding under Section 22 (2) of the B. T. Act, and the '*Batwara Khatian*', based upon it under Section 49 of the Estates Partition Act also showed the same but the possession of the lands had been delivered over to the defendants, and an order under Section 144, Criminal Procedure Code had been passed against the plaintiffs who therefore, brought this suit for possession.

Held: Section 119 of the Estates Partition Act did not bar the suit. The terms '*kasht*' or '*bakasht*' are words of art introduced to facilitate understanding the possession of land by the proprietors and the tenants.

[P. 194, C. 2; P. 196, C. 1.]

S. M. Mullick—for Appellants.

Kulwant Sahay and *Sambhu Saran*—for Respondents.

Jwala Prasad, A. C. J.:—These are appeals under the Letters Patent from a decision of Mr. Justice Adami, dated the 12th August, 1920. By his decision Mr. Justice Adami upset the decision of Mr. Boyce, District Judge of Shahabad, and restored that of the Munsif of that district with the result that the plaintiffs' suit has been dismissed.

The suit arises out of delivery of possession under a *batwara* which took place on the 24th February, 1916, the disputed lands having fallen into *takhta* of the defendants. After the delivery of possession the defendants instituted criminal proceedings under Section 144 of the Code of Criminal Procedure in which an order dated the 2nd June, 1916 restraining the plaintiffs from using the lands in question was passed. The plaintiffs and defendants were co-sharers in the estate and had held a mortgage of the 4 *annas* share of another co-sharer of the villages Semraon and Akari.

The plaintiffs purchased the occupancy holdings of certain tenants under *kobalas* and also took certain plots of land in *rehan* from different persons. The mortgagors redeemed the mortgage and brought separate suits against the plaintiffs, the defendants and others in the Court of the Subordinate Judge at Arrah. That case was fought up to the High Court. The High Court held that the mortgagors were entitled to treat the holdings purchased by the mortgagees as accessions to the mortgaged property and to obtain possession of them on paying the purchase-money. The decision of the High Court is reported in *Rambrich Narayan* v. *Ambica Prosad* (1). The purchase-money was not paid and the plaintiffs continued in possession of the holdings.

In the Survey and Settlement record the lands were shown as *bakasht* and in possession of the plaintiffs under Section 22 (2) of the Bengal Tenancy Act. After the publication of the Record-of-Rights there was a collectorate partition under the Estates Partition Act in 1916 between the co-sharers. Under Section 49 the survey Record-of-Rights was accepted as the basis of the partition. The lands in dispute 9-65 acres in area which were recorded in the survey as *bakasht* and in possession of the plaintiffs under Section 22 (2) were allotted to the *patti* of the defendants.

The plaintiffs claim to hold the land in their possession under Section 22 (2) on the strength of the survey Record-of-Rights as well as the *batwara khatian* which followed the survey. The defendants, on the other hand, claim to hold the land in their possession as being *bakasht* or *zerait* of the proprietors. They assert that whatever rights the plaintiffs may have acquired by the purchase prior

(1) 17 C. W. N. 586=19 I. C. 90.

to partition were done away with by the *batwara* proceedings. They also dispute the plaintiffs' right to institute the present suit and refer to Section 119 of the Estates Partition Act. The contentions of the defendants succeeded before Mr. Justice Adami, and the plaintiffs challenge before us the soundness of the view taken by that learned Judge.

The strongest point urged by Mr. Kulwant Sahay on behalf of the defendants in support of the judgment is that based on Section 119 of the Estates Partition Act. It is said that the present suit virtually seeks to upset the valuation of the allotment of the lands by the *batwara* and that the plaintiffs, who were parties to the proceedings, are estopped from claiming the lands as against the entries made in the *batwara khatian*, describing the land as the *bakasht* of the proprietors and as having fallen into the *pattis* of the defendants

It is also urged that the present action seeks to disturb the direct possession of the land in suit awarded to the defendants under Section 94, Chapter X of the Estates Partition Act. The ingenious argument of Mr. Kulwant Sahay lent great colour to the simple point involved in this contention. True, the plaintiffs being co-sharers and parties to the partition proceedings are estopped from claiming otherwise than the Record-of-Rights, as approved by the *batwara* proceedings, purports to give them.

I am in full accord with the view expressed in the case of *Baldeo Sahai* v. *Brijnandan Sahay* (2) that a co-sharer is not permitted to show that land entered as *raiyati* land was as a matter of fact *zerait* land. This is, however, not the scope of the plaintiffs' suit. The plaintiffs' case, if I understand it aright, is founded upon the *batwara khatian* and the description of the lands mentioned therein. That *khatian* has, as observed above, simply adopted the survey Record-of-Rights. The lands no doubt in both the survey Record-of-Rights and *batwara khatian* have been described as *bakasht* lands.

Both the records state that the same are in possession of the plaintiff as purchasers thereof. Survey record makes it still clearer by describing the possession of the plaintiffs to be under Section 22 (2) of the Bengal Tenancy Act. The *batwara khatian* has, therefore, to be interpreted with the help of the survey Record-of-Rights, for under Section 49 the entire Record-of-Rights was accepted for the purposes of the partition, and under the subsequent section there is nothing to show that the Record-of-Rights was in any way varied.

The plaintiffs nowhere say that they have been aggrieved in any way by the *batwara* proceedings In paragraphs 7 and 8 the plaintiffs have clearly based their claim upon the *batwara* proceedings and say that their former possession was continued by the *batwara* proceedings. Their grievance originates after the delivery of possession and the termination of the *batwara* proceedings and the order passed under Section 144 of the Code of Criminal Procedure at the instance of the defendants.

In this view Section 119 can be of no avail to the defendants nor need we consider it. Mr. Kulwant Sahay has, however, failed to show what particular order the suit of the plaintiffs seeks to set aside. Section 119 acts as a bar to a suit being brought against certain orders of the authorities passed under the Estates Partition Act. If the defendants seek to bar the plaintiffs' suit under that section they must clearly shew in what respect the order of the Revenue Authorities is affected or sought to be set aside in the present suit. This Mr. Kulwant Sahay has failed to do. The contention must, therefore, be over-ruled.

The next contention is upon the status of the plaintiffs with respect to the lands in suit. It is said that the lands were *bakasht* of the proprietors and as such the plaintiffs had no right to the same if they fell into the *pattis* of the defendants in the partition proceedings. This would be so if the land was the *bakasht* of the proprietors prior to the partition. It is admitted that the lands formed originally the occupancy holdings of the tenants of the village. They were purchased by the plaintiffs, when they were part proprietors of the village and had held the other shares as mortgagees.

Reliance has been placed upon the judgment of the High Court at Calcutta referred to above in *Ram Brich Narayan* v. *Ambica Prasad* (1) in order to show that the lands were purchased by the 16 *annas* proprietors and the status of the proprietors holding the lands was that described in Section 22 (1) of the Bengal Tenancy Act, and not in Section 22 (2).

(2) (1917) 3 P. L. W. 26=43 I. C. 359=(1918) P. H. C. C. 164.

It is, however, said, the difference between the two clauses is that under the former when the 16 *annas* proprietor purchases a holding of a tenant, the interest of the landlord and the *raiyat* become united in the same person. In other words, the tenancy right is merged in the proprietary interest, whereas under Clause (2) when a part proprietor of a holding purchased the holding he is entitled to hold possession of the same subject to the payment of the proportionate rent to the other co-proprietor.

Mr. Kulwant Sahay says that no rent was ever paid for this holding by the plaintiff to any of the proprietors and, therefore Clause (2) of Section 22 does not apply. The circumstances under which no rent was paid was fully explained in the decision of the High Court relied upon by Mr. Kulwant Sahay. In that litigation both the plaintiffs and the defendants in the present case were defendants. Chatterji J., one of the Judges who decided that case, observed :

"The defendants, though holding different interests in the *mahal* and in the mortgage, represented between themselves the entire interest of the landlord for the time being, when the purchases were made. There was no one else to whom the portion of the rent, which was payable for the lands purchased by them, could be paid during the subsistence of the mortgage."

The mortgage has been redeemed and the plaintiffs and the defendants are not the entire 16 *annas* proprietors of the *mouza*. The mortgagor is also in possession of certain shares in the village. The question is not whether any rent was ever realised but whether any rent was payable. There can hardly be any doubt that the purchase in the present case was by the plaintiffs co-sharers, and they were liable for the payment of the proportionate rent to the other co-sharers, but in the circumstances set forth in the judgment of the High Court, there was no rent due from them on accounts being taken between the several proprietors and the mortgagees.

The Survey Record-of-Rights states clearly that the possession of the plaintiffs was under Section 22 (2). No doubt, that is the status described under the law, but the Survey Authorities being conversant with the Bengal Tenancy Act must be presumed to have fully appreciated the true scope and meaning of Clauses (1) and (2) of Section 22. The real import of the entry is one of fact that the plaintiffs as part-proprietors had purchased the holdings and were in possession thereof as part-proprietors. In this view the Survey Authorities made the aforesaid entry that their possession was under Section 22 (2).

It is then contended that whatever the possession or status of the plaintiffs might have been before the partition, the partition effected a complete change in that status, inasmuch as the plaintiffs ceased to be co-proprietors after the partition, separate *pattis* or estates having been allotted to the several co-proprietors. The plaintiffs are not now the co-proprietors in the *pattis* allotted to the defendants wherein the land in dispute has fallen and consequently they cannot now claim possession of the land under Section 22 (2). To this I replied in the case of *Ram Prasad* v. *Munshi Gopal Chand* (3) in the following words :—

" It will be anomalous and indeed unjust to permit a co-proprietor, after the *kasht* lands in the estate have been purchased by another co-proprietor at great expense, to go to the Collectorate partition and to claim the same as *bakasht* and to share in the acquisition to which he has not contributed a single farthing.

" The section clearly empowers a co-proprietor to hold possession of the *kasht* land purchased by him the only condition imposed upon him being that he should pay rent therefor to his co-sharers. There is no limit of time of his possession nor is it controlled by any event, such as the partition of the estate. If his possession was to remain only for so long as the estate was not partitioned, it would have been clearly and unmistakeably expressed by the Legislature.

I do not, on principle, see any reason why a flourishing co-sharer of a small fractional share in the village should be

(3) A. I. R. 1921 Pat. 341=2 P. L. T. 163

deprived of an opportunity of purchasing lands in occupancy holdings in the village, just in the same way as a stranger would be allowed to do. Neither law nor equity would make him worse than a stranger."

The authorities quoted by Mr. Kulwant Sahay have also been dealt with in that judgment.

The term *kasht* or *bakasht* also does not at all embarrass me in any way. They are words of art introduced for the purpose of understanding the possession of lands by the proprietors and the tenants. The former term is one of recent creation by the Settlement authorities. The latter in its true sense equally applies to the cultivation of lands by the proprietors and the tenants. However, the question of status does not arise in the present case.

The real question is whether the plaintiffs are entitled to continue to hold possession of the land in the same way as they used to do before the partition of the estate. I have discussed in detail the question in the case referred to above (2) and I do not want to repeat my arguments here. For the sake of brevity I would prefer to refer to the said judgment. I have no doubt that the plaintiffs are entitled to hold possession of the land on payment of rent to the defendants under Section 22 (2) of the Bengal Tenancy Act.

I would therefore, respectfully differ from the view taken by my learned brother, Mr. Justice Adami, and would decree these appeals and consequently the suits of the plaintiffs with costs throughout.

Das, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 196.

COUTTS AND DAS, JJ.

Shaikh Nazir Hussain—Decree-holder-**Petitioner**

v.

Mohamad Ejaz Hussain—Opposite-party.

Civil Revision No. 20 of 1922, decided on 10th May, 1922, from a decision of the District Judge, Muzaffarpur.

Civil Procedure Code (Act V of 1908), S. 47 and O. 21, R. 58—Claim by judgment-debtor for release from attachment on ground of property being wakf—*O 21, R. 58 applies.*

Order 21, Rule 58, applies to the objection of a judgment-debtor that the property attached in execution is *wakf* property and, therefore not liable to be attached and sold. Section 47 does not apply. No appeal lies from the order passed by the executing Court in the case. [P. 196, C. 2.]

Sant Prasad—for Petitioner.

Syed Mohamad Tahir—for Opposite-party.

Coutts, J.:—This is an application in revision arising out of an execution matter. It appears that Ejaz Hussain obtained a decree against Nazir Hussain. He filed an application to execute his decree against certain property in possession of the judgment-debtor, Nazir Hussain. Nazir objected that the property was *wakf* property.

This objection was allowed by the Court of first instance but on appeal to the District Judge that order has been set aside and execution has been ordered to proceed against the property in respect of which the objection was made.

The application made by the judgment-debtor to the Munsif, that the property which had been attached was *wakf* property, was headed as being an application under Sections 47 and 151 of the Civil Procedure Code. It is contended, however, that the application was not one under Section 47, C. P. C. but was an application under Order 21, Rule 58, and that consequently no appeal lay to the District Judge and the order passed by him is without jurisdiction.

The only question for consideration now is whether the application is one under Section 57, C. P. C. or one under Order 21, Rule 58. To my mind there can be no doubt that the application was in fact one under Order 21, Rule 58; and, if authority be needed in support of this view it is afforded by the decisions in the cases of *Kartick Chandra Ghose* v. *Ashutosh Dhara* (1) and *Upendra Nath*

(1) (1911) 39 Cal. 298=14 C. L. J. 425=12 I. C. 163=16 C. W. N. 26.

Kalamuri v. *Kusum Kumari Dasi* (2). The contention of the petitioner that no appeal lay to the District Judge must, therefore, prevail.

The order of the learned District Judge is without jurisdiction and must be set aside. I would accordingly allow this application and set aside his order. There will be no order as to costs.

Das, J.:—I agree.

Rule made absolute.

(2) (1914) 42 Cal. 440=20 C.L.J. 485=27 I.C. 328=19 C. W. N. 520.

A. I. R. 1922 Patna 197 (1).

DAWSON MILLER, C. J. AND COUTTS, J.

Mussammat Chandmani—Appellant

v.

Kartik Singh—Respondent.

S. A. No. 281 of 1920, decided on 21st December, 1921.

Civil P. C. (Act V of 1908), O 22, R. 5—Party to appeal dead—Question as to Legal Representative cannot be delegated by appellate Court to lower Court for determination.

The word 'Court' in Order 22, Rule 5 means the Court before whom the question arises, *i.e.*, the trial Court if the question arises at the trial stage and the appellte Court if the appellate Court is seized with the case. There is no provision in the Code by which the appellate Court can delegate to the lower Court the question for determination as to who is the legal representative of a deceased party to an appeal; the trial Court can only be directed to take evidence upon the question [P. 197, C. 2.]

Abani Bhushan Mukerji—for Appellant.

Rai Guru Sharan Prasad—for Respondent.

Order:—We think that the question for determination in this application is one which ought to be decided by the Court itself. That can only be determined after taking evidence. We may either hear evidence ourselves by affidavit or orally, to both of which courses there is obvious objection, or we may direct that evidence be taken before the trial Court.

It is clearly the most convenient course to direct that the evidence be taken before the trial Court. The parties reside in that neighbourhood and the oral evidence, which is always more satisfactory than evidence by affidavit, can then be taken. Whether or not the trial Court before whom the evidence is taken should submit a report and come to findings upon the questions concerning which the evidence is taken, is a matter which has been brought to our consideration.

It appears from Order XXII, Rule 5, that where the question arises as to whether any person is or is not the legal representative of a deceased party, such question shall be determined by the Court. The 'Court' there means the Court before whom the question arises, that is to say, the trial Court if the question arises at the trial stage and the appellate Court if the question arises when the appellate Court is seized of the case. There is no provision in the Code for delegating our powers conferred under this rule and, therefore, we do not think it would be proper to ask the trial Court to report upon and determine the question, which is a question for the determination of this Court alone.

In the circumstances we think the order should be that the trial Court be directed to take evidence upon the question as to who is the proper legal representative of the deceased plaintiff, Babu Kartick Singh, and to return the evidence to this Court at as early a date as possible.

Order accordingly.

A. I. R. 1922 Patna 197 (2).

JWALA PRASAD AND COUTTS, JJ.

Ram Krishna Singh and others—Accused-Petitioners

v.

King-Emperor—Opposite Party.

Cr. Rev. No. 90 of 1922, decided on 3rd April, 1922, against an order passed by S. J., Monghyr,

(a) *Penal Code, S. 147—Unlawful assembly—Civil Court decree and delivery of possession cannot be re-opened in Criminal Court—It must maintain the auction purchaser's possession—Cr. P. C., Ss. 107, 144, 145.*

The Criminal Court is bound to maintain the auction-purchaser in possession of the property purchased by him after the passing of a decree by a Civil Court and the service of the writ of the delivery of possession. The Criminal Court cannot re-open the question of possession and investigate it

under Sections 107, 144 and 145 of the Cr. P. C. or in an enquiry of an offence under the Penal Code. The Magistrate has power under Section 145, Cr. P. C. to investigate into the actual service of the writ of delivery of possession. But as soon as it is proved that the *dakhaldahani* has been effected, it is his duty to maintain the possession of the auction-purchaser. [P. 199, C. 2]

(b) *Civil P. C., O. 21, R. 95—Delivery of possession to auction-purchaser—Possession of Judgment thereafter is that of trespasser—Auction-purchaser taking possession does not commit any criminal act—Penal Code, S. 147.*

Delivery of possession under Order 21, Rule 95 of the C. P. Code, has the effect of making the judgment-debtor's possession after it, that of a trespasser. The auction-purchaser does not commit any criminal act in going to assert his title and to take possession of the purchased property by ousting the judgment-debtor. A rightful owner is entitled to physically turn out a trespasser, but is not entitled to use more force than is reasonable to defend his possession from a trespasser, (1878) 3 Cal. 573 and *Parmeshwar Singh* v. *Emperor*, (1910) 38 Cal. 180 followed. [P. 199, C. 2.]

(c) *Penal Code, S. 425—Person destroying his own property commits no offence.*

If the auction-purchaser destroys the property which he purchased, he does not cause any mischief under Section 425 Penal Code. The principal ingredient of the offence under the section is that there must be an intention to cause wrongful loss or damage to the public or to any person. [P. 200, C. 1.]

Hasan Imam, S. N. Rai and *G. C. Pal* —for Petitioners.

H. L. Nandkolyar—for the Crown.

Jwala Prasad, J. :—The petitioners 5 in number have been convicted of rioting under Section 147, I. P. C. Petitioner Shibram was convicted by the Assistant Sessions Judge under Section 436, I.P.C. (mischief by fire) and the other petitioners were convicted of mischief under Sections 436—149, I. P. C. The lower appellate Court has set aside the conviction of Shibram under Section 436, I. P. C. and has convicted him under that section read with Section 149.

Thus all the petitioners have been convicted under Sections 436—149 by the lower appellate Court. Petitioners Shibdhyan and Babua have been convicted also under Section 323, I. P. C. All the petitioners, after the reduction of the sentences, have been sentenced to one year's rigorous imprisonment under Sections 436—149. They have further been sentenced to six months' rigorous imprisonment under Section 147, I. P. C. and Shibdhyan and Babua to three months' rigorous imprisonment under Section 323, I. P. C. The sentences are to run concurrently.

The facts briefly stated are as follows. Ram Krishna Singh obtained a mortgage-decree against Adya, the complainant, on the 7th July, 1915, and in execution of that decree he sold 8 *annas* share in Akbarpur Tauzi No. 796. Ram Krishna Singh and his brothers purchased the same on the 28th July, 1918. The sale was confirmed on the 26th August, 1918. Ram Krishna Singh obtained delivery of possession of the property on the 15th March, 1919. This delivery of possession was under Order 21, Rule 95 of the Code of Civil Procedure.

There wae some litigation between the parties with respect to the sale, but the sale was finally upheld by the High Court (*vide* judgment Exhibit H). On the 27th April, 1920, the Sub-Inspector of Police submitted a report for an action under Section 144 to be taken against Adya Singh and his family on the ground that the disputed property was in possession of the petitioners, Ram Krishna Singh and his brothers.

Subsequently proceedings under Section 145 were instituted on the 7th June, 1920. On the 6th November, 1920, the Magistrate declared the possession of Adya Singh holding that in spite of the delivery of possession, he continued to be in actual possession of the property in question. This order of the Magistrate was set aside by this Court on the 12th January, 1921, with the observation that it was not open to the Magistrate to dispute or disregard the Civil Court writ of delivery of possession in favour of Ram Krishna Singh. This occurrence took place 4 days after the aforesaid order of the High Court on the 16th January, 1921.

The case of the prosecution is that Ram Krishna Singh came to the house in question with a mob of about 200 armed with *lathis* and ordered Adya Singh to leave the house in question. Adya Singh refused to do so. Thereupon Ram Krishna Singh ordered the mob to demolish the house, loot its contents, burn it down and remove the occupants. Adya Singh remonstrated and thereupon he was hit by Babua Singh with a *lathi*. Khela Singh, a grandson of Adya Singh, was also assaulted by Shibdhyan Singh with a *lathi*. Khela Singh retaliated and struck Ram

Krishna Singh with a *lathi*. Subsequently the ladies of the house came out and one of them Lalbati was struck on the head by Nasib Singh with a *lathi* and a box which she was carrying was snatched from her by Nasib Singh. The mob continued the loot and eventually Shibram Singh set fire to a room on the northern side of the house. This room was wholly destroyed by fire.

It was contended by the defence that the house in question was not the house which was the subject-matter of dispute under Section 145 or with respect to the Civil Court delivery of possession to Ram Krishna Singh on the 15th March, 1919. It was further asserted that Adya Singh was in possession of the house and was never dispossessed; and, therefore, the accused had no right to try to dispossess him by means of force; and that inasmuch as the house was in possession of Adya Singh and he with his family was residing therein, the accused did mischief as defined by Section 425, I. P. C. and hence were liable to conviction under Section 436.

The Court below has come to a definite finding that the house in question was the very house with respect to which the Civil Court had executed the writ of delivery of possession in 1919 and that it was the property which was the subject of dispute under Section 145, Cr. P. C. The Court has further held that the possession of Adya Singh and his family was wrongful and that of a trespasser inasmuch as the petitioner Ram Krishna Singh was put in possession of it in pursuance of a Civil Court *dakhaldehani*.

The Court very rightly repelled the suggestion that inasmuch as symbolical possession was only delivered under Order 21, Rule 95. Ram Krishna Singh should not be deemed to be in actual possession of the house in question. The Court, however, has held that in spite of the Civil Court *dakhaldehani*, Adya Singh continued to be in actual possession of the house in question and, therefore, the accused were not justified in attacking him with a large mob and assaulting his party and in turning them out and burning the house. According to the finding of the Court below the house in question now belongs to Ram Krishna Singh by virtue of his purchase at a Civil Court auction sale in 1918. He was also given possession by the Civil Court; therefore Adya Singh was occupying the house if at all as a mere trespasser.

It was rightly pointed out by this Court that after the execution of the writ of delivery of possession, the Criminal Court was bound to maintain Ram Krishna Singh in possession of the house in question. In other words the Criminal Court was bound to maintain Ram Krishna Singh in possession of the house in question. In other words, the Criminal Court was not competent to re-open the question of possession and to investigate it under Section 145 of the Code of Criminal Procedure. No doubt under Section 145, a disputed possession may be enquired into and the party found in possession by the Magistrate may be maintained by an order under Clause (4) of that section.

Therefore, in order to find out as to whether the possession was disputed or not, the Magistrate could investigate as to the actual service of the writ of delivery of possession; but once a *dakhaldehani* was proved to have been effected to the satisfaction of the Magistrate, it was then his bounden duty to maintain the possession of Ram Krishna Singh either by an order under Section 145 or by having recourse to actions under Section 144 or 107, Cr. P. C.

In this case it appears that the *dakhaldehani* was proved and consequently the Criminal Court whether acting under the preventive sections of the Code of Criminal Procedure or enquiring into an offence under the Indian Penal Code has to maintain the possession of Ram Krishna Singh; therefore, Ram Krishna Singh was not committing any criminal act in going to assert his title and to take possession of the house in question by ousting Adya Singh who was remaining in the house only as a trespasser. Therefore, the accused were not members of an unlawful assembly and they did not commit any riot. So the conviction under Section 147, I. P. C. must fail.

As to the conviction under Section 436 of causing mischief by setting fire to the house, it is obvious that there could not possibly be any wrongful loss or damage to Adya Singh or any person inasmuch as the house did actually belong to Ram Krishna Singh, the accused. The principal ingredient of an offence under Section 425 is that there must be an intention to cause wrongful loss or damage to the public or to any person.

Therefore, if the property in question did not belong to Adya Singh

and belonged to the accused no offence of mischief was at all committed. Explanation 2 to Section 425, I. P. C. has been referred to by the learned Assistant Government Advocate in order to show that mischief may be by an act which affects any property belonging to the person committing the act or to that person and others jointly.

Now Illustrations (*g*) or (*h*) clearly show the cases to which that explanation is applicable. The mischief must be done to the property belonging to another person, but the act whereby that mischief is done may have reference to the property belonging to the person committing the mischief.

The case of *Empress* v. *Rajcoomar Singh* (1), is an obvious illustration of a person having his right declared by a Civil Court destroying the property without being guilty of any mischief. In that case B obtained a decree from a civil Court against A declaring his right in the property, whereupon the servants of B went on the land and pulled down the edifice which was erected thereon by A subsequent to an order under Section 530, Cr. P. C. (145 of the present Code), Jackson, J., held that as there had been no causing of wrongful loss the accused had not been guilty of mischief.

The following observation appears to me to be pertinent to the question in issue in the present case. His Lordship (Mr. Justice Jackson) observed: "Now it is clear from the decision of the Civil Court, which was then in force, that Shama Charan Lahiri was not at that time legally entitled to have those bamboos put together in that place in the form of a *nawbutkhana*, and consequently there was no causing of wrongful loss in the act done by the accused persons."

Instead of pulling down the house, here the accused persons burnt it down; otherwise the case appears to me to be on all fours with the present one. If there was no mischief in pulling down the edifice there was no mischief committed in burning it. I would quote the case of *Parmeshwar Singh* v. *Emperor* (2) in order to show that no mischief can be committed by any act which causes damage to a property if the property actually belongs to the accused.

The learned Assistant Government Advocate then contended that rightly or wrongly, the complainant, Adya Singh, occupied the house in question at the moment, and, therefore, the accused had no right, what the learned Assistant Government Advocate describes, to take the law into their own hands. That phrase obviously means that the accused persons should not use more force than is necessary in order to maintain their own right or possession.

It goes without saying that a rightful owner is entitled to physically turn out a trespasser or one trying to infringe upon his rights. It is also true that a person exercising this right should not use more force than is reasonable to defend his possession from a trespasser.

This is the view taken even in the case quoted by the learned Assistant Government Advocate; *Emperor* v. *Gulsha* (3). Therefore, the accused persons to my mind are not guilty either under Section 147 or under Sections 436-149.

The last contention of the learned Assistant Government Advocate is that the conviction of Babua and Shibdhyan under Section 323, I. P. C. for causing hurt to Adya and Khela with *lathis* should stand.

The learned Sessions Judge has not come to any definite finding as to the circumstances under which the aforesaid assaults were committed and whether they were necessary to eject Adya Singh from the house or that they were in excess of the right of private defence of property which Ram Krishna and the other accused had in order to maintain their possession of the house in question. Therefore, I am not prepared to convict the aforesaid petitioners Babua and Shibdhyan under Section 323.

The result is that the conviction and the sentences passed upon the accused are set aside.

Coutts, J.:—I agree that these petitioners must be acquitted. The learned Sessions Judge has found that the complainant and his party were trespassers and it is clear that the accused have not exceeded right of private defence which they undoubtedly had.

Rule made absolute.

(1) (1878) 3 Cal. 573=1 C. L. R. 352.
(2) (1901) 38 Cal. 180=15 C.W. N. 224=7 I.C. 812=11 Cr. L. J. 532.
(3) (1912) 6 S.L.R. 121=17 I.C 78=13 Cr. L. J. 766.

A. I. R. 1922 Patna 201.

DAS AND ADAMI, JJ.

Chottey Narain Singh and others—Appellants

v.

Kedar Nath Singh and others—Respondents.

Appeal No. 5 of 1919, decided on 22nd March, 1922, from original decree of Sub-Judge, Gaya.

Limitation Act (IX of 1908), S 15 and Art. 181—Decree Nisi for foreclosure—Receiver appointed—Starting point of limitation for application for making decree final runs from the date when the decree-holder was given liberty to apply for final decree.

In a case where, after the passing of the preliminary decree for foreclosure in a mortgage suit, a Receiver was appointed at the instance of the defendant pending an appeal to His Majesty in Council and the latter appeal is dismissed for non-prosecution, the right to apply for making decree final accrues from the date of the order giving the decree-holder liberty to so apply. The decree-holder is incompetent to make such an application so long as the receiver is in possession of the mortgaged properties. [P. 203, C. 2.]

Hasan Imam, Sultan Ahmed, A. N. Das and *D. N. Das*—for Appellants.

P. C. Manuk, H. L. Nandkeolyar and *T. N. Sahay*—for Respondents.

Das, J.:—This appeal is directed against the final decree for foreclosure passed by the learned Subordinate Judge of Gaya under the provisions of Order 34, Rule 3 of the Code; and the only question which we have to determine in this appeal is whether the application of the plaintiffs was barred by limitation.

On the 3rd of July, 1913, the Calcutta High Court modifying the decree of the learned Subordinate Judge which was a decree for sale, passed a foreclosure *decree nisi* in favour of the plaintiffs whereby it fixed the 3rd of January, 1914, as the date for payment of the mortgage money by the defendants to the plaintiffs. On the 22nd December, 1913, defendants 1 and 2 presented an application and in due course obtained a certificate for leave to appeal to His Majesty in Council. On the 9th January, 1914, defendants 1 and 2 presented another application to the Calcutta High Court. They stated in that petition that they were negotiating for a loan to pay off the mortgage, and had also preferred an appeal to His Majesty in Council from the decree passed by the High Court. They asserted that the opposite parties were " contemplating to apply for the final decree of foreclosure and for the delivery of possession of the property to them "; and they asked as follows:—" It is therefore prayed that your Lordships will be pleased to stay the passing of the final decree for foreclosure for such period as to your Lordships appears proper, and, in the alternative, to stay the delivery of possession over the said mortgage property on your petitioners furnishing security, and, in case of their being unable to do so, to appoint a Receiver for the management of the property and to pass such order or orders as to your Lordships appear just and proper." On the 20th January, 1914, the High Court appointed Babu Siva Nandan Roy, pending the disposal of the appeal to His Majesty in Council, receiver of the disputed mortgaged properties in suit, and directed the receiver to pay all the rents as they fell due and also the interest on the mortgage debt. On the 1st of June, the receiver was discharged as he declined to act on the remuneration fixed for him. On the 1st of September, 1914, some of the mortgagees applied for an order that as there was no fresh order for the appointment of a receiver, they were at liberty to apply for the final decree for foreclosure and delivery of possession of the mortgaged properties in accordance with the decree of the High Court, dated the 3rd July, 1913. This application had the effect of compelling the defendants to make another application for the appointment of a receiver; and this they did on the 2nd September, 1914. On the 3rd September, 1914, the High Court made an order on the Subordinate Judge to appoint a fit and proper person as the receiver of the mortgaged properties. It is not disputed that, in pursuance of this order, the Subordinate Judge appointed a person as the receiver of the properties and directed the receiver to pay the interest on the mortgage debt. The next date of importance is the 9th of October, 1916, when the Judicial Committee dismissed the appeal of the mortgagors for non-prosecution of the appeal. On the 20th December, 1917, the plaintiffs applied to the High Court for the discharge of the receiver and for an order on the receiver to make over the mortgaged properties to them. On this application the High Court passed the following order:—" We direct that the receiver do forthwith pass his accounts, but that he be not discharged until a further application. The mortgagees will be at liberty to proceed with a view to

obtaining a final decree notwithstanding the fact that the receiver is in possession." This order was passed on the 18th March, 1918; and on the 3rd April, 1918, the mortgagees presented their application out of which the present appeal arises for a final decree in the foreclosure action under the provision of Order 34, Rule 3 of the Code. It is to be remembered that the preliminary decree for foreclosure was passed on the 3rd July, 1913; and the fact that the present application was presented on the 3rd of April, 1918, encouraged the mortgagors to raise a plea of limitation. The learned Subordinate Judge has rejected the plea; and the only question which we have to determine in this appeal is whether the plea put forward on behalf of the mortgagors was a good plea.

Mr. Manuk, on behalf of the respondents, argues that his right to apply for a final decree in a foreclosure action accrues from day to day and that the statute of limitation is inapplicable to such an application and he relies on *Madhab Mani Dasi* v. *Lambert* (1). As has been pointed out more than once, that was not a decision on the question which we have now to determine, for the learned Judges in that case held that the Code of Civil Procedure, 1908, did not apply to the case at all. It is conceded that the Code of Civil Procedure, 1908, does apply to the present case, and I have no doubt whatever that that question, as it has now arisen, is somewhat different from the question, which the learned Judges in *Madhab Mani Dasi* v. *Lambert* (1) had to try. Now there was a considerable difference of opinion at one time on the question as to whether orders under Sections 87 and 89 of the Transfer of Property Act were orders in the suit itself or in execution, and whether the Limitation Act governed them and, if so, whether Article 178 or 179 of the old Act governed an application for obtaining such orders. It was with a view to put an end to the conflict of decisions that provisions as to mortgage suits have been removed from the Transfer of Property Act to the Code of Civil Procedure and applications which follow preliminary decrees either for sale or for foreclosure are not described as applications for a decree for sale and a decree for foreclosure and not applications for an order for sale or for an order for foreclosure. It is impossible now to contend that these applications are not applications under the provisions of the Code of Civil Procedure. If that be so, Article 181 of the Limitation Act clearly governs such an application and the period of limitation is three years from the time when the right to apply accrues. This was the view which was taken by this Court in *Bala Ramnaick* v. *Kanhai Bharam Mahapatra* (2).

The next question is when did the right to apply accrue? It will be remembered that the preliminary decree was passed on the 3rd July, 1913, and that though the mortgagors carried an appeal to His Majesty in Council that appeal was dismissed on the 9th October, 1916, not on merits, but for non-prosecution of the appeal. Mr. Hasan Imam on behalf of the appellants contends that the result of the dismissal of the appeal for non-prosecution was to place the parties in the same position as if there was no appeal and that accordingly the right to apply accrued on the 3rd July, 1913. That was certainly the view which was taken by the Judicial Committee in *Abdul Majid* v. *Jawahir Lal* (3). That case was decided under the Transfer of Property Act and the old Limitation Act before the new Civil Procedure Code made a change in the procedure relating to mortgage actions. In that case the Court of first instance passed a decree in favour of the mortgagees on the 12th May, 1890, for the sale of the mortgaged property unless payment was made on or before the 12th August, 1890. There was an appeal to the Allahabad High Court and that appeal was dismissed on the 8th April 1893. The mortgagor obtained leave to appeal to the Privy Council, but did not prosecute his appeal, and on the 13th May, 1901, the appeal was dismissed for want of prosecution. The Judicial Committee held that Article 179 of the Limitation Act governed the application which was then presented by the decree-holder for an order absolute for sale and that limitation began to run, not from the dismissal of the appeal for want of prosecution, but from the order of the High Court confirming the decree. The Judicial Committee in the course of its judgment said as follows:—"The order dismissing the appeal for want of prosecution

(1) (1910) 37 Cal. 796=6 I.C. 537=12 C.L J. 328.

(2) (1917) 1 P.L J. 364=38 IC. 385=3 P.L.W. 74

(3) A. I. R. 1914 P. C. 66=36 All. 350 (P.C.).

did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated the 8th April, 1893, and that is a decree of the High Court of Allahabad." That case was of course decided on the view that an application for an order absolute for sale under the Transfer of Property Act was an application in execution of the decree. The position now is different ; but we are entitled to hold by analogy that the right to apply in the present case accrued on the 3rd July, 1913, and that the application is accordingly barred by limitation unless the operation of the preliminary decree was stayed by an order and injunction of the Court.

Mr. Manuk contends that the order for the appointment of a receiver coupled with the direction upon the receiver to pay the interest on the mortgage money operated in effect as an order staying further proceedings and that he is accordingly under Section 15 of the Limitation Act entitled to exclude the period between the 3rd September, 1914, and the 18th March, 1918, on which date the High Court gave him liberty to apply for the final decree notwithstanding the fact that the receiver was not discharged. The argument involves an examination of the nature of a final decree in a foreclosure action. Order 34, Rule 3 of the Code, after dealing with the case where the defendant pays into Court the amount declared due to the plaintiff, provides as follows:—"Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property." The form of a final decree for foreclosure is to be found in Appendix D to the Code of Civil Procedure and is No. 10. Under that form the decree to which the plaintiff is entitled is as follows:—"That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed." (Where the defendant is in possession add "and shall put the plaintiff in possession of the said property.") There is no doubt at all, on a perusal of the form as provided by the Legislature in No. 10 of Appendix D, that the words "if necessary" in Order 34, Rule 3 (2), refer to a case where the defendant is in possession and that, where the defendant is in possession, the plaintiff is entitled to a decree first debarring the defendant and all persons claiming through or under him from all right to redeem the mortgaged property ; and, secondly, ordering the defendant to put the plaintiff in possession of the property, Mr. Manuk contends that, in the events which have happened, he was not entitled to either of these orders until the 18th March, 1918.

I will first consider the question whether the plaintiffs, were in the events which happened, entitled to an order debarring the defendants from the right to redeem the mortgaged property. Now it will be remembered that the receiver was appointed on an application by the defendants in which they stated that they were negotiating for a loan in order to pay off the mortgage-money and that they were confident that they would be able to raise such a loan within two months from the date of that application. The Court appointed a receiver and directed the receiver to pay the interest due on the mortgage-money to the plaintiffs. In my opinion, so long as the order of the High Court stood, the defendants had the right not only to pay the interest on the mortgage-money to the plaintiffs but also, to quote their own words, "to pay off the decree." In other words, the appointment of a receiver and a direction upon him to pay the interest due to the plaintiffs operated in substance, though not in form, as an order staying further proceedings in the suit until the disposal of the appeal by the Privy Council.

In the next place so long as the receiver was in possession of the mortgaged properties, it was clearly incompetent to the plaintiffs to ask for an order that the defendants do put the plaintiffs in possession of the property. The Code of Civil Procedure recognizes the right of the plaintiff who is out of possession to be put in possession of the mortgaged properties; in other words, he is in the same action entitled not only to a decree for foreclosure,

but also to a decree for possession. At one time it was doubted in England whether a Court of Equity could grant the mortgagee leave to join an action for the recovery of land with the action for foreclosure. See *Sutcliffe* v. *Wood* (4). It was in order to remove the difficulty raised by such cases as *Sutcliffe* v. *Wood* (4) that a proviso was added to Order 1 , Rule 2 of the Rules of the Supreme Court in December 1885. That proviso now permits a plaintiff to join a claim for possession in an action for foreclosure or redemption. There is no doubt at all that an order for foreclosure absolute in a foreclosure action may now include an order for delivery of possession by the defendant to the plaintiff. See *Best* v. *Applegate* (5). It is quite true that an order for delivery of possession may be given after the final decree. This was established in *Keith* v. *Day* (6), though the proposition was not accepted in *Wills* v. *Luff* (7). It may be assumed, however, that the plaintiffs were entitled to have an order as to delivery of possession not as part of the foreclosure decree, but after the decree ; but the fact that the plaintiffs may obtain such an order after the final decree does not take away their right to claim such an order as part of the foreclosure decree. That order they could not have obtained so long as the receiver was in possession of the mortgaged properties. The Calcutta High Court removed the bar on the 18th March, 1918, and in my opinion the plaintiffs became entitled to apply for the final decree on the 18th March, 1918.

In my opinion the conclusion at which the learned Subordinate Judge has arrived is right and I would dismiss this appeal with costs.

Adami, J. :—I agree.

Appeal dismissed.

(4) (1884) 53 L. J. Ch. 970=50 L. T. 705.
(5) (1888) 37 Ch. D. 42=57 L. J. Ch. 506.
(6) (1888) 39 Ch. D. 452=58 L. J. Ch. 118.
(7) (1888) 38 Ch. D. 197=57 L. J. Ch. 563.

A. I. R. 1922 Patna 204.

COUTTS AND DAS, JJ.

Hiro Singh — Judgment-debtor-Petitioner

v.

Kazi Syed Ahmed Hussain and another—Opposite Party.

Civ. Rev. No. 385 of 1921, decided on 16th March, 1922, against the order of Sub-J., Gaya, dated

Civil Procedure Code (V of 1908), S. **151**—*Re-calling a perfected order passed by the predecessor under is without jurisdiction and invalid.*

If an order of a SubJudge in execution is erroneous the proper course for the party aggrieved is to apply to the High Court under Section 115, Civil Procedure Code. It is well settled that the Court has inherent power to re-call an order which has not been perfected but no power whatever to re-call one which has been perfected. Therefore a successor has no power to re-call the perfected order of his predecessor. *In re* St. Nazaie, Co. (1879) 12 Ch. D. 88, *Parsi Dai Debi* v. *Jotindra Nath Bose*, 10 C. L. J. 496.

[P 205, C. 1.]

Tribhuban Nath Sahay—for Petitioner.

A. K. Roy—for Opposite Party.

Das, J. :—This application is directed against the order of the learned Subordinate Judge of Gaya, dated the 2nd of August, 1921. The petitioner obtained a rent decree as against the opposite party and in execution of that decree put up the holding for sale and purchased it himself. The opposite party took various proceedings to contest the order of the execution Court. On the 7th of June, 1919, his application to have the sale set aside under Order 21, Rule 90, C. P. C. was rejected. On the 12th of June, 1919, the sale was confirmed. On the 23rd of June, 1920, a sale certificate was granted to the decree-holder-auction-purchaser, and on the 24th of June, 1920, a writ of delivery of possession was issued to the petitioner. He went to take delivery of possession but was obstructed by the opposite party. Thereupon the petitioner came to the Court and complained against the obstruction made by the opposite party. That matter was heard before Mr. Saiyid Hasan, where the opposite party relied upon an order of the Subordinate Judge, dated the 18th of September, 1919, which showed that there was a certificate of full satisfaction of the decretal amount due to the decree-holder. Mr. Saiyid Hasan took the view that he could not direct the decree-holder to be put in possession of the property so long as the order, dated the 18th September, 1919, stood. In that view he declined to give any assistance to the decree-holder whatever. Thereupon the decree-holder presented an application under Section 151 of the Code before Mr. Saiyid Hasan by which the decree holder asked the Court to re-call the order passed by it on the 14th of August, 1920. That matter was heard by Mr. Abinash Chandra Nag and that learned Subordinate Judge has now, by

his order, dated the 2nd of August, 1921, recalled the order passed by his predecessor on the 14th of August, 1920. It is the validity of the last mentioned order which is in controversy before us in this application.

It was urged by the learned Vakil appearing on behalf of the petitioner that the Court had no jurisdiction to recall the order passed by Mr. Saiyid Hasan on the 14th of August, 1920. It appears to me that this contention is right and must succeed. The learned Vakil on behalf of the opposite party contends that the order dated the 18th of September, 1919, was an *ex parte* order that was passed behind his back, that he is entitled to show that the certificate of full satisfaction was a forgery and that the Court was entirely deceived by the fraud practised on it by the petitioner. Now, in my opinion, the decree-holder had the opportunity to prove his case before Mr. Saiyid Hasan. It is quite true that Mr. Saiyid Hasan declined to consider that case. If the order of Mr. Saiyid Hasan was an erroneous one, the remedy was to apply to this Court under Section 115 of the Civil Procedure Code. That course was not adopted by the decree-holder and he chose to ask the Court to vacate the order which had been passed by that Court and which he challenged as an invalid order. Now, in my opinion, it is well settled that the Court has inherent power to re-call an order which has not been perfected but that the Court has no power whatever to re-call an order which has been perfected. In other words, while the order is in minutes it is always open to a party to call attention of the Court to that order and ask the Court to recall it: but once the order has been signed by the Court there is no longer any power in a party to invite the Court to re-call that order. This was laid down by Sir George Jessel *In Re St. Nazaire Company* (1), which was followed by the Calcutta High Court in *Peari Dai Debi* v. *Jotindra Nath Bose* (2). The order passed by Mr. Saiyid Hasan was signed by him and the application which has given rise to these proceedings before us was presented to that Court after the order was in fact signed. In my opinion there was no power at all in Mr. Abinash Chandra Nag to recall the order of his predecessor. The application must succeed. The order of the learned Subordinate Judge must be set aside. The petitioner is entitled to his costs. Hearing fee two gold mohurs.

Coutts, J.:—I entirely agree.

Application allowed.

(1) (1879) 12 Ch. D, 88=41 L. T. 110.
(2) (1909) 10 C. L. J. 496=4 I. C. 441.

A. I. R. 1922 Patna 205.

DAS AND ADAMI, JJ.

Saiyid Jowad Hussain—Defendant-Appellant v.

Gendan Singh and others—Plaintiffs-Respondents.

Appeal No. 139 of 1919, decided on 22nd March, 1922 from original decree of Sub J., Gaya.

Limitation Act (IX of 1908), Art. 181—Preliminary decree appealed against—Right it apply for final decree accrues from date of appellate decree.

In a case where preliminary decree is passed in a mortgage suit and an appeal is preferred, the right to apply for final decree accrues from the date of the appellate decree, for "when an appeal is preferred, it is the decree of the appellate Court which has become conclusive between the parties." 39 All. 641, followed. A I. R. 1914 P. C. 66, referred to [P. 207, C. 1.]

Sultan Ahmad, S. M. Tahir and *Hasan Jan*—for Appellant.

Hasan Imam and *A. B. Mukherji*—for Respondents.

Das, J.:—The material facts are all stated with precision in the judgment of the Court below; and, as I agree with the conclusion at which the learned Subordinate Judge has arrived, it is unnecessary to recapitulate those facts. The learned counsel for the appellants contends that the right to apply accrued to the plaintiffs on the 22nd August, 1915, the date fixed for payment of the mortgage-money by the preliminary decree passed by the Court of first instance, and that as the respondents did not apply for a final decree until the 22nd of February, 1919, the application presented on that date was barred under the provision of Art. 181, first schedule, of the Limitation Act. The learned counsel for the respondents, on the other hand, maintains that as there was an appeal to the High Court by his clients from the decree of the Court of first instance and that as that appeal was disposed of on the 21st May, 1917, the right to apply accrued to the respondents on the 21st May, 1917, and the application was not accordingly barred by limitation. To this, the learned counsel for the appellants replies that, as the decree of the High Court did nothing more than dismiss the appeal with costs, time began to run from the 22nd August, 1915.

I confess that the question is not free

from difficulties. It is conceded that Article 181 of the Limitation Act applies ; and I think that it is a matter for regret that there are no provisions in the Limitation Act which would govern applications for a final decree analogous to those contained in the third column of Article 182 of the Limitation Act. It is conceded that if the appellate Court at all varies the decree of the primary Court, time would begin to run from the date of the decree of the appellate Court, and not from the decree of the Court of first instance ; but it is contended that if the appellate Court dismisses the appeal without extending the time for payment fixed by the decree of the primary Court, time would begin to run from the date so fixed. It seems to me that, if the argument be a good one, it is possible for a mortgagor to defeat the mortgagee by carrying an appeal from one appellate Court to another, and ultimately suffering the appeal to be dismissed. But the mere fact that the argument may have that result is no ground for holding that it is a bad one ; but it is a ground for hoping that the Legislature may find it possible to deal with the subject by providing a period of limitation for applications for final decrees in mortgage actions, and the time from which such period would begin to run on principles analogous to those contained in the third column of Article 182 of the Limitation Act. Though not strictly pertinent to this subject, I may point out that, under Article 182 of the Limitation Act, the period of three years limited for an application for the execution of a decree or order begins to run from the date of the decree or order, unless there has been an appeal, in which case the time begins to run from the decree or order of the appellate Court or the withdrawal of the appeal. But where there is an appeal, and the appeal is dismissed for want of prosecution, since the order dismissing the appeal neither adopts nor confirms the decision appealed from nor is it an order passed on the withdrawal of the appeal, time begins to run from the date of the decree or order appealed against, as in the opinion of the Judicial Committee, the party appealing must be regarded in the circumstances as being in the same position as if he had not appealed at all See *Abdul Majid* v. *Jawahir Lal* (1). This obviously puts the decree-holder at a great disadvantage, where the appeal is by the judgment-debtor. If the matters are at all re-considered by the Legislature, and applications for final decrees in mortgage actions are put on the same footing as applications for executions of decrees, then the case where a mortgagor or a judgment-debtor carries an appeal to the appellate Court and then suffers the appeal to be dismissed for want of prosecution ought not to be overlooked by the Legislature.

The question which has been argued before us is not free from difficulties : but it is difficult to resist the argument employed by Bannerjee, J. in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (2) upon which the learned Subordinate Judge relied. In giving effect to the arguments advanced on behalf of the mortgagees, that learned Judge said as follows:—" It seems to me that this rule" that is to say, the 5th rule of Order 34, the rule regulating applications for final decrees in mortgage actions, "contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which has become conclusive between the parties." The decision of the Judicial Committee in the case of *Abdul Majid* v. *Jawahir Lal* (1) was relied on by Mr. Justice Bannerjee. The facts of that case were these : by the preliminary decree passed by the Court of first instance 12th of August, 1890 was fixed for payment of the mortgage-money. An appeal was taken from that decree to the High Court, and that appeal was dismissed on the 8th of April, 1893. The mortgagor obtained leave to appeal to the Judicial Committee, but did not prosecute his appeal, and on the 13th of May, 1901 the appeal was dismissed for want of prosecution. On the 11th of June, 1903 the mortgagee applied to the Subordinate Judge for an order absolute to sell the mortgaged properties. The Judicial Committee came to the conclusion that the application was barred under Section 179 of the Limitation Act of 1877 at the expiry of three years from the date of the decree of the High Court, and therefore before the passing of the Code of Civil Procedure of

(1) A. I. R. 1914 P. C. 66=36 All. 350 (P. C.).

(2) (1917) 39 All. 641=42 I.C. 93 =15 A.L.J. 734.

1908, and that, as the right had once been barred, no provision of the Code of 1908 could operate to revive it. With this portion of the judgment of the Judicial Committee, we are not concerned, except in so far as it held that, before the passing of the Code of 1908, an application for an order absolute to sell the mortgaged properties was regarded as an application for execution of the preliminary decree; for on no other hypothesis could Article 179 of the Limitation Act of 1877 be regarded as applicable to such an application. The Judicial Committee however held that the time for making such an application began to run from the 8th of April, 1893, the date of the decision of the High Court dismissing the appeal. Mr. Justice Banerji took the decision of the Judicial Committee in the case cited to establish that, when an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the case. But it may be pointed out that on the hypothesis that Article 179 of the old Limitation Act was applicable to such an application, under the express provision of Article 179, time would begin to run from "the date of the final decree or order of the appellate Court"; and it is doubtful whether we can apply a decision under Article 179 of the old Limitation Act to a case under Article 181 of the new Limitation Act, except by analogy. All that Article 181 condescends to tell us that limitation begins to run from the date "when the right to apply accrues" The question is, when does the right to apply accrue? Under Article 179 of the old Limitation Act, it accrued on the date of the final decree or order of the appellate Court. This provision is not to be found in Article 181. But neither is there anything in Article 181 to contradict the view that the right to apply accrues on the date of the final decree or order of the appellate Court, where there is an appeal from the decision of the Court of first instance. Now the essential character of an application which follows a preliminary decree for sale remains the same, though the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, and the order passed on such an application is now called a decree for sale and not an order for sale. The change effected by the Code of 1908 was a change in procedure so as to shut out such contentions as used to be raised that such applications were not under the provisions of the Civil Procedure Code. Neither the C. P. C. of 1908 nor the Limitation Act of 1908 has answered the question, when the right to make the application accrues. That being so, we are, I think, entitled, by analogy, to apply the provision of Article 179, third column, in answering the question, when the right to apply accrues. As I have said before the question is not free from difficulty; but, on the whole, I think, with great respect, that the view of Banerjee, J. in the case I have cited is right.

I must dismiss this appeal with costs.

Adami, J.:—I agree.

A. I. R. 1922 Patna 207.

DAS, J.

Parmanand Lal—Petitioner

v.

Emperor—Opposite Party.

Criminal Revision No. 65 of 1922, decided on 22nd March, 1922.

Police Act, S 29—Order of transfer served on police officer—Another order construable as cancelling the first order made—Non compliance with first order—Accused cannot be convicted.

Where a police officer was served with one order of transfer and then with another order which he could reasonably have construed as cancelling the previous order and he did not comply with the first order:

Held, he could not be convicted of wilful breach or neglect of a lawful order made by a competent authority [P. 209, C. 1.]

Rai Gurusaran Prasad—for Petitioner.

Sultan Ahmed—for the Crown.

Das, J:—This application is directed against the order of the learned Sub-Divisional Officer of Ranchi, convicting the petitioner under Section 29, Police Act, and sentencing him to three months, rigorous imprisonment. The petitioner was an Officiating Sub-Inspector of Police, his permanent post being that of a Head Constable. The Superintendent of Police heard a report that the son of the petitioner was a non-co-operator and he sent for the petitioner and asked him "to put his son right." The petitioner replied that he had no control over his son, whereupon the Superintendent of Police retorted that if he could not control his son, he would have to consider whether he would retain him as an Officiating Sub-Inspector, as in his view, "a man who could not control his son could not obviously control his *thana*." This happened on the 15th November last, and on the 16th November the petitioner tendered his

resignation of the post which he held in the police force. On the evening of the same day an order signed by the Superintendent of Police was communicated to him which ran as follows:—"Officiating Sub-Inspector Parmanand Lal is reverted to his substantive rank of grade writer head constable with effect from the 16th November, 1921, A. M. He will proceed to the Thathaitangar Police Station within 48 hours." It is admitted that Thathaitangar Police Station is about 80 miles from Ranchi, and about 40 miles from the nearest railway station, and although under the Civil Service Regulations six days are ordinarily allowed to an officer for making preparation for a journey on transfer, the Superintendent of Police thought that 48 hours were all that the petitioner was entitled to for making his preparations for a difficult journey including a journey of 40 miles from the nearest railway station. In my opinion the order was an unreasonable one, as it was difficult, if not impossible, for the petitioner to obey it. That, however, was the position on the evening of the 16th November, but on the morning of the 18th November, another order was served on him to proceed to Thathaitangar within 24 hours. If this was an order on which the petitioner could act then he had 24 hours from the midday of the 18th November, to obey it. He was however suspended on the 19th November, and the decision to prosecute him under the Police Act was taken that day.

Now the question that arises for consideration is which order is it that the petitioner has disobeyed? The case for the prosecution is that he should have obeyed the order of the 16th November, Exhibit 2, which was served on him on the evening of the same day, and that he should have left Ranchi for Thathaitangar sometime on the 18th November. The learned Sub-Divisional Officer agreed with the contention of the prosecution and convicted the petitioner of having disobeyed the order of the 16th November. As, in my opinion, the order of the 16th November was an unreasonable one. I must critically examine the record to see whether any justification can be found for the conduct of the petitioner in not complying with that order, and, in my view, that justification can be found in the order which was served on him on the 18th November and which asked him to proceed to Thathaitangar within 24 hours. If the latter order in effect cancelled the first order which was served on him, then it cannot be argued that the petitioner was guilty of a wilful breach or neglect of a lawful order made by a competent authority in not leaving Ranchi for Thathaitangar sometime on the 18th November, for under the latter order he had 24 hours from the morning of the 18th November, to obey it. The learned Magistrate took the view that the latter order was also dated the 16th November, and that 24 hours was a mistake for 48 hours. It is true that that order Exhibit A was issued on the 16th November, but it passed through various departments and was ultimately served on the petitioner on the 18th November. It bears the endorsement of the Reserve Inspector, dated the 18th November, and that the endorsement ran as follows:—"Copy forwarded to W. H. C. Parmanand Lal through Town Inspector for information and compliance." In my opinion, it is not an unreasonable view that the order served on the petitioner on the morning of the 18th November, in effect cancelled the order which was served on him on the evening of the 16th November, and the petitioner cannot be convicted of having disobeyed the order which was first served on him.

But then it was argued that he did no leave Ranchi on the 19th November, and that he disobeyed the order served on him on the 18th November. But it was not the case of the prosecution that there was disobedience by the petitioner of the order served on him on the 18th November. If it were, it might be possible for the petitioner to show that he was in fact suspended before he could carry out that order. He was in fact suspended on the 19th November, and the only question is whether he was suspended in the forenoon or in the afternoon of the 19th November. If he was in fact suspended in the forenoon of the 19th November, then the order of suspension prevented him from carrying out the order served on him on the 18th November, while there was still time to carry it out. But it is unnecessary to deal with this point, as it is not the case of the prosecution that the petitioner disobeyed the order served on him on the 18th November. The case for the prosecution is that the petitioner disobeyed the order served on him on the evening of the 18th November. As, in my opinion, the

petitioner might reasonably have taken the view that the order served on him on the 18th November in effect cancelled the order of the 16th November, I must set aside the conviction and the sentence passed on the petitioner. The petitioner will be released from his bail bond.

Conviction set aside.

A. I. R. 1922 Patna 209.

Ross, J.

Nand Kishore Nath Sahi Deo and others —Petitioners v.

Emperor at the instance of Messrs. Garg Brothers & Co.—Opposite-party.

Cr. Mis. Application No. 11 of 1922, decided on 21st March, 1922.

Criminal Procedure Code (V of 1898), Ss. 107 and 112—Allegations not specific—Accused cannot be called upon to show cause

Where the allegations against the petitioners are too vague and do not give the necessary details which are required to inform the petitioners of the accusation that they have to meet, the Magistrate should not call upon the petitioners to show cause why they should not be bound down to keep peace. 6 All. 26 and 41 Mad. 246, referred to. [P. 210, C. 1.]

Manuk and *G. C. Pal*—for Petitioners.

Government Advocate—for Opposite Party.

Ross, J.:—By this application the petitioners seek that proceedings drawn up against them under Section 107 of the Criminal Procedure Code may be quashed or in the alternative that the case be transferred from the Magistrate who is trying it.

There are five petitioners. The first is the son of the Maharajah of Chota Nagpur and is Khorposhdar of Diwarkhand Pargana in the District of Ranchi, the second is a barrister who has obtained a prospecting lease from the first, the third is the Tahsildar and the fourth is a Barahil of the first petitioner, and the fifth is a lessee under him. The opposite party are Messrs. Garg Brothers & Co. who have taken a prospecting lease for coal from the Maharajah. The proceeding drawn up by the Magistrate recites that it appears from the report of the Sadar Inspector of Police that the second party, that is, the petitioners, are likely to commit a breach of the peace or do a wrongful act which may occasion breach of the peace inasmuch as the first and second petitioners personally and through their servants, the other petitioners, and other men employed by them, are using threats of violence to the men of the first party. It further alleges that the petitioners 1 and 2 are believed to have instigated various offences. This second allegation refers apparently to a series of cases set forth in the Police report, in all of which, except one which is still under trial, the petitioners have been acquitted or discharged. It is conceded by the learned Government Advocate who opposed this application that this affords no basis for a proceeding under Section 107 of the Criminal Procedure Code and the question is therefore restricted to the first ground.

It is contended on behalf of the petitioners that this ground is too vague; it does not give the necessary details which are required to inform the petitioners of the accusation that they have to meet and does not satisfy the tests laid down *in the matter of Jaiprakash Lal* (1) and in *Nagireddy Konda Reddy* v. *King-Emperor* (2). It is also contended that it does not comply with the provisions of Section 112 of the Criminal Procedure Code and that the proceeding is therefore bad. The learned Government Advocate relies on the last paragraph of the Police report in which it is stated by the Police officer that on recent enquiries he had come to learn that the servants of the Garg Brothers and others assisting them in their prospecting operations, including witnesses Nos. 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 17 and 18 have been threatened with violence on different occasions by the petitioners. It is argued that, if the petitioners have not received due notice of the acts of intimidation alleged against them in the proceeding, they can apply to the Magistrate for further particulars. But it appears that this very objection was taken in the written statement filed by the petitioners and that the Magistrate nevertheless did not amend the proceeding. Now it appears that there was an earlier proceeding drawn up on the 4th of August, 1921, which was quashed by the High Court on the 30th of September last. It was pointed out by the learned Judge of this Court in dealing with that earlier proceeding that "the responsibility of issuing notice under Section 112 is of the Magistrate." The proceeding drawn up in that case was discussed and it was found that it did not show that there was any information before the Magistrate entitling him to act under Section 107. Now the Magistrate

(1) (1883) 6 All. 26=1883 A. W. N. 208 (F. B.).
(2) (1917) 41 Mad. 246=41 I C. 990.

has been informed by the judgment of the High Court in that earlier case of the necessity of showing that there was information before him entitling him to act under Section 107. But the present proceeding can hardly be said to be more definite than the last or to show any definite ground for proceeding against the petitioners. The Police report, if it can be referred to in this connection, is little better. It does not give any details nor does it allege any recent acts of intimidation. It is too indefinite to be met and the petitioners are necessarily prejudiced by being called upon to meet vague allegations of this kind. It is difficult to avoid the conclusion that when the Magistrate, after having had his attention drawn by this Court to the necessity of setting out the specific allegations to be met, has nothing more definite to say than what is contended in this proceeding, the proceeding in itself is without substance. The proceeding in this case does not satisfy me that there are any genuine tangible grounds for calling upon the petitioners to show cause why they should not be bound down to keep the peace and it must be set aside. There is one other matter to which I ought to refer in connection with the application for transfer although that question no longer falls to be decided. In paragraph 13 of the affidavit it is alleged that the Magistrate at the suggestion of the pleader of the first party got the chamber of Mr. Basu, Barrister-at-law, petitioner No. 2 and also the chamber of the counsel appearing for the accused searched to find out the petitioner Jawahir. Now the Magistrate has dealt with the other allegations contained in this paragraph, but has said nothing about this alleged search. This may be due to an oversight, but if it is to be construed as an acknowledgment of the truth of the allegation then I must say that the Magistrate acted with grave impropriety and on this ground alone the case would have had to be transferred from his file.

Petition allowed.

A. I. R. 1922 Patna 210.

JWALA PRASAD, J.

Raghunandan Pandey—Petitioner

v.

Kishin Mohan Singh and others—Opposite-party.

Cr. Rev. No. 298 of 1920, decided on 14th July, 1920.

Criminal Procedure Code, S. 145—Possession disputed—Decree of Civil Court and proceedings under S. 145 giving possession to one party—Magistrate's duty is to maintain such possession—Remedy of the other party is to apply under S 100, Civil P. C.—Civil P. C., S. 100.

Where in spite of the decree of a Civil Court declaring title and giving possession to the first party and also in spite of an order in appeal of the High Court to that effect under Section 145, Criminal Procedure Code, the Magistrate, on the ground that second party was not a party to the previous proceedings and that the dispute was not the same, declared them to be entitled to claim possession and gave it:—

Held, when, under Clause 3, proceedings under Clause 1 of Section 145 are published by affixing at a conspicuous place or near the subject matter in dispute and thus sufficient notice is given to persons interested in the subject-matter in dispute to come forward and be made parties to the proceedings, the proceedings are binding upon the whole world. As far as the Magistrate is concerned, the question of possession is thus set at rest once for all and thereafter he should maintain the order by taking action under Sections 107 and 144 as the case may be against persons interfering with the possession of the party declared by the Magistrate to be in possession. The possession was effectively delivered by the Civil Court to the 1st party and the only course open to persons, other than the judgment-debtors, was to apply under Section 100 of the Code and thereafter to institute regular suit. The subject-matter in dispute being the same in the new as well as in the previous proceedings that in itself is sufficient ground to set aside the order of the Magistrate.

[P 211, C 2; P 212, C. 2.]

G. C. Pal—for Petitioner.

Khurshed Hussan for Opposite-Party.

Jwala Prasad, J.:—This application is directed against an order of the Magistrate, dated the 9th June, 1920, declaring the possession of the 2nd party under Section 145 of the Code of Criminal Procedure Raghunandan Pandey, 1st party, is the applicant before us. The 2nd party consists of Kishun Mohan Singh, Dharam Lal Singh and Sheo Tahal Rai. The subject-matter in dispute is plot No. 1705 of the Cadastral Survey. The litigation is a long standing one and has become a matter of ancient history which has been given in detail in the judgment of this Court, dated the 7th November, 1918, in a previous proceeding under Section 145 of the Code. Raghunandan Pandey, 1st party, was also 1st party in that case. Sheo Thal of the 2nd party in this case was along with Ramrekha Rai and others, 2nd party in that case. The 1st party purchased on the 16th January, 1917, at an auction sale held in execution of a decree against Ramrekha Rai and his sons, the property of the judgment-debtor and obtained writ Exhibits A and A-1 referred to in the judgment of this Court.

On the 23rd April, two members of the 2nd party in that case Prayag and Ram Kishore instituted proceedings under Rules 100 and 101 of O. 21 of the Code of Civil Procedure disputing the right of the decree-holders to take possession of the properties on the ground that they were not parties to the Civil Court sale and the *Dakhaldehani*. Their objections were disallowed and the possession given by the Court was confirmed on the 16th August, 1917. A few months after that, the possession of the 1st party auction-purchaser was interfered with on the spot. The Police reported on the 17th January, that the 1st party was in possession of the properties and that the judgment-debtors and others at their instigation were trying to disturb his possession. A proceeding under S. 145 was accordingly instituted. The proceeding is dated the 23-1-1918, and is Ex. 3 in this case. It was proclaimed and served on the spot per report of the Sheriff of the Court, dated 30-1-1918. Plot No. 1705 is mentioned in the proceeding as being the subject-matter of dispute.

The Magistrate was therefore under misapprehension in saying that it is not clear that the former case under Section 145 "affected survey plot No. 1705" which is the subject matter of the present case. This in itself vitiates his order under S. 145. If he had looked to Ex. 3, the proceeding in the former case and the Sheriff's report he would not have made this remark and the fact that the present plot was also the subject-matter of the previous proceeding under S. 145 was a very material fact for the determination of the present proceeding before the Magistrate. The delivery of possession by the Civil Court to the 1st party and the proceedings adopted by some of the persons at the instigation of the judgment debtors under Ss. 100 and 101 of the Code of Civil Procedure, were fully dealt with in the judgment of this Court in that case and it was held that the 1st party was in possession of the property, and the only remedy of persons affected by it was to go Tahal Rai, one of the 2nd party in the present case concerned, for he was also a party in the previous proceeding. Clause 3 of the Code of Criminal Procedure requires that a copy of the order of the Magistrate under Cl. (1) of the section, namely, the proceeding under Section 145, shall be published by being affixed to some conspicuous place at or near the subject-matter of dispute. This is a new clause and is intended to give notice to the persons interested in the subject-matter of the dispute to come forward and be made parties to the proceeding. As far as the Magistrate is concerned, the question of possession is thus set at rest once for all and thereafter he should maintain the order by taking action under Ss. 107 and 144 as the case may be against persons interfering with the possession of the party declared by the Magistrate to be in possession. Therefore the proceeding in the previous case is binding upon the whole world. In the other case the order of the Magistrate declaring the 2nd party to be in possession was set aside and it was held that the 1st party was in possession of the property under the recent writ of *dakhaldehani* of the Civil Court. In that view the Magistrate was directed to see that the possession of the 1st party was not interfered with in any way. This virtually was a declaration under S. 145 in favour of the party and the Magistrate should have acted upon the directions given by this Court and protected the 1st party from being interfered with in its possession. The Magistrate has disregarded the order of this Court and has embarked upon an investigation into the question of possession on the ground stated by him that Kishun Mohan Singh of the 2nd party was not a party in the previous S. 145 case. As shown above, this position is untenable. Another reason for reopening the proceeding is stated by the Magistrate to be that he was not a party also in the Civil Court decree and the *dakhaldehani*, but, as shown in the previous judgment of this Court the possession was effectively delivered by the Civil Court to the 1st party, and the only course open to persons other than the judgment-debtors was to apply under S. 100 of the Code and thereafter to institute a regular suit. As a matter of fact two other persons, who subsequently became parties in the former proceedings under S. 145, Cr. P. C., made such applications, which after investigation by the Civil Court were dismissed. It was in the circumstances held that the order became final and conclusive under S. 103 and that order was binding upon the Criminal Court under S. 145 so far as the question of

possession is concerned.

Thus the grounds upon which the Magistrate has re-opened the question of possession are untenable.

Again, the Magistrate in his order has not specified as to whether the three persons, members of the 2nd party, were jointly or severally in possession of the property. If they were jointly liable, the former proceeding under S. 145 operating against Sheo Tahal Rai, one of the members, is also conclusive against the other members also. If, on the other hand, they were separately in possession the Magistrate ought to have said so and to have specified as to which of them was in exclusive possession. The matter is concluded by the subsequent decree of the Civil Court (Ex. 4 dated 13-9-1919, filed before the Magistrate).

Sheo Tahal Rai very rightly under the directions of this Court in the previous proceeding under S. 145 along with others lodged a Civil suit for a declaration of his title and recovery of possession of the property with respect to which an adverse order was passed against him. In that case a number of persons have been arrayed as plaintiffs and defendants. Sheo Tahal Rai knew full well who were the persons interested in the subject-matter and it is conspicuous that although in the present proceeding he claims to be in possession of the property along with two other persons and the order of the Magistrate has been made jointly in favour of all of them, yet he did not make them parties in the civil suit. It clearly shows that Kishun Mohan Singh and Dharam Lal, two members of the 2nd party in the present proceeding, had no interest in the property. That case was decided against the plaintiff Sheo Tahal Rai and the right, title and possession of the 1st party was confirmed and the previous delivery of possession of the Civil Court was also upheld. The 2nd party Sheo Tahal Rai has no *locus standi* in the present proceeding and for the matter of that, the other party Kishun Mohan Singh and Dharam Lal Singh. The Magistrate has disregarded the decree of the Civil Court which was Ex. 4 produced before him and which under S. 145 was conclusive as to the rights of the parties to possession of the property in suit. The fact that the plot was not mentioned in the original Civil Court writ of delivery of possession does not affect the question, for at that time the survey plots were not known. The property was identified in the former proceeding which clearly mentions plot No. 1705 as the subject-matter of the dispute. It has also been specified in the Civil Court decree. (Ex. 4 dated 13-9-1919).

The order of the Magistrate is therefore without jurisdiction and is set aside.

It is strange that the Magistrate in this particular case is bent upon disregarding the repeated orders and decrees of the Civil Courts at the instance of one person or the other. If the man declared by the Civil Court to be rightful owner of the property and entitled to possession of the same, be driven to litigation in this way, perhaps there will be no end to it, for everybody in the village one after the other will come forward to dispute his right. It was clearly held in the previous proceeding by this Court and also by the Police in that proceeding that the judgment-debtors were instigating the persons not parties to the decree to set up claims adverse to the purchaser simply with a view to harass him. There must be finality somewhere and if the Magistrate had realised his duty and done it properly in following the Civil Court precept and maintained the possession of the property, so far as he was concerned, the matter would have come to an end.

I therefore have no hesitation in setting aside the order of the Magistrate and I enjoin the Magistrate will maintain the possession of the 1st party and prevent aggressions by others and will not take notice of the fact that they were not parties either to the Civil Court decree or to the previous 145 proceeding. If anybody is aggrieved by the possession given by the Civil Court let him go to the proper Tribunal for the adjudication of his rights and recovery of the property. The Magistrate has ample power under Ss. 107 and 145 to maintain the possession of the 1st party.

Order set aside.

A. I. R. 1922 Patna 212.

Ross, J.

Ram Nandan Singh and another—Petitioners

v.

The King-Emperor—Opposite-Party.

Cr. Rev. No. 94 of 1922, decided on 22nd March, 1922.

Cr. P. Code, S. 342—Examination not taken —Trial is vitiated.

A trial is vitiated if the accused were not examined as required by Section 342, Cr. P. C.

G. C. Paul—for Petitioners.

No one—for Opposite Party.

Ross, J.:—This trial is vitiated by the fact that the accused were not examined as required by S. 342, Cr. P. C. As the petitioners have been in jail for several days and the offence was a petty assault I do not think it necessary to order a re-trial.

The conviction and the sentences are set aside and the petitioners will be released from bail.

Conviction set aside.

A. I. R. 1922 Patna 213.

Ross, J.

Mannoo Lal Choudhury and others—Defts.-Appellants v.

Lalji Chaube and others—Plffs.-Respdts.

Appeal from Appellate Decree No. 735 of 1920, decided on 22nd March, 1922.

C. P. Code, S. 11—Rent suit for a particular period—Decree will bar subsequent suit for rents of those years—It is not a bar as to rates of rent for subsequent years though it may raise presumption of same rate—B. T. Act, S. 51.

So far as the rents of the years which were in contest in the previous suit were concerned, the decision no doubt is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. The prior decision may be taken to determine the rent claimed in that suit and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. 3 P. L. J. 372 dist. 6 C. W. N. 589, followed.

[P. 214, C. 1.]

Sambhu Saran—for Appellants.

Lakshmi Narayan Singh—for Respondents.

Judgment:—The plaintiff is the tenant of 2 *bighas* 11 *kathas* 18 *dhurs* of land which he alleges he held at an annual *Hunda* rental of 15 mds. of grain. In the recent revisional survey his rent was recorded as 30 mds., and he has brought this suit for a declaration that his rent is 15 mds. a year. The defence was that the rate of rent was 30 mds., that in the Cadastral Survey it had been recorded erroneously as 15 maunds and that subsequently the plaintiff agreed to pay at the higher rate. It was further pleaded that in suit 2483 of 1918 rent was decreed for the years 1322 to 1325 at the rate of 30 mds. per annum. The Munsif decreed the plaintiff's suit and the learned Subordinate Judge dismissed the appeal.

The main question raised in second appeal is whether the rate of rent is not *res judicata* by reason of the decision in the suit of 1918. It is further argued that even if the matter is not *res judicata*, the decision in that suit raises a presumption as to the rate of rent and it would be for the plaintiff to show a subsequent agreement reducing the rent. In *Kishun Dayal Rai* v. *Mt. Kulpati Kuer* (1) Mr. Justice Atkinson laid down that

"a judgment in a rent suit did not in point of law amount to an estoppel and did not accord with the principles of *res judicata* unless the rent was payable at a rate stipulated by contract."

Mr. Justice Mullick observed

"The question whether a decision as to the rate of rent operates as *res judicata* depends on the frame of the issue."

In *Hurry Behari Bhagat* v. *Pargun Ahir* (2) it was held that the question depended upon whether the previous decision was that the plaintiff should recover from the defendant the sum admitted by him to be due, or that the sum so admitted to be due was the proper amount of rent payable for the period in question. In *Hara Chandra Bairagi* v. *Bepin Behari Dasi* (3) the rule was thus stated by Mr. Justice Mukherji:

"Whether the decision in the previous suit operates as *res judicata*, must be determined with reference to the question whether the issue in the previous suit related to the amount of rent payable for a particular period or to the rent payable for the full term of the lease. In the former contingency, the decision is not *res judicata*, in the latter event it is."

In the present case the pleadings in the previous suit have not been produced, and from the judgment there is nothing to show that it was not simply a suit for rent for the years 1322 to 1325. The issue was: "What is the *Hunda* payable by the defendant to the plaintiffs for the rent claimed land"? This issue is equivocal and may be either general or particular. It is true that the judgment is not based on any special considerations, particularly relating to the

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(1) (1918) 3 Pat L. J. 372=45 I.C. 316=1918 P H. C. C. 238.

(2) (1890) 19 Cal. 656.

(3) (1910) 13 C. L. J. 38=6 I. C. 860.

years then in suit; but, on the other hand, there is nothing to show that the Munsif was deciding anything more than the claim to the rent for the years for which rent was claimed. This judgment does not satisfy any of the tests laid down in the decisions cited above. The true rule applicable in this case is that stated in *Maharani Beni Pershad Koeri* v. *Raj Kumar Chowbey* (4).

"We think that so far as the rents of the years which were in contest in that suit were concerned, the decision no doubt is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, we do not think that the judgment can be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. In our opinion, the prior decision may be taken to determine the rent claimed in that suit, and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same."

All that this judgment does is to raise a presumption as to the rate of rent for the following years and that in the absence of evidence of a subsequent agreement it remained the same. The effect to be given to this presumption depends on the whole evidence. The defendant's case was that there had been a panchayat at which the plaintiffs agreed to pay 30 mds. It has been found that this was not proved. It has further been found to be proved that the plaintiff had paid 15 mds. previously and also that the defendants failed to prove payment at 30 mds. subsequently. The case is therefore concluded by the findings of fact.

The appeal must be dismissed with costs.

Appeal dismissed.

(4) (1902) 6 C. W. N. 589.

A. I. R. 1922 Patna 214.

Ross, J.

Bandh Rai and Others—Petitioners

v.

T. B. Norman—Opposite Party.

Cr. Rev. No. 102 of 1922, decided on 23rd March, 1922.

Cr. P. Code, S. 147—Magistrate's finding on existence of right based upon written statement—High Court will not interfere in order based upon such finding.

Where the contention on behalf of the petitioners is that the order in favour of the opposite party in respect of a right to fish in water lying over the occupancy holdings of the petitioners is without jurisdiction inasmuch as an order can only be made under S. 147 if it appears to the Magistrate that the right to use of land or water exists, but the Magistrate himself made a finding of fact to that effect himself, relying on the written statement,

Held; that the order cannot be interfered with. Where there is an allegation that the right is the sole right of the Pipra concern, who have been exercising and enjoying it ever since the grant of the mokarari right to them by the Bettiah Raj:—

Held: although this is not an explicit pleading of an acquisition of the right by adverse possession it is sufficient to let in the evidence on which that finding has been arrived at. [P. 215, C. 1.]

Sambhu Saran for Petitioners.

P. Kennedy and *B. K. Mitt*—for Opposite Party.

Ross, J.:—This is an application against the order of the Sub-Divisional Magistrate of Motihari made in favour of the opposite party under S. 147 of the Criminal Procedure Code in respect of a right to fish in water lying over the occupancy holdings of the petitioners in village Bathnah.

The contention on behalf of the petitioners is that the order is without jurisdiction inasmuch as an order can only be made under S. 147, if it appears to the Magistrate that the right to the use of land or water exists, and that in the present case the Magistrate has taken an erroneous view of the law on the subject. He has held that the opposite party is in possession of this right, although he had no such right in law and consequently no order can be made under S. 147. Reference is made to the decision of Mullick, J., in the case of *Messrs. Henry Hill and Co.* v. *Sheoraj Rai*(1). Now the law on the subject is certainly mis-stated in the judgment of the Magistrate. But this in itself does not entitle this Court to interfere if there was jurisdiction to make the order. In para. 5 of the judgment there is a finding that from 1310 onwards the right to fish in the tank as well as in the Chaur of Bethnah village has been annually leased to a *thikadar* by the opposite party and up to the current year the possession of the disputed use of water for fishing purposes in the village has been shown to be in favour of the landlord. This amounts to a finding that the opposite party has acquired the right to fish over these lands by prescription. It is urged that on the written

(1) Letters Patent No. 7 of 1921.

statement of the opposite party no such finding was open to the Magistrate. It is true that throughout the written statement there is the same misapprehension of the law as in the Magistrate's own judgment: but in the last there is an allegation that the right is the sole right of the Pipra concern, who have been exercising and enjoying it ever since the grant of the mokarari right to them by the Bettiah Raj, although this is not a pleading of an acquisition of the right by adverse possession, it is sufficient to let in evidence on which that finding has been arrived at. The application is dismissed.

Application dismissed.

A.I.R. 1922 Patna 215.

DAWSON MILLER, C. J. AND ADAMI, J.

Bishun Pragash Narayan Singh—Appellant

v.

Achaib Dusadh and others—Respondents.

Letters Patent Appeal No. 24 of 1921, decided on 27th March, 1922, from a decision of Ross, J.

Bengal Tenancy Act, S. 52 (a)—Applies to cases where land is proved to be in excess of the area for which rent was previously paid.

The tenant's liability to pay additional rent is not limited to cases where the area is in excess of that comprised in the Settlement at its inception but merely to cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid by him.

[P. 215, C. 2: P. 216, C. 1.]

The Zemindar must show that the lands were in excess of those for which rents were being paid and that to do this it is for him to show what those lands are and what were the terms of the original settlement and what was the process of the measurement, if any, adopted. If there has been an intermediate settlement, the landlord need not go back to the inception of the tenancy and prove what area was then settled.

[P. 216, C. 2.]

Sultan Ahmed and *Hurnarayan Prasad*—for Appellant.

Syed Mahomed Tahir—for Respondents.

Dawson Miller, C. J.:—This is an appeal under the Letters Patent from the decision of a single Judge of the Court overruling the decision of the special Judge who had affirmed that of the Assistant Settlement Officer.

The appellant took proceedings under S. 105 of the Bengal Tenancy Act as landlord against a large number of tenants claiming in some cases enhancement of rent under S. 30 of the Act and in other cases additional rent under S. 52 (*a*).

The present appeal is concerned only with the claims under the latter section in respect of land held by the tenants in excess of the area for which rent had been previously paid by them. In certain cases it was found that the tenants had been in occupation of their holdings since before the survey and settlement operations of 1898 and paying rent therefor to the landlord, and that the settlement and Record-of-Rights finally published in March, 1917 showed that although the rent remained the same, the area of their holdings was in excess of that for which they had been paying rent according to the previous settlement. The Assistant Settlement Officer before whom the case came held that in the cases mentioned the landlord was entitled to an additional fair rent for the excess area after making an allowance of 5 per cent. for probable difference in area extraction. An appeal by the tenants to the special Judge was dismissed. On second appeal to this Court the case came before Mr. Justice Ross who took the view that in all such cases, in order to prove that the lands in respect of which an additional rent is claimed, are in excess of the area for which rent was previously paid, the landlord must show that the area included in the tenancy at its inception was less than that subsequently shown by measurement to be in occupation of the tenant. It followed from this, in his view, that although the tenant's holdings were proved by scientific measurement at the previous survey and settlement operations, made some twenty years earlier, to have been less than that for which they were still paying the same rent as shown by the subsequent survey, the landlord could not recover any additional rent in respect of the excess area. For this finding he relied upon the decisions in the following cases: *Gouri Pattra* v. *H. R. Reily* (1), *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (2) and *Rajkumar Pratab Sahay* v. *Ram Lal Singh* (3).

With great respect to the learned Judge I am unable to concur in the view taken by him. On referring to S. 52 (*a*) of the Bengal Tenancy Act it does not appear that the tenant's liability to pay additional rent is limited to cases where the area is in excess of that comprised in the settlement at its inception, but merely to cases where the land is proved by measurement

(1) (1892) 20 Cal. 579.
(2) (1902) 6 C.W.N. 318.
(3) (1907) 5 C.L.J. 538.

to be in excess of the area for which rent has been previously paid by him. The section provides as follows :—

"52 (1) Every tenant shall—

(*a*) be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him unless it is proved that the excess is due to the addition to the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise without any reduction of the rent being made."

The exception in the latter part of this section does not apply to the present case. By Cl. (*b*) of the section the tenant is entitled to a reduction of rent in similar circumstances where the measurement shows a deficiency in the area of his tenure or holding as compared with the area for which rent has been previously paid by him. And in the case of some of the tenants the Assistant Settlement Officer allowed such reductions but we are not concerned with them in the present appeal.

Where no previous measurement has been made upon a scientific basis from which the actual area of the land held by the tenant can be accurately determined and compared with the area proved to be held at the date of the claim, no doubt the landlord is confronted with a more serious problem in proving an excess of area, and generally speaking he could only discharge the burden of proof in the case supposed by shewing that the area of the tenure or holding at the inception was less than that subsequently shewn by proper measurement to be in occupation of the tenant. Consequently it was held in *Gouri Pattra* v. *Reily* (1) that the mere fact that a measurement made under Chapter X of the Bengal Tenancy Act, 1885, shewed the tenants to be in occupation of lands in excess of the areas shewn in the *zemindari* papers and rent receipts did not necessarily prove that the landlord was entitled to an additional rent. It is important to bear in mind that in that case it was found that at no previous time had there been a measurement of the lands in suit, and that the actual areas let out were originally ascertained by guess work without any accurate survey, and it was the areas so arrived at that were entered in the landlord's papers. The Court thought it would be impossible in these circumstances to find that the areas were accurately stated in the landlords' papers. They added that it was for the *Zemindar* to shew that the lands were in excess of those for which rents were being paid and that to do this it was for him to shew what those lands were and what were the terms of the original settlement and what was the process of measurement, if any, adopted. This has been relied on for the proposition that in all cases, even if there has been an intermediate settlement the landlord must go back to the inception of the tenancy and prove what area was then settled. I do not think the decision can be held to support this view. In dealing with the object of Chapter X of the Bengal Tenancy Act the judgment states that it is to enable the landlords and tenants to know their relative position towards one another and not to disturb previously existing relations unless it can be shewn that they have terminated, and adds:

"The Zemindar in this case is bound to shew how the areas in the last settlement with the ryots were ascertained and that the ryots are now in possession of excess lands and consequently liable to pay additional rent therefor."

The settlement and Record-of-Rights defines the relationship between landlord and tenant in various respects including the area of the holdings for which rent is paid and is presumed to represent what is the relationship between them until the contrary is proved. The settlement in 1898 was made in the presence of both parties and accepted without objection as representing the area for which rent is paid. The effect of such a settlement would be to throw the *onus* upon the party questioning it, and in this case the tenant has to shew that it did not accurately represent the true state of affairs. In the present case therefore it must be presumed that the settlement of 1898 was correct and the initial *onus* cast upon the landlord is discharged. The subsequent settlement shews an area arrived at by the same process of measurement to be in excess of that for which rent has been previously paid.

The later decisions which have been referred to are based upon the decision in *Gouri Pattra's case* (1) and do not carry the matter any further in so far as the general principle is concerned. In none of them was there an intermediate settlement by which the area could be definitely ascer-

tained. *Rajendra Lal Goswami* v. *Chandra Bhusan Goswami* (2) was complicated by the fact that the excess claimed by the landlord was alleged by the tenant to be due to the addition of land previously belonging to the tenure but lost by diluvion which is not the case here. In *Rajkumar Pratab Sahay* v. *Ram Lal Singh* (3) there was no intermediate settlement and therefore the original settlement had to be proved before it could be shown that the lands were in excess of those for which rent was previously paid. In the later case of *Durga Priya Chowdhuri* v. *Hazra Gain* (4) it was definitely held that it is not in all cases necessary for the landlord to prove the area of the holding at the time of the inception of the tenancy. It is sufficient for the landlord to establish that since the inception of the tenancy rent has been assessed on the basis of a certain area and that the tenant is in possession of lands not included in that area and on which no rent was assessed.

In the present case the previous survey and settlement *khatiyan* were produced and proved and from these it appears on comparison with the recent survey, in which the method of measurement was the same, that the tenants are holding lands in excess of those for which they were paying the same rent since 1898. The only point which appears to have been urged by the tenants on appeal to the Special Judge was that the survey measurements must have been inaccurate in argument which did not commend itself to the Special Judge. In this respect I concur with his view. On the facts proved I think the appellant has satisfied the burden of proof required by S. 52 of the Act and is entitled to the additional rents such as may be just and equitable upon the excess areas found by the Asst. Settl. Officer. The appeal is allowed. The decree of Ross, J., is set aside and that of the Asst. Settl. Officer restored. The appellant is entitled to his costs here and before Ross, J.

Adami, J.:—The appellant in applications under S. 105 read with S. 52 (1) (*a*) of the Bengal Tenancy Act claimed additional rent in respect of lands in the holdings of the respondents, his tenants, in village Hiramani which, according to his allegation, were shown by the measurement entered, the Record-of-Rights to be in excess of the area for which rent had been previously paid by them. He asserted in the application that at their inception of the tenancies the area of the holdings had been determined by the measurement with a pole of ten cubits.

The Asst. Settl. Officer decided that the appellant had failed to prove either actual encroachment or that there was a practice of settlement of land by measurement in the estate and, if there was such a practice, how the measure adopted for the purpose compared with the present survey measure. He found however that the respondents had held the tenancies from the time of the previous settlement, the Record-of-Rights of which was finally published in 1898, and that there had been no alteration of rent since that year, and held that the appellant-landlord was entitled to additional rent for any excess area found on comparison of the survey area of 1898 with the area shown in the Record-of-Rights published in 1917. Therefore, after making an allowance of 5 per cent. for probable difference in the area extraction of the same field by different persons at different times he assessed a fair rent in respect of the excess area so found and granted the application to that extent.

The Special Judge, on appeal by the present respondents, upheld the decision of the Asst. Settl Officer, finding that at each survey the area was determined by a scientific process and that the comparison gave sufficient evidence of an excess.

On second appeal the learned Judge of this Court has disagreed with the lower Courts and has held, basing his decision on *Gouri Pattra* v. *H. R. Reilly* (1), *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (2) and *Rajkumar Pratab Sahay* v. *Ram Lal Singh* (3), that, in order to show that the lands in respect of which an additional rent is claimed are lands held in excess of those for which rent was paid, the landlord must prove an excess over the quantity of land included in the tenancy at its inception, and that the criterion is the area of the holding at the inception of the tenancy and not any intermediate measurement. The learned Judge refused to accept the argument that the present case should be differentiated from the cases on which he relies because in the present case there were two survey measurements in both of which the same scientific standard was

(4) A.I.R. 1921 Cal. 345.

employed, as he finds that there is no authority to support the view and no justification in principle to support the argument.

Now Section 52 (1) (*a*) is perfectly clear in its terms, it provides that every tenant "Shall be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him," and sub-Section (2) runs: "In determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to—

"(*a*) the origin and conditions of the tenancy, for instance whether the rent was a consolidated rent for the entire tenure or holding,

"(*b*) the length of the measure used or in local use at the time of the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit."

In the case of *Gouri Pattra* v. *H. R. Reilly* (1) the landlord sought to prove the area for which rent had been previously paid by the tenants by entries of area in his zemindari papers and in rent receipts. There was no evidence in that case that there had been any measurement of the lands according to any actual standard and it was found that the areas shown in the zemindari papers were arrived at by guess work. The Court rightly held that the areas shown in the papers could not be accepted. The judgment shows that it was assumed that the tenants had required the Assistant Settlement Officer to have regard to the points mentioned in sub-Section (2). In absence of other evidence of measurement the Court decided that it was for the landlord to show what were the terms of the original settlement and whether it was by any, and if so, by what process of measurement.

In the case of *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (2), the landlord sought to base the comparison on the area shown in the revenue survey papers of 1854. The learned Judges appear to have considered that sub Section (2) of Section 52 was mandatory, whether the tenants required the Court to have regard to the origin of the tenancy or not, and held that the landlord must show that the alleged excess is really an excess over the area of the tenure as originally created. They state:—

"We think the language of sub-Section (2), Clause (*a*), by referring to the origin and conditions of the tenancy as some of the circumstances which the Court is required to have regard to, shows that the expression "the area for which rent has been previously paid" must be understood to mean the "area with reference to which the rent previously paid had been assessed or adjusted."

The decision in *Rajkumar Pratab Sahay* v. *Ram Lal Singh* (3) followed that in *Gouri Pattra* v. *H. R. Reilly* (1), as did the decision in *Ratan Lal Biswas* v. *Jadu Halsuna* (5), but in both of these cases the landlord sought to base the comparison on entries in *zemindari* papers and receipts; no scientific previous measurement was shown.

The above cases are authorities for the principle that where there is no good evidence of scientific measurement, assessment or adjustment since the inception of the tenancy, the landlord will have to prove what was the area at the origin of the tenancy, or that the lands originally settled were defined by boundaries which have been encroached upon, or that rent was settled at a certain rent per *bigha*.

In *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (2) and in *Akbar Ali Mian* v. *Mt. Hira Bibi* (6), it has been held that the words "the area for which rent has been previously paid" in Section 52 mean "the area with reference to which the rent previously paid has been assessed or adjusted" and in the case of *Durga Priya Choudhuri* v. *Hazra Gain* (4), where the District Judge has held that it was necessary for the plaintiff to prove the area of the holding at the time of the inception of the tenancy. Sir Asutosh Mukherji, Acting C. J., held that the view taken by the District Judge was erroneous and that it was sufficient for the landlord to prove that since the creation of the tenancy rent had been assessed, that when rent was last assessed the assessment was on the basis of a certain area and that the defendants were in possession of land on which no rent was assessed at the time.

Now in the present case there is nothing to show when the tenancies were created, or how rent was assessed, whether the rent was a consolidated rent or was assessed at a certain rate per *bigha*, or whether there was any measurement of the holdings at

(5) (1905) 10 C. W. N 46.
(6) (1912) 16 C. L. J. 182=15 I.C. 332.

the inception. We have the evidence, however, of the Record of-Rights published in 1898 that a certain rent was then being paid for a holding of a certain area. During the preparation of the Record-of-Rights the holding was measured scientifically and the area shown in the record was the result of the measurement; the settlement proceedings were carried on publicly and the parties may be presumed to have been present and to have had every opportunity of objecting. The rent payable by the tenants was ascertained and recorded, and it must be presumed that the tenants accepted that rent as the rent payable for the area as recorded. They did not come forward and prove that the area recorded was less than the area of the holding at its inception. The entry shows that the rent entered there was either the rent for the area which the tenants had been paying previous to 1898, or was the rent assessed or adjusted after dispute during the settlement proceedings between the parties as to the amount payable. In my opinion the area shown in the record of 1898 was the area with reference to which the rent previously paid by the respondents was assessed or adjusted. The respondents continued to pay the same rent for nearly twenty years and at the end of that time in the settlement of 1917 it was found after scientific measurement by the same standard that the area of the holding for which that rent was being paid had increased. I am of opinion that according to the clear wording of S. 52 (1) (*a*) the landlord was entitled to additional rent for the land in the holdings which was not covered by the area entered in the Record-of-Rights of 1898.

I would therefore allow the appeal with costs and set aside the decree now appealed against.

Appeal allowed.

A. I. R. 1922 Patna 219.

Ross, J.

Raja Kalanand Singh and others—Petitioners

v.

Hirde Misser and others—Opposite Party.

Crim. Rev. No. 601 of 1921, decided on 24th March, 1922.

Cr. P. Code, S. 107 — Ferry — Dispute about possession — Jurisdiction—Magistrate having no jurisdiction over place of ferry cannot pass an order in respect thereof.

By the award of arbitrators it was agreed that the parties share equally the tolls of the ferries situated in two places. The Magistrate in proceeding under S. 107 held that the proceeds belonged to the second party only, who were originally entitled to them, on the ground that only some of the landlords of the second party were party to arbitration proceedings—

Held, the main objection to this order is that, so far as there is any dispute between the parties, it relates to the right of the second party to take passengers to and from Raotara and so far as the Magistrate's order has the effect of declaring that the second party have this right, it is without jurisdiction, Raotara is admittedly in Madhipura subdivision, and the proper tribunal for the decision of any question as to the taking of passengers by ferry from and to Raotara is the Court of the Sub-Divl. Magistrate of Madhipura.

[P. 220, C. 1,]

P. C. Manuk and *S. N. Palit*—for Petitioners.

K. N. Choudhury and *N. C. Roy*—for Opposite Party.

Ross, J. :—This is an application by the first party, who may be briefly described as Rajas of Baneili, against an order passed by the Sub-Divl. Magistrate of Bhagalpur under S. 145 of the Criminal Procedure Code declaring the rights of the parties in a ferry known as Karhil Ferry which plies on the river Ghagri between Nagarpara, on the south and Nagarpara, Raotara and Murat on the north. The second party are the proprietors of Nagarpara. There is no dispute that the ferry belongs to the second party and that originally it plied between Nagarpara on the south and Nagarpara on the north. In 1324 the river changed its course and was no longer in Nagarpara alone. In October, 1918 a new ferry *ghat* was opened in plot No. 60 in Nagarpara and plot 507 in Raotara. A dispute arose and proceedings were taken under S. 107. The matter was referred to arbitration and the award of the arbitrators was embodied in a registered document on 23-4-1920, whereby it was agreed that no matter where the landing stage was located the petitioners would be entitled to one-half of the tolls. The learned Magistrate holds that that agreement was accepted by the 8 annas, landlords of Nagarpara and they are bound thereby, but that the opposite party Nos. 17, 21 and 22, owners of the other 8 annas did not accept it and are not bound. He therefore ordered that the said contesting second party should be entitled to realize their entire share of the ferry dues. The main objection to this order is that, so far as there is any dispute be-

tween the parties, it relates to the right of the second party to take passengers to and from Raotara, and so far as the Magistrate's order has the effect of declaring that the second party have this right, it is without jurisdiction. Raotara is admittedly in Madhipura sub-division, and the proper tribunal for the decision of any question as to the taking of passengers by ferry from and to Raotara is the Court of the Sub-divisional Magistrate of Madhipura. This part of the order is clearly without jurisdiction and the order of the Magistrate will be modified as follows :— It is declared that the second party are in possession of Karhil Ferry and are entitled to take passengers from Nagarpara on the north to Nagarpara on the south. So far as the order declares the rights of the second party to take passengers to and from Raotara it is set aside, without prejudice to the rights of the parties which may be declared by a competent Court. *Order modified.*

A. I. R. 1922 Patna 220.

JWALA PRASAD, J.

Firm Sanehiram Baijnath and others—Defts.-Appellants v.

Surajmal Marwari—Plaintiff-Respondent

Appeal No. 982 of 1920 and Civil Revision No. 79 of 1921, decided on 9th February, 1922, from Appellate Decree of Sub.-J., Ranchi, dated 22nd November, 1920.

Contract Act (IX of 1872), S. 30—Wagering contract—Common intention not to accept or deliver goods is essential—Speculation is not wager.

Where the plaintiff expects that the goods would be delivered to him and he enters into the contract with that expectation, and also in the hope of making some profit upon the difference in price.

Held: the defendants might or might not have intended to deliver the goods, but that would not make the contract a contract of wager. In order to bring a contract under S. 30 of the Contract Act it is necessary to show that both parties intended that no delivery or acceptance shall take place and agreed that the mere difference between the price at the time of the bargain and the price at some later time shall be paid; but if only one of the parties intends that no delivery shall take place the contract is not vitiated. Speculation does not necessarily involve a contract by way of wager and to constitute such a contract a common intention to wager is essential. A.I.R. 1917 P. C. 101 followed 29 Cal. 461 referred to. [P. 221, C. 2; P. 222, C. 1.]

H. Nandkeolyar and *G. C. Pal*—for Appellants.

B. N. Mitter—for Respondent.

Judgment :—The defendants have filed this second appeal No. 982 of 1920 as well as an application in revision No. 79 of 1921 against the decree passed against them on 22-11-1920, by the Subordinate Judge of Ranchi, reversing that of the Munsif, dated 23-1-1920.

The plaintiff sued the defendants for recovery of Rs. 462-8-0 besides interest, Rs. 512-6-0 on account of a breach of contract caused by the defendants. The suit was of the nature cognizable by a Court of Small Causes and as such the second appeal to this Court is barred by S. 102 of the Code of Civil Procedure. The second appeal is therefore incompetent and must be dismissed.

This Court entertain the civil revision No. 79 of 1921 only under S. 150 of the Code of Civil Procedure, that is, upon the grounds mentioned in that section affecting the jurisdiction of the Court below or showing that the Court acted in the exercise of its jurisdiction illegally or with material irregularity. Mr. Nandkeolyar, appearing on behalf of the defendants, says that the contract alleged by the plaintiff, upon which his action is founded, is "by way of wager," and that such a suit is not entertainable by reason of Section 30 of the Indian Contract Act (IX of 1872). That section runs as follows :—

"Agreements by way of wager are void and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."

The present case as laid in plaint was the defendants entered into a contract with the plaintiff on the 14th of October, 1918 to supply to the latter at Ranchi 100 maunds of fine *Sargunja* (oil seeds) on the 16th of January 1919 at the rate of Rs. 4-14-0 per maund and the plaintiff agreed to purchase the same at the said rate ; that the defendants "did not deliver" to the plaintiff the oil seeds in accordance with the aforesaid contract, and just after the expiry of the due date, the 16th of January, 1919, the plaintiff served a notice upon the defendants on the 19th of January and subsequently another notice on the 13th of February to deliver to him the goods in question, failing which to pay the difference in value. But the defendants did not reply to the said notices. Consequently the plaintiff suffered loss which he estimated at the difference in the contract price and the price prevailing on the due date. The suit

was instituted on 25—2—1919. The defendants denied the contract and also pleaded that the contract was illegal and the plaintiff was not entitled to recover the difference in price by reason of S. 30 of the Contract Act.

The principal issue raised at the trial was whether the contract was illegal and void on account of the same being a wagering contract only. The Munsif answered this in the affirmative. The learned Subordinate Judge differed from the Munsif and held that the contract was a valid one and was not wagerous as was pleaded by the defendants. Both the Courts below, in arriving at this divergent view, referred to the evidence and circumstances of the case. The Munsif drew an inference from the consideration of the various circumstances set forth in his judgment, that there was no contract of sale but only an agreement of bargain upon the fluctuating price of the oil seeds. The learned Subordinate Judge has also referred to certain circumstances and the evidence in the case in support of his view. He says:

"In the present case it is in evidence that *Surguja* seeds which are locally produced, are often sold and purchased in the local market. The appellant pressed for actual delivery of 100 mds., failing which he demanded the difference between the contract price and the market rate. He had dealings in *Surguja* and cannot be held to have intended to pocket the profit without actual transfer of the goods."

Here the contract was with respect of 100 mds., of oil seeds at the rate of Rs. 4-14-0 a md., that is, the contract was with respect to a sum below Rs. 500. Both the plaintiff and the defendants have firms at Ranchi and deal in grain. The plaintiff in his evidence stated that he carries on trade to the value of Rs. 10,000. Considering this circumstance the learned Subordinate Judge held that the contract entered into between the parties was not beyond the means of the parties, and it cannot be said to be too extravagant to be "capable of compliance" or the parties never intended to sell and deliver the goods but to profit by the difference of price on account of the rise and fall of the market. Thus he distinguished the present case from that covered by the decision of their Lordships of the Privy Council in *Kong Yee Lone and Co.* v. *Lowjee Nanjee* (1). In that case their Lordships found that the capital of the firm was a trifle more than a lakh of rupees and the cost of the goods covered by the contract would be that amount multiplied five hundred fold. Their Lordships observed: "It is possible for traders to contemplate transactions so far beyond their basis of trade, but it is very unlikely. In point of fact they never contemplated nor were they called on to complete any one of the ostensible transactions. The rational inference is that neither party ever intended completion." From these data their Lordships of the Privy Council say:

"It is unreasonable to draw any other conclusion than that the description which the larger promissory note gives of the consideration for it is the correct one. It is for "difference on rise" not as now contended, for the price of rise resold by the plaintiffs to the defendants."

In the present case the means of the parties are, as observed above, not so trifle, and the contract entered into by them was not exorbitant and extravagant. The intention of the parties was that the goods would be delivered as the plaintiff expected it, inasmuch as just after the expiry of the due date he persistently demanded the defendants to deliver the goods to dim. Similarly the case of *Firm of Lal Chand Gela Ram* v. *Nathu Ram* (2) was decided upon the facts and circumstances of that case. His Lordship, Shadi Lal, J., observes:

"The mode of entering into these transactions as set out in the judgment of the lower Court, the fact of their value being far beyond the means of the parties, the absence of any attempt to complete any of the transactions and other circumstances, warrant the inference that the agreement in question was not a commercial transaction, but a wager, pure and simple. The plaintiff, no doubt, as observed above, expected that the goods would be delivered to him and he entered into the contract with that expectation, and not only in the hope of making some profit upon the difference in price. The defendants might or might not have intended to deliver the goods, but that would not make the contract as a contract of wager. In order to bring a contract under Section 30 of the Contract Act it is necessary to show that both parties intended that no delivery or acceptance shall take place and agreed that the mere difference

(1) (1902) 29 Cal. 461 = 28 I. A. 239 = 8 Sar. 101 (P.C.).
(2) (1916) 74 P.L.R. 1916 = 36 I. C. 48 = 226 P. W. R. 1916.

between the price at the time of the bargain and the price at some later time shall be paid; but if only one of the parties intends that no delivery shall take place the contract is not vitiated."

In the present case at best the defendants only might not have intended to deliver the goods; but the plaintiff, on the other hand, did enter into the contract with the intention of enforcing the delivery of the goods. This has been made clear by the latest pronouncement of their Lordships of the Privy Council in the case of *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (3), where their Lordships held that speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager; nor would the mere fact, that as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction.

My attention has been drawn to a number of authorities in both ways, but each case was decided upon its own case. The Court below was, therefore, entitled to draw a legal inference from the facts set forth by it that the contract in the present case was a valid and legal contract and was not affected in any way by S. 30 of the Indian Contract Act. There was no want of jurisdiction in the Court below nor has the decision been arrived at in any irregular or illegal manner. It is a question only of the difference of opinion between the court below. Therefore the defendants are not entitled to invoke the revisional jurisdiction of this Court to set aside the decree passed against them.

The Court below has, however, failed to exercise the jurisdiction vested in it in not deciding Issues Nos. 4 and 5 raised in the trial Court. Those issues are :—

"Are the defendants, Sukhdeo and Nand Lal, minors and can the suit proceed against them in this form."

(Issue No. 4).

"To what relief, if any, is the plaintiff entitled."

(Issue No. 5).

The contract is said to have been entered into between the plaintiff and defendant No. 1. Neither in the plaint nor in the evidence is there any reference to the other defendants having entered into any contract with the plaintiff. The Court below has not given any reason for making his decree against the defendants other than defendant No. 1. Two of the defendants are minors, and no reason has been given by the Court below as to how these defendants are bound by the contract set forth by the plaintiff. The decree passed against the defendants other than defendant No. 1 is illegal and without jurisdiction. The trial Court held that the contract was illegal and the plaintiff was not entitled to enforce it against any of the defendants. Consequently it was not necessary for that Court to come to a definite finding upon Issues Nos. 4 and 5. The learned Subordinate Judge while holding that the contract was proved, ought to have gone further and held to what relief was the plaintiff entitled and against which of the defendants. This he failed to do and therefore the decree passed by him is liable to be set aside in revision as against defendants Nos. 2 to 5.

The decree of the Court below is confirmed as against defendant No. 1 and is set aside as against the remaining defendants. In the circumstances of the case each party will bear his own costs. *Appeal partly allowed.*

(3) A.I.R. 1917 P. C. 101=42 Bom. 373=45 I. A. 29 (P.C.).

A. I. R. 1922 Patna 222.

COUTTS AND ROSS, JJ.

Musammat Makhduman — Defendant-Appellant

v.

Saiyed Altaf Hussain and others—Plaintiffs Respondents.

Second Appeal No. 300 of 1921, decided on 27th March, 1922.

Evidence Act, S 91—Deed not produced—Proof of transaction by other evidence is not barred.

Where it was contended that the plaintiff, not having produced *Bainukasha* deed, was not entitled to adduce evidence of the transaction and therefore failed to establish his title:—

Held, all that Section 91 provides is that when the terms of a contract or of a grant or any other disposition of property, have been reduced to the form of a document, no evidence shall be given in proof of the terms of such a contract, grant or disposition of property except the document itself. This, however, refers only to the method of proof of the terms of contract, grant or disposition of property; it does not exclude other proof of the transaction itself and this being so, the Courts are entitled to consider the other evidence adduced in proof of *Bainukasha* transaction. [P. 223, C. 2.]

S. M. Mullick and *Siva Narain Bose*—for Appellant.

Kailaspati—for Respondents.

Coutts, J.:—This appeal is against a decision of the Additional Subordinate Judge of Gaya, dismissing an appeal against the decision of the Munsif in a suit which was brought by one Saiyid Altaf Hussain and others for a declaration of their permanent *mokarrari* interest in 10 *dams* and odd share of village Aurapokhar.

The case of the plaintiff is that 8 annas *milkiat* of the village originally belonged to the ancestors of Sayid Abdul Rahim and Sayid Fazl Tauhid. These persons granted *mokarrari* of their 8 annas *milkiat* to Mussammat Hayatan, the widow of Shah Mehdi Ali, by a *patta* dated 4—2—1805. Out of this 8 annas *mokarrari* 4 annas went to Shah Rahat Hussain, Mehdi's brother's son and 4 annas remained with Mussammat Hayatan. Saiyed Muhammad Nasir, one of the sons of Rahat, got by inheritance 19 *dams* and odd out of the 4 annas *mokarrari* which had gone to Rahat and in respect of this he executed a *Bainukasha* in favour of his wife Mussammat Kubra in 1895. In the following year Mussammat Kubra executed a *kabala* conveying this 19 *dams* and odd to the plaintiff No. 1. The plaintiff No. 1 in 1915 executed a *darmokarrari* deed in favour of his sons plaintiffs Nos. 2 and 3. During the survey, however, the defendant No. 13 and the defendant No. 6 fraudulently arranged that the defendant No. 1 should get the name of the plaintiff No. 1 recorded only in respect of 1 *dam* 19 *kowris* and odd out of the 19 *dams* as *mokarraridar*.

The defendant's main plea was that neither Rahat Hussain nor his sons, including Nazir, nor Mussammat Kubra had any interest in the *mokarrari*. He alleged that the suit was barred by limitation as the plaintiff had not been in possession within 12 years, that out of the 8 annas *mokarrari* defendant No. 1 got 4 annas from her mother-in-law Hayatan as a present and the other 4 annas was divided amongst the heirs of Hayatan Her husband gave her 18 *dams* and odd out of his own inherited share in lieu of her dower. Later on she became possessed of 4 annas 18 *dams milkiat* by virtue of a *kabala*, dated 22—6—1898, and thus her *milkiat* and *mokarrari* right became equal in extent and she was accordingly recorded correctly in the *khatian*.

The suit was decreed in the Court of first instance, and this decree has been upheld on appeal by the Additional Subordinate Judge. The defendant No. 1 has appealed to this Court.

The first point urged in appeal is that as the *Bainukasha* deed has not been produced, the plaintiff is not entitled to adduce evidence of this transaction, and this being so the plaintiff has failed to establish his title. This argument is based on a misapprehension of the scope of S. 91 of the Evidence Act. All that S. 91 provides is that when the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or disposition of property, except the document itself. This, however, refers only to the method of proof of the terms of contract, grant or disposition of property; it does not exclude other proof of the transaction itself, and this being so, the Courts below were entitled to consider the other evidence which was adduced in proof of the *Bainukasha* transaction.

The next point urged is that certain documents which have been relied on by the learned Subordinate Judge are not admissible in evidence. These are Exs. 9, 7 and 3. From Ex. 9 it appears that one Saiyed Medhi Hussain brought a suit for specific performance of contract of sale against Mussammat Kubra and the plaintiff No. 1. In that suit it was urged that Mussammat Kubra had entered into a contract to sell her *mokarrari* share to Mehdi Hussain, and in that suit neither the title of Mussammat Kubra nor the title of Rahat Hussain was denied, although the defendant No. 13, the husband of defendant No 1, gave evidence against the plaintiff. It is clear that the husband of the defendant No. 1 has for long been trying to dispossess the plaintiff No. 1 from the disputed share. That document then is clearly evidence for what it is worth. The next document is Ex. 7. This mentions that Nazir gave an *ijara* of 14 *dams* and odd share along with other properties to the defendant No. 13, and what the learned Subordinate Judge says in regard to this is that this share although it is stated to be *milkiat* evidently refers to the *mokarrari* interest as it is nobody's case that Nazir had any share in the *milkiat* of village of Rampokhar. The inference may perhaps be a wrong one, but it is certainly a legitimate one to draw

and here again the document is clearly evidence for what it is worth. Similarly Exhibit 3 also shows that defendant No. 13 had knowledge of the plaintiff No. 1's purchase and this again is evidence. The Courts below were therefore entitled to consider all these documents, and their findings are findings of fact with which we cannot interfere in second appeal.

The last point urged is that the decree which has been granted to the plaintiff contains a declaration that the defendant No. 1 is the proprietor, and it is contended that this is not a declaration to which the plaintiff is entitled. This is admitted by the learned Vakil for the respondents and this declaration should clearly be omitted from the decree.

In the result, then, I would dismiss this appeal except for the slight modification to which I have referred, namely, that that part of the decree, which declares that the defendant No. 1 is the proprietor, should be expunged. The appellant will bear the costs.

Das, J. :—I agree.

Decree modified.

A. I. R. 1922 Patna 224 (1).

Ross, J.

Janki Singh—(1st party) Petitioner

v.

Bidapat Singh and others—(2nd Party) Opposite Party.

Criminal Revision No. 96 of 1922, decided on 21st March, 1922.

Criminal Procedure Code, S. 299—Jury—Opinion of—Construction.

Where it was contended that the jury acted without jurisdiction in recommending that *Bhusaul* should be allowed to remain on land which they found to be a public road :—

Held. In allowing the *Bhusaul* to remain they must be understood as having found that it did not constitute any obstruction. [P. 224, C. 2.]

Shiveshwar Dayal and *Satyadeva Sahay*—for Petitioner.

Sambu Saran—for Opposite Party.

Ross, J. :—The only point of substance taken in this application is that the jury acted without jurisdiction in recommending that the *Bhusaul* should be allowed to remain on land which they found to be a public road. Reference was made to *Queen-Empress* v. *Kedar Nath* (1), where it was held that any obstruction on the public road is a nuisance. Reading the verdict of the jury it seems to me that they made a distinction between the *Bhusaul* and other articles such as tiles, palm tree leaves, etc. These latter they evidently regarded as a nuisance and ordered that they should be removed. In allowing the *Bhusaul* to remain they must be understood as having found that it did not constitute any obstruction.

In my opinion, there is no ground for interference with this order.

The application is dismissed.

Application dismissed.

(1) (1901) 23 All. 159.

A. I. R. 1922 Patna 224 (2).

ADAMI AND ROSS, JJ.

Chulai Mahto and others—Petitioners (3rd Party)

v.

Babu Surendra Nath Chatterji—(1st Party) *and others*-Opposite Party (2nd Party.)

Cr. Rev. No. 388 of 1921, decided on 3rd November, 1921.

Criminal Procedure Code, Ss. 148 and 145—Commissioner—Pleader Commissioner—Direction to survey and report respecting land in dispute under S. 145—Action of Commissioner is not 'local inquiry' but a mere ministerial act.

The direction was merely "to survey the disputed lands and report within 15 days." All that the person had to do was to ascertain from the parties what lands were in dispute and then to survey the lands pointed out and to draw up a map and report what he had done. This was a ministerial act. Whether the duty of survey was entrusted to a pleader commissioned or to an amin makes no difference ; stress cannot be laid on the fact that the person selected to do the work bore the title of pleader commissioner It cannot be held that the survey of the lands, after enquiry from all the parties as to what land was in dispute, amounted to a "local enquiry" within the meaning of Section 148, Criminal Procedure Code. It was a mere ministerial act.

S. N. Sahay—for Petitioners.

C. C. Dass for (*G. C. Paul*)—for Opposite Party.

Adami, J. :—The petitioners were the third party to proceedings drawn up by the Deputy Magistrate, Bhagalpur, under Section 145, Criminal Procedure Code : they apply to have the order passed in favour of the first party to those proceedings set aside. It appears that after the proceedings under Section 145 shewing the boundaries of the lands in dispute, had been served on all the parties, the first party in their written statement declared that the disputed 378 *bighas* of land with the boundaries as shown in the

proceedings could not be identified, nor was there any trace of such lands to be found in village Dildarpur. On the 18th February, 1921, the Deputy Magistrate passed the following order:—

"First party states that the lands are not at all identifiable; the other parties assert that they are identifiable. The first party offers to pay the costs of a survey passed and pleader commissioner for identifying the lands as per proceedings drawn up and report to this Court. I think this is reasonable and I direct the first party to deposit Rs. 100 and then I shall appoint a Commissioner."

A Commissioner was appointed and went to the lands in dispute and submitted a map and report on the 10th of April. Copies of the report were furnished to the parties and the pleader commissioner was examined and cross examined as a witness, and after his cross-examination on the 14th of May the Vakil for the first party contended that as the report showed that the land, bounded as shown in the proceedings, was not identifiable, the proceedings should be cancelled. The other parties apparently resisted the contention. The Deputy Magistrate passed the following order:—

"*Heard*, the parties on the contention of the learned Vakil of the 1st party that the pleader commissioner having reported that the lands are not fully identifiable according to the boundaries given in the proceedings, the same, *i.e.*, the proceedings should be cancelled. I hold that the pleader commissioner's report and evidence are only evidence and not final judgment, and that it is liable to be challenged by the parties who are entitled to produce further evidence in Court I therefore decided to go into evidence in the case."

On subsequent dates the witnesses produced by three parties respectively were examined, and the Deputy Magistrate then delivered judgment declaring the first party to be in possession of the disputed lands.

The chief contention raised by Mr. S. N. Sahay on behalf of the petitioners is that the Deputy Magistrate dealing with a case under Section 145, Criminal Procedure Code, has no jurisdiction to direct a pleader commissioner to hold a local enquiry and cannot receive in evidence a report drawn up by the Commissioner after completing the inquiry. He argues that Chapter XII of the Code of Criminal Procedure furnishes a complete mode of procedure for the prevention of breach of the peace arising out of disputes as to immoveable property, and that the only provision in that chapter allowing any delegation is that contained in Section 148, which runs:—

"Whenever a local inquiry is necessary for the purposes of this chapter, any District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry and may furnish him with such written instructions consistent with the law for the time being in force as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid. The report of the person so deputed may be read as evidence in the case."

So that the Magistrate who has drawn up proceedings is precluded from deputing any one, other than a Magistrate, to hold any local inquiry whatever. He argues that, if there is in the opinion of a party, the necessity to have the lands demarcated or surveyed and an inquiry made locally, that party should privately engage its own man to make the survey and inquiry and then put him into the witness-box and examine him like any other witness produced by one of the parties.

Now, if the question were whether a Magistrate who has drawn up proceedings under Section 145, Cr. P. Code, is empowered to delegate any of his judicial functions to any person other than a Magistrate, or if such person were directed to report who was in possession of certain lands there could, I think, be no doubt that the answer would be in the negative. Here, however, the direction was merely "to survey the disputed lands and report within 15 days." All that the person had to do was to ascertain from the parties what lands were in dispute and then to survey the lands pointed out and to draw up a map and report what he had done. This was a ministerial act: whether the duty of survey was entrusted to a pleader commissioner or to an *amin* makes no difference; stress cannot be laid on the fact that the person selected to do the work bore the title of pleader commissioner.

I cannot hold that the survey of the lands after enquiry from all the parties, as to what land was in dispute, amounted to a "local enquiry" within the meaning of S. 148, Cr. P. Code. It was a mere ministerial act.

It is to be noted that S. 148, Criminal

Procedure Code, gives the special privilege to a report made by a Magistrate under its provisions, that such report may be taken into evidence without calling the Magistrate to prove it. In the present case no such privilege is claimed and the pleader commissioner was called as a witness and examined and cross-examined.

If Mr. Sahay's contention were correct a Magistrate who had drawn up proceedings under S. 145, Cr. P. Code would in almost every case be unable to get a map prepared of the disputed lands, or there are few, if any, Magistrates who are competent to carry out a survey and prepare a map. Direction to draw up a map of the disputed land in proceedings under Section 145 have been frequent in the past, and there is no decision to be found showing that the power to issue such directions has been disputed except the case of *Achambit Das* v. *Sarada Prasad* (1), where it was held that the Court has power to depute a *kanungo* to demarcate disputed lands in proceedings under S. 145.

In the present case the pleader commissioner was examined and cross-examined by the present petitioners without objection by them as to his delegation, and I hold that the Court was fully empowered to refer to his evidence and to the map he prepared. His report should not have been admitted in evidence except for the purpose of proving that he surveyed lands pointed out to him by the parties as being in dispute and showing which those lands were, but a perusal of the judgment shows that the Court did not rely on this report. The case was decided on the evidence as to possession given by the parties, and the only reference made to the commissioner or his report is the remark, after finding, that boundaries mentioned in *kabuliyats* relied on by the present petitioners were entered therein without a visit to the lands, "no wonder therefore that the pleader surveyer found that the boundaries given in the *kabuliyats* of the tenants (3rd party) could not be identified on the spot."

Even if the report had been wrongly relied on that would not amount to an error in or want of jurisdiction which would warrant an interference of this Court.

I hold that there was no defect as to jurisdiction in the direction to the pleader commissioner to survey the disputed lands and report.

It is next contended that as the first party asserted from the first that the lands could not be identified, the Deputy Magistrate could not award them possession of lands which did not exist. This is not a question of jurisdiction, and apart from this, the petitioners throughout asserted that the lands mentioned in the proceedings could be identified, and they cannot now be allowed to assert the contrary; they "chose to wait and take the chance of judgment in their favour and cannot now be heard to complain of excess of jurisdiction" *Marsden* v. *Wardle* (2), *Kalada Kinkar Roy* v. *Denash Nur* (3).

The third point argued by the learned counsel for the petitioners, namely, that the petitioners were induced to execute *kabuliyats* in favour of the first party by their properly constituted agent, and that therefore the first party were estopped from giving evidence to show that they and not the other petitioners were in possession, raises no question of jurisdiction, and, apart from this, the finding being that effect was not given to the *kabuliyats*, they do not stand in the way of evidence being given to show what the actual possession was at the time proceedings were taken.

I would dismiss the application.

Ross J.:—I agree.

Application dismissed.

(1) (1910) 12 I. C. 88.

(2) (1854) 3 E & B. 695 (801).

(3) (1905) 33 C. 33, (46).

A. I. R. 1922 Patna 226.

Ross, J.

Arjun Mahton—Petitioner

v.

Juggannath Singh—Opposite Party.

Cr. Rev. No. 92 of 1922, decided on 24th March, 1922, against an order of Sub-Div. Mag., Hazaribagh.

Cr. P. Code, S 145—Inquiry under is not an elaborate one—Process to witnesses cannot be claimed as matter of right—Delivery of possession by Civil Court—Magistrate is bound to maintain it.

Where the Magistrate refused an application of the petitioner for adjournment based on the ground that witnesses were not present and that copies of papers were required, and decided the case on the arguments of the pleaders and on such evidence as was adduced :—

Held, the legislature could hardly have contemplated an elaborate and protracted investigation, the result of which might in many instances be to defeat the very object in view, namely, an effective prevention of a breach of the peace. It is not obligatory upon the Magistrate to assist the parties to a proceeding

under Section 145 to produce their witnesses and they cannot claim as a matter of right that processes should be issued by the Court to enable them to bring forward their evidence. Similarly whether the delivery of possession by the Civil Court is symbolical or actual or whether there was a recognition by the second party of the sub-tenancy claimed by first party petitioner or whether there was a resumption of tenure under Section 14 of Chota Nagpur Tenancy Act, these are plain questions, which are not for the Magistrate to decide. When the Magistrate has the evidence before him that the judgment-debtor was ejected and possession delivered by the Civil Court he must act on it. [P. 227, Cs. 1, 2.]

Manohar Lal and *Nawal Kishore Prasad* —for Petitioner.

Bankim Chandra De — for Opposite Party.

Ross, J:—This is an application by the first party against an order passed by the Sub-Divisional Magistrate of Hazaribagh under Section 145 of the Criminal Procedure Code declaring the second party to be in possession of certain land.

Two grounds are taken in this application. The first is that the petitioner has been refused a fair trial because he had no opportunity of presenting his case before the Court. It is stated that the petitioner resides 70 miles away from Hazaribagh and that the proceeding drawn up against him was served on the 14th of January, the date fixed for trial being the 21st. On that date a petition was filed stating that the witnesses had not come and that copies of papers were required and an adjournment of one month was prayed for The Magistrate appears to have refused this application and decided the case on the arguments of the pleaders of both sides and on such evidence as was adduced. Now Section 145, Clause (4) lays down what the procedure is to be. The Magistrate has to peruse the written statement, to hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and if possible decide the question of possession. There is nothing in this section which requires the Magistrate to issue processes on any witnesses. The whole question was discussed fully in *Tarapada Biswas* v. *Nurul Haq*, (1) where it was pointed out that "the legislature could hardly have contemplated an elaborate and protracted investigation the result of which might in many instances be to defeat the very object in view, namely, an effective prevention of a breach of the peace. The whole object might obviously be defeated if the Court could be compelled to summon and re-summon witnessess at the choice of the parties."

It was further observed that it appeared clear from the provisions of the Code that it is not obligatory upon the Magistrate to assist the parties to a proceeding under Section 145 to produce their witnesses and they cannot claim as a matter of right that processes should be issued by the Court to enable them to bring forward their evidence. This case is a direct authority against the contention of the petitioner and it has been approved and followed in *Harendra Kumar Bose* v. *Girish Chandra Mitra*, (2) I cannot see therefore that in refusing to issue summons the Magistrate refused a fair trial. He took all the evidence that the parties had ready and heard what they had to say.

The second contention is that the Magistrate has acted on the delivery of possession by the Civil Court without going into the question whether that possession was symbolical or actual. Whether there was recognition by the second party of the sub-tenancy claimed by the first party or whether there was resumption of tenure under Section 14 of the Chota Nagpur Tenancy Act, these are plainly questions which were not for the Magistrate to decide. He had evidence before him that the judgment-debtor in the decree under execution was ejected and that possession was delivered by the Civil Court to the second party. His decision may be right or it may be wrong but I can see no defect in jurisdiction. The application is dismissed.

Appeal dismissed.

(1) (1905) 32 Cal. 1093=2 C. L. J. 280.

(2) (1910) 38 Cal. 24=7 I.C. 798.

A. I. R. 1922 Patna 227.

Ross, J.

Brij Nandan Panday — Accused-Petitioner

v.

King Emperor—Opposite Party.

Cr. Rev. No. 64 of 1922, decided on 20th March, 1922.

Cr. P. Code, S. 260 (f)—Summary Trial—Magistrate's duty is to satisfy himself that the value of property is less than Rs. 50

Before the Magistrate can assume jurisdiction to try the accused in a summary form, he has to satisfy himself that the property in respect of

which he is trying the accused is less than Rs. 50, in value. [P. 228, C. 1.]

G. C. Pal and *Sambhu Saran*—for Petitioner.

Government Pleader—for the Crown.

Ross, J.:—The petitioner has been convicted under Section 411, I.P.C, in a summary trial and has been sentenced to one month's rigorous imprisonment for the offence of being dishonestly in possession of a piece of wood which had been stolen being the top of a cell box of a railway carriage.

The principal ground on which the conviction is assailed and the only ground which I propose to deal with is that the record of the summary trial does not show on its face that the property stolen was less than Rs. 50 in value. Under S. 260, Cl. (*f*), Criminal Procedure Code jurisdiction to try summarily an offence under S. 411, Indian Penal Code is limited to cases where the value of the property does not exceed Rs. 50. The record is to be kept in the form prescribed in S. 263, Criminal Procedure Code. Clause (*f*) of that section requires that in cases falling under S. 260 (*f*) the value of the property in respect of which the offence was committed shall be set forth. In the present case the Magistrate has not stated the value of the property.

It is urged in support of the conviction that in the charge sheet there occur the letters and figures "P. S Rs. 10", "P.R. Rs. 10", and it is argued from this that the property in respect of which the offence was committed was valued at Rs. 10. It seems to me, however, that before the Magistrate could assume jurisdiction to try the accused in a summary form, he had to satisfy himself that the property in respect of which he was trying the accused was less than Rs. 50 in value. He did not in fact direct his mind to this question at all and there is no reference in his record to any such question. The record of this trial does not on its face show that the Magistrate has jurisdiction to try the accused summarily and in my opinion therefore the conviction cannot stand. See *Queen* v. *Abheen Parrida* (1) where the following passage occurs:

"The conviction in this case, which was drawn up in the form prescribed by Section 327, does not say any such thing, nor does it anywhere appear what the value of the property alleged to have been stolen really was. Upon this ground, we set aside the proceedings of the Deputy Magistrate as being without jurisdiction."

(1) 20 W. R. Cr. 17.

As to the question of retrial, I take into consideration the facts that this is a first offence and that the offence is of a very petty nature and that the petitioner is said to have been in jail for 4 or 5 days. It therefore appears to me that it is unnecessary to order a retrial in this case. The conviction and sentence are set aside.

The petitioner will be released from Bail. *Conviction set aside.*

A.I.R. 1922 Patna 228.

JWALA PRASAD, J.

Ratan Chand Sahu and others—Petitioners v.

Mohanlal Sahu—Opposite Party.

Cr. Rev. Appeal Nos. 51 and 52 of 1922, decided on 1st May, 1922.

Cr. P. C., Ss. 144, 107 and 145—One party claiming to be in exclusive and the other in joint possession—Order against latter not to be passed under S 144 without enquiring into the question of nature of possession of parties.

It is well to indicate the relative value of the preventive Ss. 107, 144 and 145 of the Code in a dispute relating to property, where the first party claim to be in exclusive possession and the second party claim to be in joint possession. If the property is found to be in joint possession of both the parties, then no order under S. 145 can be passed and the danger to a breach of the peace by the contending parties with a view to exclude the other from the possession of the property in dispute can only be averted or avoided by binding both the parties or by binding both of them under S 107, for none of them has a right to exclude the other from joint possession. If, on the other hand, one of them is found to be in exclusive possession of the property then the other side can be restrained under S. 144 from interfering with the exclusive possession of the other party, and if possible by binding him down. Unless the exclusive possession of one of the parties is undisputed or is admitted or is concluded by some decision of a competent Court, an enquiry into the claims of the parties as to exclusive or joint possession must be held. It is only when after an enquiry a decision is arrived at as to the possession of the contending parties, separate or joint, an order under S. 144 or 107, against one of the parties will not be justifiable. Such an order will prejudice the other party and will exclude him from the possession of the property whether exclusive or joint. No Court by its proceeding or order can allow such an advantage to one of the parties. Therefore in a dispute of this kind the danger to a breach of the peace can be averted by issuing a temporary order upon both the parties under S. 144 if the case is of urgency and holding an enquiry into the possession of the parties before confirming the order. The danger to a breach of the peace can also be averted by at once instituting a proceeding under S. 145 by attaching the property in dispute pending the enquiry.

P. C. Manuk, G. C. Pal—for Petitioners.

K. N. Chaudhry, Athar Hussain and *Sambhu Saran*—for Opposite Party.

Government Advocate—for the Crown.

Jwala Prasad, J.:—These two applications are against an order of the Sub-Divisional Officer of Sasaram, dated the 10th of January, 1922. By this order the Sub-Divisional Officer confirmed, in other words made absolute, his two previous orders and notices issued under S. 144 of the Code of Criminal Procedure. By the first notice, the 2nd party petitioners before us were directed not to interfere with the possession of the 1st party over the Oil and Flour Factory situate in the town of Sasaram. By the 2nd notice he directed the petitioners from interfering with the possession of the 1st party over 42 villages, factories at Sasaram, Dehri and Nasriganj, Rs. 40,000, in cash and jewellery worth Rs. 2,000. Both the parties are members of the same family descended from one Bhikari Sahu. He had six sons. We are concerned only with four of them, namely, Sheo Prasad, Sheogulam Janglal and Thakur Chand. The 1st party are the sons of Sheogulam. The 2nd party are the descendants of Sheo Prasad and Janglal. Thakur Chand, one of the sons of Bhikhari Sahu died childless in March 1921, and the dispute between the parties has arisen since then.

The name of Thakur Chand appears to have been recorded in respect of the Flour Mill and the Factory and the villages along with the members of the 1st Party Mohan Lal and Moti Lal. Mohan and Moti claim all the properties as their own and to be in their exclusive possession. The 2nd party claim to be in possession of the properties jointly, with Mohan and Moti alleging that they were all members of a joint family of which Thakur Chand was the *Karta* and that the properties in dispute were the joint family properties in possession of all the members, and after the death of Thakur Chand, all of them have succeeded to the properties by right of survivorship and are in joint possession of the same.

The Magistrate of Sasaram held that the 1st party were in possession of the property and accordingly on the 10th of January, 1922, confirmed both the notices set forth above under S. 144 against the 2nd party.

Against the order of the Sub-Divisional Officer, the 2nd party moved the District Magistrate. By his order of the 31st of January the District Magistrate refused to interfere observing that he had no jurisdiction in the matter and that it was open to the 2nd party to move this Court. The following observation of the learned District Magistrate shows that the case is not free from difficulty:

"I admit that I should ordinarily not be prepared, if I could help it, to pass an order under Section 144, Criminal Procedure Code in the case of a dispute involving the property of so much value, but it is difficult to say what other course is open. A case under Section 145, Criminal Procedure Code will not lie if the contention of the second party that the property is joint is sound. If this contention is not sound, as I hold *prima facie* appears to be the case, no hardship is done to the second party by the order under Section 144, Criminal Procedure Code. Again, a proceeding under Section 107, Criminal Procedure Code is hardly a suitable course in such a case for in such a proceeding the question of possession is bound to be dragged into an interminable length"

It is well to indicate the relative value of the preventive Sections 107, 144 and 145 in the Code of Criminal Procedure in a dispute of this nature. The following authorities have been cited at the Bar :— *Basunta Kumari Dasi* v. *Mohesh Chunder Saha* (1), *Tarapada Bhattacharji* v. *The King Emperor* (2), *Sham Lal Mahton* v. *Rajendra Lal* (3), *Tarujan Bibee* v. *Asamudai Bepari* (4), *Krista Alhadini Dasi* v. *Radha Syam Panday* (5), and *Jageswar Das* v. *Trilochan Das* (6). Now, it is obvious that both parties in the present case claim to be in possession of the propetry in dispute. The 1st party claim to be in exclusive possession. The 2nd party claim to be in joint possession. If the property is found to be in joint possession of both the parties, then no order under Section 145 can be passed and the danger to a breach of the peace by the contending parties with a view to exclude the other from the possession of the property in dispute can only be averted or avoided by binding both the parties or by binding both of them under S. 107, for none of them has a right

(1) (1912) 17 C. W. N. 944.
(2) (1919) 1 P.L.T. 72.
(3) (1919) 1 P.L.T. 594.
(4) (1900) 4 C. W. N. 426.
(5) (1902) 7 C. W. N. 118.
(6) (1919) P. H.C. C. 479.

to exclude the other from the joint possession. If on the other hand, one of them is found to be in exclusive possession of the property then the other side can be restrained under S. 144 from interfering with the exclusive possession of the other party, and if possible by binding him down. Unless the exclusive possession of one of the parties is undisputed or is admitted or is concluded by some decision of a competent Court, an enquiry into the claims of the parties as to exclusive possession or joint possession must be held. It is only when after an enquiry a decision is arrived at as to the possession of the contending parties, separate or joint. I do not think that an order under S. 144 or 107 against one of the parties will be justifiable. Such an order will prejudice the other party and will exclude him from the possession of the property whether exclusive or joint. No Court by its proceeding or order can allow such an advantage to one of the parties. Therefore in a dispute of this kind the danger to a breach of the peace can be averted by issuing a temporary order upon both the parties under S. 144 if the case is of urgency and holding an enquiry into the possession of the parties before confirming the order. The danger to a breach of the peace can also be averted by at once instituting a proceeding under S. 145 of the Code by attaching the property in dispute pending the enquiry.

Now, an enquiry under S. 145 in a dispute of this kind is not inappropriate. The final order under S. 145, Cl. (4) can be withheld when it is proved that the possession is joint, and when so proved the Magistrate can immediately take action under S. 107 or 144 as the case may be against both the parties, but in order to find out as to whether the possession of the contending parties is joint as claimed by one of the parties, or separate as claimed by the other, an enquiry can be held under S. 145 of the Code. Therefore what was open to the Magistrate in the present case was to issue a notice under S. 144 against both the parties and to inquire as to their possession before making his order absolute or to forthwith institute a proceeding under S. 145 and to attach the property and to pass his final order upon the result of the enquiry, either confirming the possession of one of the parties if found to be exclusive, or restraining both the parties under S. 144 from committing a breach of the peace or instituting a proceeding under S. 145 or binding them down as the case may be.

The Magistrate in the present case resorted to a proceeding under S. 144 against one of the parties, when that party was claiming to be in possession of the property though jointly with the 1st party. This was somewhat prejudicial to the case of the 2nd party. The order was confirmed against the 2nd party, and if, as a matter of fact, the Magistrate found upon enquiry that the 2nd party was not in possession of the property the order confirming the notice under S. 144 cannot be disturbed. The Magistrate has, no doubt, come to the conclusion that the 1st party was in possession of the property. His finding is

" Documentary evidence adduced by the 1st party strongly indicate that the 1st party has been in possession since the death of Thakur Chand Sahu. Chaukidari receipts and Khas Mahal receipts both stand in his name."

This is the only reference to the evidence of possession. The Chaukidari receipts and the Khas Mahal receipts referred to therein cannot possibly relate to the 42 villages with respect to which the Magistrate has confirmed his order under S. 144, directing the 2nd party not to interfere with the possession of the 1st party with respect thereto. If the case of the 2nd party is true, the order in question dispossesses him altogether from the 42 villages in which, according to them, they have been enjoying hitherto joint possession. These villages and the shares in these villages have not been specified in the notice under S. 144 or in the final order of Magistrate of the 10th of January.

The enquiry by the police was started when the parties were disputing their possession over the Oil and Flour Factory at Sasaram. The police of Sasaram gave a history of the dispute between the parties and said that the dispute was with respect to all the properties including the right of collection in the villages. The reports of the police of Sasaram, dated the 12th, 15th and the 18th of December, were in favour of the 2nd party, stating that the properties were in joint possession of both the parties. The police asked for a proceeding against both the parties under S. 144 or 107. The report of the police of Nasriganj dated 1st January, 1922, was in favour of the 1st party. The immediate dispute between

the parties which tended to a breach of the peace related to the Oil and Flour Factory and the treasure. The larger dispute as to the villages was incidentally brought into evidence. The enquiry of the Magistrate has largely concerned itself with the possession of Oil and Flour business. That apparently is the reason why no particular evidence appears to have been referred to by the Magistrate as regards the possession of the villages. The general reasons given by him are not sufficient to dispose of the claim of the 2nd party, or to show that the 1st party was in an undisputed possession of the villages so as to justify an order under S. 144 against the 2nd party. The enquiry of the Magistrate therefore does not justify an order in favour of one of the parties as to the possession of the property and against the other. Therefore the order of the Magistrate with respect to the 42 villages appears to be without any jurisdiction.

The order of the Magistrate as regards the Oil and Flour Factory and the treasure stands on a somewhat better footing, and the Chaukidari receipts might afford some *prima facie* evidence in favour of the 1st party ; and had the order been confined to these properties only, perhaps I might not have been inclined to interfere ; but the dispute in the present case is of an extensive property both moveable and immoveable and I do not think that a temporary order under S. 145 will solve the difficulty or will put an end to the danger to a breach of the peace.

The parties were well represented before me and the arguments in the present case on both sides were at great length and with great ability. Having the benefit of the best advice, better reasons seem to have prevailed in the end and the parties have come to terms so as to have their dispute settled without having recourse to a breach of the peace and also to let their business continue without any prejudice. They have filed a written petition to this Court which I accept and incorporate herein as a part of my order :

"1. The Oil and Flour Mill at Sasaram and the Mills at Dehri and Nasriganj are to be run by the 1st party until the decision by the final revenue authority in land registration proceedings now pending in the Deputy Collector's Court at Arrah, subject to the liability of the 1st party to account to the second party and keep proper vouchers. If the decision of the Land Registration Department is in favour of the 2nd party and they are also recorded as co-sharers in respect to the villages in dispute, the Mills in question will be thenceforward held and run jointly by both the 1st and 2nd parties. If the decision of the Land Registration Department is in favour of the 1st party, they will continue to run the Mills and will cease to be accountable to the 2nd party subject to the decision or order of a Civil Court. This agreement will not in any way prejudice the right of either party to have its rights determined by a competent Civil Court, either before or after the decision of the Land Registration cases and irrespective of what those decisions may be."

2. Of the cash and other valuables and document and Bahis in the locked up room of the Gaddi house at Nasriganj, an inventory will be made by the Sub-Divisional Officer who will also seal and initial each page of the Bahis. The cash, documents, valuables and Bahis may then remain in possession of the 1st party on giving security to the satisfaction of the Sub Divisional Officer for the cash, valuables and documents. The documents and Bahis will be available to both the parties for use as evidence in the land registration or other proceedings, and the person in charge of them will be bound to produce the same on a proper requisition. Till such security is furnished, the properties mentioned in this paragraph shall remain in charge of the Sub Divisional Officer."

3. The 2nd party to remain in possession of the residential house at Nasriganj."

"4. The question of possession of the villages is left open as that will be decided in the Land Registration Department : but the parties undertake that they will not commit any breach of the peace."

"5. The orders passed under Section 144 of the Code of Criminal Procedure, dated the 10th January, 1922 and the proceedings drawn up on the 3rd of January, 1922, and the 2nd of January, 1922 shall not in any way affect the rights of the parties"

Even if the order of the Magistrate under Section 144 were upheld, it is expiring, whereas the present arrangement

between the parties is expected to prevent a breach of the peace. The rights of the parties will now therefore be governed, so far as the Criminal Courts are concerned, in terms of the aforesaid agreement between the parties. *Order accordingly.*

A. I. R. 1922 Patna 232.

DAS AND BUCKNILL, JJ.

Nilmoni Chaudhuri—Appellant

v.

Kedar Nath Daga—Respondent.

Civil Rev. No. 2 of 1922, decided on 12th April, 1922.

Civil Procedure Code, O. 23, R. 3—Consent decree—Counsel acting on acquiescence of appellant's agent—Appellant is bound by decree—Legal Practitioner.

Where the applicant challenged the consent decree on the ground that his counsel acted on misapprehension against instructions.

Held, on the facts proved that the agent of the appellant acquiesced in the settlement, though under protest, proposed by the counsel, in good faith in the interest of his chief, that he accepted it, and that the decree was binding on him. Two propositions are well settled ; first, that express authority is not needed for a counsel to enter into a compromise within the scope of the suit; and secondly, that where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect.

[P. 234, C. 1.]

Swinfen v. *Swinfen*. (1857) 1 C.B. N S. 364 referred to.

P. K. Sen, *A. C. Sen* and *A. B. Mukharji*—for Appellant.

Manuk, *S. P. Sen* and *B. N. Mitter*—for Respondent.

Das, J.:—This is an application for setting aside a consent decree passed by this Court on the 11th November, 1921. The circumstances are these:—The opposite party instituted a suit against the applicant in the Court of the Subordinate Judge of Dhanbad for specific performance of certain agreements and also for recovery of a sum of Rs. 6,05,642-11-0. Pending the disposal of that suit the plaintiff applied for, and obtained an order, appointing the applicant as the receiver of a certain colliery business which was the subject-matter of the litigation between the parties. Against that order of the learned Subordinate Judge the applicant preferred an appeal to this Court That appeal came on for hearing on the 5th November and Mr. Hasan Imam appearing on behalf of the appellant, the applicant before us, made certain proposals for settlement. Mr. Manuk on behalf of the opposite party suggested that the case should stand over till the 11th November, 1921, in order to enable the parties to consider those terms or any alternative terms that might be suggested. The matter accordingly stood adjourned till the 11th November, 1921. On that date a consent order was passed to the effect that the appellant would deposit in the Court of the Subordinate Judge of Dhanbad on or before the 16th January, 1922, the sum of Rs. 6,05,642 to answer any decree that might be passed against him in that suit and that on such deposit being made the order appointing him the receiver of the colliery business would be discharged; but that on his failure to bring into Court the said sum on or before the 16th January, 1922 the appeal would stand dismissed. This consent order was passed on the 11th November, 1921, and on the 9th January, 1922, the present application for setting aside the consent order of the 11th November, 1921, was presented to this Court. The petition alleged that one Ramratan Das who was in fact a broker but who represented himself to be the *karpardaz* of the applicant, gave instructions to Mr. Hasan Imam on behalf of the applicant and that Mr. Imam in proposing the terms of settlement to the Court acted on instructions given to him by Ramratan Das and not in exercise of that authority which was vested in him as an Advocate of the applicant. It was suggested in the petition that Mr. Imam acted under a misapprehension in so far as he thought that Ramratan Das was authorized by the applicant to propose those terms to the Court and that as Mr. Imam's consent was given under a misapprehension there was in reality no consent at all and that accordingly the consent decree ought to be set aside. The whole basis of the petition, as I have stated, is that Ramratan Das was a broker and not a *karpardaz* of the applicant and had no authority from the applicant to propose any terms of compromise on his behalf and that as Mr. Imam acted entirely on the instructions given to him by Ramratan Das the consent decree could not stand. As I shall presently show, the introduction of the name of Ramratan Das has raised an entirely false issue in the case; for it now appears that on the 11th November, 1921, when the consent order was in fact passed by this Court it was not Ramratan Das who came to Patna from Calcutta to give instructions to Mr. Imam but one Provas Babu who

admittedly looks after the applicant's business and was undoubtedly authorized to give instructions to Mr. Imam. The applicant has certainly shown a want of candour in so far as he has concealed the part which Provas Babu took in the matter from the Court in his petition. We are told that this petition was drafted in a solicitor's office in Calcutta. I am loath to believe that any solicitor of any position would deliberately give a wrong impression to the Court if the facts were disclosed to him. I am of opinion that the false issue which the applicant has deliberately raised in his petition has by no means improved his case.

The petition then states that new circumstances arose subsequent to the passing of the consent order which made it impossible for the applicant to bring into Court such a large sum of money within the period fixed in the consent order. This paragraph again suggests, and the evidence in the case makes it perfectly clear, that the applicant tried his best to give effect to the consent order and that the application was presented only when it became clear to the applicant that the money could not be raised so as to enable him to bring into Court such a large sum of money on or before the 16th January, 1922. It is only necessary to mention at this stage that the order which was passed by consent on the 11th November, 1921, was duly drawn up and entered before the application was presented in this Court on the 9th January, 1922.

The evidence shows that when the first proposal was made by Mr. Imam for settlement it was Ramratan Das who gave instructions to Mr. Imam on behalf of the applicant. Having given those instructions he left for Calcutta on the night of the 5th November. When the case came up for hearing on the 11th November, it was not Ramratan Das who came from Calcutta to instruct Mr. Imam. Provas Babu, who, as I have stated, is undoubtedly the agent of the applicant, was in Court and it was in his presence and not in the presence of Ramratan Das that Mr. Imam offered the terms which were accepted by Mr. Manuk. I am of opinion that the question whether Ramratan Das had authority from the applicant is entirely irrelevant; we have only to enquire whether Provas Babu's evidence in this Court is that when he came to Patna on the 11th November, he was wholly unaware of the fact that any terms of settlement had been proposed to the Court on the instructions of Ramratan Das. I find it difficult to accept this testimony. Ramratan Das did give certain instructions to Mr. Imam and Mr. Imam did propose certain terms to the Court. Ramratan Das left for Calcutta immediately after and it is admitted that he saw the applicant as well as Provas Babu in Calcutta. It is admitted that Ramratan Das informed them that the case would be taken up on the 11th November. I find it difficult to believe that Ramratan Das failed to tell them that certain terms of settlement had been proposed to the Court by Mr. Imam on his instructions. There is no suggestion that Ramratan Das deliberately acted to the prejudice of the applicant. He undoubtedly thought that a settlement was best for the parties and though he may have exercised an authority which he never had in fact, there is no explanation why he should not have told the applicant exactly what happened in Court on the 5th November. Babu Abani Bhusan Mukharji, a leading Vakil of this Court who appeared in the case with Mr. Imam, has made a statement to this Court and we entirely accept that statement. He says in his statement that Provas Babu told him that it was not possible to bring into Court such a large sum of money within so short a time and that Abani Babu told Provas Babu that the other side would probably not accept the terms which had been proposed by Mr. Imam. Abani Babu's impression as to what happened on the 11th November, is as follows:—

"On the 11th before the Hon'ble Judges came to Court Mr. Manuk in Court room said that he agreed to the terms. This came upon Provas Babu as a surprise: but I advised Provas Babu to try and agree to it since the other side was agreeable, on the ground that the matter had advanced too far, the proposal had gone from us and it would not be wise to back out of it now and that judging from the rate at which they had been working and selling coal, I thought it would be possible for them to deposit the money if they tried honestly. Provas Babu said it would be difficult to put together such a large sum within such a short time; but I thought that in the interests of the client it would not be proper to recede at that stage and tried to make him submit to the terms. Provas Babu kept quie and I understood him to agree. Thereupon I

instructed Mr. Imam that the client was agreeable."

I accept the statement as an accurate representation of what actually happened in Court. The question still remains that Provas Babu kept quite and allowed his counsel Mr. Imam to make the proposal in Court on the 11th November. He made no attempt to tell Mr. Imam, although he was actually present in Court, that the terms were such as could not be carried out. On the contrary, he went to Calcutta and made a genuine effort to raise the money. Circumstances, however, changed over which the parties had no control which made it impossible for the applicant to raise the money in Calcutta. The fact remains, however, that between 11—11—1921 and 9—1—1922 there was not only no challenge by the applicant on the consent order of the 11th November, 1921, but on the contrary, there was a submission to that order in the sense that the applicant tried to raise the money to enable him to carry out the order.

What then is the position? Two propositions are well-settled; first, that express authority is not needed for a counsel to enter into a compromise within the scope of the suit; and, secondly, that where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. But the position is one of difficulty where the limitation is unknown to the other side or where counsel acts on instructions as to a compromise under a misapprehension and not in exercise of that authority which is vested in him as an Advocate of the party to the litigation. It was urged before us by Mr. P. K. Sen that in this case Mr. Imam did not purport to exercise his discretionary authority at all; but that he purported to act on instructions and that as he was wholly unaware of the fact that his client had stated to his Vakil Abani Babu that it would be impossible for him to carry out the terms of the consent order, his consent was given under an entire misapprehension so that there was in reality no consent at all. Mr. Sen relied upon *Swinfen* v. *Swinfen* (1) in all its stages on *Lewis* v. *Lewis* (2) and on *Nand Lal Bose* v. *Nistarini Dasi* (3). So far as *Swinfen* v. *Swinfen* (1) is concerned, the subsequent case of *Prestwich* v. *Poley* (4) declined to refer to it as a decision which is to afford a guide in any case not similarly circumstanced. In *Swinfen* v. *Swinfen* (1) the circumstance were these: On the 15th March, 1856, an issue directed by the Master of the Rolls, in a suit in Chancery of *Swinfen* v. *Swinfen* (1) to try the validity of the will of one Samuel Swinfen, deceased, came on for trial before Cressell, J. and a special jury at the Assizes at Stafford. Negotiations for settlement took place between the leading counsel for the respective parties at the close of the first day of the trial and ultimately certain terms were agreed upon and embodied in a memorandum which was signed by them in the presence of the attorneys on both sides. The terms were that the estate was to be conveyed by the plaintiff to the defendant free of incumbrance, if any, created since the death of Samuel Swinfen and that the defendant was to secure to the plaintiff an annuity for her life on the estate of £ 1,000 a year. This memorandum was embodied in an order of *nisi prius*, which was afterwards made a rule of Court. In order to give effect to the compromise the defendant's solicitor addressed several letters to the plaintiff's solicitor for certain documents and was ultimately informed by the plaintiff that she was not disposed to carry out the terms of compromise on the ground that the arrangement was made not only without her sanction but directly in opposition to her wishes. Thereupon the defendant obtained a rule calling upon Mrs Swinfen, the plaintiff, to show cause why an attachment should not be issued against her for disobedience of the rule of Court. This was the first stage of the case and the decision of these proceedings is reported in 18 Common Bench 486; 139 E. R. 1459. The application failed on a technical ground, namely, that it was not shown that there was personal service of the rule and a personal demand of performance before the rule was obtained; but Cresswell, J. in delivering the judgment came to the conclusion that the compromise was binding on Mrs. Swinfen. In the course of his judgment the learned Judge said as follows:—

"I think it would be most fatal to the due administration of justice if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this; for, if

(1) (1857) 24 Beave. 549=53 E. R. 470.
(2) (1890) 45 Ch. D. 281=59 L. J. Ch. 712.
(3) (1900) 27 Cal. 428=4 C. W. N. 169.
(4) (1865) 18 C B. N. S. 806=144 E. R. 662.

the client or the attorney has any reason to think that the counsel is taking a course that will prejudice his interests, he may withdraw his brief; and so put an end to his authority to represent the client before the Court"

I may mention that in the case before us there was at no time any express dissent on the part of Provas Babu. All that he did was to make his protest, not to Mr. Imam but to Abani Babu and then remained silent when it was pointed out to him by Abani Babu that it was possible for them to raise the money if they "tried honestly." He suffered the consent decree to be passed without making any protest to Mr. Imam although he was sitting behind Mr. Imam and made an effort to comply with the terms of settlement. In my opinion the case of *Swinfen* v. *Swinfen* (5) is against the contention of Mr. Sen.

The next stage of *Swinfen* v. *Swinfen* (6). The application was again made for attachment of the plaintiff for disobedience of the rule of Court after effecting personal service on her. One of the learned Judges, Crowder, J., was of opinion that attachment should not issue inasmuch as there was no real consent on behalf of the plaintiff. He found that the plaintiff before the commencement of the litigation had rejected an offer much more advantageous in its terms than those contained in the agreement in question and that she has refused again to entertain the proposition when recommended to her by her counsel after the adjournment of the case on the first day. He thought that there was express dissent on her part and that there was no authority in her counsel to settle the case on her behalf. This was the view of Crowder, J.; but the other learned Judges who heard the case were of a different opinion. But having regard to the well-known practice that it is impossible for a Court to treat a party as guilty of contempt for refusing to perform an agreement by which one member of the Court thinks the party is not bound, the Court, although the majority of the Judges was clearly of opinion that the plaintiff was bound by the agreement, discharged the rule. This case again does not support the contention of Mr. Sen.

The last stage of this case is reported in *Swinfen* v. *Swinfen* (1). This was a decision in Chancery in a supplemental bill filed by Captain Swinfen who was the defendant in the original action, praying that Mr. Swinfen might be decreed specifically to perform the agreement for a compromise. The Court came to the conclusion that a client may become bound by a compromise entered into by his attorney without his authority but not repudiating it within a reasonable time. The facts found by the Court were that the compromise was unauthorized by the plaintiff and was effected without the instructions of his attorney and that as there was no subsequent acquiescence the bill by the defendant in the action for specific performance of the compromise could not be entertained. Now in my opinion a suit for specific performance of an agreement stands on a different footing from an application to set aside a consent order. A plaintiff is not entitled as of right to a decree for specific performance and various questions can properly be taken into consideration by a Court in deciding whether an agreement should be specifically performed which do not arise in an application for setting aside a decree. It is open to a Court in an action for specific performance to say that the bargain is a hard one and that there is real hardship in the matter and that the plaintiff should be left to his remedy at law. This was at the bottom of the judgment pronounced by the Master of the Rolls in the case: but though the decision cannot be claimed as an authority by a party seeking to set aside a consent decree on the ground that the counsel had no authority to enter into the compromise the Court in *Prestwich* v. *Poley* (4), refused to recognise the decision of the Master of the Rolls as a guide in any case not similarly circumstanced; the case is against the contention of Mr. Sen in so far as it recognizes that unless the repudiation is prompt and within a reasonable time the compromise would bind the party. In the case before us the repudiation was not only not prompt but actually came only after the applicant discovered that, owing to change of circumstances which took place subsequent to the date of the consent order, it was impossible for him to comply with that order, I am unable therefore to look upon *Swinfen* v. *Swinfen* (1) as in any way assisting the arguments of Mr. Sen. The next case is that of *Lewis* v. *Lewis* (2), Kekewich, J., held that although a compromise entered into by counsel under the authority implied by their employment is

(5) (1856) 18 C. B. 485=139 E. R. 1459.
(6) (1857) 1 C. B. N. S. 364=140 E. R. 150.

binding on the client, and cannot be upset by the Court, a compromise entered into in intended pursuance of terms consented to by the client but by misapprehension not strictly following them, is not binding on the client. It was argued by Mr. Sen that there was a clear misapprehension in the mind of Mr. Imam in so far as he thought that his client desired him to settle the case on the terms proposed by him. It is necessary to mention that the decision of Kekewich, J , was pronounced in a motion on behalf of the plaintiffs for leave to withdraw their consent to the order which purported to be a consent order on the ground that there was misapprehension in the mind of the counsel. This motion was made before the order was actually drawn up and entered. *Neale* v. *Gordon Lennox* (7), also supports the argument that there is very large discretion in the Court before the order is actually drawn up and entered. The action was for damages for slander and libel on the allegation that the defendant had made serious imputations against the plaintiff's character. Before the case came up for trial Sir Edward Clarke, the plaintiff's leading counsel, proposed certain terms of settlement to his client. The terms were written out by Sir Edward Clarke himself and were handed over to the plaintiff and they were as follows :—" Defendant stating by her counsel that she never imputed or meant to impute anything against the moral character of the plaintiff and is satisfied that there is no ground for any such imputation."

"Case referred to.....to say what should be done between the parties in satisfaction of all matters in difference between them."

"Case referred to.....to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action."

It will be noticed that alternative terms were suggested by Sir Edward Clarke to his client. If the first alternative was accepted by the defendant there was no question of any sum being paid by the defendant in compensation for the matters complained of in the action. But it required the defendant to state that she never imputed or meant to impute anything against the moral character of the plaintiff and was satisfied that there was no ground for any such imputation. The other alternative assumed the correctness of the allegations of the plaintiff and left the question of compensation to arbitration. At the bottom of these terms the plaintiff wrote the words :—" I consent to either alternative Sir Edward Clarke adopts." There was clearly a limitation of counsel's authority, but this limitation was not made known to the defendant's counsel. The defendant, however, refused to disclaim all imputations and after an interview with the learned Judge an order was drawn up in the following terms :—

"It is ordered that the whole of this case be tried before H. F. Dickens Esqr., K. C., as Official Referee, who shall have all the powers of certifying and amending of a Judge of the High Court of Justice, and shall direct judgment to be entered and otherwise deal with the whole action pursuant to Order 36."

In other words, the whole action was referred to the arbitration of Mr. Dickens. Before the order was actually drawn up and entered the plaintiff took steps to set it aside and the House of Lords came to the conclusion that the learned Judge in the trial Court who did set it aside and restore the cause to the list for trial acted with the great propriety. Mr. Sen strongly relied upon this case and argued that where there is in fact a limitation of authority the consent given by counsel outside the limits of his authority would not bind his client irrespective of the question whether that limitation is communicated to the other side or not. On the other hand, *Strauss* v. *Francis* (8), establishes that a compromise which is within the counsel's apparent authority, that is to say, a compromise within the scope of the suit, is binding on the client notwithstanding he may have dissented unless this dissent was brought to the knowledge of the opposite party at the time. *Holt* v. *Jessee* (9), lays down that though a consent given by counsel in the presence and with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence, it cannot be withdrawn where the matter was fully understood at the time and the client shortly afterwards changes his mind. In this case there is no doubt that the client did fully understand what the compromise was about and that he changed his mind not shortly afterwards, but only when

(7) (1902) A. C. 465=71 L. J. K. B. 939

(8) (1866) 1 Q B 379=35 L. J. Q. B. 133.

(9) (1876) 3 Ch. D. 177=46 L. J. Ch. 254.

he found that it was impossible for him to comply with the consent order. This case entirely supports the contention of Mr. Manuk.

There is, however, an apparent conflict between *Strauss* v. *Francis* (8) and *Neale* v. *Gordon Lennox* (7). This conflict was explained in the case of *Shepherd* v. *Robinson* (10). The learned Judges in *Shepherd* v. *Robinson* (10) accepted the proposition as well-settled that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it: and that if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embody in some order or judgment of the Court. In reference to *Neale* v. *Gordon Lennox* (7) the learned Judges said that that case belonged to a different line of cases which decided that before a consent order has been drawn up and perfected, the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor give it under a misapprehension. This, in my opinion, is the real distinction between *Neale* v. *Gordon Lennox* (7) and *Strauss* v. *Francis* (8). The Court undoubtedly has very large discretion in the matter before the order is actually drawn up and perfected, but there is no such discretion where the order has in fact been drawn up and perfected. As was pointed out in *Shepherd* v. *Robinson* (10) the real question in each case is to see within which class the particular case falls.

There is no doubt whatever that the application in the present case was made long after the order was drawn up and perfected. There is also no doubt, in my mind, that the applicant not only did not repudiate the consent given on his behalf by Mr. Imam but acquiesced in it in so far as he tried to raise the money in order to enable him to comply with the order. I am of opinion, therefore, that the applicant is not entitled to an order setting aside the consent order of the 11th November, 1921.

It was urged by Mr. Sen that it has been the settled practice of the Calcutta High Court to set aside consent orders in applications for review and it was urged that the case is a particularly hard one for his client and that this Court ought to set aside the consent order. It may be assumed that an application for review would lie to set aside a consent order; but the question still remains whether grounds have been made out by the applicant which would induce this Court to set aside the consent order. In my opinion there are no grounds for review. I quite agree that there are certain terms in the order which has been passed by the learned Sub. Judge which are very hard on the applicant and although we can give no directions upon the learned Sub. Judge in these proceedings we would urge upon him the necessity of altering these terms to some extent. We are informed, for instance, that the receiver has been directed to file his account monthly. I have no doubt whatever that this would have the effect of hampering him in his business. In my experience half-yearly accounts are usually required from the receiver and I think that if an application be made by the petitioner to the learned Sub-Judge, the learned Sub. Judge ought to consider whether it is not a sufficient protection for all the parties concerned if the receiver is directed to bring his accounts into Court half-yearly. But although the Court may properly require the receiver to file his accounts half-yearly he ought to be required to send abstract of the receipts and disbursements of the property in his hands every three months to the plaintiff. He ought further to be required to supply to the plaintiff once every three months a copy of the completed contracts which have been entered into by him. Any order which may have the effect of compelling him to disclose the agreements into which he may enter before those agreements have matured into completed contracts might seriously embarrass him in his business. These are the matters which I think the learned Sub. Judge ought to seriously consider if a proper application is presented to him by the plaintiff. But the fact that the order which has been passed by the learned Sub. Judge is undoubtedly hard on the receiver, is no ground for reviewing the consent order of the 11th November, 1921.

This application must fail and we refuse it with costs. Hearing fee fifteen gold mohurs.

Bucknill, J.:—This was an application made by one Nilmoni Chowdhuri who is the defendant in an action brought against

(10) (1919) 1 K. B. 474=88 L. J. K. B. 873.

him by one Kedarnath Daga in the Court of the Sub. Judge of Dhanbad in the District of Manbhum in connection with a claim for a very large sum of money which the plaintiff alleged have been advanced to the defendant relative to an agreement for sale of a colliery.

There is no doubt that there was a serious dispute between the parties: the defendant, however, maintained that the real issue between them was merely a matter of account. The plaintiff, on the ground that the defendant was trying to dispose of the property in question and on other grounds, applied to attach the defendant's colliery before judgment and for the appointment of a receiver pending the hearing of the suit, and, as a result of this application, the Sub. Judge called upon the defendant to show cause why the property should not be attached and why a receiver should not be appointed *pendente lite*; and he granted an *ad interim* attachment pending the hearing of the application. When the matter on 1-9-1921 came up before him the Sub. Judge made an order appointing the defendant as receiver. From this order the defendant appealed to this Court and a rule was issued upon the plaintiff to show cause why an *ad interim* stay of the execution of the order appointing the receiver should not be allowed.

Now it is very important to note what took place when the matter was finally brought up before this Bench for it is from that that the present application now arises; it is accordingly necessary to review shortly what actually occurred. During the course of the hearing it was agreed by counsel purporting to act on behalf of the defendant and by counsel for the plaintiff that the defendant would deposit in Court on or before 16-1-1922, the amount claimed by the plaintiff in order to satisfy any decree which might be passed against him in the suit and that in the event of his failure to do so the rule *nisi* would be discharged and the appeal dismissed with costs; and on this basis this Bench on the 11-11-1921 passed an order accordingly. The matter however did not rest there for on the 9-1-1922 the defendant filed the present petition in which he asks that the order passed by this Court on 11-11-1921 should be reviewed (that is to say, set aside) on the ground that the individual who purported to represent him and who purported to agree to the terms of the order was in no way authorised so to do. The individual referred to was one Ram Ratan Das. It is noticeable, however, that the defendant in his petition, whilst pointing out that Ram Ratan Das had no authority to assent to the terms of the agreement, also indicates that, owing to various circumstances such as strikes, demand for higher wages, and the insufficient supply of railway waggons which had occurred subsequent to this Court's order, he had found it almost impossible to collect and deposit the agreed sum in Court. The authority of counsel for the defendant to enter into any such arrangement as had been embodied in the order of this Bench was under these conditions seriously challenged on behalf of the defendant; and, the facts therefore demanded a close investigation. A considerable volume of evidence upon affidavit was adduced by both parties whilst in addition this Bench thought fit to have before it for examination the individual named Ram Ratan Das to whom reference has already been made, another gentleman named Provash Chandra Ray who is an employee in the defendant's firm and who was present at the Court at a very material date when the question of the terms of the order of 11-11-1921, were under discussion; in addition to this the defendant himself was also examined. I do not think that it is necessary for me to analyse closely the evidence which has been given. I have read and carefully considered it all and I have come, without difficulty to the conclusion that the attitude which is now taken up by the defendant is without justification. It is, I think, sufficient to say that Ram Ratan Das who was the defendant's broker came to Patna on November 5th last in connection with the proceedings taken by the defendant in this Court against the order of the Sub. Judge; he was accompanied by a clerk in the defendant's firm. Ram Ratan Das had a consultation with his counsel and says that he (Ram Ratan Das) suggested that if an adjournment could be obtained the money could be collected by the defendant and deposited in Court. As a result of this the matter was adjourned till the 11th idem and Ram Ratan Das returned to Calcutta; he stated that he did not inform his principal of what had taken place at Patna; I regret to have to say that I cannot believe this statement. On the 11th November, Ram

Ratan Das did not return to Patna; but, on that date, the defendant was here represented by Provash Chandra Ray who, to use his own expression, "looks after the defendant's cases." He also had a consultation with his legal advisers; and although he says *now* that he did not agree to the arrangement made by his counsel and which formed the basis of the order of November 11th, there is no doubt whatever in my mind that he did in fact, even though it may be somewhat reluctantly, acquiesce. The matter having been dealt with in the manner in which I have before indicated, this gentleman returned to Calcutta. There is no doubt that he told his master what had been done, but no protest so far as I can see was ever raised until the present application was filed. In my own view there is no doubt that what really took place was that there was in the mind of the defendant no thought of repudiating what had been agreed until it may have been found that the collection of the sum to be deposited presented perhaps more difficulty than had been anticipated or demanded somewhat greater sacrifices than had been expected.

For these reasons I think that this application should be rejected with costs. The order of the 11th November, 1921, of this Court will therefore stand but, as the money has not been paid in, the result is that the rule issued by this Court stands discharged whilst the appeal stands dismissed. But although that is so the order of the Subordinate Judge appointing the receiver should in my opinion be modified in certain respects as have been detailed by my learned brother.

Application rejected.

A. I. R. 1922 Patna 239.

Ross, J.

Panchi Ram and another—Petitioners

v.

Sheikh Muhammad Abdulla—Opposite Party.

Cr. Rev. 73 of 1922, decided on 20th March, 1922.

Criminal Procedure Code, S 144—Order—No sufficient material—Order is not valid.

The report of the police who were ordered to report as to the likelihood of breach of peace, gave the Magistrate no material for proceeding against the three petitioners. There was in the body of the report a general remark about Marwaris is Murliganj; but certain persons were specially named at the end of the report and the Police Sub-Inspector prayed for proceedings against them:

Held, the effect of the report must be understood as limiting its purpose to these named persons. The Magistrate had no materials before him upon which he could make an order against petitioners. [P. 240 Cs. 1, 2.]

P. C. Manuk, C. C. Das and *P. C. Ray*—for Petitioners.

G. C. Pal—for Opposite Party.

Ross, J.:—This is an application by six persons against an order by the Magistrate of Madhipura passed under Section 144, Criminal Procedure Code. The application was only admitted in respect of three petitioners Panchi Ram, Sava Chand and Tajmul.

A preliminary objection is taken that the force of the order has expired and that the Court ought not to interfere. The matter however is not clear because although the substantive order was passed on the 9th December, 1921, the Magistrate recorded an order on the 25th January, 1922, making the rule absolute. From this it would appear that the Magistrate intended the first order to be a conditional order and as no cause was shown against it, it was made absolute on the 25th January. I do not think it is necessary therefore in the present case to give effect to this preliminary objection.

The facts of the case are that on the 2nd December, 1921, the opposite party Sheikh Muhammad Abdulla who claimed to be the lessee of a certain *ghat* under the Maharaja of Darbhanga, filed a petition before the Magistrate of Madhipura praying for action against certain persons Indrachand and Balchand and certain other persons who are not parties to the present petition, for having refused to pay tolls to him. As there was likely to be a breach of the peace, the Police were ordered to report on this petition by the 14th December In the meantime, as some goods belonging to the petitioners and others were detained at the *ghat* by the lessee, a petition was filed by six persons including Panchi Ram, Sava Chand and Tajmul, praying that the Magistrate would order the Sub Inspector not to interfere with their merchandise and allow them to remove their goods. When this petition was being heard the Mukhtear of the lessee

said that the Police report on his petition had been received. The Magistrate therefore went into the whole matter and drew up the order complained against.

The ground on which the learned counsel for the petitioners attacked this order is that there was nothing before the Magistrate to entitle him to say that the petitioners Panchi Ram, Sava Chand and Tajmul were likely to do anything leading to a disturbance of the public tranquillity; they were merely placing their grievance before the Magistrate for such action as he was ready to take, and there was nothing in this to justify him in passing an order against them under Section 144, Cr. P. C. It is contended on the other side that the Police report refers to the Marwari merchants of Murliganj in general and that this report and the fact that the goods of these three petitioners as well as of other Marwaris had been seized entitled the Magistrate to find that these three petitioners were likely to commit a breach of the peace.

Now the Magistrate does not purport to act on personal knowledge. It is true that if he has grounds on which he is satisfied that a breach of the peace is likely, then the Court will not enquire into the sufficiency of those grounds. But the contention here is that there was no material whatsoever before the Magistrate for an order against these three men. It is clear that the petition of these three petitioners and others filed on the 9th December does not disclose any ground for an order against them. They merely recite the facts of the seizure of their property and pray for an order from the Magistrate upon the Police not to interfere with their merchandise. It is equally clear that the Police report gives the Magistrate no material for proceeding against the three petitioners. There is in the body of the report a general remark about the Marwaris of Murliganj; but certain persons are specifically named at the end of the report and the Police Sub-Inspector prays for proceedings against them. The effect of the report must be understood as limiting its purpose to these named persons. The only other document is the petition of the lessee, and this admittedly makes no reference to these three persons at all.

In my opinion the Magistrate had no materials before him upon which he could make an order against Panchi Ram, Sava Chand and Tajmul. The order so far as these three persons are concerned is without jurisdiction and must be set aside.

Order set aside.

A. I. R. 1922 Patna 240.

DAWSON MILLER, C. J. AND ADAMI, J.

Pithu Manji and another—Appellants

v.

Jhuksar Singh and others—Respondents

Letters Patent Appeal No. 61 of 1921, decided on 25th April, 1922.

Contract Act, S. 74—Kabuliat—Stipulation to pay heavy rent in default of delivery of possession on due date may be a penalty.

The contract was that if after the lease terminated the defendants continued on the land, they should pay to their landlord half the amount of the produce of land In the event of their objection to do so or preventing the landlords from having the produce assessed the stipulation was that they should pay at Rs. 10 a bigha.

Held, that that stipulation is purely penalty and not meant to be a substantive part of the contract binding in any way on the defendants. The Judge ought to consider what is the actual value of the produce in the particular case and award the plaintiffs a rent based upon the value of the produce. [P. 241, C. 2.]

S. Saran—for Appellants.

S. N. Dutt—for Respondents

Dawson Miller, C. J. :—This is an appeal by the defendants under the Letters Patent from a decision of Mr. Justice Ross setting aside the decree of the District Judge and restoring that of the Munsif. The defendants entered into a *kabuliat* with the *patnidars* of Mauza Birari Bhikham by which they took settlement of 80 *bighas* of land for a period of 4 years, that is from 1320 to 1324 F. inclusive at a rent of Rs. 2 per bigha. The *kabuliats* provided that the tenants should give up possession at the end of the term, but if on the expiry of the lease they continued in occupation and possession without taking a fresh settlement and executing *kabuliats* the landlords should have a right to half the produce and to have it apportioned. There then follows a stipulation in the *kabuliats* that if the defendants prevented the landlords from getting the produce apportioned the latter should be entitled to realise the value of their share in the produce at Rs. 10 per bigha. On the expiry of the lease the defendants remained in occupation and it is alleged in the plaint and not

contradicted that the defendants refused to give up possession or to allow the landlords to have the produce apportioned or to pay rent at the rate of Rs. 10 per *bigha*. Thereupon the plaintiffs who are the 8 annas landlords brought the present suit claiming their half share of the produce which they fix under the terms of the *kabuliat* at Rs. 10 per bigha of Rs. 400 in all for the year 1324 F. The defendants raised two defences, first, that they took *kaimi* settlement at Rs. 2 and that they were not aware of the terms of the *kabuliat* which were fraudulently inserted without their knowledge and secondly that the stipulation as to Rs. 10 per *bigha* was a penalty and not binding upon them as an agreement to pay rent at that rate.

The learned Munsif before whom the case came did not in fact go into the question of what was the actual rate in rupees of the produce of the land but thought that under the contract the plaintiffs were entitled in the event of the defendants refusing to have the produce apportioned to recover rent at the rate of Rs. 10 per *bigha* for the year 1324 F. and accordingly he passed judgment for the sum claimed with costs against the defendants.

On appeal the learned Officiating District Judge considered the terms of the *kabuliat* and came to the conclusion that the stipulation to pay rent at the rate of Rs. 10 per *bigha* in the event of the defendants refusing to allow the produce to be apportioned was merely a stipulation by way of penalty and not a substantive part of the agreement binding the defendants to pay rent at that rate. What he said was that "the payment and price of the produce at this rate does not seem to me the proper consideration for the plaintiffs' share in the produce. There is nothing on the record to show on what basis or date this rate of the price was fixed at the time of the *kabuliat*. This rate *prima facie* seems to me altogether unreasonable. In this view of the matter I am prepared to hold that the agreement relating to the payment of the price at Rs. 10 per *bigha* is in the nature of a penalty to be impressed upon the defendants if they failed to divide the produce as agreed upon, and as such it is not enforceable. It was simply a sort of threat to compel the defendants to divide the produce should they hold over without executing a fresh *kabuliat*". In that view of the law it seems to me that the learned District Judge was quite right and on referring to S. 74 of the Indian Contract Act it seems clear that the stipulation contained in the *kabuliat* was one which came within the direct terms of that section. It was a sum named in the contract as the amount to be paid in case of a breach of the contract and in such cases where that occurs the stipulation for payment of such an amount is treated and properly treated as a penalty. It is a stipulation entered in the agreement merely with the object of forcing the defendants to fulfil their terms of the contract. In the present case the contract was that at the end of 4 years when the lease terminated the defendants should pay to their landlord half the amount of the produce of the land. That was the agreement, and in the event of their objecting to do so or preventing the landlords from having the produce assessed, then follows the stipulation that they should pay at Rs. 10 per bigha. It is clear to my mind that that stipulation was purely a penalty as understood in law and it was as one knows from one's knowledge of the usual rate of rent of lands of this description a much higher rate of rent than is usual in such cases and I have no hesitation in coming to the conclusion that that stipulation was purely a penalty and not meant to be a substantive part of the contract binding in any way on the defendants. In these circumstances the question is whether the learned District Judge was right in dismissing the suit on the ground that the rent claimed was a penalty or whether he ought to have considered what was the actual value of the produce in the particular case and awarded the plaintiffs a rent based upon the value of the produce.

When the matter came before the learned Judge of this Court he took a different view from that taken by the Officiating District Judge. His view was that *prima facie* the agreement was reasonable and that if the defendants contended that it was not reasonable then it was for them to prove it and in the absence of any finding based on evidence the learned Judge thought it must be held that the agreement was reasonable and that the plaintiff was entitled to recover rent at the rate of Rs. 10 a bigha. I have already stated that in my opinion the stipulation was purely and simply entered in the kabuliat as a penalty. Then the only question which we have to consider is what ought to be the result. The learned District Judge dismissed the suit and stated that the plain-

tiffs might in some other proceedings if they chose apply for the ascertainment of a fair rent based upon the actual produce. I do not think however in this case where evidence has been given by both parties as to the actual produce that we should be serving any good purpose by dismissing the suit and allowing the plaintiffs if they should be so advised to bring a fresh suit asking for rent based upon the produce. The question as to what the produce was or the value of the produce was or was not determined by the Courts below that is to say by the Lower Appellate Court and the Munsif. It was left undetermined but there is evidence on the record to which we have been referred and in my opinion in order to dispose of this suit we are entitled under section 103 of the Civil Procedure Code if the evidence on the record is sufficient to determine issue of fact necessary to the disposal of the appeal provided that that issue has not been determined by the Lower Appellate Court. The issue was not determined by the Lower Appellate Court and although the evidence is somewhat meagre and one can only arrive at a rough and ready conclusion still the evidence is there and we have been referred to it and have read it and that is sufficient to enable the Court to come to a conclusion in the case as to what the proper rate of rent should be based upon the produce. The plaintiffs very naturally put it considerably higher than the defendants.

The evidence on behalf of the defendants is roughly that the yield of *maki* and *kurthi* was from 2½ to 3 maunds per *bigha* and that *tori* is sold from Rs. 2 to Rs. 3 per maund. If you take the higher figures given by the defendant the result would be that the total produce would be about Rs. 9 per bigha. The plaintiffs, on the other hand, put the produce much higher. They state that the land yields from 10 to 12 maunds per *bigha* of *maki* and *tori* in the year 1324 F. If you take the lower rate, *viz*, 10 maunds per *bigha* and treat the value as Rs. 3, then you get Rs. 30 per bigha. That estimate is in my opinion clearly excessive, but considering the evidence as a whole the result which I have arrived at is that a fair rent for the whole produce of the land would be Rs. 10 per bigha so that the plaintiffs are entitled to rent at a rate of Rs. 5 per bigha. The result is that the judgment and decree of the learned Judge of this Court are set aside and a decree will be entered for the plaintiffs for rent at the rate of Rs. 5 per bigha in respect of 40 bighas, that is to say, Rs. 200 in all for the year 1324 F. With regard to costs the plaintiffs have succeeded to the extent of half their claim and we think that they are entitled to proportionate costs throughout.

Adami, J.—I agree.

Appeal allowed in part.

A. I. R. 1922 Patna 242.

ADAMI, J.

Thakur Kishan Narayan Singh and others—Petitioners. v.

Emperor.—Opposite Party.

Cr. Revn. No. 84 of 1922, decided on 12th April 1922, against an order of Deputy Commissioner, Hazaribagh.

Cr. P. C., S. 514—Forfeiture of security under S. 107—Proof of forfeiture is necessary and court should record reasons.

S. 514 lays down that it must be proved to the satisfaction of the Court that the bond has been forfeited and that the Court shall record the grounds of such proof, and it is after such grounds have been recorded that the person bound by the bond may be called on to show cause why the amount should not be paid. Where there has been a failure to carry out the express provisions of the law and the Deputy Magistrate acted without jurisdiction in failing to record proof before he issued notice to show cause, the petitioners are entitled to have proceedings set aside. [P. 243, C. 1.]

Hasan Imam and *A. P. Upadhya*—for Petitioners.

H. L. Nandkeolyar—for the Crown.

Judgment:—The petitioners in this case were bound down in proceedings under section 107, Cr. P. C, to keep the peace for one year in January 1920. Later on in that year a complaint was laid before the Magistrate by the opposite party to the effect that the petitioners were so acting as to cause a breach of the peace. The Magistrate did not treat this as an ordinary complaint but sent the matter to the police for enquiry. The police seem to have made an enquiry and to have submitted a report. On the 3rd of December 1920 the Deputy Commissioner on reading the report of the police stated that he was of opinion that the facts disclosed justified the issue of an order on the petitioners to show cause why they and their sureties should not under section 514 of the Criminal Procedure Code forfeit their bonds of Rs. 200 each. The Deputy Commissioner ordered that case should be transferred to a Deputy Magistrate for disposal after issue of

notice. A notice accordingly was issued to the petitioners asking them merely to show cause why their bonds should not be forfeited.

The petitioners duly appeared and the police were directed to produce witnesses, and these witnesses when produced were examined and cross-examined in the presence of the petitioners. During the course of the proceedings the Dy. Magistrate who was hearing the case considered whether he should frame charges against the petitioners under certain sections of the Penal Code. After the examination of the witnesses produced by the police the petitioners called no evidence and then the Dy. Magistrate drew up an order finding that the petitioners had committed breaches of the peace and directing that their bonds should be forfeited. An appeal was made to the Dy. Commissioner who upheld the finding of the Dy. Magistrate.

The orders of the Dy. Commissioner and the D. Magistrate are assailed before me on the ground that they were passed without jurisdiction. Mr. Hasan Imam's contention is that the wording of S. 514 shows that, before issuing an order calling upon a person who is subject to a bond to show cause why he should not forfeit it, the Magistrate is bound to have before him sufficient proof that a good reason exists for making the order and the section requires that the grounds of such proof must be recorded. In the present case the petitioners were merely called upon to show cause on the police report which had been submitted to the Magistrate, and evidence was taken on oath after the order had been issued. S. 514 lays down that it must be proved to the satisfaction of the Court that the bond has been forfeited and the Court shall record the grounds of such proof, and it is after such grounds have been recorded that the person bound by the bond may be called on to show cause why the amount should not be paid. The contention of Mr. Hasan Imam is supported by the case *In Re Hariram Bibbham* (1). There it is clearly laid down that the Magistrate cannot have jurisdiction to issue an order to shew cause under Section 514 until it has been proved, and proof has been afforded by evidence recorded on oath that there is justification for forfeiting the bond; there must be *prima facie* proof that the bond has been forfeited. It is quite clear, I think, that in the present case the Dy. Magistrate treated the case as a criminal case and this is shewn by his doubt as to whether charges should be framed. Proceedings under S. 514 are of the nature of civil proceedings and it has been more than once laid down that the provisions of section 514 must be most carefully observed. I do not think that as a matter of fact, the petitioners were in any way prejudiced by the procedure adopted by the Dy. Commissioner, but there has been a failure to carry out the express provisions of the law and the Dy. Magistrate acted without jurisdiction in failing to record proof before he issued notice to show cause, and on this ground I must hold that the petitioners are entitled to have the proceedings set aside and the amounts that they have paid as forfeited refunded to them. *Proceedings set aside.*

(1) 11 B.H.C.R. 170.

A. I. R. 1922 Patna 243

DAS AND BUCKNILL, JJ.

Mahanth Ramrupgir and others— Appellants.
v.
Lal Chand Marwari and others— Respondents.

Appeal Nos. 101 and 102 of 1919, 28, 29, 30 and 32 of 1920, decided on 12th April, 1922 from Original Decree of Sub-J., Muzaffarpur.

(a) *Lim. Act, Art. 134—Religious endowment is not a trust—The head not trustee—Alienation by head of mutt—Art. 134 does not apply.*

The endowments of a Hindu Math are not "conveyed in trust" nor is the head of the Math a "trustee" with regard to them, save as to any specific property proved to have vested in the head for a specific and definite object; and that consequently Art. 134 of the Lim. Act does not apply where the head of a Math has alienated the properties not proved to be subject to a specific trust. *Vidya Varuthi* v. *Balusami*, 44 Mad. 831, foll. [P. 244, C. 2.]

(b) *Lim. Act, Art. 144—Religious endowment—Property vested in mahant—Alienation by mahant—Suit by successor against alienee—Time runs from death of alienor or when he is presumed to have died—Evidence Act.*

Where the property is vested in the juridical person, and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol or the manager of the idol on behalf of the idol must bring the suit within 12 years from the date of the alienation. But where the title is in the Mahant or the Shebait the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment; and there is no adverse possession so long as the person making the alienation is alive and the possession of the

defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation. Where there can be no doubt whatever that though the property is endowed property in the sense that its income has to be appropriated to the purposes of the endowment, still the title is in the successive Mahants, time is to run from the date of the death of alienor who alienated the properties in dispute. If the alienor has not been heard of for 7 years by those who would naturally have heard of him, if he had been alive, it can be presumed that he is dead. The suits are not barred as the time begins to run from the date of the presumption. *Damodar Das* v. *Lakhan Das*, 37 Cal. 885, referred. *Vaidya Varuthi* v *Balusami*, 44 Mad. 831, followed.[P. 247, C.1; P. 248, C.1.]

Hasan Imam, *C. C. Das*, *G. C. Pal*, *S. Dayal* and *B. K. Prasad*—for Appellants.

Sultan Ahmed, *S.C. Mitra*, *L. N. Singh*, *T. N. Sahay*, *Sant Prasad*, *J. G. Prasad Singh* and *Bhagwan Prasad*—for Respondents.

Das, J.—These analogous appeals arise out of suits instituted by the appellants for recovery of certain properties held by Mahant Bhuan Gir as Mahant of an *asthal* at Pakri Khemkaran and now in the possession of the defendants as a result of a certain transaction of Mahant Bhuan Gir. Plaintiff No. 1 claims to have succeeded Bhuan Gir as Mahant of the *asthal*. The remaining plaintiffs have taken certain conveyances from plaintiff No. 1 and have actually paid the expenses of this litigation. The plaintiffs allege that Bhuan Gir was addicted to certain vicious habits and that there was an entire absence of legal necessity in respect of the various transactions into which Bhuan Gir entered, as a result of which the properties, to recover which the present suits have been instituted, have passed into the hands of the defendants. It appears that Bhuan Gir left for a pilgrimage sometime prior to 1895, and has not been heard of since. In 1895 the plaintiffs instituted suits for recovery of these properties and they alleged that Bhuan Gir had in fact died on the 15th Baisakh 1299. The defendants in their written statement raised the plea that Bhuan Gir was in fact alive at the date of the institution of the suits and they maintained that the suits were premature. Both the Court of first instance as well as the High Court on appeal found in favour of the defendants on the point raised by them and dismissed the plaintiffs' suit as premature, the judgment of the High Court being dated the 30th November 1897. As Bhuan Gir has not been heard of since the date of the pronouncement of the judgment by the High Court the plaintiffs instituted these suits in June 1917.

The defendants raise various questions of law and facts; but the learned Subordinate Judge has decided all the points, save one, in favour of the plaintiffs. He has come to the conclusion that Bhuan Gir held the properties as a trustee for the *asthal* and that there was no necessity for him to dispose of these properties. But he came to the conclusion that the suits having been instituted more than twelve years from the date of the alienations in question, they are barred under the provision of Art. 134 of the Limitation Act. It has, however, been held by the Judicial Committee in the recent case of *Vidya Varuthi* v. *Balusami* (1) that the endowments of a Hindu Math are not "conveyed in the trust" nor is the head of the math a "trustee" with regard to them, save as to any specific property proved to have vested in the head for a specific and definite object, and that consequently Art. 134 of the Limitation Act does not apply where the head of a Math has alienated the properties not proved to be subject to a specific trust. It is not the case of the respondents that the properties in dispute were conveyed in trust to the head of the *asthal* at Pakri Khemkaran or that they were vested in him for a specific and definite object. In my opinion the decision of the learned Subordinate Judge on this point cannot be supported and must be reversed.

The learned Vakil for the respondents accepts the position that in view of the decision of the Judicial Committee, to which I have just referred, the decision of the learned Subordinate Judge cannot be supported, but he maintains that though Art. 134 does not apply, the suits are nevertheless barred under Art. 144 of the Limitation Act. Under Art. 144 of the Limitation Act the period begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. There are decisions far too numerous to mention that where the property is in a juridical person and such property is transferred by a person who is only the representative and the manager of that juridical person then there is adverse possession to the right of the juridical person from the

(1) A.I.R. 1922 P.C. 123=44 Mad. 831 =48 I.A. 302 (P.C.)

date of the alienation. It is sufficient to refer to *Damodar Das* v. *Lakhan Das* (2). The facts of that case were these ; the properties in question which were annexed to the Math at Bibisarai formed part of the debutter estate of idol Sri Gopaljin the Bibisarai Math being subordinate to the Math Bhadrak. On the death of a Mahant, a controversy arose between two chelas as to the right of succession to the Maths and the property annexed to them. The dispute was settled by an arrangement embodied in an *ekrarnama* dated the 3rd November 1874 executed by the senior chela in favour of the junior chela, by which the Math at Bhadrak was allotted in perpetuity to the senior chela and his successors, while the Math at Bibisarai and the properties annexed to it were allotted to the junior chela and his successors for the purposes connected with his Math, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak Math. Less than twelve years after the death of the senior chela, but considerably more than that period after the date of the *ekrarnama*, the appellant, the successor of the senior chela, brought a suit against the junior chela to recover possession of the properties annexed to Bibisarai Math, on the allegation that they were debutter properties dedicated to the worship and service of the plaintiffs' idol, and that they should not have been alienated in favour of the predecessor-in-title of the defendant. Now it will be noticed that if the period of limitation began to run from the date of the alienation the suit was clearly barred by limitation : but that if it began to run from the date of the death of the person who alienated the property, the suit was well within time It was held by the Judicial Committee that the period began to run from the date of the *ekrarnama* and that the suit was accordingly barred by limitation. The basis of the decision was stated by Sir Arthur Wilson who delivered the judgment of the Board to be this : that in point of law the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested not in the Mahant, but in the legal entity, the idol, the Mahant being only his representative and Manager. The learned Vakil for the respondents strongly relied on this case and maintained that the plaintiffs' suits having admittedly been brought more than twelve years after the dates of the alienations in question must be dismissed as barred by limitation.

But there is a second and a different line of cases upon which Mr. Imam strongly relies. The first of these cases is *Abhiram Goswami* v. *Shyama Charan Nandi* (3). The facts of that case were these : in 1787 the then Raja of Pandra made a grant by way of lakheraj debutter", the entire mauza of Gorfalbari to the predecessor-in-title of the plaintiff. It will be noticed that the grant was in terms not to an idol but to the predecessor-in-title of the plaintiff who received the gift as one for the service of the particular idols whose shebait he was. On the 6th February 1860 and on the 2nd November 1896 respectively the then Mahant of the endowment granted leases of the mauza in question in favour of the defendants. The action was brought within twelve years of the death of the Mahant who granted the leases in question, but considerably more than twelve years after the dates of the leases for possession of the mauza on the ground that there was no power in his predecessor to alienate the mauza in favour of the defendants. The Judicial Committee came to the conclusion that the leases were valid only during the lifetime of the Mahant by whom these were granted, and that as Art. 134 of the Limitation Act did not apply, the plaintiffs suit could not be regarded as barred by limitation. It will be noticed that on the construction of the original grant in favour of the plaintiffs' predecessor-in-title it was argued on behalf of the lessees that the property was in fact not debutter property but was the property of the Mohant by whom the leases were granted. The argument was that although the grant was to the Mohant and by way of lakheraj debutter there was no complete or specific dedication of the mauza to the service of any idol but that the gift was to the Mahant personally and descendible to his heirs in return for blessings bestowed on the donor and his family. The Judicial Committee came to the conclusion that the donee received the gift as a gift for the service of the particular idols whose shebait he was and that the income of the mauza was entirely appropriated to that service. It will be noticed that if the argument of the respondents before us be well founded that argument was a clear answer to the suit in *Abhiram Goswami's Case* (3)

(2) (1907) 37 Cal. 885=7 I.C. 240=37 I.A. 147 (P.C.)

(3) (1909) 36 Cal. 1003=4 I.C. 449=36 I.A. 148 (P.C.)

The only other case to which I need refer is the case of *Vidya Varuthi Thirtha* v. *Balusami Aiyar* (1). The properties which were the subject-matter of the litigation in that case were undoubtedly endowed properties in the sense that their income was appropriated to the purposes of the endowment, but the title to the properties was in the head of the endowment and the income was at his absolute disposal during his lifetime. On the 17th March 1891 the then Mahant, who may be described as Mahant No. 1 gave a lease in favour of plaintiff No. 2. The Mahant died shortly after and was succeeded by Mahant No. 2. In 1902 plaintiff No. 2 gave a sub-lease to defendants Nos. 1 and 2. In 1905 plaintiff No. 2 assigned his interest under the lease of the 17th March 1891 to plaintiff No. 1. In the same year the management of the Math passed into the hands of the Diwan of Mysore. In 1906 Mahant No. 2 died and was succeeded by defendant No. 26 who may be described as Mahant No 3. In 1912 the sub-lease in favour of defendants 1 and 2 expired. Before the expiry of the lease they obtained a lease for seventeen years from the Diwan of Mysore. On the 5th March 1913 the suit was instituted for recovery of the land from defendants 1 and 2 and the question raised was whether Mahant No. 1 was entitled to grant a lease in favour of plaintiff No. 2 and if he was not so entitled, whether the plaintiffs had acquired a title in themselves by adverse possession. Now it will be noticed that the alienation in question took place on the 17th March 1891 and the dispossession of the plaintiffs took place in 1912. If it be considered that the time began to run from the date of the lease, the plaintiffs undoubtedly acquired a title in the subject-matter of the lease by adverse possession. If, on the other hand, it be held that the time began to run only from the death of the Mahants who granted and recognized the lease, then it could not be said that the plaintiffs had acquired a title by adverse possession; for though Mahant No. 1 died shortly after granting the lease there was evidence which was accepted by the Judicial Committee that Mahant No. 2 recognised the transfer and received the rent from the plaintiffs. Mahant No. 2, it will be remembered, died in 1906, and if the period of limitation only began to run from the date of the death of Mahant No. 2 it could not be said that the plaintiffs had acquired a title by adverse possession. The Judicial Committee came to the conclusion that neither under article 134 nor under article 144 had the plaintiffs acquired a title to hold the land as against the endowment. It will be useful to quote the following passage from the judgment of the Judicial Committee :—"Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years' adverse possession under article 144. That article declares that for a suit " for possession of immoveable property or any interest therein not hereby (*i.e.*, by the schedule) otherwise specially provided for" the period of limitation is twelve years' from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could enure only for the grantor's lifetime. According to the well-settled law of India (apart from the question of necessity, which does not here arise, a Mahant is incompetent to create any interest in respect of the Mutt property to enure beyond his life. With regard to Mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

Now how is the decision in *Damodar Das* v. *Lakhan Das* (2) to be reconciled with the decisions in the other two cases? In *Damodar Das*' case the period of limitation, according to the decision of the Judicial Committee, began to run from the date of the alienation and not from the date of the death of the person who made the alienation. In the two other cases the period of limitation was held to run not from the dates of the alienations in question, but

from the dates of the death of the persons making the alienations. In my opinion the true rule is this; where the property is vested in the juridical person, as it was in *Damodar Das*' case, and the Mahant is only the representative and Manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol or the manager of the idol on behalf of the idol must bring the suit within 12 years from the date of the alienation. But where the title is in the Mahant or the Shebait, as it was in the two other cases to which I have referred, the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment; and there is no adverse possession so long as the person making the alienation is alive and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation.

I have now to see whether the title to the properties in dispute was in the juridical person or in the succession of Mahants who presided over the affairs of that juridical person. In my opinion, there is no doubt whatever that the title is not in the juridical person but in the Mahants. Ex. 12 is an extract from the certified copy of register relating to pergana Tilokechand and it shows that the villages stood in the name of the Mahant as "Bishunprit" and "Sheotar" villages. Exs. 13, 13*a* and 13*b* show that the grants in question were made in favour of the Mahants although the documents by which the grants were made are variously named as "*sheotar*" and "*sheoprit*" documents. Ex. 11 is the certified copy of a *rubakar* dated the 2nd November 1836 in certain proceedings instituted by the Government to assess revenue on these properties. The document recites that the original grant was made by Raja Pratap Singh in favour of Lachmi Gir, the predecessor-in-title of the plaintiff, and that the property was Shivater property and that in 1836 the question arose whether the grantee was entitled to hold the land revenue free. Certain proceedings were instituted to try the question whether the grant had been made previous to the 12th of August 1765, the date of accession of the East India Company to Diwani, the British Government having adopted the principle that grants previous to the accession to Diwani accompanied with possession should be held valid. As the grantee could not establish that the grant had in fact been made to him prior to the accession of the East India Company to Diwani, it was held that revenue should be assessed on these properties and we find from various documents in the record that settlement was concluded with Mahant Manik Gir, one of the predecessors-in title of the plaintiff. There can be no doubt whatever that though the property was endowed property in the sense that its income had to be appropriated to the purposes of the endowment, still the title was in the successive Mahants and that accordingly time began to run from the date of the death of Bhuan Gir who alienated the properties in dispute. There is no evidence when Bhuan Gir died, but as he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, we are entitled to presume that he is dead. I am of opinion that these suits are not barred by limitation.

While I am on the question of limitation, it will be convenient to dispose of another point which was raised by Mr. Sultan Ahmad who appeared on behalf of some of the respondents. He argued that assuming that time began to run from the date of the death of Bhuan Gir, the suits must still be held to be barred by limitation inasmuch as it was the plaintiff's own case in the suits which he instituted in 1895 that Bhuan Gir died on the 15th Baisakh 1299. Alternatively he argues that the plaintiff must show that his suit is within time. In other words, he must give evidence as to the date when Bhuan Gir actually died. In my opinion, the arguments are without any substance. It is quite true that it was the plaintiff's case that in the suit which he instituted in 1895 that Bhuan Gir died on the 15th Baisak 1299, but that case was not accepted by the Courts. As regards the argument that Bhuan Gir must have died more than 12 years before the institution of these suits, the short answer is that though a person who has not been heard of for 7 years is presumed to be dead, there is no presumption as to the time of his death, and that if any one seeks to establish the precise period at which such persons died, he must do so by actual evidence. The plaintiffs in

substance say this: "We have not heard of Bhuan Gir for seven years and we would naturally have heard of him if he had been alive. Consequently we ask the Court to presume that he is dead." The Court is entitled to presume that he is actually dead at the date of the institution of the suit and if it be the defendants' case that he died more than twelve years prior to the institution of these suits, it is for the defendants to establish the date of Bhuan Gir's death by actual evidence. I must overrule the contentions raised on behalf of the defendants on the question of limitation.

The learned Subordinate Judge decided all the other issues in favour of the appellants, but the respondents have challenged the decision of the learned Subordinate Judge on these issues, and it will now be necessary for me to consider how far the arguments advanced on behalf of the respondents are entitled to succeed. It is argued that the suit is bad for non-joinder of parties. It appears that prior to 1895, there was a transfer by plaintiff No. 1 of certain share in the properties in dispute in favour of one Mahabaruni Prasad and it was argued before us that the failure to join him as a plaintiff in the action debarred the plaintiffs from recovering possession at any rate of such share of the properties which plaintiff No. 1 sold to Mahabaruni Prashad. The argument, in my opinion, is unsubstantial. The conveyance was admittedly prior to 1895 and it was found in the suits which the plaintiffs instituted in 1895 that the plaintiffs had no cause of action. In other words, plaintiff No. 1 had no title in him to convey. Accordingly it was unnecessary for him to join Mahabaruni Prashad as a plaintiff in the action. It was also argued that as one of the appellants Nurul Husain died pending the disposal of the appeals in this Court and that as the plaintiffs declined to substitute the heirs of Nurul Husain in the place of Nurul Husain, the plaintiffs are incompetent to get a decree in respect of the share which the plaintiff No. 1 sold to Nurul Hussain. In my opinion the question is one between plaintiff No. 1 and Nurul Hussain. Now the answers to this argument are two in number. In the first place, the suit was filed on the 30th November 1916 and the conveyance in favour of Nurul Hussain is dated the 15th of June 1917. In other words, Nurul Hussain took the transfer *pendente lite* and it was wholly unnecessary to join him as a plaintiff in the action. He was in fact added as a plaintiff on the 30th January 1918 on his own application. In my opinion he was not a necessary party to the suit and it is not a defect in the constitution of the appeal that his heirs were not substituted in his place. The other answer is that the question whether any title passed to Nurul Hussain is a question of evidence which can only be decided in a proceeding between the plaintiff and Nurul Hussain. We do not know whether Nurul Hussain paid the purchase-money to plaintiff No. 1 and it may have been agreed between them that title would not pass until the payment of the full consideration money. I am wholly unable to decide this point in the present proceedings between the plaintiffs and the defendants.

The next argument of Mr. Sultan Ahmad is that as a result of the resumption proceedings to which I have already referred, the properties in suit must now be regarded as having been resumed by the Government and settled with the Mahant in his personal capacity. Mr. Sultan Ahmad puts his argument as follows:— The properties were either in the idol or in the Mahant. If they were in the idol the suit is clearly barred. If they were in the Mahant then we are bound to consider the effect of the resumption proceedings. If the result of the resumption proceedings was to vest the property in the Mahant then Bhuan Gir was fully competent to alienate the property and Mr. Sultan Ahmad relied on *Divi Punniah* v. *Goratula Kotamma* (4). That was a case where the Government resumed certain lands which were held previously as charitable inam and after imposing an assessment granted a patta to one of the persons who were the trustees thereof prior to the resumption. It was held that the representatives of the other trustees had no right to claim a share in the land as against the trustee to whom the patta was given. Now in my opinion the question here is entirely different. It was not the object of the paramount authority in the resumption proceedings to resume the lands and to re-settle the lands with the persons who originally held the lands As the history of the legislation on the subject shows the resumption was not of the land but of the revenue and that resumption meant nothing

(4) (1916) 40 Mad. 939.

more than assessing the land to Government revenue. In my opinion the person with whom the Government settled the land in 1836 must be regarded as having continued to hold the land on the same terms and subject to the same restrictions as bound him prior to the resumption proceedings.

It was lastly argued that there was legal necessity in respect of the transaction in question. The learned Subordinate Judge has dealt with this question and has decided the issue in favour of the plaintiff. Mr. Sultan Ahmad argued before us that it was sufficient for him to establish that there was representation made to his predecessors-in-title that there was necessity for the loans; and that he made due enquiry to satisfy himself that there was in fact such necessity although it may be that there was no necessity to raise the loans; and he relied upon the decision of the Judicial Committee in a recent case to the effect that the recital is clear evidence of representation and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth then when proof of actual necessity has become impossible the recital coupled with such circumstances will be sufficient evidence to support the deed. We have been referred to the documents which establish that the transactions took place so far back as the 19th December 1878 and the 6th March 1880, and we accept Mr. Sultan Ahmad's contention that proof of actual necessity has become almost impossible. But before he can take advantage of the principle laid down by the Judicial Committee he must establish that the circumstances were such as to justify a reasonable belief that an enquiry would have confirmed the truth of the representation of which the recital is evidence. Now we have no proof at all as to what the circumstances in 1878 were. The income of the properties was between Rs. 3,000 and Rs. 4,000 a year. We have no evidence that the circumstances at that time were such as to compel Bhuan Gir to go to the defendant's predecessors-in-title for loans. In my opinion the issue was rightly decided by the learned Subordinate Judge in favour of the appellants.

I would allow these appeals, set aside the judgment and decree passed by the Court below and give the plaintiffs a decree for possession in respect of the properties specified in the plaint with costs in both the Courts and mesne profits.

Bucknill, J.—I agree. *Appeals allowed.*

1922 P—32

A I. R. 1922 Patna 249.

JWALA PRASAD, J.

Mt. Ram Ratan Kuar and others—Second Party-Petitioners.

v.

Tarakh Nath Bhattacharji and others—First Party-Opp. Party.

Crl. Rev. Nos. 15, 16, 50 of 1922 decided on 2-3-1922 against the order of Sub. Div. Mag, Dinapur, dated 7-1-1922.

(a) *Cr. P.C., S. 150—Irregularity—Misstating of evidence—Order based on, must be vacated.*

Where the Magistrate's order was attacked on the ground that the amended proceedings were incorrect with respect to the names of the parties and the subject matter and the *Kucha* receipts relied upon by the Magistrate related only to a few of the claimants and could not therefore be evidence as regards possession of the large body of the members who claimed specific and separate lands in dispute and who had no community of interest and lastly on the ground that there was a misstatement of evidence. *Held* : on the facts proved, the Magistrate's order must be vacated. [P. 251, C. 2.]

(b) *Cr. P. C., S. 148—Local inspection cannot be made basis of decision.*

The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered in court ; but the local inspection cannot take place of legal evidence, much less can the result thereof be used as a basis for the decision. *Rama Sahai Singh* v. *Dwark Singh* 61 I.C.712, followed. [P. 251, C. 1.]

Manuk S. K. Banerji, S. C. Bose, K. N. Chaudhury, J. P. Singh, Sultanuddin Hussain—for Petitioners.

Govt. Advocate and *G. C. Pal*—for Opposite Party.

Jwala Prasad, J :—This is an application against an order of the Sub-Divl. Mag. of Dinapore, dated the 7-1-1922, passed under S. 145 of the Code of Criminal Procedure declaring the 1st party in possession of the land in dispute. The 2nd party are petitioners before us.

It appears that a proceeding under S. 145 was originally drawn up mentioning 1100 *bighas* as the subject matter of dispute and 15 persons as members of the 1st party. Under the orders of the Magistrate, on behalf of the 1st party names of 72 persons, with the lands and the boundaries thereof, claimed by each of them, were filed in separate sheets of paper. They were printed and were attached to an amended proceeding. The amended proceeding, however, omitted to mention all the 72 persons as members of the 1st party, wherein the names of 15 persons as originally stood, continued. The total of the area claimed by each member of the 1st party, as mentioned in the aforesaid

sheets of paper attached to the amended proceeding, comes to about 800 odd *bighas*, whereas the amended proceeding continued to mention 1100 *bighas*. There was no dispute with respect to the remaining 300 bighas which has neither been expunged from the proceeding, nor has any order been passed with respect thereto in the final order of the Magistrate, dated the 7th of January 1922. The amended proceeding was therefore incorrect and irregular with respect to the names of the parties and the subject-matter in dispute.

Out of the 800 old *bighas* claimed by the members of the 1st party, eleven of them Basdeo, Sheo Tahal, Saducharan, Sukhdeo, Ramunandan, Danukhdhari, Rasdhari, Saudagar, Tilak, Bali Ram and Bipat relinquished their claims as set forth against their names in the sheets of paper attached to amended proceeding with respect to the land aggregating to 115 bighas, and the Magistrate therefore declared the possession of the 2nd party with respect thereto, and we are now not concerned with it. Magistrate passed the following order:

"The other lands in dispute less 115 bighas.
"Surrendered of Shes Tahal, Basdeo.
"Sadhucharan, Sukhdeo, Ramunandam.
"Dhanukhdhari, Rasdhari Saudagar, Tilak.
"Baliram and Fipat I hold to be in the
"Possession of the 1st party tenants."

Mr. Manuk contends that this order evidently relates to 1100 *bighas* which was in the proceeding minus 115 *bighas* and is therefore wrong inasmuch as the area claimed by the members of the 1st party in the sheets of paper attached to the proceeding amounted only to 800 odd *bighas*. This contention appears to be substantial. It has not even been refuted by Mr. Sultan Ahmad who appears on behalf of the 1st party. The mistake apparently arose on account of not having amended the proceeding in which 1100 bighas occurred in view of the claims of the 1st party which disclosed that only 800 odd *bighas* was in dispute.

Mr. Manuk further contends that the Magistrate has not based his finding of possession in favour of the 1st party upon any legal evidence, nor was there such evidence to justify his finding. The contention is that 8 of the claimants out of a large body of about 60 to 72 persons gave their evidence in Court. There was no evidence except of a vague character as regards the lands claimed by the rest of the members of the 1st party. They themselves have not come forward to depose in Court The Kucha receipts relied upon by the Magistrate relate only to a few of the claimants and cannot be any evidence of possession as regards possession of the large body of the remaining members of 1st party claiming specific and separate lands in dispute. Herein also the contention is well founded. The Magistrate has not referred to the oral evidence offered on behalf of the 1st party to prove their possession, and we do not know whether he was satisfied with the oral evidence adduced on their behalf. It is also true that the receipts are only with respect to a few of the claimants about 8 in number who gave evidence. Therefore even if the Magistrate had acted upon the evidence offered on behalf of the 1st party, it was not sufficient to hold the possession of all the members thereof with respect to the particular plots of land claimed by them. The Magistrate has treated the members of the 1st party as one body, and has apparently taken the evidence offered to prove the possession of some of them with respect to the particular plots of land claimed by them as sufficient for finding possession with respect to all the members of the 1st party. In this he is in error, for there is no community of interest among the members of the 1st party, except that they claim to be the tenants of the land in question; but each of them claims separate parcels of land as set forth in the sheets of paper attached to the proceeding; so that whereas one of the members of the 1st party might be in possession of the land claimed by him the other members might not be in possession of the lands claimed by them.

The Magistrate has referred to the Chaukidari assessment list in support of the claims of the 1st party. He has very rightly taken this evidence as only corroborating the general case of the members of the 1st party that they held some lands in the village. He says: "If these tenants "had not been in cultivating possession "of the lands in August 1920, the *sirpanch* "and Raipanches could not possibly have "prepared such an assessment list and "have given Chaukidari receipts for these "holdings on payment by the tenants." Both the parties prepared and filed before me a comparative statement showing the areas claimed by the members of the 1st party and those mentioned in the Chaukidari assessment. They largely differed and therefore the Chaukidari assessment

could not possibly be evidence of possession of the specific lands claimed in the present case, and the Magistrate also has not treated it as such.

It appears that the Magistrate has mainly proceeded upon the result of his local inspection. He says that he had examined a number of persons on the spot and had asked the tenants to point out the respective lands to him. As to the local inspection he says "Most of them (tenants) who were examined by me had from 15 to 20 plots in twelve to fifteen widely scattered *khandas*. They were tested searchingly in regard to in each case not less than six or seven of their holdings, etc." Then he gives the names of the 17 tenants examined by him. The evidence of these people could not be acted upon without giving proper opportunity to the other side to cross-examine these. The real scope and object of holding local inspection was pointed out by this Court in the case of *Ram Sahai Singh* v. *Dwarka Singh and others* (1). The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered in Court; but the local inspection cannot take the place of legal evidence, much less the result thereof can be used as a basis for the decision. The Magistrate has, as a matter of fact, solely relied upon his local inspection and the statement of witnesses made to him at the inspection for the purpose of holding possession of the lands in dispute with the 1st party. His entire order is therefore vitiated. The Magistrate has not acted upon any definite legal evidence on behalf of the members of the 1st party in support of their possession over the lands claimed and included in the proceeding. The order on this ground alone is liable to be set aside.

Mr. Manuk has also pointed out to me that the learned Magistrate has vitiated his inquiry and order by misstating the evidence on the record. For instance, the Magistrate says: "The 1st party have claimed that they were never dispossessed, that they were permitted to remain on in their old holdings on payment of *salami*." There is no "evidence for or against this assertion." At another place, he repeats it in the following words: "These original holdings were sold up in auction and delivery of possession was obtained by Narain Dutt, whether he actually dispossessed those tenants from their particular lands there is no evidence for or against." Mr. Manuk says that evidence was given on behalf of the 2nd party to disprove the above claim of the 1st party, and that the Magistrate is wrong in saying that there is no evidence against the assertion of the tenants.

Again, the Magistrate says "There is no evidence to disprove their (tenants', 1st party) statements that 'besides these lands they have no other means of livelihood." Mr. Manuk says that the evidence both on behalf of the 1st and the 2nd parties shows that the tenants have other lands besides the disputed lands, and he refers to the statements of Bahori (witness No. 1 for the 1st party) and Sukhari (witness No. 15 for the 2nd Party). There are other passages also pointed out in the judgment of the Court showing that the remarks made by the Magistrate were against the evidence on the record. This also largely takes away the value of the decision of the Magistrate in the present case.

I therefore hold that the order of the Magistrate in the present case must be vacated; but as there is a serious dispute between the parties tending to a breach of the peace, the proceeding should not be dropped once for all, but that the proceeding instituted by the Magistrate should be thoroughly enquired into. I therefore direct that the case be remanded for an enquiry under Section 145 of the Code after amending the proceeding stated above and on giving full opportunity to the parties to give any additional evidence they like in support of their respective claims. The parties agree that the evidence already on the record may be used in the case but that they may be permitted to give additional evidence. The course suggested by the parties appear to be reasonable and I accept it, because I fully appreciate the remark of Sultan Ahmad that the attention of the parties mostly directed in the present case to the trial of the issue as to whether the 2nd party had made settlements of the lands with new tenants after the *dakhaldehani* in 1904, or that the old tenants such as the members of the 1st party were allowed to hold possession of the lands either by some arrangement or by fresh settlements. The parties therefore did not direct their attention to the principal issue in the case, namely, as to which party was in possession of the specific lands claimed in the case. The

(1) (1921) 1 P. L. T. 569=61 I. C. 712

lands in the present case are parcels claimed by several persons, each tenants claiming right to hold the land for himself. The evidence of the claim of each of the tenants was therefore necessary. In order to avert the danger to a breach of the peace, the lands in the present case should be attached under clause (4) of Section 145, and the Magistrate upon the evidence in the case will dispose of the proceeding in accordance with law.

In the circumstances of the case and in view of the opinion expressed by the Magistrate, the parties propose that the case be tried at Patna. I am told that the Magistrate is under orders of transfer and will be succeeded by another Magistrate. In that case, the case will be heard by the successor of the present Magistrate, otherwise it will be transferred to Patna. The matter should be expedited. *Case remanded.*

A. I. R. 1922 Patna 252.

JWALA PRASAD, AG. C. J. AND DAS, J.

Sheikh Abdul Rahman—Plaintiff-Appellant.

v.

Shib Lal Sahu and others—Defendants-Respondents.

S. A. No. 192 of 1920 decided on 18th July 1921 from a decision of Dist. J., Bhagalpur, dated 20th August 1919.

(a) *Hindu Law—Antecedent debt as consideration for Mortgage bond proved—Proof of family necessity or benefit to minor is not necessary.*

Where upon the pleadings and upon the findings of the trial Court it is obvious that the consideration of the mortgage bond in question was an antecedent debt of the father of the minor defendant there is no obligation on the part of the plaintiff to prove family necessity or benefit to the minor for the loan. [P. 253, C. 1.]

(b) *Civil P. C., O. 1, R. 2—Suit on mortgage bond—Mortgagor—Joint family sufficiently represented—Non-joinder of one member is not fatal to suit.*

The plaintiff in a mortgage suit is bound to bring every person interested in the mortgage or in the equity of redemption upon the record, but, when upon the face of the record it is obvious that there is sufficient representation of the members of the joint family, although all are not on the record, the plaintiff's suit cannot fail. *Jag. Shah* v. *Ram Chandra Prasad* S. A. No. 715 of 1919 since reported A.I.R. (1921) Pat. 289; 6 P. L. J. 640 (1921) followed. [P. 253, C. 1.]

(c) *Words—'Hearing'—Meaning.*

The word 'hearing' has not been defined in the Civil Procedure Code, but it is obvious that it is used in the different rules with a view to state the different purposes for which a date for hearing of the suit is fixed. [P. 254, C. 2.]

(d) *Civil P. C., O. XVII, R. 3 and O. IX, R. 8—Day fixed for appointment of guardian—Dismissal of suit for default on that day is without jurisdiction and does not operate as Res judicata—Civil P. C., S. 11.*

In a mortgage suit a day was fixed for the appointment of a guardian of a minor defendant. The plaintiff having failed to appear on that day the suit was dismissed, *Held*: the default of the plaintiff fell under O. XVII, R. 3 and not under O. IX, R. 8 of Civil Procedure Code. As under O. XVII, R. 3 it was incumbent upon the Court to fix a day on default for the disposal of the suit and inasmuch as the parties and particularly the plaintiff who suffered by the order did not know that the case would be taken up for hearing as soon as there was a default in his not taking the necessary steps for the appointment of a guardian, the order was without jurisdiction and if that is so there is no valid decree which can operate as *res judicata* so as to bar a fresh suit of the plaintiff based upon the mortgage bond in question. [P. 255, C. 1.]

L.N. Singh and *S. Dayal*—for Appellant.

Rai T. N. Sahai—for Respondents.

Jwala Prasad, Ag. C. J.—This appeal arises out of an action to enforce a mortgage, dated the 11th August 1914. The mortgage bond executed by Shib Lal, Defendant No. 1, and Mahabir, father of defendant No. 2. Ramchandra, Defendant No. 4 is the son of Defendant No. 1. Defendant No. 3, Mahadeo Lal, is a subsequent purchaser of the equity of redemption in execution of a decree, Defendants Nos. 5, 6, 7 and 8 are members of his family. One member of the family Shibnath, son of Jagannath, Defendant No. 6 is not on the record. The Courts below passed only a personal decree against the Defendants Nos. 1 and 2. They dismissed the suit against Ram Chandra, son of Defendant No. 1, on the ground that legal necessity for the loan or benefit to him was not proved. The suit has also been dismissed as against subsequent purchasers, Defendants second and third parties, upon the ground that the order of the Court in the previous suit brought by the Plaintiff No. 892 of 1915, dated the 6th June 1916 operates as *res judicata* upon the points raised in the present case. Another reason given by the Court below for refusing a mortgage decree is that Shibnath, grandson of the subsequent purchaser Mahadeo, is not on the record and consequently in his absence a mortgage decree cannot be passed. On behalf of the appellant all these grounds upon which his claim for a mortgage decree have been dismissed have been challenged.

As regards the view of the Court below as to there being no proof as to the benefit from the loan or family necessity reference may be made to the allegations in the plaint that the mortgage in question was executed in 1914 to pay off a prior debt of

the executant of the bond for which a suit had been already brought and which was settled by compromise between the parties that a mortgage bond be executed. That prior loan was certainly of a much anterior date because the suit to recover the same was instituted in the year 1913. Dealing with the issue as to consideration for the bond the trial Court held that the consideration was a *hath chitta* for which the previous suit in 1913 was brought. Therefore upon the pleadings and upon the findings of the trial Court it is obvious that the consideration of the mortgage bond in question was an antecedent debt of the father and therefore there was no obligation on the part of the plaintiff to prove family necessity or benefit to the minor for the loan. No doubt no argument was raised in the Court below as against the view of the trial Court that the plaintiff was not entitled to the mortgage bond inasmuch as the debt was not proved to have been beneficial to the family nor for family necessity but the point does not require any consideration of evidence on the record. It is based entirely on the finding of the trial Court and is a purely legal point and therefore it is open to the Appellant to dispute the view taken by the Courts below and it is also competent to this Court to hold upon the pleadings and the findings of the trial Court that the plaintiff is not required to show legal necessity for the loan or benefit to the sons of the executants. All the family members besides the executants are bound to pay the loan which was contracted to pay of the antecedent debts of the executants. The view taken by the Court below on this point is overruled and the contention of the learned Vakil on behalf of the Appellant therefore prevails.

The second ground of dismissal of the Plaintiff's claim to have a mortgage decree by the Court below appears also to be erroneous. No doubt the Plaintiff in a mortgage suit is bound to bring every person interested in the mortgage or in the equity of redemption upon the record and in this respect the view taken in the case of *Girwar Narain Mahton* v. *Musammat Makbunessa* (1) is right but when upon the face of the record it is obvious that there was sufficient representation of the members of the joint family although all are not on the record, the Plaintiff's suit cannot fail. In the present case the Plaintiff impleaded not only Mahadeo Lal in whose name the property appears to have been purchased but also almost all the members of his family with a clear assertion that they were all members of a joint family. It was through inadvertence or on account of some accidental omission that the name of one of the members of the family, Shibnath, the grandson of Mahadeo Lal, was omitted. The defendants in their written statement did not disclose the name of that minor son of Jagarnath who is said to have been omitted from the record nor was there any denial that Mahadeo Lal or Jagarnath, the father of the minor, did not properly represent the minor in the suit. There was therefore a proper representation of Shibnath in the present case. Again the property was purchased in the name of Mahadeo and if he was competent to represent the entire family in the transaction of the purchase there is no reason why he should not be held to be competent to represent the other members in the present litigation in respect of the same property. This is in full accordance with the view taken by this Court in *Jag Sah* v. *Ram Chandra Prasad* (2). The view taken by the Court below upon this point also is overruled.

There remains the crucial point in the case upon which both parties have addressed us at great length. I have carefully considered the full and learned argument on both sides and the rules in the Code of Civil Procedure on this point and the authorities cited at the Bar. These are;—*Balmukand Marwari* v. *Lachmi Narain Marwari* (3), *Naurang Ram Sahu* v. *Bakhori Mandur* (4), *Valliammai Nadathi* v. *Asservada Nadar* (5) and *Firm of Harchand Rai Anand Ram* v. *Raja Ram Bahadur Singh* (6).

I need not enter into a detailed consideration of these authorities for in some of them I myself was a party to the judgment and I still adhere to the view taken by me in those cases. The order of the Court in the previous suit relied upon by the lower Appellate Court and the Respondents in the present appeal is as observed

(1) (1915) 1 P.L.J. 468 = 36 I.C. 542.

(2) A.I.R. 1921 Pat. 377 = 6 P.L.J. 640.

(3) (1920) 2 U.P.L.R. 197 = 57 I.C. 748.

(4) (1919) 4 P.L.J. 277 = 51 I.C. 189 = 1 P.L.T. 177.

(5) (1919) 53 I.C. 44 = 12 Bur. L.T. 158.

(6) (1919) P.H.C.C. 32 = 48 I.C. 192.

above of the 6th June 1916 and reads as follows :—

"Up to date the Plaintiff has filed no *talbana* and no processes as ordered. To day also Plaintiff takes no steps. So I order the suit be dismissed for the Plaintiff's default."

That suit was originally brought against the major defendants who had already appeared in the case and filed their written statement. On the 15th March 1916 issues were settled and the 4th May was fixed for disposal. Subsequently on the 22nd March the plaintiff applied to add new defendants, some of whom were minors. He was accordingly ordered to file *talbana* and process fees in order to have the notice served upon the proposed guardian of the minor Defendants. This *talbana* and process fee was not filed, which has been referred to in the order in question and which caused the default of the Plaintiff. There is no doubt therefore that the original Defendants had already entered appearance in the case and upon the findings of the Court below they were also present on the 6th June 1916 when the order of dismissal was passed. Therefore the order of dismissal could not have been under O. IX, R. 3 of the Civil Procedure Code which is to be applied only when neither party appears. The order must therefore have been under O. IX, R. 8, inasmuch as the Defendants had entered appearance and were also present upon the date when the suit was dismissed.

The question then is whether this is a valid order under O. IX, R. 8. If it is a valid order under that rule then the present suit is surely barred by R. 9 which clearly lays down that the plaintiff when his suit is dismissed under R 8, shall be precluded from bringing a fresh suit. Therefore the contention of Mr. Lachmi Narain Singh that an order of dismissal for default is not a decree within the definition of the term in section 2, Cl. 2 of the Code does not seem to be of any effect. If on the other hand the order of the Court of the 6th June does not come under O. IX, R. 8 then the Plaintiff's present suit cannot be barred by any provision in the Code and the order will be without any jurisdiction. Consequently the principle of *res judicata* also will not apply inasmuch as the Plaintiff was not bound to have such an order set aside either by appeal or by review or in any other way. Much has been argued at the Bar as to the real meaning and scope of the word "hearing" used in the different provisions of the Civil Procedure Code but a careful examination of the rules on the subject will leave no manner of doubt that this is purely a question of academic interest. The word "hearing" has not been defined in the Code but it is obvious that it is used in different rules with a view to state the different purposes for which a date for hearing of the suit is fixed. Now in O. IX, R. 1, read with R. 3, it would appear that after the institution of the suit when the summons is issued upon the Defendants calling upon them to appear upon a particular date and that date is the first hearing of the suit and if the parties fail to appear when the suit is called on for hearing on that date the Plaintiff's suit is dismissed for default. Various steps have to be taken by the parties in a suit in order that it may be ready for final hearing which means the examination of witnesses, the tendering of documents, and the hearing of arguments. At the intermediate stage in order to enable or compel the parties to take necessary steps in the prosecution of the case the Court may fix dates for some particular action to be taken. These dates are dates for hearing of that particular matter which is specified in the order of the Court.

In the present case the Plaintiff on a previous date wanted to summon his witnesses but this was put off till the final date for hearing, meaning the examination of witnesses, was fixed. The same thing happened with steps taken up by the appearing defendants for the production of their evidence. No doubt on the 16th March the Court had fixed the 4th May for disposal but in view of the application made by the Plaintiff in the meantime on the 22nd March the case could not be taken up for disposal on that date but an order was passed fixing a date for the appointment of a guardian for the proposed new defendants who were minors. The 6th June was specially fixed for that purpose and the hearing on the 6th June was for the appointment of a guardian of the minor Defendants and it was not for the disposal of the case. The Plaintiff did not take the necessary steps for the appointment of the guardian on that date and consequently there was a default on his part on the 6th June. That default of the Plaintiff had to be dealt with under R. 3 of O. XVII, of the Code which says that "where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his

witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith." The plaintiff having defaulted the Court should have proceeded to decide the suit forthwith. In order to do that in the present case it was incumbent upon the Court to fix a date for the disposal of the suit inasmuch as the parties and particularly the plaintiff who suffered by the order of the Court of the 6th June did not know that the case would be taken up for hearing as soon as there was a default in his not taking the necessary steps for the appointment of a guardian. The Court in the order sheet does not even intimate that the case was to be taken up for disposal forthwith as is required by R. 3. The case could not therefore be disposed of on that date in the way the Court did, *viz.*, by dismissing the entire suit. The plaintiff was entitled to have his case decided as against the appearing Defendants upon a chance being to give to him to adduce his evidence which was postponed on account of the Court's order that this should be put off till the final date for hearing was fixed. In this view the order of the Court of the 6th June appears to me to be without any jurisdiction and if that was so there was no valid decree which could operate as *res judicata* so as to bar the present suit of the plaintiff based upon the mortgage bond in question. The result is that the view of the Court below refusing to give a mortgage decree upon the ground that the order of the 6th June operates as *res judicata* is set aside. I hold that the Plaintiff is entitled to a mortgage decree against all the Defendants and the subsequent purchaser Mahadeo Lal and the family members are certainly bound to pay off the prior incumbrance of the Plaintiff. The result is that the decision of the lower Appellate Court is set aside and in lieu thereof it is ordered that a mortgage decree in terms of the bond be prepared carrying interest as stipulated in the bond up to the day of grace which is fixed as six months from this date and thereafter interest will run at the rate of 6 per cent. per annum till the date of realisation. If the sum due under the mortgage calculated as above, is not paid on or before the days of grace the Plaintiff will be entitled to sell the property. The appeal is decreed with costs throughout.

Das, J.—I agree.

Appeal allowed.

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DAWSON MILLER, C.J. AND ROSS, J.

Mahabir Prasad Tewari—Appellant.

v.

Jamuna Singh and another—Respondents.

Privy Council Application No. 54 of 1921, decided on 16-3-1922 from a decision of Mullick and Bucknill, JJ. dated 21-4-21.

Lim. Act, S. 12 and Art. 179—Application for leave to appeal to His Majesty in Council—Limitation—Time taken for obtaining copies of decree and judgment, can be excluded.

In computing the period of limitation under Art. 179 of the Lim. Act, the applicant is entitled under S. 12, cl. 2 to exclude the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree. S. 12, sub-S. 2 of the Lim. Act is general in its terms and applied to all applications for leave to appeal including an application for leave to appeal to His Majesty in Council. Under sub-S. 3 of S. 12 the time requisite for obtaining a copy of the judgment ought also to be deducted in cases of application for leave to appeal to His Majesty in Council. The provisions of sub-S. 3 are meant to apply generally to cases covered by sub-S. 2 and the reason seems to be this that if the appeal in question is from a decree then it is generally necessary that the judgment on which that decree is based should also be obtained.

[P. 256, C. 1, 2.]

R. Prasad—for Appellant.

P. N. Sinha—for Respondent.

Dawson-Miller, C. J.—This is an application for leave to appeal to His Majesty in Council from a decision of this Court, dated the 12th April 1921. The judgment, which it is sought to appeal from, is a judgment of reversal and the value of the matter in dispute is over Rs. 10,000 but the Respondents contend that the application for leave to appeal was out of time. The period of limitation under S 179 of the Lim. Act as now amended is 90 days for a person desiring to appeal under the Civil Procedure Code to His Majesty in Council. The judgment of this Court was dated the 12th April 1921 and the 90 days allowed would expire on the 11th July. The petitioner applied for a copy of the judgment appealed from on the 9th July and did not obtain that until the 25th and two days later, on the 27th the application for leave to appeal was filed. It is quite obvious that if the period occupied in obtaining a copy or the judgment is excluded the application is in time. Even if one only excludes the two days of that period from the 9th to the 11th July, still as the application was filed two days after the copy was obtained, I think that the application was clearly in time. It has been contended, however, by the learned Vakil who appears for the Respondents that we ought not to exclude the period

which was occupied in obtaining a copy of the judgment and that S. 12 of the Lim. Act does not apply to cases of appeals to His Majesty in Council. In my opinion this contention is not well founded. The question of whether S. 12 applies to applications for leave to appeal to His Majesty in Council has no doubt been the subject of somewhat conflicting decisions in the different High Courts in India but the matter was considered by the Chief Justice and Mr. Justice Rafique in the Allahabad High Court in the case of *Ram Sarup* v. *Jaswant Rai* (1) and the learned Judges in that case came to the conclusion that in computing the period of limitation under Art. 179 of the Lim. Act, the applicant was entitled under S. 12, cl. 2 of the Lim. Act to exclude the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree They arrived at this conclusion on the ground that S. 12, sub-S. 2, of the Lim Act is general in its terms and applied to all applications for leave to appeal, including an application for leave to appeal to His Majesty in Council, whereas formerly under the previous Act it had been restricted to application for leave to appeal as a pauper. In my opinion that decision expresses properly the interpretation of S. 12, sub-Cl. 2, however, of S. 12 only deals with obtaining copies of the decree, sentence or order appealed from and therefore does not in terms cover the present case where the time sought to be deducted is the time occupied in obtaining a copy of the judgment. A copy of the decree was applied for sometime between the 9th July and the 25th July and it does not appear that any further time was occupied in applying for a copy of the decree. I think, however, that sub-S. 3 of S. 12 of the Limitation Act applies to the present case and that the time requisite for obtaining a copy of the judgment ought also to be deducted in cases of application for leave to appeal to His Majesty in Council. I think that the provision of sub-S. 3 are meant to apply generally to cases covered by sub-S. 2 and the reason seems to me to be this that if the appeal in question is from a decree then it is generally necessary that the judgment on which that decree is based should also be obtained in order that the parties may satisfy themselves by reference to it exactly what its terms are and further in order that they may as is provided in the Civil Procedure and under the rules of most High Courts file a copy of the judgment with the application for leave to appeal. Under the practice in this Court it is necessary that a copy of the judgment from which it is sought to appeal should always be filed with the petition applying for leave. The court insists upon that because in some cases it is absolutely necessary that the judgment itself should be considered notably in cases where the question is whether a substantial question of law arises for consideration by their Lordships of the Judicial Committee. In my opinion, therefore, the time occupied in obtaining a copy of the judgment ought to be deducted in this case. If that is done then the application for leave to appeal was in time and I think a certificate should issue that the case complies with the provisions of S. 110 of the Civil Procedure Code. As this application has been opposed by the Respondents I think the petitioner is entitled to his costs of the application. Hearing fee, 5 gold mohurs.

Ross, J.—I agree. *Certificate issued.*

(1) (1915) 38 All. 83=13 A. L. J. 1114 =31 I. C. 906.

A. I. R. 1922 Patna 256.

DAWSON MILLER, C J. AND ADAMI, J.

Raj Kishore Das—Petitioner

v.

Ram Gulam Sahu—(Opp.-Party).

P. C. A. No. 45 of 1920 decided on 11th February 1921 from an order of Mullick and Sultan Ahmad, JJ. D. 19th April 1920.

(a) *Civil P.C.S.* 109—*Order after contest as to validity of order of lower court recording compromise—Certificate can be issued in respect of.*

An order made by the High Court after contest by both the parties, which decides one way or the other whether an order by a lower court recording a compromise agreement was a valid order is not an order by consent, and therefore a certificate can issue as to the fitness of the case to be taken to the Privy Council. [P 257, C. 2.]

(b) *Civil P. C. O.* 32, *R.* 5—*Application on behalf of minor to court cannot be made by a discharged guardian* ad litem.

Any application made on behalf of minors if not made by the guardian for the suit but by the previous guardian *ad litem* who long before the application was made had been discharged by the Court must be rejected, as it contravenes the provisions of O. 32, R. 5, of the Civil Procedure Code which lays down that every application to the Court on behalf of the minor other than an application under R. 10, sub-R. (2) shall be made by his next friend or by his guardian for the suit. [P. 258, C 1.]

W. H. Akbari and *H. P. Sinha*—for Petitioner.

S. M. Mullick and *J. P. Sinha*—for Opp. Party.

Dawson Miller, C. J.—This is an application on behalf of certain minors for leave to appeal to His Majesty in Council from a decision of this court dated the 19th April 1920. The facts are somewhat peculiar but may be shortly stated. The petitioners and one Shyam Sahai Das are members of a joint Hindu family. They were sued by the respondents and a decree was obtained against them for a sum of Rs. 29,000. In execution of that decree on the 21st March 1919, certain property belonging to the judgment-debtors was sold in execution and purchased by the decree-holders for a sum of Rs. 36,783, the decretal amount by reason of interest which had accrued having at that time amounted to considerably more than Rs. 29,000. Of the judgment-debtors who formed the joint family the only adult member of the family was Shyam Sahai Das, the other members who are present petitioners to the court being minors. In those proceedings the minors were represented by a guardian Babu Basanta Kumar Neogi. The property having been sold, two applications were presented under Order XXI, rule 90 one on the 28th March 1919, by Shyam Sahai Das and the other on the 3rd April 1919 by the minor members of the family, praying to set aside the same on the ground of material irregularity within the meaning of that rule. On the 12th April 1919 a petition of compromise was filed by all the parties asking that the case might be settled upon the terms agreed to, by the compromise which were that if the judgment-debtors paid the sum of Rs. 37,283 by the 27th May the sale should be set aside and that if they failed to pay that sum by the date mentioned the sale should be confirmed. An order was made by the District Judge when the petition came before him in the presence of the parties, the order being in the terms of the compromise, to the effect that if the money was paid on the date mentioned the sale should be set aside and if not the sale should be confirmed. In the result the judgment-debtors failed to pay the sum of Rs. 37,283 by the 27th May on that day a petition was filed by Shyam Sahai Das in which he alleged that subsequently to the compromise the decree-holders had agreed to take a smaller sum *viz.*, Rs. 30,400 in full satisfaction of their claim and further that payment should be made as to Rs. 15,000 on the 27th May and the balance of Rs. 15,400 in two months time. This variation of the compromise was disputed by the decree-holders and on the 10th June when the matter came up for determination by the Subordinate Judge he found that the variation of the compromise alleged by Shyam Sahai Das had not been established and the application was rejected. The result therefore would be that the money not having been paid by the time stipulated in the compromise the sale would be confirmed, but in the course of the argument Shyam Sahai Das urged the contention that the court in passing its order on the 12th April recording the compromise had not recorded in express terms its leave to compromise on behalf of the minors, and that the order was therefore not binding. The Judge was of opinion that Shyam Sahai Das himself was bound by the compromise originally made but that it was not binding on the minors and that their application under Order XXI, rule 90 should be tried and heard on the merits. Against that order the decree-holders moved the High Court and obtained a rule and served the minors with notice through their guardian *ad litem* Babu Basanta Kumar Neogi. The guardian did not appear in those proceedings and accordingly a new guardian *ad-litem* Babu Narendra Nath Sen was appointed by the High Court and the old guardian was discharged. The High Court, when the matter came before them, held that the order of the Subordinate Judge setting aside the consent order without any application by the minors was with jurisdiction and that the order of the 12th April should stand.

It is from that decision of the High Court that the minors seek to appeal to His Majesty in Council. It is objected by the respondents that this is really an attempt to appeal from an order or decree made by consent. That, however, in my opinion is not the case.

The order which it is sought to appeal from, is an order made by the High Court after contest by both the parties. The fact that it decided one way or the other whether an order recording a compromise agreement was a valid order, does not in any way make the order appealed from an order by consent, and were this all, I think it would be a proper case in which to issue certificate asked for.

It appears however that the present application by the minors is presented not in the name of the guardian *ad litem* appointed by the High Court *viz.*, Babu Narendra Nath Sen but in the name of Babu-Basanta Kumar Neogi who at the date when the application was presented

no longer represented the minors. The application therefore cannot in my opinion be entertained as it contravenes the provisions of O. 32, R. 5, of the Civil Procedure Code which lays down that every application to the court on behalf of the minor other than an application under R. 10, sub-R. (2) shall be made by his next friend or by his guardian for the suit The application made in the present case is not made by the guardian for the suit who is Babu Narendra Nath Sen but is made by the previous guardian *ad-litem* who long before the application was made had been discharged by the court. The result is that this application must be rejected. The respondents, are entitled to their costs.

Adami, J.—I agree. *Application rejected.*

A. I. R. 1922 Patna 258

DAWSON-MILLER, C. J. AND MULLICK, J.

Sir L. E Ralli and others—Appellants

v.

A. H. Forbes—Respondent.

Letters Patent App. No. 75 of 1921 decided on 17-5-1922, against the judgment of Mr. Ross, J. dated 19-7-1921.

(a) T. P. Act, S. 106—Lease—Construction.—Liberty to make permanent structures on demised property cannot make lease a permanent lease against the express terms thereof.

Admitting that a lease granted for the purpose of building permanent structures may be presumed to pass a permanent interest, such a presumption cannot outweigh the actual terms of the lease itself. If the lease purports to be from year to year at an annual rental this can only be constructed as granting a lease from year to year even if the lessees have power to build.

(b) Evidence Act, S. 115—Lease—Lessor's consent to allow permanent construction.—Will estop him from subsequently disputing the permanent nature of the lease.

Where the lessees had a doubt whether they had permanent interest under the terms of the lease and wanted it cleared up before committing themselves to building on the land and they approached the lessor who definitely declared that the lease was a permanent one and gave the lessees the right to erect building and by so acting dissipated any doubt that remained in the mind of his lessees and induced them to spend money in buildings which, it was found, they never would have done but for the representation made, *Held* the lessor was estopped from disputing that the lease was not a permanent lease. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest, is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, had induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *Sibi impulet*, it may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequence on the person who believed his statement and acted on it as it was intended he should do

[P. 263, C. 2; P. 264, C. 1]

Mauuk, S. P. Sen and *B N. Mitter*—for Appellants.

P K. Sen and *L. M. Ganguli*—for Respondent.

Dawson-Miller, C. J.:—This is an appeal by the defendants under the Letters Patent from a decision of Mr Justice Ross, dated the 19th July 1921 setting aside a decree of the lower appellate Court.

The appellants, Messrs. Ralli Brothers, are merchants carrying on business in Calcutta and other places. The respondent, Mr. A H. Forbes, is the proprietor of a large estate in the Purnea District of this province. The appellants are the lessees under the respondent of 4 *bighas* of the land on the latter's estate under an instrument dated the 22nd January 1894.

On the 17th September 1917 the respondent instituted this suit as plaintiff claiming to eject the appellants and to recover possession of the land. This case is that the lease was yearly lease and could be terminated by him on giving 6 months' notice, which was duly given, but the appellant refused to give up permission. It is the appellant's case, first that the lease was a permanent lease, or secondly, if the instrument does not bear this interpretation, that they had been induced by the acts and representations of Mr. Forbes to believe that they had a permanent interest in the land and that acting thereon, and in good faith, they had erected permanent buildings on the land and established a business connection at that place at considerable expense and that Mr. Forbes was estopped from denying the truth of the representation. They rely upon the provision of S. 115 of the Evidence Act and the equitable doctrine of estoppel.

The Munsif before whom the case came for trial was of opinion that the lease was a permanent one and not a lease from year to year and, further, that Mr Forbes had induced the appellants to build upon the land at considerable expense by representing that Messrs Ralli Brothers had a permanent interest and was estopped from denying the truth of the representation.

On appeal the Officiating District Judge affirmed the decree of the Munsif and dismissed the appeal.

A second appeal to this Court was argued before Mr. Justice Ross who was

of opinion that the lease created a yearly tenancy only and not a permanent interest in the land. On the question of estoppel the learned Judge held that, as the written lease was plain and unambiguous in its term there was no room for mistake and, as the lease was not a permanent one, no statement about it by Mr. Forbes could make it so. He further considered that there was in fact no representation that the lease was a permanent lease and that no opinion expressed by Mr. Forbes could alter the nature of the estate taken under the deed and that there was no estoppel.

From this decision Messrs. Ralli Brothers have appealed under the Letters Patent to this Bench. It is contended on their behalf, first, that the lease in fact grants a permanent interest and, secondly that upon the facts found by the lower appellate Court, which cannot be questioned in second appeal, the respondent is estopped from denying the truth of the representation made by him as found by the lower appellate Court, and that it was not competent for the learned Judge of this Court by his decision to arrive at a different conclusion of fact and base his decision thereon.

It is necessary therefore to consider in some detail the facts alleged by the parties and the conclusions arrived at by the Officiating District Judge in first appeal. The lease in question is dated the 22nd June 1894 and was registered three days later. The lease itself has been put in evidence and the *Kabuliat* executed by Mr. Acatos the Agent of Messrs. Ralli Brothers has also been proved and admittedly contains the terms of the lease. It provides as follows:—"That whereas land is required by me Mr. Acatos, Agent of Messrs Ralli Brothers, Sahebgunge Agency for the purpose of erecting building, putting up press etc., for trading I, the aforesaid Agent, agree to lease from Mr. A. H. Forbes, executor to the estate of the late A. J. Forbes, 4 *bighas* of land for the above purpose measured with the local rod of 4½ cubits of 18 inches situate in Mauza Pokhar Pargana Sultanpore, thana Motihari in the District of Purnea and adjacent to the Forbesganj Railway station on the following terms, *viz.*, from year to year at an annual rental of Rs. 45 per *bigha* or total rental of Rs. 180 and to pay Zamindari dak cess as well as all legal cesses payable at present and which may hereafter be enforced by Government beginning from the agricultural year 1302 M. S. The second clause provides for payment of rental by quarterly instalments. The third clause restricts the tenants from cutting down or selling any trees on the land without the sanction of the lessor under penalty of paying Rs 10 per tree or more according to the value thereof. The clause provides that if at any future date the area of the land under the lease should be found by measurement to be in excess of the area leased the tenant should pay rent for the excess according to the highest rate then prevailing. The fifth clause provides that the nominal lessee Mr. Acatos shall have no right to transfer except to the name of Messrs. Ralli Brothers or to sell any portion of the land without the written authority of the lessor. The sixth and last clause contains the boundaries and dimensions of the land settled.

By section 106 of the Transfer of Property Act in the absence of contract or of local law or usage to the contrary the lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable by 6 months' notice by either party. But where a lease has been granted for building purposes, and no term specified in the instrument, if the buildings contemplated or in fact erected are of a permanent nature, the Courts in this country have generally presumed that the interest granted was intended to be a permanent one. The present lease purports to be a building lease and buildings have in fact been erected of a permanent nature but the terms are stated to be from year to year at an annual rental of Rs. 45 per *bigha* and some years later, towards the end of 1903. Messrs. Ralli Brothers, although they considered, as was found by the learned District Judge, that they had a permanent interest in the land and might safely erect permanent buildings thereon, nevertheless, owing to a certain vagueness in the terms of the lease, approached the lessor before doing so. Accordingly on the 31st December 1903 an interview took place between Mr. Forbes and his agent Mr. Duff on the one hand and Mr. Carras representing Messrs. Ralli Brothers on the other. The purport of what took place at that interview was given in evidence by Mr. Carras and was accepted by the learned Judge. At the request of Mr. Carras the result of what took place at that interview was reduced to writing and is contained in a letter written to Mr. Carras by

Mr. Duff the same day. The letter is in these terms:—

Sultanpur,

Dear Mr. Carras. 31st December 1903.

Referring to your conversation of this morning with Mr. Forbes and myself I write at your request to say that the lease executed by Mr. C. Acatos dated the 22nd June 1894 is a permanent lease and gives you the right to erect buildings but it does not entitle you to hold at a fixed rate and the rent is liable to enhancement after proper legal notice. If your firm desires to have a permanent lease at a fixed rate of rent I will be glad to see the proposed draft of lease and to show it to Mr. Forbes. In the meantime you can commence the house if you like to do so.

Yours sincerely,
(Sd.) Patrik Duff,
Manager, Sultanpur Estate.

The evidence of Mr. Carras, which was accepted by the learned District Judge, was to the effect that he wanted to construct a permanent building for his residence on a portion of the leasehold and on referring the matter to his principals at Calcutta, was instructed that the point should be made quite clear as to whether the lease was a permanent one or not. He accordingly interviewed Mr. Forbes and his manager Mr. Duff when a conversation took place between them the substance of which was embodied in the letter of the 31st December.

Mr. Duff was not called as witness, Mr. Forbes was called and apparently denied all recollection of the matter. It was found as a fact that the letter accurately represented the substance of the conversation between Mr. Forbes and his agent and Mr. Carras and that the letter was written under the directions of Mr. Forbes. It appears that at this time Messrs. Ralli Brothers wished to have a permanent lease at a fixed rent and it is clear from the letter that the question whether the rent was fixed or liable to enhancement, was discussed at the interview and the agreement come to was that the lease was permanent but did not entitle the tenant to hold at a fixed rate of rent. It appears further from the Munsif's judgment that a nazarana was paid by the lessees in respect of the building which was commenced sometime in January 1904 and completed in May and, from a letter written by Mr. Duff to Messrs. Ralli Brothers' solicitors on the 23rd January, it appears that before building the lessees had called for the lessor's title deeds. This letter refuses to produce the title deeds stating that matters of greater importance than the lease of a few *bighas* of land were constantly transacted in the lessor's estate without the production of such papers and that there was no special title deeds for the plot of land which Messrs. Ralli Brothers had held for the last nine years. It then says "Mr. Forbes therefore declines to produce such valuable papers as he holds and considers that the existing lease 'with the addition of the sanction recently 'given to erect the building is insufficient 'for all requirements". It is found as a fact that the defendants would never have undertaken the construction of a masonary building at such a heavy cost if they had not been led to do so by the representation of the plaintiff and his manager referred to above. It is also found in terms that Mr. Forbes gave Messrs. Ralli Brothers fully to understand that the lease of 1894 was permanent lease and that they could construct building without any fear but had no right to hold the land at a fixed rate. From 1904 till 1916 the appellants remained in occupation paying the rent reserved under the lease. In that year the lessor to Kacheri or estate-house was unfortunately destroyed by fire. He thereupon attempted to levy a toll upon each of his tenants at the rate of 0-1-6 per rupee of their rental for the purpose of rebuilding the Kacheri. Whether the other tenants of Mr. Forbes submitted without protest to this procedure does not appear, but Messrs. Ralli Brothers definitely refused to contribute their proportion and were undoubtedly within their rights in so doing. This appears to have given offence to Mr. Forbes who in August 1916 served the lessees with notice to quit and subsequently instituted the present suit.

I have referred in some detail to the findings of the Additional District Judge as it is upon these findings that the determination of the question of estoppel must depend. With regard to the appellant's first contention *viz.*, that the lease is in fact a permanent one in my opinion the decision of Ross, J., now under appeal was right and that of the Additional District Judge cannot be supported. Admitting that a lease granted for the purpose of building permanent structures may be presumed to pass a permanent interest, I do not think that such a presumption can outweigh the actual terms of the lease itself. The lease purports to be from year to year at an annual rental of Rs. 45 per *bigha* and this

in my opinion can only be construed as—granting a lease from year to year even if the lessees have power to build. Certain cases were referred to by the appellants in support of their contention on the first point. The first is that of *Juhooree Lal Sahoo* v. *Dear* (1) but that decision goes no further than this, that where the land is given to a lessee for the purpose of building a house to live in, without any term being fixed for the tenancy, the tenure of the house and land cannot be taken away from the lessee's heir or his vendee as long as he continues to pay the rent. The decision goes no further than to raise a presumption of permanency in the case of building leases where no term is fixed which does not appear to me to be the present case where the term is said to be from year to year. It was contended however that the words "year to year at an annual rental of Rs. 45 per *bigha*" meant no more than an undertaking to pay the rent year after year and the case of *Raja Promoda Nath Roy* v. *Sri Govindo Chaudhury* (2) was cited, where it was held that where a lease was given for building purposes the court may well presume that it was intended to be a perpetual lease, the words used in that instance were "you will pay the rent etc., at the above rate Kist by Ryots, year after year", and the following passages in the judgment of Ghose and Boddig, JJ. were relied upon that even a lease stated to be from year to year might be of a permanent nature. "As already noticed the lease in this case does not specify any period during which it is to subsist. The land was to be held by lessee from year to year at a certain yearly rent and in the event of a masonary building being erected on it, the lessee would be liable to pay the prevailing rate of rent. And it seems to us, looking at the document as a whole, that the absence of the words *Maurasi Mukurari* and so forth which are usually found in grants in perpetuity does not indicate that it was not the intention of the lessor to grant a permanent lease". If by this the learned Judges meant that the lease was in fact one from year to year the decision eventually arrived at seems hardly consistent with that finding nor were the words from year to year in that part of the judgment a correct reproduction of the words actually used in the lease. I do not think that a chance expression such as that relied upon and which may well have been made *per incuriam* can have any binding force as an authority upon the construction of such leases.

In *Sarada Kirpa Lall* v. *Akhil Chandra Biswas* (3) the lease which was called a *taluka patta* recited that the tenant had executed the kabuliat in favour of the grantor and that the taluka patta was granted on rent of Re. 1 from year to year. Then followed a covenant in these terms:—"You shall erect houses upon the land and live there. If I have a personal necessity you shall relinquish the land and you will not be entitled to make any objection." It was held that if there be nothing either in the surrounding circumstances or in the instrument which creates the interest to show that it was intended to be otherwise, the inference is that a lease described as a taluka patta was intended to be permanent. The words in that case "on rent of Re. 1 from year to year" was clearly taking as indicating merely a yearly rent of one rupee and having no reference to the term demised, and no point appears to have been taken that they could bear any other interpretation. In the present case however the words are different and appear to me to indicate both a lease from year to year and an annual rent of Rs. 45. I hold therefore that the lease must be construed as a yearly lease. At the same time the cases to which reference has been made may well have raised a doubt in the minds of the parties in this case as to what their exact rights were under the instrument in question and this is not without importance in considering the question of estoppel.

In support of their plea of estoppel the appellants rely upon the case of *Ramsden* v. *Dyson and Thornton* (4) and contend that on the facts found by the Officiating District Judge the respondent is estopped from denying the permanent nature of their interest. The doctrine is thus expressed by Lord Cranworth, L. C. in that case:—

"If a stranger begins to build on my land—supposing it to be his own, and I, perceiving his mistake, abstain from settling him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended on the

(1) 23 W. R. 399.

(2) (1905) 32 Cal. 648=9 C. W. N. 463.

(3) (1918) 28 C. L. J. 18=41 I. C. 530 =21 C. W. N. 903.

(4) (1866) 1 H. L. 129=14 W. R. 926 =12 Jur. (N.S.) 506.

supposition that the land was his own. It considers, that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title and that it would be dishonest in me to remain wilfully passive on such occasion, in order afterwards to profit by the mistake which I might have prevented.

"But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principal of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive making it inequitable in me to assert my legal right."

The respondent on the other hand contends that on the facts found the case is not governed by the principle there enunciated. The Lord Chancellor in thus stating the principle deals only with the case where the owners of the land takes no active part in inducing the tenant to build or encouraging him in the mistaken idea that he has a right to do so, but merely remains passive whilst he perceives the mistake. The reason why Courts of equity refuse to allow the owner of the land to profit by such a mistake rests upon the ground that it would be conniving at dishonesty to permit him to do so. But in the case supposed where the owner merely stands by and does nothing and afterwards seeks to eject the tenant there can be no question of fraud or dishonesty unless the owner was aware when the building was erected that he had power to prevent it. In such a case there could be no obligation or duty upon him to disclose that of which he was not himself aware and it is the attempt to take advantage of this breach of duty or obligation which constitutes the dishonesty. Similarly, if the tenant is aware that he has no right to build, there is no obligation upon the owner to inform of that which he already knows, nor would it make any difference in such a case that the owner was well aware of his own rights. The knowledge of the owner as to his power to interfere is therefore essential where his conduct is merely passive and he takes no active steps to create or induce the mistaken belief in the mind of the tenant as to the latter's rights or as to his own acquiescence in consent to the trespass Lord Cranworth, L. C. did not in terms formulate any principle indicating the factors which would be necessary for the application of the doctrine where the owner by his own words or acts intentionally caused the tenant to believe that he was entitled to build or induced him to do so. But I apprehend that where the owner, being either ignorant of his rights or uncertain of their extent, by his own act or representation creates or induces in the mind of his tenant a mistaken belief that he had a permanent interest in the land and may safely build thereon, and the tenant relying upon the act on representation so made, treats his interest as permanent and incurs expense in building which he would not have otherwise done, the owner cannot afterwards, be heard to deny the truth of that which he represented. To allow him to do so would in my opinion be opposed to the fundamental principles of the doctrine of estoppel. For just as in the former case the rightful owner must be deemed guilty of a dishonest act if knowing an innocent mistake has been committed he omits to correct it and afterwards seeks to take advantage of it, so in the latter case, if he actively assists in creating the mistaken belief in the mind of his tenant which the tenant acts upon in good faith, it would be contrary to honest dealing if the landlord were afterwards to go back upon his word, however innocent his conduct may have been in the first instance.

The facts found by the majority of their Lordships in *Ramsden* v. *Dyson* (4) did not bring the case within the doctrine, but Lord Kingsdown who took a different view of the facts enunciated the rule thus:—

"The rule of law applicable to the case appears to me to be this: if a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same something, under an explanation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land a court of equity will compel the landlord to give effect to such promise or expectation. This is the principle of the decision in *Gregory*

v. *Mighell* (5) and as I conceive, is open to no doubt.

Although Lord Kingsdown differed from the majority of their Lordships in his appreciation of the evidence, his decision as to the principle to be applied has not so far as I am aware ever been questioned. It was referred to by Sir Lawrence Jenkins, C. J. in *The Municipal Corporation of Bombay* v. *The Secretary of State for India* (6) as a correct exposition of the doctrine and was applied in that case. Moreover the application of the doctrine of estoppel in this country, in so far as it creates a rule of evidence, is governed by statute and finds expression in Section 115 of the Evidence Act, whether there be, as stated by Sir Lawrence Jenkins, C. J. in that case essential differences between the law embodied in the section and the equitable doctrine referred to, I do not propose to discuss, for full effect must be given in this country to the rule enacted by the section, which appears to me to do no more than embody in a compendious form the result of the principles laid down in the decided cases. It is unnecessary therefore to refer in detail to all the English authorities which were referred to in argument. Section 115 of the Evidence Act provides as follows :—

" When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

It will be observed from the wording of this section that it combines the principles underlying the doctrine of estoppel as enunciated both by Lord Cranworth, L. C. and Lord Kingsdown in *Ramsden* v. *Dyson*, (4). The estoppel may arise by reason of either a declaration, an act or an omission, but in either case there must be an intention on the part of the person against whom the estoppel operates to cause or permit a belief in the mind of another. In the case of a mere omission no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party. In considering the effect of this section I cannot do better than refer to the case of *Sarat Chandra Dev* v. *Gopal Chandra Laha* (7) where Lord Shaw in delivering the judgment of their Lordships of the Judicial Committee dealing with the case of a declaration or act observed :—

" In regard to the first of these points, the section of the Evidence Act by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The court is not warranted or entitled to add any such qualifying conditions to the language of the Act, but even if they had the power of thus virtually interpolating words in the statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned Counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel and their Lordships entirely adopted that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declaration induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act ; and the principle on which the law and the statute rest, is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If

(5) (1811) 18 Ves. 328=11 R. R. 207.
(6) (1905) 29 Bom. 580=7 Bom. L. R 27.
(7) (1893) 20 Cal. 296=19 I. A. 203 =6 Sar. 224 (P. C.)

the person who made the statement did so without full knowledge, or under error, *sibi imputent*, it may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequence on the person who believed his statement and acted on it as it was intended he should do."

The Judgment from which I have just quoted contains a forcible and lucid exposition of the law of estoppel as administered in India and based upon the statute. Upon the facts found by the lower appellate Court the present case appears to me to come directly within the four corners of the principle as enunciated by Lord Shaw.

It is contended on behalf of the respondent however that the terms of the lease are so clear that there can be no room for mistake, and that Messrs. Ralli Brothers could never have been deceived as to the actual rights by any representation made by Mr. Forbes. It is further argued that the representation was at most a mere expression of opinion upon which Messrs. Ralli Brothers might act or not at their own risk. This appears to have been the view taken by Ross, J. in the decision now under appeal. The learned Judge also appears to have considered that there was no representation at all of any existing fact, and, as I read his judgment, he arrived at this conclusion by finding that the representation such as it was a mere expression of opinion, or, at most of the landlord's present intention. In face of the express feelings I must respectfully decline to speculate as to whether a person of reasonable intelligence could honestly believe the instrument created more than a yearly interest. It is found as a fact that Messrs. Ralli Brothers thought that they had a permanent interest but that the terms of the lease were vague and indefinite, and they therefore had a doubt and wanted it cleared up before commuting themselves to building. I think that is a fair inference to be drawn from the findings as a whole. In these circumstances they approached the lessor who definitely declared that the lease was a permanent one and gave the lessees the right to erect building. By so acting the lessor dissipated any doubt that remained in the mind of his lessee and induced them to spend money in buildings which, it is found, they never would have done but for representation made. The suggestion that the representation was a mere expression of opinion was argued before the Officiating District Judge but was rejected and in my opinion rightly. The finding of the Officiating District Judge who had the evidence before him is conclusive on this question of fact and it could not be re-opened in second appeal.

The case of *Jordon* v. *Money* (8) was also referred to in argument and relied on by the respondent. From the facts found in that case it would appear that the representations relied upon were taken to amount merely to an expression of present intention by Mrs. Jordon which created no estoppel fettering her future conduct or preventing that lady from changing her mind. It was found that she was never agreed to give up her legal rights but merely intimated that she had no present intention of enforcing them, and any one who speculated upon slender chances of a lady remaining of the same mind could not afterwards complain of his venture turned out unprofitable. The representation may well have been true as to the state of affairs existing at the time it was made and it was nonetheless true because subsequently Mr. Jordon's intention altered. The representation in the present case cannot be regarded as mere expression of an intention. It is in the nature of a declaration of the tenant's rights and a direct invitation to them to act upon it which in consequence they did.

It was further contended by the learned Counsel for the respondent that the proper course, if our judgment should be against on the point of estoppel was to grant him a decree of ejectment giving the appellants compensation for the sum expended by them on the holdings. In my opinion no reason has been shown why this course should be adopted and it is manifest that the mere cost of building would not adequately compensate the appellants for the loss. Of the land in connection with which after erecting permanent structures at considerable expense they have established a large business connection. In my opinion the proper course to follow is to dismiss the plaintiff's claim. I would allow this appeal and dismiss the suit with costs here and in the courts below.

Mullick, J.—I agree.

Appeal allowed.

(8) (1854) 5 H. L. C. 185=23 L. J. C.H. 865 =101 R. R. 116.

A. I. R. 1922 Patna 265.

JWALA PRASAD, J.

Bhim Bahadur Singh and another—(Accused)-Petitioners

v.

Emperor—Opposite Party.

Cr. Rev. No. 22 of 1920, decided on 10-2-1920, against the order of J. C. Ranchi, dated 7-1-1920.

(a) *Penal Code, S. 379—Conviction under—Bona fide plea of accused claiming title—Cases involving complicated questions of title, if should not be tried summarily, but left for determination by Civil Court.*

Where there is a clear plea of *bona fide* title raised in a case under S. 379, Indian Penal Code, which takes the case out of the province of the Criminal Court, the Magistrate should leave the parties to have their rights determined by a Civil Court. When from the nature of the dispute and specially from the plea taken by the accused it is clear that a complicated question of right and title is involved in the case, the Magistrate should not try the case summarily. [P. 265, C. 2, P. 267, C. 1.]

(b) *Registration Act, Ss. 17, Cl. (d) and 49, Cl (c) Hukumnama creating perpetual lease, but unregistered is not admissible in evidence for any purpose.*

An unregistered document, with a stamp of one anna affixed thereon and purporting to create a lease without fixed terms is of the nature of a perpetual lease. Such a document comes well within cl. (d) of S. 17 of the Registration Act under which it is compulsorily registerable. Such document is inadmissible in evidence under S. 49 (c) of the Act. If the whole decision as to the right of the complainant in the land in question is decided on the basis of such Hukumnama which is improperly admitted in evidence, the conviction on this ground is liable to be set aside. [P. 266, C. 1.]

(c) *C. P. C., O. 21, R. 95—Auction purchaser—Right to retain possession—Criminal Court should maintain auction purchaser's possession as against others-Criminal Court.*

Prima facie an auction purchaser is entitled to obtain possession of all the lands comprised within the writ of the Court free from any incumbrance created by the judgment debtor, and it is for the persons claiming right to remain on the land in spite of the delivery of possession, to prove conclusively the right to set up by them. Every attempt should be made by a Criminal Court to maintain the auction purchaser in possession of the property unless a clear right to possession is established in any other person. [P. 267, C. 2.]

P. C. Manuk and *S. N. Palit*—for Petrs.

Judgment :—This is an offshoot of a series of litigation, arising out of a *dakhaldahani* or delivery of possession given to the auction-purchaser Rai Bahadur Baldeo Das Birla in respect of a tenure belonging to the judgment-debtor, Thakur Madan Mohan Nath Sahi Deo. The delivery of possession was effected on various dates on the several properties comprised in the writ of the Court, from the 30th March to 14th April, 1919. Ex. A in this case shows that the possession was delivered in respect of village Kiso on the 23rd of April 1919. Nilmoni Nath Sahi Deo was an under-tenure-holder under the judgment-debtor and by the operation of law his under-tenure was rendered void by the auction sale under S. 208 of the Chota Nagpur Tenancy Act read with S. 16 of the Bengal Rent Recovery Act (Act VIII of 1865). Nilmoni Nath Sahi Deo resisted the claim of the auction purchaser to obtain possession of the under-tenure, but was defeated in a proceeding under S. 145 of the Code of Criminal Procedure by the order of the Magistrate, dated 1-9-1919, passed in favour of the auction purchaser, which was upheld by this Court on 13-10-1919. Apparently when the proceeding under S. 145 was going on, on 12-9-1919, the complainant in this case Shaikh Karim Bux filed a petition before the Magistrate, complaining against the petitioners, who are the servants of the auction purchaser, of having cut and removed paddy crops from a Plot No. 371 of the Cadastral Survey on the allegation, that the said paddy was grown by the complainant on the strength of the possession derived from a settlement alleged to have been made with him by Nilmoni Nath Sahi Deo on the 13th of March Sambat 1970, corresponding to the 24th of January 1914, by a *Hukumnama*. The police were ordered to investigate into the matter, but they returned the petition with a report that they were unable to come to any decision as to the respective claims of the parties. This report is dated 14-10-1919. On the 27th of October the Magistrate summoned the accused under S. 379 of Indian Penal Code. The plea of accused as recorded by the Magistrate was that

"They removed the paddy as they had sown it and had ploughed the field this year."

The Magistrate tried the case summarily, and after, examining five witnesses on behalf of the prosecution and four witnesses on behalf of the defence, recorded a judgment of conviction and sentenced the accused to six weeks' rigorous imprisonment.

The petitioner moved the Judicial Commissioner of Ranchi who by his order of the 7th of January 1920, declined to recommend the case of this Court for interference with the order of the Magistrate.

From the nature of the dispute and particularly from the plea taken by the accused, it was obvious that the case involved a complicated question of right and title and that it was not possible in a summary procedure to come to a definite and correct decision upon these points. This is also obvious from the long judg-

ment of the Magistrate who appears to have taken great pains in order to solve intricate questions involved before him. In spite of all this, the Magistrate chose to adopt the summary procedure for the trial of the petitioners.

The learned Judicial Commissioner seems to have realised the unreasonableness of the procedure adopted by the Magistrate, for, he says, that he agrees with the argument on this point urged on behalf of the Petitioners before him, but he declined to take any action inasmuch as in his view the wrong exercise of the discretion was not in itself a sufficient ground for an interference with the decision of the Magistrate. Whether the Judicial Commissioner is right or not in the abstract principle of law laid down by him, in the circumstances of this case it is obvious that the accused have been prejudiced by this wrong exercise of the discretion by the Magistrate and that itself is a good ground for an interference with the discretion exercised by the Magistrate to try the case summarily, and for setting aside the conviction and ordering a retrial. Another reason why the conviction cannot be supported is the illegal and irregular acceptance of the most important document in the case, the title deed of the complainant, the *Hukumnama* referred to above. This *Hukumnama* is an unregistered document with a stamp of one anna affixed thereon. It purports to create a lease without fixed terms and is therefore of a nature of a perpetual lease with the fixity of rent of Rs. 2-8 besides cesses. Such a document comes well within Cl. (d) of sec. 17 of the Indian Registration Act under which it is compulsorily registerable. The document was, therefore, inadmissible in evidence under Sec. 49 (c) of the Act. The whole decision as to the right of the complainant in the land in question has been decided on the basis of this *Hukumnama* which was improperly admitted in the evidence. The conviction on this ground also is liable to be set aside.

It may, however, be said that there was oral evidence in the case on behalf of the prosecution to show that the settlement was made and that the complainant was in possession of the land for the last six or seven years before the date of the occurrence and that even if the *Hakumnama* be taken out of consideration the finding of the Court below can be supported upon the oral evidence. In this state of the circumstances there can be no legitimate complaint that this Court should not go into the evidence in this case in revision. But before doing so and finding out how far the finding of the Magistrate can be supported upon the oral evidence in the case, it is impossible for this Court to find out how far the Magistrate was not influenced in his estimate of the oral evidence on account of the document which was improperly accepted in evidence. From the tenor of the Judgment of the Courts below I am inclined to think that their estimate of the oral evidence is to a great extent influenced by the said document. Coming to the evidence, it is impossible to place any reliance upon the testimony of the witnesses judging it externally or internally. From the evidence it is clear that there was a proceeding under Sec. 147 started by the Magistrate at the instance of the manager of the auction purchaser. Witnesses Nos 1, 2 and 5 were accused in that proceeding, whereas all the five witnesses have recently taken settlement of the land from Nilmoni Nath Sahi Deo, most probably out of the disputed under-tenures. Their evidence, is ridiculous and to read them is sufficient to discard them. The Judicial Commissioner has declined to go into the evidence as he thought that his hands were fettered in revision. As I have observed above, this is a case in which this Court is justified in looking into the evidence, particularly when the trial has been summary. The Magistrate has given no reason in his judgment as to why the evidence of Mr. A. P. Hanson, Manager of the auction purchaser, should not be accepted. He has in clear terms stated that he took delivery of possession of the lands in question from the Civil Court Nazir and had them sown and cultivated, and that the paddy crops were cut by the accused under his instructions. As to the delivery of possession the Nazir of the Civil Court corroborates Mr. Hanson, though it could not be expected that he would be able to swear to the possession being given of particular plots, when he had been engaged in giving possession from the 30th March to the 14th April 1919 over innumerable properties covered by the writ of the Court.

Compared with the evidence on behalf of the defence, the evidence on behalf of the prosecution appears to me not only unreliable but also vague and insufficient for conviction. The Magistrate as well as the Judicial Commissioner appears to have been greatly influenced by the plea taken

by the accused. That plea, as recorded by the Magistrate and as referred to above, appeared to them to be a plea of having actually sown and ploughed the field but from the evidence in the case, particularly of the manager, it appears that the land in question was not actually sown by the accused, but that the crops were cut and removed by them under the order of the manager. As the accused were claiming the possession of the land on behalf of their master, it was consistent with their plea to allege that they had sown and ploughed it, meaning thereby evidently that it was sown and ploughed on behalf of their master. On account of the summary nature of the trial their statement has not been recorded in their own words, and hence they cannot be pinned down to the purports of their statements recorded by the Magistrate. This also shows how the procedure adopted in this case has prejudiced the accused. The learned Judicial Commissioner has declined to give effect to their plea of not having acted *mala fide* and with dishonest intention in cutting the crop in as much as they were cutting it under the orders of their master simply upon the ground that their plea was that of having actually sown and cultivated the land ; but the evidence in this case as already pointed out shows that the plea was misunderstood. There is, therefore, no reason why the principle of law should not be applied to this case, that, even if the fact alleged by the prosecution be accepted, it has not been shown that the accused acted with any dishonest motive in cutting and removing the crop from the land in question under the orders of their master who, they believed, had grown the crop. There was a clear plea of *bona fide* title raised in the case which took the case out of the province of the criminal Court and the Magistrate could well have left the parties to have their rights determined by a Civil Court.

The allegations made in the complaint and the note of the Magistrate thereon referring to the *Khatian*, must also have made it clear to him that the dispute in this case raised a *bona fide* question of title. This was made clearer still by the report of the police, which stated that in spite of their local investigation, they could not come to any conclusion as to the respective rights and claims of the parties. Nowhere in the evidence in the case it has been asserted that the complainant was a settled *raiyat* in the village or had acquired a right of occupancy in the lands in suit apart from *Hukumnama*. It thus becomes a matter of great controversy as to what the rights of the complainant were in the lands even if he be held to have been in possession of them. *Prima facie* the auction purchaser is entitled to obtain possession of all the lands comprised within the writ of the Court free from any incumbrance created by the judgment-debtor and it is for the persons claiming right to remain on the land in spite of the delivery of possession, to prove conclusively the right set up by them.

The litigation arising out of a Civil Court *dakhaldhani* has already become most unfortunate, and every attempt should be made by a Criminal Court to maintain the auction purchaser in possession of the property unless a clear right to possession is established in any other person. I purposely refrain from giving any opinion as to the right of the complainant in the land in question and I do not consider it pertinent for a Criminal Court, or this Court sitting in revision, to attempt to decide such a complicated question of title raised in this case. I think the matter should be left to be determined by a Civil Court.

The rule must, therefore, be made absolute and the conviction and the sentences passed upon the Petitioners must be set aside. *Rule Made absolute.*

A. I. R. 1922 Patna 267.

BUCKNILL, J.

Gossain Misser & another—Accused —Petitioners v.

Emperor—Opposite Party.

Cr. Rev. No. 354 of 1921 decided on 10th August 1921, from an order of Dist. Mag. Champaran dated 9th July 1921.

Penal Code, S. 506—Deterrent sentences—Should be given only in exceptional circumstances.

It is of some importance that the theory of deterrent punishment should not be loosely put into practice, and that the principles upon which alone a deterrent penalty should as a rule be inflicted, clearly comprehended. Deterrent punishments are now regarded only as of utility under exceptional circumstances. When waves of imitative crime such as for example garrotting, gang robbery, (or dacoity as it is called here) and forgery of counterfeit coin or notes commence to sweep over a State judicious and increasing severity may properly be utilised to check and deter such an inundation; again in times of public tumult when there is a danger of wide breach of the public peace or security or where a highly organised or what one may call semi-professional association of persons engineer series of offences such as swindling or Burglary, deterrent punishments may be

with caution advantageously inflicted. Such a category is naturally not exhaustive but illustrative only; and sound knowledge, experience and a proper sense of perspective are alone the guides which can safely be followed in concluding whether the use of such an aid to the maintenance of the order and tranquillity of a locality is properly permissible and desirable. To adjust the punishment, so as to make it appropriate and to balance it, so that it justly fits the gravity of the offence but does not shock the public conscience (and thus wrap and dull the public's social sense and appreciation of crime as evil), should be the aim.

[P. 268, C. 2, P. 269, C. 1.]

G. C. Pal and *B. C. Mitter*—for Petitioners

Kalwant Sahay and *Shib Narayan Bose*—for the Crown.

Judgment:—This is an application in Criminal Revisional Jurisdiction No. 354 of 1921. The applicants are two men named Gos-ain Missir and Nandan Missir, and they ask for the setting aside of or the interference by this Court in an order of the Deputy Magistrate of Motihari, dated the 13th June of this year convicting and sentencing them under S. 506 of the Indian Penal Code to three months' rigorous imprisonment each, from which an appeal to the District Magistrate of Champaran was dismissed on the 9th July 1921.

I have thought over this case very carefully. There is no doubt that the two applicants threatened the complainant: whether they would have ventured to turn their words and gestures into an actual assault it is impossible to say—had they done so the consequences would have been very serious for them. Both the Deputy Magistrate of Motihari and the District Magistrate of Champaran considered that the sentence was a deterrent one; the former specifically passed it as such on the ground that—to use his own words—"I must consider the times and the prevailing atmosphere of the country all round;" the latter thought the sentence appropriate "in times which are somewhat exceptional."

The complainant, who was mounted on a horse, says that he did not feel "comfortable", when the two applicants threatened him and expected they would attack him; the two applicants were Indian residents of Sugaon village; the complainant is the European manager of the Sugaon factory; the complainant had endeavoured to intervene between the applicants here and a man called Choudhur Turaha, who had had a dispute about the ownership of the fruit of a Beel tree; the applicants had resented this.

In none of these circumstances can I, I must confess, see anything relating to this particular occurrence which renders the offence of exceptional gravity.

It is said at the Bar that the planters are isolated in these country localities; I appreciate fully that statement which I have no doubt is correct.

In the decision of the Deputy Magistrate and District Magistrate the expressions occur which I have quoted just above; I do not, however, see any evidence or indeed anything in the papers before me, which indicate that at or in the neighbourhood of the locality where this incident occurred there was any marked popular excitement creating or likely to create breaches of the public peace or a public tumult or disorder. I think it is of some importance that the theory of deterrent punishment should not be loosely put into practice, and that the principles upon which alone a deterrent penalty should as a rule be inflicted clearly comprehended. Normally most penalties in one sense are supposed to be primarily punitive (that is a punishment imposed upon the offender personally), and from a secondary aspect and in minor degree of a nature admonitory to others (that is a warning to those who may at any time contemplate a like offence); a "deterrent" penalty is an elaboration of the latter. Penalties were at one time of a type which to modern mentality were savage and wrong; but those were based largely on class distinction most of which have long since disappeared and on the theory of the deterrent effect which crushing punishments were thought to have on crime. But that hypothesis has long since been exploded; for experience has shown that where the general average of punishment was of a cruel severity the effect was but to minimize in the public the social sense and recognition of crime as an evil and to produce a callous and brutalising indifference.

Deterrent punishments are now regarded only as of utility and it cannot be denied that they have under certain circumstances their value in what are luckily as a rule exceptional circumstances. When waves of imitative crime such as for example (and I speak from personal experience) garrotting, gang robbery (or dacoity as it is called here) and forgery of counterfeit coin or notes commence to sweep over a State, judicious and increasing severity may properly be utilized to check and deter such an inundation; again in times of public tumult when there is danger of a wide breach of the public

peace or security; or where a highly organised or what one may call semi-professional association of persons engineer series of offences such as swindling or burglary, deterrent punishments may be with caution advantageously inflicted. Such a category is naturally not exhaustive but illustrative only; and sound knowledge, experience and a proper sense of perspective are alone the guides which can safely be followed in concluding whether the use of such an aid to the maintenance of the order and tranquillity of a locality is properly permissible and desirable.

It is now recognised that the hardest and most difficult task of those who are set as judges over the crimes of misdemeanours of their fellowmen is that most important question, *i e*, what is the proper penalty. Few, however, I fear, make a serious study of this almost unwritten breach of criminal jurisprudence and it is unwritten because the facts which make up the environment of an offence are so infinitely diversified that comparatively seldom are two crimes exactly identical.

To adjust the punishment so as to make it appropriate should be the aim; and to balance it so that it justly fits the gravity of the offence but does not shock the public conscience and thus warp and dull the public's social sense and appreciation of crime as evil is no easy task.

Now, in this case, as I have stated at the outset of my remarks, I can see no apparent reason for any punishment of a deterrent character such as this is explicitly stated to be. It is of course ethically untoward that person should not be of one mind and should have differences of opinion; but it is indeed deplorable, when in countries such as this and others where Indian and Europeans have to reside together and where they should live side by side in amity and community of interest, either should provoke the other; self-control and the treatment of one's neighbour as you would that they should treat you are the keys of all higher life, call that by whatever phrase one may. I shall set aside these sentences as inappropriate. I shall fine each of these men Rs. 30 each and as their offence is one which, not least for their own sakes, I am most anxious they should not repeat, I shall bind them over each in one surety of Rs. 100 to keep the peace of a period of one year. I hope and trust that my action in this matter may be of general value.

Sentence reduced.

A. I. R. 1922 Patna 269

FULL BENCH

DAWSON MILLER, C.J. MULLICK AND JWALA PRASAD, JJ.

In the matter of an application by Miss Sudhansubala Hazra

M. J. C. No. 110 of 1921, decided on 28th Nov. 1921.

Legal Practitioners Act, Ss. 6, 7 and 8—Women cannot be admitted and enrolled as pleaders—Nature of proceedings is administrative—'Person' in section is a male.

Under the rules made by the High Court under S. 6 of the Legal Practitioners Act, women cannot be admitted and enrolled as pleaders. Proceedings relating to the admission of pleaders are administrative and not judicial. From the perusal of the sections it appears that the 'Person' referred to is male and not female as the Pronoun 'He' is invariably used. [P. 269, C. 2.; P. 272, C 2.]

P. C. Manuk, S. P. Sen, S. M. Mullick and *D. P. Sinha*—for Petitioners.

Dawson-Miller, C. J.—This is an application by Miss Sudhansu Bala Hazra for enrolment as a pleader in the District Court of Patna, a Court, subordinate to this High Court. She holds a degree of Bachelor of Law conferred by the Calcutta University this year and is qualified in all respects for enrolment unless she is debarred by the disability of sex. The application was originally made to the District Judge and forwarded to the High Court according to practice. The matter is strictly speaking one for an administrative order but as it is one which raises a question of considerable public importance, *viz*, whether under the Legal Practitioners Act and the Rules framed thereunder women can be enrolled as pleaders I thought it desirable to give the applicant an opportunity of appearing before the Court by Counsel in order to argue the legal points which arise in connection with the application before coming to any decision thereon.

Sec. 6 of the Legal Practitioners Act enables the High Court to make rules consistent with the Act as to (*inter alia*) "the qualifications, admission and certificates of proper persons to be pleaders in the Subordinate Courts." By S. 7 on admission of any person as a pleader a certificate signed by the proper officer shall be issued to such person authorising him to practise up to the end of the current year as a pleader and provision is made whereby if he desires to continue to practise he may have his certificate renewed. From a perusal of these sections as well as sec. 8 it appears that the persons referred to are males and not females as the pronouns "he," "his" and "him";

are invariably used. On turning to the rules made under Sec. 6 of the Act the same phenomenon appears, the persons referred to being always described by words appropriate only to those of the male sex. This is only what might be expected from the fact that since 1793 when the qualifications of pleaders were first established on a regular basis by Reg. VII of that year no female has ever been admitted to the roll of pleaders in the Subordinate Courts or elsewhere and it is not suggested that earlier records would disclose any different state of affairs. The Petitioner however, claims that by reason of Sec. 2 of the General Clauses Act, 1868, since repealed and re-enacted by Cl. 13 of the Act of 1897 a radical change has been affected so as to confer upon women a privilege which they have not hitherto been regarded as capable of exercising under any of the acts or Regulation dealing with the subject. Sec. 13 of the General Clauses Act of 1897 provides as follows:— "In all Acts of the Governor-General in Council and Regulations, unless there is anything repugnant in the subject or context—(1) words importing the masculine gender shall be taken to include females." The earlier Act of 1868 by Sec. 2 provided "In this Act and in all Acts made by the Governor-General of India in Council after this Act shall have come into operation unless there is something repugnant in the subject or context words importing the masculine gender shall be taken to include females." Conceding that the General Clauses Act applies not only to the Legal Practitioners Act itself but also to the rules made thereunder which have the force of law, the question for determination is whether there is something repugnant in the subject which excludes the operation of the sections mentioned in the General Clauses Act. The learned Counsel for the Petitioner has with great gallantry and considerable vigour scorned the idea that there is anything repugnant in the conception of a bar composed partly at least of lady pleaders whose forensic ability he assures us would in many cases compare favourably with that of many of those upon whom alone hitherto the privilege of enrolment has been conferred. I am quite prepared to concede this part of his argument. The repugnancy, however, which we have to consider is not one arising out of policy which is a matter for the Legislature alone. The question is not whether women would make good pleaders but whether it appears, either from the context or the subject dealt with in the enactment, that it was the intention of the Legislature to confine the privilege of enrolment as a pleader to men only. In other words can it be said that the Legal Practitioners Act and the rules made thereunder contemplated the possibility of the enrolment of women pleaders. Regulation VII of 1793, the earliest enactment on the subject, confined the office of public pleaders or vakils to men of character and education versed in Muhammadan and Hindu law who were to be of the Muhammadan and Hindu persuasion and selected from the students of the Muhammadan and Hindu Colleges at Calcutta and Benares respectively. It also appears from the preamble that even before that time, when apparently no special qualifications appear to have been necessary, those who followed the business of a vakil were men. In 1814 and again in 1846 important enactments were passed relating to the qualification of pleaders and their control, appointment and removal. By Reg. XXVII of 1814, Sec. 111, the Sudder Dewany Adawlut and the several Provincial Courts were empowered to appoint to the office of vakil in their respective Courts such a number of persons being natives of India and duly qualified for the situation as may from time to time appear to them to be necessary." Throughout the Regulation the words "his", "him", and "he" are invariably used in connection with the persons so appointed. Act I of 1846 by Sec. 4 threw open the office of pleader in the Courts of the East India Company "to all persons of whatever nation or religion provided that no person shall be admitted as a pleader in any of those Courts unless he has obtained a certificate in such manner as shall be directed by the Sudder Courts that he is of good character and duly qualified for the office." The language of the different sections of these two enactments leaves no room for doubt that the exclusion of women from the office of pleader or vakil was intended. Act XX of 1865 authorised and required the new High Courts to make rules for the admission of proper persons to be pleaders and again the language used is applicable to men only to the exclusion of women. The interpretation clause contained in that Act provided, that, unless there was something repugnant or inconsistent in the subject or context, words importing the singular number should include

the plural and *vice versa*, but it did not, as was the case in other Acts passed at about the same time, provide that words importing the masculine gender should include females (cf. Act XLV of 1860, section 8 Act X of 1865, section 3 and Act XI of 1865 Sec. 1). It would appear therefore that from very early times even before 1793 no women had been admitted to the office of pleader and that at least down to 1865 the Legislature had on several occasions dealt with the subject in terms which leave no doubt as to its intention to exclude them.

The question then arises whether, in view of the General Clauses Act, the Legal Practitioners Act of 1879 which consolidated and to some extent amended the law, the Legislature, by the use of words similar to those employed in previous enactments dealing with the same subject intended to effect a far reaching change in the policy hitherto pursued and to confer upon women the privilege of enrolment as pleaders, a privilege which from the earliest times had been denied them. I am unable to accept the view that it was the intention of the Legislature to bring about a change of such magnitude by the language employed in the Legal Practitioners Act. It appears to me that by the date when that enactment was passed the word "pleader" had by inveterate usage acquired a definite meaning connoting a male person which obviated the necessity of emphasising the sex of the persons included under the term. It was in my opinion never intended by the General Clauses Act to effect radical changes in the law but rather to set at rest ambiguities arising in the construction of Statutes, where such existed, and to avoid multiplicity of words. Had it been the intention of the Legislature by the Act of 1879 to alter the existing law it would not, if I may borrow an expression from the judgment of Lord Loreburn, L. C. in *Nairn* v. *The University of St. Andrews* (1) have brought about a constitutional change so momentous and far reaching by so furtive a process.

Emphasis was placed upon the fact that in the Legal Practitioners Act, 1879 the word "persons" is used in describing the class from which pleaders may be appointed whereas in the Regulation of 1793 the word used was "men" holding the prescribed qualifications. This argument loses much of its force when it is remembered that from 1814, onwards, when it was manifestly the intention to exclude females, the enactments relating to the appointment of pleaders always used the word persons in referring to the class eligible for enrolment and the Act of 1879 merely retained the former phraseology. It is moreover a recognised cannon of the construction of Statutes that there is a presumption that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by necessary implication (See Maxwell Interpretation of Statutes, 6th Ed. 149). Many cases might be quoted where the use of the word "person" in Acts of Parliament has been construed by the Courts in a limited sense and even in a different sense in different parts of the same enactment. *Nairn* v. *The University of St. Andrews* (1) is a striking instance. In that case the Franchise Act of 1868 relating to Scotland by Sec. 27 gave every person whose name was for the time being on the register of the general council of certain Scottish Universities the right to vote in the election of a member of Parliament for such Universities. The 28th Section defined the members of the general council as "all persons on whom the University to which such general council belongs has after examination conferred" certain specified degree or any other degree that may hereafter be instituted. At that date women were not admitted to graduation in any of the Scottish Universities but they were afterwards admitted under the Universities (Scotland) Act of 1889 (52 and 53 Vic., c. 35) The Appellants were five ladies who had graduated at the Universities of Edinburgh and St. Andrews and were qualified to be put on the register of voters under the Act of 1868 unless their sex was a bar. It was contended that they were persons within the meaning of the Act of 1868. The case in their favour was in some respects even stronger than the present as the Act in other sections dealing with county and borough franchise and which created new franchises used the term "man" instead of "person." The House of Lords rejected the contention and dismissed the appeal. The basis of that decision was that women had never been regarded from earliest times as capable of exercising the franchise and therefore although the word "persons" would *prima facie* include women the Legislature must be regarded as having

(1) (1909) A. C. 147=78 L. J. P. C. 54=25 T. L. R. 160.

used the word in a limited sense in the light of existing circumstances. "It is a dangerous assumption", said Lord Loreburn, L. C." to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word or that the language used in Statutes is so precisely accurate that you can pick out from various Acts this and that expression, and, skilfully piecing them together lay the foundation for some remote inference."

In the present case it is not shown that women ever acted as pleaders in the Courts of this country. On the contrary the enactments referred to show that they have been invariably excluded not by any direct prohibition but inferentially by words appropriate only to the male sex, as though the matter were one well settled by inveterate usage and requiring no express legislation. It seems to me impossible to hold that the Legislature in 1879, by employing the language of previous enactments, passed at a time when the question could not have arisen, intended to convey any different meaning from that which had always been understood.

It has been contended that certain anomalies must necessarily arise if by our decision we reject this petition. By Sec. 36 of the Legal Practitioners Act certain courts and officers may frame and publish lists of persons proved to their or his satisfaction habitually to act as touts, and by Cl. (2) of the section "no person's name shall be included on any such lists until he shall have had an opportunity of shewing cause against such inclusion." It is argued that it would logically follow that if the word "persons" in S. 6 means male persons only it should have the same meaning in S. 36 and therefore no woman could be included in the list of touts. The argument assumes that the question of sex was in such a case one of vital importance whereas it is obvious that in framing S. 36 the intention of the Legislature was simply to prevent touting, and it is hardly conceivable to me that the question of sex could have had the slightest importance in the intention of the Legislature if the unlikely event should arise of a female perpetrating the mischief aimed at. There is nothing inherently improbable in supposing that the section was meant to prevent touting irrespective altogether of the sex of the tout. The short answer to the argument is that there is nothing repugnant in the subject to prevent the application of the General Clauses Act to S. 36. In that section the subject is the prevention of touting whereas in the 6th section the subject is the admission of proper persons to be pleaders.

The case of *Bebb* v. *Law Society* (2) was referred to not as an authority in the Petitioner's favour, which it is clearly is not, but in order to distinguish it from the present case. In that case it was held that by the Common Law of England women could not be attorneys or solicitors and therefore in passing the Solicitors Act of 1843 the Legislature did not intend to remove the disability by a mere interpretation clause which provided that "every word importing the masculine gender only shall extend and be applied to a female as well as a male?" "unless there be something in the subject or context repugnant to such construction." It was pointed out that there was in this country no such disability arising from the Common Law as was the case in *Bebb* v. *Law Society* (2). But the Common Law as pointed out by Lord Loreburn, L. C. in *Nairn* v. *St. Andrews University* (1) is founded solely upon inveterate usage. The inveterate usage in this country as in England has been to exclude women from admission as pleaders and although there may have been no express prohibition such as that founded upon the *dictum* of Lord Coke referred to in *Bebb* v. *Law Society* (2) the inveterate usage has been similar in both countries and I agree with the opinion expressed by Mookerjee, J., in *Re Regina Guha* (3) that the case of *Bebb* v. *Law Society* (2) furnishes valuable aid as to the mode in which the problem should be approached. In *Regina Guha's case* (3) ex- the same question arose as it presented in this case and a Full Bench of the Calcutta High Court consisting of the Chief Justice and four other Judges decided that it was not the intention of the Legislature in the Legal Practitioners Act to reverse the established policy or to introduce a fundamental change in long established principles of law and that to read the sections of the Act relating to the admission of pleaders as including females was repugnant to the subject. I agree with the conclusions arrived at in that

(2) (1914) 1 Ch. D. 286=30 T. L R. 179
(3) (1916) 44 Cal 290=35 I C 925=21 C. W. N. 74 (S. B.)

case and am of opinion that the present application should be refused.

Mullick, J.—I agree that the framers of the Legal Practitioners Act of 1879, intended that women should not be admitted to practise as pleaders. It was not merely a lapse or an omission; a failure to realize the exact import of the words used in the Statute and of the bearing upon them of the then current General Clauses Act (Act 1 of 1868), but in my opinion it was a deliberate re-imposition of the disability which had hitherto been imposed upon the female sex. I readily concede that there was no intention to proclaim the inferiority of the sex either in attainments, intellect or character, for even then women had begun to avail themselves of the advantages of western education and to prove that they were in no way less qualified than many men: and if it were permissible to speculate upon the reasons of the Legislature all that can be hazarded is that, having regard to the previous history of the relation of the sexes and the general position of women in the country the Legislature was of opinion that it would be repugnant to ideas of decorum to permit women to join in what I may call the rough and tumble of the forensic arena. At any rate whatever may have been the reasons which guided the Legislature the fact that no woman had been admitted to practise as a pleader during the 65 years which had elapsed since the Regulation of 1814, is a contemporary exposition of the Statute which cannot be disregarded. I cannot therefore read the word "person" in Act XVIII of 1879 as applicable both to men and women.

There is however one other matter to which I think it necessary to draw attention. From the rules framed by the High Court under the Legal Practitioners Act it is clear that proceedings relating to the admission of pleaders are administrative and not judicial. The note to R. 19 states this in clear language Then R. 20 directs the District Judge to send the application and other papers to the High Court, who under Rr. 22 and 23 may, after making inquiries, if any refuse the application without assigning any reason.

Rr. 24 and 25 direct the Registrar of the Court to enter the name of the applicant if admitted by the Court in the appropriate Register and to sign a certificate and to cause the same to be delivered to the applicant through the District Judge. By R. 7 (IV) of the General Rule framed by the High Court under the authority of the Letters Patent the Court has delegated to the Judge in the English Department the duty of passing orders on all applications connected with the admission and enrolment of pleaders under Act XVIII of 1879, but R. 7 (V) empowers him to refer the matter to a greater number of Judges if the importance of the subject in his opinion requires it.

In the present case it appears that the Judge in the English Department has laid the matter before the Chief Justice who has constituted the present Bench so that the Petitioner might be heard through Counsel. It is clear, however, that though we have had the assistance of Mr. Manuk's able argument the proceedings are still administrative. The Legal Practitioners Act does not appear to contain any provision for a judicial hearing but it has been found convenient in this case to adopt the procedure applicable to Full Benches.

I have no doubt that we have authority to dispose of the application and that it should be rejected.

Jwala Prasad, J.:—The only question that arises for our consideration is whether under the Legal Practitioners Act (XVIII of 1879) women can be enrolled as pleaders of the Courts Subordinate to the High Court.

Sec. 6 of the Act empowers the High Court to make rules consistent with the Act as to the qualifications, admissions and certificates of proper persons to be pleaders of Subordinate Courts.

The word "person" no doubt would include men and women. In sec. 7 and the subsequent sections of the Act, the pronouns used for a person as a pleader or *mukhtar* are "he, his and him" indicating thereby male persons only. It is said that these words importing the masculine gender should be taken to include females by virtue of section 2, Cl. 1 of the General Clauses Act of 1868, which runs as follows:—"In this Act and in all Acts made by the Governor-General of India in Council after these Acts shall have come in operation; unless there be something repugnant in the subject or context; words importing the masculine gender shall be taken to include females."

The above clause in the Act is expressly stated to apply to the General Clauses Act and to all Acts made by the Governor-General of India in Council. It is more than doubtful whether the aforesaid clause

will apply to the rules framed under section 6 of the Act.

The rules framed by the High Court under that section have also employed the pronouns importing masculine gender and have not given any interpretation clause to the effect that the words importing masculine gender shall include females, nor have they expressly stated that females shall be entitled to be admitted or enrolled as pleaders.

Assuming that females could be proper persons to be pleaders under the Legal Practitioners Act, the rules framed by the High Court have made no provision for them to be enrolled and admitted as such. Without such a rule, therefore, a woman cannot be enrolled as a pleader, for section 6 of the Act has expressly made the High Court the sole authority to make rules for determining "proper persons" to be admitted as pleaders.

The applicant has obtained the degree of Bachelor of Law as well as of Arts in the Calcutta University. The University Act (Act II of 1857) as well as Act VIII of 1904 empower the University to examine and confer degrees on persons and students showing the required proficiency in the different branches of learning. The University was further empowered to frame rules and regulations for the purpose of determining suitable candidate for any University examination. An express regulation was framed entitling the female candidates to be admitted to the examinations. But for this regulation, no female candidate could obtain the degree although the Act itself did include females in the general expression "persons" "students" and "candidates".

The Patna University Regulations also expressly provided for admission of females of the University examinations and degrees; so have the other Universities. The Bombay University set out in the beginning of their Regulations the following interpretation clause L—"the pronoun" 'he' and its derivatives are used to denote, either sex, the male or the female", thus extending the privileges of the Regulations to females.

Therefore even if the Legal Practitioners Act did contemplate the inclusion of females as proper persons to be admitted as pleaders, no females can be admitted as such unless the rules of the High Court expressly provide for it. Therefore under the existing rules of the High Court no female can be admitted as pleader :

The question as to whether the Legal Practitioners Act did intend females to be pleaders by the use of the general word "person" in Sec. 6 and by the application of the General Clauses Act, in order to interpret the pronouns importing masculine gender as including females in the subsequent sections of the Act, does not really arise in the present case. But as the question has been debated with great zeal, ability and learning at the Bar, I venture to give my opinion upon it.

I must confess that the question raised is as difficult as it is important. No doubt, the Interpretation Act, known as the General Clauses Act, does apply to the Legal Practitioners Act. Unquestionably the pronouns importing masculine gender do include females in Chap. VII of the Act and would also include females whereever the words "importing masculine gender" have been used in the chapter relating to the admission and enrolment of pleaders "unless there be something repugnant in the subject or context". These words occur both in Sec. 2, cl. 1 of the General Clauses Act of 1868 and in Sec. 13 of the General Clauses Act of 1897.

After the constitution of the British Courts, the profession of pleaders was for the first time recognised in Reg. VII of 1793. No doubt, legal profession did exist long prior to that, both in the Hindu and the Mohammadan Courts, in India, but no definite data have been placed before us to determine with absolute certainty whether women were recognized as legal practitioners in the Hindu and the Mohammadan Courts in this country. Justice Sir Asutosh Mookherjee tried to investigate the matter with his usual thoroughness but failed to discover any instance of women having been so recognized vide *Ragina Guha* (cited above.)

On the other hand, it has not been shown that prior to 1793 there was any legal disability imposed upon females being law officers either under the Hindu law or the Mohammadan law. Sir Asutosh Mookherjee observes that there are indications of women being allowed to hold legal position under the Mohammadan law.

It is not disputed that Reg. VII of 1793 expressly recognized male persons only eligible for being admitted as pleaders inas much as men only were found following up "the business of vakil to obtain a livelihood" as stated in the preamble to the Regulation.

The subsequent legislations on the subject, no doubt, were directed to the removal of

communal and religious bar in the way of persons to be admitted as pleaders, but the privilege which was conferred upon men only in 1793 was not expressly extended to females. Perhaps there was no demand for such an extension. Men were found to be carrying on the profession of pleader in 1793 and Reg. VII of that year gave them a legal status. No woman was carrying on the profession of pleader at that time and there was therefore no necessity of any legal recognition of women as pleaders.

It is said that the word "person" instead of "man" in the subsequent Acts has the effect of conferring such a right upon females without express legislation. The word "person" to my mind used in the Legal Practitioners Act is wide enough to include females as unquestionably it does in most of the provisions of the Act, such as Chap. VII. In the matter of the petition of *Girha Narain* (4) Norris, J., observed:—"I am altogether unable to give the words 'any person' in Sec. 32 the narrow construction sought to be placed upon them". The word "person" would, therefore, include ordinarily females in Sec. 6 of the Act unless they were expressly excluded from being legal practitioners. All the pronouns used in the subsequent sections of the Legal Practitioners Act would seem to apply to females by virtue of the General Clauses Act "unless there be something repugnant in the subject or context" to admit them to practise as pleaders.

In the case of *Narain* v. *University of St. Andrews* (1) reliance was placed upon the *dictum* of Lord Coke as showing that women were under disqualification and the disability of women to the privilege claimed therein was taken for granted.

The decision in the case of *Bebb* v. *Law Society* (2) was based upon the disability imposed upon females under the Common Law of the Country. It has, however, not been shown that there was any legal disability imposed at any time upon the females of this country to carry on the profession of law. In the case of *Girhar Narain* (4) it was further held that Act XVIII of 1879 is an amending as well as a consolidating Act. In this view it may be urged that the use of the word "person" had the effect of conferring upon women the right to be admitted and enrolled as pleaders. But in face of the aforesaid authorities; *Narain* v. *University of St. Andrews* (1) and *Bebb* v. *Law Society* (2) it is difficult to accept this view and to hold that such an important right would be conferred in such an indirect way.

There is therefore a good deal to be said in favour of the view that men were given the privilege and status of pleaders by statute; women could also obtain the same only by legislation.

A question similar to the one in the present case arose in the Calcutta High Court in the case of *Regina Guha* (3) and it was held by a Special Bench of that Court that as the law now stands, women are not entitled to be enrolled as pleaders of Courts subordinate to the High Court, and that the rules of the High Court were made in accordance with and for the purpose of carrying out the intention of the Legal Practitioners Act, and consequently did not entitle a woman to be enrolled as pleader, and that if a change of policy is desirable, the proper remedy is legislation, and not alteration in law in the disguise of judicial exposition of the existing law.

In England, the legislation has solved this question and has removed the disqualification of sex and thereby has admitted females to the legal profession. Consequently it has been urged that females will now be entitled to practise in the Indian Courts, inasmuch as the Legal Practitioners Act does not apply to them and they will be entitled to plead in the Courts of India as Barristers. This may be an argument for an amendment of the Legal Practitioners Act, but we are chiefly concerned with the construction of the Act as it at present stands.

A recent instance has been brought to our notice where a lady (Miss Sorabjee) has been enrolled as a vakil of the Allahabad High Court. This was done by a decision of the English meeting of the Court consisting of the Chief Justice and the Judges present in Allahabad, under R. 15 of Chap. XV of the Allahabad High Court Rules. In matters of practice, however, we generally follow the tradition of the Calcutta High Court and we do not think we can deviate from the decision of that Court passed on the 29th of August 1916 in *Regina Guha's case* (3) only a few months after the creation of our High Court.

No doubt, the recent admission of Miss Sorabjee in the Allahabad High Court might create some anomaly inasmuch as ladies enrolled as vakils in the Allahabad

(4) (1887) 14 Cal. 556=12 Ind. Jur. 22 F.B.)

High Court may claim to practise in occasional cases in the Courts subordinate to this Court under S. 4 of the Legal Practitioners Act, although no lady will be permitted to be enrolled in our own High Court. This again is a very good ground for changing the present law.

An appeal has also been made to us on the ground of intelligence and capacity of women to be fit compeers of men in the forensic arena and that the rapid advancement of the country in the matter of education amongst females requires that their right in all the spheres of life including the profession of pleader should be recognized as being equal with men. This is quite true. As a matter of fact, new professions are now gradually being opened to them, such as, medicine, etc. A similar argument was advanced in the case of *Bebb* v. *Law Society*, (2) and I would answer it in the words of Cozens Hardy, M. R. at Page 294 of the Report "We have been asked to hold" says his Lordship "what I for one quite assent to, that in point of intelligence and education and competency women—and in particular the applicant here, who is a distinguished Oxford student, (Calcutta University student)—are at least equal to a great many and, possibly, far better than many of the candidates who will come up for examination, but that is really not for us to consider. Our duty is to consider and, so far as we can, to ascertain what the law is, and I disclaim absolutely any right to legislate in a matter of this kind. In my opinion that is for Parliament (Legislature of this country)". The words within the brackets are mine.

Application rejected.

A. I. R. 1922 Patna 276.

JWALA PRASAD AND BUCKNILL, JJ.

Jadunandan Singh — Judgment-debtor-Appellant

v.

Sheonandan Prasad Singh and another—Decree-holders-Respondents.

Misc. Appeal No. 195 of 1921 decided on 5th May, 1922 against the Dist. J., Patna, dated 8th August 1921.

(a) *C. P. C., S. 47, O. 21, R. 2 (2 and 3)—Application for certifying payment out of Court made within time but pending execution proceedings—O. 21, R. 2 (3) does not apply—Appeal from order lies under S. 47.*

Where an application for certifying a payment out of the Court was made, under O. 21, R. 2, Cl. (2) within the period prescribed for making such an application, to the Court which was executing the decree and where an inquiry was therefore invited by the judgment-debtor as to the payment alleged to have been made by him to the decree-holder during the pendency of the execution proceedings, his application could not be thrown out upon the ground that it was not certified under Cl. 3 of that rule. The application was made for the purpose of having the payment certified and until that question was decided the stage of Cl. 3 did not arise. The application of the judgment-debtor for certifying payments by him to the decree-holder out of Court is an application in course of the execution of the decree obtained by the decree-holder. The application is therefore one under S. 47, Civil Procedure Code for it raised the question as to the execution and satisfaction of the decree sought to be executed. The dismissal of that application certainly gives rise to a right of appeal to the judgment-debtor. [P. 277, C. 2, P. 278, C. 1.]

(b) *Witness—Summons issued—Court's duty is to enforce attendance—Practice.*

When once the Court issues the summons it is the duty of the Court, unless the judgment-debtor is guilty of gross-laches to assist the judgment-debtor and to enforce the attendance of the proper person who can give evidence relevant to the case. The refusal to grant the prayer of the judgment-debtor to summon the proper witness is a grave irregularity and contravenes the recognised principles embodied in the Code of Civil Procedure regarding the enforcement of the attendance of witnesses. [P. 278, C. 2.]

Shiveswar Dayal and *Brijkishore Prasad*—for Appellant.

N. C. Sinha, *Anand Prasad* and *Guru Raisharan Prasad*—for Respondents.

Jwala Prasad, J :—This appeal arises out of an order of the District Judge of Patna, dated 8th August 1921 whereby he dismissed an appeal preferred before him against an order of the Subordinate Judge dated the 20th April 1921. The appellant is the judgment-debtor before us against whom an execution of a decree was levelled. In the course of this execution he filed an application under O. 21, R. 2, of the Code of Civil Procedure in which he stated and prayed that a certain sum be duly recorded and certified as payment of the decree in question. He also filed a receipt granted by the decree-holder Sukhan Singh purporting to bear his thumb impression, his (Sukhan's) grandson Sheonandan Singh having signed the said receipt for him. The decree-holder denied having received the money or granted the receipt in question. He also stated that the thumb impression on the receipt was not his. In order to prove that the thumb impression was that of the decree-holder, the judgment-debtor applied for examination of a finger print expert. The expert was accordingly examined, who took sample thumb impressions of the decree-holder, but he could not gave any definite opinion inasmuch as the impression on the receipt appeared to be blurred. He got the impression enlarged and photographed and then the thumb-

impressions of the decree-holder which were taken by him were compared in the Government Finger Print Bureau and a report was submitted to the Court by the Inspector General of Crimes. That report stated that the thumb impression on the receipt in question was similar to those on the bonds B and C which were the admitted thumb impressions of the decree-holder. The judgment-debtor then applied to the Court for summoning an expert from the Government Finger Print Bureau who could prove the opinion embodied in the report of the Inspector General; and accordingly summons was served upon the Inspector General to send the expert who could prove the opinion stated in the report. But unfortunately the person sent from the Bureau was not able to give any opinion and he does not appear to be connected with the examination of the thumb impressions upon which the report was based. He was not able to give any opinion in the case and accordingly his evidence was useless. The judgment-debtor then applied for summoning the proper person, namely, the person who was competent to prove the opinion set forth in the report of the Inspector General. The learned Subordinate Judge refused this application in the following words:—"The applicant then put in a petition for time to take further steps to call another witness from the Bureau. The petition cannot be granted. The expert was here and has been examined and he does not prove the applicant's case. There is no reason for adjourning the case again. The applicant is called upon to examine his other witnesses but he does not examine any witness and his pleader informs that he has no further instruction after the petition for time is rejected as no further adjournment will be given as prayed for by him. The application is therefore dismissed for want of prosecution." Against this order the judgment-debtor appealed to the District Judge of Patna. He was of opinion that no appeal lay from the order of the Subordinate Judge inasmuch as the application of the judgment-debtor was dismissed for default. He also held that the application of the judgment-debtor under O. 21, R. 2, Cl. 3, could not be entertained in execution proceedings in asmuch as the alleged payment was not certified.

Both these grounds upon which the learned District Judge dismissed the appeal appear to me to be untenable. The application of the judgment-debtor for certifying payment under O. 21, R. 2, Cl. 2 could not be dismissed for default inasmuch as some evidence was given in Court and the Court held that the evidence was useless and dismissed the application. It is obvious that the learned Subordinate Judge is wrong in using the words "for want of prosecution." Virtually his order amounts to a dismissal of the application for the reason that the evidence adduced was worthless The application of the judgment-debtor for certifying payments by him to the decree-holder out of Court was an application in course of the execution of the decree obtained by the decree-holder. The application is therefore an application under S. 47, Civil Procedure Code, for it raised the question as to the execution and satisfaction of the decree sought to be executed. The dismissal of that application certainly gives rise to a right of appeal to the judgment-debtor. If an order of dismissal for want of prosecution is passed in a suit, it is conceded that an appeal does lie; but it is contended that an order of dismissal for default in execution proceedings is unappealable. That may be so, but here is the dismissal of an application for certifying payment said to have been made by the decree-holder out of Court; the order amounts to a decree passed in a proceeding under Sec. 47 of the Code and as such it is appealable. In any case the order in the present case disposed of the application on merits upon the findings that the evidence adduced by the judgment-debtor was useless and of no avail to him. Undoubtedly such an order is appealable.

The second ground urged by the learned District Judge is equally unsubstantial for an application for certifying a payment made in the present case was made under O. 21, R. 2, Cl. (2) within the period prescribed for making such an application; the application may be made either to the Court which passed the decree or to the Court whose duty is to execute the decree as is expressly stated in Cl., 1, R. 2 of that order. The judgment-debtor could therefore make his application either to the Court which passed the decree or to the Court which was executing the decree. In the present case the decree was under execution and the application was properly made to the Court which was executing the decree. In the present case the Court executing the decree was the Court that passed the decree. The inquiry

was therefore invited by the judgment-debtor as to the payment alleged to have been made by him to the decree-holder during the pendency of the execution proceedings; therefore his application could not be thrown out upon the ground that it was not certified under Cl. 3 of that rule. The application was made for the purpose of having the payment certified and until that question was decided, the stage of Cl. 3 did not arise. The learned District Judge was therefore wrong in throwing out the application on the above technical grounds. He ought to have gone into the merits of the appeal. The appeal before him was, therefore, not legally disposed of and he failed to exercise the jurisdiction vested in him by law. The decision of the District Judge is therefore set aside.

Now, the District Judge has not gone into the merits of the case, and the issue before him was whether the application was properly and legally disposed of by the Subordinate Judge; in other words, whether Subordinate Judge was right in refusing the application of the judgment-debtor for the adjournment of the case and for summoning the proper person from the Finger Print Bureau in order to prove the opinion set forth in the report of the Inspector General as to the identity of the thumb-impressions on the receipt in question and on the bonds B and C. The judgment-debtor had been making strenuous efforts and taking all possible steps in order to have a definite opinion and evidence of a Finger Print expert as to the thumb-impression of the decree-holder on the receipt in question. He paid the necessary expenses and the expert who first came was not able to give definite opinion unless the impressions were enlarged and photographed. To this also the judgment-debtor submitted and paid all the necessary expenses. This was done with the result that an opinion decidedly in his favour was obtained. He was therefore naturally anxious to place upon the record the testimony of the witness who could prove the opinion contained in the report. He put in all the necessary expenses and necessary summons was issued upon the Department to send the person cognizant of the opinion expressed in the letter. Through no fault of his the man sent from the Bureau turned out to be not the proper person and was not able to give any relevant evidence in the case. He accordingly applied to the Court and expressed his willingness to defray all the necessary expenses for summoning the proper person from the Bureau. When once the Court issued the summons it was the duty of the Court, unless the judgment debtor was guilty of gross-laches to assist the judgment-debtor and to enforce the attendance of the proper person who could give evidence relevant to the case. The refusal to grant the prayer of the judgment-debtor on the 30th April was a grave irregularity and contravened the recognised principles embodied in the Code of Civil Procedure regarding the enforcement of the attendance of witnesses. The order of the Subordinate Judge therefore contravened the rules of procedure in the Code and the recognised principles which produced error in the decision of the case on the merits.

The question before the lower Appellate Court was whether the discretion was properly used by the Subordinate Judge in refusing the application of the judgment-debtor for enforcing the attendance of the witness from the Bureau. This question was, as observed above, left undecided by him. The question affects the merits of the case and we are entitled in second appeal under Sec. 3 of the Code of Civil Procedure to determine the question which the District Judge ought to have determined. We, therefore, hold that the order of the District Judge dismissing the appeal was illegal. We also hold that the order of the Subordinate Judge dismissing the application of the judgment-debtor and refusing him an adjournment of the case so as to enable him to produce evidence was also improper.

We, therefore, set aside both the judgments of the Courts below and remand the case to the Subordinate Judge for disposal of the original application of the judgment-debtor under Sec. 47 and O. 21, R. 2 of the Code of Civil Procedure in accordance with law.

The judgment-debtor in this case, however, acted indiscreetly and foolishly in not examining witnesses present on the date when the Court called upon him to give evidence after having rejected his application for adjournment. The practice of not going on with the case after the rejection of an application of this kind is first creeping into the Courts below and must be put a stop to. The judgment-debtor would have been in a far better position, and so also the Courts, if he had examined the witnesses present in Court on the 30th April. Perhaps much of the time and harassment of the opposite party

would have been saved. I have no hesitation in holding that the conduct on the part of the judgment-debtor or his legal representative was improper in refusing to go on with the case when the witnesses were present, simply because the Court rejected the application for summoning the expert. Besides the costs awarded to the decree-holder by the Courts below, the judgment-debtor must pay to the decree-holder Rs. 64 as costs of hearing in this Court, as a condition precedent to the hearing of the case in the Court below, within a fortnight from the notice given to the judgment-debtor by the Subordinate Judge on the arrival of the records in his Court.

Bucknill, J.—I agree.

Appeal allowed.

A. I. R. 1922 Patna 279.

COUTTS AND ROSS, JJ.

Balgobind Mandar and others—Defendants-1st Party—Appellants.

v.

Dwarka Prasad and others—Plaintiffs-Respondents.

Appeal No. 174 of 1919 decided on 20th February 1922 from Original Decree, of Sub. J, Manbhum.

Landlord and tenant—Receipt by Tahsildar not authorised does not amount to recognition of tenancy—Co-sharer landlord is entitled to decree for joint possession against tenant settled by other co-sharer—Waiver—Acquiescence in tenants' possession does not take away his right—Co-sharer.

Where the Tahsildar has not authority from the landlord, his act in granting a receipt cannot amount to recognition. Where the tenants took settlement only from the twelve annas landlords and the twelve annas landlords did not settle the land with them as sixteen annas landlords; *Held* the four annas landlord who made no settlement with tenants is entitled to a decree for joint possession with the tenants. The co-sharer landlord is not debarred from claiming joint possession with the tenants only because the defendant's occupation of the land was acquiesced in without remonstrance for nine years.

[P. 280, C. 1, 2 ; P. 281, C. 1.]

S. M. Mullick and *Nirsu Narain Sinha*—for Appellants.

C. C. Das, Jagarnath Prasad and *Bindeshwari Prasad*—for Respondents.

Ross, J :—This is an appeal by the Defendants, first party. The Plaintiffs are the owners of four annas share in Mauza Sarauni Kalan. The defendants, Second party are the owners of the remaining 12 annas and the Defendants first party are said to be tenants. The suit relates to 143 bighas of land which was formerly under water but became fit for cultivation in 1314. The present plaintiffs were not then proprietors in the village. They purchased the share of two Marwaris, Kedar Mal and Nemraj in 1321. Certain proceedings in partition were started in 1907 but were never completed. The Defendants first party are said to have taken possession of the land in suit in 1317 without any legal right so far as the Plaintiffs' share is concerned and the suit has been brought for recovery of possession or for possession jointly with Defendants first party or Defendants second party with mesne profits.

The defence of the Defendants first party was that settlement of the land in suit was taken from all the properties at an annual rental of Rs. 174-15-21 gandas in 1316 and that since then these Defendants have been in possession as tenants. It was further alleged that the Plaintiff's predecessors had granted a receipt for rent to the Defendants and that in the partition papers these defendants were recorded as tenants of the land. Of the Defendants second party, the owners of eight annas share in their written statement acknowledged the tenancy of the Defendants first party and the owner of the remaining four annas did not enter appearance. It may, therefore, be taken that as regards 12 annas share the Defendants first party are recognised as tenants.

The learned Subordinate Judge found that there had been no settlement with the Defendants first party by the Plaintiffs' predecessors. He further found that there was no proof that rent had been actually received by them and that in any case the receipt granted by their *Tahsildar* was not a recognition of any tenancy. He consequently held that the Plaintiffs were entitled to a decree for joint possession of a four annas share in the land in dispute with the Defendants first party and to mesne profits.

Two main grounds have been taken in appeal. It is contended, in the first place, that on the facts found the Plaintiffs are not entitled to a decree for joint possession, and that their only remedy is to receive rent or a partition. Reliance is placed on the decision in *Watson & Co.* v. *Ram Chand Dutt* (1), *Madan Mohun Shaha* v. *Rajab Ali* (2), *Dakhyayani Debi* v. *Mana Raut* (3)

(1) (1890) 18 Cal. 10=17 I. A. 110=5 Sar. 535 (P. C.)

(2) (1900) 28 Cal. 223.

(3) (1913) 19 C. L. J. 113=22 I. C. 666=19 C. W. N. 407.

and *Sat Narayan Singh* v. *Anant Prasad* (4). The argument briefly is that as to the rights which one tenant in common has against another tenant in common who has taken possession, the rule is that unless there is actual ouster, no action of trespass will lie, but only an account. The principle is that the co-tenant is doing nothing but what is lawful in putting the land to the use for which it is intended, namely, the production of crops. It is further argued that it is immaterial whether the co-tenant does this by raising the crops himself or by letting the land to a tenant.

Now, the Defendants first party in this case allege that they took settlement from all the proprietors. This has been found against them. It is found that they took settlement only from the 12 annas landlords. It is not alleged that the 12 annas landlords settled the land with them as 16 annas landlords. Consequently as to four annas of the holding, they have no settlement at all and there is no authority for saying that in such circumstances the four annas landlord, who has not made any settlement, is not entitled to a decree for joint possession. The decision in *Watson's* case (1) does not support any such proposition. In that case the essential facts were that one of the tenants in common was in actual occupation of part of the estate and cultivating it as if it were his separate property; and that the other tenant in common attempted to come upon the property in order to carry on operations inconsistent with the course of cultivation in which the former had been engaged. Neither of these elements is present here. Similarly in the case of *Madan Mohun Shaha* v. *Rajab Ali* (2) the co-sharer landlord who had made the settlement had been in exclusive possession of the tank, the subject-matter of the suit, and had settled it as having been in exclusive possession. The same principle is to be found in *Dakhyayani Debi* v. *Mana Raut* (3) where the landlord who made the settlement had taken possession of the land, apparently without any protest by his co-sharers, and in the ordinary course of management had made the settlement with the Plaintiff. Moreover, all that was decided in that case was that the Plaintiff had the status of a raiyat and that is not disputed in the present case. On the other hand, the decision in *Sat Narayan Singh* v. *Anant Prasad* (4) is against the Appellants' contention. The cases on the subject were there discussed and it was held that one remedy open to the co-tenant was a decree for joint possession. And in the case of *Radha Prasad Wasti* v. *Esuf* (5) it has been held that no man has a right to intrude upon *Ijmali* property against the will of the co-sharers or any of them. It is argued that the Defendants first party have the right to the possession of an undivided 12 annas share in the land in suit. This is true, but it is in no way inconsistent with a decree for joint possession in favour of the Plaintiffs. In my opinion, therefore, the first contention fails.

The second argument is on the merits of the case. It is contended that from the conduct of parties it should be inferred that all the proprietors consented to the settlement, especially in view of the facts that the *Tahsildar* of the Plaintiffs' predecessors granted a receipt and that the Defendants first party were in undisturbed possession for nine years. Now, with regard to this receipt, the learned Subordinate Judge has found, in the first place, that there is no satisfactory proof that any payment of rent was actually made, and this finding has not been attacked on appeal. The evidence is reduced to the uncorroborated statement of a single witness and in the circumstances of this case, in view of the relations of the parties, it is difficult to accept such evidence as sufficient. But even if this receipt is taken to be a receipt for money actually paid, it does not lead, in my opinion, to any inference that a tenancy exists between the Plaintiffs and the Defendants first party. It is argued that the Defendants do not rely upon this receipt as a recognition of their tenancy in the sense in which the transfer of a non-transferable holding is required to be recognised; but I can see no difference. The receipt is relied upon as binding the landlord through the act of the *Tahsildar* and preventing him from denying the relationship of landlord and tenant. Now, the receipt granted by a *Tahsildar* cannot have that effect. In *Debi Dayal Pande* v. *Ram Sakal Pathak* (6) the law on this subject was considered and the rule was deduced that where the *Tahsildar* has not authority from the landlord, his act in granting a receipt cannot amount to recognition.

From the fact that the Defendants' occupation of the land was acquiesed in without

(4) (1919) 51 I. C. 31.

(5) (1881) 7 Cal. 414=9 C. L. R. 76.

(6) A. I. R. 1921 Pat. 156=1921 P. H. C. C. 135.

remonstrance for nine years, it is argued on the authority of *Nityanand Ghose* v. *Kissen Kishore* (7) that the Defendants must be treated as tenants That was a suit by the landlord claiming rent and the execution of a *Kabuliat* from a person who had occupied land within his *zemindari* and it was held that a tenancy existed and that the tenant must comply with the requirements of the tenancy. The ground of the decision is that it is not open to a person occupying land to plead in answer to claim for rent that he is a trespasser see *In re Hallett's Estate* (8) But there is nothing to prevent the landlord from taking this plea. Consequently no tenancy can be inferred here.

Much was made of the failure of the Plaintiffs to produce their collection papers. Evidence was given that these papers had been stolen, and it was contended that the evidence was insufficient. That may be so, but it is for the Plaintiffs to say what papers they will produce. The Defendants never sought discovery of these papers and no inference can be drawn against the Plaintiffs from their non-production.

The entries in the Batwara papers are referred to in the written statement and it was argued that these raise a presumption of a tenancy. But evidence has been given by Plaintiffs' witness Bachu Lal Das, *tashildar*, that the name of Balgobind Mandar is not in these papers and that the lands in suit are recorded as Gair Mazrua on the *maliks*. The Batwara Khesra itself is not produced and there is no evidence to support the allegation in the written statement Indeed it seems doubtful on the whole evidence whether the defendant No. 1 is a *bona fide* tenant at all. He is related to one of the Defendants second party Mohan Mandal. There is evidence on both sides that for all settlements made since 1314 *Kabuliyats* have been executed but in the present case no *Kabuliyat* is produced. The crops are left at Madan Mandal's Cutchery and in all probability Balgobind is merely his nominee. Therefore on the merits also it seems to me that the appeal must fail.

I would dismiss this appeal with costs.

Coutts, J.—I agree.

Appeal dismissed.

(7) (1864) W R. Act X r. 82.
(8) (1880) 13 Ch. D. 696=49 L.J. Ch. 415.

A. I. R. 1922 Patna 281.

DAWSON MILLER, C. J. AND COUTTS, J.

Suraj Pal Pandey and others—Defendants Appellants

v.

Uttim Pandey and others — Plaintiffs-Respondents.

L. P. A. No. 62 of 1920 decided on 21-6-1921, against the decision of Dist. J, Saran, dated 31-1-1918.

(a) *C. P. Code (Act V of 1908), S. 2, O 41, R 10—Appeal—Rejection for failure to pay deficit court fee is a Decree and not dismissal for default.*

When the appellant fails to put in the deficit court fee on the memorandum of appeal, the order dismissing an appeal for default is an order rejecting the memorandum of appeal. It is therefore a 'decree' under S. 2 (2) and does not fall under O. 41, R 19 applicable to cases under O. 41, rr 11 (2) 17 or 18 [P. 282, C 1.]

(b) *C. P. C., O 47, R. 4 (2) (a)—Notice upon "opposite party" — Provision is mandatory—Appeal rejected prior to admission—Respondent is entitled to notice of application for review.*

An appeal rejected for non-payment of deficient court fee may be reviewed at the instance of the appellant. But though the respondent does not receive any notice of the appeal dismissed before admission he is entitled to a notice of the application for review. The expression 'opposite party' in O. 47, R. 4 (2) (a) means the party interested to support the decree or order sought to be set aside or modified in the application for review [P 284, C 2.]

(c) *C. P. C., S 100—Appeal—Restoration after rejection not known to respondent—Plea can be raised in second appeal.*

If a respondent first comes to know of the erroneous order restoring the appeal without any notice upon him, he can raise objection to its validity in second appeal. [P. 284, C. 1.]

Parmeshwar Dayal and *Bhagwan Prasad*—for Appellants.

Harnarayan Prasad and *Sambu Saran*—for Respondents.

Dawson-Miller, C. J—The suit out of which this appeal arises was brought by the plaintiffs as the next reversionary heirs of the deceased sons of the defendant No. 1, a Hindu widow, claiming a declaration that three sale deeds executed by the widow were not justified by legal necessity and not binding upon them.

At the trial before the Munsiff the suit succeeded as to one of the deeds but was dismissed as to the other two. The plaintiffs appealed to the District Judge against that part of the decree which dismissed that claim and were successful. The defendants thereupon appealed to the High Court. The appeal was heard by a single Judge of the Court, who affirmed the decision of the lower appellate Court and dismissed the appeal. From that decision the present appeal is brought by the Defendants under the Letters Patent

The question for determination in this appeal is whether in the circumstances

which arose the appeal to the District Judge was regular and whether the appellants can now object that that appeal was improperly restored after it had been dismissed by the learned Judge.

The decree of the trial Court was dated the 6th March 1917. After providing for the days requisite to obtain copies of the decree and judgment, the last day for presenting an appeal to the District Judge was the 14th April. On the 2nd of April the plaintiffs presented a memorandum of appeal for registration in the Court of the District Judge. It was presented, however, on an insufficiently stamped paper which fact on being discovered was communicated to the plaintiffs' pleader. The District Judge thereupon gave time to the 11th of April which was subsequently extended to the 14th to make up the deficiency in the stamp. The deficiency was not made good and on the 17th of April the amount still remaining unpaid, the District Judge passed an order in these terms:—

"Court fee not paid, appeal dismissed for default."

The correct order to have made would have been an order rejecting the memorandum of appeal, which had not up to that time been registered nor properly presented. On the 23rd of April the plaintiffs presented a petition praying for restoration of the appeal on payment of the deficit Court fee. Under what rule of procedure the application was made does not appear from the petition. On the following day, the 24th of April, the District Judge, after hearing the pleader for the plaintiffs but without any notice having been served upon the defendants, ordered the appeal to be admitted and registered. He did not intimate under what rule of procedure he was acting in making that order, and the rule under which he purported to act can only be conjectured. As far as can be gathered from what happened, the application appears to have been treated as an application under O XLI, R. 19. It was clearly not in terms an application for review and was presented on an insufficiently stamped paper for such an application. It seems equally clear that O. XLI, R. 19 had no application to the circumstances of the case. The procedure there prescribed applies only to cases where an appeal is dismissed under Rr. 11 (2), 17 or 18 of the same Order. The order of the 17th April dismissing the appeal for default was certainly not made under O. XLI, R. 11. It is also clear that it could not have been dismissed under R. 17 or 18 of O. XLI, which at that stage could have no application. The memorandum of appeal had never been admitted, no date had been fixed for hearing the appeal as required by O. XLI, R.12 nor had any notice been served on the respondents as required by R. 14 None of the necessary preliminaries contemplated in that order had been complied with. It was not within the competency of the Court to make any order dismissing the appeal under R 17 and it is not suggested that the court acted under R. 18. This being so the order of the 24th of April ordering the appeal to be admitted and registered after it has been previously dismissed, could not have been an order made under O. XLI, R. 19. In pursuance of that order, however the appeal was registered and was in due course heard by the learned District Judge, the defendants remaining in ignorance that the memorandum of appeal although presented in time had been rejected for failure to pay the necessary Court fee but had afterwards been admitted and registered. Consequently when the appeal was heard, no question was raised as to the propriety of the order of the 24th of April admitting the appeal. When the appeal came on for hearing the District Judge allowed the appeal on the merits and gave the plaintiffs a decree for the whole relief claimed. From that decision the defendants appealed to the High Court and complained that in the circumstances above referred to the learned District Judge was acting irregularly and without jurisdiction in passing the order of the 24th April restoring the appeal for hearing after it had once been dismissed. It is not stated when the defendants first became aware of the irregularity complained of, but it is not shown that they were aware of it at any time before the appeal was heard and determined by the District Judge. On appeal to the Judge of this Court the matter seems to have been treated as one of limitation, and the learned Judge considered that as the memorandum of appeal although insufficiently stamped had been presented in time, the District Judge was authorised under Secs. 148 and 149 of the Civil Procedure Code in extending the time for payment of the deficit Court fee even after the appeal had been dismissed for default. He does not, however, appear to have considered how the order of the 17th of April dismissing the appeal may have affected the rights of the

defendants to be heard in any subsequent application to restore the appeal. He accordingly dismissed the appeal with costs. It is from that decision that the present appeal is brought.

I have already indicated that in my opinion the order restoring the appeal was not and could not have been made under the provisions of O XLI, R. 19. It is contended, however that the petition asking for restoration should be treated as an application. In review under O. XLVII of the Civil Procedure Code and in fact the plaintiffs have since paid the deficiency between the fee paid with their application for restoration and the amount necessary for an application in review and have asked the Court to treat that application as if it had been an application in review. The defendants, however, raised the objection that even if the application can be treated as one presented under O. XLVII the provisions of R. 4 (2), proviso (a) of that order have not between complied with. That rule provides that no such application shall be granted without previous notice to the Opposite Party to enable him to appear and be heard in support of the decree or order, a review of which is applied for. They contend that as notice of the application was served upon them they had no opportunity of appearing or being heard when the order restoring the appeal was made, and that, therefore, the order was bad in law. In any case they contend that they are entitled as soon as the matter has been drawn to their notice even in second appeal to a hearing. In my opinion, the defendants' contention must prevail. If it could be shown that the defendants were aware of the order complained of when the appeal was being heard before the District Judge and raised no objection on that occasion different considerations might arise. But in the present case there was nothing to show that the defendants had any notice of that order until after the appeal had been determined by the District Judge. The order of the 17th of April in terms dismissing the appeal for default was in effect an order rejecting the memorandum of appeal. There is good authority to show that such an order is tantamount to a decree within the meaning of the Civil Procedure Code. See *Ayyavna* v. *Nagabhooshanam* (1) and *Rup Singh* v *Mukhraj Singh* (2). The defendants, therefore, had at that time not only a decree of the trial court but also a decree of the Appellate Court in their favour, and except as provided by the rules the court had no power to deprive them of the right vested in them under these decrees. It is contended, however, that assuming the application for restoration could have been an application in review under O. XVII, no notice was necessary to the defendants and that an order in review setting aside the previous order and restoring the appeal for hearing could be made *ex parte* on the ground that there was no Opposite Party upon whom service of notice was necessary under the proviso of sub. R. (2) of R. 4 of O. XLVII. In support of this contention the decision of *Janki Nath Hore* v. *Prabhasini Dasse* (3) is relied on. In that case it was held, dissenting from a previous decision of the same Court, that where an appeal had been summarily dismissed under O. XLI, R. 11 an application in review by the appellants might be heard *ex parte* and the appeal restored for hearing without notice to the respondents. The ground for this decision appears to have been that there was no Opposite Party within the meaning of the proviso to R. 4 of O. XLVII at tha tstage of the proceedings. There does not appear to have been any settled practice of the Calcutta High Court at that time and from the judgment it appears that in certain cases the contrary view has been expressed notably in the case of *Abdul Hakim* v. *Hem Chandra* (4). In my opinion the expression Opposite Party in the proviso to O. XLVII, R. 4, means the party interested to support the order or decree sought to be set aside or modified in the application for review. In the present case the defendants were the Opposite Party and I can see no reason why the expression there used should be limited to cases in which such party has actually appeared in the appeal. I think the proper principle to apply is that laid down by their Lordships of the Privy Council in *Krishnasami Pandaram* v. *Ramasami Chettiar* (5). In that case an appeal had

(1) (1893) 16 Mad. 285.

(2) (1885) 7 All. 887 = (1885) A. W. N. 260.

(3) (1915) 43 Cal 178 = 22 C.L.J. 99 = 30 I.C. 898 = 19 C. W. N. 1077.

(4) (1914) 42 Cal. 433 = 30 I.C 165.

(5) A. I. R. 1917 P. C. 179 = 41 Mad. 412 = 45 I. A 25 (P.C.)

been presented after the period allowed by the Limitation Act, 1908, and had been admitted under S. 5 of that Act by order *ex parte* by a single Judge, no notice having been served upon the respondents. It was held that the respondents were entitled on the appeal to question the propriety of the order and to show that no sufficient case for granting the extension had been shown. It was argued that the admission of the appeal by the Judge was final and that the Division Bench could not reconsider the question whether the delay was excusable. In dealing with this argument their Lordships said:—

"By this order of admission was made not only in the absence of Kamasami Chettiar the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that, though unqualified in expression, it should be open to reconsideration at the instance of the party prejudicially affected"

In the result their Lordships declined to interfere with the decision of the Division Bench which had held that sufficient cause had not been shown for extending the time under S. 5 of the Limitation Act and had set aside the order of Sankaran Nair, J. admitting the appeal.

It seems to me that the defendants who had had no opportunity of appearing to oppose the application are at least entitled to a hearing as soon as the matter is drawn to their attention. The learned District Judge gave no reasons for admitting the appeal and, as already stated, he appears to have dealt with it as an application under O. XLI, R. 19 which had no application in the circumstances; and I think we are entitled to go into the grounds alleged in the petition to determine for ourselves whether any sufficient cause is shown, treating it as an application, for review. All that the petition states is that the petitioner's pleader informed him by letter which was delivered at a later date that the Court fee paid was deficient and that when he came here (that is apparently to the place where the District Judge's Court was held) he learnt that the appeal had been dismissed for default. No reason is given why the proper fee was not paid in the first instance. It is not stated when he was informed by his pleader that there was a deficit nor is it stated when he arrived on the spot or provided the funds. In the ordinary course if the pleader informed him by letter on the 2nd of April when the deficit was pointed out, he would receive the letter in plenty of time to make up the deficiency before the 17th of April when the appeal was dismissed for default. But nothing was done until the 23rd April when the petition was filed and no sort of explanation is given why the money was not provided in time and sort of cause is shown upon which the Court exercising a reasonable discretion could act in granting an extension. If, therefore, the defendants are entitled, as I think they are, to be heard upon the propriety of the order made, they have sufficiently shown that no cause for extending the time has been made out.

Apart from this, however, treating the matter as an application in review it seems to me that the provisions of R. 4 O. XLVII which require notice to be served upon the Opposite Party were not complied with, and, that the order of the 24th of April restoring the appeal was made without jurisdiction and should be set aside.

I would, therefore, allow this appeal and set aside the judgment and decrees of the lower Appellate Courts and order the decree of the Munsif to be restored. The appellants are entitled to their costs here and in each of the lower Appellate Courts.

Coutts, J.—I agree. *Appeal allowed.*

A. I. R. 1922 Patna 284

DAWSON MILLER, C. J. AND ADAMI, J.

Rasik Behari Prasad Chowdhury and others—Appellants

v.

Hriday Narayan and another—Respondents.

S. A. No. 264 of 1921, decided on 28th March 1922.

Court Fee—Deficiency of court fee on cross-objection in lower appellate Court—High Court can insist on party paying up the deficient fee before entertaining second appeal.

Even where an appellant is not appealing from that part of the decree of the lower appellate Court which disallowed his cross-objection of which he did not pay the proper court fees due, the appellate Court has inherent jurisdiction not to entertain his appeal before the deficit is made good as it is a default arising out of the same suit. The High Court has discretionary power to insist upon the appellant to pay the proper Court fees throughout the litigation as a condition precedent to allowing him to come before

it in appeal and ask it to set aside the decree of the lower Appellate Court.
[P. 285, C. 2, P. 286, C. 1.]

Jinak Kishore—for Appellants.
Sambhu Saran—for Respondents.
Sultan Ahmad—for the Crown.

Order:—The question for decision in this case is whether the Court has power to order the appellant, who is the plaintiff in this suit, to pay a deficit Court-fee upon his memorandum of cross-objection in the lower appellate Court before it will entertain his appeal here. The circumstances are a little peculiar and the question arises in this way. The plaintiff brought a suit against the defendants for a declaration of his title and recovery of possession in respect of 10 *gundas* share in certain property. The fee he paid upon his plaint was based upon a valuation of ten times the Government Revenue and the fee actually paid arrived at in that manner was Rs. 3-12. In the trial Court the plaintiff succeeded as to half his claim, that is to say, he got a decree in respect of to 5 *gundas* only and not 10 *gundas*. From that decree the defendants appealed contesting the plaintiff's right to recover even 5 *gundas*. The plaintiff entered a cross-objection claiming that he was entitled not only to the 5 *gundas* under the decree of the trial Court, but that he was entitled to the other 5 *gundas* also. In respect of his cross-objection he paid a court fee of Rs. 1-14-0 upon the same basis of calculation as in the trial Court. The defendants' appeal in the lower appellate Court succeeded and the plaintiff's cross objection failed The result, therefore, was that the plaintiff recovered nothing. From that decision he entered a second appeal in this Court. That appeal, however was concerned only with what I may call the first 5 *gundas* or that part of the claim which was decreed in the trial Court. As far as the 5 *gundas* refused by the trial Court were concerned, the plaintiff did not pursue his appeal in this Court.

Now when the case came before this Court the taxing officer came to the conclusion that the fee payable by the plaintiff appellant was not a fee based upon ten times the Government Revenue, but an *ad valorem* fee. Therefore, he was ordered to pay a deficit upon his memorandum of appeal. It was also found that his plaint in the trial court was deficient in the matter of fee and those two fees he has now paid. It was also found by the taxing officer that his memorandum of cross objection in the lower appellate Court was deficient to the amount of Rs. 88-2, that is to say, there was a deficiency in respect of property which is no longer the subject of appeal to this Court, and the question for us to determine is whether before we allow his appeal to proceed we should insist upon his paying the fee which he ought to have paid in his cross-objection in the lower appellate Court. It is contended on behalf of the appellant that this Court has no jurisdiction in the matter, because the subject matter of his cross-objection in the lower appellate Court is not now before the Court, and he relies upon the case of *Kirala Varma* v. *Chadayan Kutty* (1). The facts of that case however, are entirely different from those of the present. What happened in that case was that the plaintiff obtained a decree for arrears of rent and possession of certain parcels of land. There were four defendants and he recovered against them all. One of the defendants appealed and during the appeal it was discovered that the plaintiff respondent had not paid the proper court fee on the plaint: His decree was not objected to except by one of the defendants, who only objected to it in so far as it related to his interest, namely one-fourth of the whole. The District Judge before whom the appeal came considered that he was entitled to give the defendant a decree because the respondent, the plaintiff, had not paid the full court fee in the Court below. He made an order that the defendant's appeal should be allowed merely upon that ground. When the matter came before the High Court, it was pointed out that the Court had no jurisdiction over the whole subject matter of the suit as the appeal by the fourth defendant related to one item only, and it seems obvious that as the plaintiff had a vested interest in that part of the decree which had not been appealed from, the court clearly had no jurisdiction to interfere with that interest merely because one of the defendants appealed against another portion of the decree.

Now the matter so far as this Court is concerned appears to me to depend upon whether or not where there has admittedly been a deficit in the Court-fee in the lower appellate Court and the person by whom that deficit was payable appeals to this Court, this Court has power to refuse to entertain his appeal until the deficit in

(1) (1891) 15 Mad. 81.

the lower appellate Court has been paid. The question is not one which arises under any particular provision of the Court fees Act, but it is a matter which, as has been held in this Court, is within the inherent jurisdiction of the Court. In the case of *Narain Prasad* v. *Sheo Kameswar Prasad Singh* (2) it was laid down by the late Chief Justice and Mr. Jwala Prasad that the plain duty of the Court was to require the appellant to pay a deficiency in the Court fee in the court below before they could entertain any appeal arising out of the same suit by that appellant. Now, although it is true that in the present case the appellant is not appealing from that part of the decree of the lower appellate Court which disallowed his cross objection, nevertheless he was in default and it is a default arising out of the same suit and he is now asking this court to hear his appeal, although he in the lower court did not comply with the provisions of law requiring him to pay a certain court fee. There can be no doubt as to his liability in the lower Court, and I think that the Court has discretion in the matter to insist upon his paying the proper court fees throughout the litigation as a condition precedent to allowing him to come before this Court in appeal and ask it to set aside the decree of the lower Appellate Court.

The result is that the appeal will be stayed until the appellant has complied with his obligation to pay deficit court fee in the lower appellate Court which amounts to Rs. 88-2-0. The appellant will be allowed ten days' time within which to pay the court fee. *Order accordingly.*

(2) (1917) 3 P.L.J. 101=43 I.C. 489.

A. I. R. 1922 Patna 286.

JWALA PRASAD, J.

Dhunmun Chowdhury and others—Accused-Petitioners v.

Emperor—Opposite Party.

Cr. Rev. No. 42 of 1922 decided on 2nd March 1922.

Bengal Municipal Act (111 *B. C. of* 1884) *Ss.* 30, 234 *and* 235—*Municipality has no right to levy rent, etc., from the persons exposing goods for sale on the Municipal road—Preventing lessee of such rents from realising it is no offence —Penal Code, S* 143.

S 234 of the Municipal Act is a section of emergency referring to deposit of moveable property on the road side. The right of the Municipality as to the road is governed by S. 30 by which the property in roads is vested in the Commissioners for the purposes given in the Act. Under S. 30 Municipality has no right to lease out its rights for the purpose of carrying on shops or exposing goods for sale. There is no right to collect rent, toll or any tax, unless there is a contract creating the relationship of landlord and tenant between the parties. If the provisions of S. 335 of the Municipal Act do not apply to any place like Lohardagga, accused who prevented the lessee of the Municipality of Lohardagga from realising rent from the shop-keepers or persons exposing their goods for sale along the road, not on a Municipal market nor on a market to which the provisions of Part X applied were not guilty of an offence under S. 143, Penal Code. [P. 287, C. 2.]

Rai Guru Sharan Prasad and *Anand Prasad*—for Petitioners.

Judgment:—The petitioners have been convicted under Section 143 of the Indian Penal Code and sentenced to a fine of Rs. 30 each.

The common object is stated to be

" to prevent Abdul Halim and Ghulam Mohidin from collecting toll in Gudri Bazzar on the 7th August 1921."

Abdul Halim is a Sub overseer and Mohidin has taken a lease of the Bazaar from the Municipality on the 26th of July last. The settlement was made in pursuance of a resolution of the Municipal Commissioners at a meeting held on the 10th of May 1921, resolving to levy toll at the rate of half a pice from each vendor sitting and selling his goods on a road within the Lohardagga Municipality. Before that resolution was passed in 1920, the Municipality had issued a notice prohibiting the people to keep their stalls along side the road in Gudri Bazaar so that the traffic may not in any way be obstructed and accident may not happen. This notice was not obeyed. The Municipality evidently did not enforce it. The Magistrate says that the width of the road is 28 feet and between the stalls ample space is still left for traffic. The Municipality, therefore, abandoned the idea forbidding persons from keeping the stalls alongside of the road, but they have resolved to levy some toll or fee from persons who expose their goods for sale in the market. Dhunmun, one of the accused, has got his shop and it is said that he prevented the realisation of toll, from people sitting in front of his shop. The contention before me is that the Municipality has no right to realise any rent, toll or fee from persons exposing their goods for sale on the road side. This contention is based upon the fact that Part X of the Municipal Act (Act III of 1884), which deals with the regulation of market has not been extended to the Lohardagga Municipality. The market, which is held

on the Lohardagga road (50 feet on each side of the Road) on market days is not a Municipal market and, therefore, the Municipality is not entitled to charge any toll, rent or fee from persons exposing their goods in the market on the road side. It is conceded by the Magistrate that Part X of the Act, has not been extended to the Lohardagga Municipality and, therefore, the place where the stalls are located, in Lohardagga on the roadside is not the Municipal market. Section 335, Part X of the Act says:—

"In any Municipality to which this Part shall have been extended in the manner prescribed by section 222, the Commissioners at a meeting may provide land for the purpose of being used as a Municipal market and may defray the cost of providing such land and of all expenses necessary for the establishment of such market from the Municipal fund, and may take a lease of any market, and may charge rent, tolls and fees for the right to expose goods for sale in such market, and for the use of shops, stalls and standings therein All such rents, tolls and fees may be covered as arrears of tax under the provisions of sections 120 to 129 (both inclusive)"

The Municipality, therefore, cannot enforce any rent, tolls or fees from the shopkeepers or persons exposing their goods on the Lohardagga road under Section 335, inasmuch as the said spot is not a Municipal market. As the Municipality itself has no right under that section, it can confer no right upon the complainant lessee in the present case. The Magistrate concedes this in his judgment and says that the right of the Municipality though not arising under Section 335, does arise by an analogy of the common law as the Municipality is the owner of the road in question and has a right to realise anything from persons for the use and occupation of the road. This appears to be the meaning of the Magistrate's finding though he has not said so in so many words. He has come to this conclusion by an analogy, as he says, of Section 234 of the Municipal Act. Under this section, the Commissioners may grant permission to any person for such period as they may think fit, to deposit any moveable property on any road, or to make any excavation in any road or to enclose the whole or any part of any road, and may charge such fees as they may fix for such permission.

This section in itself is inapplicable inasmuch as the shop-keepers or the Bazar people of Lohardagga have neither asked for nor has any permission been given to them to deposit any moveable property on the road in question. That section in itself does not apply to exposing goods for sale on any road. That is a section of emergency whereby a person, who wants to use the road temporarily for certain object, may be allowed to deposit any moveable property, such as bricks, etc., for the construction of his house or may dig a portion of it for carrying, say, water and the Municipality may charge such fees as it considers reasonable in order to compensate itself for the damage caused to the road by the temporary use of it by any person. Under this section the Municipality is not entitled, to my mind to lease out its right for the purpose of carrying on shops or exposing goods for sale. The property in the road has been vested in the Commissioners by section 30 of the Act. The Municipality, therefore, can use the road as owner of it for the purposes set forth in the Act. If the Municipality thinks that any road or a portion thereof can be leased by it to any person for any purpose there must be a contract between the Municipality and that person, and without a contract the Municipality is not entitled to force the payment of any tax by any person. In the present case there is no contract between the shop-keepers and the Municipality with respect to the goods they expose on the road side for sale. There is no relationship of landlord and tenant in any sense of the term and, therefore, the Municipality is not entitled to realise any rent, tolls or fees for the use and occupation of the road side land. The spot in question is neither a Municipal Market to which the provisions of Part X of the Municipal Act apply. The lessee of the market has no right to realise the rent. Therefore the petitioners did not commit any illegal act in preventing the lessee from realising rent from the shopkeepers.

Petition allowed.

A. I. R. 1922 Patna 287.

DAS AND ROSS, JJ.

Raja Jyoti Pd. Singh Deo—Plaintiff-Petitioner.

v.

Ranjit Singh — Defendant-Opposite Party.

Civ. Rev. Nos. 248 and 241 of 1921 decided on 29th April 1921, against an order of Sub J., Purulia, D. 14th August 1920.

Chota Nagpur Encumbered Estates Ac

(VI B. C. of 1876), Ss. 3, 12—Protection of Estate—Estate, Release of—Creditor's rights which were in abeyance will revive.

Section 3 gives a statutory protection to a person whose property is brought within the operation of the Encumbered Estates Act, and S 12 removes that protection when the proprietor is restored to possession and provides in effect that all remedies which, but for S 3, the creditor could enforce against the proprietor shall be enforcible against the proprietor as soon as he is restored to possession.

[P. 288, C. 1.]

Naresh Chandra Sinha and *Shisir Kumar Mitter*—for Petitioner.

Abani Bhushan Mukerjee—for Opposite Party.

Das, J.—I am unable to agree with the view taken by the learned Subordinate Judge. S. 3 of the Chota Nagpur Encumbered Estates Act provides that on the publication of an order under S. 2, that is to say, an order vesting in the Manager the management of the whole or any portion of the immoveable property of or to which the holder is then possessed or entitled in his own right, all proceedings which may then be pending in any Civil Court in British India or in any Revenue Court in Bengal in respect of such debt or liabilities shall be 'barred' and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void. S. 12 of the same Act provides that when all the debts and liabilities mentioned in the schedule referred to in S. 11 have been paid and discharged and the holder of his property or his heir is restored to the possession and enjoyment of the property, such restoration shall be notified in the Calcutta Gazette and thereupon the proceedings, processes, execution and attachments mentioned in S. 3 shall be revived

Now it appears to me that S. 3 gives a statutory protection to a person whose property is brought within the operation of the Encumbered Estates Act, and S. 12 removes that protection when the proprietor is restored to possession, and provides in effect that all remedies which, but for S. 3, the creditor could enforce against the proprietor shall be enforcible against the proprietor as soon as he is restored to possession.

Now, the petitioner brought a mortgage action against four persons, of whom the opposite party was one. After the commencement of the action there was a notification under S. 2 of the Act with the consequence that the proceedings which were then pending in respect of the debt due to the petitioner, by the express provision of the statute became 'barred' I use the expression "barred", because the Act, which is very inartistically drafted, uses that expression; but I have no doubt whatever that the word "barred" means nothing more than what is conveyed by the expression "stayed". The petitioner, however, proceeded with the suit so far as the other mortgagors were concerned, and consented to an order striking out the name of the opposite party from the record. The petitioner then obtained a mortgage decree against all the mortgagors other than the opposite party. An order has now been made under S. 12 restoring the opposite party to the possession and enjoyment of his property and the sole question, which we have to decide is, whether the petitioner can continue the suit which he instituted against the opposite party notwithstanding the fact that he has not obtained a decree against the mortgagors other than the opposite party.

Now it seems to me that the provision in S. 12 is closely analogous to what is known in the Chancery Courts as a proceeding of revivor. Now it is clear that a suit which was perfect at the time when it was instituted may, under certain circumstances, become defective. In such a case no proceeding can be taken in it until an order to revive the suit is made by the Court If the defect is due to some impediment to the continuation of the suit an order of revivor cannot be passed until the impediment is removed, but when the impediment is removed, a court of Chancery will, under ordinary circumstances, make an order for revivor, provided that the petitioner proceeds with due diligence and satisfied the court that his claim will remain unsatisfied. That is the Chancery practice and I have no doubt whatever that S. 12 has to some extent introduced that practice here.

But it was argued by the learned Vakil, who appears for the opposite party, that a mortgage claim is an indivisible claim, and the petitioner having elected to proceed against some of the mortgagors, has precluded himself from pursuing his remedy against the opposite party. That would be true under ordinary circumstances; but here we are dealing with exceptional legislation which bars the remedies available to the creditor for no other reason than that the proprietor is in insolvent circumstances and needs protection. The protection having been removed, the creditor is, in my judgment, restored to the position which he

occupied at the time when the estate of the proprietor was vested in the Manager under the provisions of the Act.

But the question still remains whether the claim of the petitioner still remains unsatisfied. On this point the parties adduced no evidence whatever. It is obvious that he ought not to be allowed to continue the proceeding, if his claim has been satisfied by the mortgagors other than the opposite party.

I would set aside the order of the learned Subordinate Judge and remand the case to him for disposal according to law.

He must first investigate the question whether the debt due by the mortgagors to the petitioner has been satisfied by some of the mortgagors. If he finds that it has been satisfied, then of course no further proceedings can be taken. If he finds that the debt is still unsatisfied, then he will proceed with the suit.

The petitioner is entitled to his costs.

Ross, J.—I agree. *Case remanded.*

A. I. R. 1922 Patna 289

DAWSON-MILLER, C. J. AND ADAMI, J.

Prithi Mahton—Appellant

v.

Jamshed Khan and others—Respondents.

Letters Patent Appeal No. 49 of 1922 decided on 26th April 1922 against the Judgment of Ross, J., D. 27th May 1921.

Civil P. C. S. 11, Exp. IV—Execution proceeding—Special rules in explanation to S. 11 do not apply.

Although the doctrine laid down in Section 11 of the Civil Procedure Code, relating to *res judicata* may be applied and rightly applied in certain proceedings in execution arising out of the same judgment, so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases, fought between the same parties, still it cannot be thought that the special rules laid down in the explanation to that section which go beyond the ordinary doctrine of *res judicata* ought to be applied generally in execution cases. *Kalyan Singh* v. *Jagan Prasad*, 37 All. 589 referred to. *Gantayet* v. *Gajapati Vasudeva Devu*, 24 Mad. 681 referred to. [P. 290, C. 2.]

Murari Prasad—for Appellant.

Mohammad Hasan Jan—for Respondents.

Dawson-Miller, C. J.:—This is an appeal on behalf of the defendant No. 1 from a decision of Mr. Justice Ross dated the 27th of May last year. The plaintiffs are the proprietors of a plot of land measuring 2 *bighas* 2 *dhurs* of which the defendant No. 2 and apparently the defendant No. 3, for there is some doubt about it, where the tenants or at all events the defendant No. 2 was the original tenant in January 1914. The tenants sold the land to the defendant No. 1 under a *kebala* but it appears from the terms of that *kebala* that the whole holding less 12 *kanvas* alone was sold under that kebala. The purchaser therefore was not the transferee of the whole holding but transferee of a portion of the holding. Before the date of this transaction namely on the 18th of September 1913, the plaintiffs as landlords obtained a decree for rent against the Defendant No. 1's vendors or their predecessor-in-title or at all events against the existing tenant at that time and on the 16th April 1914, the land was put up to sale in execution of that decree and purchased by the plaintiff. The decree obtained by the landlord for some reason which has not been explained was treated as a money decree only, but nevertheless the land was sold and purchased by the landlord who on the 4th August in the same year actually got delivery of possession of the land. Subsequently the defendant No. 1 Pirthi Mahto, the transferee, took proceedings under Order 21, rule 90, C.P.C. for setting aside the sale and he produced his *kebala* under which he purchased the land in support of his application to shew that he had an interest in the land. Now I pause here for a moment to point out that the interest asserted by the defendant No. 1 at the time of his application under Order 21, rule 90 was an interest in a portion of the holding only, and therefore, so far as the plaintiff was concerned, there appears to have been no reason why he should take the point that the holding was non-transferable because even if he succeeded in proving the point nevertheless a transfer of a portion only of the holding would be binding as against him provided that the original holder or occupier had not abandoned possession of the whole holding. Eventually the application of the defendant No. 1 under Order 21, rule 90, proved successful and the sale was ordered to be set aside. He however had some difficulty in getting possession and further proceedings were taken first under Section 144, Cr. P. C and subsequently under Order 21, rule 101 : but it would appear that although the defendant No. 1 had been in possession at some time between the date of his *kebala* in September 1913 and August in the following year when the plaintiff got possession by an order of the Court, still from the latter date up to the time of this

suit it seems, although it is not absolutely clear from the judgments, that the plaintiffs themselves had been in possession of this land. Indeed in the plaint amongst other things the plaintiffs prayed for confirmation of their possession and that in fact is one of the reliefs granted by the learned Munsif which was affirmed both by the Lower Appellate Court and by the Judge of this Court. I mention this because in one portion of the Munsif's judgment it would appear that he found upon the evidence of the plaintiffs' witnesses that the defendants were in fact in possession of the whole holding. It seems, however, that in arriving at that finding what he really was discussing was the original possession of the defendants up to sometime in August 1914.

The plaintiffs claimed that possession of the property in suit may be confirmed and that a perpetual injunction may be issued upon the defendant 1st party restraining him from getting possession over the property in suit or from recovering mesne profits and further asked for that relief after finding that there was no custom of transferability in the mouzah in which the property is situated and that the original tenants had in fact abandoned the property in suit.

Various defences were raised in the suit, and amongst others it was contended that the suit was barred by reason of the provisions of Section 11 read in the light of the fourth explanation to that Section of the Civil Procedure Code. It was contended that the question of non-transferability which if established would put an end to the defendants' claim could not now be raised because in the proceedings under Order 21, rule 90, either no such point had been taken by the landlord, or if it had not been taken then it could not be taken now because it might have been taken then. It was therefore contended that the present suit was barred by *res-judicata*. The Munsif with regard to this question came to the conclusion that the point had really never been taken at all or decided by the execution court in the proceedings under rule 90 of Order 21 and therefore held that the point not having been raised or decided, there was no bar to the plaintiff's raising the point now. He did not deal in terms with the fourth explanation to Section 11 but possibly he had in mind the result of certain cases which have been decided both in Madras and Allahabad, where it has been laid down that whatever may be the extent to which an analogous doctrine to that laid down in Section 11 may be applied in execution cases, still the explanation as for example explanation 4 and explanation 5 can have no application to proceedings of that nature so as to bar the plaintiffs in a subsequent suit from raising points which have not been determined in the previous execution proceedings. When the matter came before the District Judge, although a question was raised based upon the doctrine of estoppel, no question was raised as far as appears from the learned Judge's Judgment upon the point which has now been argued before us in this appeal, and there is nothing to show that the point in fact was taken before the learned District Judge. Had it been taken it would have been open to the appellant before us to day to bring some evidence or some proof that the point had in fact been argued and that the learned Judge omitted to deal with it. But it would appear on reading the judgment of the learned District Judge that the point was never taken and therefore one must assume that it was abandoned. Now when the matter came before the Judge of this Court that point, which I may say is the only point which has been argued before us to-day, and other points were urged. The learned Judge dismissed the appeal and in dealing with the point I have just referred to, he pointed out that it should not succeed because for obvious reasons it had not been taken before the learned District Judge, and therefore the appellant ought not to be allowed to revive it in appeal before him. With that part of the learned Judge's judgment I entirely concur and that in itself would be sufficient to lead us to dismiss this appeal. I further think, however, that although the doctrine laid down in Section 11 of the Civil Procedure Code relating to *res judicata* may be applied and rightly applied in certain proceedings in execution arising out of the same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases fought between the same parties, still I do not think that the special rules laid down in the explanation to that section which go beyond the ordinary doctrine of *res judicata* ought to be applied generally in execution cases. The High Court of Allahabad in the case of *Kalyan Singh* v. *Jagan Pra-*

sad (1) held that "if a judgment-debtor does not take exception the amount erroneously set forth in an application for the execution of a decree as being the sum due, he is not prevented by the principle of *res judicata* from doing so on a subsequent application for the execution of the same decree". It was argued in that case that by reason of explanation 4 to Section 11 of the Code the judgment-debtor not having taken the point in the first application for execution of his decree was barred from taking the point in a subsequent application. The Court who delivered the judgment in that case consisting of the Chief Justice and Mr. Justice Rafiq refused to accept this contention and refused to apply the principle laid down in explanation 4 to Section 11 to cases of that nature. Again in Madras in the case of *Nityananda Gantayet* v. *Gajapati Vasudeva Devu* (2) the Court refused to apply the law of *res judicata* as laid down in explanation 3 of Section 13 of the Code of 1882 which is now explanation 5 of the present Code to a case where the plaintiff had been awarded by a decree possession of land together with mesne profits and applied in execution for delivery of the land and for mesne profits but was not awarded mesne profits by the executing Court. In fact that Court made no reference to it in its decision and when the plaintiffs subsequently applied for mesne profits they were met with the objection arising under what is now explanation 5 of Section 11, and the Madras High Court refused to entertain the argument based upon that explanation in such a case. I see no reason to differ from the principles laid down in those cases and therefore on this ground also I think that this appeal should be dismissed. The respondents are entitled to their costs of this appeal.

Adami, J:—I agree. *Appeal dismissed.*

(1) (1915) 37 All. 589 = 30 I C. 523 = 13 A.L.J. 828.

(2) (1901) 24 Mad. 681 = 11 M.L.J. 343.

A. I. R. 1922 Patna 291.

JWALA PRASAD AND ADAMI, JJ.

Rani Chhattra Kumari Debi—Defendant-Appellant. v.

Panda Radhamohan Singari—Plaintiff-Respondent.

Appeal No. 117 of 1919 decided on 16th March 1922, from a decision of Sub. J., 2nd Court, Muzafferpore, dated 19th March 1919.

(a) *Civil P. C., O. 5, R. 1 and O. XVII, R. 2—Suppression of summons—Fraud—Active part in not having summons served, is necessary to be proved in order to constitute fraud.*

In order to charge a party with fraud in the suppression of summons it is essential to prove that the non-service was the result of some active part taken by that party in not having the summons served and thereby keeping the opposite party from the knowledge of the suit. [P. 292, C. 1 & 2.]

(b) *Civil P. C, O. 32, R. 3, Cl. 4—Guardian* ad litem *not appointed—Minor not represented—Decree is not binding on minor.*

Where the mother of the minor who is his guardian did not know of the suit, no notice or summons was served upon her, no order of the court was passed appointing her as guardian, no consent, either express or implied, is given by her and at no stage of the case did she enter appearance; *held* therefore the suit is decreed against the minor without any guardian and the minor was not represented in the suit. He is therefore not bound by the decree or any proceeding in connection with that decree. 26 C. L. J. 258 followed. [P. 293, C. 1.]

P. N. Sinha and *Murari Prasad* for *Ambika Parsad Upadhya*—for Appellant.

Parmeshwar Dayal and *Jalgobind Prasad Sinha*—for Respondent.

Judgment:—This appeal arises out of an action to recover possession of the disputed property with mesne profits after setting aside an *ex parte* decree and auction sale held thereunder.

The suit of the plaintiff has been decreed by the Subordinate Judge of Muzaffarpur by his judgment, dated the 19th of March 1919. The defendant is the appellant before us. She had instituted a suit against the plaintiff for recovery of road and embankment cess before the Munsiff of Motihari and obtained an *ex parte* decree on the 19th of November 1912. This decree was executed and the *biri* in question was purchased by the defendant. The delivery of possession took place through the Court in May 1913.

The grounds urged in the plaint for setting aside the *ex parte* decree and the subsequent proceedings are that (1) the decree in question was obtained by means of fraud resorted to by the decree-holder in suppressing the notice and summons and the process in the suit and the execution proceedings thereby preventing the present plaintiff from the knowledge of the suit and the proceedings, (2) that the property worth Rs. 10,000 was thus purchased by the defendant at a grossly inadequate price of Rs. 162-8-0 and (3) that the plaintiff suffered a serious loss and injury on account of the fraudulent action of the defendant. The defence was a denial of the charge of fraud and it was asserted that no fraud was committed in connection with the suit and the execution proceedings. It is also

alleged that the plaintiff's mother and guardian had full knowledge about the suit and that the price of the property fetched at the auction sale was not inadequate.

The Court below held that the fact stated by the plaintiff was proved that the *exparte* decree in question was obtained by the defendant by means of fraud and that the decree obtained against the plaintiff was null and void inasmuch as no guardian *ad litem* was appointed on behalf of the minor to protect his interest in the suit under Order 32 of the Code of Civil Procedure. The Court below also held that the price fetched was grossly inadequate inasmuch as the total collections of the disputed property will be about Rs. 197, whereas it was sold for Rs. 162-8 only. The Court below has therefore decreed the plaintiff's suit directing possession to be delivered to the plaintiff with mesne profits. The defendant has, therefore, come to us in appeal.

Mr. Purnendu Narain Sinha on behalf of the appellant urges that the Court below has not recorded a sufficient finding of fraud in order to hold that the decree in question was vitiated by reason of fraud committed by the defendant in obtaining the *ex parte* decree in question. He further says that there is no evidence of such a fraud. The evidence in the case consists of the plaintiff's mother and her Karpardaz. They deny the service of summons or notice upon them and knowledge of the suit in which the defendant obtained the decree in question. On behalf of the defendant no evidence of service of the notice or summons in the case was adduced. The evidence on the point was therefore one sided and the Court below has accepted that evidence. The finding of the Court below that no notice or summons was served upon the plaintiff and his mother must be accepted as unassailable.

There is, however, a good deal of force in the contention of Mr. Purnendu Narain Sinha that this finding alone is not sufficient to infer in law a finding of fraud, and the learned Subordinate Judge is wrong in holding that the aforesaid finding "constitutes fraud which vitiates the *ex parte* decree obtained by the defendant against the plaintiff". It is concluded by authorities that the mere non-service of summons is no evidence of fraud. The summons might not have been served on account of the laches of the Court peon or on account of other reasons. In order to charge a party with fraud in the suppression of summons it is essential to prove that the non-service was the result of some active part taken by that party in not having the summons served and thereby keeping the opposite party from the knowledge of the suit. The point is so clear that now it hardly needs support of any authority. I, therefore, agree with the contention of Mr. Purnendu Narain Sinha that the court below has not recorded a sufficient finding to attribute fraud on the part of the defendant in obtaining the *ex parte* decree in question. If that were the only ground upon which the decree obtained by the defendant was attacked, then the plaintiff's suit would have been dismissed and the appeal would have been allowed; but the learned Subordinate Judge has come to a finding that the plaintiff in the suit in which an *ex parte* decree was passed against him was not represented at all. No guardian *ad-litem* of the plaintiff was at all appointed by the Court. This finding of the Subordinate Judge is borne out by the order sheet of the original suit No. 876 of 1912 (Exhibit 4). On the 9th of September 1912, the Court directed notice to issue on the minor defendant and the proposed guardian *ad litem* and summons on the defendant fixing the 4th of October 1912 for appointment of a guardian of the minor. After some adjournment on account of the non-receipt of the service of summons the case was ultimately taken up on the 19th of November. On that date the court recorded the following order: "This suit and suit No. 876 of 1912 tried together. Defendant absent. Service proved. Plaintiff examined Dip Narain Lal. Suit decreed *ex parte* with costs".

It is thus clear that although an order was passed by the Court to issue notice upon the proposed guardian, no order was passed appointing any guardian, nor did any guardian appear in the case on behalf of the minor, and as the evidence stands no summons or notice was served upon the guardian or minor as is required by Order 32, rule 3, clause (4). Rule 3 of that Order makes it imperative upon the Court to appoint a person to be guardian for the suit on behalf of a minor. Under rule 4, clause (3) no person can be appointed a guardian for the suit without his consent. Therefore according to the provisions in the Code of Civil Procedure when there is a minor defendant in a suit it is incumbent upon the Court to appoint a guardian with his consent to act as a guardian in the suit on behalf of the minor.

Now, it has been held in a large number of cases that where the court has by its action given its sanction for the appearance of a person as guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. In other words a mere irregularity in the appointment of a guardian *ad litem* will not render the decree obtained against the minor null and void unless the interest of the minor has suffered by reason of such an irregularity. The leading decision upon the subject is that of their Lordships of the Judicial Committee in the case of *Walian* v. *Banke Bihary Prasad Singh* (1). Vide also *Paresh Nath Mallick* v. *Hari Charan Dey* (2) ; *Nagendra Nath Bose* v. *Parbati Charan and another* (3) ; *Surajdeo Narain Missir* v. *Surjuq Prasad Missir* (4) ; *Ram Asray Singh* v. *Sheonandan Singh* (5), *Keshawesarindra Sahi* v. *Rani Debendra Bala Dassi* (6) and *Chhatter Singh* v. *Tej Singh and others* (7). In most of these cases the guardian did act on behalf of the minor in the case and his interest therefore was protected. Consequently in those cases it could not be said that the minor was not represented, though the representation was not formally sanctioned by the Court.

In some of those cases it would be noticed that the Court itself permitted the guardian to act on behalf of the minor and the guardian was therefore acting with the full knowledge and approval of the Court but here the case is of a different character. The mother of the minor who is his guardian did not know of the suit. No notice or summons was served upon her. No order of the Court was passed appointing her as guardian. No consent either express or implied was given by her and at no stage of the case she entered appearance. Therefore the suit was decreed against the minor without any guardian and the minor was not at all represented in the suit. He is therefore not at all bound by the decree or any proceeding in connection with that decree. *Baneswar Pramanik* v. *Tarapada Bhattacharjee* (8) ; *Bhagwan Dayal* v. *Param Sukh Das* (9) ; *Narendra Chandra Mondol* v. *Jogendra Narain Rai* (10) ; *Sadashiv Bamchandra Datar* v. *Trimbak Keshav Vaze* (11) ; *Eda Punnayya* v. *Jangala Kama Kotayy* (12) ; *Lala Rampirit Prasad* v. *Babu Thakur Saran* (13). The principle has been recognised in the well known decision of their Lordships of the Judicial Committee in *Rashid-un-nisa* v. *Muhammad Ismail Khan* (14). Therefore the *ex parte* decree in question was not binding upon the plaintiff and was null and void. His interest in the property could not therefore be affected by the sale in execution of the decree.

Mr. Purnendu Narain Sinha, however, contends that this point was not taken in the plaint nor was any issue raised and consequently no proper opportunity was given to the defendant to rebut it. It appears, however that the order sheet of the case was filed and used as evidence on behalf of the plaintiff (marked Exhibit 4). Upon the face of that order sheet the plaintiff was not represented in the suit. It appears that on the date when the present case was taken up, that is the 14th of March 1919, after the close of the plaintiff's case, the defendant wanted time on the allegation that her witnesses had missed the train and could not come that day. The Court granted adjournment on payment of Rs. 20 as costs. Mr. Kennedy, the defendant's Vakil, then intimated to the Court that his client was not willing to pay costs. The petition for time was accordingly rejected and the case was decided only upon the evidence adduced on behalf of the plaintiff. Therefore the defendant had full opportunity to rebut the case made by the plaintiff in evidence. Therefore there is not much substance in the contention of the appellant. In fact, no evidence is required and no evidence would be available to rebut the documentary evidence in the shape of the order sheet in the case. The Court has held upon evidence that no notice was served and there is no order of the Court appointing any guardian of the plaintiff. This is a stubborn fact and will not be upset by any amount of evidence. Therefore we are not prepared to remand the case to enable the defendant to give evidence in the case. He had full opportunity and no further evidence is possible.

(1) (1903) 30 Cal. 1021=30 I. A. 182=8 Sar. 512 (P.C.)
(2) (1911) 38 Cal. 622=10 I. C. 361=15 C. W. N. 875.
(3) (1914) 20 C. W. N. 819=35 I. C. 339.
(4) (1917) 2 P-L.J. 390=40 I.C. 227=1917 P.H.C.C. 198.
(5) (1916) 1 P.L.J. 573=35 I.C. 868=1917 P.H.C.C 2 (F.B.)
(6) (1915) 29 I. C. 211.
(7) (1920) 59 I.C. 671=19 A.L.J. 956.
(8) (1917) 26 C.L.J. 258=41 I.C. 872.
(9) (1915) 37 All. 179=27 I.C. 623=13 A.L. J. 179.
(10) (1914) 20 C.L.J., 469=27 I.C. 139=19 C.W.N. 537.
(11) (1920) 44 Bom. 202=56 I. C. 399=22 Bom. L. R. 266.
(12) (1919) 37 M.L.J. 399=53 I.C. 184=1920 M.W.N. 1.
(13) A.I.R. 1921 Pat. 293=1921 P. H. C. C. 335.
(14) (1909) 31 All. 572=36 I.A. 168=3 I.C. 864=6 A.L.J. 822 (P.C.)

We also note that even if the non-representation of the plaintiff in the original suit was due to any irregularity, we find that the learned Subordinate Judge has come to a clear finding upon evidence on the record that the property in suit was sold for a very inadequate price. The case of the plaintiff is that he is not bound to pay the embankment cess for which the *ex parte* decree was obtained by the defendant. Therefore there is no question that the plaintiff has been prejudiced by reason of the non-appointment of a guardian in the case.

For all these reasons we uphold the decision of the Court below and dismiss the appeal with costs throughout.

Appeal dismissed.

A. I. R. 1922 Patna 294 (1)

COUTTS, J.

Ramsundar and others—Petitioners

v.

Maharaja Bahadur Kesho Prasad Singh—Opp. Party.

Cr. Rev. No. 208 of 1922 decided on 3rd May 1922 against an order of Sub-Div. Mag., Buxar.

Criminal Procedure Code, S. 145—Results of local inspection not recorded—Decision based on, is bad.

Where the Magistrate twice made local inspections and without making any record of the result of his observations, used his conversations at the time of his local inspections in the course of his judgment in substitution of and in order to supplement the evidence which has been recorded by him. *Held* : that the Magistrate had, in fact, turned himself into a witness in the case and, that further, his failure to record the result of his local inspections which would have given both parties a chance of challenging the correctness of his observations, vitiated his decision. [P. 294, C. 2.]

Gour Chandra Pal—for Petitioners.

N. N. Singh—for Opp. Party.

This is an application in revision made by the first party against an order of the Sub-divisional Magistrate of Buxar in a proceeding under Section 145 of the Code of Criminal Procedure.

The main point urged in support of this application is that the learned Sub-divisional Magistrate has twice made local inspections and that without making any record of the result of his observations he has used his conversations at the time of his local inspections in the course of his judgment in substitution of and in order to supplement the evidence which has been recorded by him. On reading the judgment of the learned Sub-divisional Magistrate it is clear that these contentions must succeed. The learned Sub-divisional Magistrate has clearly used his observations both in substitution of and to supplement the evidence recorded by him He has in fact turned himself into a witness in the case and, further, he has failed to record the result of his local inspections which would have given both parties a chance of challenging the correctness of his observations.

Another contention has been urged in the case, namely, that the documents of the first party have not been considered. It is, however, unnecessary to consider this, because on the first contention alone this application must succeed.

The order passed under Section 145, Cr. P.C. is set aside. If there is still any likelihood of a breach of the peace, fresh proceedings should be instituted.

Order set aside.

A. I. R. 1922 Patna 294 (2)

COUTTS AND ROSS, JJ.

H. Grant—Petitioner

v.

Emperor—Opp. party.

Cr. Mis. Case No. 33 of 1921 decided on 16th May, 1921 against an order of Dist. Mag., Bhagalpur.

Criminal P. C., S. 190—Cognizance of an offence—Charge sheet need not mention—What each witness is to prove.

No provision of law requires that the Magistrate before taking cognizance should know exactly what each of the witnesses named in the charge sheet will prove ; where the charge sheet alleges that a certain offence will be established by the evidence of certain witnesses this is sufficient to enable the Magistrate to take cognizance [P. 296, C. 1.]

J. N. Mittra, S. C. Roy, N. C. Roy and *Manuk*—for Petitioner.

Government Advocate—for the Crown.

Coutts, J.—This is an application to quash proceedings under Section 150 of the Indian Penal Code, which have been instituted by the District Magistrate of Bhagalpore against Mr. Grant one of the proprietors of the Luttipore concern. The application has been made on three grounds :—

(1) that the proceedings are not *bona fide*, (2) that on the face of the charge sheet and on admitted facts the ingredients necessary for a prosecution under section 150 of the Indian Penal Code are not present and (3) that the charge sheet as submitted to the Magistrate is such that he could not, under the law, take cognizance.

It appears that in the Luttipore Zemindary there are a number of Diara villages which are subject to the action of the river Ganges, and, it is said, that under the terms of the *kabuliyats* which are taken by the proprietors from tenants the arrangement is that the tenants do not pay rent on diluviated lands, the rights of tenancy are extinguished and when the lands reform the proprietors have an unrestricted right of settlement. Amongst these Diara villages is one named Sonbarsa. This village diluviated many years ago to the extent of some 400 *bighas*, which in the year 1918 reformed. There were apparently many applicants for settlement and when the settlement was made, it is said that the disappointed tenants began to create disturbances. The result was that the proceedings under Section 107 were instituted and in the beginning of the year 1920, 19 persons were bound down to keep the peace for a year. This however, did not settle the matter and there were in the course of the next ten or eleven months ten criminal proceedings, which seem to have ended in convictions. The proprietors however, were not satisfied and they made several applications to the authorities for police aid. These were not granted. Mr. H. Grant, thinking he was aggrieved, on the 20th of January engaged 40 Gurkhas from the Depot at Lucknow. This action, he says, was necessary for the protection of his properties, the persons of his servants and tenants and for maintaining possession. These Gurkhas came down from Lucknow and, on the morning of the 2nd February, 27 of them accompanied by tenants and Zemindary servants, crossed the river to the Diara for the purpose, it is said, of watching the crops. They were met, however, by a large body of persons, a fight ensued, 20 Gurkhas were killed and the remaining Gurkhas and the Zemindari servants fled.

Proceedings were started against both contending parties in respect of this occurrence and on the 14th February the proceedings, with which we are now concerned, was instituted by a formal first information made by the Sub-Inspector of the Thana in which the occurrence took place. This shortly is the history of the case and, in my opinion, the facts disclosed absolutely nothing which would indicate that prosecution is not perfectly *bona fide* one.

Next it has been contended by Mr. Manuk on behalf of the petitioner, that the charge sheet which was sent up after the investigation in this case, and the admitted facts do not contain the ingredients for a prosecution of Mr. H. Grant under section 150 of the Indian Penal Code. With this contention I am unable to agree. It is clearly stated in the charge sheet that Mr. H. Grant engaged or hired the services of 40 Gurkhas from the Lucknow Depot who joined or became members of an unlawful assembly which led to the commission of offence under Sections 302, 148, and 379 of the Indian Penal Code, and that the charge against Mr. H. Grant under Section 150 of the Indian Penal Code has been proved and satisfactorily established by the witnesses who were named by the Police. This is clearly a charge under Section 150 of the Indian Penal Code. Mr. Manuk, however, contends that at the time this first information was submitted, the Magistrate had before him another charge sheet, namely, the charge sheet in a case under Section 143 which had been sent up by the Police against some of the party with which it is said, the Gurkhas were at the time of occurrence on the 2nd of February. In the first information which was laid in that case the Gurkhas, who had not been killed, were named as accused, but these Gurkhas were not sent up for trial as the case against them had not been satisfactorily established and Mr. Manuk contends that this being so, there is no substance in the case against Mr. H. Grant, because unless the Gurkhas are members of the unlawful assembly, he cannot be said to have engaged or hired the services of the Gurkhas from Lucknow to join or to become members of an unlawful assembly. He, further, contends that the unlawful assembly for which hiring is done must be an unlawful assembly formed or forming and that the circumstances of this case do not comply with this view of the law.

With regard to the first of these contentions, the mere facts, that the police did not consider that the Gurkhas could be successfully prosecuted under Section 145, Indian Penal Code, by no means shows that they took no part in the occurrence. Moreover 20 Gurkhas were killed and there is nothing to show what part they took in the occurrence. This contention, therefore failed.

As to the second contention, its success or otherwise depends on the interpretation of Section 150 of the Indian Penal Code. The interpretation of this section is not free from difficulty and without having the

whole facts before us, it is impossible to say whether they will constitute an offence under this section or not.

The last contention of Mr. Manuk is that on the charge sheet as submitted the Magistrate could not, under the law, take cognisance, because it does not show exactly what each of the witnesses named in the charge sheet will prove. I can find no provision of the law which requires that the Magistrate before taking cognisance should know exactly what each of the witnesses, named in charge sheet will prove; nor can I find any authority for such a proposition. The charge sheet alleges that a certain offence will be established by the evidence of certain witnesses and in my opinion, this is sufficient to enable the Magistrate to take cognisance.

I would accordingly dismiss the application.

Ross, J:—I agree. *Application dismissed.*

A. I. R. 1922 Patna 296.

JWALA PRASAD, J.

Parmeshwar Lal Mitter—Petitioner.

v.

Emperor—Opp. Party.

Cr. Rev. No. 79 of 1921 decided on 28th Feb., 1921, against the order of the Hon. Mag., Bhagalpore.

Criminal P.C., Ss. 260, 248, 342—Charge under S. 447, I. P. C.—Accused not examined under S. 342—Note not made of local inspection but observation made basis of decision—Trial is vitiated.

Where in a trial in which the accused was charged under S. 447, examination under S. 342 Criminal Procedure Code of the accused was not taken or recorded, no opportunity was given to cross-examine the complainant on the main question, the Magistrate did not place a note of his local inspection on record and did not confine himself to evidence taken, *held* on these grounds these charges could not be maintained and the conviction must be set aside. [P. 297, C. 2; P. 298, C. 1.]

J. N. Maitra, N. C. Roy and *S. S. Bose*—for Petitioner.

Khursed Hossain—for Opp. Party.

Jwala Prasad, J:—The petitioner has been convicted under Section 447, I.P.C. and sentenced to pay a fine of Rs. 51 by the Honorary Magistrate of Bhagalpur. The trial was held according to the procedure laid down in Chapter XXII of the Code of Criminal Procedure for summary trials.

As Section 447 is a summons case, the procedure laid down under Chapter 20 of the Code for the trial of summons cases would apply to the trial of the present case by virtue of Section 262 of the Code. The trial is impugned as having been vitiated by the irregularities committed by the Magistrate. It is also urged that in the circumstances of the case the Magistrate ought to have tried the case not summarily but by the regular procedure as there were complicated questions of the title and possession involved in the dispute between the parties. For this reliance is placed upon sub-section 2 of section 260 of the Code. The irregularities complained of may be summarised as follows:—

(1) That the examination of the accused under Section 342 was not taken or recorded;

(2) that no opportunity was given to the accused to cross-examine the complainant on the main question relating to the occurrence;

(3) that the Magistrate acted illegally and irregularily in not placing a note of his local inspection on the record;

(4) that the Magistrate imported into his judgment facts, the knowledge whereof he gained at the local investigation, and did not confine himself strictly to the evidence taken by him in Court; and

(5) that the findings of the Magistrate are not sufficient for a conviction under Section 447, I.P.C.

In order to appreciate the first contention, namely, that the trial in the present case should not have been by the summary procedure it is necessary to state very briefly the circumstances relating to the dispute between the parties.

In 1902 the complainant purchased about 12 bighas of Brahmottar land situate in village Jichuchuck. There was a dispute with regard to either the whole or a portion of this land between the complainant and the neighbouring village Shampur which resulted in favour of the complainant. Subsequently he acquired the raiyati interest also in respect of those 12 *bighas*. In 1905 the record-of-rights was prepared. Plots Nos. 83 to 86 have been shown in the record-of-rights as belonging to the complainant and plot No. 82 as belonging to Mr. Grant. In 1908 there was a civil litigation between the complainant and Mr. Grant which resulted in a decree in favour of the complainant with respect to two *bighas*. The complainant obtained *dakhaldahani* in 1911. The present dispute is in connection with plot No. 82, measuring 11 *kathas*. The accused obtained lease or *mastasiri* from Mr. Grant including the land in dispute, plot No. 82. The complainant's case is that the accused on the day of occurrence forcibly ploughed about 11 *kathas* of land in Plot No. 82. The question before the Magistrate

for determination was therefore whether the 11 *kathas* of land in dispute is a part and parcel of the two bighas and odd decreed in favour of the complainant in the year 1908. The above statement will clearly show that the dispute between the parties is far from being simple. In the litigation in the Civil Court the plots of land were not specified and it is difficult to find out whether it corresponds with plot No 82 of the survey or not. According to the survey the land in dispute is admittedly in the name of the accused's lessor and is covered by the lease granted to him. It was therefore for the complainant to prove conclusively that the particular plot was covered by the decree and the writ of delivery of possession obtained by him from the Civil Court. On the 14th August 1920, it appears from the order-sheet that the Magistrate admitted that the question involved in the present case was an intricate one dealing with title and possession of the parties and that upon that ground it was transferred from the file of one Honorary Magistrate to the present one, apparently because the Honorary Magistrate who had tried the case was an experienced retired officer. The evidence laid in the case by the parties was far from convincing as to the exact location and identity of the land in question. This necessitated a local inspection by the Magistrate.

From the judgment of the Magistrate it is clear that he could not entirely depend upon the evidence before him but had perforce to take assistance of the impression upon his mind created by the local inspection and upon the statements of the parties made before him while pointing out the land in dispute. Upon this sole question as to whether the land in dispute was identical with plot No. 82, the Magistrate has devoted about 11 typed pages. This could not possibly come within the scope of a summary trial wherein one point would require the Magistrate to write such a long judgment. It established beyond doubt that the case was one which on the face of it came under sub-section (2) of Section 260 of the Code of Criminal Procedure and the Magistrate would have done well if he had exercised discretion vested in him by that section and had tried the case by the ordinary procedure. The prejudice resulting from the summary procedure to the accused is obvious, for the question for determination depended upon the documentary evidence and comparison of the survey map with the locality. The learned Magistrate himself says that he tried his best to draw up a sketch of the land in accordance with the survey map. I think if the course adopted by the Magistrate were not summary, the best way to solve the difficulty would have been to depute a commissioner to find out the exact position of the land in question. I therefore agree with the contention that the procedure for the trial of the case was not proper and that the case should have been tried in an ordinary way.

The irregularities complained of appear to me to be substantial and fatal to the trial of the petitioner. There is no trace in the record of the examination of the accused under section 342, as has been settled by this Court in a number of cases, is essential and obligatory. The Bombay High Court in the case of *G. S. Fernandez* v. *Emperor*, (1) following the decision of this Court in the case of *Raghu Bhumij* v. *King Emperor*, (2) held that the principle of the decision of this court extends to the trial of summons cases also and that the omission to examine the accused under Section 342 would vitiate the whole trial. No doubt under Section 263 of the Code the Court is required to prepare a record of the summary trial giving the particulars enumerated in that section. True also that the Magistrate need not record the evidence of the witness or frame a formal charge and that the judgment of the Court embodying the substance of the evidence and the particulars mentioned in Section 263 shall only form the record of the case (Section 264). But neither these Sections 263 and 264, nor any other provision in the Chapter for summary trials does away expressly with the requirements of sections 342 and 364 of the Code relating to the examination of the accused. The Magistrate is not absolved from the responsibility of recording the examination of the accused simply because the trial was summary. The plea of the accused under clause (g) of section 263 cannot possibly take the place of the examination of the accused, for the former naturally occurs at the initial stage of the case and the latter after the termination of the prosecution evidence and before the accused is called on to enter into his defence. It

(1) (1921) 45 Bom. 672=59 I C. 129=22 Bom L R, 1040.
(2) (1920) 5 P.L.J. 430=58 I.C. 49=1 P.L. T. 241.

appears from the record that the complainant was examined and cross-examined on the 23rd August, and on the next date, the 30th August two more witnesses were examined and cross examined. The case was then fixed for the 13th September for the defence. On that date the accused made an application stating that the complainant was not cross-examined upon the occurrence, as the Magistrate intimated to the pleader for the accused that the cross-examination should at that stage be confined as to the title of the parties to the land in question. The petitioner accordingly desired that an opportunity should be given to him to cross-examine the complainant on the occurrence. The Magistrate rejected this petition on the ground that the complainant had been cross-examined at great length. There is no denial by the Magistrate of the facts set-forth in the petition, namely, that the cross-examination of the complainant about the occurrence was postponed with his direction, nor has any explanation been submitted to this Court to contradict the statement made in the petition to this Court. It would appear that the complainant was, as a matter of fact, not cross-examined at all about the occurrence, whereas the two witnesses examined on the 30th August were cross-examined. There is no reason why the complainant should not have been cross-examined upon the occurrence inasmuch as the accused denied that there was any occurrence such as was alleged by the prosecution. The Magistrate apparently was in doubt as to the question of title involved in the case and consequently wanted to have the evidence laid upon that point first. In the circumstances the accused has been denied the opportunity of cross-examining the complainant upon the occurrence and the Magistrate would have exercised his discretion better if he had allowed the complainant to be re called for cross-examination. No doubt the procedure laid down for the trial of summons cases, the complainant has no right to postpone the cross-examination of any prosecution witness as in the case of the trial of a warrant case. But if the cross-examination was postponed in accordance with the direction of the Magistrate, the Magistrate was bound to give further opportunity to the accused to cross-examine the witness. Without such a cross-examination, the complainant's evidence will not be legally admissible.

The aforesaid irregularity also therefore vitiates the trial.

The third and the fourth objection relate to the local investigation and may be disposed of together. There is nothing in law to prevent a Magistrate from making local inspection; but in order to give an opportunity to the accused to remove any wrong impression created on the mind of the Magistrate it is fair that a note of the inspection should have been placed on the record and the parties should have been given an opportunity of being heard with respect to it. The Magistrate therefore committed a grave irregularity in this case, particularly when he has used the information gathered at the locality, as substantive evidence in the case.

The civil court *dakha'adahani* took place in 1911 in favour of the complainant. The Magistrate no doubt has addressed himself at great length to find out whether the plot in dispute was covered by the civil court *dakha'adahani* or not and he has also held that the accused disposed the complainant from the land, he has not come to a definite finding as to whether the complainant or the accused was in possession of the land in dispute at the time when the occurrence took place. This is apparently because he was misled by the issue laid down by him, namely, whether the accused dispossessed the complainant from the land No issue was framed by him as to whether the complainant was or was not in possession of the land. Thus the finding of the Magistrate upon the issue laid down by him does not dispose of the case under S. 447, I. P. C. which require it to be affirmatively and positively held that the complainant was in possession of the land in dispute with respect to which the criminal trespass is said to have been committed.

For all the aforesaid reasons I think the trial in this case has been illegal and I accordingly set aside the conviction of and the sentence passed on the petitioner. The fine if already realised should be refunded.

In view of the aforesaid remarks I do not think any useful purpose will be served by ordering a retrial. The parties are apparently disputing the possession of the land in question and in case of the dispute being of a serious nature the Magistrate has full power to deal it under the law to prevent any breach of the peace.

Conviction set aside.

A. I. R. 1922 Patna 299 (1).

DAS, AND ADAMI JJ.

Rameswar Singh—Petitioner

v.

Emperor—Opp. party

Criminal Revision No. 573 of 1920 decided on 7th January 1921 from an order of S. J. Darbhanga, dated 2nd Oct. 1920.

Criminal P. C., S. 342—Examination of accused before examination of medical witness.

It cannot be said as a general rule that medical evidence is always formal and where the legislature says definitely that the Court shall put questions to the accused person generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence it is not an admissible argument that the Court may do so before all the prosecution witnesses have been examined.

Raghu Bhumij v. *The King Emperor* (5 P. L. J. 450) referred to. [P. 299, C. 2].

J N Mitter—for Petitioner.

Assistant Government Advocate—for the Crown.

Judgment :—This application, in our view, is entitled to succeed on one point namely that the trial Court has contravened the provision of Section 342 of the Criminal Procedure Code.

It appears that on the 28th July, 1920, the complainant and two witnesses on behalf of the complainant were examined in chief. Charge was framed against the accused on that date and the accused was examined under the provision of Section 342 on the same day. On the 2nd August the complainant and his witnesses were cross-examined, and on the 13th September the Medical Officer was examined, and on behalf of the prosecution, it was urged before us in the first place that the trial Court should have examined the accused not only after the examination-in-chief of the complainant and his two witnesses but after their cross-examination and re-examination; and in any case the Court should not have put any questions to the accused until all the witnesses including the Medical Officer had been examined in the case. It is, in our view, unnecessary to deal with the first question which is of some doubt and difficulty: but in view of the decision in the case of *Raghu Bhumij* v. *The King Emperor* (1) the conviction is liable to be set aside in view of the fact that the trial Court put the question to the accused person before the Doctor was examined. It was urged on behalf of the opposite party that the whole object of putting questions to the accused person is to enable him to explain any circumstances appearing in the evidence against him, and the trial Court substantially performs its duty in putting questions to the accused persons after all the material witnesses for the prosecution have been examined. It was further urged that the medical evidence is purely formal evidence as there is no circumstance in that evidence against the accused person, the Court was within the rights not to wait for that evidence. We do not think that this argument is admissible in view of the decision to which we have already referred. Apart from that we cannot say as a general rule that medical evidence is always formal and where the Legislature says definitely that the Court shall put questions to the accused person generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence, it is not an admissible argument that the Court may do so before all the prosecution witnesses have been examined. We would therefore set aside the conviction of the petitioner and direct that he be retried according to law.

Case remanded.

(1) (1920) 5 P. L. J. 430 = 58 I. C. 49 = 1 P. L. T. 241.

A. I. R. 1922 Patna 299 (2).

DAS AND ADAMI, JJ.

Raghunath Bhagat and others—Appellants

v.

Amir Bakhsh—Plaintiff and *Sheikh Muhummad Latif* alias *Sheikh Chundra*—Defendant 1st party and *Guru Prasad Bhagat* Defendant 3rd party—Respondents.

Appeal No. 55 of 1919 decided on 11th January 1922 from a decision of Sub. J., Darbhanga.

Transfer of Property Act, S. 58—Mortgage—Non payment of consideration does not make mortgage inoperative from date of execution

If there is nothing in the mortgage-deed to suggest that the mortgage was not to become effective until the consideration money was paid, the mortgage-deed becomes operative as from the date of the execution of the mortgage.

Sultan Ahmad and *Muhammad Hasan Jan*—for Appellants.

P. Dayal and *Bhagwan Pershad*—for Respondents.

Das, J.—This appeal arises out of a suit instituted by the plaintiff-respondent

to enforce a mortgage-bond executed by the defendants first party in his favour. The material facts are these.

On the 3rd of May 1913, the defendants first party executed a bond for Rs. 13,000 in favour of the plaintiff. This document was registered on the 5th May 1913. On the 7th May 1913 some of the properties which had been mortgaged by the defendant first party to the plaintiff were sold by the defendant first party to the defendants second party who are the appellants before us. The deed of sale was presented for registration on the 9th May 1913, but it appears that it was not in fact registered on that date and was compulsorily registered in August 1913. The defendants second party contest the claim of the plaintiff and rely upon their document which admittedly was executed subsequent to the mortgage upon which the plaintiff relies. Their case is that although the document was executed on the 3rd of May 1913 the mortgage was not effective until the full consideration money has been paid to the defendant first party and as the full consideration money or any portion thereof was not paid by the plaintiff till after the execution of the deed of sale in their favour their deed of sale is entitled to priority over the mortgage-bond upon which the plaintiff relies.

On the question of fact, the learned Subordinate Judge has come to the conclusion that a portion of the consideration money was undoubtedly paid on the 6th of May by the plaintiff to the defendant first party and the balance which was payable under the terms of the mortgage by the plaintiff to the defendant first party was deposited in Court by the plaintiff on the 10th of May.

Now, Mr. Sultan Ahmad on behalf of the appellants, concedes that if the payment was in fact made by the plaintiff to the defendant first party on the 6th of May as alleged by the plaintiff, then he must fail. But he argues before us that the evidence on the point is so unsatisfactory that the learned Judge in the Court below should not have accepted it.

Dealing then, with the question of fact, I find very great difficulty in accepting the finding of the learned Subordinate Judge. The document states that Rs. 9,600 was due to the defendants second party and Rs. 1,201 was due to a judgment-creditor of the mortgagors, namely one Budham Sahu, and the document provides that these two sums of moneys should be paid to the creditors and then the balance should be paid to the mortgagor, and that upon such payment the mortgagor should make over the mortgage deed to the plaintiff. That is the document.

Now, admittedly, Budhan Shah has never been paid by the plaintiff; admittedly Rs. 9,600 due to the defendants second party was not deposited in Court until the 10th of May but it is urged by the plaintiff that he had tendered that amount to the defendants second party on the 6th of May and that they refused to accept the money. The learned Subordinate Judge has not expressed any opinion on the evidence of the plaintiff that Rs. 9,600 was in fact tendered by the plaintiff to the defendants second party on the 6th of May. The evidence is conflicting on this point and it is difficult to say whether or not the tender was in fact made on the 6th of May. It seems to me that the point should have been established by the plaintiff beyond any doubt by the production of his account books. The plaintiff is a money-lender and is presumably, in possession of account books. If as a matter of fact, the plaintiff paid to the defendants first party the money which he says he paid to him on the 6th of May, then the production of the account-books would have settled the question; but the account-books have not been produced in the case and in their absence it is difficult to accept the finding of the learned Subordinate Judge that the money was in fact paid by the plaintiff to the defendant first party on the 6th of May.

I will, then, assume that this money was not paid to the defendant first party by the plaintiff till after the actual conveyance in favour of the defendants second party, that is to say, it was not paid till the 10th of May. The question which I have now to consider is, whether it makes any difference to the rights of the parties that the money was in fact not paid to the mortgagor till after the conveyance of the property by the mortgagor to the defendants second party. In my opinion, it does not. The mortgage was executed on the 3rd of May 1913 and though it may be that the consideration money was not paid to the mortgagor till the 10th of May, still upon payment to the mortgagor, whenever it may have taken place, the mortgage must have become effective on and from the 3rd of May 1913. The very definition of mortgage in the Transfer of Property Act supports the contention of

the learned Vakil who has argued this appeal on behalf of the plaintiff. The definition of a mortgage is the transfer of an interest in specific immoveable properties for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing future debt, or the performance of an engagement which may give rise to a pecuniary liability. The document itself shows that the money was to be paid on a future date The parties contracted on the basis that the money was to be paid at a future date. The argument that the mortgage does not become effective until the money is actually paid loses sight of the fact that mortgage is a conveyance and not a contract. The distinction was pointed out by Farran, C. J. in *Tatia* v. *Babaji* (1). That learned Judge said as follows in the course of his judgment in that case: "I am not, however as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the Mofussil perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to me to have been sufficiently borne in mind throughout the judgment." In this case there is no doubt that the mortgage became perfected by registration and the only question between the parties is, whether the consideration money was paid on the 6th of May as is alleged by the plaintiff, or on the 10th of May as is alleged by the defendants second party. I am of opinion that if there is nothing in the mortgage-deed to suggest that the mortgage was not to become effective until the consideration money was paid, the mortgage-deed became operative as from the date of the execution of the mortgage.

This brings me to the argument of Mr. Sultan Ahmad that the document in fact shows that the mortgage was not to become effective until the payment of the consideration money. He draws my attention to a passage in the mortgage which provides that the mortgagor undertook to make over the mortgage-deed to the mortgagee upon the payment of the full consideration money. In my opinion, this provision does not amount to a contract between the parties that the mortgage is not to take effect until the payment of the consideration money and my ground is that the document itself says as follows: "In security and satisfaction of the said loan principal with interest, I have mortgaged and hypothecated the entire and whole 8 anna *pokhta*, etc." In other words, the mortgage and hypothecation was complete as and from the date of the execution of the mortgage-bond but for his own protection the mortgagor provided that the mortgage-bond was not to be made over to the mortgagee until the payment of the full consideration money. In my opinion, then, there is nothing in the contract which establishes that the title was not to pass to the mortgagee as and from the date of the execution of the mortgage bond; that being so, the mortgage was clearly prior in date to the deed of sale.

I must, therefore, affirm the decree passed by the learned Subordinate Judge though not on the grounds stated by him. So far as the cross-appeal is concerned, I am of opinion that the view of the learned Subordinate Judge is correct and must be affirmed. It may be that a tender was made by the plaintiff to the defendants second party on the 6th of May but if the plaintiff's case is to be believed the defendants second party unequivocally refused to accept the money; if that be so, there was no obligation on the part of the plaintiff to deposit the money in Court. He should have offered to pay the money to the mortgagor if he wanted it. There was absolutely nothing in the contract to compel the plaintiff to pay the money into Court if the person in whose favour the deposit was to be made unequivocally refused to take the money.

Both the appeals must be dismissed and dismissed with costs.

Adami, J :—I agree. *Appeal dismissed*

(1) 22 B. 146.

A. I. R. 1922 Patna 301

MILLER, C. J. AND JWALA PRASAD, J.

Ramchandra Marwari—Appellant.

v.

Krishna Lal Marwari and others—Respondents.

Letters Patent Appeal No. 42 of 1921 decided on 17th January 1922 from a decision of Ross, J., Dated 23rd May 1921.

Limitation Act, Art. 182—Application for transfer of decree for execution is a Step-in-aid—Order not carried into effect—Jurisdiction of the Court passing the decree does not cease—Civil P. C. S, 39.

An application for a certificate is a step-in-aid of execution and it is a step which is always necessary

where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. Where the decree-holder having obtained his order for some reason or other best known to himself, either because he was not satisfied as to the existence of the property or for some other reason, never carried out the order which he had obtained and the decree was never in fact sent, the court passing the decree does not lose jurisdiction. [P. 302, C. 1, 2; P. 303, C. 1.]

J. Prasad—for Appellant.

R. G. S. Prasad and *R. T. N. Sahai*—for Respondents.

Dawson Miller, C. J.—This is an appeal on behalf of the judgment-debtor from a decision of Mr. Justice Ross, dated the 23rd May 1921.

The respondent obtained a decree against the appellant on the 23rd May 1911 in the Court of the Munsif at Bhagalpur. Within three years of that date, *viz*, on the 1st May 1914 the decree-holder applied for a certificate to execute the decree in Monghyr where it appeared the judgment-debtor had certain property. At the same time he asked for issue of a notice under O. XXI, R. 22 of the Civil Procedure Code. The issue of such a notice at that stage of the proceedings was not necessary. However, the application was allowed and the notice was issued and the certificate he asked for was granted. The matter, however, was not in fact transferred to the Monghyr Court and no further steps were taken in that application. On 22—11—1916, that is about two years and six months later, the decree-holder again applied for the same relief and both his prayers were allowed. He again failed to take any further steps. On 3—9—1919, that is, within three years of the last application, the decree-holder applied a third time and on this occasion the judgment-debtor objected that his application was time barred.

The first point made by the appellant, whose objection was not allowed either by the Munsif or the District Judge or by the Judge of this Court: is that the applications made on the 1—5—1914 and again in 1916 were not steps taken in aid of execution and were not in themselves applications for execution within the meaning of the 182nd article of the Limitation Act. We are not concerned to enquire whether applications of the nature referred to were applications in execution. The better view appears to be that they are not. I have no doubt what ever, however, that such an application is a step-in-aid of execution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. In fact there are certain decisions to the effect that such an application is a step-in aid of execution, whereas the learned Vakil for the appellant has been unable to put before us any case in which the contrary view has been expressed. I should have thought myself that there could be no question upon this point.

The next point urged by the appellant is that the Bhagalpur Court had no jurisdiction to issue a notice under O. XXI, R. 22, of the Civil Procedure Code. The Court did in fact issue such a notice but it was not necessary at that stage of the proceedings and it is not contended that any other notice was necessary. Whether the Court issued such a notice or not and whether it had jurisdiction to do so or not does not seem to be a matter of any consequence in this appeal.

The third point and substantial point made by the appellant was that the Bhagalpur Court having once purported to act under S. 39 of the Civil Procedure Code had ceased to have any further jurisdiction in the matter and could not then make any further order which would be binding upon the parties and that such order, if made, could be treated as a mere nullity and that, therefore, it could not be contended that any step had been taken between the 1st May 1914 and the 3rd September 1919 when the third application was made, and that more than three years having elapsed the decree holder's right to have his decree executed was barred by limitation. Assuming, without deciding that where a court issuing a decree has made an order under S. 39 of the Civil Procedure Code and has in fact transmitted a copy of the decree to the Court in which the decree is to be executed it ceases to have any further jurisdiction in the matter that was not the case which arose here. All that was done in the present instance was that an application was made by the decree holder and that application was granted. But the copy of the decree was never sent to the Monghyr Court and certainly never received by that Court. If that had been so the Monghyr Court undoubtedly would have had jurisdiction to execute the decree against the property of the judgment-debtor within its jurisdiction. But the Monghyr

court never in fact, in my opinion, got jurisdiction to do anything at all and that seems to me to be obvious upon considering what the effect of S 42 of the Civil Procedure Code is. That section says:—The court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. In the present case the decree was never sent to the Monghyr Court. The decree holder having obtained his order for some reason or other best known to himself either because he was not satisfied as to the existence of the property or for some other reason never carried out the order which he had obtained and the decree was never in fact sent. It seems, therefore, clear that no jurisdiction was ever transmitted from the Bhagalpur Court to the Monghyr Court and in my opinion, this appeal fails.

It is not necessary in this case to decide whether a Court having made a decree ceases to have jurisdiction in execution proceedings where it has once sent a copy of the decree and the other papers to another Court for execution and I merely wish to state that it is not my intention that anything I have said in this judgment should lead to the conclusion that I consider the Court which made the decree would in such circumstance, lose all jurisdiction in the matter.

The appeal is dismissed with costs.

Jwala Prasad, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 303.

JWALA PRASAD AND ROSS, JJ.

Pitamber Chawdhry—Deft.-Appt.

v.

Shaikh Rahmat Ali—Plff.-Respt.

S. A. No. 54 of 1920 decided on 16-12-1921 from a decision of J.C. Ranchi.

(a) *Bengal Cess Act, Ss. 5, 52 and 64 - Rent-free tenure of—Liability to pay Road cess to Government is a Personal liability—Encumbrance cannot be annulled—Previous decree for cess is not* res judicata—*Civil P C., S. 11.*

The provisions of Ch. IV of the Act must be complied with to make cess payable with respect to rent free lands The liability to pay cess to the superior landlord arises in case of a rent free tenure only after the publication of extracts from the valuation roll Only then is the superior landlord entitled to realise the cess with the same penalty and in the same manner as if it were an arrear of rent. The payment of road cess is a liability to the Government, but this liability enforceable under S. 5, does not in itself create any charge on the tenure or estate. The liability to the Government is a personal one enforceable under Public Demands Recovery Act. Only the right, title and interest of the judgment-debt pass in realizing this liability. The holding itself therefore does not pass in execution of a decree to the purchaser at the execution sale so as to entitle him to hold it free from encumbrance created upon it by the tenant previous to the sale. The purchaser therefore cannot have the encumbrance annulled nor recover the possession of the holding from a purchaser of it in execution of a decree based on the encumbrance . . . . . A previous decree for cess does not operate as *res judicata* as a cess is a recurring charge.

[P. 305, C. 1, P. 306, C. 1 2, P. 307, C. 1.]

(b) *Bengal Cess Act, S. 41—Contract to pay cess is not illegal.*

A contract to pay cess is not at all illegal, nor is it prohibited under the provisions of S. 41 or any other provisions of the Cess Act.

[P. 307, C. 1.]

(c) *Evidence Act, S. 114—Bengal Cess Act, S. 52—Notice under—No presumption as to liability to pay cess, arises—Owner of rent free lands is not bound to pay cess before publication of valuation rolls.*

No presumption of S. 114, Cl. (c) of Evidence Act applies with respect to notice provided by S. 52 of Cess Act and the person who claims that a right or an obligation such as the payment of cess by a tenure-holder, has accrued, must prove that the liability had been incurred and the things described in the Act had actually been done. The owner of rent free lands is not bound to pay road cess before the publication of the valuation rolls under S. 52.

[P. 305, C 2. P. 306, C. 2.]

S. Ahmad and *G S. Prasad*—for Applt.

K. Sahay, A. K. Rayand and *S. Dayal*—for Respondent.

Jwala Prasad, J.—This is an appeal by defendant No. 1. The property in dispute is 42 *kats* of *don* land known as Gangi Jamuni, Ras and Geshin Nari in *Mauza* Darida. The village belonged to one Ram Narain Singh, Manki of Tarai, and the land in question was held by his uncle Bharat Singh as rent free Khorposh, the rule of succession in the family being that of lineal primogeniture where by the elder member succeeds to the estate and the junior members are allowed rent-free grants for maintenance. Such grants are transferable, but the grantor may resume them on the failure of heirs male of the original grantee, free from encumbrance. Ram Narain died in 1898 and was succeeded by Bharat Singh's son Ganga Narain. Bharat had three sons, Ganganarain, Ramgopal and Harakh. During his occupancy of the rent-free tenure in question, Bharat gave sometime before 1896 12 *kats* out of 42 in usufructuary mortgage or *bhugut* to Regree Babu. The term of this *bhugut* expired long ago. In 1896 however he gave the remaining 30 *kats* to defendant No. 1 in *bhugut* for a consideration of Rs. 1,000 for a term expiring in 1913 (1916). In 1897 Ram Narain, the proprietor of the estate, executed a *bhugut* of the whole *mauza* in favour

of two cousins, Rajab Ali and Sher Ali for a term expiring in 1912. In 1899 Ganganarain and Ramgopal, the two elder sons of Bharat, executed a simple mortgage, of the lands in suit for a consideration of Rs. 700 in favour of defendant No. 1. In the meantime Rajah Ali and Sher Ali had obtained a decree for cess against Bharat in the year 1897 in the Revenue Court. They executed this decree in 1901 against Ganganarain only, whose right, title and interest in the property in dispute was sold in November 1901 under section 124 of Act I of 1879 and the holding in question was purchased by one Baldeo Sahay. In 1902 Ganganarain executed, a *kabala* in favour of Rajab Ali, Sher Ali and three others in lieu of the advance made by them to Ganganarain and Ramgopal for carrying out the litigation against the widow of Ramnarain as to the right of succession to the estate. It may be incidentally mentioned that after the death of Ramarain, his widow and Ganganarain disputed the fight of succession to the estate, which ultimately terminated in favour of Ganganarain in the year 1905. In February 1902 Ganganarain and Ramgopal had executed in favour of the defendant No. 1 Pitamber Choudhury a *mokarari* deed with respect to the land in suit. Pitamber however abandoned his right under the *mokarari* deed and brought a suit in July 1902 to enforce his mortgage of 1899 which was executed by Ganganarain and Ramgopal. He obtained a preliminary decree in September 1902 for the sale of the mortgaged properties subject to his own prior mortgage in execution whereof he purchased the property in 1911. In 1912 he obtained delivery of possession of the property in suit. In the meantime Rajah Ali and Sher Ali had instituted a suit for recovery of cess against Baldeo Sahay who had purchased the land in 1901 in execution of a decree for cess. In April 1904 they obtained a decree for cess, and in August the land in suit was sold in execution of the decree and was purchased by the present plaintiff Rahmat Ali. The sale purported to have taken place under section 123 of Act I of 1879, section 124 of that Act having been repealed by the Amending Act of 1903. Thus the land in suit has been purchased by both the plaintiff and defendant No. 1. The plaintiff's purchase was in execution of a decree for cess in the year 1904 and the defendant's purchase was in execution of his mortgage-decree in the year 1911, the mortgage being of the year 1899. The land in suit is at present in possession of the defendant No. 1 and the plaintiff seeks in the present suit to oust the defendant No. 1 upon a declaration that he purchased the land free from any encumbrance and that the defendant's lien created by the mortgage of 1889 was consequently annulled. He also prays for recovery of mesne profits.

The Courts below have decreed the plaintiff's suit. The defendant No. 1 has, therefore, come to this Court in second appeal. It is unnecessary to give in any detail the pleas taken by the defendant No. 1 in his written statement. The following issues framed by the Trial Court will show the nature of the different pleas.

(1) Is the suit barred by limitation? (2) Has the plaintiff acquired any right to the disputed land? Whether the suit brought by Sher Ali and Rajab Ali is fraudulent? Whether any cess was payable in respect of this land (3) Whether the decree and sale in execution of it is bad in law? (4). Whether the plaintiff can avoid the encumbrance to which the disputed land was subject? (5). To what relief, if any, is the plaintiff entitled in this suit?

The first and the foremost question upon which the decision of the present appeal hinges is as to whether the tenure in question was liable for the payment of cess to the superior landlord and whether such a cess was chargeable upon the tenure. The Trial Court held, upon the construction of the provisions in the Cess Act (IX of 1880) and the admissions contained in paragraphs 6 and 7 of the plaint in the mortgage suit (Exhibit 4) brought by the defendant Pitamber to enforce his mortgage against the son of Bharat that the tenure in question was liable to pay cesses. The Subordinate Judge, however referred to Exhibit R, L, and 13 upon the record and recorded the following finding

"Defendants on the other hand contends that the tenure, which was a rent-free one, was not liable to pay any cesses. In support of his contention defendant has filed copy of a valuation roll (Exhibit R.) for the year 1900 which does not show any assessment in respect of this tenure. It is further argued on behalf of the defence that under section 36 of the Cess Act this assessment continued to be in force for a period of five years. So in 1904 when the suit against Baldeo was brought for arrears of cesses, the tenure was as a matter of fact, not liable for such a charge. Plaintiff has produced a valuation roll

(Exhibit 18), which proves that the tenure held by Baldeo was assessed to cesses and valued at Rs. 50 1-3. The cess returns are not now available to prove the state of affairs in existence in 1897, when the first decree for cesses was obtained by Rajab Ali against Bharat Singh or at the date of the subsequent decree obtained against Baldeo Sahay. Under Section 50 of the Cess Act all lands are assessable to cesses unless exempted under sections 2 and 3 of that Act. There is no evidence to prove that the tenure was exempted from such assessment. Exhibit 13, valuation roll at least disproves the defendant's contention that the tenure was not liable to pay any cesses."

Then he refers to paragraphs 6 and 7 of the plaint which have already been adverted to and concluded his finding upon this point in the following words :

" So I have not the least doubt that the tenure was liable to pay cesses as alleged by the Plaintiff."

On appeal the learned Judicial Commissioner set aside this finding of the Subordinate Judge and referred in detail to the documents, namely, the cess valuation papers referred to by the Subordinate Judge, and said :—

" Exhibit R is very strong evidence that Rajab Ali and Sher Ali made such a return in obedience to an order passed when a re-valuation of the estate, which include Mauza Darida was going on and that they omitted from it any mention of the rent-free tenure in suit. In the absence of any evidence to explain or to rebut the entries in this statement, I find such to be the case. It is suggested that the tenure of Baldeo Sahay may have been shown elsewhere, but in the face of the return this suggestion, which is improbable should not be accepted unless it is proved."

And as a consequence of this omission the learned Judicial Commissioner held that Baldeo Sahay, the holder of the tenure, although he may not have known it, was not liable to pay cess. This is a finding of fact which is binding upon this Court in second appeal. It has not been shown to us that in arriving at this finding the Court below anywhere misconstrued the documents referred to by it or in any way misguided itself. Therefore, the plaintiff failed to prove that the tenure in question was shown in the return submitted by the superior landlord under the Cess Act or that any cess was assessed upon this tenure as payable to the superior landlord. The plaintiff seeks to have a declaration that he purchased the property free from any encumbrance on the ground that cess was the first charge thereon. He must prove it; in other words, the onus lay upon him.

The learned vakil on behalf of the respondents has employed the argument advanced by the Subordinate Judge in support of the contention that whether any cess was actually assessed upon the tenure or not and whether the tenure in question was shown in the return submitted by the superior landlord to the Collector under the Cess Act or was omitted therefrom, the holder of the tenure is liable to the superior landlord within whose estate the tenure in question is geographically situate. He contends that such a liability is enforced by the Cess Act. He has referred to the definition of " tenure " in sections 5, 41 and 47 of the Act in support of his contention.

The definition of "tenure" includes both rent paying and rent free tenure, S. 5 of the Act makes all immoveable property situate in any district or part of a district liable to the payment of road cess and public works cess. This is a liability to the Government but the liability enforced by S. 5 does not in itself create any charge on any estate or tenure. So far as the liability to the government is concerned it is on a personal one, which is enforced by the provisions of the Public Demands Recovery Act and for the realization of which the right, title and interest only of the judgment-debtor passes. This is settled law and hardly needs any authority. Reference may, however, be made to *Ahsanulla* v. *Manjura Banoo* (1); *Shekaat Hosain*, v. *Sasi Kar* (2). Therefore, when the section says that all immoveable property situate in a district shall be liable to the payment of cess, it does not in any way create any charge upon the property. Section 41 of the Cess Act deals with the mode of payment of road cess and public works cess. Clause (1) deals with the modes of such payment by the holder of an estate to the Collector and clause (2) deals with the modes of payment by the holder of a tenure to the holder of the estate or tenure within which the land held by him is included. But such liability is subject to the exceptions that may be contained in other portions of this Act, for the section opens with the most important words " Except as otherwise in

(1) (1903) 30 Cal. 778 = 8 C.W.N. 359.
(2) (1892) 19 Cal. 782.

this Act provided". Section 42 which fixes the time for the payment of road cess, applies only to the rent paying tenure as is expressly provided in clause (3) of the section. The subsequent sections in Chapter III deal with the modes of payment relating only to the rent paying tenures. In order to secure the cess payable to the Government the Act provides for a penalty upon the holders of estates and tenures on account of their omission to submit their returns of all the lands situate within their estates or tenures. In cases of rent paying lands, whether in possession of tenure-holders or in possession of cultivating tenants. Section 20 of the Act precludes the superior landlord from suing for or recovering any rent for such lands unless the same are entered in the return submitted to the Collector. This provision applies to the case of rent paying tenures, and in respect of such tenures as well as of rent paying lands in possession of cultivating tenants. Section 47 of the Act entitles the holder of an estate or tenure to recover the cess payable from the rent-paying tenants and from the cultivating tenants under the same penalties and in the same manner as if the same were arrears of rent due to him. This provision is for the benefit of the holder of an estate or tenure who is required to show all his lands within his estate or tenure so that he may be able to discharge his responsibility to the Government in respect of the cesses conveniently and without any loss. Ordinarily section 47 will, therefore, apply to a rent-paying tenure only and as there was a doubt as to whether the provisions of that section extended to the case of rent-free tenures, section 64 A was added in Chapter V containing provisions similar to those of section 47. But suppose for a moment that section 47 is wide enough to apply to rent-free tenures also but to apply this section, the most important condition must be satisfied and that is that the sum claimed as cess for a rent free tenure, "must be payable under the provisions of this Act."

Now in order to make cess payable the provisions of this Act with respect to rent-free lands the requirements of Chapter IV must be complied with. Section 50 of the Act deals with the inclusion of rent-free lands in estate or tenures. Section 51 enjoins upon the holder of an estate or tenure in which a rent-free tenure is included to enter such land in the return to be submitted to the Collector; and section 52 then requires a notice to be served upon the holder of the rent-free land with the extract of the valuation roll. It also provides for the publication of such notice and extract. The subsequent sections deal with the disposal of objections, if any, filed by the rent-free tenure-holders. Section 56 is an important section and it says:—

"After publication of the extracts from the roll as provided in section 52 and in cases in which publication of the notice mentioned in section 54 is required after publication of such notice and not otherwise, every owner and holder of any rent-free land included in such extracts and every person in receipt of the rents and profits or in possession and enjoyment of such land, shall be bound to pay year by year to the holder of the estate or tenure in the return of which such land has been included the amount of the road cess and public works cess which may thereafter became due to such holder, calculated on the annual value of such land as entered in such extracts, or on any other annual value which may have been determined by the Collector under section 53 at the full rate of rates which may have been fixed under this Act for the levy of such cesses respectively in the district generally for the year".

Therefore, it is only after the publication of the extract from the valuation roll that the liability to pay cess to the superior landlord arises in the cess of a rent-free tenure. When the provisions of Chapter IV are thus fully complied with, then a cess becomes payable under the Act and such a cess a superior landlord is entitled to realize, "with the same penalty and in the same manner as if it were an arrear of rent".

Now as observed already, the onus was upon the plaintiff to prove that the tenure in question was made liable to the payment of cess under section 64 A of the Act and that the necessary notices and publications were served upon the tenure and that it was entered in the return submitted by the superior landlord. In the case of *Ashonullah Khan Bahadur* v. *Trilochan Bagchi* (3) it was held that no presumption of section 114, clause (e), of the Evidence Act applies with respect to the notice provided by section 52 of the Cess Act and that the person who claims that a right or obligation, such as the payment of cess by a tenure-holder, has accrued, must prove that the liabilities had been incurred

(3) (1886) 13 Cal. 197.

and the things described in the Act had been actually done. In the case of *Bhagawati Kuweri Chowdhurani* v. *Chutterput Singh* (4) a distinction was drawn between rent-paying and rent-free tenures and it was said that

"The owners of rent-free lands are not bound to pay road cess before the publication of the valuation rolls under Section 52."

The point was, however, directly raised and decided in the case of *Rash Behari Mukerjee* v. *Petambari Chowdrani*. (5) There can, therefore, be no doubt that the tenure in question was not liable for the payment of cess to the superior landlord under the Act. The fact that on a previous occasion a decree for cesses was obtained in the year 1897 against Bharat does not at all make the cess payable under the Act, inasmuch as a decree for cess cannot operate as *res-judicata*, cess being a recurring charge. The fact that Baldeo himself purchased the property at the previous sale in execution of a cess decree does not at all change the aspect of the question. The Subordinate Judge relied upon certain admissions in the plaint filed by Pitamber in the mortgage suit (Exhibit 4) in order to show that the tenure was admittedly liable to pay cesses. The liability to pay cesses may arise in different ways. It may arise on account of a contract between the parties, for instead of the rate or proportion fixed under the Act a tenant may agree to pay the entire cess or a larger amount than what is fixed by the Collector to the superior landlord A contract to pay cess is not at all illegal, nor is it prohibited under the provisions of section 41 of any other provisions of the Cess Act, *Ashtosh Dhar* v. *Amir Mollah* (6). The Subordinate Judge simply held that the tenure was liable to pay cess and stopped short there. That would not itself make the cess a first charge upon the property so as to pass it at an auction sale free from any encumbrance. The Judicial Commissioner has gone further and, in my opinion, has rightly held that the tenure was not liable to pay cess under the Act. Therefore, it could not be enforced and realized in the same manner and with the same penalty as if it were an arrear of rent. Baldeo might have been liable to pay cess and the sale in question might have passed his right, title and interest; but the holding itself did not pass so as to entitle the plaintiff to hold it free from encumbrance created upon it by the mortgage of 1899, in execution of which the defendant has purchased the property. The learned Judicial Commissioner himself upon his finding would have been inclined to dismiss the plaintiff's suit but he felt embarrassed by the decisions in the case of *Malkarjun* v. *Narhari* (7) and the case of *Moti Lal* v. *Karrobuldin* (8). None of these cases stand in the way of the sale being held to have passed only the right, title and interest of the judgment debtor, Baldeo Sahay in the tenure. The second case has distinctly said that there is a wide difference between the setting aside of a sale and deciding that the plaintiff's right was not affected by it. The first case simply held that a sale will not be treated as invalid provided the court had jurisdiction to execute it, even if there had been a material irregularity. The defendant need not have the sale of the plaintiff set aside and declare it invalid, for he is in possession of the property on the strength of a Court sale in execution of a mortgage-decree. The plaintiff wants to have the mortgage-lien annulled and to recover possession of the property on the strength of a superior title. That title is based upon a sale which as observed above, passed only the right, title and interest of the judgment-debtor and not the property itself. The fact that the sale took place under the provisions of section 123 of Act I of 1879 as amended in 1903 does not at all affect the title of the defendant in the property or give a higher title to the plaintiff in it when, as a matter of fact, there was no charge created upon the property by the decree in execution of which he purchased the property.

I, therefore, set aside the decree of the Courts below and dismiss the suit of the plaintiff with costs throughout.

Ross, J.—I agree.

Appeal allowed.

(4) (1898) 25 Cal. 725 = 2 C.W.N. 407.
(5) (1888) 15 Cal. 237.
(6) (1900) 3 C. L. J. 337.
(7) (1900) 25 Bom. 337 = 27 I. A. 216 = 7 Sar. 739 (P. C.)
(8) (1897) 25 Cal. 179 = 24 I. A. 170 = 7 Sar. 222 (P. C.)

A.I.R. 1922 Patna 308 (1).

ADAMI, J.

Akshoy Kumar Bhattacharjee--Petitioner.

v.

Dr. M. L. Agarwala—Opposite Party.

Civ. R. No. 11 of 1922 decided on 20th June 1922.

C. P. C., S. 115—Scope.

Where there is no mistake in computing the period of notice but error in holding that 15 days inclusive of the first were sufficient, *it is an* error of law and there is no sufficient ground for review. [P. 308, C. 1].

K. N. Chowdhury and *A. N. Das*—for Petr.

K. P. Jayaswal—for Opposite Party.

Adami, J. :—This is an application for review by me of my judgment passed in revision in the case of a Small Cause Court suit in which the present petitioner had sought to recover the rent for February 1921 in respect of a house which the opposite party had agreed to take on lease for a period of three years.

Several grounds are mentioned in the petition but the only one which can possibly be considered in review is that which alleges that on the face of the judgment I have been mistaken in computing the number of days between the receipt of a notice to quit by the petitioner and the last day of the month.

In my judgment I have found that a registered notice posted on the 15th of the month and received on the 17th was sufficient where the month consisted of 31 days. It is pointed out that there must be 15 clear days notice and in the present case I was wrong in my calculation in finding that there were 15 days between the receipt and the end of the month. The decisions in *Gobinda Chandra Saha* v. *Dwarka Nath Pakla* (1) and in *Sidebotham* v. *Holland* (2) have been relied on to show that the notice was not sufficient.

It seems to me however that this is not a case in which I should grant the application : there was not a mistake in calculation, the mistake if any was in holding that fifteen days inclusive of the first day were sufficient. I may have been wrong in this but that would be an error not in calculation but in law. There are two points also which I take into consideration, one is that the notice was posted on the 15th and should have reached the petitioner on the 16th in the ordinary course and another is that about the 14th of the month the petitioners had dispossessed the opposite party's mali. Also the subject of insufficiency of notice was not raised in the pleadings of he petitioner. I cannot interfere. The application is rejected.

Hearing fee, three gold mohurs.

Application rejected.

(1) (1914) 20 C.L.J. 455.

(2) (1895) 1 Queen's Bench 378.

A.I.R. 1922 Patna 308 (2)

ADAMI, J.

Khub Lal Das—Petitioner.

v.

Patho Jha and others—Opposite Party.

C. R. No. 99 of 1922 decided on 20th June 1922.

C. P. C. (1908), O. 21, R. 100—Decree and delivery of possession against present tenant—Transferee from previous tenant who is dispossessed thereby, can be restored to possession.

In an action for rent the landlord obtained a decree against the tenant-(purchaser from the original tenant) of a holding and purchased it. The opposite party applied under R. 100 praying that he should be restored to possession of his portion of the holding which he had purchased from the same original tenant. The opposite party was therefore restored to possession The landlord again sued the tenant for the rent of the portion in possession of the opposite party, got an *ex parte* decree and got it purchased by his servant who was given possession. The Opposite party again objected under R. 100, *held* that, whether the decree obtained by the landlord is a rent decree or money decree, it is quite clear that the opposite party who was not party to the suit and did not in any way claim through the tenant against whom the decree was obtained had full right to come under O. 21, R. 100. *Held* further that the landlord had acted in a *malafide* manner and that the matter cannot be interferred with in revision. [P. 309, C. 2.].

S. P. Sen and *B. N. Mitter*.—for Petitioner.

Monohar Lal and *A. P. Upadhaya*—for Opposite Party.

Adami, J. :—The facts of the case to which this application refers are as follows :—

Brijnandan Singh who has an eight anna share of the village instituted a suit in 1914 against Chuman Khawas in respect of the rent of 62 *bighas* 2 *kathas* 19 *dhurs* of land which it was alleged, Chuman had purchased from the original tenants Musaria and Phudan. He obtained a decree and in 1917 purchased the whole area in execution thereof. On 13-12-1918 Bathojha field an application under O. 21, R. 100 claiming that his grand-father had purchased 2 *bighas* 5 *kathas* 13 *dhurs* out of the 62 *bighas* 2 *kathas* 19 *dhurs* from Musharia and Phudan and his grand-father, and after him, Batho Jha had been in possession; and his grand-father was shown to be in possession of the 2 *bighas* 5 *kathas* 13 *dhurs* in the record-of-rights. He complained that he had been dispossessed by Brijnandan in taking delivery after the purchase at auction sale. Batho's

application was granted and he was put in possession of the 2 bighas odd on the 30th May 1919.

Then on the 28th January 1920 Brijnandan instituted a suit again against Chuman Khawas in respect of the rent of the 2 *bighas* out of the 62 *bighas*. Chuman did not appear to contest the suit and Brijnandan thus obtained an *ex parte* decree. At the sale in execution of the decree the 2 bighas were purchased by the present petitioner Khub Lal, who, it seems, is a servant of Brijnandan. Khub Lal obtained delivery of possession on March 9th 1920, and then on April 8th 1920, Batho Jha, the opposite party again filed an application under Order 21, Rule 100.

On December 5th, 1920, the Munsif granted the application, and it is against that order that the present application is made by the petitioner. The Munsif found that the first decree obtained by Brijnandan against Chuman was a money decree, and that after Batho Jha had succeeded in his first application, Brijnandan was in possession of only a portion of Chuman's holding, and the second suit as it related to only a portion of the holding and there was no evidence that the holding had been split up, could give Brijnandan nothing more than a money decree. As Batho Jha had shown that he had been in possession on his own account he had therefore a right to be restored to possession.

It is argued that the Munsif by his order has practically reversed the rent decree obtained by Brijnandan and that he had no jurisdiction to do that. It is also contended that in holding that only a portion of a holding was in suit and that therefore only a money decree could be passed, the Munsif disregarded the ruling of this Court, and that Batho Jha was not entitled to make an application under Order 21, Rule 100 as he cannot come under the description of a "person other than the judgment debtor." Finally it is urged that as the petitioner was not the decree-holder but a *bona fide* purchaser for value, he could not be deprived of possession, and the only remedy for the opposite party was to institute a suit to set aside the *ex parte* decree as being obtained by fraud.

With regard to the last mentioned argument it may be pointed out that there is no finding that the petitioner was a *bona fide* purchaser for value; the Munsif points out on the other hand, that he is a servant of the landlord, Brijnandan and all the circumstances of the case point to the fact that the landlord was doing all he could to get rid of Batho Jha. The fact of his instituting a suit for rent against Chuman Khawas in respect of the two *bighas* when he knew that he himself had bought up the whole of Chuman's holding previously, and that Chuman had no further interest in it, as also the fact that he knew of Batho's previous successful application under Order 21, Rule 100, as also the fact that Chuman made no effort to appear and resist the demand for rent for the two bighas odd, added to the fact that Brijnandan's own servant purchased the land at the auction sale, all these facts are sufficient to convince me that the petitioner was not a *bona fide* purchaser for value.

I cannot find that the Munsif in any way reversed the rent decree obtained against Chuman Khawas by Brijnandan. He has not attacked in any way the decree as against Chuman, what he has done is to find that Batho is not bound by it and cannot be turned out of lands which are rightly in his possession. Batho did not derive his interest through Chuman but obtained it from Musharia and Phudan, and he is altogether independent of Chuman, so that he is a "person other than the judgment-debtor" and could apply under Rule 100 of Order 21.

Mr. Sen argues that the suit for rent of the 2 bighas was a suit for the rent of an entire holding, and even urges that the 2 *bighas* 5 *kathas* 13 *dhurs* was not included in the 62 *bighas* 2 *kathas* 19 *dhurs* and was not identical with the 2 *bighas* 5 *kathas* 13 *dhurs* which formed the subject of the previous application under Order 21, Rule 100. That contention cannot stand for a moment; the petitioner himself stated in paragraph 3 of his plaint in the second suit that the 2 *bighas* 5 *kathas* 13 *dhurs* were part of the 62 *bighas* 2 *kathas* 19 *dhurs*.

Whether the second decree obtained by Brijnandan was a rent decree or a money decree, it is quite clear that in this case Batho Jha who was not a party to the suit, and did not in any way claim through Chuman Khawas, had full right to come forward under Order 21, Rule 100. Chuman, too, to the knowledge of Brijnandan had no subsisting title to, or interest in any part of the 62 *bighas*, and if the decree was a rent decree there were no lands which could be charged with the rent.

It is quite clear that the landlord has been attempting to get rid of Batho Jha

from the land by indirect and not honest means.

I refuse to interfere. The application is rejected. Hearing fee five gold mohurs.

Application rejected.

A.I.R. 1922 Patna 310

COUTTS AND DAS, JJ.

Kamal Nain Singh (J. debtor)—Appt.

v.

Maharaja Bahadur Kesho Prasad Singh —(Decree holder) Respondent.

Appeal No. 245 of 1921 decided on 13th June 1922 from a decision of Dist. J., Shahabad.

Lim. Act, Art. 182 and 181—C.P.C., O.21, Rr. 90 95—Application under against one judgment-debtor only dismissed-Later application against all is not continuation of the first application—Such application is not also a step-in-aid of execution.

Where an application has been made against one of several judgment-debtors and has been dismissed for this reason, a subsequent application made against the whole of the judgment-debtors cannot be treated as an application in continuation of the previous application. If the first application for execution is *ab initio* a bad application the subsequent application cannot be an application made in continuation. Where the question is whether an application by a decree-holder auction purchaser for delivery of possession is a step in-aid of execution the answer must be in the negative.

O. 21, R. 95 applies to an application made by the purchaser and an application made by the purchaser cannot possibly be read as an application by a decree-holder to take some step-in-aid of execution, whether the purchaser be the decree-holder or an outsider. [P. 311, C. 1, 2]

S. C. Mitter and *N. C. Roy*—for Appt.

N. N. Singh—for Respondent.

Coutts, J.—This appeal arises out of an application for execution. Maharaja Bahadur Kesho Prasad Singh obtained a rent decree against one Ram Khelawan Singh on 20-10-1914. After the decree had been obtained Ram Khelawan died on 7-4-1916 the decree-holder took out execution against his three sons Dwarika Singh, Kamal Nain Singh and Murli Singh. In the execution petition Kamal Nain Singh was described as a major and Murli Singh as a minor under the guardianship of his eldest brother Dwarika Singh. The properties of the three brothers were sold on 31-10-16 and purchased by the decree-holder, and on 5-12-1916 the sale was confirmed. On 7-9-1918 an application to set aside the sale was made by the three brothers on the ground that Kamal Nain Singh was a minor at the date of the sale and that Murli Singh was not properly represented by his brother Dwarika Singh. The application was successful and on 4th February 1920, the sale was set aside. On 9th October 1920 the decree-holder filed the application for execution with which we are now concerned. The execution was against Kamal Nain Singh, who was by this time admittedly major, Dwarika Singh and Murli Sing, minor represented by Dwarka Singh. Kamal Nain filed an objection on the ground that the application for execution was barred by limitation inasmuch as the first application made on the 7th April 1916 was not an application in accordance with law. The executing court overruled the objection finding that the application made on 9th October 1920 was an application in continuation of the first application of 7th April 1916, that Article 181 of the Limitation Act applied and limitation accordingly ran from the date on which the sale was set aside, namely, the 4th February 1920. Against this decision the Judgment-debtor appealed to the District Judge who has held that the application with which we are now concerned is an application in continuation of the previous application. He has, however, found that Art. 181 of the Lim. Act does not apply but that although Article 182 applies limitation runs from the date which the decree holder applied for delivery of possession as this was the last step taken in aid of execution and as this application was made on the 5th February 1918 the present application is not barred. The judgment debtor has again appealed to this Court.

It is admitted by the learned Vakil for the appellant that if the present application is an application in continuation of the first application for execution, limitation will run from the date of setting aside the sale and consequently the present application is within time. But he contends first that the present application cannot be treated as an application in continuation of the first application; and secondly, that if this is so, the present application is barred because an application for delivery of possession is not a 'step-in-aid' of execution and that limitation must run at latest from the date of the confirmation of the sale, namely the 5th December 1916.

With regard to the first point in my opinion the present application for execution cannot be treated as an application made in continuation of the first application. It has been held that where a previous application for execution has been dismissed because far successful application made under O. 21, R. 90 a

subsequent application for execution is an application in continuation of the previous application; but I can find no case in which, where an application has been made against one of several judgment debtors and has been dismissed for this reason, a subsequent application made against the whole of the judgment debtor has been treated as an application in continuation of the previous application. It seems to me that in the present case the first application for execution was *ab initio* a bad application and consequently the subsequent application cannot be an application made in continuation.

I now come to the second point and the sole question here is whether an application for possession after confirmation of sale made by a decree-holder auction purchaser is a step-in-aid of execution. There is much divergence of opinion in the different High Courts on this point. In Calcutta in the cases in which the question directly arose it has been decided that such an application is a step-in-aid. I may refer to the case of *Sariatolla Malla* v. *Raj Kumar Roy* (1). In the Allahabad High Court the question has been directly considered in three cases *Moti Lal* v. *Makund Singh* (2), *Bhagwati* v. *Banwari Lal*, (3) and the latest decision in the case of *Babu Ram* v. *Pearey Lal* (4), In the case of *Moti Lal* v. *Makund Singh* (2) it was held that such an application was a step-in-aid. In the case of *Bhagwati* v. *Banwari Lal* (3) which is a Full Bench decision three Judges held that it was not a step in aid and two Judges that it was. But in-the-case of *Babu Ram* v. *Pearey Lal* (4) it has been held by a Division Bench of the Allahabad High Court that the question was not definitely before the Full Bench in the case of *Bhagwati* v. *Banwari Lal* (3) and they have confirmed the decision arrived at in the case of *Moti Lal* v. *Makund Singh* (2). In Bombay and Madras the decisions appear to be that such an application is a step-in-aid. So far as this court is concerned the point has never definitely been decided but the principle was considered in the case of *Haji Abdul Gani* v. *Raja Ram* (5) a Full Bench decision of this court and if we accept the principle of that decision, there can be no doubt that such an application is not a step-in aid of execution. The question in that case was whether an appeal lay from an order under O.21, R. 95, C.P.C. when the decree-holder was the auction purchaser and in that case following the majority of decisions in the Calcutta High Court, this Court has held that an appeal does not lie. The reason for this is that the question is either one not relating to the execution, discharge or satisfaction of the decree or because it is not a question arising between the judgment-debtor and the decree-holder as such but between the judgment-debtor and the auction-purchaser as such. If we apply this principle to the question of whether an application made by a decree-holder auction purchaser for delivery of possession is a step-in-aid of execution the answer must in my opinion certainly be in the negative and this is exactly what we would expect from the wording of the section itself. O. 21, R. 95 applies to an application made by the purchaser and an application made by the purchaser cannot in my opinion possibly be read as an application by a decree holder to take some step-in-aid of execution, whether the purchaser be the decree-holder or an outsider. As soon as the sale is confirmed the property vests in the purchaser and any further step which it may be necessary for him to take in order to secure possession is not a step taken by a decree-holder even if he happens to be the auction-purchaser but is an application by the auction-purchaser as such and has consequently nothing to do with the execution of the decree. I have not specifically referred to the cases in the Calcutta High Court because they have all been referred to in the Full Bench decision of this Court in the case of *Haji Abdul Gani* v. *Raja Ram* (5).

For the reasons I have given I would set aside the order of the learned District Judge and that of the Subordinate Judge and would decree this appeal with costs.

Das, J —I agree. *Appeal allowed.*

(1) (1900) 27 Cal. 709=4 C.W.N. 681.
(2) (1897) 19 All. 477=1897 A W N, 117.
(3) (1908) 31 All. 82=1 I C 416=6 A.L.J. 71
(4) (1919) 41 All. 479=50I. C. 143=17 A L.J. 496.
(5) (1916) 1 P.L.J. 232=35 I.C. 468 =20 C.W.N. 829.

A. I. R. 1922 Patna 311.

MULLICK, J.

Gadadhar Bhagaria—Petitioner.

v

Emperor—Opposite Party.

Cr. R. No. 95 of 1922 decided on 1st June 1922

Penal Code, S. 147—Inciting mob to violence under guise of pacifying them is within the section.

Where the petitioner, though outwardly making a show of trying to pacify the mob

in reality incited the mob and took part in the doings of the mob to overawe the Government servants by attacking them and to cause loss to Government property without provocation: *Held*: He committed offence under S. 147, though he personally did no violence. [P. 314, C. 1.]

G. C. Pal and *Devaki Prasad Sinha* and *the petitioner himself*—for Petitioner.

Government Advocate—for the Crown.

Mullick, J.—The petitioner Gadadhar Bhagaria has been sentenced under Section 147, I. P. C. to rigorous imprisonment for one year for having on 25th April 1921 taken part in a riot outside the Sub-jail at Giridhi. It is alleged that the rioters numbered about 7,000 and that in it the course of a bombardment with stones and bricks they caused hurt to an Inspector, two Sub-Inspectors, two Head Constables, five constables and some warders; they also caused extensive damage to the barracks, and severely assaulted with lathis and brickbats, an orderly peon who was in search of his master and finally on their way back from the Sub-jail, they attacked the Giridih Thana and wounded the Sub-Inspector who attempted to defend it.

The Hon'ble Judges constituting the Divisional Bench which heard the petitioner's application for revision having differed as to the sentence, the case has been referred to me; one learned Judge Mr. Justice Jwala Prasad is of opinion that at best this was a case of technical rioting so far as the petitioner is concerned and that a fine of Rs. 500 with two sureties for keeping the peace for one year will meet the ends of justice; the other learned Judge Mr. Justice Coutts is of opinion that the petitioner took an active part in the riot and that the sentence of one year's rigorous imprisonment is not unduly severe.

It appears that out of the 26th accused sent up for trial before the Sub-Divisional Magistrate of Giridih, 11 were acquitted and 15 convicted. On appeal the Judicial Commissioner of Chota Nagpur maintained the sentence of one year's rigorous imprisonment with regard to 13 of the appellants before him and with regard to the remaining two, he reduced their sentences on account of their youth.

The facts which seem to me to be established by the evidence are as follows. The territory within the jurisdiction of the Pachamba Outpost in the Sub-Division of Giridih comprises many collieries where large numbers of coolies are employed. At or about the time of the alleged riot a movement called in these proceedings the Non-Co-operation movement was being girovously pushed within this area, and a local tribunal set up by the Non-Co-operators in opposition to the King's Courts had ordered that one Piar Ali should he boycotted and prevented from having access to the village well because he had refused to accept the tribunal's, award in a dispute between him and one Kedar Nath about the sale of a cow. Piar Ali's daughter having gone to draw water from the well was assaulted by a Muhammadan named Mogal Jan acting under the orders of the tribunal. Upon Piar Ali's complaint to the Police Officer in charge of the Puchamba—Outpost, Mogal Jan was arrested on the 24th April on a charge under Section 341, I.P.C. and taken to the Outpost at about 11 P.M. A crowd of 150 men accompanied him to Outpost and upon his declining to give bail the Police despatched him in custody to the Giridih Thana to which the Outpost is subordinate. It is to be explained that as those who follow the doctrine of Non-Co-operation do not recognize the administrative machinery set up by His Majesty's Government, it was contrary to Mogal Jan's principles to give bail. Mogal Jan reached the Giridih Thana at about midnight accompanied by the same crowd. He was kept in the lock-up till 6-30 A. M., when one Pearey Lal stood bail for him and took him away. An hour later Pearey Lal returned and surrendered Mogal Jan saying that the Non-Co-operators would not allow him to be released on bail. Meanwhile the Non-Co-operators had recruited a large mob, the evidence is that it numbered 5,000 at first and was later reinforced by a detachment of 2,000 headed by one Chittaranjan Guha. Not deterred, the Police nevertheless forwarded Mogal Jan in custody to the Giridih Magistrate's Court which was then holding morning sittings in consequence of the heat. The mob followed and entered the Court compound and some made their way to the court room. The Sub-Divisional Magistrate Babu Bhawani Prasad finding that Mogal Jan was not willing to give bail suggested that he should enter into recognizances, but even this proposal was not accepted owing to the intervention of some Non-Co-operators. It was then ordered that Mogal Jan should be kept in custody pending his trial, and a force consisting of one Inspector, two Sub-Inspectors, one Head Constable and five constables was deputed to take Mogal Jan to the Sub-jail which is 200 or 300 yards from the Court house.

But progress through the mob was slow and the journey occupied 10 or 15 minutes. Before the jail was reached a part of the mob numbering about 1000 rushed to the jail gate and demanded that either Mogal Jan should be released or that they themselves should be permitted to go to Jail with him. The warders naturally resisted this demand, and when the escort arrived with Mogal Jan, the Police Officers also insisted that Mogal Jan should be lodged in jail and that no member of the mob should be allowed to enter. Thereupon a violent fusillade of bricks and other missiles began, and both Warders and Police were injured Mogal Jan was hurried into the Warders' barracks where the escort and the warders also took shelter. After about an hour, finding that the mob shewed no inclination to disperse, the Inspector took off Mogal Jan's handcuffs and set him free but this had no effect.

Next an attempt was made to break through the mob a Treasury Head Constable named Wali Muhammad, who was armed with an unloaded rifle, succeeded in doing so by fixing bayonet and charging; but the remaining members of the escort were driven back again into the barracks. At this point the Sub-Divisional Magistrate accompanied by a Deputy Magistrate and Sub-Deputy Magistrate reached the Jail gate and attempted to pacify the rioters who for some unaccountable reason were complaining that two of their number had been killed by the Police and that their bodies were being concealed within the Jail. The Sub-Divisional Magistrate thereupon took the petitioner, who appeared to be one of the leaders, and one Satis Babu inside the Jail and showed them that the allegation was utterly false. But the rioters were not satisfied and stone throwing continued. Finally at the Sub Divisional Magistrate's suggestion a second search was agreed upon and three men alleged to be colliery coolies were taken round the jail and upon their informing the rioters that no dead bodies were being concealed in the jail, the rioters moved off; but, as has already been stated, on their way one group attacked the Giridih Thana and injured a Sub-Inspector.

All the doors and windows of the barracks and the gate of the jail are reported to have been damaged and all the members of the police force and some warders were hurt by brickbats or stones. Guder Tewari the orderly peon had no less than 12 injuries which were caused by lathi blows and brickbats and having regard to the size of the mob it is certainly fortunate that there was no loss of life or arson or forcible rescue of prisoners. The wicked cry that two men had been killed by the Police was clearly the scheme of some malicious mind and was admirably suited to incite a rabble of ignorant colliery coolies to every imaginable excess; it is the merest chance that it did not succeed.

Nevertheless such as it was the occurrence was sufficiently serious.

From the facts thus narrated I think it is clear that the common object of the unlawful assembly at the Pachamba outpost and at the Giridih Thana on the night of the 24th April and on the morning of the 25th April both at the Giridih Thana and the Sub-Divisional Court house was to overawe the public servants who were charged with the custody of Mogal Jan by show of criminal force. It was clearly the intention of the assembly to obtain Mogal Jan's release without any of the formalities required by the law. At the jail the same common intention was manifest. It is clear that the intention of the thousand men, who first ran to the jail gates, was to overawe the jail staff in the exercise of their lawful powers. They were determined that Mogal Jan should not be detained in jail; the throwing of brickbats began when the Police declined to let them have their own way.

There can, therefore, be no doubt that the offence of rioting was complete, and the only question is what part the petitioner Gadadhar took in the riot.

His case is that he was trying to pacify the mob; that while the question of Mogal Jan's bail was being considered, he came out of the Court room and addressed the mob from under a Pipal tree in the compound on the principles of "Non-Co Operation without violence" and impressed upon his audience the teachings of Mahatma Gandhi; that he did not move from the tree till the Sub-Divisional Magistrate came out; that it was at the Sub-Divisional Magistrate's request that he accompanied him to the jail; that there he tried to stop the stone throwing but without success, and that after assisting in the first search of the jail, he with the permission of Maulavi Reza Karim, Deputy Magistrate left the place and went home.

Now the Sub Divisional Magistrate who heard the case in the first instance has made a very careful examination of the evidence produced against each of the

26 prisoners placed before him, and no one can say that at least in the case of the petitioner's father Bansidhar Marwari and of Chittaranjan Guha and the Vakil Jainarayan, he has shown any disposition to take a harsh or biassed view in favour of the prosecution. He has acquitted these prisoners because upon the evidence he thought it possible that either they were not present among the rioters outside the jail or that they were honestly trying to put a stop to the riot; but in the case of the petitioner Gadadhar, he has come to the deliberate conclusion that his defence cannot be accepted.

It is quite clear that Gadadhar's story that he accompanied the Sub-Divisional Magistrate to the jail is false. It is true that he was seen haranguing the mob under the pipal tree and that he was then preaching non-violence; but his subsequent conduct shows that he was in favour of and was prepared for violence; for he followed the mob as soon as a rush was made at the jail gate and when the Police arrived with Mogal Jan he was at the gate trying to get it opened: further when the Sub-Divisional Officer arrived he was still in the same place and was actually taken to be a leader. Chittaranjan's conduct gives some support to his plea that, though at the last moment, he did try to stop the riot; but in the case of Gadadhar there is nothing at all to show that he did anything at the jail before the arrival of the Sub-Divisional Magistrate to stop the attack or that he even showed his disapproval of it. There is evidence that after the stone throwing had begun, he was seen standing behind one of the warders for shelter, but that circumstance does not indicate that he did not approve of the stoning of Government Officers or of the wrecking of Government buildings. The finding of both the lower courts is that while the stone throwing was going on he shared the common object of the unlawful assembly; he in fact wished that either Mogal Jan should be set free or that the warders should be compelled to open the jail gates. With these findings I agree and the petitioner's conviction is in my opinion correct.

Mr. Gour Chandra Pal who appears before me on behalf of the petitioner while admitting that in view of the course adopted by his senior before the Divisional Bench, it is not open to him to argue that the conviction is incorrect, has referred to the evidence in order to show that the offence was at best a technical one and that it merits but a nominal sentence. At his request I have read through the whole record but I regret I cannot share his view.

The petitioner was a member of the mobs which gathered before the Pachamba Outpost, the Giridith Thana and the Court House. What was his object except to make the administration of the law impossible? Oh! he says, "that was a technical offence; I may have been wrong but I never intended violence." But what about the 5,000 or 7,000 men who were assembled in the Court compound and most of whom were rough ignorant men? In my opinion it is an insult to petitioner's education and intelligence to hold that he for a moment expected that they would be content with a mere demonstration or with a recital of the teachings of the Mahatma Gandhi The petitioner may not have had the courage to engage in violence himself but he wanted violence just as much as those who without any provocation whatever destroyed Government property and attacked Government servants in the execution of their duty.

I take into account the fact that the petitioner is a young man who had just entered the legal profession and that he is a person of some social position and fully —realising the ruin which a sentence of rigorous imprisonment will bring upon him, I feel the responsibility that rests upom me. But after the most careful consideration I have come to the conclusion that the petitioner's guilt is certainly not less than that of those who were sentenced with him and that a mere fine will be a wholly inadequate punishment for an offence showing such complete and open contempt for law and order. It is no fault of his that the riot though sufficiently serious did not culminate in a catastrophe.

I think therefore that the sentence of one year's rigorous imprisonment must be affirmed.

The only suggestion which I can make is that the petitioner should throw himself on the mercy of the local Government. Perhaps some day when satisfied that conditions in the locality have improved and that the petitioner's assurances of future good conduct can be accepted, the Local Government will think fit to exercise the prerogative which the law confers. For the petitioner's sake I think I may without impropriety venture to express the hope that that time may come soon.

Sentence confirmed.

A I. R. 1922 Patna 315

DAS AND BUCKNILL, JJ.

S. A. Zamin—Petitioner

v.

S. M. A. Ali—Opposite Party.

Civil Rev. No. 140 of 1921 decided on 12-12-1921 from an order of Sub-J, Gaya.

Bengal Land Registration Act (1876), S. 42, 52 and 55—Scope of—Two applicants each claiming assumption of charge of endowment—Collector finding one in possession, cannot refer parties to Civil Court.

It is necessary for an applicant for registration of his name in the Land Registration Record to establish not only that the succession or transfer has taken place but that he has acquired possession in accordance with such succession or transfer, where he claims to have succeeded to any proprietary right whether by purchase, inheritance, gift or otherwise But if his claim is that he assumed charge of the estate or property either as joint proprietor or as manager, it is sufficient for him to establish that his possession exists. Where each of the two applicants claims to have assumed charge of an endowment, the Collector has simply to see with whom possession exists. If he finds that possession exists with one of the applicants, he has no jurisdiction to refer the matter to the Civil Court, but should order the name of the persons in possession to be recorded in the land Registration Record. The jurisdiction either to determine summarily the question of the right to possession or to refer the matter to the Civil Court arises where there is no proof to the satisfaction of the Collector that any person is in possession of the interest in dispute. [P. 316, C. 1, 2.]

(b) *C. P. C., S. 115—Other remedy open—Revision does not lie.*

The exercise of revisional powers is always discretionary, and where an aggrieved party has other remedy available the High Court will be unwilling to interfere. [P. 316. C. 2]

S. M. Mullick and *Panchanan Banerji*—for Petitioner.

S. Ahmad—for Opposite Party.

Das, J.—This application is directed against the order of the Subordinate Judge of Gaya in a reference made by the Land Registration Deputy Collector under section 55 of the Land Registration Act. Mr. Hasan Imam on behalf of the applicant contended before us that the learned Subordinate Judge had no jurisdiction to deal with the matter inasmuch as the reference was invalid under the law. He also contended, that assuming the reference was a valid reference; the order must still be set aside inasmuch as the learned Subordinate Judge acted in the matter illegally or with material irregularity.

The contest is between the petitioner, Syed Ali Zamin, and Nawab Syed Akbar Ali commonly known as Chotey Nawab. Each of these persons claims to be the Mutwalli of the endowment of Nawab Lutf-ali-Khan. The learned Deputy Collector who tried the question between the parties in the first instance came to the conclusion that Ali Zamin had title but had no possession and that Nawab Akbar Ali had possession but no title. He accordingly referred the matter to the Civil Court under S. 55 of the Act. The learned Subordinate Judge agreed with the learned Deputy-Collector that Akbar Ali Khan was in possession of the properties in dispute. He, however, differed from the Deputy Collector on the question of title He came to the conclusion that Akbar Ali Khan had a good title to the properties. He accordingly certified to the Collector his determination as to the right of possession under S. 63 of the Act.

In my opinion the reference was not a valid one. In order to determine this point it is necessary to refer to the relevant sections of the Land Registration Act. Section 42 of the Act provides, that

"every person succeeding after the commencement of this Act, to any proprietary right in any of the estate or revenue free property, whether by purchase, inheritance, gift or otherwise, and every joint proprietor of an estate or revenue free property assuming charge after such commencement of such estate or property, or of any interest therein, respectively, on behalf of the other proprietors thereof, every person assuming charge after such commencement of any estate or revenue free property or of any interest thereof, respectively, as manager, shall, within six months from the date of such succession or assumption of charge, make application to the Collector for registration of his name and of the character and extent of his interest as such proprietor or manager."

It will be noticed that this section makes a clear distinction between the case of "succession" whether by purchase, inheritance, gift or otherwise, and the case of "assumption of charge," whether as joint proprietor or as manager. The distinction is an important one, as we shall presently see in connection with section 52.

That section provides for the enquiry to be held by the Collector, and runs as follows:—

"On the day fixed in the notice issued under section 48, or as soon thereafter as possible, the Collector shall consider any objections which may be advanced and make such further inquiry as appears necessary to ascertain the truth of the alleged possession of, succession to, or transfer of the estate revenue free property

or interest therein in respect of which registration is applied for ; and if it appears to the Collector that the possession exists, or that the succession or transfer has taken place, and that the applicant has acquired possession in accordance with such succession or transfer, but not otherwise, the Collector shall order the name of the applicant to be registered in the proper registers as proprietor or manager of the said estate, revenue free property or interest therein ; provided that any person to whom any proprietary right in an estate has been mortgaged may be registered as mortgagee, whether he be in actual possession or otherwise.

It seems to me that reading section 52 with section 42, the Collector has the power to order the name of the applicant to be registered where, in the case of assumption of the charge, he is satisfied that the possession exists; but that in the case of succession or transfer he has no right to direct the name of the applicant to be registered unless he is satisfied first, that the succession or transfer has taken place and, secondly that the applicant has acquired possession in accordance with such succession or transfer. In other words, where the applicant claims to have assumed charge of the estate or property either as joint proprietor or as manager, it is sufficient for him to establish that his possession exists ; but where he claims to have succeeded to any proprietary right, whether by purchase, inheritance, gift or otherwise, it is necessary for him to establish not only that the succession or transfer has taken place but that he has acquired possession in accordance with such succession or transfer. In the present case there were two applicants in the land registration department each claiming to have assumed charge of the estate or property as manager of the endowment. There was no question of succession, whether by purchase, inheritance, gift or otherwise, to be tried by the land registration department. It seems to me, therefore, that the only question which the Land Registration Deputy Collector had to determine was—did possession exist in favour of either of the applicants ? He came to conclusion that it did exist in favour of the opposite party. In my opinion he ought to have ordered the name of the opposite party to be registered as manager of the endowment.

The learned Deputy Collector, however, referred the matter to the Civil Court under section 55 of the Land Registration Act. That section gives the right to the Collector to determine summarily the right to possession of the property or if he be of opinion that the dispute can more properly be determined by a Civil Court, to refer the matter in dispute to the Civil Court, provided it is not proved to his satisfaction that any person is in possession of the interest in dispute. In other words, the jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute. In the present case the learned Deputy Collector was satisfied that the opposite party was in possession of the interest in dispute. In my opinion, therefore, there was no jurisdiction in the Land Registration Deputy Collector to refer the matter to the Civil Court under section 55 of the Act.

I have now to consider whether we ought to set aside the order of the learned Subordinate Judge in view of the decision that the reference was not a valid one. I have come to the conclusion that we ought not to interfere with the order passed by the learned Subordinate Judge. We are asked to exercise our revisional powers and, as is well settled, the exercise of revisional powers is always discretionary. The ordinary rule is that where an aggrieved party has other remedy available this Court is unwilling to interfere, and in this case we are all the more loath to interfere since the learned Subordinate Judge has passed an order which the learned Deputy Collector should have passed in the first instance. In these circumstances we think that no useful purpose will be served by revising the order passed by the learned Subordinate Judge. I would refuse this application but, in the circumstances, would make no order as to costs.

Bucknill, J.—I have no doubt that the Land Registration Deputy Collector ought not to have referred this matter to the Civil Court. He had really no jurisdiction so to do, for he had come to a clear decision as to the possession by one of the parties. Under such circumstances the reference to the Subordinate Judge merely because the Deputy Collector thought that the possession and the title were not identical was outside his proper jurisdiction. The Subordinate Judge should, and, if it had been clearly pointed out to him, no

doubt, would have seen this impasse; but he accepted instead of refusing the reference and his order, based as it is on an invalid reference, is obviously incapable of theoretical support. The Subordinate Judge, however, although he accepted wrongly, the incubus of the reference, came, by a quite irregular mode of dealing, with the matter, to the conclusion that, whilst the Land Registration Deputy Collector was right so far as possession was concerned, he was wrong in his view as to the title; and so, on quite improper premises and on a reference which he ought to have rejected as outside his jurisdiction, he has made an order the effect of which is no doubt correct. The upshot is that the right thing has been done in quite a wrong way.

The question then arises what this court ought to do under such circumstances If this Court decided to quash the order and send the matter back for reconsideration, the only result would be to cause further and possibly considerable expenses; whereas, if the order is allowed to stand, the position will remain the same as would be effected by a re-consideration. I think, therefore, that although I do not quite like to allow an order which I feel is without jurisdiction to stand the sensible course is not to interfere, and I, therefore, agree with my learned brother.

Rule discharged.

A.I.R. 1922 Patna 317

ADAMI J.

K. Dusadh—Petitioner

v.

Sarati Dusadh and others—Opp. Party

Cr. Rev. No. 117 of 1922 decided on 5th May 1922.

Cattle Trespass Act, (1871) S. 10 – Watchman —General instruction to seize cattle trespassing— Rescuing cattle seized by watchman is an offence.

Under section 10 of the Cattle Trespass Act a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing. [P. 317, C. 2.]

S. S. Bose—for Petitioner.

N. C. Roy—for opposite Party.

Adami, J.—The petitioner in this application seeks to have an order acquitting the opposite party of an offence under sections 352 and 24 of Act I of 1871 set aside. The petitioner complained that the opposite party had rescued cattle which his watchman had seized on the petitioner's land. The only question considered by the Deputy Magistrate who tried the case summarily was whether under section 10 of Act I of 1871, the Cattle Trespass Act, the watchman of the petitioner had any power to seize cattle on his master's land and take them to the pound. The learned Deputy Magistrate found that the watchman was neither a cultivator nor occupier nor fulfilled the other qualifications mentioned in the section. He therefore found that the opposite party had committed no offence and acquitted them of the charge. The Sessions Judge was approached with a view to having this finding set aside but he declined to make a reference to this Court. He however found that there were irregularities in the trial and that the petitioner had not made out a strong enough case to warrant a reference.

It is clear, I think, that the Deputy Magistrate was mistaken in his interpretation of Section 10 of Act I of 1871. The section states that a cultivator or occupier of any land may seize or cause to be seized any cattle trespassing on such land and the watchman might well be taken to be a person whom the petitioner as occupier and cultivator of the land had directed to seize cattle on that land. There may be no evidence on the record that there was any special authority given to the watchman but it may be presumed that the watchman would have general authority from his master to seize trespassing on his land. Further more there is a decision of the Madras High Court *In re Subbaraya Pillai* (1) on the point to the effect that under section 10 of the Cattle Trespass Act a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing.

The only question that I have to decide is whether where a mistaken view of the law has been taken by the Deputy Magistrate, the acquittal should be set aside and the case sent back for retrial. The case is a petty one and it is shown by the Sessions Judge that otherwise the procedure adopted was not altogether satisfactory. The opposite party in this case have undergone the harassment of a trial and have been brought up again to this court, and in the circumstances of this case, which I have said is a petty one, I am not inclined to interfere in revision and set aside the order of acquittal. The application is rejected.

Application rejected.

(1) (1915) 31 I.C. 372.

A.I.R. 1922 Patna 318.

DAS AND ADAMI, JJ.

P. C. L. Choudhuri—Plaintiff-Appellant

v.

K. Singha and H. C. Dutt—Defendants-Respondents.

Misc. A. Nos 96 and 97 of 1920, Civ. Rev. No. 127 of 1920 decided on 27-5-1921 from Purnea, dated the 11-3-1920 and Bhagalpur, dated 12-4-1920.

Civil P. C. (1908), O. 40, R. 1—Essentials—Applicant must have interest in property or special equity in his favour—Court must, in appointing Receiver protect rights of others—Fraud practised in Court, is sufficient to discharge Receiver.

There is no jurisdiction in the court to appoint a Receiver at the instance of a simple contract creditor, unless the creditor establishes a special equity in the favour of such appointment. A prior mortgagee is entitled to have the Receiver obtained by a puisne mortgagee or a simple contract creditor discharged and a nominee of his own substituted. Whenever a Court appoints a Receiver it ought to take care to protect the rights of persons other than the applicant. The appointment of a Receiver is an equitable relief and if the applicant does not establish a special equity in his favour it is impossible to say that it is "just and convenient" that a Receiver should be appointed. The first essential condition for the appointment of Receiver is that the applicant must satisfy the court that he has an interest in the property to be affected by the order. The fact that fraud is practised on the court is sufficient ground for the discharge of the Receiver. [P. 319, C. 2, P. 320, C. 2]

S. Ahmad and *S. M. Tahir*—for Appelt.

S. M. Mullick, D. N. Sircar and *H. H. Mukherji*—for Respondents.

Das, J.—Misc. Appeal No. 96 of 1920 is directed against the order of the Subordinate Judge of Purnea, dated 11-3-1920, Misc. Appeal No. 97 of 1920 is directed against the order of the Subordinate Judge of Bhagalpur, dated the 12th April 1920. As there is some doubt whether the latter appeal is competent, the appellant has presented a revision-petition the subject matter of Civil Revision No. 127 of 1920, against the order of the Subordinate Judge of Bhagalpur, dated the 12th April 1920.

The material facts are these: On the 23-1-1918 the appellant obtained in the Court of the Subordinate Judge, Purnea, two mortgage-decrees against the Srinagar Raj, one for Rs.1,51,000 and the other for approximately rupees ten lacs. On 2-12-1919, the appellant applied in the Court of the Subordinate Judge, Purnea, for the appointment of a Receiver in respect of the mortgaged properties. The learned Subordinate Judge fixed 10-2-1920 for the disposal of the application. On 10-2-1920, the matter was adjourned to the 17th Feby. both sides having represented to the Court that there was a chance of settlement. On the 17th February when the matter was taken up, Babu Satyabrata Chatterji, who manages the Srinagar Raj under a power of attorney executed in his favour by the proprietor of the Raj, appeared before the Court and informed the Court by a petition that he had been appointed Receiver of the Srinagar Raj in money Suit No. 69 of 1920, and that the Court should not appoint another Receiver over the same properties, did not give the date of his appointment in his petition, and he stated that on coming to Purnea as Receiver he heard that there was an application pending that day in the Court of the Subordinate Judge, Purnea for the appointment of a Receiver.

It will be convenient now to trace the history of Money Suit No. 69 of 1920; which is as interesting as it is short. On the 30th January 1920 the respondent filed a suit in the Court of the Subordinate Judge, Bhagalpur for recovery of Rs. 50,000 on a hand-note executed by the Srinagar Raj in favour of the respondent. On the same day the respondent applied for attachment before judgment of the properties of the Srinagar Raj. On the 7th February the respondent changed his mind, and on that date he applied for appointment of a Receiver pending the disposal of the suit. The learned Subordinate Judge issued notice upon the Srinagar Raj to show cause why a Receiver should not be appointed, and fixed the 20th February for the disposal of the application. But the Srinagar Raj was unwilling to wait till the 20th February, and on the 11th February they consented to the appointment of Babu Satyabrata Chatterji as the Receiver of the estate. The Court dealt with the application on the 13th February and on that date appointed Babu Satyabrata Chatterji Receiver of the estate in money Suit No. 69 of 1920. His appointment on the 13th February just gave Babu Satyabrata Chatterji time to take a trip to Purnea and to accidentally hear of the application for the appointment of Receiver then pending in the Court of the Subordinate Judge, Purnea.

The events that happened subsequently may be briefly told. The learned Subordinate Judge of Purnea thought that the conduct of the Srinagar Raj was open to serious criticism, but taking the view that in appointing Babu Satyabratha Chatterji as the Receiver of the estate the learned Subordinate Judge of the Bhagalpur had acted with jurisdiction, and that he ought not to appoint another Receiver over the same properties, he rejected the application

of the appellant. Miscellaneous Appeal No. 96 of 1920 arises out of the order of the Subordinate Judge of Purnea rejecting the application of the appellant for the appointment of a Receiver. The appellant thereupon presented an application to the Court of the Subordinate Judge, Bhagalpur and invited that Court in the circumstances which he fully set out in his petition, to recall the order which the learned Subordinate Judge had made on the 13th February 1920 appointing Babu Satyabrata Chatterji as the Receiver of the estate. This application was rejected by the learned Subordinate Judge of Bhagalpur on the 12th April 1920, and Miscellaneous Appeal No. 97 of 1920 and Civil Revision No. 127 of 1920 arises out of the order passed by the Subordinate Judge, Bhagalpur, on the 12th April 1920.

While throwing not the slightest doubt on the *bona fides* of that claim of the respondent in Money Suit No. 19 of 1920. I must express my strong disapproval of the method adopted by the Srinagar Raj in meeting the application presented by the appellant in the Purnea Court. A critical study of the dates is sufficient to convict the Srinagar Raj not only of want of candour, but of dishonesty in the matter, and I have no doubt whatever that a gross and deliberate fraud was practised on the Court by the Srinagar Raj. On the 10th February, the date fixed by the Purnea Court for the disposal of the appellant's application, the defendants represented to the Purnea Court and to the appellant that there was no necessity for the appointment of a Receiver, as they were about to execute a trust deed in favour of certain respectable persons providing therein for the payment of the debts due to the appellant. On that date, they knew of the application for the appointment of Receiver in the Bhagalpur Court, and in my judgment, the representation made by them to the Purnea Court was untrue, but was made in order to give them time to manoeuvre out of a difficult position. On the 11th February, they consented to the appointment of their constituted attorney. Babu Satyabrata Chatterji, and, having succeeded in their object, they went to the Purnea Court on the 16th February, stated to the Court that there was little hope of the execution of any trust deed, and solemnly agreed to the appointment of Babu Bisheshwar Prasad as the Receiver of the estate. The learned Subordinate Judge of Bhagalpur appears to have been greatly impressed by the fact that the defendants consented to the appointment of a Receiver in the Purnea Court. For myself, I have no illusion in the matter. That was a bit of acting indulged in by the defendants in order to enable the Subordinate Judge of Bhagalpur to say what he has actually said. I have not the slightest doubt that the defendants were advised, at every stage, by their constituted attorney, Babu Satyabrata Chatterji, and it does not require much ingenuity to see through the game as played by the Srinagar Raj and their constituted attorney. I cannot regard the presence of Babu Satyabrata Chatterji in Purnea on 17th February as accidental or as due to his zeal in the discharge of his duties as Receiver. I have not the slightest doubt that he was present there according to arrangement, so that the Subordinate Judge of Purnea might be informed of his appointment as Receiver.

The fact that a fraud was practised on the Court is sufficient ground for the discharge of the Receiver, but in this case, the order is otherwise open to two serious objections. In the first place, there is no jurisdiction in the Court to appoint a Receiver at the instance of simple contract creditor, unless the creditor establishes a special equity in his favour for such appointment; in the second place a mortgagee was entitled to have the Receiver obtained by a simple contract creditor discharged, and a nominee of his own substituted. So far as the first question is concerned, the learned Subordinate Judge has an idea that the present code has given him unlimited powers to appoint a Receiver. That is pure delusion. The appointment of a Receiver is an equitable relief and will be only granted on equitable grounds; and when the applicant does not establish a special equity in his favour, it is impossible to say that it is "just and convenient "that a Receiver should be appointed. Now the first essential condition for the appointment of a Receiver is that the applicant must satisfy the Court that he as an "interest" in the property to be affected by the order. Now, how does a simple contract creditor show that he has an interest in the property over which he seeks the appointment of a Receiver? Only if he shows that, though he may not have a specified charge on the fund so as to give him priority, still he has a right to be paid out of that particular fund. If a plaintiff had a right to be

paid out of a particular fund, he could in equity obtain protection to prevent that fund from being dissipated so as to defeat his rights. This was established in *Kerns* v. *Leaf* (1) and was adopted in *Cummins* v. *Perkins* (2). In granting relief by the appointment of a Receiver in a case where the plaintiff establishes that he has a right to be paid out of a particular fund, the Court acts on the view that there is clear equity in favour of the plaintiff, entitling him to the order. But what equity is there in favour of the plaintiff, who does not suggest that there was any agreement between him and Srinagar Raj that he should be paid out of a particular fund or property The following passage from the judgment of the Lord Chancellor in *Owen* v. *Homan* (3) may be usefully cited : "The plaintiffs here do not claim as specific appointees of any part of the defendant's separate estate. They are merely in the nature of general creditor seeking to obtain payment by a sort of equitable action of assumpsit or debt. In such a case it is a strong exercise of authority to deprive the defendant, on motion, of property of which the plaintiffs have no specific claim, in order that if they establish their claim as creditors there may be assets wherewith to satisfy them. I do not mean to say that such a course may not be taken, though I have not discovered any authority for it. Perhaps the anomalous nature of the right, where a plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the Court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the interim interference by a Receiver. But a chance of doing a wrong to the defendant in such a case is certainly much greater, and much more apparent, than were a right against some specific fund or estate. "It is the almost universal rule", says Pomeroy in his Equity Jurisprudence, 4th Volume 1533), "that a creditor's bill whether to set aside a fraudulent transfer or to reach equitable assets will not lie on behalf of mere general creditors who have not prosecuted their claim to judgment nor, in any other manner, acquired a lien upon the debtor's property. The slowness and inadequacy of the legal remedies open to such creditors are not considerations that can move a Court of Equity in the absence of statutory authority, to intervene in their behalf with the instrumentality of a Receiver to preserve the debtor's property".

On the second question, the authorities are clear and leave no room for controversy. Whenever a Court appoints a Receiver, it ought to take care to protect the rights of persons other than the applicant ; and the cases established that a prior incumbrancer desiring to take possession is entitled to have the Receiver obtained by a puisne incumbrancer and, therefore, by a simple contract creditor, discharged and a Receiver of his own substituted. It is sufficient to refer to *Yorkshire Insurance Coy.* v. *Metropolitan Amalgamated Estates* (4).

The conclusions at which I have arrived are these ; that the learned Subordinate Judge of Bhagalpur had no jurisdiction to appoint a Receiver at the instance of the plaintiff in Money Suit No. 69 of 1920 ; and that in any event he could have recalled his order when all the facts were brought to his notice by the appellant, clearly establishing that a fraud had been practised on him by the Srinagar Raj, and that his order was bound to prejudicially affect the appellant, who had a clear equity in his favour for the appointment of a Receiver.

The appeal from the order of the Subordinate Judge, Bhagalpur, seems to me to be incompetent. I would dismiss Miscellaneous Appeal No. 97 of 1920 without costs, but would allow the application, the subject matter of Civil Revision No. 127 of 1920, and discharge the order for the appointment of Babu Satyabrata Chatterji as the Receiver. The petitioner is entitled to his costs in both the Courts from the defendants in Money Suit No. 69 of 1920. Hearing fee in each Court, five gold *mohurs*. I would allow Miscellaneous Appeal No. 96 of 1920 and remand the matter to Subordinate Judge, Purnea, for disposal according to law. The appellant is entitled to his costs in this Court from the defendants. Hearing fee five gold *mohurs*. Costs incurred in the Court below will abide the result and will be disposed of by the Subordinate Judge.

Adami, J.—I agree.

Case remanded.

(1) (1864) 1 H. and M. 681=71 E.R. 299

(2) (1899) 1 Ch. 16=68 L.J.Ch. 57.

(3) 1853) 4 H.L C. 997=10 E.R. 75 =94 R.R. 516

(4) (1912) 2 Ch. 497=81 L.J.Ch. 745 =107 L.T. 45.

A.I.R. 1922 Patna 321

DAWSON MILLER, C. J. AND ADAMI, J.

Emperor—Appellant

v.

Bhimlal Chamar—(Accused)-Respondent.

Govt. App. No. 4 of 1920 decided on 31st January 1921 from an order of acquittal by the S. Judge, Patna.

Cr. P. C., (1908), S. 297—Non-direction as to facts constituting a lesser offence also is not a Mis-direction—Penal Code, S. 302.

A mere failure on the part of the Sessions Judge to point out to the Jury all the matters which may be considered by them in evidence, does not necessarily amount to a misdirection. Where the facts disclose a case to be either of murder or nothing else, the non-direction by a Sessions Judge of the attention of the Jury to the fact that even if an offence under section 302 of the Penal Code has not been made out the facts established might constitute a minor offence, does not amount to a misdirection. [P. 321, C. 2.]

Government Advocate—for the Crown.

G. C. Pal, J. C. Singh and *P. N. Bose* for Accused.

Dawson Miller C. J.—This is an appeal brought on behalf of the Crown under section 417 of the Code of Criminal Procedure from a verdict of acquittal in a trial for murder held before the Sessions Judge of Patna and a Jury on the 2nd August 1920. The Jury unanimously found the accused not guilty of the charge of murder, and the learned Judge stated that in view of the unsatisfactory state of the evidence he was not prepared to disagree with the unanimous verdict of the Jury, and the accused Bhimlal Chamar was acquitted and set at liberty.

The grounds of appeal, which have been put before us for our consideration, are that the learned Sessions Judge did not direct the attention of the Jury to the fact that even if an offence under section 302 of the Indian Penal Code had not been made out, the facts established might have constituted a minor offence and that the non-direction amounted to a misdirection, and therefore, the verdict was liable to be set aside. It was further contended, but not pressed, that there was a misdirection on the part of the learned Sessions Judge in that he did not point out to the Jury that the deceased child, whose death the accused is alleged to have caused, was the last co-sharer with him in the income arising from his business as Chamar and that he would be materially benefited by getting the child out of the way.

I may say at once with regard to this last point that it is not a matter which ought to influence this Court in an appeal against an acquittal, because it is not a misdirection but a mere non-direction or a failure of the Judge to point out what the prosecution considered to have been a material part of the evidence, as showing a motive on the part of the accused, and a mere failure on the part of the Sessions Judge to point out to the Jury all the matters which may be considered by them in evidence, that is, matters which have been established by the evidence, does not necessarily amount to a misdirection which in the case of an appeal against an acquittal would justify the Court either in deciding the case itself or sending it back for a new trial.

With regard to the main ground of appeal the learned Government Advocate has stated what the ground of appeal is and pointed out to us very properly what he considers to be the law upon the subject, and speaking for myself I entirely agree with his view. He has not gone in detail into the evidence, but we have had an opportunity of considering the evidence and it would be extremely difficult in this case for the Court to arrive at the conclusion that there had been a non-direction which amounted to a misdirection, so that we ought to send the case back for a new trial.

The point which has been stated, but not argued at any length because the learned Government Advocate feels, as I feel, the difficulty about it upon the evidence, is that the learned Sessions Judge failed in his duty in summing up to the Jury in pointing out that although the accused might not be guilty of the offence of murder under section 302 of the Indian Penal Code, it was still open to the Jury to find that he might be guilty of culpable homicide not amounting to murder.

It is not contended that any of the exceptions to section 300 of the Indian Penal Code could possibly have any application in the present case, and, therefore, the only possible manner in which the Jury, if they should come to the conclusion of fact that murder had not been committed, might still find the accused guilty of culpable homicide not amount-

ing to murder was that they considered that the accused did in fact bring about the death of the child, but that the circumstances were such that he did not know and could not know that what he was doing was likely to cause death. Now having read the evidence which it is unnecessary to refer to in detail but which may very shortly be stated, it seems to me that this is a case in which it was either murder or nothing.

The facts, shortly stated, are that the accused, who since his brother's death a few months earlier was the sole surviving male member together with his brother's son of his family, had refused to maintain the son of his deceased brother, a small boy of some 1½ or 2 years of age. There had been a *panchayet* of his castemen and they had come to the conclusion that the accused ought to share the family income with the child. The accused had refused to do so. He had thereupon been importuned both by his deceased brother's wife and by his mother to share the family income with the small boy or at least to provide for his maintenance.

Matters had reached a climax on the night before the alleged murder and the accused's mother had apparently had a quarrel with him on the subject. On the following morning, according to some 6 or 7 witnesses, it is shown that the accused early in the morning, when the small boy was playing with his sister, a girl of some 6 years of age, seized the boy by the feet and dashed his head against a *tar* tree, with the result that the child died a few hours afterwards in hospital. It was very severely wounded about the head, most of the bones had been broken and there can be no doubt that if the evidence was accepted, it was clearly a case of murder and nothing else.

It is to my mind impossible to conceive in such circumstances that a person in the position of the accused, treating a child in that manner, could not have understood what the natural consequence of such an act would be and therefore, it seems to me that it was quite immaterial that the Sessions Judge did not direct the Jury that if in fact a murder were not committed they might still come to the conclusion that a lesser offence of culpable homicide not amounting to murder had been committed. The learned Government Advocate felt the difficulty in pointing out any facts which might have justified such a verdict and, therefore, he did not go into the facts of the case. He also agrees that if the facts show that the case is one really of murder or nothing else, it is immaterial that the learned Sessions Judge did not direct the Jury, in the event of their failing to find a verdict of murder, to consider whether it did not amount to the lesser offence.

The evidence upon the question of whether or not the accused did commit the act complained of seems to have been all one way. There were some slight discrepancies in details between the various eye-witnesses, but for some reason which it is impossible to explain now, the Jury appear to have rejected the evidence given by the witnesses. They were the judges of the question of fact. They were at liberty to reject the evidence if they did not think it worthy of credence, and apparently that is the only ground upon which they arrived at their decision.

It is not possible for this Court sitting in appeal to question that verdict and as the prosecution has failed to make out that there was any material non-direction in the case, I think that this appeal must be dismissed.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 322

DAS AND ADAMI, JJ.

Dwaraka Prasad Marwari and others—Appellants

v.

Jai Barham and others—Respondents.

App. from original decision Nos. 128 and 135 of 1919 decided on 27th May 1922 from a decision of Sub-Judge, Bhagalpur.

(a) *Bengal Regulation* III *of* 1872, *Ss.* 11 *and* 25 *A—Scope—Decision under S.* 11 *is a decree and can only be avoided under S.* 25 *A if question involves rights of proprietors as between themselves.*

Section 11 bars every suit regarding any matter decided by any settlement court; except such suits under S. 25 A. as are brought to contest the finding or record of the settlement officer where only the rights of *Zamindars* or other proprietors as between themselves are concerned, provided they are brought within three years from the date of the publication of the record of rights. Section 11 provides that every decision and order of the settlement officer regarding the interests and rights of the parties shall have the force of a decree. The decree under

S.11 cannot be avoided except under S.25A and only when the question in controversy between the parties involves the determination of the rights of the *zemindars* or other proprietors as between themselves.

[P. 325, C. 1, 2.]

(b) *Hindu Law—Impartibility—Mortgage—Execution—Sale—Objection.*

The plaintiffs took objection to the sale held in execution of a decree in a mortgage suit on the ground that the property mortgaged formed part of the estate in which the plaintiffs were interested as co-owners and that they were not made parties to the mortgage suit. The evidence, oral and documentary, proved that the estate was impartible, and the revenue records, settlement proceedings and judicial decisions showed that the mortgagor or his lineal ancestors were each the sole proprietor. *Held*: the estate was impartible and the objection therefore could not be allowed, as the members other than the owner of the impartible estate have no manner of interest in the estate and were consequently not necessary parties to the mortgage suit.

[P. 332, C. 2.]

(c) *Civil P. C. Ss. 21, 11 — Question of jurisdiction raised and decided—Decision is final and cannot be re-opened collaterally—Jurisdiction.*

Jurisdiction may be defined as the power and authority conferred on a court to pronounce the sentence of the law or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the court for decision, and authorised by law to be the subject of investigation or action by that court, and in favour of or against persons who present themselves, or who are brought before the court in some manner sanctioned by law.

[P. 333, C. 2.]

Where, in a mortgage suit the defendant raised a plea that the court had no jurisdiction, but did not bring to the notice of the Court S. 5 of Bengal Regulation III of 1872 which also barred the jurisdiction of the court, and the question was decided against the defendant *held* that the court had jurisdiction to decide whether it has jurisdiction to entertain the suit, and that its decision on the point is final and conclusive in all collateral enquiries.

[P. 333, C. 2.]

Where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then, if he does not bring that fact forward but allows the court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding.

[P. 334, C. 1.]

Hasan Imam, N.C. Sinha, Ranjit Sinha, Juggernath Prasad, A. Sen and *N.C. Ghosh* —for Appellants.

S. P. Sen, S. M. Mullick, S. M. Das and *N. C. Roy*—for Respondents.

Das, J.—On the 14th August 1895, one Thakur Barham, in consideration of a large sum of money then due by him to the defendants and of a present advance of Rs. 3,959-7-3, executed a bond in favour of the defendants by which he agreed to pay to the defendants the sum of Rs. 1,25,000 with interest thereon at 13 annas per cent. per month, and secured this sum by a mortgage in their favour of an eight annas of Tappa Patsunda in the Santal Pargana and an eight annas of Milik Kosapet Amdar in Bhagalpur.

On the 15th September 1900, the defendants commenced a suit against Thakur Barham in the Court of the Subordinate Judge of Bhagalpur, to enforce the mortgage of the 14th August 1895, and on the 8th September 1902, recovered a mortgage decree as against Thakur Barham for Rs. 2,57,600 Thakur Barham appealed to the Calcutta High Court and, as a condition for stay of execution pending the disposal of the appeal, gave as further security another 2 annas of Patsunda. On the 16th December 1903, the Calcutta High Court dismissed the appeal of Thakur Barham. The defendants then commenced execution proceedings, and, on the 5th October 1904, purchased the 10 annas of Patsunda and 8 annas of Kosapat at a Judicial sale held in execution of their mortgage decree.

The sale was duly confirmed, and, on the 21st December 1904, the defendants obtained delivery of possession of the properties purchased by them. Thakur Barham died on the 7th September 1905; and on the 7th April 1916, the plaintiffs who claim to have had a joint interest with Thakur Barham in all the properties that stood recorded in the name of Thakur Barham including the mortgaged properties, instituted the suit out of which this appeal arises for redemption of the mortgage of the 14th August 1895, and, in the alternative for possession. The learned Subordinate Judge agreeing with the contentions put forward on behalf of the plaintiffs, has given them a decree for possession.

The case of the plaintiffs, as made in the plaint, is a simple one. They contend that they were joint with Thakur Barham and that the proceedings taken by the defendants against Thakur Barham cannot affect their right to redeem the mortgage. They also contend that, Tappa Patsunda, being situate within the Santal Paraganas, the Bhagalpur

Court had no jurisdiction to entertain the suit or to sell the mortgaged properties. They accordingly ask for a decree for redemption and in the alternative, for a decree for possession with mesne profits. The defendants, in their written statement, rely upon the admitted fact that there was a settlement of the Santal Parganas including Tappa Patsunda in 1905, and they contend that the present suit is barred by certain provisions of Regulation III of 1872. On the merits they say that the properties dealt with by Thakur Barham formed part of his impartible *zemindari* and that the plaintiffs were not necessary parties to the mortgage action and have no right to redeem the mortgage. They also challenge the contention of the plaintiffs that the Bhagalpur Court has no jurisdiction to entertain the mortgage action.

The learned Subordinate Judge framed twenty-nine issues for trial between the parties; but, in my opinion, the questions that arise in the case are three in number, 1st, is the suit maintainable in view of Sections 11 and 25A of Regulation III of 1872; secondly, had the Bhagalpur Court jurisdiction to entertain the mortgage action; and lastly, was the *zemindari* of which Thakur Barham was in possession, an impartible *zemindari* and, if so, have the plaintiffs, in the events which have happened, any right to redeem the mortgage. The learned Subordinate Judge has decided all these questions in favour of the plaintiffs and has given them a decree for possession.

I will first consider the question whether the present suit is maintainable in view of Section 11 and Section 25 A of Regulation III of 1872. In order to appreciate the arguments which have been advanced to us on the point, it is necessary to remember that there was a settlement of the Santal Parganas including Tappa Patsunda under the provisions of Regulation III of 1872 between 1903 and 1905, and that, in that settlement, known as McPherson's settlement, the defendants were recorded as owners of Tappa Patsunda. The certificates of publication of the Record-of-Rights were granted on various dates in May and June 1905, and it is alleged by the defendants that they were duly published in the villages in accordance with the rules laid down in the Regulation.

On the 23rd May 1905, Gaja Barham for self and as guardian of the minors Nitia Nand and Pram Nand, Balbhaddar Barham, and Jai Kisshun Barham, presented a petition of objection in the Court of the Settlement Officer of Dumka in which they contended that Tappa Patsunda was the ancestral property of the objectors and that they had a right to get their respective names recorded in the settlement department in respect of 10 annas 8 pies share. Although Jai Barham's name does not appear in the petition of objection as printed in the paper book, it is clear from Mr. Allanson's order dated the 24th June 1905, that he was a party to the proceedings.

It will be noticed, therefore, that all the present plaintiffs were represented in the petition of objection which was rejected by Mr. Allanson, who succeeded Mr. McPherson as the Settlement Officer on the 24th June 1905. The learned Subordinate Judge says that this petition was filed before the completion of the record of rights. This is wrong. It was actually filed after the publication of the record-of-rights in respect of two hundred villages, and the decision of Mr. Allanson was pronounced after the publication of the record-of-rights in respect of the remaining villages.

On these facts it was argued that, in view of Section 11 and Section 25A of the Regulation, the present suit is not maintainable. Section 11 of the Regulation provides as follows: "Except as provided in Section 25A, no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules, but the decision and orders of the Settlement Courts made under these rules, regarding the interests and rights above mentioned, shall have the force of a decree of Court."

Section 25A provides as follows "where only the rights of *zemindars* and other proprietors as between themselves are concerned, a suit may, unless it is barred by Section 11 of the Code of Civil Procedure, be brought in a Court established under the Bengal, Agra and Assam Civil

Courts Act, 1887, to contest the finding or record of the settlement officer within three years from the date of the publication of the record-of-rights, or of the final order of the Revenue Court. But no such suit shall be brought in any court after the expiration of three years from such and such date. If any in such suit it is found that the finding of the settlement officer is erroneous, the record shall be amended accordingly."

It was contended on behalf of the defendants that the question in controversy between the parties was decided by the settlement officer in favour of the defendants and that Section 11 of the Regulation operates as a bar to the suit. The plaintiffs replied that the rights involved in this suit fell within the class of rights mentioned in Section 25 A of the Regulation and that the present case therefore falls within the exception and not the prohibition of Section 11.

The defendants retorted that even then the suit is barred by limitation as it has been brought after the expiration of three years from the date of the publication of the record-of-rights.

Speaking with great respect, I think there has always been some confusion as regards the applicability of Section 11 and Section 25 A of the Regulation. It was argued as though, when the rights of *zemindars* and other proprietors as between themselves are concerned, the prohibition contained in Section 11 does not operate. I read the sections somewhat differently.

In my opinion section 11 bars every suit regarding any matter decided by any settlement court, except such suits as are brought to contest the finding of record of the settlement officer where only the rights of *zamindars* or other proprietors as between themselves are concerned provided they are brought within three years from the date of the publication of the record of rights. Section 11 provides that every decision and order of the settlement officer regarding the interests and rights of the parties shall have the force of a decree.

Section 25 A provides a procedure for avoiding the decree only when the question in controversy between the parties involves the determination of the rights of the *zemindars* or other proprietors as between themselves. When the question in controversy between the parties does not involve the determination of such rights, the decree under section 11 cannot be avoided by a suit under section 25A; but when the question in controversy does involve the determination of such rights, the decree under section 11 can be avoided by a suit under section 25 A.

In my opinion, section 11 operates in every case to give to every decision and order of the settlement courts the force of a decree, and section 25A enables a party affected by such decisions and orders to sue for setting aside such decisions and orders provided the rights decided fall within the class of rights mentioned in section 25A. I have no doubt whatever as to the rights of the parties under the Regulation. Under section 14, the settlement officer has to give due notice to the people of a village for which he is about to prepare a record-of-rights, so that all persons interested may bring forward their claims either in writing or by verbal application, and he has to enquire into, settle and record all rights in, or claims to, the lands of a village of which he is preparing a record of rights, even though such claims or rights may not be urged by the parties interested.

The parties, then, have an opportunity of representing their views to the settlement officer in the course of such enquiry and his decisions thereon are decisions within the meaning of S. 11 and operate as decrees of Court, and the only way in which such decrees may be avoided is by a suit under S. 25 A, provided the decision affects the rights of *zemindars* and other proprietors as between themselves. But the settlement officer may himself set aside the decision in an appropriate proceeding under Section 24 of the Act which makes it obligatory on the settlement officer, after he shall have made the record-of-rights for any village, to notify and publish the contents of such record to the persons interested by posting it conspicuously in the village and otherwise in such manner as may be convenient and which enables any person interested to bring forward in the settlement courts within a period of six months from the date of publication of such record-of-rights, any objection he may desire to make to any part of such record.

The Section provides that any objection so made shall be enquired into and dis-

posed of by a decision in writing under the hand of the officer presiding in the Court. The decision arrived at under Section 24 is again a decision within the meaning of section 11 and operates as a decree of Court, and the only way again in which such a decree can be avoided is again by a suit under Section 25A, provided the decision affects the rights of *zamindars* and other proprietors as between themselves. Section 25 provides that after a period of six months from the date of the publication of the record-of-rights of any village, such record shall be conclusive proof of the rights and customs therein recorded, other than the rights mentioned in Section 25 A, except so far as concerns entries in such record regarding which objection by parties interested may still be pending in the original or appellate Court, or may still be open to appeal.

It follows from this provision that where the rights dealt with in the settlement proceeding are such rights as are mentioned in Section 25 A, the record-of-rights cannot be relied on as a bar to a suit which asserts a right contrary to the entry in the record-of-rights, or Section 25. It is quite clear that the record-of-rights is not conclusive proof of the rights mentioned in Section 25 A. But the decision which is the basis of the record-of-rights constitutes a bar to the suit under Section 11; A distinction has been drawn in the Regulation between "the decision and orders" of the settlement court and the record-of-rights.

The decision and orders have the force of a decree of court, whereas the record-of-rights is conclusive proof of the rights and customs therein recorded, other than the rights mentioned in Section 25 A. In my opinion, when, in any suit, we are concerned with such rights as are mentioned in Section 25 A, and a decision of the settlement court is pleaded as a bar to the suit, all that we have to see is whether there is such a decision as is alleged by the defendants, and it is wholly immaterial to enquire whether the record-of-rights was published in accordance with law.

Now the defendants have been recorded in the record-of-rights as the proprietors of Tappa Patsunda. The question was, as we have seen, directly raised by the plaintiffs before the settlement officer by their petition Ex. C, dated the 25th May 1905. The Settlement Officer directly decided the question against the plaintiffs by his order Ex. F. F. dated the 24th June 1905. In my opinion that order operated as a decree between the parties under Section 11 of the Regulation. It is conceded that the rights decided by the settlement officer fell within the class of rights mentioned in Section 25 A of the Regulation.

It must therefore follow that the plaintiffs had the right to contest the finding of the settlement officer, provided they brought their suit within three years from the date of the publication of the record-of-rights. Is the present suit, then, a suit to contest the finding or record of the Settlement Officer?

In my opinion, it is not. It is sufficient to refer to the plaint to make good the point, that the suit is not a suit to contest the finding or record of the settlement officer. There is not a word about the finding or record of the settlement officer in the plaint, and there is nothing in the plaint, which either expressly or by necessary implication invites the Court to set aside such finding or record.

In my view the present suit cannot be regarded as a suit under Section 25A of the Regulation, and, there being no challenge of the order of the settlement officer dated the 24th June 1905 that order operates as a bar to the present suit.

The learned Subordinate Judge was of opinion that the decision of a settlement court does not operate as a decree under Section 11 of the Regulation, unless there is proof of the publication of the record-of-rights. I have dealt with this point, and all that I need say is that I am unable to concur in this view. It is impossible, in my opinion, to escape from the provision of Section 11 that the decision and orders of the settlement courts shall have the force of a decree of court. There is nothing in the language employed by the Legislature in Section 11 to suggest that they shall have the force of a decree only on proof of the publication of the record-of-rights.

It was argued before us that the nature of a defence under Section 11 is substantially equivalent to a plea of *res judicata*, and that

it was for the defendants to establish the decree upon which they relied as operating as *resjudicata*, and reliance was placed upon *Nadiar Chand Singh* v. *Chunder Sikhur Sadhu* (1) I quite agree that it is for the defendants to establish the decree upon which they rely but what is the decree under Section 11? Not the record-of-rights, but the decisions and orders of the settlement courts.

It was then argued that the plaintiffs could not be expected to bring a suit to contest the finding or record of the settlement officer, since they do not admit that there is a record-of-rights relating to these lands. The argument completely ignores the provisions of Section 25-A which gives a party the right to contest not only the record but also the finding of the settlement officer; and it is conceded that the plaintiffs were aware of the finding of the settlement officer contained in the order dated the 24th June 1905.

It was open to the plaintiffs to sue for setting aside that finding, but this course they did not adopt. In my opinion the decision of the 24th June 1905 constitutes a complete bar to the suit under Section 11 of the Regulation.

I will now deal with the question whether the record-of-rights was published in accordance with law. In other words I will assume that the suit is one under Section 25A, and enquire whether it has been brought within three years from the date of the publication of the record-of-rights.

In my opinion, the defendants have established that there was due publication of the record-of-rights in May and June 1905. The present suit, regarded as a suit under Section 25 A, is clearly barred by limitation.

My decision on this point is sufficient to dispose of the appeal; but I think it just as well that I should deal with the other two points which have been argued before us. First, I will deal with the question of impartibility, as to which the *onus* is undoubtedly on the defendants. That the family is an ancient and a noble one admits of no doubt whatever. The history of the family will be found at page 244 of the District Gazetteer, Santal Parganas. It appears that one Deb Barm a Khetaur Chief of Kharagpur, being driven out of that tract by the Rajput invaders, obtained a grant of Patsunda and Barkop from the Moghul Viceroy of Emperor Akbar.

In 1687 the estate was divided between two of his descendants, Man Barm and Chandra Barm, Man Barm retaining Barkop, while Patsunda was handed over to his younger brother Chandra Barm. Thakur Barm is the lineal descendant of Chandra Barm. We have no authentic history of the mode of succession from Chandra Barm to Sital Barm, Sital had three sons, Fateh Barm Dowlat Barm and Ratan Barm. Permanent settlement was admittedly concluded with Fateh Barm. Fateh Barm died in January 1811 and was succeeded by his only son Tej Barm. Tej Barm died on the 30th January in 1848, leaving four sons, Tilak, Kirat, Rudar and Lachman, of whom the eldest Tilak was recorded in the Government records as the owner of the property. Thakur Barm was the only son of Tilak, and succeeded him to the exclusion of his uncles.

In my opinion, the admitted history of the family makes the case of the defendants inherently probable. The founder of the family was a Khetauri Chief who, no doubt, in return for such services as he was able to render to the Moghul, secured a grant of an extensive tract of land from the Moghul. It is permissible to infer that that which he secured as a Chief, he intended to retain as a Chief.

The next important event is the succession of Fateh Barm to the estate and the fact that permanent settlement was concluded with Fateh Barm to the exclusion of his brothers. It is admitted by the plaintiffs that Fateh Barm had two brothers, Dowlat and Ratan; but Tulsi Jha, the first witness examined on behalf of the plaintiffs says that they died minors during their father's life.time, though, in cross-examination he admits that his evidence on the point is hearsay.

The learned Subordinate Judge says that the evidence of the plaintiffs shows that the two brothers "died during the life time of their father and that they left no heirs." This is wrong. There is no evidence on the side of the plaintiffs that they left no heirs. The defendants have given evidence that Dowlat and Ratan left sons whose descendants are still in

(1) (1888) 15 Cal. 765.

existence; but the evidence on this point is weak, and I am not prepared to differ from the learned Subordinate Judge on this point. The fact that the permanent settlement was concluded with Fateh Barm is therefore not conclusive.

The succession of Tej Barm calls for no comment since he was the only son of his father. Tej Barm however left four sons, Tilak, Kirat, Rudra and Lachman. On the 16th November 1848, Tilak applied for registration of his name in the Government record and asserted that, though his father had left three other sons, he alone was entitled to have his name recorded as the malik of the *zemin laris* and household goods left by his father.

It is necessary to quote the exact language employed by Tilak in making the application. "According to the custom of the family and under Act X of 1800", he asserted, "your petitioner has been in possession and occupation of all the properties left by his father, considering them to be the Jungle *tari Mahals*, and has been paying the Government Revenue for the same. It is apparent that on the death of a father, his eldest son becomes the malik of all the *zemindaris* and household goods left by him, has a right to pass orders, and maintain his brothers and other heirs of the deceased".

The learned Subordinate Judge says that the word "*malik*" means a manager, and that the petition Ex. 5, read as a whole, shows that the estate was a joint concern and that after the death of Tej Barm his sons become equal coparceners therein". It may be assumed that the estate was the family property of a joint undivided family in the sense that it had never been divided and that the succession thereto would be governed by the rules of survivorship obtaining in a joint Mitakshara Hindu family; but an estate may be the family property of a joint undivided family, and yet be impartible.

There is, however, nothing in the petition to suggest that the brothers of Tilak were equal co-parceners with him in the estate. On the contrary, there is an assertion, clear and unequivocal that Tilak was in possession and occupation of all the properties left by his father to the exclusion of his brothers and that he alone was entitled to have his name recorded in the Government records as the proprietor of the estate. The reference to Regulation X of 1800 puts the matter beyond all reasonable doubt. But under Regulation XI of 1793, the estates of proprietors of land dying intestate were declared liable to be divided among the heirs of the deceased agreeably to the Hindu or Muhammedan Law.

But a custom having been found to prevail in the Jungle Mahals of Midnapore and other districts by which the succession to the landed estates invariably devolved to a single heir without the division of the property, it became necessary for the Governor-General in Council to pass a Regulation to save such customs from the operation of Regulation XI of 1793 Regulation X of 1800 was accordingly passed, and it provided that Regulation XI of 1793 shall not be considered " to supersede or affect any established usage which may have obtained in the Jungle Mahals of Midnapore and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir, to the exclusion of the other heirs of the deceased", and that "in the *mahals* in question the local custom of the country shall be continued in full force, as heretofore".

The assertion of Tilak Barm in the petition was that he was in possession and occupation of all the properties left by his father to the exclusion of his brothers according to the custom of the family and under Regulation X of 1800. This is, in my opinion, equivalent to an assertion that the estate which belonged to his father, was an impartible estate, and had devolved on him as a single heir of his father.

This application was disposed of by a *Rubakari* of the Collectorate, Ex. T. T. dated the 16th Jan, 1849. The *rubakari* shows that notices of the application were duly issued, that there was no opposition from anybody, that the petitioner examined three witnesses who gave evidence to the effect that Tilak Barm had succeeded to the estate according to family custom and that his brothers were in receipt of maintenance from him and that the Court directed the name of Tilak Barm to be recorded in the Government *Sherista* Exhibit 8 and Exhibit

T. T. in my opinion, strongly support the case of the defendants.

In September 1862 Tilak died, leaving three brothers and a son, Thakur Barm. If the property left by him was partible property, then Kirat Barm, as the eldest male member of the family, would be entitled to take up the management of the estate. But, as a matter of fact Thakur Barm, on the 14th January 1863 applied to have his name recorded in the Government *sherista* in respect of the zemindari which stood recorded in his father's name. He asserted in his petition, Ex. UU, that his father had died leaving him as his only heir, and that he had taken possession of the estate of the deceased. He asked that the witnesses named by him might be examined in support of the case and his name duly recorded in the Government *sherista*.

Notices of this application were apparently served on the brothers of Tilak, and Rooder Barm, one of the brothers of Tilak, promptly presented a petition of objection on the 27th February 1863. In this petition, Exhibit 8, he alleged that on the death of Tej Barm, all his sons came into possession of his estate, although the name of Tilak was recorded in the Government *sherista*. According to him, the custom of the family was that "all the brothers unanimously get the name of one of them registered in the Government *sherista* and the costs of maintenance, marriages and deaths, all the expenses of the three brothers are jointly defrayed from the usufruct of the said estate after the payment of Government revenue."

There was thus a direct challenge upon the title of Thakur Barm and on his right to have his name recorded in the Government *sherista* in respect of the zemindari. Thakur Barm replied to this petiton by his petition Exhibit 8(a), dated the 26th March 1863. In this petition he asserted that his father Tilak Barm had succeeded to the estate according to the custom of the family and under the provisions of Regulation X of 1800, under which the eldest sonbecomes proprietor of all the properties left by his deceased father, and that the objection petition of Rooder Barm was not tenable inasmuch as he had accepted the petition on which Tilak Barm had succeeded in having his own name recorded. On the question of maintenance as to which his petition of the 14th January 1863 was silent and of which Rooder Barm had made a grievance, he said that he had not deprived Rooder of maintenance and that he was in receipt of it.

It is impossible to escape from the conclusion that there is, in this petition Exhibit 8(a), a definite assertion that the estate was an impartible one and that he had succeeded to it as the sole owner, subject only to the right of his uncles to receive maintenance from him. This position was accepted by the uncles of Thakur Barm, as the fifth paragraph of the petition, and statement signed by Rooder Barm at the foot of the petition, conclusively establish. That statement was as follows:—

"As Thakur Barm, the petitioner, has accepted the terms of the petition, dated the 16th November 1848, filed by Tilak Barm, upon which depended the proof of the allegations, contained in the objection petition in respect of the costs of maintenance, and of marriages and deaths, and has stated everything in this petition according to the custom prevailing in the family, I accept the contents of this petition and have no objection to the name of the petitioner being registered".

I regard the petition of Thakur Barm, dated the 26th March 1863 and the statement signed by Rooder Barm at the foot of the petition as wholly destructive of the case of the plaintiffs. As I have said before, there is a definite assertion in the petition that according to the family custom and under the provisions of Regulation X of 1800, the eldest son becomes the proprietor of all the properties left by his deceased father. Rooder Barm in his statement at the foot of the petition says that Thakur Barm "has stated everything in this petition according to the custom prevailing in the family", and he accepts the contents of Thakur Barm's petition. From his statement it would appear that his object in opposing the application of Thakur Barm was to get an admission from him as to his right of maintenance.

There was that admission in the petition of Tilak Barm, and his brothers did not oppose his application. There was no such admission in the petition of Thakur Barm dated the 14th January 1863, and there was a prompt challenge upon his title. But in the

petition of the 26th March 1863, Thakur Barm made it quite clear that he did not intend to repudiate the position adopted by his father, and they at once admitted the validity of the family custom which was the basis of Thakur Barm's claim. The learned Subordinate Judge says that the transaction does not show that the parties considered the estate to be impartible and that the estate was in fact recognised by them as joint.

The learned Subordinate Judge is obviously under the impression that an assertion, that an estate is the family property of an undivided family, carried with it an admission that it is not an impartible estate. This is of course an erroneous view. I regard the documents in connection with Thakur Barm's succession to the estate as strong evidence in support of the defendants' case that the estate is in fact an impartible one.

In 1878, the estate was brought under the settlement operation which took place in pursuance of Regulation III of 1872, and Thakur Barm was recorded as the proprietor of the estate. It is argued by the defendants that, had the plaintiffs any proprietary interest in the estate, they would undoubtedly have been recorded in the record-of-rights to the extent of their interest in the estate.

The learned Subordinate Judge dismissed the argument as wholly inadmissible. According to him, as the name of Thakur Barm stood recorded in the Government records as the proprietor of the estate, it is only natural that his name should be recorded in the record-of-rights. He also thought that the record-of-rights "was in consonance with the conception of joint Hindu family".

The argument employed by the learned Subordinate Judge completely overlooks the policy of the legislature enacting Regulation III of 1872 which was, as the learned Judges in *Januki Persad Jha* v. *Babu Lal Jha*, (2) pointed out, "to have a complete record of-rights and interests in land in the Sontal Pargannas and to exclude the jurisdiction of Civil Courts except in certain matters".

Section 12 of the Regulation empowers the settlement officers to enquire into, to decide, and to record the right of the zamindars and other proprietors, and Section 13 lays down that the record-of-rights to be prepared by a settlement officer shall show the nature and incidents of each right and interest held by each class of occupiers or owners in village, or, if need be, of each individual owner, occupier or headman in a village.

Section 14 requires the settlement officer to enquire into, settle, and record, all rights in, or claims to, the lands of a village of which he is preparing a record-of-rights even though such claims or rights may not be urged by the parties. The Regulation, in my opinion, gives no scope for the argument that the members of a joint family may allow the name of the *karta* to be recorded in the record-of-rights and yet claim to have an interest in the estate.

The case just cited makes interesting reading. One Jovram died leaving three sons, Babu Lal, Surjee and Dinabandhu. Surjee died in 1308, leaving four sons, who were the plaintiffs in the action. Their case was that the family properties remained in charge of their uncles, defendants 1 and 2 and they claimed a partition of the joint family properties. But the defendant No. 1 was recorded in the settlement records as the proprietor of the estate, and he took the plea that the suit was barred under Section 25 A of the Regulation which, as we have already seen, enables a party prejudiced by the record-of-rights to bring a suit to contest the record within three years of the date of the publication of the record-of-rights and which lays down that no such suit shall be brought after the expiration of three years from that date. The Court gave effect to the plea and dismissed the plaintiff's suit as regards properties in Sontal Parganas. The decision is an authority for the view that the record-of-rights framed under Regulation III of 1872 operates as between members of a joint Hindu family just as completely as between strangers. In my opinion, it is impossible to take the view that the entry in the record-of-rights, to quote the language of the learned Subordinate Judge, "was in consonance with the conception of a joint Hindu family".

The defendants have also relied upon a series of transactions into which Thakur Barm entered, by which he

(2) (1915) 19 C.W.N. 499=28 I.C. 241.

dealt with the estate as the sole owner thereof. The first is a statement, Exhibit M, made by Thakur Barm to Babu Surya Narain Singh in the course of a negotiation for a loan. He asserted that he was the sole proprietor of the entire 16 annas of Tappa Patsunda. The next in point of time is Exhibit O, the bond executed by Thakur Barm in favour of the defendants on 26th *Kartic* 1300, and the last is Exhibit DD. the bond executed by Thakur Barm in favour of the defendants on 30th *Sawan* 1302.

In each of these documents he asserted his sole and exclusive title to the sixteen annas of Tappa Patsunda. It was the last mentioned transaction that formed the basis of the mortgage suit brought by the defendants against Thakur Barm, and there is evidence that Gaju Barm, the father of the plaintiffs 3 and 4 was aware of the mortgage decree that had been passed against Thakur Barm and that he was actually negotiating for a loan to pay off the defendants. That evidence will be found in the orders, dated the 28th April 1904 and 25th July 1904, respectively, of the Court executing the decree against Thakur Barm, in Exhibit 9, the affidavit of one Pheku Lal and Exhibit H, the deposition of Pheku Lal in those proceedings.

It appears that about the time when the Court was about to pass orders for the sale of the mortgaged properties, an application was filed for adjournment of the sale on the ground that the judgment-debtor was negotiating for a loan by which he proposed to pay off the decree-holders. The deposition of Pheku Lal in those proceedings makes it perfectly clear that Gaju Barm was one of the persons who was acting on behalf of Thakur Barm. Now it may be asked why Gaju Barm should make any endeavour to have the defendants' mortgage satisfied if in point of fact that mortgage conveyed no interest to the defendants?

If indeed Thakur Barm were not the sole proprietor of the properties mortgaged, the mortgage decree obtained by the defendants could not affect the interest of Gaju Barm, and one would not expect Gaju Barm to make a tour of the banking houses in order to raise a loan on behalf of Thakur Barm. Gaju Barm in my opinion, had no doubt that Thakur Barm was the sole proprietor of the estate which was an impartible one.

Then there is a clear admission by ***Mussammat*** Kalabati, one of the plaintiffs in the action that " the estate Patsunda is an impartible estate and is placed in the hands of a single member who manages the property for the time being ", see Exhibit Y, the petition dated the 1st of June 1906. Then there is some evidence of conduct in regard to Jai Kissen, another plaintiff in the present action, showing that, so far as he is concerned, he believed in the custom of primogeniture.

Exhibit MM4 shows that Jai Kissen claimed a ***khorposh*** grant during the settlement proceedings, a claim which was disallowed by the settlement officer. Now in my opinion an assertion that a person has a ***khorposh*** grant in the estate carries with it the admission that he has no proprietary interest in the estate; for, if the estate were an ordinary partible estate he would undoubtedly have a proprietary interest in it. (Here the learned Judge deals with the oral evidence which is all in favour of the defendants.) It remains for me to consider the only piece of evidence on which the plaintiffs rely. It is pointed out that in 1687 the estate then consisting of Barkop and Patsunda was divided between two of the descendants of the original founder of the family, and it is argued that the partition which admittedly took place in 1687 completely destroys the custom upon which the defendants rely.

I am unable to agree with this contention. There are numerous instances to be found in the Law Reports where separate estates have been formed by the division of one entire estate; but it has never been held that that is a circumstance which decides the issue in favour of partibility. We do not know the circumstances unbu twhich the division took place in 1687; der we do know that there never has been a partition since 1687 and that, to quote the language of Bolaki Das, "the eldest son of the eldest branch bcomes the Raja, and this has all along been the family custom". I have considered all the evidence on this issue

with great anxiety, and I have come to the conclusion that the defendants have established their case that the estate which was in the possession of Thakur Barm is an impartible one.

It was argued by Mr. Mullick on behalf of the respondents that, even assuming that the estate in the hands of Thakur Barm was as impartible one, the plaintiffs have sufficient interest in it to challenge the validity of the mortgage executed by Thakur Barm in favour of the defendants, and, as a last resort, to redeem the mortgage. Now it is quite true that the impartibility of the estate did not destroy its nature as joint family property nor rendered it the separate property of the last holder, unless there was something equivalent to partition which, I am satisfied, there was not.

But what are the rights of the members of the joint family other than the holder of the estate ? If this case were argued before the decision of the Judicial Committee in *Sartaj Kuar* v. *Deoraj Kuari* (3) Mr. Mullick's argument would be conclusive ; but, in that case, it was held that the property in the paternal or ancestral estate acquired by birth under the Mitakshara Law is so connected with the right to a partition that it does not exist when there is no right to it. Mr. Mullick then argues that the decision in Sartaj Kuar's case has been misunderstood by the Courts and that the Judicial Committee in *Baijnath Prasad* v. *Tejbali Singh* (4) has explained that decision.

In dealing with Sartaj Kuar's case, the Judicial Committee in Baijnath Prasad's case, said as follows: "Now what was decided was that in an impartible Raj there was no restriction on the power of alienation by the member of the family who was on the *gaddi* and was in possession, in respect that there was no such right of coownership in the other members so as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right. The chance each member might have of a succession emerging in his favour was obviously outside the sphere of enquiry".

It was argued, on this passage, that, though there is no right in the other members to prevent alienation during the lifetime of the holder making the alienation, that right comes into existence on the death of the holder. I am unable to see that the decision in Baijnath Prasad's case gives any support to the argument. The question involved in Baijnath's case was one of succession, and it was argued on behalf of the appellants on the basis of what was said in Sartaj Kuar's case that there was no coparcenary which would give the succession to the respondent. Their Lordships pointed out that Sartaj Kuer's case decided no question of succession but that it considered the rights of the other members "as a presently existing right".

In my opinion, the argument is an impossible one , having regard not only to Sartaj Kuar's case but also to Pittapur case *Venkata Surya Mahipati* v. *Court of Wards* (5). I hold that the plaintiffs had no interest in the mortgaged properties at the time of the mortgage and were not necessary parties to the mortgage action and cannot be allowed, in this action to redeem the mortgage.

The only other question left for determination is whether the Bhagalpur Court had jurisdiction to entertain the mortgage action brought by the defendants against Thakur Barm. The matter in dispute is that suit exceeded the value of Rs. 1,000, and the Civil Procedure Code was therefore applicable ; see *Maha Prasad Singh* v. *Ramani Mohan Singh* (6). Section 19 of the Civi lProcedure Code (Act XIV of 1882) provided that "if the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate".

The plaintiffs in their plaint alleged that one of the properties mortgaged was situate within the jurisdiction of the Subordinate Judge of Bhagalpur. This was not disputed by Thakur Barm in his written statement, but he asserted, in the second paragraph of his written statement that the suit was "not fit to be entertained" by the Bhagalpur Court, and that "it should have been instituted in the

(3) (1888) 10 A. 272=15 I. A. 51= 5 Sar. 139 (P.C.)

(4) A.I.R. 1921 P.C. 6=45 Bom. 718 =48 I.A. 181 (P.C.)

(5) (1899) 22 Mad. 383=26 I A 83= 9 M.L.J. Sup. 1=7 Sar. 481 (P.C.).

(6) A.I.R. 1914 P.C. 140=42 Cal. 116 =41 I.A. 197 (P.C.)

Court of the Sub-divisional Officer of Godda having power of a Sub-Judge".

In the third paragraph, he gave his reasons for his assertion that the Bhagalpur Court had no jurisdiction to try the suit. According to him the Civil Procedure Code was not "effective" in the Santal Pargana, and as one of the properties mortgaged was situate in the Santal Parganna, the Bhagalpur Court had no jurisdiction to try the suit. In the fifth paragraph of the written statement, he contended, without giving any reason therefor, that the Bhagalpur Court could not, in any circumstances, pass a decree so as to affect the property situate in the Santal Pargana. At the hearing of the suit, the defendant did not appear; and the learned Subordinate Judge came to the conclusion, on the pleadings, that he had complete jurisdiction to try the suit.

On appeal to the Calcutta High Court, it was pressed on behalf of Thakur Barm that the decision of the Subordinate Judge as to his jurisdiction to entertain the suit was erroneous. The question was again argued on the pleadings, and the High Court rejected the argument which was advanced on behalf of Thakur Barm. The direct attack on the jurisdiction of the Bhagalpur Court has accordingly failed. It has now been made the subject of a collateral impeachment in this suit.

As I have said before, the Bhagalpur Court had, under the Civil Procedure, general jurisdiction to try the suit; but the plaintiffs rely upon Section 5 of the Regulation III of 1872 which provided as follows: "Till such time as a settlement of the whole or any part of the Santal Pargana shall be made under the rules hereinafter provided, and the said settlement shall be declared by Notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land or any interest in or arising out of any land or for the rents and profits of any land except as hereinafter provided; but such suit shall be heard and determined by the officer appointed by the Lieutenant Governor of Bengal under Section 2 of the said Act 37 of 1855 or by the settlement officers here-in-after mentioned, according as the said Lieutenant-Governor from time to time direct." This is followed by a proviso which does not affect the present case.

The first settlement of the Santal Parganas known as the Woods Settlement began in 1875 and was in fact concluded in 1879. The next Settlement known as McPherson's Settlement began in 1903. The mortgage suit was instituted in the Bhagalpur Court on the 17th of September 1900. But though the first settlement was concluded in 1879, by a strange omission on the part of the authorities, no notification has yet been issued declaring the settlement to have been completed and concluded. It follows, therefore, that, in the special circumstances of the case, the Bhagalpur Court had no jurisdiction to try and determine the suit.

The question now arises, whether the jurisdiction of the Court to entertain the mortgage action can now be impeached in this suit. Jurisdiction may be defined as the power and authority conferred on a Court to pronounce the sentence of the law or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the Court for decision and authorised by law to be the subject of investigation or action by that Court, and in favour of; or against, persons who present themselves, or who are brought before the Court in some manner sanctioned by law as proper and sufficient. See Black on Jurisdiction, Section 215.

The rule is well established, that when the want of jurisdiction of a Court is apparent on the face of the record, any judgment rendered by such a Court is null and void, incapable of ratification and subject to collateral impeachment. But it is equally well established that the Court has jurisdiction to decide whether it has jurisdiction to entertain the suit, and that the decision of the Court that it has jurisdiction is final and conclusive in all collateral enquiries.

In this case, the question of jurisdiction was distinctly raised by Thakur Barm. The Court decided that it had jurisdiction to entertain the suit. That decision was made the subject of a direct attack in the High Court. The High Court upheld the decision of the Subordinate Judge. That decision should, on ordinary principles be regarded as final and conclusive so far as this suit is

concerned.

But it was argued by Mr. Mullick, on behalf of the Plaintiffs that the question was not raised in the form in which the Plaintiffs have raised it in this suit. The basis of this argument is that Section V of the Regulation was not specially pleaded as having ousted the jurisdiction of the Civil Court.

It is true that there is no reference to Section V of the Regulation in the written statement, but Thakur Barm did contend that, under no circumstances had the Court any power to affect the property situate in the Santal Parganna by its decision. In my opinion the question was raised and finally decided and that decision is not open to impeachment in this suit.

But if the question was not, in fact, raised, the plaintiffs are in no better position. As I have said before, but for the fact that the authorities forgot to issue a notification declaring the settlement to have been completed and concluded the Bhagalpur Court had complete jurisdiction to try and dispose of the suit. The absence of jurisdiction in the Bhagalpur Court therefore, depended on a fact which had to be proved, like any other fact in the case.

In my opinion, when there is no want of jurisdiction in the Court, to try a suit, that is to say, when the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact, in the knowledge of the party which he had an opportunity of bringing forward in the Court, then, if he does not bring that fact forward but allows the Court to proceed with the judgment, he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding.

The question has often been debated in England in connection with the grant of a writ of prohibition, and the distinction between a latent want of jurisdiction, *i.e.* something becoming manifest in the course of the proceedings, and a patent want of jurisdiction, *i.e.* a want of jurisdiction apparent on the face of the proceedings was pointed out by Lopes, L. J., in *Farquharson* v. *Morgan* (7).

(7) (1894) 63 L.J.Q.B. 474=1 Q.B. 552=42 W.R. 306=70 L.T. 152 =9 R. 202=58 J.P. 495.

In my opinion, the Bhagalpur Court had, on the face of the proceedings, complete jurisdiction to try and dispose of the mortgage action and it is not open to the plaintiffs now, in this suit, to impeach that jurisdiction on the ground of the existence of a fact, which fact was never put forward in that suit.

I would allow this appeal, set aside the judgment and decree of the Court below and dismiss the plaintiffs' suit with costs throughout.

This judgment will, by consent of parties, govern F. A. No. 135 of 1919. The suit giving rise to F. A. No. 135 of 1919 will accordingly stand dismissed, but without costs.

Adami, J.—I entirely agree.

Appeal allowed.

A. I. R. 1922 Patna 334.

ADAMI, J.

Durga Singh—1st Party-Petitioner

v.

Amar Dayal Singh—2nd Party-Opposite party.

Cr. Rev. No. 513 of 1921 decided on 14th December 1921, from an order passed by D. C. Palamau, dated 12th August 1921.

Criminal P. C. (1898), S. 125—Order under S. 107—District Magistrate can cancel bond ordered by Sub-Divisional Magistrate but has no jurisdiction to quash proceedings.

Under S. 125, Cr. P Code the District Magistrate or the Deputy Commissioner has jurisdiction to cancel the bond ordered to be executed by a Sub-Divisional Magistrate under S. 107 of the Code. But as his jurisdiction is executive and neither appellate nor revisional he cannot vacate the order passed by the latter as *ultra vires* and quash the proceedings. In such a case he ought to refer it to the High Court. The High Court has power to set aside his order as being without jurisdiction, when the District Magistrate sets aside the order under S. 107 as *ultra vires* and does not merely order the cancellation of the bond.

[P. 336, C. 1, 2.]

Hassan Imam and *Gour Chandra Pal*—for petitioner.

Sultan Ahmad, *S. Dayal* and *B. K. Prasad*—for Opposite Party.

Adami, J.—This is an application to set aside an order passed by the Deputy Commissioner of Palamau, whereby an order passed by the Deputy Magistrate binding down the opposite party under Section 107 of the Code of Criminal Procedure was declared to be void and of no effect.

It appears that the present petitioner obtained a lease of forest rights for a period of seven years from the opposite party and proceeded to work the timber of the forest. A dispute arose between the parties as to various matters but mainly as to the manufacture of charcoal and the danger of setting fire to the forest.

It is the petitioner's case that the opposite party employed men to supervise and that these men used force. It was, therefore, prayed that steps should be taken under Section 107 against the opposite party to bind them down to keep the peace.

The case came before the Sub-divisional Magistrate in charge and he drew up proceedings and called for written statements of the parties and the Court ordered the parties to produce their witnesses. The witnesses were produced on a certain date but an adjournment was asked for and the Sub-divisional Magistrate after placing the witnesses on personal recognisance, allowed an adjournment for four days.

On the 16th of May when the case was to be heard and the witnesses to be examined, the Sub-divisional Magistrate was ill and the next senior Deputy Magistrate took charge of the pending file. He took up this case under Section 107 and tried it himself, and finally passed the order binding down the opposite party under section 107 of the Code of Criminal Procedure to keep the peace for one year.

The opposite party thereupon moved the Deputy Commissioner who, after considering the case on its merits, found that the story put forward by the present petitioner was not altogether to be believed: he also held that at the time the order was passed by the Deputy Magistrate there was no imminent likelihood of a breach of the peace; and thirdly, he considered the question whether the Deputy Magistrate who passed the order under section 107 had jurisdiction.

The point was that the Sub-divisional Magistrate-in-charge had taken cognizance of the case and there had been no order by the Deputy Commissioner for the transfer of the case from the file of the Sub-divisional Magistrate to the file of the Deputy Magistrate. He came to the conclusion that the Deputy Magistrate had acted without jurisdiction. His finding was that,—

"He therefore acted without jurisdiction in this case and under Section 530 where a Magistrate acts without jurisdiction the whole proceeding is void *ab initio*. There has been no trial and the order is void. There is in fact no order for security such as would be enforced in law, and I, therefore, quash the whole proceedings. Party aggrieved should seek his remedy in the Civil Court".

It is to be noticed that there is no order cancelling the bond. Mr. Hassan Imam on behalf of the petitioner argues that the learned Deputy Commissioner had no jurisdiction to pass the order he did. Section 125 of the Code of Criminal Procedure runs as follows:

"The Chief Presidency Magistrate or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace, or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court."

There is no provision in the Criminal Procedure Code allowing an appeal against an order passed under Section 118 requiring a person to execute a bond to keep the peace, and section 125 alone enables a magistrate to deal with orders passed under section 107 and section 118 read together. In the case of an orrder for the execution of a bond

to be of good behaviour, the Code under section 406 allows an appeal. It is to be noticed that Section 125 only allows cancelment of the bond; it says nothing about setting aside proceedings or in any way dealing with the proceedings which have led to the order for the execution of a bond. In fact the order passed under Section 125 is an executive order.

It has been held in the case of *Dayanath Thakur* v. *Emperor* (1) that a proceeding under Section 125 is not a judicial proceeding and in fact it cannot be otherwise than an executive order. It has been held further in *Barka Chandra Dev* v. *Janmejoy Dutt* (2), that section 125 of the Criminal Procedure Code does not confer upon a District Magistrate either an appellate or revisional jurisdiction in respect of orders binding down persons to keep the peace. In that case the District Magistrate set aside a proceeding which was taken under Section 107 before any bond had been executed, and the learned Judges held that "sufficient reason" mentioned in Section 125 was confined to the reason that a bond was no longer necessary.

In the case of *Nubu Sardar* v. *Emperor* (3) the decision passed in the previous case was overruled and it was decided that a bond to keep the peace might be cancelled on other grounds than that the bond was no longer necessary. In that case there was no overruling of the decision in the earlier case; that section 125 conferred no appellate or revisional jurisdiction.

In the case of *Daya Nath Thakur* v. *Emperor* (1), to which I have alluded above, it was held that Section 125 does not confer the right to hear an appeal from an order in a proceeding under Section 107.

Either of two courses was open to the learned Deputy Commissioner; if he considered that there was no likelihood of a breach of the peace, or there were other sufficient reasons for cancelling the bond, he could under Section 125 cancel the bond, or, if he considered that the Deputy Magistrate had acted without jurisdiction and the proceedings under Section 107 should be quashed on that ground, he could have referred the matter to this Court for the exercise of its revisional jurisdiction.

He has not however, cancelled the bond as he was empowered to do by Section 125, but has usurped appellate or revisional jurisdiction and set aside the whole proceedings as being without jurisdiction and void *ab initio*. This he plainly could not do.

Mr. Sultan Ahmad on behalf of the Crown had urged that this Court has no jurisdiction to interfere with the order of the learned Deputy Commissioner as it was not passed in a judicial proceeding. He, therefore, admits that the order under Section 125 is an executive order. He has also argued that the person against whom orders are passed under Section 107 is an accused person and that the proceedings under Section 107 are criminal proceedings, so that if the Deputy Commissioner's order is set aside by this Court it will be tantamount to the setting aside of an acquittal. But if his admission, that an order, under Section 125 is an executive order, is right, then plainly there could be no executive order setting aside an order passed in a judicial proceeding under the Code of Criminal Procedure.

The learned Counsel has contended too that the whole trend of the judgment of the learned Deputy Commissioner was to show that the bond must be cancelled. It would have been quite regular if the Deputy Commissioner at the end of his judgment, for the reasons he gave, had simply cancelled the bond, but he has not done so; he has declared the whole proceedings to be void *ab initio*. Under Section 125 he had no power to do this.

The order of the learned Deputy Commissioner must, therefore, be set aside as being without jurisdiction and the order of the Deputy Magistrate restored. If the opposite party is aggrieved; he can approach the Deputy Commissioner again and the latter can then consider whether under the existing circumstances it is necessary to cancel the bond for any sufficient reason.

Rule made absolute.

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(1) (1909) 37 Cal. 72=5 I. C. 555=14 C. W. N. 306.

(2) (1905) 32 Cal. 948=9 C.W. N. 860.

(3) (1906) 34 Cal. 1=4 C. L. J. 428=11 C. W. N. 25 (F.B.)

A. I. R 1922 Patna 337.

BUCKNILL, J.

Suradhani Debi—Defendant-Petitioner.

v.

Hari Charan Mahton and others—Plaintiffs-Opposite Party.

Civil Revision No. 310 of 1920 decided on 12th April 1921, against the decision of Small Cause Court Judge, Purulia, dated 25th September 1920.

(a) *Contract Act (IX of 1872), Ss. 69 and 70—Execution of rent decree—Payment by purchaser of tenure to prevent sale—Suit for reimbursement against outgoing tenant does not lie.*

Where a purchaser of a tenure in execution of a money decree against the tenants, paid the decretal amount to prevent a subsequent sale in execution of a decree for arrears of rent

Held: he is not entitled to claim reimbursement from the outgoing tenant either under S. 69 or S 70 of the Contract Act. The purchaser is not bound personally in law to pay the rent due under S 69. Under S 70 it must be shown that the person, for whom he paid the money, not only derived benefit from the payment but had the opportunity of expressing his acceptance or rejection of it Under S. 69 the person making the payment should have an apprehension though it may or may not really be justified in law that his interest will be adversely affected. [P 33 , 2, P 339, C. 1.]

(b) *Provincial Small Cause Courts Act (IX of 1887), Sch II, Art. 41—Claim under Ss. 69 and 70 Contract Act is not excluded.*

Apart from a contribution suit amongst co-sharers in a certain property, a claim for reimbursement under Ss. 69 and 70, is not excluded under Sch. II, Art. 41 of the Provincial Small Cause Courts Act. [P. 338, C. 1.]

(c) *Civil P. C. O. 20, R 4—Small Cause judgment must be intelligible and state points for decision.*

The judgment in a Small Cause Court suit must state the points for determination and the decision must be intelligible, although under O. 20, R. 4 it can be reduced to a minimum. [P 337, C 2.

Abani Bhushan Mukerji—for Petitioner.

Sushil Madhab Mullick and *Narendra Nath Sen*—for Respondent.

Judgment:—This was an application made under Sec. 25 of the Small Cause Courts Act of 1887, asking this Court to exercise its revisional powers in connection with a decision given by the Small Cause Court Judge of Purulia in September of last year under the following circumstances.

There was a tenure in a certain *mouzah* called Shimulbera in the Manbhum district. The tenants (the *pro forma* defendants here) had apparently a money decree against them and the petitioner No. 1 in 1919 appears to have purchased the property. At the time when the purchase was made, the outgoing tenants were in arrear with their rent and the landlord later on sued them therefor, and obtained a decree. He then put the property up for sale in 1920 The property apparently was sold.

The Petitioner No. 1, made no effort to protect her tenure but the plaintiff (the opposite party here) who professed to be interested in some way in the *mauzah* deposited the amount for which the rent decree had been obtained and the sale was set aside. The plaintiff then brought this action against the petitioners for recovery of the sum which they had thus paid.

Now it is difficult to say, from the judgment hich the Small Cause Court Judge gives, what were really the points which were argued before him or which were brought to his notice; but he found that the defendants were liable to pay this rent and that the plaintiff had, what he called, "several rights and interest" in the property.

He also found that the plaintiff believed in good faith that his interest was in danger by the rent sale and that, therefore, he was a person interested in the sense contemplated by Sec. 69 of the Contract Act in the payment of this sum and was in consequence entitled to be reimbursed by the defendant.

Now it is said that it is permissible under the provisions of O. XX, R. 4, that a Judge, deciding a case in a Small Cause Court, can reduce is remarks to a minimum and that they need not contain more than the points for determination and the decision thereon. I can only say with regard to that that it is obvious that at any rate this minimum must be intelligible

The first point which is suggested here—I do not know that it was raised in the Small Cause Court—is that under item No. 41 of the Second Schedule to the Provincial Small Cause Courts Act this suit is excluded from the jurisdiction of that Court, on the ground that it may properly be regarded as a suit for contribution by a sharer in joint property in respect of payment made by him of money due from a co-sharer. I can, however see no reason for thinking that

any of the facts in this case discloses any such conditions. I do not think that there was any question of contribution as such, but that the suit simply must rest upon its being a simple claim for money and if recoverable at all recoverable under those principles of law which are codified in the Act and in particular in Sec. 69 or Sec. 70 of the Indian Contract Act.

The second question which is asked, and it is no doubt a somewhat pertinent question, is, if Sec. 69 is called in aid by the plaintiff, what was the interest which th plaintiff really had in the property and what interest did he really have in the payment of the amount for which he is now suing the defendant.

Now, here I think that the expressions which are contained in the Small Cause Court Judge's decision have certainly been reduced to a minimum; but at the same time he does find as a fact on evidence which was apparently before him that the plaintiff had certain rights and interest in the property.

What exactly those rights really were and how the plaintiff stated they were or might have been affected by the sale of the property, if the money had not been paid into Court in order to set that sale aside, is certainly not very clear. But in his evidence the plaintiff's son says that they, that is, he and his father, held in 12 *annas* of the property "*miadi* and *kebala* lands", and the note of the evidence continues thus:—

"Witness proves documents executed by Chandi and Haradhan, Ex. 2 to 2 (*f*) and 3 and 3(*a*). Our *mokurari* deed has been called for from the defendant".

Now it is contended with a good deal of force that, in order that a person can take advantage of the provisions of Sec. 69 of the Indian Contract Act, such person's interest must be clearly defined and that such person must show that his interest in the property would be adversely affected by the sale of the property in respect of which he has paid the money which he seeks to recover from the party who is bound to pay.

The authorities, however, which have been quoted before me and notably the case of *Pankhabati Chaudhurani* v. *Noni Lal Singh* (1), do not support so wide a contention. In that case the judgment of the Court, which consisted of Mr. Justice Mookerjee and Mr. Justice Beachcroft, con ains a passage which indicates that there is no such wide construction to be put upon this section. They say:—

"There is no foundation for the contention that a payment of this description must be deemed a voluntary payment unless and until it is established that the sale would have actually prejudiced the position of the person who pays the money."

It would seem that it is sufficient if the person who pays the money has an apprehension founded upon an impression that his interest will be adversely affected; and whether or not he may, as the result of more careful investigation, find that his apprehension was really in law justified, it does not seem to matter.

The third point which was argued seems to me to be a point of considerably more substance. It is as to whether the petitioner No 1 was here bound in law to pay the amount which the plaintiff paid ostensibly on his behalf and which he now seeks to recover.

Now it is argued for the Opposite Party here that the rent of the outgoing tenants was a charge on the tenure and there is no doubt that that argument is quite sound; that is to say, supposing the landlord chose to sue the outgoing tenants for the rent which they had not paid and supposing they did not pay the amount which was found (on judgment being given in favour of the landlord) due to him, he could sell the tenure.

It is true that a purchaser who has, as in this case, prior to the decree in the rent suit purchased the property from the outgoing tenants, can protect himself against the effect of the sale simply by paying the decretal amount into Court; but that he (such purchaser) is bound personally in law to pay the amount of the rent which was due by the outgoing tenants to the landlord, is a matter which, to my mind, is a very different thing.

It is well pointed out in two cases which have been quoted before me that neither under Sec. 69 nor Sec. 70 of the Indian Contract Act, is it the case that a person, who makes a payment to protect his own interest, can recover the amount

(1) (1913) 18 C.W.N. 778=21 I. C. 207 =19 C.L.J. 72.

which he pays from the person on whose behalf he ostensibly pays it, unless it can be shown in the case of Sec. 69, that that person was bound in law to pay the money, or in the case of Sec. 70, that the person for whom he paid the money had not only benefited from the payment but had also had the opportunity of expressing his acceptance or rejection of such benefit.

Now, as was clearly seen by the learned Vakil for the respondents, this really is the only important legal question in this case. Can it be said that the petitioner No. 1 was bound in law to pay the money for which the property had already been sold under the rent decree? I think the authorities are quite clear that he was not so bound.

I, therefore, think that it was not a case under Sec. 69 in which the petitioner was bound to pay the amount and that, therefore, the plaintiff could not recover the sum which he had paid for him. No doubt the plaintiff was actuated by motives on his own behalf primarily and no doubt he thought that in law the petitioner was bound to pay this sum, but it will be observed that the petitioner made no motion whatever to pay the decretal amount; he gave no indication that he intended to pay off or take the benefit of his possibility of discharging the amount for which the landlord had obtained his rent decree.

On the contrary, he allowed the sale to take place and did nothing. It has been said quite clearly in more than one case which has been quoted before me, that under circumstances such as that, it cannot be said that a person is bound in law to pay a debt for which his property has already been sold.

I think, therefore, that on this point the Small Cause Court erred in law and that, therefore, his decision must be set aside. The petitioner is entitled to his costs which I assess at two gold *mohurs*.

Rule made absolute.

A.I.R. 1922 Patna 339.

COUTTS AND MACPHERSON, JJ.

Ram Lal Marwari — Plaintiff—Appellant.

v.

Mahadeo Marwari and others—Defendants—Respondents.

S. A. No. 850 of 1920 decided on 2nd August, 1921 from a decision of the D. J., Manbhum, dated 20th August 1920.

Transfer of Property Act (IV of 1882), Sec. 50—Payment of rent before due date—Section 50 does not apply.

S 50 of the Transfer of Property Act protects a tenant against having to pay his rent twice over, if paid in good faith, but if he has paid rent before it was due, it is merely an advance to the landlord and is not a payment in fulfilment of an obligation to pay rent. If, then before the date on which the rent falls due, the landlord makes an assignment, the receipt of rent cannot be treated as a discharge by him, because by assignment before the rent falls due, he has parted with the power of giving such a discharge, and payment of rent before it falls due cannot free the tenant from further liability. [P. 340, C. 1.]

A.B Mukharji and *B. B. Mukharji*—for Appellant.

A. N. Das for *S. M. Mullick* — for Respondents.

Coutts, J.—This is a suit for recovery of Rs. 1,017-13 as rent or minimum royalty. It appears that one Raghuroy Marwari held a mining lease of *mauza* Chandakua from Parbati Charan Chatterji, defendant No. 3. The rights of Raghuroy Marwari were purchased in the year 1915 by the defendants Nos. 1 and 2. On the 6th June 1918, Parbati Charan mortgaged this village to the plaintiff, the agreement being that the plaintiff was to realize the royalty payable by defendants Nos. 1 and 2 in lieu of interest.

On the 31st December 1918 and again 26th April 1919 the plaintiff demanded the rent from defendants Nos. 1 and 2, but was met with a refusal on the ground that on the 17th September 1918, that is, a little more than two months after the date of Parbati Charan's mortgage to the plaintiff, they had paid five years' rent in advance to Parbati.

The plaintiff then brought this suit against these defendants for the rent of the *Chait kist* of 1325 and the *Aswin kist* of 1326 which fell due after the date of the mortgage. The suit was dismissed in the court of first instance, and this decision has been upheld on appeal by the District Judge. The plaintiff has again appealed to this Court.

The sole question for decision in the appeal is whether the defendants Nos. 1 and 2 are entitled to plead advance payment of royalty to the defendant No. 3. It is clear, I think, that they are not. Sec. 50 of the Transfer of Property Act protects a tenant against having

to pay his rent twice over, if paid in good faith, but if he has paid rent before it was due, it is merely an advance to the landlord and is not a payment in fulfilment of an obligation to pay rent.

If, then, before the date on which the rent falls due, the landlord makes an assignment, the receipt of rent cannot be treated as a discharge by him because by assignment before the rent falls due, he has parted with the power of giving such a discharge, and payment of rent before it falls due cannot free the tenant from further liability. It may be that the tenant does not know of the transfer, but it is clear that if he had waited he might have known, and consequently an advance payment will not save him from liability.

The law on this point has been very clearly laid down in *DeNicholls* v. *Saunders* (1) and in *Cook* v. *Guerra* (2 and so far as I am aware the principle therein enunciated has never been departed from. The learned District Judge is, therefore, clearly wrong in the view which he has taken of the law on this point.

This District Judge has, however, further found that a small part of *bari* land in another village in Pandar *Pargana* was mortgaged merely for the purpose of enabling the deed to be registered in Raghunathpur, and he is of opinion that this was done with some sinister motive. This, however, was not a point in issue in the suit and as the learned District Judge has given absolutely no reason for his opinion his decision on this point cannot be upheld.

In the result then I would set aside the decree of the District Judge and would decree this appeal with costs.

Macpherson, J:—I agree.

Appeal allowed.

(1) (1870) 5 C P. 589 = 18 W.R. 1106 = 22 L. T. 661 = 39 L.J. C.P. 297

(2) (1872) 7 C.P 132 = 41 L J.C P. 89 = 20 W.R. 367 = 26 L.T. 97.

A I. R. 1922 Patna 340.

JWALA PRASAD, J.

Mahadeo Dutt and another—2nd Party-Petitioners v.

J. N. Sarkar—1st Party-Opposite Party.

Cri. Rev No. II of 1922 decided on 14th February 1922, against an order of the Magistrate, Giridih.

Criminal P C., (Act V of 1898) S 145—Dispute as to mines and minerals—Section applies—Proceedings under cl (1) are conclusive—Applicability of section depends upon facts of each case

If a party under a mining lease is in actual possession of the mines and minerals as profit a *prendre* he can enforce his possession not only by a civil suit but can claim to be maintained in their possession by an order under Sec 145 of the Code of Criminal Procedure. Whatever difficulty might have been felt in the construction of the corresponding section in the Code of 1878 as to whether Sec. 145 can comprise a dispute relating to mines and minerals it is clear that the present section provides an explanation so as to remove any doubt whatsoever upon the point No doubt is entertained upon the point that mines and minerals and the right to take mines and minerals can well be dealt with by an order under Sec 145. But behind all this rests the fundamental idea in connection with Section 145 of positive physical possession The question as to whether Section 145 is appropriate must be determined in the circumstances of each case The proceeding drawn up under cl. (1) of Section 145 must be considered to be conclusive of the existence of a breach of the peace unless it were shown that the information upon which the proceeding is based does not in fact disclose any danger to a breach of the peace. [P. 341, C. 2, P 344, C. 1, 2.]

Asjhar and *Harihar Prasad Sinha*—for Petitioners.

P. K. Sen and *Abul Krishna Roy*—for Opposite Party.

Judgment.—This is an application against an order of the Magistrate of Giridin passed under Sec. 145 of the Code of Criminal Procedure in favour of the first party. The Magistrate has recorded the following order.

"I am satisfied on a consideration of all these points that the first party were in actual possession of mica mines and mica deposits within Bishun Tikar village on the day and prior to it when these proceedings were started. I accordingly order that the first party is entitled to possession of the aforesaid mica mines and mica deposits and forbid their disturbance of such possession until evicted therefrom in due course of law."

The order is objected to by the second party. It is said that the original proceeding drawn up was with respect to specific plots Nos. 1, 2, 3 and 1083 situate in the aforesaid village Bishun Tikar and the order in question passed by the Magistrate relates not only to those plots but to all the mica mines and mica deposits within the village. It is said that there was neither any report of the police as

to there being any dispute likely to cause a breach of the peace with respect to the mica mines in the entire village, nor as a matter of fact was there any such dispute.

Upon an information lodged to the police on the 4th of August, the police went to the spot and found that work in the aforesaid plots Nos. 1, 2, 3 and 1083 was going on in the mountains and jungle. On behalf of the first party "there was an interference" and that consequently there was the probability of a riot between the parties.

The Sub-Inspector deputed some constables to keep a watch so that there might be no breach of the peace, and requested the Magistrate to issue notices against both the parties under Sec. 144 of the Code of Criminal Procedure. The Magistrate accordingly by his order of the 29th of August issued notices against both the parties under Sec. 144 fixing the 5th of September for cause being shown as to why the order should not be made absolute.

On the 5th of September the Magistrate on hearing the parties came to the conclusion that the dispute was with regard to a particular area in the village from which both parties alleged that they were taking mica and he directed proceedings under Sec. 145 to be instituted, fixing the 22nd of September for filing written statement.

On that day, a petition was filed on behalf of the first party praying for an amendment of the proceeding by including the entire village as the subject-matter of dispute. The proceeding was by the order of the Magistrate, amended. The amended proceeding related to "the possession of whole village Bishun Tikar (mica mines)."

In the meantime on the 21st of August the police had submitted another report in which the police stated that the danger to a breach of the peace was accentuated and that it could only be prevented by attaching the subject-matter of dispute. In the amended proceeding, the Magistrate referred to the police report as a source of his information upon which the proceeding was founded. The report referred to must be the latter report of the 21st of August

On the 24th of October both the parties filed their written statements. The second party in its written statement (para. 7) stated that there was never any likelihood of a riot or breach of the peace on behalf of the second party, nor did it want to commit any riot. Upon these facts it is said that there was no likelihood of a breach of the peace with respect to any mica mine in the village, far less with respect to all the mica mines therein.

Consequently it is urged that the proceeding is without jurisdiction, and, even if there was any danger to a breach of the peace, it was with respect to the specific plots referred to above and that the proceeding of the 21st of August and the order of the Magistrate declaring the possession of the first party with respect to the mica mines in the entire village is without jurisdiction.

As regards the first contention, which is directed against the entire order of the Magistrate, it is sufficient to state that the parties did not at any stage of the trial contend that there was no dispute leading to a breach of the peace as set forth in the proceedings of the Magistrate. No evidence was directed upon this point by any of the parties.

Both the police reports were clear upon the point that the danger to the breach of the peace was imminent and in spite of the deputation of the constables no party was desisting from asserting their rights of possession over the subject-matter of dispute. In the second report the matter came to a head, so much so that the police wanted an immediate action to be taken by attaching the property in order to prevent a breach of the peace. The plea taken in the written statement of the second party (para. 7) referred to above only shows that the second party was not going to commit any riot.

The written statement does not say that there is no danger to a breach of the peace on behalf of the first party. The plea set forth in the written statement of the second party is one of innocence so far as that party is concerned. That does not show that there was no danger to a breach of the peace. The proceeding drawn up under Cl. (1) of Sec. 145 must be considered to be conclusive of the existence of a breach of the peace unless it were shown that the information upon which the proceeding is based does not in fact disclose any danger to a breach of the peace. The proceeding in this case

as shown above, was passed upon the police reports which clearly showed that there was a danger to a breach of the peace. The proceeding therefore was not without jurisdiction.

It could, however, be dropped subsequently under Cl. (5) by a party showing to the Magistrate that there was in fact no danger to a breach of the peace. The parties in the present case did not give any evidence disputing the correctness of the statement made in the proceeding with respect to the existence of danger to a breach of the peace. This contention is, therefore, without any substance and must be overruled.

The next contention, which attacks the proceeding so far as it comprises all the mica mines in the village, stands more or less on the same footing. The police report disclosed the reason of the dispute between the parties Each of them was claiming the right to work mines in the whole village. No doubt at the particular moment the specific plots of mica mines mentioned above were being worked out.

The Magistrate was well within his jurisdiction to include within the proceeding drawn up under Sec. 145 what he upon the police report and on hearing the parties on the 5th of September 1921 thought was the real subject matter of dispute between the parties which endangered the peace. The written statements filed in the case by the parties clearly shew that the mica mines in the entire village were in dispute: *vide* paras. 2 and 3 of the written statement of the first party and paras. 5, 8 and 9 of that of the second party.

In fact, the whole tenor of the claim set forth in the written statements relates to possession of the mica mines in the entire village. The second party alleged that "they were in possession and occupation of the entire *mouza* Bishun Tikar and of the surface and sub-soil rights from a long time by virtue of a *mukurari* lease held from the time of their ancestors, etc."

Again, the second party states that the first party had never any concern with the village nor had they worked any mica mines in the said *mouza*. Similarly, the first party stated in its written statement that the mica mines and the deposits in *mouza* Bishun Tikar was being worked by it from a long time. The evidence was also laid by both the parties claiming the exclusive right of possession over the mica mines in the entire village. Therefore it is idle to contend that only the specific plots mentioned above were in dispute between the parties, and not all the mica mines in village Bishun Tikar.

The Magistrate construed the police report as disclosing dispute over the entire village and the view taken by him does not seem to be so perverse as to entitle this Court to hold that the proceeding with respect to the mica mines in the entire *mouza* was without jurisdiction. The Magistrate is not bound by the letter of the police report or other information. He is to consider as a whole the police report and the information given to him and to satisfy himself as to the real subject matter of dispute between the parties. In this case he was satisfied that the dispute was with respect to mica mines in the entire village.

We have no reason to quarrel with the Magistrate for the construction put by him upon the police report and the pleadings of the parties He heard the parties on the 5th of September and that also afforded to him the ground upon which he drew up the proceeding with respect to the mica mines in the entire village. The proceeding, therefore, in the present case does not seem to be at all illegal or irregular, or beyond the jurisdiction of the Magistrate.

The next contention of Mr. A ghar is not only subtle but full of difficulty. His contention is that the order in question is too vague and general to come within the scope of Sec. 145 of the Code. He says that the first party claimed their right to work mica mines in the village on the strength of a temporary lease granted by the proprietor of the village, whereas his clients (the second party) claimed to be in possession of the entire village, both surface and sub-soil rights, from a long time so far back as 1858, as *mukuraridars* of the village. He says that the Criminal Court and particularly the enquiry under Sec. 145, is not proper *forum* where the intricate question relating to the rights of the parties as to the sub soil in the village can be determined.

In short, his case is that he is a man on the spot admittedly in possession of the surface rights in the village and he is asserting his right to work out the mines. He has a right to prevent the *Zemindar* of the village from coming in and disturb-

ing his possession of the surface in order to work out the mines below the surface; in other words, he says that the dispute between him and the *Zemindar* and the lessee of the *Zemindar* must be determined by a Civil Court, and so long as the rights of the parties are not settled the Magistrate should not force upon him a stranger to the village who holds only a lease of mining rights.

In support of his contention Mr. Asghar has relied upon the case of the *Indian Iron and Steel Company* v. *Banso Gopal Tewari* (1) and the case of *Bejoy Nath Chatterji* v. *Bengal Coal Company Limited* (2). In the latter case, the right claimed was to sink coal pits upon a part of the village named Nimcha on the strength of the lease which gave right to sink coal pits in the entire village. On a construction of the leases set up by the contending parties, Jackson, J., recorded the following finding :

"Therefore the matter in dispute here, being the right of the Opposite Party, the lessee under the second *pottah*, to sink coal pits upon a part of the village of Nimcha, which, as far as we can see from the papers, is not situated within the limits of the 800 bighas of *danga putet jumee* on which the Bengal Coal Company are working, all that the Magistrate had to see was whether the Complainants or the Opposite Party were in possession of the subject of dispute.

"It appears to us that the possession in regard to which the Magistrate's jurisdiction under Sec. 530 should be exercised must be of a real and tangible character. We think that, when a party claims under a document or agreement the right of doing certain things over a large extent of territory, the performance of acts under such alleged right in one portion of the ground over which the right extends, although it may be good and sufficient for the purpose of keeping alive that right so as to be an answer to the plea of limitation raised in a civil suit, is not of itself a sufficient possession on which the Magistrate's order under Sec. 530 may be based for the purpose of forbidding in a distant locality acts not necessarily in conflict with such possession, though at variance with the right.

"The Magistrate observes that the Coal Company could not be expected for the purpose of maintaining their rights to dig pits over very few acres when they are not presently wanted for mining purposes. Certainly they could not, because, if they did so, and extended the range of their work, they would make themselves liable for the payment of additional rent under the stipulations of the *pottah*.

"It seems to us that there was no ground for the contention that the Bengal Coal Company was in actual possession of that portion of the village of Nimcha, whether as to underground rights or otherwise in which the acts complained of took place, so as to entitle the Magistrate to interfere under the provisions of Sec. 530. It appears to me that the *pottah* in this case is one upon which the Magistrate should not have put what he calls summary interpretation".

Then his Lordship proceeds and holds that the construction put upon the *pottah* by the Magistrate was erroneous His Lordship concludes the judgment in the following words : "The whole village was not given to them, but the landlord settled the right to dig for coal with them, subject to all sorts of rights which are stated in the *pottah*. I have carefully abstained from offering any sort of opinion as to whether the terms of the *pottah* are such as restrain the landlord from assigning over the right to dig coal to anybody else.

" This, I think, is abundantly clear that, if the landlord, in giving such right to the second party under the *pottah* lately granted, has derogated from the rights of the Bengal Coal Company, their remedy is perfectly clear and open for they are at liberty to bring a suit against the landlord and the party deriving title from him, and may, on showing sufficient grounds, have an injunction from the Court restraining the latter from taking coal. The Magistrate, I think, was not the proper *forum* to which they ought to have gone.

"I think, therefore, that the Magistrate's order was made without jurisdiction and on a misconception of the facts, and that consequently, it ought to be quashed".

This case was largely relied upon by Sir Asutosh Chaudhuri, J, in the case quoted above *Indian Iron and Steel Company* v. *Banso Gopal Tewari* (1). It would, however, appear that both the contending parties in that case

(1) (1919) 32 C.L.J. 54=59 I.C. 403 =22 Cr.L.J. 99.

(2) (1875) 23 W.R.Cr. 45.

were claiming upon the leases granted to them by the landlord. The construction of those leases was the matter of dispute between the parties and the Court clearly came to the conclusion that the leases granted to the company restricted them to a certain area and the fact that they dug coal mines in that particular area did not give them constructive possession over the entire village.

That case is not an authority, for the proposition that under no circumstance the right to dig coal mines can come within the purview of Sec. 530 of the old Code of Criminal Procedure (1872) corresponding to Sec. 145 of the present Code. On the other hand if the right was exercised with respect to the particular area to which the lease extended, Jackson, J., in the case of *Bejoy Nath Chutterji* v. *Bengal Coal Company, Limited* (2) would probably have held that the Magistrate had jurisdiction to maintain the possession under Sec. 145 of the Code.

Sir Asutosh Chaudhuri was perfectly right in his observation that it may be difficult to extend possession over other areas covered by mines and minerals from the fact of actual possession over the particular area and that when the question involves a consideration of what is meant by possession in such matters and the difference between actual and constructive possession in the case of mines and minerals, the proper *forum* is the Civil Court.

His Lordship also makes a distinction between a prospective license and a lease to dig minerals. In that case the actual disputants did not "hold mining leases but mere prospecting licenses." That case also is no authority for the proposition that mines and minerals or the right to dig mines and minerals cannot be the subject matter of an enquiry under Sec. 145 of the Code of Criminal Procedure. This is clear from the following observation of his Lordship.

"Nor does it confer any estate or interest in the minerals before they are actually gotten. A license to dig minerals coupled with a grant to carry them away is a profit *a prendre* an incorporeal hereditament lying in grant, and if exercised by an actual taking of possession it may be the subject matter of use and occupation and [if exclusive] may be and [even if non-exclusive] probably may be, the subject-matter of an action to recover possession."

Now I may add that if a party under a mining lease is in actual possession of the mines and minerals as profit *a prendre* they can enforce their possession not only by a civil suit but can claim to be maintained in their possession by an order under Sec. 145 of the Code of Criminal Procedure. Whatever difficulty might have been felt in the construction of the corresponding section in the Code of 1878 as to whether Sec. 145 can comprise a dispute relating to mines and minerals, it is clear that the present section provides an explanation so as to remove any doubt whatsoever upon the point.

Land or water has been defined in cl. (2) of Sec. 145 to include "buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property." The explanation was added with a view to remove doubts thereon upon the construction of the former Act as to whether incorporeal rights can in any circumstance come within the purview of Sec. 145.

It used to be said under the old Act that Sec. 145 can deal only with tangible property. Therefore disputes relating to a profit *a prendre* or other incorporeal rights were not brought under the scope of Sec. 145 with the result that danger to a breach of the peace could not be averted by a summary decision as to the right of possession of land and the profits arising therefrom; whereas disputes with respect to such rights are more usual than the disputes relating to the possession of land or water in the abstract.

Now no doubt is entertained upon the point that mines and minerals and the right to take mines and minerals can well be dealt with by an order under Sec. 145: vide *Andrew Yule and Co.* v. *A H Skone* (3) and *Sunder Mull* v. *Jahur Lall* (4). Very recently my learned brother, Bucknill, J., in the case of *Maharaj Kumar Jagat Mohan Nath Shah Deo* v. *Burn and Company* (5), held that Sec 145 can very well be invoked and applied in the case of prospecting leases in order to find out and ascertain whether any minerals are to be found in a particular

(3) (1919) 4 P. L. J 154 = 49 I.C. 647 = 20 Cr L. J. 99.
(4) (1917) 2 P L J 637 = 2 P.L.W. 54 = 41 I. C. 132 = 18 Cr. L. J. 756.
(5) Cr. Mis. Cas. No. 21 of 1921.

area. His Lordship observes: "Now Sec. 145 contemplates, it will be observed, a dispute likely to cause a breach of the peace concerning any land or water or the boundaries thereof and by sub- ec. (2) the expression 'land or water' was, by what I understand is an amendment of the law at a later date, made to include buildings, markets, fisheries, crops, or other produce of land, and the rents and profits derivable from such profits. But behind all this rests the fundamental idea in connection with Sec. 145 of positive physical possession."

Now one may very well imagine that the right of prospecting may be at many periods merely an incorporeal right; that is to say that it does not involve any physical or actual possession of any part of the property over which the right of prospecting is given; as for example supposing that an individual is given the right to prospect for oil over a very large area of country, it could not for one moment be said that his right gave him any possession over that area which was contemplated by Sec. 145 save in so far as it could be said with truth that he was exercising over any part of the area substantial acts of possession.

On the other hand it is equally easy to understand and to contemplate that where in the case of certain minerals, such as coal, prospecting and re-search and investigation have begun, (for example an engine driving a diamond drill) that coal sheds and habitation for the workmen have been erected in certain places, and, as I have myself seen, they have been enclosed with a palisade or fence; then in cases such as that I can well understand that in connection with the area of locality where the prospector is actually engaged in his operations it may well be said that such would be a typical instance of positive possession of land or of possession following the incorporeal right which would be typical of inclusion within the purview of Sec. 145.

Cases have been quoted to me in the course of this hearing in which it has been suggested that possibly in connection with mining rights Sec 145 was not altogether the best section which could be utilised for dealing with disputes in connection with those rights. But I cannot help feeling that, although there is also some contrary opinion to the effect that Sec. 145 can be brought into play, in each case regard must be had as to whether there is any actual question of possession in dispute.

In that case it appears from the order of the Magistrate that the dispute related to the rights of prospecting for coal and other minerals in villages Pindar Kone and Jalla, Thana Balumath, and the order of the Magistrate was made declaring that the first party in that case was in actual possession in respect of carrying on prospective operations for underground minerals in the aforesaid villages

The question as to whether Sec. 145 is appropriate must be determined in the circumstances of each case. Now, whether in this particular case there was a dispute as to the actual possession of the mica mines and mica deposits within village Bishun Tikar, undoubtedly some of the mica mines were actually being worked, particularly those in Plots Nos. 1, 2, 3 and 1083. The Magistrate held that the first party was in actual possession of the mica mines and had been in such possession for a considerably long time under several temporary leases, the last lease being of 1916.

Upon the evidence of this actual physical possession over the mines in the village the Magistrate passed his decision in favour of the first party and declared their possession. The mica mines, which were dealt with in this case, are said to be the only mica mines which are at present being worked, and the order of the Magistrate relates evidently to those mica mines. The possession of first party over the mica mines at present in existence in the village, and which are being worked might lead to an inference in their favour of their right to dig mica mines elsewhere in the village; but those are not the mica mines which are at present before us and we do not know what claims, not only the contending parties but others, might make with respect to them.

We cannot anticipate any dispute with regard to things not in existence. Therefore to construe the order of the Magistrate with regard to the existing facts it must be held that all the mica mines at present worked in the village are in the possession of the first party and the declaration under Sec. 145 of the Code of Criminal Procedure in their favour is with respect to the actual physical possession of those mines. I therefore think that there is no question of any misapprehension in the present case and the order made by the Magistrate is

proper and unassailable in revision.

We affirm the order and dismiss the application. *Application dismissed.*

A.I.R. 1922 Patna 346.

DAS AND BUCKNILL, JJ.

Niamat Ali—Defendant-Appellant.

v.

Yad Ali Shah—Plaintiff-Respondent.

A. No. 196 of 1918 decided on 23rd May 1921 from the original decree of Sub.-J., Gaya, dated 14th August, 1918.

Religious Endowment—Mahant—Removal by unauthorised persons—Suit for possession of office—Court has only to consider if plaintiff has title to be restored to office.

Where a suit is brought by the Mahant of a religious endowment, removed from office on the ground of unfitness, to be restored to possession the court has not to consider the question whether the persons who took upon themselves the right to remove the plaintiff from his office were legally competent to do so, but the broad question, whether the plaintiff had any title to be restored to the possession of his office. The *onus* is upon Plaintiff to satisfy the court that he has a subsisting title to the endowment and if he fails to do so, the court is bound to refuse to give him any relief.

[P. 346, C. 1.]

Ganesh Dutt Singh—for Appellant.

Syed Md. Tahir and *Kailash Pati*—for Respondent.

Das, J.—I am unable to agree with the view taken by the learned Judge in the Court below. As I read the judgment of the learned Subordinate Judge, he does not dispute the position that the plaintiff is utterly unfit to be the *mahant* of this important endowment, but he proceeds on a very narrow ground. He has taken the view that as the defendants were not competent to remove the plaintiff from his position as *mahant* of the endowment, the plaintiff was entitled to be restored to possession.

In my opinion, the question before the learned Subordinate Judge was not the narrow question, whether the persons who took upon themselves the right to remove the plaintiff from his office were legally competent to do so; but the broad question whether the plaintiff had any title to be restored to the possession of his office. The suit was of the plaintiffs; the plaintiff was the actor in the matter and it was incumbent on the plaintiff to satisfy the court that he had a subsisting title in the endowment.

Now what are the facts? The plaintiff, on being appointed the *mahant* of this endowment, executed an *ekrarnama* in favour of the public. The second clause of the *ekrarnama* provides as follows:—

"I having maintained agreeable conduct shall perform with good faith and with elegance the duties of *mahant* and shall take care of the feeding and clothing and service of the *fakirs* residing in *Takia* Rajauli and also *fakirs* coming from other places who come and go away according to their position and also according to the means of the *Takia*. I shall not neglect or minimise the aforesaid duties and I shall perform all the acts according to the custom and manner of the family."

Stopping here for a moment, the learned Subordinate Judge has found as a fact that by the act of the plaintiff, the feeding and clothing and service to the *fakirs* has been much curtailed and that as a matter of fact income of the endowment has been reduced during the time of the plaintiff, from Rs. 3,500 to Rs. 1,000 or Rs. 1,500, year.

The third clause of the *ekrarnama* provides as follows:—

"Having remained in possession over all the moveable and immoveable properties of the *Takia* by virtue of succession and *mahanthi* in place of the deceased Shah Saheb, I will manage and look after them without interference from any body, and I will not in any way injure (waste) or transfer any property of the *takia* and shall not encumber any propecty belonging to the *takia*, if I do so it would be illegal, null and void in the face of this deed and no property of *takia* will be liable for any incumbrance caused by my act."

Here again, the learned Subordinate Judge has found that the plaintiff has encumbered every item of the property that became vested in him as the *mahant* of the endowment and, as I have said before, the income of the endowment has dwindled down to Rs. 1,000 or Rs. 1,500 a year, making it impossible for the *mahant* to carry out the objects of the endowment.

Clause (4) provides as follows:—

"I will never do any bad act and will not mismanage and I will keep watch over the conducts of other *fakirs* of the *takia* so that no one may do any vicious act which may be the cause of infamy to the *takia* and disgrace to ancestors and which may be the cause of shame to the *takia* and such immoral *fakirs* shall

be turned out of the *takia*".

Now I am far from suggesting that it is a vicious act to marry, but certainly the unwritten rules of the endowment require a life of asceticism amongst the *mahants*. Now it is admitted that the plaintiff has married a Rajput widow and has given up the life of asceticism and has entered the life of a house holder; he does not besmear his body with ashes as is customary amongst the *mahants*, but has finally and for good abjured the life of an ascetic.

In my view, according to the true construction of the endowment and having regard to the unwritten rules of the endowment, it was undoubtedly an immoral act on the part of the *mahant* to do that which he has done.

Clause (7) provides as follows:—

"If, I, in any way mi-behave, mismanage and violate the aforesaid conditions, laid down in this deed *Mahant* Gopal Bux Das (defendant No. 3) *panches*, *darveshes* and *shikpis* shall have right after enquiry and proof of my improper acts to remove me and to manage in the manner that they may consider fit and proper. At that time I will not have any objection except that I will get maintenance."

Now here is a set of express conditions to which the plaintiff submitted himself. He agrees to his removal after enquiry and proof of his improper acts. But the difficulty of the learned Subordinate Judge seems to be that the *panch* that assembled to try his conduct was not properly or regularly summoned. That may be so, but here the question before the learned Subordinate Judge was whether the plaintiff, who was out of his office, was entitled to be restored to office.

Having regard to the findings of the learned Subordinate Judge, I have no doubt that he should have refused to give any relief to the plaintiff.

I must set aside the judgment and decree passed by the learned Subordinate Judge, allow this appeal and dismiss the plaintiff's suit with costsin both the courts.

Now it appears that the defendant No. 1 has been appointed the *mahant* of the endowment by the *panch*. He is only a boy and there is grave doubt as to the validity of his appointment. The matter is clearly one for the Legal Rememb rancer of this Province. I have no doubt that a friendly action ought to be instituted by the Legal Remembrancer under Section 92 of the Code of Civil Procedure to have a proper scheme of this endowment framed and to have a proper person appointed as the *mahant* of the endowment.

Bucknill, J.—I agree. The actual proceedings by which the plaintiff was dispossessed of his possession might have been irregular; the appointment of this boy by some of the plaintiff's *chelas* as *mahant* might also have been illegal, and the individuals who took active parts in these affairs might not have been altogether proper parties; but it is common ground that the plaintiff, by his conduct, has clearly incapacitated himself from holding the position and, therefore, under those circumstances I cannot see how on any action brought by him the court could possibly restore him. *Appeal allowed.*

A. I. R. 1922 Patna 347

COUTTS AND ROSS, JJ.

Kamla Prasad—Defendant-Appellant

v.

Nathuni Narayan Singh and others—Plaintiffs-Respondents.

A. 1011 of 1920, decided on 9th March 1922, from the appellate decree of the District Judge, Arrah.

Hindu Law—Mortgage by Karta *is invalid without consent of members—Mortgagor getting title to property mortgaged must make good the representation—T. P. Act, S. 43.*

The head of a joint family cannot mortgage the joint family property without consultation with, and consent of, the other members, but where legal necessity is proved it is unnecessary to prove consent because it will be implied. But where the executor of the mortgage bond executes it as certificated guardian of a person who is really of age the recital in the bond to that effect negatives all idea of consent of such person. If the mortgagor has no title to the properties at the time of the mortgage, acquires title to a portion of the property, he must make good his representation to the extent of the property which has come to his hands. [P. 348, C. 1.]

Jayswal and *N. N. Sen*—for Appellant.

Shiva Saran Lal—for Respondents.

Coutts, J.—This was a suit brought on a mortgage bond for Rs. 500 executed by Kamla Prasad, Defendant No. 1, as the *karta* of the joint family and certificated guardian of his minor brothers. The suit was decreed in the Court of first instance on contest as against Defendants Nos. 2 to 5 and *ex-parte* against the other Defendants; but on appeal to the District Judge this decree

has been set aside and a decree has been passed *ex parte* as against the Defendant No. 1.

The principal questions which arose in the suit were, whether there was any legal necessity for the loan and whether the Defendant No. 1 was the *karta* of the family. With regard to the question of the Defendant No. 1 being the *karta* of the family there appears to be no doubt that this is so but as regards legal necessity the learned District Judge has found that there was no proof of legal necessity except in regard to a sum of Rs. 160, and he says that if the bond had been otherwise a good bond as a mortgage of joint family property he would have passed a mortgage decree for Rs. 160 with interest at the bond rate against all the Defendants : but he found that there is a defect in the bond inasmuch as Kamla Prasad executed it as *karta* and certificated guardian of his brothers.

As the learned District Judge has said the law is that the head of a joint family cannot mortgage the joint family property without consultation with, and consent of, the other members, but where legal necessity is proved it is unnecessary to prove consent because this will be implied as in the present case. If Kamla Prasad had executed the bond as *karta* of the family the consent of the other members would have been assumed, but one of the other members Lachmi Narayan was of age at the time of the execution of the bond and Kamla Prasad executed the bond as certificated guardian of Lachmi Narayan, and, as the learned District Judge very justly remarks, this recital in the bond negatives all idea of consent of Lachmi Narayan, so that there is a defect in the bond.

There can be no doubt that the view of the law which has been taken by the learned District Judge in the matter of the decree against the Defendant No. 1 is the correct view. Kamla Prosad mortgaged a certain property as having a right to do so: he had in fact, however, no title, but as title to a portion of the property has now come to him he must make good his representation to the extent of the property which has come to his hands. This is undoubtedly the correct view of the law and the learned District Judge has rightly passed an *ex parte* decree against this Defendant.

I see no reason to interfere and would dismiss this appeal with costs.

Das, J :—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 348.

JWALA PRASAD AND COUTTS, JJ.

King Emperor—Prosecutor—Petitioner.

v.

Punit Chain and others—Accused-Opp-Party.

Jury Reference No. 2 of 1922 decided on 31st March 1922 by the S.J., Patna, dated 24th January 1922.

(a) *Cr. P. C. (Act V of 1898), S. 307, cls. 1 and 3—Disagreement with the verdict—Sessions Judge, should record their reasons for the verdict—High Court has power to set aside verdict on substantial grounds.*

In making a reference under S. 307 of Cr. P. C., disagreeing with the verdict of the jury, the Sessions Judge should ask for their reasons for the verdict. It is still more necessary, whenever there is a difference in the opinion of the Jury, to consider not only the opinion of the majority, but also of the minority of the Jury. S.307, Cl.(3) requires due weight to be given by the High Court to the opinion of the Sessions Judge and of the Jury.

[P. 350, C. 2; P. 351, C. 1.]

Per *Jwala Prasad, J.*—Although on a reference the High Court is required to consider the entire evidence in the case that does not necessarily mean that the opinion of the Jury on the question of fact will be ignored. There must be something more than a mere estimate of the evidence on facts that should entitle the High Court to upset the verdict of the Jury. Whenever the verdict of a Jury is set aside, it must be upon a very substantial ground, and not merely upon the ground that another view of the evidence might be taken.

[P. 351, C. 1,2]

Per *Coutts, J.*—After the change in the new Cr P. Code, the High Court is entitled to look into the entire evidence of the case and to give due weight to the opinion of the Sessions Judge and of the Jury and not to rely solely on the verdict of the Jury. The High Court is not bound to act in accordance with the unanimous verdict of the Jury, although it is shown not to be perverse or clearly and manifestly wrong

[P. 352, C. 1.]

(b) *Criminal P. C., S. 162—Statements of witnesses—Late record by Police—Statements should be discarded.*

Whatever reasons might be given by the police to the late recording of the statement of the principal witnesses for the prosecution, the defence is entitled to ask that the evidence of those witnesses should be discarded inasmuch as there was sufficient time and opportunity for their being tutored. [P. 351, C. 1.]

H. L. Nandkeolyar—for the Crown.

P. E. Lall and *Indu Bhushan Biswas*—for the accused.

Jwala Prasad, J—This is a reference under Section 307 of the Code of Criminal Procedure by the Sessions Judge of Patna recommending that Punit and Ramkhelawan be convicted of an offence under Section 302, I. P. C. read with Section 34, I. P. C. and under Section 148, I. P. C. and that Sita Ram and Inder be convicted of an offence under Section 147, I. P. C.

The above named four persons along with 17 others were tried by the learned Sessions Judge of Patna with the aid of a Jury consisting of 5 gentlemen, on the charge of having murdered one Kokil Mahto. The Jury returned a divided verdict, three of the jurors returned a verdict of not guilty and two a verdict of guilty.

The learned Sessions Judge accepted the verdict of the majority of the Jury with respect to the 17 accused persons, and disagreeing with the verdict of the majority with respect to the aforesaid four persons has referred their case to us under Section 307 of the Code of Criminal Procedure. The reason for the reference has been given by the learned Sessions Judge in his letter No. 329 XI, dated the 24th of February 1922, to this Court. He says—

"The evidence appears to me conclusive to establish the charges of rioting and to prove that the four men, Punit, Ram Khelawan, Sita Ram and Inder, were members of the body of rioters, that the two former were armed with *bhalas*, that Sita Ram and Inder carried *lathis* and that either Punit or Ram Khelawan in furtherance of an intention which was common to both of them, caused the fatal wound in the chest of Kokil. My charge to the jury will show the details of the evidence against each of these four men.

"I rely particularly on the evidence of Saudagar, Mussamat Subhagia, Mussamat Makhni, Ram Prasad Lohar, constable Ram Bilas Singh, and Dahaur. I can find no reason why Mussamat Subhagia or Mussamat Makni or Ram Prasad Lohar or constable Ram Bilas Singh or Dahaur should perjure themselves, and their demeanour in the witness box was quite satisfactory. The evidence itself shows no grounds at all for considering their testimony to be inspired by any evil motives.

"As against all the four men with whom this reference is concerned there is a further fact that they were all arrested near the scene that night and also the fact that Sita Ram was found wearing a woman's garb."

It may incidentally be mentioned here that the charge to the jury, the verdict of the jury and the judgment of the Court all took place on the 21st of February 1922, as the order sheet and the verdict of the jury and the judgment show, but the charge to the jury bears the date 23rd February 1922 under the signature of the learned Sessions Judge.

No doubt, the jury was charged on the 21st and apparently a typed copy was placed before the learned Sessions Judge for his signature on the 23rd. It should have appeared on this copy when the Jury was actually charged.

In the letter of reference it would appear from the summary of the reasons quoted above that the learned Sessions Judge has not really discussed the evidence in the case for and against the accused persons in order to justify the conclusion that the charge against the aforesaid four accused persons was established. He, however, refers to his charge to the Jury for details of the evidence against each of the aforesaid four persons.

Now in the charge to the Jury the evidence on the record has been summarised very fully by the learned Sessions Judge. He has referred to the various circumstances which appeared in the evidence to be against the witnesses in question. As to Musammat Subhagia and Musammat Makhni, the learned Sessions Judge has stated in the charge to the Jury that they were not mentioned in the first information, and he also refers to the explanation offered on behalf of the prosecution of their not having been so mentioned. He said that as soon as they saw the attack upon Kokil they went inside and shut the door, and therefore, they had no opportunity of seeing Saudagar who must have arrived at a later stage.

The learned Sessions Judge also points out that these two witnesses were not examined even by the Sub-Inspector till the evening of next day, the 8th of October and this is sought to be explained by the fact that the Sub-Inspector was too busy. The further

attack upon the evidence of these witnesses is stated in the charge to be that they were subordinates of Kokil and consequently were under his influence. Certain discrepancies in their evidence were also pointed out.

Now against Ram Prasad the learned Sessions Judge pointed out that he was not examined by the Sub-Inspector till the night of the 9th of October, that is, the third day from the day of the occurrence. He was also not mentioned in the first information.

Dahaur was not mentioned in the first information. Besides, he was at the time of the occurrence far down the lane to the south of Kokil's and Punit's house, and it is more than doubtful whether by the time that, he says, he came to the scene of occurrence, after having heard the cries, the accused were still assaulting the deceased.

This fact is not mentioned in the charge to the Jury. Ram Bilas Singh, the last witness referred to by the learned Sessions Judge, is said to have heard the *hulla* when he was proceeding down the lane from the north. He must then at the time be about 300 feet from the place of occurrence. His evidence in the Court of Sessions as to the number of men he actually saw striking and the length of time within which he heard the *hulla* is discrepant as compared with his evidence before the Committing Magistrate. He, of course, recognized Punit only.

On behalf of the defence it has been urged that apart from the aforesaid criticisms of the evidence of the witnesses relied upon by the learned Sessions Judge in the order of reference, it was inherently impossible for the witnesses to have recognized the assailants. Saudagar, son of the deceased says that he and the deceased were taking their evening meals together, and that the deceased had left the place while Saudagar was still at his meals; sometime after he heard a *hulla* and then came out of his house and proceeded towards the place of occurrence.

Now, the place of occurrence from his house is about 150 feet. The assault was a sudden one. The assailants apparently were in ambush waiting for the victim to pass along the lane. The suggestion is, therefore, reasonable that there was hardly time for Saudagar to have arrived at the scene after hearing the cries and to have witnessed the assailants still assaulting the deceased. The evidence of the two *Musammats*, Makhni and Subhagia, has also been shown to us, and it has been contended that according to these witnesses the assailants quietly assaulted the deceased and there was no *hulla* at all. The moon had gone down and it was starlit night. The lane is a narrow one and the lantern shown at point 7 in the police map was at a distance of 150 feet.

The defence Counsel, therefore, urges with some force that there was not sufficient light to enable the witnesses to come from the distance alleged by them and to have identified the assailants. The learned Assistant Government Advocate has referred us to the evidence of a number of witnesses who are said to have been referred to in the charge to the Jury as having been connected with the *dewas*. The fact that the *dewas* was going on an point No. 14 marked in the Police map, where these witnesses are said to have collected at the time of occurrence, does not appear to have been mentioned in the first information.

Besides, in view of the criticisms stated in the charge, the learned Sessions Judge himself does not seem to rely upon the witnesses connected with the *dewas*. Therefore, these witnesses must be altogether dispensed with in considering the present reference.

Now the learned Sessions Judge has not himself discussed the evidence in his letter of reference. He has simply said that the evidence of the witnesses mentioned above should be accepted. He ought to have given his reasons for accepting the evidence. He ought to have met all the objections raised by the defence against the evidence of the aforesaid witnesses; in other words, he ought to have given his reasons for the decision arrived at by him, that the evidence in the case establishes the guilt of the aforesaid four persons.

Now, this was obviously more necessary in the present case because the learned Sessions Judge has deviated from the well recognized principle, that in making a reference under Section 307 of the Code of Criminal Procedure disagreeing with the verdict of the Jury, the learned Sessions Judge should have asked for their reasons

for the verdict.

It was still more necessary, as it was pointed out in the case of *Emperor* v. *Musammat Zohra* (1), that when the Jury had differed and there was a division in the opinion of the Jury we have to consider not only the opinion of the majority but also oft he minority of the Jury. Section 307, Clause (3) requires us to give "due weight to the opinion of the Sessions Judge and the Jury."

We have in the present case got the opinion of the Judge, but we have not got the reasons and the opinion of the Jury except the verdict of 'not guilty'. We have, therefore, to depend entirely upon the record in the case or upon the arguments advanced on behalf of the defence in order to find out whether the evidence relied upon by the learned Sessions Judge should or should not be accepted as proving the guilt of the accused.

Now, we have given broadly, without having gone into minute details, a summary of the criticisms that might have been present in the minds of the Jurors when they discarded the evidence on behalf of the prosecution and held that the case against the accused was not proved.

Whatever there might have been the explanations for the Police to record late the statement of the principal witnesses for the prosecution, the defence is entitled to ask that the evidence of those witnesses should be discarded, inasmuch as there was sufficient time and opportunity for their being tutored. Thus elimmated, there was only the evidence of Dahaur and Ram Bilas Singh against whom also there were reasons for holding that they did not come in proper time to identify the assailants. Therefore, the verdict of the Jury in the present case cannot be said to have been a perverse one.

Upon the evidence at the best it can be said that there was room for another opinion, an opinion differing from that of the Jury. But that is not the criterion upon which a reference under Section 307 of the Code of Criminal Procedure should be determined. True, on a reference the High Court is required to consider the entire evidence in the case, but that does not necessarily mean that the opinion of the Jury on the question of fact will be ignored. There must be something more than a mere estimate of the evidence on the facts that should entitle us to upset the verdict of the Jury.

I do not think it is necessary in this case to discuss the various authorities placed before us on both sides. Each case was decided on its own merits : *vide Emperor* v. *Swarnamoyee Biswas* (2), *Queen* v. *Sham Bagdi* (3), *Emperor* v. *Lyall and others* (4), *Emperor* v. *Chellan and others* (5), *Emperor* v. *Anand aCharan Thakur* (6), *King Emperor* v. *Salimudi Sardar* (7), *Emperor* v. *Sheikh Neamatulla* (8), *Emperor* v. *Musammat Zohra and another* (1), and *Emperor* v. *Bhuilotan Singh and others* (9).

Now, the meaning and scope of Section 307 was discussed by me in the case already referred to above, namely, *Emperor* v. *Musammat Zohra and another* (1), and I do not propose in this case to go into that discussion again, but I have not still come across a single case where the verdict of the Jury on a question of fact has been set aside without there being an astounding reason for it.

The case *Emperor* v. *Sheikh Neamatulla* (8), is an instance of the kind. There, the verdict of the Jury was set aside when there was an omission in the Sessions Judge's charge to the Jury of a very material fact, namely, of incriminating articles in the shape of ornaments with blood stains found in the possession of the accused.

Under those circumstances his Lordship, Sir Lawrence Jenkins, C. J. held that a proper case was made out for differing from the opinion of the Jury and for convicting the accused. Therefore, whenever a verdict of a Jury is set aside it must be upon a very substantial ground, and not merely upon the ground that another view of the evidence might be taken.

In the present case the facts and the criticisms of the learned Judge were placed before the Jury in his charge, and the Jury upon a consideration of the evi-

(1) (1919) 1 P. L. T. 657=55 I. C. 294 =21 Cr. L. J. 278.

(2) (1913) 41 Cal. 621=21 I. C. 900= 14 Cr. L. J. 660.

(3) (1873) 13 B.L.R. Ap. 19=20 W.R. Cr. 73.

(4) (1901) 29 Cal. 128=6 C.W.N. 258.

(5) (1905) 29 Mad. 91=3 Cr. L.J. 371.

(6) (1909) 36 Cal. 629=9 C.L J. 638= 2 I.C. 497=13 C W N. 757.

(7) (1912) 16 C.W.N. 107.

(8) (1913) 17 C. W. N. 1077=21 I. C. 156=14 Cr. L.J. 556.

(9) A.I.R. 1921 Pat. 506.

dence and the circumstances gave a decided and unambiguous verdict of 'not guilty.' We have also duly considered the entire evidence in the case and the opinion of both the Jury and the learned Sessions Judge and we have come to the conclusion that this is not a case in which we should interfere.

We cannot, therefore, accept the reference. The verdict of the Jury is accepted and the accused are acquitted.

Coutts, J.—I agree that this reference must fail; but I am not certain that I would accept all the remarks which have been made by my learned brother. Section 307, Sub-clause (3) of the Criminal Procedure Code requires that the High Court shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it, and in many cases the High Court has convicted accused persons in respect of whom there has been an unanimous verdict of 'not guilty'. The case of *Emperor* v. *Lyall and others* (4) was such a case.

In that case it was contended on behalf of the accused that the High Court was bound to act in accordance with the unanimous verdict of the Jury unless it was shown to be perverse or clearly and manifestly wrong. It was held, however, that this was not so and that since the alteration of the section by the Act of 1898 the High Court was bound to consider the entire evidence of the case and to give due weight to the opinion of the Sessions Judge and of the Jury and not to rely solely on the verdict of the Jury. This is, in my opinion, the correct view of the law as it now stands.

The opinion of a jury is its verdict and not the reasons on which the verdict is based, but although when a case has been referred the High Court is bound to consider the entire evidence, the verdict of the Jury must not be lightly disregarded, due weight must be given to it and in referring a case under this section it is not sufficient for the Sessions Judge to say merely that he believes the evidence of witnesses on whose evidence the jury has returned a verdict of not guilty. He should give reasons for his opinion in sufficient detail to enable the court to appreciate it and to give due weight to it.

Reference negatived.

A. I. R. 1922 Patna 352.

DAS AND ADAMI, JJ.

Bhagwati Kuer—Petitioner

v.

Jagdam Sahay and others—Opposite Party.

Civ. Rev. No. 32 of 1922 decided on 2nd January 1922. For Review of Judgment in A No. 164 of 1918 dated 21st June 1921 and reported in A. I. R. 1921 Patna 260.

Civil P. C., O. I, R. 9.—Ejectment — Non-joinder of person under whom defendant claims title does not disentitle plaintiff to relief.

A court is not incompetent to grant a decree to the plaintiff for possession as against the person in judicial possession of the property, even if for some reason the plaintiff does not choose to claim any relief as against the party who may have put the other party in actual possession 21 Bom. 229 followed [P. 354, C 1.]

S. M. Mullick and *Siva Nandan Roy*—for applicant.

P. N. Sinha and *B. C. Sinha*—for Opposite party.

ORDER.

Das, J.—This is an application for review of our judgment dated the 21st June 1921. The principal ground urged by Mr. Sushil Madhab Mullick on behalf of the applicant is that we have given a decree to the plaintiffs which they did not ask for in the plaint.

The suit was a suit for possession of certain properties set out in the schedule. The plaintiff claimed to be the reversioner of one Girwar Narain and entitled to the properties on the death of his daughter, Fateh Kuer. The applicant claims to hold a *mokarari* lease in her favour granted to her by Fateh Kuer.

The plaintiff's case in the plaint was that Girwar Narain was separate from his brother Sadhoo Narain and that upon his death his estate devolved upon his daughter, Fateh Kuer, and that upon Fateh Kuer's death the plaintiff became entitled to the estate which belonged to Girwar Narain. It appears that upon Girwar's death, there was a contest between Fateh Kuer on the one hand and Ram Prasad and Sant Prasad, sons of Sadhoo Narain on the other. There was a settlement between the parties by which the properties of Girwar Narain were divided between all the parties, who claimed to have an

interest in the estate of Girwar Narain.

The plaintiff became a party to that compromise through his father but it appears that he was then an infant and never ratified the transaction into which his father entered on his behalf. He accordingly by his action claimed to recover possession of the properties and cited the applicant as one of the principal defendants in the suit. He alleged in the seventh paragraph of his plaint that the defendant No 2, that is to say, the applicant, representing herself as the purchaser of perpetual *mokarari* right created under a deed executed by *Musammat* Fateh Kuer, was in unlawful possession of the property described in schedule I and that the defendant No. 1 was holding unlawful possession like a proprietor over the property mentioned in that schedule without having any right whatsoever.

The applicant, who, as I have mentioned, was cited as defendant No. 2 in the action, entered appearance and claimed under the *mokarrari* deed executed in her favour by Mussammat Fateh Kuer. That was the claim which she put forward in the action. Her case was that Girwar Narain was joint with his brother Sadhoo and that the compromise between the parties was binding upon the plaintiff. She accordingly contended in her written statement that Fateh Kuer took an absolute interest in the properties which were assigned to her and was competent to execute a *mokarrari* deed in her favour.

By our judgment we came to the conclusion that Girwar Narain was separate from Sadhoo and that the compromise between the parties did not operate to give any absolute title to Fateh Kuer and that the compromise was not binding upon the plaintiff. We gave the plaintiff a decree for possession as against all the defendants.

Mr. Sushil Madhab Mullick's argument is that the plaintiff claimed possession of the proprietary interest in the properties and that there was no power in the Court to give him a decree in respect of the *mokarrari* interest which is in the applicant for the reason that the plaintiff never claimed possession of that interest.

We are by no means prepared to accede to the argument of Mr. Mullick; but assuming that his contention is correct, the point becomes one of technicality without any substance to recommend it. The difficulty can be remedied at any time by amendment of the plaint, and if we are to grant a review we would be compelled to allow any application for amendment that might be made on behalf of the plaintiff if in justice the plaintiff is entitled to a decree as against the applicant.

Mr. Mullick then contended that in justice the plaintiff was not entitled to any decree as against his client, inasmuch as the question as between the plaintiff and Ram Prasad was left open. It appears that during the pendency of the case, the plaintiff and Ram Prasad entered into a settlement and by our judgment we did not, in any way, decide the question as between the plaintiff and Ram Prasad. Mr. Mullick's argument now is that if any one dispossessed the plaintiff it was Ram Prasad and that as his client claims title under Ram Prasad, it is unfair to give a decree to the plaintiff as against his client, leaving the entire question open as between the plaintiff and Ram Prasad.

In the first place it may be pointed out that his client does not claim any title through Ram Prasad, she held under a *mokarrari* deed executed in her favour by Fateh Kuer; that is, the deed which she sets up in her written statement. It is quite true that on Fateh Kuer's death, there was a contest in the Land Registration Department as between Ram Prasad on the one hand and Fateh Kuer's daughter on the other as to who was entitled to be registered in the Land Registration Department in the place of Fateh Kuer, and the Land Registration Department decided the question in favour of Ram Prasad: and we have no reason to doubt that since that decision the petitioner has been paying rent to Ram Prasad.

Mr. Mullick's contention is that we must regard that decision subsequent to the death of Fateh Kuer as a new settlement by Ram Prasad in favour of his client. I cannot look upon the decision in that way at all. The petitioner claims under Fateh Kuer and though it is quite true she is now paying rent to Ram Prasad because the Land Registration Department has decided the question in favour of Ram Prasad, still she claims to be in possession of

the property, not by virtue of any settlement made by Ram Prasad, but by virtue of the settlement made by Fateh Kuer.

The question, therefore in the form in which it has been raised by Mr. Mullick, does not arise; but assuming it does arise, I am not prepared to admit that we are incompetent to give a decree to the plaintiff for possession as against the person in judicial possession of the property, if for some reason the plaintiff does not choose to claim any relief as against the party who may put the other party in actual possession of the land. The decision of the Bombay High Court to which I referred in the course of my judgment* is conclusive on the point. Mr. Mullick relied upon the case of *H. H. Cannon* v. *Bissonath Adhikari* (1).

It appears that that case was subsequently relied upon by the Calcutta High Court in a case which was reversed by the Judicial Committee in the case of *Raja Durga Prasad Singh* v. *Braja Nath Bose*, (2). That case was also not followed by the Bombay High Court in the case to which I referred. It appears to me that the decision of Farran, C J. correctly lays down the principle that ought to guide us in dealing with cases of this nature.

This application fails and must be refused with costs. Hearing fee two gold *mohurs*.

Adami, J.—I agree.

Application refused.

* *Kashi* v. *Salashiva*, (1898) 21 Bom. 229.

(1) (1879) 5 C L.R. 154.

(2) (1912) 39 Cal. 696 = 15 I.C. 219 = 39 I.A. 133 (P.C.)

A. I. R. 1922 Patna 354

DAWSON MILLER, C. J. AND ADAMI, J.

Qyamuddin Khan and another—Plaintiffs-Appellants

v.

Ramyad Singh and others—Defendants-Respondents.

L.P A. Nos. 101 and 102 of 1921, decided on 27th April 1922, against the judgment of Ross, J., dated 27th October, 1921.

Bengal Tenancy Act (VIII B. C of 1885), S. 22 (2)—Collectorate partition—Land falling into particular takhta—*Landlords cannot dispute it except where there is arrangement to the contrary at time of Batwara.*

In all cases where you have a Collectorate partition between co-proprietors, if the lands are merely the *bakasht* lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those into whose *takhta* the particular lands in question fall. The only exceptions seem to be those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired.

[P. 356, C 2.]

S. M. Mullick and *H. P. Sinha*—for Appellants.

K. Sahai and *S. N. Rai*—for Respondents.

Dawson Miller, C.J.—These are two appeals under the Letters Patent from a decision of Mr. Justice Ross, dated the 27th of October last. There were two cases instituted by two co-sharer landlords claiming in the one case 8 *bighas* of land and in the other case 22 *bighas* 5 *kathas* against the same defendant, who previously had been a co sharer with the plaintiffs. Both the suits raised exactly the same question for determination; they have been heard together and determined by one judgment.

The plaintiff and the defendants were co-sharer landlords in *mouza* Silarhi and in April 1918 effected a Collectorate partition whereby different parcels of the lands in suit fell into the *takhtas* of the plaintiffs respectively. It appears that before the Collectorate partition the defendants had been in actual possession of the lands and had been cultivating them and giving a portion of the produce to their co-sharer landlords. After the partition when the plaintiffs sought to get possession they were resisted by the defendants and after certain proceedings under Section 144 of the Criminal Procedure the present suits were instituted in October 1918 by the plaintiffs claiming possession of the lands after eviction of the defendants.

The case set up by the defendants in their written statement was that the lands were their ancestral *kaimi raiyati* lands which they acquired before their acquisition of the proprietary interest, and of course if that case could have been made out, no doubt, the defendants would have been entitled to remain in possession as *raiyats* notwithstanding the subsequent partition.

The case made by the plaintiffs was that the lands in question were not

the defendants' *raiyati jote* at all but were the *malik's bakashat* lands and that the defendants were in fact in possession before the *batwara* but were in possession as *maliks*, and it was not disputed that the distribution of the produce was as stated and as set out in the record of rights.

A further defence was raised by the defendants to the effect that even if the disputed lands were the *maliks'* *bakasht* lands, which they denied, then in that case also they were entitled to remain in possession notwithstanding the partition, as there was no law or custom by which the defendants' *kasht* right in the disputed lands could, after the *Batwara* and demarcation of boundaries, be extinguished. The record-of rights described the lands as *bakasht* of the *maliks* and in a note in the survey *Khatian* the manner in which the rent or the produce was distributed was thus stated: —

"After deducting the *raiyati* half share, from the remainder of the produce is again deducted landlords' share due to the co-sharer in possession and the residue is divided amongst the other *maliks* according to their shares with an addition of one and one-fourth seers in the maund for cess."

When the case came before the trial court the defendants contended that this entry in the record-of-rights was consistent, and consistent only, with a *raiyati* interest in the defendants and they strongly relied upon that entry as supporting their claim which was also evidenced by some oral testimony and that they had many years ago and before they became proprietors acquired a *raiyati* interest in the land. That contention, however, failed.

The learned Munsif came to the conclusion that the defendants had never acquired *raiyati* interest by purchase or otherwise from any tenant or from any one, and he found that the entry in the record-of-rights was not inconsistent with that which in another part of the record was distinctly stated, namely, that the lands were the *bakasht* lands of the *maliks*, and upon the whole of the evidence he arrived at the conclusion of fact upon that issue adverse to the defendants.

He further came to the conclusion that as the defendants were neither *maliks* nor tenants of the *pattis* in which the disputed lands were situated, they were not entitled to remain in possession. That finding disposed of the point raised as an alternative point by the defendants that having been in possession of *bakasht* lands they were still after the *batwara* entitled to remain in possession upon payment of rent to their co-sharers.

The case then went on appeal to the Subordinate Judge and he arrived at exactly the same conclusion of fact as that which the Munsif had come to and found that there was absolutely no documentary evidence to prove that the defendant had ever acquired any tenancy right prior to their acquisition of proprietary right in the village and that the oral evidence on their behalf was quite unreliable. Those findings of fact cannot be questioned in second appeal, but when the case came on second appeal, to this Court it was contended before the learned Judge that notwithstanding the finding of fact the defendants had upon the facts found acquired an interest in the land which was not extinguished by reason of the *batwara* proceedings.

This view of the case appears to have commended itself to the learned Judge because he allowed the appeal and dismissed the suits with costs. He was apparently influenced by the entry in the record-of-rights as to the manner in which the produce had been distributed between the defendants actually occupying the land and their co-sharers. He thought that this fact itself negatived the suggestion that the lands were part of the *zerait* lands of all the proprietors held for the purpose of convenience by those particular proprietors, the defendants.

If the learned Judge meant by that passage that the plaintiffs were contending that these were *zerait* lands and, therefore, that no right of occupancy could be acquired in them, the learned Judge had not appreciated what the real issues in the case were. I think, however, it is only fair to the learned Judge to say that in using the words *zeraiti* lands there, he was not using the term in the technical sense in which it is used in the Bengal Tenancy Act. He probably meant to use the expression merely to indicate lands in the direct possession of the *maliks* such as *bakasht* lands. However that may be, the conclusion he arrived at was that the plaintiffs even after the *Batwara* could only become entitled to cultivating possession of the disputed lands as a result of

partition, if the right to cultivate itself was in hotchpot when the partition was made. It seems to me with great respect to the learned Judge that in expressing the matter, as I have just stated, he was somewhat misplacing the *onus*.

Unless the plaintiffs had acquired some right in the lands known to the law, some tenancy right or some right recognised by the law as creating an interest therein, other than the proprietary interest, the result of the partition would inevitably be that the co-sharers to whose *takhta* the land was allotted would get possession of the land, and direct possession, unless there was some tenant already on the land. It was not necessary to prove affirmatively that it was the intention in the *Batwara* proceedings that this land should be given into the direct cultivating possession of the landlords.

It must be presumed that the right to cultivate was considered by the landlords at the time of the partition to have been, as the learned Judge described it, itself in hotchpot. Apart altogether from any intention, it seems to me that it was in hotchpot and that the *onus* was upon the defendant to prove by some arrangement or by some agreement between the proprietors when the *batwara* partition was effected that the right actually to cultivate was not in hotchpot. Two cases however, have been relied upon by the learned Government Pleader on behalf of the respondents which he says support his contention.

The first of those was *Basudeo Narain* v. *Radhakishan* (1), to the judgment in which my learned brother was a party, in which it was decided that a co-sharer, who acquires an occupancy holding during the continuance of the joint estate of himself and his co-sharers, does not lose his *raiyati* right by reason of a Collectorate partition. That decision, however, may be justified under Section 22, sub section (2) of the Bengal Tenancy Act. The case set up in the present appeal is admittedly not a case coming under Section 22, sub-section (2) of that Act it is not contended that the defendants acquired any occupancy right during the period that they were co-sharers with the plaintiffs.

The other case is a decision of similar import. It is *Nandkishore Singh* v. *Mathura Sahu* (2). That was a decision of Jwala Prasad, Acting Chief Justice, and Mr. Justice Das, and that again was a case where the right of the defendant was acquired in the circumstances contemplated in Section 22, sub-section (2) of the Bengal Tenancy Act, and it is important to observe that in the course of the judgment, after pointing out that one of the contentions was that the lands were the *bakasht* of the proprietors and as such the plaintiffs had no right to the same if they fell into the *pattis* of the defendants in the partition proceedings, it is stated

"This would be so if the land was the *bakasht* of the proprietors prior to the partition".

So that so far from this decision being an authority in favour of the respondents it seems to me an authority to the contrary.

The result of my opinion is that in all cases where you have a Collectorate partition between co-proprietors, if the lands are merely the *bakasht* lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords themselves at the time of the batwara, none of them has the right to dispute the possession of those into whose *takhta* the particular lands in question fall. The only exceptions seem to me to be those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired.

But in the present case there is no law that I am aware of which provides that merely because a co-sharer has been in possession of *bakasht* lands belonging to himself and his co sharers he is, therefore entitled after a Collectorate partition to remain in possession of those lands when they are allotted to the *takhta* of one of his co-sharers.

In my opinion, these appeals should be allowed with costs, the decision of the learned Judge set aside and the decree of the Subordinate Judge restored.

Adami, J.—I agree.

Appeals allowed.

(1) A.I.R. 1922 Pat. 62.
(2) A.I.R. 1922 Pat. 193.

A. I. R. 1922 Patna 356.

DAWSON MILLER, C. J. AND ADAMI, J.

Ainthan Gope and others—Defendants.

Appellants.

v.

Khakhar Sahu and others—Plaintiffs-Respondents.

L. P. A. No. 97 of 1921 decided on 28th April 1922 against the decision passed by Ross, J., dated 26th July 1921.

(a) *Hindu Law—Mortgage by father—Necessity—Written statement in suit on mortgage not questioning necessity for rate of interest—Mortgagee need only prove necessity for loan.*

The facts necessary to prove legal necessity for the execution of the bond may be entirely different from those which are necessary to prove that there was necessity for borrowing money at a particular rate of interest or compound interest, and unless the plea of absence of legal necessity for interest is specifically taken in the written statement, the only *onus* which remains upon the plaintiff is that of proving that the bond itself i.e., the borrowing of the money, was justified by legal necessity and not of proving necessity for the rate of interest also.

[P. 358, C 2.]

(b) *Civil P. C., S. 100—Non-necessity for rate of interest for loan—Point cannot be raised for first time in appeal.*

The defendant cannot be allowed to raise in appeal the point of failure to prove legal necessity for the stipulated rate of interest when no such plea was taken in the Court below nor any issue raised on that point.

[P. 358, C. 2.]

S. N. Bose—for Appellant.

S. K. Mitra—for Respondents.

Dawson Miller, C. J—In this case the defendants have appealed under the Letters Patent from a decision of Mr. Justice Ross, dated the 26th July last year, in which he set aside the decree of the District Judge and restored that of the Munsif.

The only question for our decision in this case is whether the learned District Judge was right or not in refusing the interest payable under the mortgage bond at the compound rate, and in order to determine that question it becomes necessary to consider whether or not the plea was taken in the written statements of the defendants to the effect that the interest prescribed by the mortgage bond was not justified by legal necessity.

The defendants were the sons and grandsons of the mortgagor who had executed a mortgage bond in favour of the plaintiffs at a rate of interest of Rs. 1-9 per month compounded with yearly rests. The defendants raised various pleas by their written statements, amongst others, that the mortgage bond was not executed for legal necessity and did not benefit the defendants. They further contended that the interest was excessive and by way of penalty. But assuming that the issue as to legal necessity for the execution of the bond was decided against them, they nowhere in their written statements took the specific plea that the rate of interest was not justified by legal necessity.

There were two written statements delivered in this case, the first on behalf of Aithan Gope, the defendant No. 2, and the second on behalf of Ramrup Gope, the defendant No. 3, who appeared through his guardian, Babu Makund Krishna Das, a pleader. In the first written statement the plea with regard to interest was in these terms :—

"That a reference to the plaint will show that the plaintiff's claim for mesne profits is quite invalid and useless and it is by way of penalty. The plaintiff is not entitled to get compound interest".

The plea is set out in paragraph 6 of the written statement of the defendant No. 2. Then the plea with regard to legal necessity is in these terms :—

"That even if be proved that this defendant's father took the loan and executed the bond, as is falsely alleged by plaintiffs and totally denied by the defendant, then as the debt was not applied to legal necessities and it did not benefit this defendant or any other defendant, the plaintiffs are not entitled to a decree, nor can a mortgage decree be passed (para. 10)."

The written statement of the defendant, Ramrup Gope, denied that the bond was genuine and in paragraph 2 pleaded:—

"that even if the bond be genuine, it cannot be binding upon this defendant as it did not benefit the joint family, either the executant of the bond or this defendant".

In paragraph 3 he pleaded that the stipulation for compound interest is by way of penalty and the plaintiffs are not entitled to get it. He further raised a somewhat extraordinary plea that he, the defendant No. 3, being the grand-son of the executant of the bond, he was nothable on that account to pay interest. These are only pleas raised material for the present purpose.

The learned Munsif came to the conclusion that the bond was justified by legal necessity, that the

money raised thereunder was required for the purpose of paying rent, purchasing bullocks for the family cultivation, and some paddy for the use of the family, and he decreed the suit as prayed, coming to the conclusion that there was nothing unreasonable or unusual, certainly not unconscionable, in the rate of interest stipulated in the bond.

When the matter came before the District Judge, that learned Judge accepted the findings of the Munsif on the question of legal necessity for the raising of the money, but arrived at a conclusion, that although the rate of interest was not unusual as found by the Munsif, nevertheless there was no legal necessity proved by the plaintiffs for borrowing money at compound interest. He, therefore, reduced the interest awarded allowing only simple interest at the bond rate and not compound interest.

On appeal to this Court, the learned Judge, before whom the appeal came, after considering the authorities which were referred to him on the point dissented from the view taken by the District Judge and restored the decree of the Munsif, and the conclusion he came to was that, although the *onus* is undoubtedly upon the plaintiff suing under the mortgage bond executed by the *karta* of the family, where the interests of minor members are concerned, to prove not only the necessity for the loan but the necessity for the interest at the rate stipulated, still the *onus* thus arising in the plaintiff was discharged if the defendant did not raise specifically the plea, and that unless it was specifically pleaded that the interest was not justified by legal necessity there was no burden upon the plaintiff to prove by evidence that issue.

In the present case I have referred to the issues, which were raised by the defendants, and it seems to me that, although it may be said that the issue of legal necessity for the execution of the bond was raised, there was clearly no issue raised in the pleadings as to the necessity for the onerous interest stipulated in the bond. The facts necessary to prove legal necessity for the execution of the bond may be entirely different from those which are necessary to prove that there was necessity for borrowing money at a particular rate of interest or compound interest, and unless the plea is taken by the defendants it seems to me that the only *onus* which remains upon the plaintiff is that of proving that the bond itself was justified by legal necessity, that is to say, that the borrowing of the money was justified by legal necessity.

That fact in the present case has been found by all the Courts in favour of the plaintiffs, and I think it would be creating an altogether unjust burden upon the plaintiffs where the question has not been specifically raised, if we were to allow the defendants in appeal to raise the point that the plaintiff had failed to discharge the burden of proof upon an issue which was never in fact raised.

We have been referred to certain cases, some of them decisions of the Judicial Committee, in order to support the contention that in cases of a suit by a mortgagee against the members of the joint family it is not necessary in the pleadings for the defendants to raise the specific plea that the rate of interest stipulated in the bond was not justified by legal necessity and that it is sufficient, merely to raise the general question as to whether the loan itself was justified by legal necessity.

In the first case that of *Hurra Nath Rai Chaudhury* v *Randhir Singh* (1) the interest was reduced by the High Court at Calcutta from 18 per cent. to 12 per cent. and this decision was affirmed by their Lordships of the Privy Council. But in that case no question at all was raised, that the pleadings and issues did not permit of such a course, and even if it is left in doubt, as it certainly is as to what the exact form of the plea taken by the defendant was, as the point was never raised before their Lordships, it is certainly no authority in favour of the view now put forward by the defendant, and one must assume that the point decided, both by the High Court of Calcutta and by their Lordships of the Judicial Committee, was a point which it was competent for them to decide upon the pleadings as originally framed or at all events upon the issues framed in the suit.

The next case was that of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2). The passage relied upon in that

(1) (1890) 18 Cal. 311=18 I. A. 1=5 Sar 642 (P.C.)

(2) A.I.R 1919 P.C. 12=41 All. 571=46 I A. 145 (P.C.)

case in which the interest was reduced in a passage in the judgment of Lord Phillimore on page 702 of the report. It is in these terms:—

"In the written statement filed on behalf of the defendants, one of the points taken was that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued upon. In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of this mortgage."

The plea taken in that particular case is merely referred to in general terms by Lord Phillimore in his judgment and it must be presumed that their Lordships had before them in that case the actual words of the plea as they appeared in the pleadings, and on referring to the decision of the High Court which is reported in *Rao Raghu Nath Singh* v. *Nazir Begum* (3) one finds the defence of the defendants referred to on page 640. It is there stated:—

"The defence of the sons and grandsons was that there was no legal necessity either for the loan or for the exorbitant rate of interest agreed to be paid such as would render the family property liable for it.

It appears, therefore, quite clear on a closer reference to the actual document in the case that the plea as to the necessity or the rate of interest was specifically pleaded; and the decision of the Judicial Committee in *Nawab Nazir Begum* v. *Rao Raghu Nath Singh* (2), is certainly no authority for the contention put forward before us in this appeal. But the whole question was carefully considered in a recent judgment of this Court in the case of *Jag Sahu* v. *Rai Radha Kishun* (4) where the cases I have referred to and several others were considered, and the learned Judges, of whom my learned brother sitting with me to-day was one, came to the conclusion that before the defendants can raise the point that the plaintiff had failed to satisfy the burden of proof as to the rate of interest being justified by legal necessity, there must be a specific plea to that effect in the written statement.

If in fact no plea of that sort was taken then it must be assumed that the defendants did not intend to raise the plea and no proof is required from the plaintiffs: in other words, the burden of proof which is originally on the plaintiff is either waived or satisfied by reason of the absence of any plea requiring him to discharge that burden. Indeed it would be most unjust and unfair upon the plaintiff, where no issue has been raised in the case, to turn round afterwards and say, there is no evidence in support of the issue, the initial burden of proving it was upon you and, therefore, your case must fail, if in fact the point has never been taken from the beginning and no issue has been raised upon it.

In my opinion, the learned Judge of this Court was quite right in the decision which he arrived at and this appeal should be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

(3) (1913) 19 I. C. 639.

(4) (1920) 5 P. L. J. 287 = 1 P. L. T. 209 = 56 I. C. 867 = 1920 P. H. C. C. 211.

A. I. R. 1922 Patna 359

CHAPMAN AND ATKINSON, JJ.

Nauratan Lal—Plaintiff-Petitioner.

v.

Wilford Joseph Stephenson and others—Defendants—Opposite Party.

Civil Rev. No 234 of 1917 decided on 6th February 1918 from a decision of Sub. J., Patna, dated 14th July 1917.

(a) *Civil P. C., S. 115—Interlocutory order can be revised—Where case record has been sent for it would be proper to dispose of the matter.*

Where the High Court has sent for the record of a case and the case is before it for order, it would not be exercising a wise discretion if the High Court did not dispose of the matter, the question of discretion being merely concerned with the stage at which the matter should be determined. [P, 360, C. 1.]

The Patna High Court has adopted the established practice of the Calcutta High Court of interfering with Interlocutory orders in revision. [P. 360, C. 1]

(b) *Courts Fees Act (VII of 1870), Ss 8 and 17—Suit for possession, malikana and mesne profits—Court fee is payable on the aggregate of three items.*

A suit was one for recovery of possession of land together with a claim for *malikana* and for mesne profits and the plaintiff after valuing each of the three items paid Court fees on the total amount. The Court below held that for the purpose of assessin

the Court fees payable the three items should be taken separately.

Held the court fee payable is on the total amount of the claims added together and not on the separate valuation of each item. It would be unwise to depart from established practice since 1882 [P. 361, C. 1.]

A. B. Mukherji—for Petitioner.

Ashgar and *D. N. Sarkar*—for Opposite Party.

Judgment:—This application in revision arises out of an order made by the Subordinate Judge requiring the Plaintiff, now the decree-holder, to pay a sum of Rs. 550 which the Court has held to be due from him on account of court fee.

A preliminary objection has been taken that we ought not to interfere in revision with an interlocutory order of this kind. It has, however, been the established practice of the Calcutta High Court to interfere with interlocutory orders and that practice has been adopted by this Court.

Where the record of the case has been sent for by the Court and the case is before it for order, it would in our opinion not be exercising a wise discretion if we did not now dispose of the matter, the question of discretion being merely concerned with the stage at which the matter should be determined As considerable delay has already occurred and is likely to occur if a remand is ordered, we are of opinion that the question should be disposed of now.

The suit was one for recovery of possession and for mesne profits. The value of the land was assessed in accordance with the rules of the Court Fees Act at Rupees 16,867; there was also a claim for *mal kana* valued at Rs. 1,200; and a claim for mesne profits estimated as Rs. 13,620. The plaintiff appears to have added these three sums together for the purpose of assessing the Court fee payable and to have paid a Court fee of Rs. 995 on the total amount.

The suit was decreed and after the decree the mesne profits were ascertained by the Commissioner to be Rs. 24,474. The learned Subordinate Judge has held that for the purpose of assessing the Court fee payable the items should be taken separately; *i.e.*, that Court fee should be assessed separately on the value of the land, Rs. 16,867; separately on the *malikana*, Rs. 1,200; separately on the amount of mesne profits, Rs. 24,474. Assessing the Court fee on this basis the Court fee payable would amount to Rs. 1,645; the amount of Courtfee already paid is Rs. 995, and the learned Subordinate Judge has directed that the deficit Court fee should now be paid.

The Plaintiff decree holder, asks us to hold that the learned Subordinate Judge has fallen into an error and that for the purpose of assessing the Court fee payable he should have done, what the Plaintiff originally did, *viz*, added all the three items together. If this is done the Court fee payable would amount to Rs. 1,115 and this amount the Plaintiff decree-holder is willing to pay.

The determination of this point depends upon the interpretation to be put upon Section 17 of the Court Fees Act, which provides that where a suit embraces two or more distinct subjects the Plaintiff shall be liable to pay the aggregate of the amount of Court fees payable upon each of such subjects under this Act.

The question is what is the meaning of the word 'subject' as used in this section? Two views are possible. One is that the word 'subject' relates back to Section 7 where the various subjects of suits are divided under various heads; and that the intention of Section 17 is that where suit comprises of two or more of the various subjects named in Section 7 the provisions of Section 17 would apply.

The other view is that the word 'subject' used in Section 17 means 'cause of action' and is not to be interpreted with reference to Section 7. There can be no doubt that there is much to be said for the former view. But, on the other hand, so far as this Court is concerned the authorities seem to be conclusively in favour of the view that the word 'subject' in Section 17 means 'cause of action.'

There is a very early decision upon this point, *Mulchand* v. *Shib Charan* (1). That was not a case of mesne profits but it was held in that case that the word subject means cause of action. This point was also decided by the Calcutta High Court in a Full Bench decision, *Kishori Lal* v. *Sharut Chunder* (2), and that decision was followed in *Re. Reference under the Court Fees Act*, 1870 (3).

In the Full Bench case it was

(1) (1860) 2 All. 676 (F.B.)

(2) (1882) 8 Cal. 593=10 C.L.R. 559 (F.B.)

(3) (1894) 16 All. 401=1894 A.W.N. 124.

stated that the decision was based upon a practice which was then prevalent in that Court; and we are of opinion that it would be unwise to depart from that practice which has been accepted as the established practice since 1882 and which practice must be taken to have been adopted not only by this Court but also by all the Courts subordinate to this Court. We are accordingly of opinion that the Court-fee payable in this case is Rs 1,115 and not Rs. 1,645 as directed by the Subordinate Judge.

We therefore direct that the Subordinate Judge do dispose of this matter accordingly. The application succeeds and is allowed with costs measured at two gold *mohurs*.

Application allowed.

A. I. R. 1922 Patna 361

ROSS, J.

Secretary of State for India in Council —Defendant, No. 1-Appellant

v.

A. H. Forbes—Plaintiff-Respondent

A. No. 539 of 1919, decided on 6th June 1921, from the appellate decree of Sub. J., Purnea, dated 13th March 1919.

(a) *Income Tax Act (II of 1886), Ss. 39, 3 (5)—"Income"—Significance of—Civil Court has no jurisdiction to rectify Collector's assessment.*

The term "income" signifies that comes in. The entire income of land is "income" within the meaning of section 3 (5) of the Income Tax Act. In the matter of assessment of tax on income the Collector has power to decide what is the income and what are the outgoings which ought to be legitimately deducted. If the Collector makes any mistake in his decision, the Civil Court has no jurisdiction to rectify it in a suit brought before it for the purpose.

[P. 362, C. 1.]

(b) *Jurisdiction—Exclusive powers over subject vested in an authority—Civil Court cannot interfere.*

Where an authority is by Statute vested with exclusive powers over any subject matter a Civil Court cannot interfere; but if the authority purports to exercise these powers on what is not that subject matter then, the Court will interfere, because the authority is not acting under the Statute and is not protected thereby.

[P. 361, C. 2.]

Kulwant Sahay—for Appellant.

P. K. Sen and *L. M. Ganguly*—for Respondent.

Judgment.—The plaintiff stated that he submitted to the Collector a return showing the net income of his estate after deduction of the amount paid to the Government as land revenue, among other items, in the years 1915-1916 and 1916-1917, but the Collector required him to pay income-tax on the amount which he had so deducted as Government revenue, thereby exceeding his powers under section 15 of Act II of 1886. He, therefore, claimed a refund of the tax so realized in excess.

The defence of the Secretary of State was that the suit was barred by section 39 of Act VI of 1886. The learned Munsif accepted the defence and dismissed the suit.

The Subordinate Judge, however, held that the Civil Court had jurisdiction in the matter and gave the plaintiff a decree.

In second appeal it is contended on behalf of the Secretary of State that the order of the Revenue Authorities is final. The plaintiff appealed to the Collector and to the Commissioner against the assessment and failed, and he is not entitled to come to the Civil Court for what is in reality a modification of the assessment made under the Act.

It is contended that there is no dispute about the income and that it is for the Revenue Authorities to decide what deductions from income are to be made. On behalf of the respondent the argument is that the Collector has in effect taxed what is not income and has, therefore, acted *ultra vires* and that the Civil Court has jurisdiction in these circumstances.

On the general principle on which the Civil Court interferes in such cases there is no doubt. Where an authority is by Statute vested with exclusive powers over any subject-matter, then so long as these powers are exercised on that subject-matter, the Civil Court cannot interfere, but if the authority purports to exercise these powers on what is not that subject-matter, then the Court will interfere because the authority is not acting under the Statute and is not protected thereby. As it was stated in *Chairman of Giridih Municipality* v. *Srish Chandar Mozumdar* (1).

"The true test is, whether there has been a substantial disregard of the provisions of the law which creates the authority..... and regulates its powers and duties".

Under section 14 of Act II of 1886

(1) (1908) 35 Cal. 859=12 C.W.N. 709 =7 C. L. J. 631.

the Collector shall determine what persons are chargeable and the amount at which every person so chargeable shall be assessed, and under section 15 the assessment shall be made upon the income accruing to the person during the year ending on the day on which his accounts have been last made up. Under section 3 (5) "income" means, "income and profits accruing and arising or received in British India."

The question then is, what has the Collector done in this case? If he has assessed income, then even if his assessment is wrong, the Civil Court cannot interfere by reason of section 39 of the Act If he has assessed something which is not income, then he has acted without jurisdiction.

"Income signifies what comes in. It is as large a word as can be used".

(See Stroud's Judicial Dictionary). The plaint sets forth what the plaintiff calls net income. This is not an expression to be found in the Act. The Act defines income and deals with income. It cannot be denied that the total sum on which the plaintiff has been assessed is income. This is implied in the plaint itself.

The Collector, therefore, had jurisdiction to assess tax on it. The plaintiff claims that he is entitled to deduct Government revenue from the income. The Collector decided that he was not so entitled, but this again was a matter within the jurisdiction of the Collector. If the Collector is to assess income tax at all, he must decide how much comes in and what the outgoings to be legitimately deducted are. There is no dispute in this case as to what came in. The dispute is as to outgoings. This is for the Collector. I am wholly unable to say that anything has been done *ultra vires* by the Collector.

I, therefore, hold that the Civil Court has no jurisdiction over this question and that the suit cannot be maintained.

The appeal is decreed with costs and the suit is dismissed with costs throughout.

Appeal decreed.

A. I. R. 1922 Patna 362.

COUTTS AND ROSS, JJ.

Ashurfi Singh—Plaintiff-Appellant

v.

Biseswar Pratap Narain Sahi and others—Defendants-Respondents.

Appeal No. 816 of 1919, decided on 16th Jan., 1922, from Muzafferpore, dated 25th August 1919.

Deed—Gift in favour of wife as 'malik' *but restrictive clauzes used—Gift was held to be only of a Hindu woman's estate.*

In a deed of gift by a husband to his wife, the properties were granted to the wife as 'Malik'. Any alienation made during the lifetime of the donor was to be by his permission. After his death, she could transfer to certain specified persons and to a limited extent. She was also given authority to execute a will in favour of certain specified persons. There was a provision also for the devolution of the properties left undisposed of at the donee's death.

Held: that a court must look to all the clauses of the deed and give effect to all the clauses ignoring none as redundant or contradictory and that on a construction of the deed of gift, the intention of the donor was to provide for the donee and also for the ultimate devolution of the property. The grant in effect was grant of an ordinary Hindu woman's estate. The absence of any clause restraining the donee from granting a *mokurari* lease does not lead to the conclusion that she was empowered to grant it.

[P. 363, C. 2, P. 364, C. 1.]

S.-C. Mitter and *J. P. Singh*—for Appellant.

M. K. Sahay—for Respondent.

Ross, J.—This is an appeal by the Plaintiff. He alleges that Musammat Mulukrani Kuer was the absolute owner of the properties specified in the plaint and that he obtained an *Istamrari Mokarrari patta* from Musammat Mulukrani Kuer on the 7th of August 1896. A dispute having arisen between himself and the reversioners of Babu Har Prasas Narayan Singh, the husband of Musammat Mulukrani Kuer, the properties were attached by the order of the Magistrate and this suit was brought for a declaration of the Plaintiff's title to and for recovery of possession of the properties together with the surplus amount of profits in the hands of the Receiver.

There were six parties who were Defendants to the suit but we are concerned now only with the third party who are two minors under the protection of the Court of Wards. Their defence was that Musammat Mulukrani Kuer had only a limited interest in the properties for the term of her life and that consequently the Plaintiff was not entitled to succeed. The Subordinate Judge held that Musammat Mulukrani Kuer had an absolute right to the property and

consequently gave a decree to the Plaintiff. This decision was reversed on appeal and the question now is as to the nature of the estate taken by Musammat Mulukrani Kuer under a deed of gift executed in her favour by her husband on the 23rd June 1859.

The contention on behalf of the Appellant is that the preamble to the deed refers to the whole collection of rights to their uttermost limit in these properties, and that by the first clause the properties are granted to the grantor's wife "as malik" and that consequently she became full owner, her interest being limited only so far as it is specifically limited in the succeeding clauses.

The second clause deals with the power of alienation and there is no restriction therein on the granting of a *mokarrari* lease. Consequently Musammat Mulukrani Kuer had power to grant a Mokarrari lease and the lease granted by her is valid.

Reference was made to the decisions in *Mt. Kollany Koer* v. *Luchmee Prasad* (1), *Surajmani* v. *Babi Nath Ojha* (2) and *Bhaidas Shivdas* v. *Bai Gulab* (3) and the unreported decision of the Privy Council in *Mt Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (4). It was argued that the effect of these cases is to show, as observed in the last mentioned case, that "the term '*malik*' when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe as owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred; and further that the fact that the donee is the wife or widow of a Hindu is not in itself a circumstance qualifying the meaning of the word "*malik*"

Now as was pointed out in the case of *Mt. Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (4) it is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will which was adopted by a Court in another case. The case upon which the learned Counsel for the Appellant most strongly relies is *Bhaidas Shivdas* v. *Bai Gulab* (3) but the terms of the Will in that case were materially different from those under consideration now.

The rule of construction is given in *Shib Lakshan Bhakat* v. *Srimati Tarangini Dasi* (5) where it was laid down that the Court must in construing a Will look to all the clauses of the Will and give effect to all the clauses, ignoring none as redundant or contradictory, see also *Kandarpa Nath Ghose* v. *Jogendra Nath Bose* (6).

This deed therefore cannot be construed by reference only to the preamble and the first two clauses, but must be read as a whole. The second clause lays down the limits within which the donee can alienate the property; any alienation made during the lifetime of the donor is to be by his permission. After his death she can transfer up to a limit of 50 *bighas* for charitable purposes; she can also transfer by sale or gift to any son of the donor and the donee or the son of that son or any other son or daughter of the donor or any male descendant of his elder brother, but except to these persons she is to have no power to sell, or make a gift of, or mortgage, more than 50 *bighas*.

The third clause gives the donee power to execute a Will in favour of any of the aforesaid persons The fourth clause deals with the property undisposed of at the donee's death by any such Will and in that case it is declared that her son will get the property, or his male descendants, and if there is no son of the donee or male descendants of such son then in existence, then any other son of the donee or his son and in default of such persons, the donor's elder brother or his son will get the property but no daughter of the donee or any of her paternal or maternal relations.

The fifth clause provides for any unmarried daughter or son's daughter of the donee, and the last clause declares

(1) (1875) 24 W. R. 395.
(2) (1907) 30 All. 84=35 I. A. 17=5 A. L. J. 67.
(3) A. I. R. 1922 P. C. 193=46 Bom. 153=49 I. A. 1 (P. C.)
(4) Unreported.
(5) (1908) 8 C. L. J. 20.
(6) (1910) 12 C. L. J. 391=6 I. C. 141.

that if the donee dies before the donor, the properties undisposed of by the donee will rivert to him.

Now as was pointed out in the case of *Bhaidas Shivdas* v. *Bai Gulab* (3) the word "*malik*" is not a term of art that is to say, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. Absolute ownership imports at least the right to exclusive and free enjoyment of the property and free power of disposition.

It is impossible to hold on the terms of this deed that an absolute estate was granted to *Mussammat* Mulukrani Kuer; the limitations are inconsistent with free and full ownership. Reading the deed as a whole it seems to me clear that the intention of the donor was to provide for the donee and also for the ultimate devolution of his property. The grant in effect is the grant of an ordinary Hindu woman's estate with powers to sell, or to appoint by deed or Will, to certain specified persons, and if these powers are not exercised by the donee they are exercised by the donor by this deed in favour of those persons.

It follows that the absence of any clause restraining the donee from granting a *mokarrari* lease does not lead to the conclusion that she is empowered to grant it ; her powers must be gathered from the total effect of the conveyance and from the nature of the estate thereby granted. The argument of the Appellant involves isolating a portion of the deed from the rest and then inferring that, because this power is not expressly taken away, it is granted. The argument infringes the rule of construction above referred to.

In my opinion therefore this appeal must fail and be dismissed with costs.

Coutts, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 364.

COUTTS AND ROSS, JJ.

Gopal Rai and others—Defendants—Appellants

v.

Harchand Ram Anant Ram—Plaintiff—Respondents

First Appeal No. 94 of 1919 decided on 23rd February 1922 from a decision of Sub-J., Bhagalpur.

Limitation Act (1908), Sch. I, Art. 85—Accounts—Mutuality—No independent obligations on both sides—Account is not a mutual one—Open and current account defined—Accounts.

Where an account does not indicate transactions creating independent obligations on both sides but there is sometimes a credit in favour of the defendant and that only for a few days.

Held, the account is not a mutual account, and in a suit on such an account the plaintiff is not entitled to the benefit of Article 85 of Schedule 1 to the Limitation Act.

[P. 368, C. 2.]

An account current is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or can be ascertained, from which it follows that such an account comes under the term of open account in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits.

[P. 366, C. 2, P. 367, C. 1.]

The test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of the other. An account which consists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account. [P. 367, C. 1.]

C. C. Das and *Lal Mohan Ganguly*—for Appellants.

P. K. Sen, N.C. Sinha, Jugarnath Prasad and *Bindheswari Prasad*—for Respondents.

Coutts, J.—This is an appeal against a decree of the Subordinate Judge of Bhagalpur, decreeing a suit brought by the firm of Harchand Ram-Anant Ram against Gopal Rai and others. The plaintiff is a firm trading in Bhagalpur and the defendants are members of a joint Hindu family, of which the defendant No. 1, Gopal Rai, is the *karta* and they also have a business in Bhagalpur known as Gopal Rai-Sagar Mall.

The plaintiff's case is that they had a mutual, open and current account with the defendants' firm, that there was an adjustment of this account on the 18th of Savan *Sambat* 1973, when it was found that a sum of Rs. 4,498-15-6 was due by the defendants to the plaintiff. This sum with interest amounted to Rs 5,721-8-6 and the plaintiff brought the suit for this

amount.

The defendants admitted that they had dealings with the plaintiffs' firm but they contended that the transactions between them and the plaintiff's firm were not a mutual, open and current account and that the claim was barred by limitation. They also denied their liability for interest at the rate charged by the plaintiff. In addition, they pleaded a set off of Rs. 14,580 on the following allegation.

There was a suit which involved a large property, known as the Lachmipur case, one Radha Kishen Bhagaria, the plaintiff and one Sheodut Ram entered into a champertous transaction and advanced money for that litigation their shares in the litigation being 8-annas, 6 annas and 2 annas respectively. Bansidhar was the managing member of the plaintiff firm and the defendants' case is that he made an arrangement with the defendant No. 1, Gopal, by which Gopal was to make *pairvi* in that case; for this he was to receive 2 per cent, of all money advanced by the plaintiff for the litigation whether it was successful or not and 6 per cent. more if it was successful. The plaintiff's share of the money advanced for the litigation was Rs. 7,27,500.

The litigation was not successful and, consequently, Gopal claims only 2 per cent. which amounts to Rs. 14,550. The learned Subordinate Judge has found that no portion of the plaintiff's claim for Rs. 5,724-8-6 is barred by limitation and he has found that there was no arrangement between the plaintiff and Gopal by which Gopal was to be paid 2 per cent. of the sum advanced by the plaintiff for the litigation in the Lachmipur case whether it was successful or not.

The plaintiff's suit has, consequently, as I have already said, been decreed. The defendants have appealed, and in the appeal the same points are raised as in the Trial Court, *viz.*, (1) that the plaintiff's claim on the account between the parties is barred by limitation and (2) that the defendants are entitled to the set off which they claimed. I propose to deal with this question of set-off first.

It is an admitted fact that the Lachmipur suit was financed by certain Marwaris on behalf of the plaintiffs in that suit. Bansidhar, who is the Manager of the plaintiffs' firm, denies that he or his firm had anything to do with that litigation but it seems clear that the conclusion of the learned Subordinate Judge that Bansidhar did in fact enter into the champertous transaction alleged is correct. There is no document to show this, but in his evidence Bansidhar admits that he consulted Pleaders about that case, met Counsel and made arrangements for their convenience.

The Commissioner of the Division spoke to him about the case, he came to Patna in connection with it when it was on appeal before the High Court, and there was a question of a compromise. He attended the trial, he was present at the hearing of the appeal, and he paid the costs of the suit, both in Bhagalpur and in the Patna High Court. He says that this was done on behalf of Radha Kishen Bhagaria, who is a relative of his; but from the evidence of Radha Kishen it is clear that this is not so, for his evidence shows that he himself was paying money and was looking after the case and he had no occasion to use Bansidhar to do anything for him.

In these circumstances, I have no doubt that Bansidhar was one of the champertors, as has been found by the learned Subordinate Judge.

The question remains, however, whether in fact Bansidhar made the arrangement with Gopal, as the latter contends. We are not concerned with that portion of the alleged agreement relating to the payment of 6 per cent. in the case of the plaintiffs in the Lachmipur case being successful because, so far, they have not been successful. We are concerned only with the matter of the 2 per cent. which Bansidhar is said to have agreed to pay whether the litigation was successful or not.

Now, the probabilities are against any such arrangement having been come to. If Bansidhar had wished Gopal to be zealous in looking after the case he would hardly have promised him 2 per cent. which amounted to a large sum of over Rs. 14,000 in the case of non-success. Further, it is difficult to understand why Bansidhar alone of all the champertors should have entered into such an agreement. The champertors were all working together, the *pairvi* benefited all, and if any arrangement was being made it would certainly have been made with the knowledge of them all.

Again, it is unlikely if the defendant

No. 1 was to get 2 per cent, win or lose that he would not have asked for and got something advanced during the litigation which was of a protracted nature. Another very important consideration which tends to show that the defendants' story is untrue, is that there is no document evidencing the agreement.

It has been urged that the parties are on friendly terms and have been doing business together, and that between Marwaris who are friends documents are very often dispensed with. This is true but there is evidence of other transactions entered into by the defendant No. 1 with Marwaris in which he took documents and one is a transaction between him and his own brother in which he got a letter specifying his claim. I think, therefore, that it is unlikely that in the case of a speculative suit such as is the Lachmipur case the defendant No. 1 would not get some document executed as evidence of the agreement.

There are other circumstances referred to in the judgment of the learned Subordinate Judge which also indicate that there could not have been any such agreement. Against these we have only the statements of defendant No. 1 Gopal and his *gomasta*. The defendant No. 1 is admittedly not on good terms with one Debi Prasad Marwari who was interested in the Lachmipur case on behalf of the defendants and it is not at all improbable that he might have interested himself in the Lachmipur case on behalf of the plaintiffs for that reason.

The *gomasta* is a servant in the employ of Gopal Babu and to that extent he is an interested witness. The evidence of the agreement is thus of a very weak character and in the circumstances of the case I find it impossible to accept it as sufficient evidence of the agreement. I accordingly agree with the learned Subordinate Judge that the set-off must be disallowed.

I now come to the question of the sum of Rs. 5,724-8-6 which is claimed by the plaintiff on a mutual, open and current account adjusted on the 18th of Savan 1973 *Sambat*. The plaintiffs' claim was based, in the first place, on the account being a mutual, open and current account and consequently coming within the provisions of section 85 of the Limitation Act; and, in the alternative, on an adjustment which would bring it within the provisions of Article 115 of the Limitation Act.

The learned Subordinate Judge has found in favour of the plaintiff on both these points and he has also found that the suit is not barred by limitation on the principle laid down in the case of *Kedar Nath Mitter* v. *Denobandhu Shaha* (1), which refers to a tradesman's account. In regard to the last point the plaintiff never claimed that limitation would be saved on the principle enunciated in the decision I have just referred to, and it is clear that the case is not one of a tradesman's account. In regard to Article 115 of the Limitation Act it is also clear that the learned Subordinate Judge has taken an incorrect view of the law.

He has relied on the case of *Jalim Singh* v. *Choonee Lal Johurry* (2) for the proposition that an adjustment of accounts between the parties in the defendants' presence operates as an implied contract to pay. Now, in the present case the adjustment is said to have been made in the presence of the parties but the case of *Jalim Singh* v. *Choonee Lal Johury* (2), which related to a partnership is no authority for the proposition that in any case of accounts an adjustment in the presence of parties operates as a fresh contract and it is conceded by Mr. Sen the learned Counsel appearing on behalf of the respondents that, unless the account is a mutual, open and current account, the adjustment will not save the suit from being barred by limitation.

The question then is, whether the account is a mutual, open and current account. The question of what a mutual, open and current account is has been fully discussed by Mr. Justice Mookerjee in *Ram Pershad* v. *Harbans Singh* (3) in a judgment in which he reviews all the previous decisions on this point.

In that judgment he says: "An account current is an open or running account between two or more parties or, an account which contains items between the parties from which the balance due to one of them is or can be ascertained, from which it follows that such an

(1) (1915) 42 Cal. 1043=31 I.C. 626=19 C.W.N. 724.

(2) (1911) 15 C.W.N. 882=11 I.C. 540.

(3) (1907) 6 C.L.J. 158.

account comes under the term of open account, in so far as it is running unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits."

It is not disputed that the account with which we are concerned in the present case is an open and current account. The question is, whether it is a mutual account. The test of mutuality which has been laid down in a number of decisions is, that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other.

An account which consists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account—*Velu Pillai* v. *Ghose Mahamed* (4). In *Hajee Syud Muhomed* v. *Ashrufoonnissa* (5) it was held that if the balance was sometimes in favour of the defendant but generally in favour of the plaintiff, the banker, the account would not be a mutual one: and in *Phillips* v. *Phillips* (6) it was held that a mutual account is not merely one where one of two parties has received money and paid it on account of the other, but where each of two parties has paid on the other's account. An account under which one party has received money and paid on account of the other is not a mutual account, and this view has been adopted in a series of English decisions.

In the present case the account between the parties began as early as the year 1906 and the last transaction is said to have been after the adjustment which was made on the 3rd August 1916. The only accounts on the record are the plaintiff's account. The defendants have not produced their accounts, and, although no presumption can arise against them for not doing so, the fact that they have not produced them has considerably increased our difficulty.

As I have already said, the accounts began in 1906 and the first balance was struck after only five transactions had taken place; this shows a balance in favour of the plaintiff of Rs. 1,258. The next balance was struck in 1909 and shows a balance in favour of the defendants of Rs. 2075-8-9. From this time on there is a balance of different amounts always in favour of the plaintiff, till the 23rd of January 1912 from which date until the 18th of January 1913 there are shifting balances, sometimes in favour of the plaintiff and sometimes in favour of the defendants; and, so far as I can discover, there were in all 17 occasions on which the balance was in the defendants' favour during this period. From the 18th January 1913 onward until the last item of account, the balance has been continuously in favour of the plaintiff.

On the face of the accounts, therefore, it would appear that, in the years 1906 and 1907, there was a shifting balance once in favour of the plaintiff and again in favour of the defendants, and that, between the 23rd January 1912 and the 18th January 1913, there were shifting balances sometimes in favour of the plaintiff and sometimes in favour of the defendants, and, on the face of it, the account would appear to be a mutual account. It is contended, however, by the learned Counsel for the appellants that if the accounts are properly examined, it will be found that in 1906–1907 there was in fact no balance in favour of the defendants and that all the payments which have been made for the other period are merely payments to reduce a debt owed by them to the plaintiff or as to a banker for purpose of remittance. So far as the years 1906-1907 are concerned, there can be no doubt.

The item with which we are concerned is the item of Rs. 2,075-8-9 which is shown as a credit in favour of the defendants in 1907. One of the items on the credit side of the account, when it was made up in 1907, is a sum of Rs. 6,000 which was an item transferred from the *nakal bahi*. It appears, however, from the *nakal bahi*, Exhibit 3-A, that in fact, this sum of Rs. 6,000 had not been really paid in at the time that the account was made up; the *nakal bahi* itself shows that these items were credited as follows:—

(4) (1894) 17 M. 293=4 M. L. J. 140.
(5) (1880) 5 C. 759=6 C. L. R. 112.
(6) (1852) 9 Hare 471=68 E. R. 596.

6th Magh Sudi	...	Rs. 2,000
7th Magh Sudi	...	2,500
19th Chait Sudi	...	1,500

and the *khata* immediately following the *khata* which shows Rs. 6,000 as a credit is for the dates beginning with 6th Magh Sudi. This clearly indicates that the Rs. 6,000 should have been shown as a credit in the next account. There was, therefore, in fact no credit of Rs. 2,075-8-9 in favour of the defendants when the account of 1907 was made up.

The account from the 23rd January 1912 up to the 18th January 1913 is a more difficult matter and, at first sight, it would appear to be a mutual account. On careful examination, however, I am satisfied that this is not so. Up till the 23rd January 1912 there was a continuous debit against Gopal, but on the 20th January he paid in Rs. 1,500 and again on the 23rd January he paid in Rs. 300 which raised his credit to Rs. 100. On the 26th January he paid in Rs. 500; on the 29th January he paid in Rs. 300 which raised his credit to Rs. 900. On the 2nd February he withdrew Rs. 3,150 which left him again with a debit of Rs. 2,250.

Between this date and the 23rd February he paid in various sums and withdrew various sums there being always a debit balance until the 19th March 1912 when, by paying in Rs. 575, his account stood at this amount to his credit. On the 29th of March he withdrew Rs. 300, reducing his balance to Rs. 275; on the 30th March he paid in Rs. 400, increasing his balance to Rs. 675. On the 2nd April he withdrew Rs. 10 leaving his balance at Rs. 665; on the 4th April he withdrew Rs. 4-8-6 reducing his balance to Rs. 660-7-6, and on the 12th April he withdrew Rs. 3,000, which again left him owing a sum of Rs. 2,339-8-6 to the plaintiff. He again paid in various sums of money up to the 25th April when, by paying Rs. 1,075 he was left with a credit of Rs. 810-7-6.

On the 29th April he paid in Rs. 700, making his balance Rs. 1,510-7-6, but on the 2nd May 1912, he withdrew Rs. 4,200, when the balance again became a debit one, and this debit continued until the 9th January 1913 when he again had a credit of Rs. 24-2-0. On the 10th January 1913 he had a credit of Rs. 624-2-0; on the 12th January a credit of Rs. 1,524-2-0; on the 13th January a credit of Rs. 1,474-2-0; on the 15th January a credit of Rs. 2,374-2-0; on the 17th January Rs. 3,374-2-0; and on the 18th January Rs. 4,124-2-0.

From this date onwards there was a continuous debit balance against Gopal. This can hardly, I think, be called a mutual account. There was never a credit in favour of the defendant Gopal for more than a few days at a time and the account appears to be of the nature of those accounts referred to in *Vellu Pillai* v. *Ghose Mahomed* (4), in *Phillips* v. *Phillips* (6) and the cases following that decision. It was not an account indicating transactions which created independent obligations on both sides as is required in the case of a mutual account.

It is true that there was sometimes a credit in favour of Gopal, but the credit, as I have said, was only for a few days and such an account cannot be held to indicate a mutual account in which there has been reciprocal dealings between the parties. Some argument has been addressed to us in respect of two items (1) Rs. 408-14-0 which was realized from the estate of Rani Keshowati of Handwa, and (2) costs in respect of the Lodipur estate; and it is contended that these items show that there were mutual dealings between the parties.

I can, however, see no difference between realization from an estate and a payment of cash to the defendants' credit. The account then, in my opinion, is not a mutual account. This being so, the plaintiff is not entitled to the benefit of the limitation prescribed in Article 85 of the Limitation Act; and it is admitted that if this Article does not apply then the plaintiff can get a decree for Rs. 1,045-10-0 only.

In the result, then, I would uphold the decree of the learned Subordinate Judge with regard to set-off, but would modify his decree in regard to the principal amount claimed by the plaintiff to the extent indicated above. Costs will be in proportion to the success of the parties.

Ross, J.—I agree.

Decree modified.

A. I. R. 1922 Patna 368.

Ross, J.

Razaur Rahman—Plaintiff-Petitioner

v.

Athar Hussain and others—Defendants-Opposite party.

Civil Rev. No. 98 of 1921 decided on 29th June 1921 from an order of Munsif, Third Court, Gaya, dated 14th April 1921.

(a) *Civil P. C., (1908), S. 115, O. VII, R. 10—Jurisdiction—Plaint returned by both Munsif and by Small Cause Courts—High Court can make proper order.*

Where the Small Cause Judge returned a plaint which had been first presented to, and returned by the Munsif to be presented before the former, and the Munsif adhered to his previous order.

Held; The High Court is entitled to make such an order as would enable the plaintiff to have his action tried. [P. 369, C. 1,]

(b) *Prov. Sm. Cause Courts Act—Suit for damages incidentally involving title to immoveable property is small cause.*

Where in a suit for damages the question of title to immoveable property arises only incidentally the suit is cognisable by a Court of Small Causes. [P. 369, C 1, & 2.]

Laxmi Narayan Singh and *Shiveshwar Dayal*—for Petitioner.

Achalendra Nath Das for *Kailaspati*—for Opposite Party.

Judgment.—This is an application for revision of an order passed by the Munsif of the Third Court of Gaya on the 14th April 1921. The plaintiff, who is the applicant, brought a suit for damages for wrongful destruction of his ancestral dwelling-house and removal of the materials thereof, in the Court of the Third Munsif of Gaya, on the 21st January 1921.

The Munsif was of opinion that the suit was a suit cognizable by a Court of Small Causes and returned the plaint for presentation to that Court. The plaint was duly presented in the Court of Small Causes but the Judge of that Court, considering that the suit involved a question of title, directed that the plaint be returned to be filed in the proper Court. The plaint was refiled before the Third Munsif, who adhered to his previous order.

In my opinion, the order passed originally by the Munsif not having been set aside, the same Court, when the plaint was refiled before it, had no alternative but to pass the order which it has done. It is contended that as the present application is directed only against that order the plaintiff cannot have remedy.

I am unwilling to adopt that view, because if it is adopted, the plaintiff is without any remedy at all because the Munsif's Court is closed to him, and the Small Cause Court Judge has refused to entertain his suit, and no application has been made against that order either. But as both the orders are before me, and the whole case, I think that I am entitled to make such an order as will enable the plaintiff to have his action tried.

In my opinion, the question of title arises only incidentally, if at all. The action is an action for damages and the suit is one cognizable by a Court of Small Causes.

I therefore set aside the order of the Subordinate Judge returning the plaint and direct that the suit be tried as a small cause by the Court of Small Causes in Gaya. The time which has been taken in moving, different Courts in *bona fide* prosecution of this suit will be excluded in computing the period of limitation.

There will be no costs of this application.

Let the plaint be sent to the Court of Small Causes, Gaya, in order to be registered and the suit tried there.

Order accordingly.

A. I. R. 1922 Patna 369.

JWALA PRASAD AND BUCKNILL, JJ.

Malik Mokhtar Ahmed—Judgment-debtor Appellant.

v.

Mt. Bibi Rahimunnissa Begum—Decree-holder-Respondent.

App. No. 62 of 1921, decided on 6th February 1922 from original order of Sub. J., Patna, dated 19th August 1920.

(a) *Contract Act, Ss. 59 to 61—Payment by judgment-debtor—Appropriation must first be to interest and then to principal.*

In the absence of any agreement to the contrary the payments have first to be appropriated towards the interest and the balance of the payment if any is then to be credited to the principal. Ss. 59 to 61 of the Contract Act do not expressly deal with interest but the principle underlying these sections can well apply to interest as well. The balance of interest is never added to the principal so as to produce compound interest. This is the established practice in cases of mortgages and there is no reason why that practice should not be followed in the execution of ordinary decrees. [P. 370, C. 2,]

(b) *Civil P.C., S. 51 and O. XL, R. 1—Execution of Mortgage decree—Judgment-debtor is no-entitled to apply for appointment of Receiver.*

It would be stretching too far the discretion of the Court under O. XL, R. 1 in the matter of the appointment of receiver if the decree-holder is deprived of his right to sell the mortgaged property under the decree. Sec. 51 of the Code does not give any right to the judgment-debtor to apply for the appointment of a Receiver but prescribes the mode in which the decree-holder may seek an execution of his decree, one of the modes being by the appointment of a receiver. [P. 371, C. 1,]

Yunus and *Muhammad Hasan Jan*—for Appellant.

Atul Krishna Ray—for Respondent.

Jwala Prasad, J.—The judgment-debtor is the Appellant. He objects to the execution of the decree on two grounds: (1) that the accounts prepared by the office are wrong, and (2) that a receiver may be appointed by the Court for the properties sought to be sold so that he may pay the balance of the decretal amount in due time. Both these grounds have been overruled by the Court below.

The first ground raises a question of appropriation of the sums paid by the judgment-debtor from time to time towards the satisfaction of the decree. It is said that the payments should have been appropriated towards the principal and not towards the interest.

Reference has been made by the learned Vakil on behalf of the Appellant to the final decree passed in the case on the 19th February 1915, the petition of compromise filed in Execution Case No. 39 of 1915 on the 25th September 1915 and the petition, dated the 5th April, 1917, filed by the decree-holder, certifying payment of Rs. 23,000 and exempting a part of the mortgage properties. None of these documents are clear as to an agreement between the parties relating to the appropriation of payments made by the judgment-debtor, namely, as to whether they should be credited towards the principal or the interest.

There is no indication of any intention of the parties that the payments made should be credited towards the principal in the first instance. In the petition of the 25th September 1915 the judgment-debtor accepted the figure mentioned in the sale proclamation, namely, Rs. 1,12,787 8-9 as the correct amount of the decree presumably both principal and interest and costs.

Referring to that petition the learned Subordinate Judge says: "So that the principal decretal money was considered by them to be Rs. 1,12,787 8-9 which includes costs and interest. Payments made were to be deducted out of that sum. Hence this objection fails. Interest was to run on the amount remaining due after the sum paid. There is no stipulation contrary to this. Therefore I disallow the objection and hold that the account is correct."

In the absence of any agreement to the contrary, the payments have first to be appropriated towards the interest and the balance of the payment, if any, is then to be credited to the principal. Secs. 59 to 61 of the Contract Act do not expressly deal with interest, but the principle underlying those sections can well apply to interest as well.

In the case of *Luchmeswar Singh Bahadur* v. *Lutif Ali Khan* (1), their Lordships of the Privy Council affirmed the above principle in the following words:—

Where payment was made upon a bond, the amount paid being less than the interest due, held the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree." This principle of appropriation has been applied from earliest time to payments made with respect to mortgage debt: *vide* the case of *Gooroo Doss Dutt* v. *Ooma Churn Roy* (2).

The argument of the learned Vakil, that the appropriation of payments towards the interest would practically amount to charging compound interest against the terms of the bond, can be well met by referring to the following passage in the decision of the aforesaid case:—

"The balance of interest is never added to the principal so as to produce compound interest; but the practice appears to us to be that the payment so made is to be appropriated to the interest that has accrued. We believe that to be the established practice in cases of mortgages and we see no reason why that practice should not be followed in the execution of ordinary decrees."

See also the case of *Maharaja of Benares* v. *Har Narayan Singh* (3). The view taken by the Subordinate Judge is therefore correct, and the contention urged on behalf of the judgment-debtor is overruled.

Mr. Yunus also appearing on behalf of the judgment-debtor addressed us on the second point urging that, in the circumstances of the case, receiver

(1) (1871) 8 B.L.R. 110=2 Suther 461=2 Sar. 700 (P.C.)

(2) (1874) 22 W. R. 525.

(3) (1905) 28 All. 25=2 A.L.J. 585=1905 A.W.N. 167.

should be appointed in the interest of the decree-holder and the judgment-debtor. The decree-holder opposes the application of the judgment-debtor for the appointment of a receiver; therefore it cannot be said that the appointment of receiver would be for the benefit of the decree-holder.

Upon the merits of the case the Court below has held that no receiver ought to be appointed. In its opinion the income of the property is too small to satisfy within a reasonable time the large mortgage, still outstanding, of about Rs. 60,000. Apart from there being no substance in the application of the judgment-debtor on merits, I think, that it would be stretching too far the discretion of the Court under O. XL, R. 1 in the matter of the appointment of receiver, if we were to deprive the decree-holder of the right accrued to him under the decree to sell the mortgage property.

To do that would be to do away with the solemn agreement between the parties set forth in the mortgage bond expressly stipulating that the decree-holder shall be entitled to sell the property in order to realise the amount due thereunder. I do not think that the Court should step in and use the discretion, if any, vested by the aforesaid rule of the Code of Civil Procedure in order to rip up the contract entered into between the parties. The decree-holder knows his interest best and he has a right to stand upon the decree and to ask the court to sell the property.

I need hardly mention that section 51 of the Code has absolutely no application. That section prescribes the mode in which the decree-holder may seek an execution of his decree, one of the modes being by the appointment of a receiver. The section does not give any right to the judgment-debtor to apply for the appointment of a receiver. I therefore, reject this contention also on behalf of the judgment debtor.

The result is that the appeal is dismissed with costs.

Bucknill, J.:—I agree.

Appeal dismissed.

A.I.R. 1922 Patna 371

Ross, J.

Ramnarain Singh and others—Petitioners

v.

Dhonrai Gope—Opposite Party.

Cr. Rev. No. 494 of 1921 decided on 10th November 1921, against an order of Sub-divisional Officer, Bhagalpore.

(a) *Criminal P.C.* (1898), *Ss.* 145 *and* 360—*Possession is effective possession—Proceedings under Ch.* 12—*Depositions must be read over to witnesses—But failure to do so does not vitiate order.*

During the absence of the opposite party, a stealthy act of possession in the most haphazard manner cannot be regarded to be an act of possession. *De facto* possession means effective occupation or control. The word "accused" in S. 360 does include persons against whom an order under section 145 (1) has been drawn up and in the case of proceedings under Chapter XII the evidence must be read over to the witnesses. But the omission to do so cannot make the Magistrate's order based thereon *ultra vires*, though it may exempt the witnesses from prosecution for perjury.

[P. 371, C. 2; P. 372, C. 1, 2.]

(b) *Criminal P.C.S.* 145—*Proceedings under—Tenant not made party—Proceedings are not vitiated.*

The omission to implead a tenant in possession of a portion of the disputed land does not make the proceedings defective.

[P. 372, C. 1.]

Jayaswal, C. C. Das and *N. N. Sen*—for Petitioners.

Manuk, K. N. Chaudhri, S. K. Banerji and *S. S. Bose*—for Opposite Party.

Ross, J.—The petitioners are the second party to a proceeding under Section 145, Cr. P. C. in which possession has been declared to be in the 1st party. The first ground which is urged for revision of the order is that none of the depositions of the witnesses were read over to them as required by section 360, Cr. P. Code and, therefore, the presumption of correctness does not attach to the record under Section 80 of the Evidence Act, because the evidence was not taken according to law, and, therefore, whether admissible or not, it is of no value and there is nothing to support the finding.

In reply it is contended that section 360 does not apply to trials under Chapter 12, because there is no "accused" in such a proceeding. I cannot agree to this argument. If the word "accused" in that section does not include persons, against whom an order under Section 145 (1) has been drawn, then there is a plain inconsistency in the section itself and the court must construe it as best as it can. If so,

interpreted the section must at least mean that in the case of proceedings under Chapter 12, the evidence must be read over to the witnesses.

It is further argued that even if there is a defect in the manner of recording the evidence, that does not invalidate the trial itself. The decisions are not consistent, but the weight of opinion is that, where there is this defect in the record of the deposition, the witness cannot be convicted of perjury in a subsequent trial.

But it is altogether a different proposition, and one for which there is no authority, that because the depositions were not read over to the witnesses, there was, therefore, no evidence before the Magistrate on which he could come to a finding on the question of possession in the trial in which those depositions were made. I can see no ground in principle for such a contention and this objection must be overruled.

The second ground is that one Fadulli Mandar was also a tenant of a portion of the land in dispute and as he was no party to these proceedings, the proceedings are bad for defect of parties. This question is concluded by the decision in *Krishna Kamini* v. *Abdul Jabbar* (1), and the contention must fail.

The third ground is that the order under Section 145 (1) was drawn up on the 5th January 1921; the Police reported that the petitioners had taken possession of the land on the 9th October 1920, and therefore, the Magistrate had no jurisdiction to declare the opposite-party in possession but could only declare the petitioners in possession. If in fact the petitioners dispossessed the opposite party more than two months before the 5th January 1921, then clearly the court had no jurisdiction to declare the possession of the opposite-party.

But the Magistrate finds that there was no actual possession by the petitioners. He refers to the Police report and to the evidence on this point in detail and comes to the conclusion that such a stealthy act of ploughing and sowing, when the opposite-party was absent in court, in the most haphazard manner, cannot be held to be an act of possession. *De-facto* possession, with which alone these proceedings are concerned, means effective occupation or control.

The Magistrate evidently thought that the exclusive power of control by the petitioners could not be said to be manifest in these acts. On the facts I cannot say that the Magistrate was not entitled to find that there had been no change of actual possession; therefore, there is no question of jurisdiction.

The application is dismissed.

Rule discharged.

(1) (1903) 30 Cal. 155=6 C. W. N. 737 F. B.

A. I. R. 1922 Patna 372.

JWALA PRASAD, J.

Biso Ram and others—Accused Petitioners

v.

Emperor—Opposite Party.

Criminal Rev. No. 520 of 1921 decided on 14th Dec. 1921, from an order of Sub-divisional officer, Nawadah, Dated 29th Sept.. 1921.

Criminal P. C. (Act V. of 1908, Ss. 253, 494 and 145—Warrant case—Discharge Order of, cannot be set aside and fresh proceedings started unless there are new materials—Disputes regarding succession to large estates-Succession-(Property Protection) Act (XIX of 1841). Remedy under, is more appropriate.

An accused person cannot summarily be tried in several courts on the same facts, although the complainants in the several cases may be different. An order of discharge under section 494 (a) or under section 253 in a warrant case does not necessarily prevent the Magistrate from taking cognizance of a complaint on the same facts, but an order of discharge cannot be set aside and prosecution started afresh unless there are new materials before the Magistrate which were not before him formerly. The Succession (Property Protection) Act bas a larger scope than section 145, Cr. P. C. and affords a more appropriate remedy in cases involving disputes regarding succession to large estates involving breaches of the peace.

[P. 375, C. 2, P. 376, C. 1.]

C. C. Das and *S. S. Bose*—for the Petitioner.

Judgment:—This is an application against the order of the Sub-Divisional Magistrate of Nawadah, dated the 29th September 1921, directing the petitioners to be summoned under sections 454, 380, Indian Penal Code upon the complaint of one Bundi Lal, dated the 3rd of September 1921.

Bundi Lal was a servant of the late Raja of Singer, in the District of Gaya, who died in the month of September 1920. The petitioners are the servants of the sister's son of the late

Raja except petitioner No. 2 who disclaims all concern and is described as the nephew of Geno Singh and petitioner No. 3 is the brother of petitioner No. 1, Biso Ram.

It is undisputed that the petitioners' master, Raja Kesho Prasad Narain Sahi, is the legal heir of the deceased and is now living in Singer.

The opposite party, Bundi Lal and others, claim to be trustees of an idol, to whom it is alleged all the properties of the Raj have been bequeathed by a Will executed by the late Raja. Probate of the Will has been applied for and the proceedings in connection therewith are still pending. Raja Kesho Prasad Narain Sahi has entered caveat in those proceedings and disputes the Will.

The dispute between the parties has naturally led to an attempt on their behalf to seize possession of the properties and consequently the several usual criminal proceedings under the preventive Sections of the Code of Criminal Procedure, namely, 107, 144, etc., have been instituted. Papers of some of these proceedings have been handed over to me by the learned Counsel on behalf of the petitioners :—

(1) The complaint lodged by one Mathura Prasad, servant, of the trustees, against the petitioner Biso Modi and others which was disposed of by the order of the Sub-Divisional Magistrate of Nawadah, dated the 17th May 1921. That order is in the following words :—

" Mistake of law. Section 448." On the 27th of May 1921 the Magistrate ordered " to return the keys to Biso Modi the person from whom they were taken."

(2) On a complaint of Bundi Lal, the present complainant, against Raja Kesho Prasad Narain Sahi and others, the order of the Magistrate of the 1st of February 1921 was " I do not think that there is a fear of the breach of the peace now."

(3) In a case instituted under Section 107 of the Code of Criminal Procedure, at the instance of *Bundi Lal, complainant* v. *Raja Kesho Prasad Narain Sahi*, on the 1st of April 1921 the Magistrate passed the following order :—

" The main reason for apprehending a breach of the peace was the continuance of the collections on behalf of the 1st party and (Bundi Lal) and attempts on their behalf to possess themselves of the Kutcherry. As to the collection, as I have remarked in another order, they are only authorised to represent the estate in pending suits, and on these grounds I have refused to return the Zemindari papers to them. As to the Kutcherry and its contents it has been attached for the purposes of the case into which I inquired on the 1st January. There is, therefore, no fear of a breach of the peace. 'Proceedings dropped and accused discharged under Section 119, Criminal Procedure Code."

(4) In a proceeding started at the instance of Raja Kesho Prasad Narain Sahi as petitioner, the Magistrate recorded the following order on the 17th of January 1921 :

" There are two portions in the order complained against (1) with regard to the Kutcherry, and (2) with regard to the residential portion. With regard to (1) the 1st party (Bundi Lal and other tenants) are said to have instituted a probate case and the opposite party have entered a *caveat*. This matter might, therefore await disposal of the probate application and both parties prevented from doing anything with regard to the Kutcherry until that application is decided.

" As regards the second point, the Sub-Divisional Officer says that the second party are at present in actual possession of the inner apartments and so may be left in possession until the District Judge on the probate application otherwise holds. Call upon the first party to appear on the 25th January why an order in the above terms should not be passed; call for record and ask Sub-Divisional Officer to state whatever observations he has to make on the grounds of motions and on the above remarks. *Sd.* B. N. Roy, A.D. M."

The parties were heard and the Magistrate recorded his order on the 25th January 1921. That order gives the history of the dispute between the parties, and it is needless to quote the entire order, except the concluding paragraph, which runs as follows :

" As the District Judge's decision in the probate case will settle the dispute, the petitioner clearing out if probate is granted on proof of the Will or the opposite party clearing out if the Will be not proved to be genuine, it is best for the Criminal Court to await such decision and not disturb the *status quo*

ante. I accordingly set aside the Sub-Divisional Officer's order and direct, under Section 144, that the petitioner be permitted to live in the inner apartment which has been found to be in his possession, that the Kutcherry be kept locked and both parties be prevented from having access to anything contained in any of the apartments appertaining to it, that the Thakurghar or temple in the outer courtyard be kept open only for any one to worship and that a Police constable be deputed at the expense of the petitioner to see that the above order is given effect to until the decision of the probate matter, on receipt of which the Magistrate will cause compliance with such decision. It is expected that such decision will be given within two months. Return records at once to Sub-Divisional Officer."

So far back as the 1st of January 1921, a complaint was lodged by one Raj Karan Singh, servant of Bundi Lal, the person complaining against the present petitioners, charging them with having entered the courtyard of the Thakurghar at Singer and of having broken open the lock of the room in which were kept the collection papers belonging to Patwari Beni Lal and of having removed the articles belonging to the complainant's master from other rooms of the building.

The accused were summoned under sections 454, and 380, Indian Penal Code. As the Sub-Divisional Officer of Nawadhah had held local enquiry into the case, he reported to the District Magistrate to have the case made over to some other Magistrate for trial. Accordingly, the case was made over to the Sub-Divisional Officer of Gaya.

On the 19th July 1921 a petition was filed on behalf of the then complainant, Raj Karan Singh, detailing the several criminal cases which arose between Raja Kesho Prasad Narain Sahi and the trustees and the complaints relating to the properties of the deceased Raja and stating that those cases were all decided in favour of Raja Kesho Prasad Narain Sahi, and that there was no likelihood of the witnesses deposing in favour of the complainant.

Consequently, he sought permission to withdraw from the prosecution. The Sub-Divisional Officer refused to act upon it on the ground that he had no power to permit withdrawal of a warrant case under Sections 380 and 454, Indian Penal Code. He, however, granted time to the petitioner to move the District Magistrate for withdrawing the case. Accordingly, the complainant, Raj Karan Singh, filed a petition next day in the Court of the Sub-Divisional Magistrate repeating what he had said in the first petition and adding that the accused opposite party (petitioners) "have come into possession of the entire Singer estate and all the *raiyats* are on their side," and that the charge against the petitioners was brought at the instance of Bundi Lal who "it seems has no concern with the estate and has been trying to oust the real *maliks* from the possession," and that the case was of a civil nature.

The petition was directed to be put up before the latter officer who recorded the following order: "This is a complaint case. The petition is allowed. To the Sub-Divisional Officer for disposal."

On receipt of the order of the District Magistrate, the Sub-Divisional Magistrate recorded the following order on the 2nd of August: "Seen the petition filed before the District Magistrate and the latter's order dated the 25th July 1921 passed therein. A warrant case cannot be withdrawn without the permission of the District Magistrate. The case will proceed. Summon witnesses for 18th August 1921."

On the 29th August 1921 the Sub-Divisional Officer of Gaya examined three witnesses: (1) Mr. Reuben, the Sub-Divisional Officer of Nawadah, (2) Raj Karran Singh and (3) Beni Lal, and adjourned the case to the 1st of September, on which date a petition was filed by Ganga Prasad, Bundi Lal and others, who claimed to be the trustees of the properties and master of the complainant Raja Kesho Prasad Narain Sahi, alleging that the complainant was gained over and praying that they may be allowed to step in his shoes and continue the prosecution.

The petition was naturally rejected, as third parties could not be allowed to intervene. The Magistrate observed that the applicants may file a petition of complaint of their own if they like before a proper Court. Further hearing of the case then took place, and on the next day the Magistrate passed an order discharging the accused on the ground that the complainant had gone

back upon his deposition which he had made before the Sub-Divisional Magistrate of Nawadah and now stated that he had no personal knowledge of the facts. The case was not likely to result in a conviction. He, however, remarked that the trustees might, if they like, file a fresh petition of complaint. The case was accordingly withdrawn and the accused persons discharged under section 53, Criminal Procedure Code.

Acting upon the suggestion of the Magistrate, Bundi Lal, one of the trustees filed a fresh complaint before the Sub-Divisional Officer of Nawadah, giving the circumstances in which the first prosecution failed and the accused were discharged. The Magistrate heard both the parties upon the question as to whether this was a proper case in which the complaint could be entertained. He passed his order, overruling the objections of the accused petitioners, and directing them to be summoned under sections 454 and 380, Indian Penal Code.

The main ground upon which the Magistrate has passed his order summoning the accused is, that the order of discharge passed by him in the former case dated the 2nd of September 1921, did not debar him from summoning the accused, and that section 403 of the Code of Criminal Procedure does not apply to it inasmuch as the explanation to that section saves an order of discharge of the accused but the Magistrate would not permit the complainant to withdraw the case.

The complainant, Raj Karan Singh, applied to withdraw the case until he was directed by District Magistrate to do so. The District Magistrate's order of the 21st July was obviously a permission to withdraw the complaint and whatever the views of the Magistrate might have been on the 29th of August that he was not bound to carry out his order, he did accept it on the 2nd of September when he actually permitted the complainant to withdraw the prosecution.

Now, if the order of the Magistrate was wrong, the first complaint has not been properly withdrawn, and in that case he should have proceeded upon the complaint the seisin whereof had been withdrawn from him and was handed over to the Sub-Divisional Magistrate of Gaya. If, on the other hand, the order of withdrawal is a valid one, it could only be passed under section 494, read with section 495, of the Code of Criminal Procedure, for so long as the first case did not validly terminate the Magistrate had no right to start prosecution on the same facts at the instance of any other person.

An accused person canot be summarily tried in several Courts on the same facts, although the complainants in the several cases may be different, I will, therefore, assume, for the purposes of this case, that the order of discharge of the 2nd of September passed by the Magistrate was a valid one.

True it is that an order of discharge under section 494 (*a*) or under section 253 in a warrant-case does not necessarily prevent the Magistrate from taking cognizance of a complaint on the same facts, but an order of discharge cannot be set aside and prosecution started afresh unless there are new materials before the Magistrate which were not before him formerly and upon those materials there is a possibility of a conviction of the accused persons.

I have, therefore, carefully considered the history of the litigation and the complaint petitions which virtually are based upon the same facts. The Sub-Divisional Magistrate of Gaya had already examined three witnesses on behalf of the prosecution. Only a few more witnesses out of these named in the complaint petition were not examined. Beni Lal, Patwari, whose *bastas* containing collection papers were said to have been looted by the petitioners, was already examined before the Magistrate.

Now, having the evidence before him, the Magistrate was of opinion that there was no likelihood of the prosecution resulting in the conviction of the accused. The fact that the complainant was won over did not prevent the Magistrate from going on with the prosecution in a warrant-case, but the Magistrate was evidently of opinion that the evidence laid by the prosecution was not sufficient to convict the accused persons. The opinion of the Sub-Divisional Officer of Gaya, expressed on the 2nd of September, was one formed upon the estimate of the evidence then produced before him.

In the present complaint before the Magistrate nothing has been said in the complaint petition that there is a chance of giving better evidence. On the

other hand, the present complainant Bundi Lal, has definitely stated that he was not an eye witness to the occurrence. Therefore, upon the complaint that has now been lodged before the Magistrate it was obvious that the Magistrate was not justified in summoning the accused persons.

The statement of Raj Karan Singh, contained in the petition of the 20th of July filed before the District Magistrate, that all the properties appertaining to the Raj are in possession of the petitioners' master, Raja Kesho Prasad Narain Sahi, has not been controverted in the present complaint petition. If that is so, it is impossible to conceive that a case under section 380, read with section 454, Indian Penal Code would lie. The dispute between the parties is one relating to the succession of the estate of the late Raja of Singer.

The proceedings under the preventive sections of the Code of Criminal Procedure all terminated in favour of the master of the petitioners and these proceedings arose out of a dispute as to the possession of the Garh and the Thakurgarh which is the subject matter of the present complaint. The District Magistrate more than once has held that the Criminal Court is not the proper *forum* where the dispute of such a nature between the parties can be decided. No breach of peace has occurred, nor was it ever apprehended. No riot has taken place. Raja Kesho Prasad Narain Sahi has managed somehow or the other to be in possession of the properties and he can be ousted only in the course of law.

This was pre-eminently a fit case for invoking the aid of the salutary provisions of Act XIX of 1841, known as the Act for the protection of moveable and immoveable property against wrongful possession in cases of successions, and which I for brevity sake call the Curator's Act. The title of the Act is significant, that is, the object of it is to protect the property appertaining to an estate of this kind in case of a dispute as to succession. The death of the Raja took place only three months ago, and an application under the Curator's Act could be made within six months of the death of the late Raja.

That Act in some respects stands in a similar position to section 145 of the Code of Criminal Procedure with respect to certain specified properties, whereas its scope is larger, inasmuch as it embraces all properties moveable and immoveable, and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in a proper Court and unless that were done the danger to a breach of the peace will not be satisfactorily solved with respect to the estate in question.

The proceedings are, therefore, quashed, and I recommended that an action under that Act be taken. *Proceedings quashed.*

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COUTTS AND MACPHERSON, JJ.

Mahabir Prosad Bhagat — (Plaintiff) —Petitioner.

v.

Balkishun Das and *another*—Defendant-Opposite Party.

Civil Rev. No. 90 of 1921 decided on 4th August 1921 from an order of Sub-J. Patna.

(a) *Civil P. C., O. 47, R. 1 and O. 9, R. 13—Petition under the former can be registered as one under the latter provision.*

A successor-in-office has jurisdiction to change the registration of an application from one under O. 47, r. 1 to one under O. 9, r. 13 when the application is made under both the provisions, registration being purely a ministerial act. [P. 377, C. 2.]

(b) *Civil P. C., O. 5, R. 13 and O. 30 R. 3.—Do not apply to suits brought against person in individual capacity.*

O. 5. r. 13 applies only to suits against firms and O, 30 r, 3 also applies where persons are sued as partners in the name of their firm; they do not apply when suits are brought against persons in their individual capacities. [P. 377, C. 2.]

(c) *Civil P. C., S. 115—Error of Law—No revision lies.*

Under S. 115 the High Court cannot interfere when the lower Court commits an error of law by applying one provision instead of another. [P. 377, C. 2.]

(d) *Civil P. C., Sch. II. Para 21 (2)—Decree under—O. 9, R. 13 applies to such decree, also.*

The decree under para 21 (2) of Sch. II is a decree under S. 2 (2) and the provisions of O. 9, r. 13 apply to it. The provisions of the C. P. Code apply so far as may be, to proceedings under Sch. II save where a special procedure is laid down in the Schedule. [P. 378, C. 1, 2.]

P. C. Manuk, and *C. M. Agarwala* and *Ragho Prasad*—for Petitioner.

S. Sahay, B. C. Sinha and *A. N. Das*—for Opposite Party.

Coutts, J.—This is an application in revision against the order of the Subordinate Judge, Patna, setting aside a

decree made under schedule II, paragraph 21, to the Civil Procedure Code.

It appears that in the town of Barh there was a firm named Ghasiram Balkishun Das which carried on an agency business. After the death of Ghasiram, Balkishun Das, became the sole owner, but he lived for the most part in England and his manager Ghasita Lall, who held a general power-of-attorney from him, conducted the business.

Balkishun Das being in England, there was a difficulty about money and an arrangement was come to with the present petitioner, Mahabir Prasad Bhagat, that he should supply funds to the firm, that Ghasita Lall should continue to act as manager, that Mahabir Balkishun and Ghasita Lall should each receive 5 *annas* 4 *pies* share in the profits, and that Mahabir should get interest at 6 per cent. on all sums advanced by him. After this arrangement was come to, Balkishun Das returned to England. Mahabir Bhagat was dissatisfied with Ghasita Lall's accounts, with the result that there were disputes which were eventually referred to arbitrators under a registered *ekrarnama*.

The arbitrators gave their award on the 11th June 1920. Mahabir Bhagat then filed a petition, under Schedule II of the Civil Procedure Code, in the Court of the Subordinate Judge at Patna for filing the award and for the drawing up of a decree in accordance therewith. On this application a notice was issued to Balkishun Das and Ghasita Lall to show cause why this should not be done. No cause was shown and a decree was passed in terms of the award on the 21st July 1920. Ghasita Lall then filed a petition which is the subject matter of the application now before us.

The application was filed under Section 151, Order XLVII, rule 1, and Order IX, rule 13, of the Code of Civil Procedure on behalf of himself and Balkishun Das to have the decree set aside. The petition was registered by the then Subordinate Judge, Mr. Zahur, under Order XLVII, rule 1, and notice was ordered to issue. After passing this order, Mr. Zahur was transferred and was succeeded by Mr Damodar Prasad, who, on the 18th December 1920, directed that the petition should be registered under Order IX, rule 13. The matter was then heard by Mr. C. S. Sen and the decree set aside on the ground that notice on Balkishun Das had not been served as required by Order V, rule 25. It is against this order that the present application has been made.

The first point urged in support of the application is that Mr. Damodar Prasad had no jurisdiction to register the application under Order IX, rule 13, when it had already been registered under Order XLVII, rule 1, by his predecessor. There is no force in this contention. The application was made both under Order IX, rule 13, and Order XLVII, rule 1, and registration is purely a ministerial act in regard to which the Subordinate Judge had complete jurisdiction.

The second point urged is that Order V, rule 25, does not apply in such a case as the one before us and that if any provision of the Civil Procedure Code does apply, it is Order V, rule 13 or Order XXX, rule 3. Order V, rule 13, deals with suits relating to business or work against a person who does not reside within the local limits of the jurisdiction of the Court and it clearly does not apply, because this is not a case of a suit against a firm but against Balkishun and Ghasita Lall in their individual capacities.

Order XXX, rule 3, also does not apply because this rule deals with cases where persons are sued as partners in the name of their firm and if any rule applies it is rule 25 of Order V. This rule runs as follows:

"Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is a postal communication between such place and the place where the Court is situate."

It had been found by the learned Subordinate Judge that Ghasita Lall was not empowered to accept service. It is clear then that this rule applies. Moreover, the question whether Order V, rule 25, or some other rule applies to the case is a question of law which the Subordinate Judge has jurisdiction to decide. He has jurisdiction to decide rightly or wrongly, and with his decision on the point of law we are not entitled to interfere in revision.

The last point urged is that Order IX, rule 13 does not apply to cases under

paragraph 21 of Schedule II and that consequently the Subordinate Judge's order is without juri-diction. Schedule II, paragraph 21, runs as follows:

"(1) Where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

"(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

Now it is contended that Schedule II is complete in itself and that the ordinary rules which govern suits do not apply. There is no authority for the contention, but the argument is that Order IX, rule 13, applies only to suits; that a proceeding under paragraph 21 is not a suit and that a decree made under paragraph 21 (2) is not a decree such as is contemplated in the Code.

It is true that there is no mention of the word *suit* in paragraph 21, but under paragraph 20 where any matter has been referred to arbitration without the intervention of the court and an award has been made thereon, any person interested in the award may apply to the court having jurisdiction over the subject matter that the award be filed in court; and sub-clause (2) of paragraph 20 runs as follows:

"The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants."

It seems clear then that when an application is made, it is to be treated as and becomes a suit and that the decree upon the judgment which is pronounced according to the award becomes a decree under section 2 of the Civil Procedure Code. Section 104, which deals with appeals from orders, has been referred to as showing that the decree mentioned in paragraph 21 (2) of Schedule II is an order and not a decree. By sub-clause (*f*) an appeal lies against an order filing or refusing to file an award in an arbitration without the intervention of the court.

This, however, does not refer to the decree, but to the order referred to in sub-clause (1) of paragraph 21. Section 104, therefore, does not assist the petitioner. The decree referred to in paragraph 21 then, in my opinion, is a decree in a suit and Order IX, rule 13, applies to such a case.

For the reasons I have given, therefore, this application, in my opinion, fails and I would dismiss it with costs. Hearing fee two gold *mohurs*.

Macpherson, J—I agree to the order proposed.

The best view would seem to be that the provisions of the Code apply, so far as may be, to proceedings under Schedule II, save where a special procedure is laid down in the Schedule. An example of a special provision in the Schedule (probably with a view of court fee) is the use of the term "filing an application" instead of "presenting a plaint," but it does not follow from this variation of terms or from the issue of a notice instead of a summons that it was not the intention of the Legislature that the application, when registered as a suit, should be anything different from a suit under the Code so far as regards procedure in other matters. So also there being nothing repugnant in the subject or context of paragraph 21 (2), it is reasonable to hold that 'decree' in that provision has the meaning set out in section 2 (2).

The question is, however, not altogether free from doubt and the Legislature might well intervene to make clear its intention in this regard.

Rule discharged.

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COUTTS AND ADAMI, JJ.

Suraj Jote Kuer—Defendant No. 1 Appellant

v.

Attar Kumari—Plaintiff-Respondent.

Appeal No. 153 of 1921 decided on 16th June 1922 from the appellate decree of Sub-J., Darbhanga, dated 1st September 1920.

(a) *Hindu Widows Remarriage Act (1857), Sec. 2—Hindu widow—Conversion to Mahomedanism—Remarriage effects forfeiture of husband's estate though such marriage is allowed by custom or recognised by Sect.*

Both under the Hindu law and by the enactment of 1857 a Hindu widow loses her estate on remarriage. It may be that

certain classes of Hindus recognise widow remarriage either by custom or as a tenet of their sect but even where this is so it would be necessary to establish affirmatively that this recognition carries with it the right to retain the deceased husband's estate, for to do so is against both the general rule of the Hindu law and against the provisions of the statute.. [P. 380, C. 1, 2. P. 381, C. 1 2].

(b) *Hindu Law—Applicability —Dayanandis are Hindus.*

Dayanandis are Hindus. If the Brahmos are Hindus the Arya Samjists are more so because though professing to be monotheistic they believe in the supremacy of the Vedas.

[P. 382, C. 1.]

Hasan Jan—for Appellant.

S. M. Mullick and *N. C. Sinha*—for Respondent.

Coutts, J—This was a suit for declaration of title to and confirmation of possession of an eight annas share in Tauzi Nos. 1300, 1516 and 1519 and a two anna share in Tauzi No. 1303 in Mauza Usthia.

The facts are not disputed and are shortly as follows: The Defendant No. 1 Mussammat Suraj Jote Kuer was the wife of Ramdhari Prasad, son of the Plaintiff Mussammat Attar Kumari. After the death of Ramdhari Prasad, the Defendant No. 1 left her husband's house and went to live in the house of Defendant No. 2, Muhammad Yasin, a Muhammadan whose mistress she became.

Subsequently she was converted to Muhammadanism and was married to Muhammad Yasin. She however, still retained the estate of her deceased husband and this suit by her mother-in-law was instituted to recover the estate on the ground that having remarried, she had lost all her rights in her deceased husband's property. During the lifetime of her husband both he and defendant No. 1 were Dayanandis, that is to say, followers of Pandit Dayanand Saraswati, founder of the Arya Samaj, and the questions which have arisen in this case are whether a Dayanandi is a Hindu; if so, whether a Hindu widow belonging to this sect forfeits her rights to her husband's property on remarriage, and whether a Hindu widow after conversion and subsequent remarriage forfeits her rights to her husband's property.

It has been decided by both the Courts below that a Dayanandi is a Hindu and that in accordance with the Hindu law the widow of a Dayanandi after conversion and remarriage loses her rights to her husband's property. The suit has accordingly been decreed and against this decision Defendant No 1 has appealed.

The questions that arise in this second appeal are the questions I have indicated above and I shall first deal with the question of whether a Hindu widow after conversion and subsequent remarriage forfeits her rights to her husband's property.

So far as this Court is concerned the matter is one of first impression but the question has arisen directly in the High Courts of Calcutta, Madras, Bombay and Allahabad. The decisions in Calcutta, Madras and Bombay are unanimously to the effect that in such a case a Hindu widow loses her property whereas the Allahabad High Court has taken a directly contrary view; and it is contended by the learned Vakil for the Appellant that it is the Allahabad view which is correct and the view which we ought to follow.

The argument of the learned Vakil for the Appellant is based on the interpretation which has been placed on Sec. 2 of the Hindu Widows Remarriage Act, (Act XV of 1857) by the Allahabad High Court. The Hindu Widows Remarriage Act, it is argued, deals with the case of Hindu widows who had up to that time been held to be incapable of contracting a valid marriage: by that enactment, such marriages were legalized and the issue of such marriages was legitimatized.

But the old Hindu rule of law was retained that on remarriage the widow lost her rights to her deceased husband's property, for Sec. 2 of the Act enacts that "all rights and interests which any widow may have in her deceased husband's property by way of maintenance shall upon her remarriage cease and it shall be determined as if she had then died."

It is contended that "widow" in this section can only mean "Hindu widow" so that if a Hindu widow changes her religion and becomes a Muhammadan she is no longer a Hindu widow and if she remarries, Sec. 2 of the Act does not apply and she does not lose her husband's estate. This is the view which, as I have already said, has been adopted consistently in the Allahabad High Court and I need only refer to the last case on the point,

Abdul Aziz Khan v. *Nirma* (1) which followed the previous decision of that Court. I may mention in this connection, however, that at least one of the learned Judges, who was a party to that decision, in another case, expressed a doubt as to the correctness of this view, but did not dissent because of the long course of decisions in that Court.

The Calcutta High Court has taken an entirely different view which has been expressed in the judgment of the majority in the Full Bench case of *Matungini Gupta* v. *Ram Ruton Roy* (2). In that case, on an interpretation of Sec. 2 of the Act, four of the learned Judges, who decided that case, held that it includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows and they say that it must follow from this that if any such widow marries she is deprived of the estate which she inherited from her Hindu husband. Prinsep, J. recorded a dissenting judgment being unable to adopt this interpretation of the section and his view was the same as that which has been adopted in Allahabad.

In Madras and in Bombay so far as the interpretation of the Act is concerned there has been a difference of opinion amongst the learned Judges The wording of the section is curious and it certainly lends itself to the interpretation which has been put upon it by the Allahabad High Court and by the learned Judges who have adopted the same view, but the reasoning of the majority of the Full Bench of the Calcutta High Court appears to me to be correct and, in my opinion, Sec. 2 of the Act includes all persons who being Hindus become widows and that any such widow, if she remarries, loses the estate which she inherited from her deceased Hindu husband.

On the interpretation of the statute alone, therefore, in my opinion, a Hindu widow, who becomes a Muhammadan and remarries, loses her right to her husband's property. But even if this interpretation be wrong it is not sufficient to say that if the Act does not apply a Hindu widow, who changes her religion and remarries, retains her deceased husband's estate. In such circumstances we are relegated in coming to a decision to the general rule of Hindu law and in regard to this I think there can be no doubt.

A widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits on him. When she remarries she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. The reason therefore for her keeping the estate of her deceased husband disappears Formerly by changing her religion a widow lost her estate but since Act XXI of 1850 this is not so.

Although, however, she does not lose her estate by a change of religion it seems clear that she must lose it by remarriage when the whole reason for holding the estate disappears. Moreover, ordinarily both under the Hindu law and by the enactment a Hindu widow on remarriage loses her estate. If however, the contention of the learned Vakil for the Appellant were correct, by doing another act which is repugnant to Hindu ideas, namely, by becoming a Muhammadan she would save her estate. It is difficult to conceive that this could be a correct view of the Hindu law.

Looked at from another point of view the contention is equally difficult to accept. The estate which a Hindu widow has, she has from her deceased husband and it is distinctly limited in character, one limitation being that she loses it if she remarries. She cannot get a larger estate than she got from her husband, yet it is suggested that by changing her religion she does in fact enlarge her estate inasmuch as she can continue to hold it on remarriage. I am unable to accept this contention and in support of the view I have taken I would refer to the decisions of Wilson, J., and Banerjee, J, in the Full Bench decision in the case of *Matungini Gupta* v. *Ram Rutton Roy* (2). This view has been accepted in the latter cases of the Calcutta High Court.

The question has never been considered from the point of view of the general Hindu law in the Allahabad High Court but the view I have express-

(1) (1913) 35 All. 466=20 I. C. 335=11 A. L. J. 678.
(2) (1891) 19 Cal. 239 (F. B.)

ed has been generally accepted in Madras and Bombay. In all the Courts then in which the matter has been considered from the standpoint of the general rule of Hindu law it has been held that a Hindu widow after conversion and subsequent remarriage forfeits her rights to her husband's property and this is in my opinion the correct view of the law.

It is next contended that, even if this be so, if a Hindu widow belongs to a sect such as the Arya Samaj in which widow remarriage is allowed, she does not forfeit her rights to her husband's property on remarriage. It is in the first place urged that this cannot be so because it would be anomalous for any sect to approve of widow remarriage and at the same time to deprive the widow who remarries of her estate.

The fact of an apparent anomaly however will not establish the correctness of the contention put forward and I may remark that this is exactly the position created by the Hindu Widows Remarriage Act. The marriage of a Hindu widow has been validated but she is still deprived of her property. It is next urged that the Hindu Widows Remarriage Act does not apply to sects of Hindus in which widow remarriage is recognized and that consequently section 2 of the Act does not apply.

I am not prepared to accept this proposition, but even accepting it, the question remains, "When rule does apply" and here again we are thrown back on the general rule of Hindu law which I have discussed above. It may be that certain classes of Hindus recognise widow remarriage either by custom or as a tenet of their sect, but even where this is so it would be necessary to establish affirmatively that this recognition carries with it the right to retain the deceased husband's estate, for to do so is against both the general rule of the Hindu law and against the provisions of the statute.

I doubt whether in the case of any class amongst whom widow remarriage is recognized it has been established that this carries with it the right to retain the deceased husband's estate but certainly in the case it has not been proved. In support of the contention of the learned Vakil for the Appellant we have been referred to the rulings in the cases of *Hur Sran Das* v. *Nandi* (3), *Gajadhar* v. *Kaunsilla* (4) and *Mula* v. *Partab* (5). There is no doubt that in the Allahabad High Court the view contended for by the learned Vakil for the Appellant's has been generally accepted, but in none of these cases has the general principle of Hindu law been considered.

It has merely been said that because section 2 of the Act does not apply, therefore where widow remarriage is recognised the widow does not lose her husband's property, but with due respect to the learned Judges who decided these cases this does not dispose of the matter. If the Act does not apply we must fall back on the general rule of the Hindu law and this is that a widow loses her property on remarriage.

This is the view which has been taken in the other High Courts and I would refer to the decisions in the cases of *Murugayi* v. *Viramakali* (6) which has been followed in a series of cases ending with the case of *Tayaramma* v. *Sivyaya* (7), *Muhammad Umar* v. *Must. Man Kuar* (8), *Rasul Jehn Begum* v. *Ram Suran Singh* (9), *Gouri Churn Patni* v. *Sita Patni* (10) and *Nitya Madhab Das* v. *Srinath Chandra Chuckerbutty* (11).

The last contention is that a Dayanandi is not a Hindu. It is somewhat difficult to define the term Hindu, and there are several castes and sects who although non-conformists are still classed as Hindus. I can find no decision on the question of whether Dayanandis are Hindus. The sect which approaches most near by to the Dayanandis, however, are the Brahmos and in the case of *Bhagwan Koer* v *J. C. Bose* (12) in which their Lordships of the Privy Council discussed the question of whether Brahmos are Hindus or not, they have said. "The learned Judges of the Chief Court examined the literature bearing upon the Brahmo society; they had before them much important evidence with reference to the Brahmos

(3) (1889) 11 All. 330=1889 A.W.N. 77.

(4) (1908) 31 All. 161=11 I.C. 761=6 A.L.J. 107.

(5) (1910) 32 All. 489=6 I.C. 116.

(6) (1877) 1 Mad. 226.

(7) (1918) 41 Mad. 1078=48 I.C. 50=35 M.L.J. 317 (F.B.)

(8) (1917) 21 C.W.N. 906=40 I.C. 783.

(9) (1895) 22 Cal. 589.

(10) (1909) 14 C.W.N. 346=5 I.C. 710.

(11) (1907) 8 C.L.J. 542.

(12) (1903) 31 Cal. 11=30 I.A. 249=7 C.W.N. 895=8 Sar. 543 (P.C.)

and the relation of their principles and their organisation to the Hindu system; and they came to the conclusion that a Sheikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born.

We may therefore now take it as settled law that Brahmos are Hindus. Their creed is directed against caste and idolatory and the object of the founder Raja Rammohan Roy was to found a pure monotheistic religion. The sect of Dayanandhis was founded by Pandit Dayanand Saraswati and it is now known as the Arya Samaj and it too is directed against caste and idolatory but they follow the Vedas; and, as Dr. Gour in his Hindu Code has said, "If the Brahmos are Hindus the Arya Samajists are more so because though professing to be monotheists they believe in the supremacy of the Vedas" (Gour's Hindu Code, 1919, p. 182, para. 300).

In my opinion there can be no doubt that the Dayanandis are Hindus. This being so, the Defendant No. 1 in this case was a Hindu, she continued to be a Hindu up till the time she adopted the Muhammadan religion and for the reasons I have given she has forfeited her right to her husband's estate on her remarriage.

The suit has therefore been rightly decreed in both the Courts below and I would dismiss this appeal with costs.

Adami, J.—I agree. *Appeal dismissed.*

A.I.R. 1922 Patna 382.

DAWSON MILLER, C. J. AND MULLICK, J.

Maharaj Bahadur Singh—Judgment-debtor-Petitioner

v.

A. H. Forbes—Decree-holder—Opposite party

Civ. Rev. No. 421 of 1921 decided on 11th May, 1922 from an order of Dist. J., Purneah, dated 10th November, 1920.

Execution Proceedings—Sale—Sale day fixed by District Judge—Temporary injunction by Subordinate Judge—Refusal by District Judge to stay sale—Sale is invalid and High Court will restore status quo ante—*Civil P.C. S. 151, O. 39, rr. 1, 2—Contempt of Court.*

Where the District Judge fixed a certain date for the sale of the property alleged to belong to the judgment-debtor, and the claimant of the property instituted in the Court of the Subordinate Judge a suit for declaring the property to be his own in which he obtained an *ad interim* injunction restraining the decree-holder from selling the property but the District Judge refused to stay the sale.

Held: Although the District Judge was not personally bound by the order of injunction, yet in the exercise of his inherent powers he should have directed that the sale should not take place, the decree-holder having been restrained by injunction from proceeding with the sale. The District Judge should not have assisted a party to commit a contempt of the Court Once the injunction is granted the High Court is bound to see that the order of the Court is carried out.

[P. 383, C. 2; P. 384, C. 1.]

Mannuk, S. P. Sen and *C. S. Banerjee* —for Petitioner.

L. Mohan Ganguli — for Opposite-Party.

Dawson-Miller, C. J.—This is a petition on behalf of Maharaj Bahadur Singh asking us to declare that an order for the sale of certain property made by the District Judge of Purneah on the 10th November last was illegal and *ultra vires* or to pass such other orders as we may think fit. The property was ordered to be sold in the executing Court. The Petitioner was claiming the property as his own and therefore not subject to execution in a suit against the trustee.

The question for decision upon the point whether the property was liable to sale or not in execution depended upon whether this particular property belonged to the Respondent either as part of the trust property of his father or whether it devolved upon him through his mother. His objection to having the property sold was set aside by the executing Court and the property was ordered to be sold.

An appeal from that order was lodged in this Court and an application was made which was dealt with her on the 5th November when an order was made that if the Petitioner paid into Court the decretal sum by a certain date the property should not be sold and the sale in the event of the sum not being paid into Court was ordered to take place on the 14th November.

Subsequently a further application to this Court was made and that order was amended as it turned out, which the Court was not aware of before, that the 14th November was a public holiday and so the sale which had been adjourned by the previous order was ordered to take place on the 11th November instead. That order was communicated to the learned District Judge in whose Court the property was about to be sold.

In the meantime the Petitioner

instituted a suit against the decree-holder claiming this property as his own, and as a preliminary measure in that suit he asked for an *interim* injunction restraining the decree-holder from selling the property. The learned Subordinate Judge of Purneah before whom the application came granted a temporary injunction restraining the decree-holder from selling the property. On the 10th November an application was made to the District Judge in execution praying that the order for the sale of the property should be suspended in consequence of the *interim* injunction made by the Subordinate Judge.

What happened on that application was that the learned District Judge had both the order of the Subordinate Judge granting the injunction and the order of the High Court which so far as its terms went might be taken as being an order in the nature of a direction to sell the property upon a particular day and being uncertain as to which of these two orders he ought to obey, he refused to stay the sale of the property.

It is quite clear that the order of the High Court was in no sense in the nature of a mandatory order directing the property to be sold in any event. It was merely an order staying the sale of the property for a certain time until the Petitioner had had an opportunity of paying the money into Court. The sale of the property had already been ordered and the matter before the High Court simply was whether the sale should take place on a certain day or whether that sale should be adjourned. It was never intended by the order of the High Court that if the sale should be either postponed or set aside for some other reason that the property nevertheless was to be sold.

It is quite clear therefore that the learned District Judge, although from the information he had, which I understand was conveyed by telegram, cannot be blamed for having not fully appreciated the order of the High Court, nevertheless fell into error in considering what he really ought to have done, and it is quite obvious that had he fully appreciated the nature of the order of the High Court he never would in the face of the injunction against the decree-holder have ordered the property to be sold.

In fact by so doing he would have been lending himself directly to an attempt by the decree-holder to disobey the order of the Court and to commit a contempt of Court.

What subsequently happened was that the sale took place and the Petitioner subsequently applied under the provisions of the Civil Procedure Code and paid the decretal amount into Court and had the sale set aside. The money has not yet been taken out of Court by the decree-holder but we are asked to declare that the sale should be set aside and the parties restored to exactly the same position as if the sale had never taken place.

It is contended on behalf of the decree-holder that the learned District Judge in refusing to stay the sale was acting within his jurisdiction and acting regularly within the exercise of that jurisdiction and that therefore we have no power to interfere with his discretion in the matter. What the learned Judge was in fact asked to do was in the peculiar circumstances of the case to exercise his inherent jurisdiction and order the sale not to take place on the ground that the decree-holder had been by injunction restrained from proceeding further by way of sale with the execution of his decree.

It may be quite true that the learned District Judge was not personally bound by the order of injunction, and indeed the Subordinate Judge could not have issued any injunction upon the Court of the District Judge, but the powers which the learned District Judge was asked to exercise were the inherent powers which he undoubtedly had of taking action in the particular circumstances of the case, and we, as a Court having superintendence over that Court, are also, I think, entitled to exercise our powers of superintendence over the District Judge ; and if we think that he has clearly gone wrong, inadvertently it is true, assisting one of the parties in what amounts to a contempt of the order of the Court, then I think we are clearly entitled to take such steps as may be necessary to put the parties in the same position as if no contempt of Court had taken place.

It was in my opinion clearly a contempt of Court on the part of Mr. Forbes the decree holder to insist upon the property being sold after the in-

junction had been passed by the Subordinate Judge. This is not the place or the time to consider whether the Subordinate Judge was right or wrong in the order he made restraining the sale.

That is a matter which may be considered hereafter when the decree-holder appears to show cause against the rule for the injunction but that injunction having been granted I think that this Court is bound to see that the order of the Court is carried out and that the parties against whom the injunction has been granted should not gain any advantage by reason of having acted in a way entirely contrary to that order.

The result is that in my opinion we ought to pass an order declaring that the sale which took place on the 11th November should be set aside and treated as of no effect and that the money paid into Court by the Petitioner in order to have that sale set aside should be restored to him.

The result is that the present application is allowed and the sale will be formally set aside as not binding upon the parties and the money already paid into the executing Court will be paid back again to the Petitioner. I think the Petitioner is entitled to his costs of this application. Hearing fee two gold mohurs.

Mullick, J.—I agree. I think we are acting in the exercise of our inherent powers in declaring the order of the District Judge to be wrong in the circumstances. The only proper course in this case is to place the parties in the position in which they were before that order was made.

Application allowed.

A.I.R. 1922 Patna 384

DAWSON MILLER, C. J., AND COUTTS, J.

Munshi Lal and another—Appellants

v.

Mahanth Ramasis Puri—Respondent.

L P.A. No. 127 of 1920 decided on 21st December 1921 against a judgment of Jwala Prasad, J dated 17th August 1920.

(a) *Letters Patent (Patna), clause 10—C. P. C. O. 41, Rr. 23 and 25—Remand for re-hearing by single Judge in Second appeal—Order is a 'Judgment' within Cl. 10 and if not appealed against, cannot be questioned in appeal from decree on remand.*

If a Judge sitting singly sets aside the judgment and decree of the lower appellate court and remands the case for re-hearing the order of remand being a 'judgment' under clause 10 of the Letters Patent (Patna) is appealable. If no appeal has been preferred against the order of remand it cannot be allowed to be challenged in a subsequent appeal against the decree made on remand.

[P, 385, C. 2]

(b) *Civil P. C. S. 100—Scope—Question for consideration is not the weight of evidence but whether there is any evidence for the finding*

In second appeal, the question for the High Court is not to determine whether the weight of evidence is in favour of the appellant or the respondent, but whether there is any evidence to justify the finding [P. 386, C. 2]

A. B. Mukherji—for Appellants.

Kulwant Sahay, Gangadhar Das and *Siva Nandan Ray*—for Respondent.

Dawson Miller, C. J.—This is an appeal under the Letters Patent by Munshi Lal and Parbhu Narain, the principal defendant in the suit, from a decision of Jwala Prasad, J, dated the 17th August 1920.

The plaintiffs, who are proprietors of 8 annas 3 pies share in Mauza Mehdiganj Briwachak, instituted the suit before the Munsif of Patna claiming possession of 11 *cattahs* of land together with mesne profits against the appellants who claimed it as included in their holding. The plaintiffs also claimed in the alternative assessment of rent.

The case for the appellants was that the land originally formed part of the holding of Gobind Mahto which was mortgaged to them, and that, they obtained a mortgage-decree against Gobind and purchased his holding at a sale in execution of their decree in May 1913, and had been in possession ever since that date.

The case of the respondents on the other hand was that the land in suit never belonged to Gobind but was part of a holding in occupation of Tilak Keori, and that Tilak having disposed of all his holding, except the 11 *cattahs* in dispute, had abandoned that portion, so that the respondents as landlords were entitled to possession The respondents have recognised the appellants as tenants of Gobind's holding and the main issues between the parties were, first, whether the land originally formed part of Gobinds holding or the holding of Tilak, and, in the latter case, whether Tilak had abandoned it so as to entitle the plaintiffs to possession.

The Munsif before whom that trial originally came, found in favour of the plaintiffs and his decision, dated the 5th December 1916, was confirmed on appeal by Mr. Ross District Judge of Patna, on the 20th July 1917.

The defendants appealed to the High Court from the decision of the District Judge. The appeal was heard by Das, J. The learned Judge considered that the lower appellate Court had misdirected itself in finding that there was no evidence on the record, apart from the mortgage decree, that Gobind had ever had any title to the 11 *cattahs* in dispute and in relying on the Record-of-Rights which was not in evidence in the case. He further considered that the judgment was defective as it contained no finding that Tilak had ever abandoned the land.

He accordingly was of opinion that the whole case should be re-considered by the lower Appellate Court, with special reference to two rent decrees obtained by the respondents against Gobind in 1883 and 1894, which, in addition to the mortgage proceedings, went to show that Gobind had been in possession of the disputed land. He, therefore, remanded the case to the lower Appellate Court for decision on the 14th May 1919.

The re-hearing came before Mr. Ashutosh Chatterjee, the District Judge of Patna, on the 28th June 1919. He found that Tilak had ceased to have any concern with his holding before the suit was instituted and, if the land belonged to him, he must be taken to have abandoned it. He found, however that the land was not in Tilak's holding but in that of Gobind and passed by the mortgage sale to the appellants. He further found that the evidence produced by the appellants was sufficient to rebut the presumption arising from the entry in the Record-of-Rights. He accordingly allowed the appeal, set aside the decree of the trial court and dismissed the suit with costs.

From this decision the respondent appealed to the High Court. The appeal was heard by Jwala Prasad, J. The learned Judge found that the decision of Das, J., remanding the whole case for re-hearing was based upon a misapprehension because the rent-decree had in fact been considered by Mr. Ross in his judgment, and secondly, because, although the Record-of-Rights was not on the record in the suit, it was the case of both parties that the land in suit was recorded in Tilak's name.

He accordingly held that the judgment of Das, J., remanding the case was invalid and consequently that the judgment come to by Mr. Ashutosh Chatterjee on remand was also invalid and could not displace the former judgment of the same Court. He then held that Mr. Ross's judgment not having been legally set aside must be restored. With great respect to the learned Judge, I am unable to accept his view that it was open to him to call in question the earlier judgment remanding the case for a re-hearing. The effect of the judgment was to set aside the judgment and decree come to by the lower Appellate Court in the plaintiff's favour.

It was, in my opinion, open to the plaintiffs to appeal from the judgment of Das, J., under section 10 of the Letters Patent. They did not avail themselves of the remedy and the decision cannot be called in question in a subsequent appeal against the decree made on remand. The learned Judge whose decision is now under appeal considered that the decision of this Court in *Bara Estate Ltd.* v. *Anup Chandra* (1) applied to facts of the present case.

In the case cited it was held that an order, made by the High Court in second appeal, directing the trial of a certain issue without setting aside the decree of the lower Court was not a judgment from which an appeal lay under the Letters Patent, and, therefore, the propriety of the order could be called in question when the case came back again to the High Court for the final determination of the appeal.

With that decision I entirely agree, but where the Appellate Court sets aside the decree appealed from, whether it orders a re-hearing or not, the decision, in my opinion, is a judgment within the meaning of the Letters Patent, whereas an order merely referring an issue for trial by the lower Court before the final determination of the appeal has not been so regarded. It was no doubt this distinction which induced the Legislature to differentiate between rules 23 and 25 of Order XLI of the Civil Procedure Code.

In the former case where the decree is reversed on appeal, the decision is appealable under Order XLIII, rule 1, where an appeal would lie from the decree of the appellate Court, in the latter case an appeal is allowed under

(1) (1917) 2 P. L. J. 663=41 I. C. 337=1917 P. H. C. C. 342.

the Code, as an order under rule 25 is in no way final and can be called in question when the appeal is finally determined after the issue has been decided by the lower Court. I think it was not competent to the learned Judge to question the propriety of the order of remand made by Das, J.

That, however, does not determine the question for consideration in this appeal. The learned Judge held that the finding of the lower Appellate Court on remand, that the land in suit was part of Gobind's holding, was not based upon legal evidence. It seems to me with respect to the learned Judge that in dealing with this part of the case he was in error in failing to distinguish between a document which creates title and a transaction which may be regarded as evidence in support of a title created long ago.

He held that, because the mortgage of a land in suit given by Gobind to the appellants in 1906 did not necessarily give them a title to the 11 *cattahs* in dispute, it could, therefore, be disregarded as evidence of the fact in issue, namely, whether the land was included in Gobind's holding. The questions of possession and assertion of title by Gobind some years before the dispute arose were, in my opinion, relevant facts upon the issue and cannot be entirely disregarded.

I agree that the evidence on either side was of a very meagre kind, but it must not be supposed that the learned District Judge was unmindful of the fact that there was oral evidence adduced by the appellants in support of Gobind's possession, whilst there was similar evidence in support of Tilak's possession given on behalf of the respondent. Little, if any, value could be attached to the oral evidence, but it was for the Court to say which story was best supported by the admitted circumstances and probabilities.

The case set up by the respondents, that Gobind's holding was originally less than 6 *bighas* 2 *cattahs* 4 *dhurs* according to the Zemindari measurement, was conclusively proved to be false in face of the rent-decrees of 1883 and 1884, and the learned District Judge rejected the village papers produced by the respondents in support of the part of their case as fabrications, and found that all along, Gobind's holding consisted of 6 *bighas* 2 *cattahs* 4 *dhurs*. This alone, he thought, was not sufficient to establish the appellant's case, but it was a material factor in determining the probabilities and on which he was entitled to rely and there was a further fact found by the learned Judge, namely, that Tilak made no claim to the 11 *dhurs* in question.

The learned Judge did not expressly rely upon this as a ground for his decision but it was a fact which he found and which he must have had in mind. He considered, however, that he was entitled to rely upon the mortgage and the fact that the respondents took possession under the mortgage decree in 1913 without opposition from any one was sufficient evidence to enable him to decide in the appellants' favour.

The question for this Court to determine is not, whether the weight of evidence was in favour of the appellants or the respondents, but whether there was any evidence to justify the finding. The appellants' title to Gobind's holding is not in dispute and their recognition as tenants of that holding is admitted. The only question for decision was whether the particular plot in dispute was in Gobind's holding or in that of Tilak. This was a question of fact upon which evidence of assertion of title and of acts of possession over property was material.

I think the decree appealed from should be set aside and the judgment of the District Judge dated the 28th June 1919 restored. The appellants will have their cost of this appeal and of the appeal to Jwala Prasad, J.

Coutts, J.—I agree.

Appeal allowed.

A.I.R. 1922 Patna 386.

ADAMI AND BUCKNILL, JJ.

Bhagwati Prasad Singh—Appellant.

v.

Bishun Pragash Narain—Respondent.

Appeal No. 1 of 1920 decided on 25th July 1921 from Mozufferpore dated 21st May 1919.

Court Fees Act—Appeal—Decree-holder—Appellant is not liable to pay Court fee on interest from date of grace to date of hearing of appeal—Interest—Decree holder is entitled to, upto realisation.

Though a decree-holder would be entitled to interest from the date of grace up to the date of realisation, he, as appellant is not liable to pay Court fees on the amount of interest from the date of grace to the date of the hearing of appeal. [P. 387, C. 1.]

S. M. Mullick and *Murari Prasad*—for Appellant.

Judgment.—The only question arising in this appeal is with regard to interest. The appellant obtained an *ex parte* decree in the Court of the Subordinate Judge, but the Court refused to grant interest after the period of grace.

No reason is given why this is disallowed. As a matter of right the decree-holder would be entitled to interest from the date of grace up to the date of realisation, and he should be granted interest at the rate of 6 per cent. per annum during the period. The appeal is allowed and the decree will be amended accordingly.

A question has been raised whether the Appellant is liable to pay Court-fee on the amount of interest from the date of grace up to the date of hearing of the appeal. It seems clear that he is not. At the time when the appeal was filed it was unknown what the amount of interest would be. Furthermore, there is the case of *Vithal Hari Athavle* v. *Govind Vasudeo Thosar* (1) which supports our opinion. It is not necessary that a further Court-fee should be paid.

Appeal allowed.

(1) (1893) 17 Bom. 41.

A. I. R. 1922 Patna 387 (1)

DAS, J.

Khusiram Maharaj—Petitioner

v.

Emperor—Opposite Party.

Criminal Rev. No. 490 of 1921 decided on 24th October, 1921.

Opium Act (1878), Sec. 9 (c)—Several persons having access to place where opium was found—Accused cannot be convicted.

Where the petitioner's cook room which was the place in which opium was found was such that several persons had equal right of access thereto,

Held that the petitioner could not be convicted of illegally possessing opium.

[P. 387, C 2.]

Yunus and *K. C. Roy*—for Petitioner.

Das, J.—The petitioner has been convicted of an offence under Sec. 9 (c) of the Opium Act, I of 1878, and has been sentenced to pay a fine of Rs. 100. It is admitted that the opium was found on the roof of the petitioner's cook-room. The question, therefore, arises, can it be said that the petitioner was in possession of the opium?

Now on this point a passage from the judgment of Sir Lawrence Jenkins in the case of *Jogjiban Ghosh* v. *Emperor* (1) has been cited.

"Now, on this evidence, can it be held consistently with legal principles, that it has been proved that Santosh was in possession of the bomb? It is well-established, and is an elementary rule founded on common sense, that where the place in which an article is found is one to which several persons have equal right of access, it cannot be said to be in the possession of any one of them."

It cannot, in my opinion, be said that the place in which the opium was found is not one to which several persons had equal right of access. If that be so, however the case may stand on law, it must be extremely difficult to convict the petitioner on facts.

I am of opinion that on the whole the conviction ought not to stand. I would set aside the conviction and direct that the fine if paid be refunded.

Rule made absolute.

(1) (1909) 13 C. W. N. 861=2 I. C. 681=9 C. L. J. 663.

A. I. R. 1922 Patna 387 (2)

JWALA PRASAD, A. C. J. AND ROSS, J.

Jamuna Rai—Appellant

v.

Ramtahall Raut and others—Respondents.

S. A. No. 707 of 1920, decided on 1st August, 1921, from the decree of Dist. J., Darbanga, dated 1st April, 1920.

Court Fee—Suit on mortgage—Dismissal—Appeal—Suit decreed together with interest—Plaintiff must pay Court fee on interest awarded.

A suit on a mortgage was dismissed by the first Court. The plaintiffs who appealed, paid on the memorandum of appeal, the same court-fee as had been paid on the plaint. The appellate court awarded the plaintiffs the sum claimed in the plaint, together with interest accruing due between the institution of the suit and the date of the decree.

Held: The plaintiffs were bound to pay additional court-fee on the amount awarded as interest. [P. 388, C. 2.]

Janak Kishore—for Appellant.

Md. Hasan Jan—for Respondents.

Jwala Prasad, A. C. J.—The learned vakil for the respondents disputes the view taken by the Stamp Reporter that there is a deficiency on the part of the respondents with respect to the court-

fee payable by them in the lower appellate Court to the extent of Rs. 9. The respondents were plaintiffs in the case and instituted the suit to enforce a mortgage claiming Rs. 757–3–3 principal, with interest at the bond rate up to the date of the suit. They also claimed interest *pendente lite* and future interest up to the date of realization at the rate entered in the bond. The suit was dismissed by the Munsif. They appealed to the District Judge, paying a court-fee on the aforesaid sum of Rs. 757–3–3, which they had paid on the plaint.

The lower appellate Court reversed the decision of the Munsif and decreed the plaintiffs' suit with costs in both the Courts. As to interest, the decree directed that interest was to be paid at the bond rate up to the date of grace, which was six months from the date of the decree, namely, 1st April, 1920. There was also direction as to future interest up to the date of payment.

The lower appellate Court prepared the decree stating the principal to be Rs. 311 and interest at the bond rate of *2 per cent. per annum* up to the 8th September, 1918, the date of filing the plaint, making a total of Rs. 757–3–3, upon which court-fee was paid on the plaint as well as on the memorandum of appeal.

To this sum the lower appellate Court added in the decree a further sum as interest at the bond rate from the date of the plaint up to the date of its decree, namely, 1st April 1920. This sum came up to Rs. 117–3–0. No court-fee was paid by the plaintiffs upon this additional sum added in the decree.

It may be conceded that the suit having been dismissed the plaintiffs were entitled to value their appeal at the sum of Rs. 757–3–3 claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and they were not bound to value the future interest, which they claimed from the date of the suit up to the date of realization, or to pay any court-fee thereunder, as was held in *Srinivas Row* v. *Ramasami Chetti* (1) and *Ramasami* v. *Subbusami* (2).

But in the present case the plaintiffs obtained a decree not only for Rs. 757-3-3 at which they had valued their appeal and which they had claimed in the plaint but for a larger sum namely, Rs. 874-6-3 which was arrived at by adding Rs. 117-3-0 as interest from the date of the suit, up to the date of the lower appellate Court's decree.

The plaintiffs cannot contend that this sum has been wrongly entered in the decree as there is no cross-appeal on their behalf. This is not, therefore, an unascertained sum but has now been specified in the decree and the plaintiffs are entitled to recover it by mere execution of the decree.

It has been well settled, that the plaintiff-decree-holder seeking to enforce a decree directing payment of future interest, is bound to pay the court-fee upon the interest claimed by him in execution for which no court fee was paid in the suit. There can hardly be any doubt that a mortgagee seeking to enforce the mortgage and praying to recover the amount due thereunder has to pay court-fee not only upon the sum decreed but also upon the interest that becomes due to him subsequent to the decree and which he claims in the execution.

It is also obvious that the lower appellate court was not bound and should not have passed a decree for a larger sum than that claimed by the plaintiffs in the memorandum of appeal unless, before the judgment was pronounced, an amendment of the memorandum of appeal was allowed and proper court-fee paid in *Percival* v. *Collector of Chittagong* (3).

The plaintiffs accepted the decree of the Court below and it appears that the decree was signed by the pleaders of the parties. The value of the appeal was therefore admittedly increased, by adding to the decree, the amount of future interest from the date of the institution of the suit to the date of the lower appellate Court's decree. The plaintiffs are, therefore, bound to pay additional court-fee and the view taken by the Stamp Reporter appears to be correct.

The deficit court-fee having just been paid, the appeal will be heard.

Ross, J.—I agree.

Court-fee ordered to be paid.

(1) (1900) 10 Mad. L. J. 144.
(2) (1890) 13 Mad. 508.
(3) (1903) 30 Cal. 516.

A. I. R. 1922 Patna 388.

COUTTS AND MACPHERSON, JJ.

Mir Tilawan—Petitioner

v.

Emperor—Opposite Party.

Cr. Rev. No. 334 of 1921 decided on 2nd August 1921 from an order of Sub. J., Muzaffarpur, dated 25th June 1921.

Criminal P. C., S. 342—Accused not examined, but filing written statement—High Court will not interfere if accused have not been prejudiced.

When the accused persons were not examined under section 342 after the examination of the prosecution witnesses, but they filed written statement not only at that stage but also after the examination of the defence witnesses, the accused were held to have been not prejudiced, and there being no miscarriage of justice, the High Court would not interfere in revision. [P 389, C. 1.]

W. H. Akbari and *Lakshmikant*—for Petitioner.

Kulwant Sahay—for the Crown.

Coutts and Macpherson, JJ.—This is an application in revision in regard to an order of the Sessions Judge of Muzaffarpur. The petitioners were convicted by the Sub-divisional Officer of Sitamarhi under section 143, Indian Penal Code, and sentenced to 14 days' rigorous imprisonment and a fine of Rs. 20 each; one of the petitioners was also ordered to give security to keep the peace under section 106, Criminal Procedure Code. On appeal to the Sessions Judge the convictions and sentences have been upheld.

The first point urged in support of this application is that the provisions of section 342, Criminal Procedure Code, have not been complied with inasmuch as the accused were not examined after the prosecution witnesses had been examined, cross-examined and re-examined. It appears that they filed written statements not only at that stage of the proceedings but after the defence witnesses had also been examined and cross-examined and discharged.

It is clear therefore that the accused have not been prejudiced and on this account there has been no miscarriage of justice. In these circumstances we see no reason to interfere on this ground in revision.

Revision disallowed.

A. I. R. 1922 Patna 389.

COUTTS AND MACPHERSON, JJ.

Mt. Shahzadi Begum—Defendant-Appellant

v.

Mt. Kokila—Plaintiff-Respondent.

Apps. from App. Decree Nos. 283 and 284 of 1920 decided on 3rd August 1921 from a decree of D. J., Gaya, dated 25th February 1920.

Bengal Land Revenue Sales Act, (XI of 1859) S. 54—"Incumbrance"—Tenure created intermediate between the proprietor and the mukarraridar is an 'incumbrance'.

The existence of a *mukarari* created by grant by the proprietor, does not bar the proprietor from creating an intermediate tenure between himself and the *mukararidar*. Where the proprietor therefore, granted to his wife, the right of collecting rent in lieu of dower from the *mukarraridar*.

Held the grant was an incumbrance within the meaning of S. 54. [P. 390, C. 2]

Raj Kumar Majumdar v. *Probal Chandra Ganguli*. (1904-1905) 9 Cal. W. N. 656, followed.

Sultan Ahmed—for Appellant.

Md. Husan Jan and *Md. Ishfaq*—for Respondent.

Coutts, J.—These two appeals arise out of two suits, one for rent brought by Mt. Shahzadi Begum against Ghulam Rasul Khan and others in which the defendants contended that the rent was payable to Mt. Kokila, a *mukarraridar* under Mt. Shahzadi, the other a suit brought by Mt. Kokila against Mt. Shahzadi claiming the rent which had been deposited by Ghulam Rasul and others in the rent suit.

The case of Mt. Shahzadi is that she purchased 2-annas 11-*dams* 4-*kauris* of village Mai Fatehpur in 1916 from Warasat Husain who had in the previous year purchased it at a revenue sale. It appears that this 2-annas 11-dames 4-kauris was part of a 6-annas 8-dames share in the village which belonged to M. Khairat Ahmed. When Khairat Ahmed died he left two widows, Dargahan and Jamilan, two sons, Fazlur Rahman and Mokhtar Ahmed and one daughter Kulsum.

Jamilan one of the widows sued for dower, and having got a decree purchased Khairat Ahmed's 6 annas 8-*dams* share at an auction sale. Subsequently there was a family settlement by which Fazlur Rahman got a 2-annas 11 *dams* 4-*kauris* share and later he granted in lieu of dower what has been called a *mukarrari* of this to his then wife Mt. Kokila. Afterwards a separate account was opened for Fazlur Rahman's share and what happened was that the share was sold for arrears of revenue and purchased by Warasat Husain who transferred it to Shahzadi Begum in 1916.

The main question in the suit and the

only question with which we are now concerned, is whether by the revenue sale the interest which Fazlur Rahman conveyed to his wife Kokila and which has been called a *mukarrari* was annulled or not Admittedly section 54 of Act XI of 1859 applies to the present case.

This section runs as follows:—

" When a share or shares of an estate may be sold under the provisions of section 13 or section 14, the purchaser shall acquire the share or shares subject to all incumbrances and shall not acquire any rights which were not possessed by the previous owner or owners."

And the point here is whether the so-called *mukarrari* granted by Fazlur Rahman to Kokila is an incumbrance within the meaning of this section or not. Both the Courts below have found that it is an incumbrance and it is against this finding that Shahzadi Begum has appealed in both cases.

Now what was granted by Fazlur Rahman to his wife Kokila was not really a *mukarrari*; it was merely a right to collect rent from the existing *mukarraridars* whose *mukarrari* covers the whole share and what is contended by the learned Government Advocate is that it is not an incumbrance on the land but merely a personal right not affecting the land and consequently not such an incumbrance as is referred to in the section.

It is true that in *Bibi Jarao Kumari Saheba* v. *Hanifuddin Akand* (1) there is a remark at the end of the judgment which goes to support this contention, but this remark is purely *obiter* and in my opinion it is not the correct view of the law. The same question was fully discussed in regard to a *patni* tenure in *Raj Kumar Majumdar* v. *Probat Chandra Ganguli* (2).

In that case it was held that the existence of a *patni* tenure does not bar the proprietor from creating an intermediate tenure between himself and the *patnidar* and exactly the same reasoning applies to the case of a proprietor and a *mukarraridar*.

It may be that the tenancy which is created is not a *mukarrari* tenure but it is certainly in my opinion an incumbrance. It is urged that having granted *mukarrari* of the whole share all that remains in the proprietor is his proprietary right and when he leases any portion of this proprietary right he is merely parting with a portion of such right and not creating an incumbrance.

This argument would be correct if the proprietor was selling a portion of his proprietary right, but in the present case what was done by Fazlur Rahman was not to part with his proprietary right but merely in consideration of an annual rent of Rs. 29 to give to his wife the right of collecting rents from the *mukarraridars*. This, to my mind, is clearly an incumbrance and in my opinion the view which has been taken by the Courts below is correct.

I would accordingly dismiss these appeals with costs.

Macpherson, J.—I agree. The only rights, which a purchaser of a separate account at revenue sale acquires by his purchase are, under section 54 of the Bengal Revenue Sales Act, 1859, those which the owner of the separate account possessed at the time of the sale. In this instance, the rights of the previous owner were affected by the limitation which Fazlur Rahman had put upon them in 1906 in favour of his then wife, the present respondent; the purchaser accordingly secured them subject to the same limitation. I also agree that it comes within the term "incumbrance" expressed in section 54.

Appeals dismissed.

(1) (1910) 14 C.W.N. 389=4 I. C. 471.
(2) (1905) 9 C.W.N. 656.

A. I. R. 1922 Patna 390.

DAS AND ADAMI, JJ.

East Indian Railway Company—Appellants

v.

Bhagwan Das and others—Respondents.

Appeals from App. Dec. No. 1206 of 1920, decided on 30th July 1921 against a decision of J. C. Chota Nagpur, dated 28th Sept. 1920.

Railways Act, Section 57—Ry. receipt lost—Consignee offering to give indemnity—Company taking time to inquire into bona fides of offer—Demurrage cannot be charged for that period.

Where the plaintiff, the consignee, who had lost the railway receipt offered to execute an indemnity bond in favour of the Company but the Station Master refused to deliver the goods until the Railway administration had satisfied itself that the plaintiff's claim was *bona fide*;

Held The company was not entitled to charge demurrage for the period during

which the investigation into the consignee's claim was being made, 18 Bom. 237 followed.
[P. 391, C. 1 : P. 392, C. 1.]

S. M. Mullick and *S. N. Roy*—for Appellant.

S. Dayal and *B. K. Prasad*—for Respondents.

Das, J.—This appeal arises out of a suit instituted by the respondents for recovery of a sum of Rs. 513 from the defendants. The claim has been allowed by both the Courts below.

The facts of the case are these. On the 26th of September, 1918 Sadaram Kishun Dayal, a firm carrying on business in Calcutta, made over a consignment of 450 bags of salt at Sulkea to the defendant Company for carriage of the same to Giridih. The Railway Receipt No. 79164 was made out in the name of Kishun Dayal.

It appears that Sadar Ram Kishun Dayal sold the goods to the plaintiffs and made over the Railway Receipt to the plaintiffs; but it also appears that the Railway Receipt was lost. The goods actually arrived in Giridih on the 3rd October, 1918. The plaintiffs, on getting information of the arrival of the goods on the 5th October, 1918, applied for delivery of the goods to them and offered to execute a bond of indemnity in favour of the Railway Company.

The Station Master of Giridih, however, refused to deliver the goods to the plaintiffs pending an enquiry by the Railway Administration as to the claim of the plaintiffs. The Railway Administration was subsequently satisfied as to the *bona fides* of the claim of the plaintiffs, and on the 19th October, 1918, made over the goods to the plaintiffs on payment of Rs. 513 by the plaintiffs as demurrage.

The plaintiffs say that the Railway Company was not entitled to charge the demurrage from them. The Courts below, agreeing with the contention put forward on behalf of the plaintiffs, have allowed the claim in full as against the Railway Company.

Section 57 of Act IX of 1890 appears to be the relevant section. That section provides, (omitting all immaterial matters).

"Where receipt given for the goods is not forthcoming the Railway Administration may withhold delivery of the goods until the person entitled in its opinion to receive them, has given an indemnity to the satisfaction of the Railway Administration against the claims of any other person with respect to the goods."

Now Railway Administration has been defined to mean the Railway Company. *Mr. Sushil Madhab Mullick's* argument is, that the Station Master was incompetent to accept the indemnity offered by the plaintiffs and that he was bound to refer the matter to the Railway Administration, in other words to the Railway Company, which, in this particular case, under the rules framed under the Act, would be the Divisional Traffic Manager.

There is no doubt that under the various rules that have been framed under this Act the Station Master was incompetent to make over the goods to the plaintiff, inasmuch as they did not produce the Railway Receipt to the Station Master, and it may be that the time taken by the Railway Administration in holding the enquiry into the claim of the plaintiffs was a perfectly reasonable one in the circumstances of the case.

The question still remains whether the Railway Administration was entitled to charge demurrage from the plaintiffs for the time occupied by it in making a proper enquiry into the plaintiff's claim.

Under the Rules framed by the Governor-General in Council under the provisions of the Act, a wharfage charge may be levied in respect of all goods not removed from Railway premises before closing time of the day following that on which they are made available for delivery; and demurrage at a particular rate may be charged on all loaded vehicles, requiring to be discharged by owners, which are not discharged after the expiry of nine hours of day light from the time of being placed in position for unloading.

The question which we have to determine in this case is when were the goods made available for delivery, and whether the owners were required to discharge the goods at any time prior to the 19th October, 1918 In my opinion the goods were not available for delivery until the 19th October, 1918. The proper person had applied for delivery of the goods so far back as the 5th October, 1918. It is quite true that that proper person did not produce the Railway Receipt and

that the Railway Administration was entitled to make an enquiry into the *bona fides* of the claim made by the plaintiffs. But the result of that enquiry was entirely satisfactory to the claim of the plaintiffs.

It must follow, therefore, that the proper person had applied for delivery of the goods on the 5th October, 1918, and that the Railway Administration refused to deliver the goods to that person pending the result of the enquiry made by it; in other words, according to the view taken by the Railway Administration itself, the goods were not available for delivery until they were satisfied as to the *bona fides* of the claim put forward on behalf of the plaintiffs.

On the question of demurrage they were not required to discharge the goods until the Railway Administration was satisfied that they were the owners and ought to discharge the goods. In my opinion the view taken by the Court below is entirely correct.

The case referred to by the Court of first instance, the case of the *B. B. & C. I. Ry. Co.* v. *Jacob Elias Sassoon* (1), entirely supports the case of the plaintiffs. *Mr. Sushil Madhab Mullick* argues before us that that case was wrongly decided. Well, we are not prepared to dissent from the view taken by Mr. Justice Parsons in that case. We must accordingly dismiss this appeal with costs.

A question was raised by *Mr. Sushil Madhab Mullick* as to whether the Railway Company are entitled to reasonable warehouse rent for the time the goods remained with them. This claim has never been put forward on behalf of the Railway Administration and we cannot adjudicate on it in this Court in second appeal when the facts are not before us. If they are entitled to any reasonable warehouse rent, they are entitled to enforce that claim, in a properly constituted suit against the plaintiffs.

We cannot entertain the claim in this appeal.

Adami, J.—I agree.

Appeal dismissed.

(1) (1894) 18 Bom. 231.

A. I. R. 1922 Patna 392.

DAS AND ADAMI, JJ.

Shaikh Rafiquddin and another—Appellants

v.

Haji Shaikh Asgar Ali—Respondent.

App. from App. Decree, No. 595 of 1920 decided on 29th July, 1921 from a decision of D.J., Bhagalpur dated 24th January 1920.

(a) *Specific Relief Act, S 42—Suit for declaration of right to contribution when occasion arises, does not lie.*

S. 42 does not apply to a suit for a declaration that the plaintiff will be entitled to contribution from the defendants if and when the occasion arises. [P. 393, C. 2.]

(b) *Court Fees Act, Sch. II, Art. 17—Suit for declaration of right to contribution when occasion arises—Court fee of Rs. 10 is correct.*

Where in a suit, for a declaration that the plaintiff will be entitled to contribution from the defendant if and when occasion arose, the plaintiff had paid a court fee of Rs. 10 only.

Held: the fee was correct.—39 Cal. 704 Ref., 4 Pat. L. J. 302 foll. [P. 392, C. 2, P. 393, C. 1.]

A. B. Mukerjee and *M. Fakhruddin*—for Appellants.

M. H. Jan.—for Respondent.

Das, J.—A preliminary question arises in this appeal as to the sufficiency of the court-fees paid by the plaintiffs-respondents on the plaint filed in the Court of first instance. The Stamp Reporter reports that there is a deficiency of Rs. 275.

It will appear on a reference to the plaint that the plaintiff sued for a declaration, *first*, that Rs. 2,370 as given in Schedule A, was borrowed for the benefit of the joint business and that the defendants are therefore liable to pay the principal amount besides interest to the extent of their share: *secondly*, for a declaration that the defendants are liable to pay Rs. 1,350 principal, besides interest and costs as per account given in Schedule (B) together with interest and costs as may be found on calculation to be due by them according to the award of the *panchas*; and *thirdly*, for a declaration that in case the plaintiff for any reason whatever be compelled to pay the share of the defendants, he would be entitled to realize the same, principal with interest and costs, from the defendants.

In my opinion the view taken by the Stamp Reporter is not correct. It may of course be that the suit does not lie under section 42 of the Specific Relief Act; but it cannot be suggested as was suggested in the case of *Deokali Koer* v. *Kedarnath* (1) that the suit

(1) (1912) 39 Cal. 704=15 I. C. 427=16 C.W. N. 838.

is not a suit to obtain a declaratory decree where no consequential relief is prayed for.

That case which is referred to by the Stamp Reporter is clearly distinguishable. The late Chief Justice of the Calcutta High Court came to the conclusion that there was in substance a prayer for injunction and a prayer for injunction is a consequential relief within the meaning of the Statute.

So far as the other case namely, *The Midnapore Zamindari Company* v. *The Secretary of State for India in Council* (2), is concerned, it will appear that the second declaration sought for by the plaintiff was based on the first declaration, and in the peculiar circumstances of the case the learned Judges took the view that the second declaration asked for, by the plaintiff was in effect a consequential relief within the meaning of the Statute. In this Court Mr. Justice Roe took another view in the case of *Tewari Kora* v. *Bhupat Mandar* (3). I am of opinion that there is no deficiency due from the respondents.

Coming now to the case, I am clearly of opinion that the suit does not lie. The whole question is, is it a suit under section 42 of the Specific Relief Act.

That section declares that: "Any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is entitled, and the plaintiff need not in such suit ask for any further relief."

The plaintiff in this suit has not asked for a declaration as to his legal character. Now clearly a legal character under section 42 means the status of the plaintiff that is to say, the status as to legitimacy, marriage, divorce, adoption and the like. It is quite clear that in this suit the plaintiff is not asking for a declaration as to his status.

Is he then asking for a declaration of his right as to any property? Clearly he is not. The right to any property must mean the right to any existing property. In this case he is not asking for any declaration as to any existing property. His whole suit is a suit for declaration that he will be entitled to contribution from the defendants if and when the occasion arises. That, in my opinion, is not contemplated by section 42 of the Specific Relief Act.

I would allow this appeal, set aside the judgments and decrees passed by the Courts below and dismiss the plaintiff's suit. In the circumstances of the case I would dismiss it without costs.

Adami, J.—I agree.

Appeal allowed.

(2) (1917) 44 Cal. 352=40 I.C. 96=21 C.W.N. 834.

(3) (1919) 4 P.L.J. 302=50 I.C. 298.

A.I.R. 1922 Patna 393.

JWALA PRASAD AND ADAMI, JJ.

Shamlal Kalwar and others—Petitioners

v.

Emperor—Opposite Party.

Cr. Rev. No. 506 of 1921 decided on 8th November 1921, against an order of S. J., Champaran.

Criminal P. C. Ss., 342 and 231—Charge altered after examination under S. 342—Witnesses re-called under S. 231—Further examination under S. 342 is not necessary.

If after the examination of the accused under S. 342 but before he is called upon to enter on his defence there is an alteration made in the charge, or a new charge is added, it is not necessary that the court should re-examine the accused under S. 342, although some of the witnesses have, after the alteration of or addition to the charge is made, been recalled under section 231 and examined with reference to such alteration or addition.

[P. 394, C. 1, 2.]

H. L. Nandkeolyar—for Petitioner.

Manohar Lal—for the Crown.

Facts.—The petitioners, who were accused of rioting and stealing certain grains, which were being carried in carts, by the servant of one Sant Lal, and of causing hurt, were convicted, some under S. 325 and others under Ss. 147 and 379.

Jwala Prasad, J.—[After detailing the facts his Lordship continued:]—Learned Counsel on behalf of the petitioners raised a law point founded on section 342 of the Criminal Procedure Code, urging that the entire trial was vitiated and that there should be a retrial. We have carefully examined this contention with the facts and circumstances and we are of opinion that there is no substance in it.

The examination and cross examination of the prosecution witnesses finished on the 24th May, 1921, and

the charge was then framed. The accused were asked if they would cross-examine any of the prosecution witnesses after the charge, but they declined and consequently they were called upon to enter on their defence fixing the 11th June. On the 11th June at the instance of the Public Prosecutor a charge under section 325 was added against one of the accused, Shamlal Kalwar, and the charge under section 147 was verbally altered.

The prosecution witnesses were then re-called and were cross-examined on the 17th June. On the 25th of June, the previous convictions against two of the accused Shamlal and Brich Koeri were framed and five defence witnesses were examined on behalf of the defence and discharged. It is not disputed that the prosecution evidence then closed, and the accused were called upon to enter on their defence on the 24th May, 1921, upon the charges that were originally framed.

It is however contended that after the alteration of the charge under section 147 and the addition of the charge under section 325 on the 11th June, the procedure under sections 255, 257 of the Code of Criminal Procedure re-opened and the prosecution case therefore was closed on the 25th June, 1921, when the accused should have been examined, and the omission to do so contravened the mandatory provisions of section 342 of the Code.

In my opinion sections 255 to 257 have no application to a case when a charge is altered or added. Section 342 has consequently no application when the accused were already called on to enter on their defence prior to the alteration or the addition of the charge. The procedure for the trial in regard to the alteration or addition of a charge is laid down in sections 227 to 231 of the Code.

Section 228 empowers the Court to proceed with the trial as if the new or altered charge had been the original charge. Section 229 empowers the Court either to direct a new trial or to adjourn a trial for such period as may be necessary, if the Court be of opinion that the proceeding immediately with the trial is likely to prejudice the accused or the prosecution.

Section 231 entitles the prosecutor and the accused to recall or summon or re-summon and examine with reference to the altered or added charge any witness who may have been examined and also to call any further witness whom the Court may think to be material. The addition or the alteration of a charge does not open up the trial from the beginning and the Court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused. In order to safeguard the interests of the parties section 231 gives them the right to recall or resummon any witness. The recalling of the prosecution witnesses for further cross-examination in the present case by the accused was evidently under this section.

Under section 227 the added or altered charge has to be read and explained to the accused. These safeguards appear to have been deemed sufficient to protect the interest of the prosecution or the accused in the case The trial as already observed does not commence *de novo*, so that if the accused had been already called upon to enter on their defence there is no further obligation upon the Magistrate to examine the accused under section 342 of the Code. Therefore, the authorities on the subject of which we are so well cognisant do not at all apply to the present case.

The contention is therefore overruled (convictions were confirmed and sentences reduced.)

Adami, J.—I agree.

Sentences reduced.

A.I.R. 1922 Patna 394

JWALA PRASAD, A. C. J. AND ROSS, J.

Maharaj Bahadur Singh—Defendant No. 1—Appellant.

v

Shaikh Abdul Rahim—Plaintiff—Respondent.

S. A. No. 409 of 1920, decided on 30th July 1921 from a decision of D. J., Purnea, dated 7th January 1920.

(a) *Bengal Patni Taluks Regulation, (VIII of 1819), S. 14—Patni Sale—Part of purchase money withdrawn by a holder of decree against patnidar's judgment creditor Sale subsequently set aside—Purchaser can sue for refund of money withdrawn.*

A person had a decree against the judgment-creditor of a *Patnidar* and withdrew, in execution of his decree, a part of the purchase money deposited in the Collectorate by the purchaser of the *patni* at a sale, held under section 14, *Patni Taluks* Regulation. When the *patni* sale had been set aside by a compromise decree in a suit brought by

the *patnidar* against the *Zamindar* and the purchaser;

Held: the purchaser had a right to maintain a suit against the person who had withdrawn the portion of the purchase money, for recovery of amount withdrawn. 3 Ch. 483, 21 W R. 251 referred to. [P. 397, C 2; P. 398, C. 2]

(b) *T. P Act, S. 52 — Applicability to moveable property is doubtful.*

It is more than doubtful if the doctrine of lis pendens is applicable to moveable property. [P. 396, C. 1.]

K. P. Jayaswal and *S. M. Tahir*—for Respondent.

Sultan Ahmed and *C. S. Basu*—for Appellant.

Jwala Prasad, A. C. J.—This is an appeal by the defendant No. 1, against a decision of the District Judge of Purnea, dated the 7th January, 1920, whereby he dismissed the appeal of the appellant and confirmed the decree passed by the Subordinate Judge of Purnea in favour of the plaintiff.

The plaintiff had purchased the *patni* in question which was put up to sale by the proprietor under the *Patni* sale law, Regulation VIII of 1819, on the 14th May, 1912, for Rs. 1,26,000. The purchase money was deposited in the Collectorate on the 13th June, 1912. Defendant No. 2 the *patnidar*, instituted a suit under section 14, clause (2), of the *Patni* Sale Law to set aside the sale impleading the plaintiff-purchaser and the landlord as defendants in the suit.

The suit terminated in a decree passed on compromise whereby the sale was set aside on the 17th September, 1913. Four months prior to this, on the 15th May, 1913, the appellant, defendant No. 1, withdrew Rs. 1,795-7-6 of the purchase money deposited in the Collectorate by the plaintiff. The defendant No. 1 had a money decree against one Chaturput Singh who had held a decree against the *patnidar*.

In execution of his decree defendant No. 1 attached the decree of Chaturput Singh and executed the same. He attached the said sum of Rs. 1,795-7-6 out of the purchase money deposited by the plaintiff in the Collectorate and ultimately, as observed above, the said sum was withdrawn by him on the 15th May 1913.

After the *patni* sale was set aside the plaintiff withdrew from the Collectorate the purchase money of Rs. 1,26,000, *minus* the said sum of Rs. 1,795-7-6, which had been withdrawn by the defendant No. 1. The plaintiff now brings the present suit for realization from the defendant No. 1, of the said sum of Rs. 1,795-7-6, with damages at the rate of one rupee per cent. per mensem. The plaintiff subsequently joined defendants 2 and 3, who are the holders of the *patni*, as defendants in this suit. The courts below have decreed the plaintiff's claim against defendant No. 1.

In second appeal he raised the same contentions as he did in the court below; *first*, it is said, that inasmuch as the appellant withdrew the sum of money claimed in the present suit in execution of his decree against the *patnidar* four months before, the sale was set aside by means of the compromise decree dated the 17th September, 1913, and at that time the money in deposit in the Collectorate belonged to the *patnidar*, defendants second party, the appellant could not be made liable for the said sum.

Secondly, it is said that in any case the deficiency in the purchase money should have been made good by the proprietor of the *patni* at whose instance the sale had taken place and not by the defendant No. 1. *Lastly* it is contended that the plaintiff must proceed against Chaturput Singh who was directly benefited by the sum as it went to satisfy the decree as against him.

The court below held that inasmuch as the suit was filed in June 1912, and remained pending in court till it was compromised in September, 1913, and the money was drawn by the appellant in the meantime on the 13th April, 1913, he must be presumed to have known of the suit and consequently he withdrew the money with notice of the claim of the *patnidur* to have the sale set aside, and that sale having been set aside, he must refund the money.

As to the second and third contentions, the Court below held that Chaturput Singh could not in any case, be liable to recoup the plaintiff with respect to the land sold by him, and as the appellant took away the money he must be held to be liable to the plaintiff.

The ground taken by the Court below for overruling the first contention probably rests upon the principle of *lis pendens*. It is true that under the law, embodied in section 52 of the Transfer of Property Act, which virtually agrees with the later views in England, no notice is necessary in order to apply the principle of *lis pendens*. But the principle of *lis pendens* applies to immoveable property

[*Wigram* v. *Buckley* (1)] and it is more than doubtful whether it can be extended to moveable property such as in the present case, for the obvious reason, that a person dealing with immoveable property is expected to apprise himself of all the circumstances connected with it, notably pending litigation in respect of the right to the property.

We are, however, dealing in the present case with moveable property in the shape of money deposited in the collectorate as the purchase money of the *patni* which was sold for arrears of rent due from the *patnidar* under Regulation VIII of 1819. The sale was held under section 14 of the Regulation which has to be made "without reserve" on the date fixed for the sale of the tenure and is not to be postponed on any account unless the amount be lodged. The only way in which this peremptory sale can be contested is, as laid down in that section, by instituting a suit against the *zamindar* for the reversal of the sale.

The plaintiff in such a suit, upon establishing a sufficient plea, is entitled to obtain a decree with full costs and damages. Then follows the most important clause in the section which runs as follows:—

"The purchaser shall be made a party in such suits, and upon passing decree for reversal of the sale, the court shall be careful to indemnify him against all loss, at the charge of the *zamindar* or person at whose suit the sale may have been made."

In the suit brought by the *patnidar* to set aside the sale the purchaser who is the plaintiff in the present case was made a party but the compromise decree of the 17th September, 1913, does not deal with the indemnity to which the purchaser was entitled. Now such a direction should in terms of the section have been made.

In the case of *Saikh Abdoolah* v. *Oomed Ali* (2) it was held that the purchaser was not entitled to be indemnified for his loss by the *patnidar* when the sale is set aside on proof of its having been held without due service of the notice required by law. We do not know in the present case whether the sale was vitiated on account of non-compliance with the provisions of sections 9 and 10 of the Regulation or on account of the required notice of the sale not having been served. It was set aside in the present case by means of a compromise which had been arrived at between the parties and which was incorporated in the decree but the compromise set forth in the decree is silent as to the ground upon which the sale was agreed to be set aside. In any case, the *patnidar* is not liable for the loss sustained by the purchaser on account of the sale having been set aside.

As regards the purchaser's right to be thus indemnified by the *zamindar* the compromise decree is silent. The omission to make the necessary direction in the decree providing for the indemnity of the purchaser was the ground upon which the decree in the case referred to above, was set aside and the case was remanded to enable the court to pass the necessary orders in favour of the purchaser to recover his loss against the *zamindar*.

In the case of *Mobaruck Ali* v. *Ameer Ali* (3) the Munsif who tried the case omitted to make the necessary direction in the decree under the aforesaid clause in section 14, in favour of the purchaser as against the *zamindar*. The contention that the purchaser should have applied to the Munsif to have his order reviewed was overruled and necessary orders were added to the decree in the High Court.

The court observed as follows:— "That remedy is now shut out, as no review can be entertained after a special appeal has been preferred, and, therefore, if we decline to interfere, the purchaser will be obliged to bring a regular suit. Under section 14, Regulation VIII of 1819, clause I, it is provided that, in cases like the present, the court making a decree setting aside the sale shall be empowered to indemnify the purchaser against all loss at the charge of the *zamindar* or person at whose suit the sale may have been made; and we think that the purchaser, appellant in special appeal No. 318, is entitled to receive back from *zamindar*

(1) (1894) 3 Ch. 483=63 L. J. Ch. 689=43 W. R. 147.

(2) (1866) 6 W. R. 321.

(3) (1872) 21 W. R. 252.

who brought the *patni* improperly to sale, the amount of the purchase money with interest at 6 *per cent. per annum* from the date of the sale up-to-date of repayment."

This recognizes the right of the purchaser to bring a regular suit in case there happens to be an omission in the decree for the refund of the purchase money. There was such an omission in the present case in the compromise decree dated the 17th September, 1913, setting aside the sale. There was no review or appeal from that decree and the only course now left to the purchaser was to bring the present suit.

In the case referred to above, the sale was vitiated on account of some irregularity caused by the conduct of the *zamindar*. We do not know whether the sale in the present case was defective in any way and as to who was really responsible for the sale, the *patnidar* or the *zamindar*. Upon the materials in the case, we are not in a position to fix the liability either upon the *zamindar* or upon the *patnidar*.

The case, therefore, has to be decided upon the right of the purchaser to receive the money from the appellant who withdrew it from the collectorate and who must be deemed to be liable to refund it when the sale was ultimately set aside. The purchase money was deposited by the plaintiff with the officer conducting the sale under section 15 of the Regulation.

That section provides that after such a deposit is made, the purchaser is forthwith entitled to obtain a certificate of the sale and to procure a transfer to his name in the *katcherri* of the *zamindar* of the *patni* by receiving the usual *amal tastak* or order for possession. The sale proceeds in the hands of the officer conducting the sale are to be disposed of in accordance with the directions laid down in section 17 of the Regulation. One *per cent.* is carried to the account of Government for the purpose of meeting the expenses of any extra establishments maintained for carrying into effect the provisions of the Regulation. The balance is next applied to make good in full to the *zamindar* or other person any sum which may be due to him. The balance, if any, then left, is to be sent by the officer conducting the sale to the Treasury of the Collector to be there held in deposit to answer the claims of the *talukdars* of the second degree, or of others who, by assignment of the defaulter, may be at the time in possession of a valuable interest in the land composing the *taluk* sold or any part of it.

In the present case the suit contesting the sale was brought soon after the sale on the 13th June, 1912, the period of limitation for such a suit being one year under Article 12 of the Indian Limitation Act. It appears that the purchase money in deposit with the officer conducting the sale, was not at all distributed in the manner set forth in section 17 of the Act and before such a distribution takes place, it is impossible to foresee if anything would be available to the defaulter *patnidar*.

As a matter of fact after the sale was set aside the purchaser was given a refund of the entire purchase money *minus* the sum withdrawn by the defendant No. 1. This clearly shows that it was not declared under section 17 what sum, if any, was then held by the Collector to the credit of the *patnidar* defaulter. It is, therefore, doubtful as to whether the appellant had any right to withdraw the money in question from the collectorate as belonging to the *patnidar*.

No doubt he may have had a right to have the claim, if any, of the *patnidar* in the purchase money deposited with the Collector, attached to satisfy his decree against the *patnidar* when the sum due to the *patnidar* is determined. Assuming for the sake of argument that, the money in deposit belonged to the *patnidar* and was kept to be paid to him or to his creditors, such payment was subject to the result of the suit instituted by the *patnidar* to set aside the sale.

The setting aside of the sale means that the *patnidar* should get back his property. He could not therefore retain the property and the price fetched by the property at the auction sale. The refunding of the purchase money is a necessary consequence of the setting aside of the sale of the property. If the *patnidar* was bound to refund it there is no reason why the defendant No. 1, who withdrew the money as belonging to the *patnidar* should not be called upon to do so. In any view of the case, it appears just and equitable that the defendant No. 1, who withdrew the

money should not be allowed to retain it when the sale was set aside.

The obligation to refund, on the sale being set aside, is towards the Collector who had the money in deposit and who paid it to the defendant No. 1. During the pendency of any dispute regarding the sale held by the Collector at the instance of the *zamindar*, the money is generally paid, on security being taken from the person withdrawing the money for the refund of the same.

Clause (8) of section 17 provides for this. It says—

"It shall be competent to any party interested in a deposit to withdraw the whole or any part thereof on substituting Government securities, bearing interest, in lieu of the money so held in deposit."

This security is certainly to enure to the benefit of the person paying the money during the pendency of any litigation with respect to the money or the property such as the one brought by the *patnidar* in the present case to set aside the sale. The case of *Behari Lal Seal* v. *Maharaja Dhiraj Bijoy Chand Mahtab Bahadar* (4) was decided on the basis of the aforesaid principle.

In that case the creditors of the defaulting *patnidars*, as in the present case, withdrew a portion of the purchase money deposited with the Collector on the sale of the *patni* in execution of the decree of the *zamindar* for arrears of rent. Before that, as in the present case, the defaulting *patnidars* had brought a suit for setting aside the sale and the sale was ultimately set aside. The *zamindar* was obliged to refund the purchase money to the purchaser obviously under the direction of the court passed in the suit to set aside the sale under section 14 of the Regulation. The *zamindar* then instituted a suit to recoup himself from the creditors who had withdrawn the money pending the suit to set aside the sale. The suit was decreed.

It is well to quote the short judgment of the court below:—"They" (that is the creditors) "took out a portion of the surplus sale-proceeds at a time when there was a suit pending, in which the question of the validity of the sale was involved. They, therefore, took out the money subject to the result of that suit: and when the sale was set aside there was an implied obligation on their part to return the money to the Court. They did not do so, and consequently the *zamindar* had to repay to the auction purchaser Rs. 15,000 the whole of which he would not have been obliged to pay, if the defendants Nos. 1 to 9 had fulfilled the implied obligation which was upon them to return the surplus sale-proceeds to the Court."

This decision definitely fixed the liability upon the creditor (in the present case the defendant No. 1) to return the money to the court so that the same can be refunded to the purchaser when the sale was set aside. If the *zamindar* could recover from the creditor who drew the money, there is no reason why the purchaser himself could not recover the same, on the principle, that it was the failure of the defendant No. 1, which prevented the plaintiff from getting back from the Collector the entire sum deposited by him.

There is no substance in the contention of *Mr. Sultan Ahmed* that, though the *zamindar* could recover the money from the creditor who withdrew it from the collectorate, the purchaser himself cannot do so. As observed above, the creditor was liable to refund the money and it was ultimately to go to the pocket of the purchaser. It is wholly immaterial whether the *zamindar* without paying in the first instance brings a suit to recover the money or the purchaser himself institutes the suit.

I, therefore, uphold the decision of the court below and would dismiss this appeal with costs.

Ross, J.—I agree.

Appeal dismissed.

(4) (1906) 10 C. W. N. 234.

A. I. R. 1922 Patna 398

DAS AND ADAMI, JJ.

Khub Lal Upadhya—Appellant

v.

Jugdish Prasad Singh—Respondent.

App. No. 155 of 1920 decided on 1st Aug., 1921 from the Appellate Decree of Dist. J., Saran, dated 30th July 1919.

Civil P. C., S. 100—Plea of bar by limitation raised without any facts—New plea of bar by adverse possession or under Art. 137 of the Limitation Act cannot be raised in Second Appeal.

If the defendant pleads that the suit is barred by limitation he is entitled to

show that upon the allegations made in the plaint the suit is so barred. But if he intends to raise any question of fact with regard to the plea of limitation it is necessary for him to state the facts on which he relies in the written statement and to ask the court to frame an issue on the facts so stated. If he does not do so, he will not, in second appeal, be entitled to argue that he has a good title to the land by adverse possession and that the suit is also barred under Article 137 of the Limitation Act. [P. 399, C. 1, 2.]

Sumbhu Saran—for Appellant.

S. Roy and *J. P. Sinha*—for Respondents.

Das, J.—The only question which has been argued before us is one of limitation. The learned Vakil appearing on behalf of the appellant puts his case in two ways: *first*, he says that he has a clear and good title to the land in dispute by adverse possession, and, *secondly*, that under Article 137 the plaintiff's suit is barred by limitation.

Now, it seems to me, that on the pleadings in the case it is not open to him to take up either of these points. The only point which he has raised in the written statement is that the plaintiff's suit is barred by limitation. It is an issue in bar and entitles the defendant to argue that upon the allegations made in the plaint the plaintiff's suit is barred by limitation.

Upon the allegations made in the plaint the plaintiff's suit is clearly within time.

If it was the object of the defendants to raise any questions of facts in connection with the issue as to limitation, then it was obligatory on them to state those facts in the written statement and invite the Court to raise an issue on the particular facts alleged by them. This has not been done and I do not think, it is open to the appellant in this Court which is not a Court of facts, to raise questions of facts.

The question of adverse possession is essentially a question of fact and the injustice to the respondents is apparent because there is no finding by the Courts below as to when the appellants took possession of the property and in order to enable the Courts below to determine this point, we would have to remand the case to the Court below.

The same argument may be advanced with reference to the point as to Article 137. It is true that the Court of first instance did say that even from the point of view of Article 137 the suit was within time, but still the necessary allegations were not made in the written statement, and I do not think it proper to remand the case for the ascertainment of the facts upon which alone these questions of law can be determined. It has been held by the Court below that the purchase made by the appellant did not give them any title at all and that the respondents have a perfectly good title to the property, having purchased it in execution of a mortgage decree against the parties who are entitled to the property.

In my opinion, it is not open to the appellant to raise the question of limitation in this Court, and I would dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 399

DAS AND ADAMI, JJ.

Rakhyapal Singh—Appellant.

v.

Lal Bir Surjodiy Singh Deo—Respondent.

App. Nos. 46 and 47 of 1920 decided on 22nd November 1921 from the appellate decree of Sub. J., Sambalpur, dated 19th August 1920.

C. P. Land Revenue Act (XVIII of 1881), S. 4 (3)—Ss. 76, 132 (h) and 153—Cess determined by Settlement Officer—Sanction by Commissioner of the cess is sufficient—No sanction as to rates is necessary.

Section 76 authorizes the Settlement Officer to determine and record the village cesses, if any, which are leviable, according to village custom, and the persons by and from whom and the rates at which, they are leviable, and it directs that such cesses shall, if sanctioned by the Chief Commissioner, be leviable accordingly. Section 132 (h) gives similar powers to the Deputy Commissioner when the settlement is not in progress. When the cesses are thus sanctioned it is not necessary for the Chief Commissioner to sanction the rates [P. 400, C. 1.]

S. C. Chattarji—for Appellant.

B. Chowdhury—for Respondent.

Das, J.—The learned vakil for the appellant has put the point very concisely and very forcibly before us, but we are unable to say that the view taken by the lower appellate Court is erroneous. He concedes that the suit for the plaintiff was in respect of cesses. He concedes that the Settlement Officer,

to be more accurate, in this particular case, did determine the village cesses which were leviable in accordance with village custom and the rates at which they were leviable and he concedes that the suit is in accordance with the determination of the Deputy Commissioner.

He also concedes that the Board of Revenue has sanctioned the proposal of the Deputy Commissioner as to the levy of the cesses, but he urges before us that as the Board of Revenue did not sanction the rates at which such cesses were leviable, the plaintiff is not entitled to maintain the action.

Now in order to determine the point which has been argued before us, it is necessary to consider the provisions of certain sections of the Central Provinces Land-Revenue Act. Section 76 of the act authorizes the Settlement Officer to determine and record the village cesses, if any, which are leviable in accordance with village custom, and the persons by and from whom, and the rates at which, they are leviable; and it directs that such cesses shall, if sanctioned by the Chief Commissioner, be leviable accordingly.

Section 132 of the Act gives a similar power to the Deputy Commissioner if he has to determine the matter when the settlement is not in progress. Section 153 provides that—

"no suit shall lie in a Civil or Revenue Court for the recovery of any village cess which has not been sanctioned by the Chief Commissioner and also either recorded at a Settlement or under section 132, clause (*h*)."

The argument of the learned vakil is that the Chief Commissioner must not only sanction the village cess, but must further sanction the rates at which such cess is leviable. I am unable to agree with this contention. It seems to me clear on a reading of section 76 of the Central Provinces, Land-Revenue Act that all that the Board of Revenue has to do is to sanction the levy of the cess, not the rate at which such cess is leviable. In my opinion, the view taken by the learned Judge is right.

These appeals must be dismissed with costs.

Adami, J.—I agree.

Appeals dismissed.

A.I.R. 1922 Patna 400

COUTTS AND MACPHERSON, JJ.

Chaudhuri Shyam Narain Singh—Plaintiff-Appellant.

v

Shiwcharan Sahu—Defendant-Respondent.

App. from App. Decree No. 399 of 1919 decided on 3rd August 1921 from a decision of J. C., Chota Nagpur, dated 1st February 1919.

(a) *Chota Nagpur Tenancy Act (1908), S 240—Suit under for more than Rs 100—Appeal in respect of Rs. 41*—Forum *of appeal is not changed.*

When a rent suit is brought against several tenants or sets of tenants collectively under section 240 of the Chota Nagpur Tenancy Act, and the total amount sued for exceeds Rs. 100, the appeal lies to the Judicial Commissioner even though the appeal relates to a tenant or a set of tenants against whom the claim does not exceed Rs. 100.

[P. 401, C. 2, P. 402, C. 1.]

(b) *Jurisdiction—Venue of appeal is determined at date of suit and not altered by revival of suit later on, in respect of portion of subject-matter.*

The forum of appeal in a rent suit is determined at the date of the institution of the suit, by the amount sued for and cannot be altered by a revival of the suit at a later stage in respect of a portion only of the subject-matter

[P. 402, C. 1.]

(c) *Chota Nagpur Tenancy Act, Ss. 227, 228, 157—Order under S. 227 setting aside decree is final—Decree need not appear on face of it as* ex-parte, *to be within S. 157.*

An order under section 227 setting aside such a judgment is final under section 228 A decree need not appear on the face of it to have been passed *ex-parte* so as to be within S 157, it is sufficient if it is shown to have actually been passed *ex-parte.*

[P. 402, C. 1.]

Kulwant Sahay and *Sheonandan Roy*—for Appellant.

Sambhu Saran—for Respondent.

Macpherson, J.—The rent-suit out of which this appeal has arisen, was instituted so long ago as 1913. The landlord of Sildilia in Palamau brought a collective suit for rent against four sets of tenants. The present respondents, who constituted one set, were defendants Nos. 2 and 3 and both were sued as majors. On the 11th December 1913, defendant No. 2 appear-

ed and admitted the claim against them which was for a sum of Rs. 33-0-3 as arrears of rent for 1320 F in respect of an area of 5 *bighas*, 1 *katta*, *nagdi uttakar*, plus damages at 25 *per cent* or a total of Rs. 41 odd. On the 6th March, 1914, the suit was dismissed against one set of defendants and decreed under section 166 on admission against the other three sets including the defendants Nos. 2 and 3.

On the 31st March, 1914, the mother of defendant No. 3 applied on his behalf for revival of the suit on the grounds that the defendant No. 3 was a minor, though he had been sued as a major, that he had not appeared in the suit, still less admitted the claim, that in fact the holding was one of 5 *bighas*, 15 *kattas*, at a *nagdi jama* of Rs. 6, including cesses, and that defendant No. 2 had no concern with the holding and no rent was due.

On June 24th, 1914, the *ex-parte* decree was set aside under section 227 of the Chota Nagpur Tenancy Act, 1908, and the suit was tried and eventually decreed for Re. 0-10-6, being the difference between Rs. 6, the rent alleged by the contesting defendant, and Rs. 5-5-6 shown in the plaintiff's papers as realised in the year in suit.

The decree of the Deputy Collector was upheld by the Deputy Commissioner on appeal but set aside on revision by the Commissioner, who held that as the aggregate value of the suit as instituted was Rs. 240, the appeal lay under section 218 read with section 224 of that Act to the Judicial Commissioner, although, as has been said, the claim against the set of defendants consisting of defendants 2 and 3 was only Rs. 41.

The memorandum of appeal was thereupon presented to the Judicial Commissioner who dismissed the appeal on the ground of limitation. The High Court set aside this order, and eventually, on the 1st February, 1919, the Judicial Commissioner, agreeing with the findings of the Deputy Collector, dismissed the appeal on the merits.

On second appeal the case was heard by a single Judge of this Court who referred it to a Division Bench on account of the importance of the questions involved.

The first of these questions is, the preliminary objection taken on behalf of the respondent that no appeal lay to the Judicial Commissioner. It is contended in the first place that as the value of the claim against defendants 2 and 3 is only Rs. 41, the appeal under the provisions of section 218 lies to the Deputy Commissioner, and, secondly, that even if the "amount sued for" in the original suit be admitted to be Rs. 240 for the purposes of determining the *forum* of appeal, the "amount sued for" in the suit after the revival in respect of the defendants 2 and 3 only should be considered to be Rs. 41. In my opinion neither contention is well-founded and the objection must be repelled.

The position under Bengal Act I of 1879 was that it was incumbent on the landlord to institute a separate suit in respect of each tenant, and the *forum* of appeal in the case of a suit tried by a Deputy Collector was the Deputy Commissioner or the Judicial Commissioner according as "the amount sued for" did not or did exceed Rs. 100. The only substantial change in this respect made by the Chota Nagpur Tenancy Act, 1908, was the introduction in section 240 of a provision permitting a suit to

"be instituted before.....the Deputy Commissioner collectively by or against any number of tenants holding land in the same village."

Here the important consideration, so far as the *forum* of appeal is concerned, is that a single suit is provided for. It is patent that in such a suit "the amount sued for" is the aggregate of the claims against the individual tenants sued collectively, and whether the contingency was or was not contemplated by the Legislature, the only feasible interpretation of the enactment as it stands, is, as the Commissioner of Chota Nagpur held, that in a rent suit against tenants collectively (as in a suit against an individual tenant) section 224 applies if the amount sued for, exceeds Rs. 100, and the appeal lies to the Judicial Commissioner irrespective of whether the "amount sued for" in respect of the particular tenant who is appellant or respondent exceeded or did not exceed Rs. 100.

Accordingly, though the appeal by the landlord in this instance related to a tenant from whom he only claimed Rs. 41, it lay to the

Judicial Commissioner, as the amount sued for in the suit exceeded Rs. 100. The first contention therefore fails, and as the *forum* of appeal in the rent suit is determined once for all at the date of institution by the amount sued for, it follows that it cannot be disturbed by a revival of the suit at a later stage in respect of a portion only of the subject matter, since the suit as revived is still the same suit, and the second contention also cannot be sustained.

On behalf of the appellant exception is not taken to the judgment of the Judicial Commissioner, but it is sought to assail the order of the Deputy Collector under section 227 reviving the suit at the instance of defendant No. 3. Now section 228 provides that an order under section 227 setting aside a judgment shall be final.

The learned vakil accordingly is driven to contend that that order was made without jurisdiction inasmuch as the consent-judgment passed against defendant No. 3 had not been

" passed against him for default of non-appearance under Section 157."

There is, however, no force in the contention. Even if it was in law a nullity, the judgment came also within the terms of section 227. Though ostensibly by consent or *inter partes*, it had in fact been passed against him *ex-parte* under section 157 he had not appeared at all in the suit either personally or through defendant No. 2 as agent, even as major, still less as minor, and he had not consented to the decree. To come within section 157 it is not necessary, that a decree should appear on the face of it to have been passed *ex-parte*; it is sufficient if it is shown to have actually been passed *ex-parte*, as in the present instance.

This contention fails, and as no other point is pressed, I would dismiss this appeal with costs to defendant No 3 throughout the litigation.

Coutts, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 402

DAS AND ADAMI, JJ.

Sarada Prasad Tej—Appellant.

v

Triguna Charan Roy—Respondent.

F. A. No. 5 of 1921 decided on 16th January 1922 from an order of Dist. J., Cuttack, dated 24th January 1921.

Succession Act, S 50—Will—Attestation—Execution witnessed by one witness—Sub-Registrar endorsing admission of signature by testatrix—Attestation is proper.

A Will purported to be signed by the testatrix who made her mark, "by the pen of the scribe....." It was proved that the one of two alleged attesting witnesses had been present when the mark of the testatrix had been affixed by the scribe. The will bore an endorsement by the Sub-Registrar that the testatrix had admitted execution of the will to him. The endorsement was also signed by the testatrix, marking her mark "by the pen of the scribe : held, that the signature of Sub-Registrar must be taken as an attestation and when so taken, the will must be held to be properly attested. [P. 404, C. 1.]

D. Prasana Das Gupta—for Appellant.

B. Sinha, S. C. Mukerjee, S. C. Chatterjee, M. Subba Rao and *Gopal Chandra Roy*—for Respondent.

Adami, J.—This is an appeal against the order of the District Judge, Cuttack, dismissing an application for grant of letters of administration with copy of the Will annexed.

Bhobunmani Dasi died in 1910. She is alleged to have executed a Will in 1901 whereby she bequeathed a moiety of her four annas share in a *zamindari* to her daughter, Annapurna, the mother of the appellants, and the other moiety to her adopted son, Triguna.

In 1912, after Annapurna's death, an application for letters of administration made by her husband on behalf of her sons resulted in a compromise according to which the District Judge allowed him to take out letters of administration in respect of a quarter of the four annas share in the *zamindari*.

This court, however, set aside the order and revoked the grant on the ground that letters of administration could not be granted with respect to a portion only of the estate. The appellants then applied for letters of administration in respect of the whole estate. A certified copy of the Will was attached to the application, it being alleged that Triguna, the caveator, refused to give the original Will to the petitioners, appellants.

The alleged Will is dated the 8th February, 1919, and is signed by the testatrix who made her mark, by the

pen of the scribe, Ramnarayan Roy. It bears the signatures of Rakhal Prasad Roy and Girdhari Prasad Roy as attesting witnesses, and has a registration endorsement to the following effect: —

"Having visited the residence of the above Bhubonmoni Dasi at Sahebzada Bazar, I have this day examined the said Bhubonmoni Dasi who has been identified to my satisfaction by Ram Narayan Roy, son of Lakshi Narayan Roy of the same bazar, caste and profession, and the said Bhubonmoni Dasi admitted the execution of the document.

Bhubonmoni Dasi, M. A., Samad, (by mark) by the pen S. S. Registrar, of Ramnarayan Roy, Cuttack, "9-2-01."

The only witness examined by the petitioners, appellants, for the purpose of proving the Will was Girdhari Prasad Roy, the attesting witness, who proved the execution of the Will by Bhubonmoni. He stated, that the Will was read over by him to Bhubonmoni and that she approved of it and in his presence affixed her mark by the hand of the scribe, Ramnarayan Roy, who also signed the Will. He asserted emphatically that no other attesting witness except Ramnarayan was present when he signed. It is quite clear, on the face of the document that Ramnarayan signed as scribe and not as an attesting witness. He is dead.

The petitioners also called Rakhal Prasad Roy to prove attestation, but though he was present in court, refused to examine him on the ground that he was hostile.

The learned District Judge found that from Girdhari's evidence it was clear that Rakhal Prasad was not a due attesting witness because he was not persent when Bhubonmoni signed the Will or when Girdhari signed, and, as there was no suggestion that Rakhal Prasad became an attesting witness in any other of the methods prescribed by section 50 of the Succession Act, therefore, it must be held that there was only one attesting witness and the Will was not duly executed. He dismissed the application on this ground.

The point taken by the appellants in this court does not seem to have been raised in the Lower Court; it is this, that the Special Sub-Registrar's signed endorsement showing that Bhubonmoni admitted execution of the Will before him next day is an attestation which sufficiently complies with the requirements of section 50 of the Succession Act, so that it should be held that both Girdhari and the Sub-Registrar attested the Will.

In the case, *In the goods of Romoney Dassee* (1), the Will bore the following signature and attestation—

"Sree Roymonee Dassee by the pen of Sree Jadub Chander Sen."

"Presented for registration between the hours of 6 and 7 a. m. on 31st October, 1874, at her residence 18, Durponarain Thakoors Street, by Roymoney Dassee by whom execution was also admitted."

Sree Roymoney Dassee.

By the pen of Sree Jadub Chunder Sen.
"Identified" by her nephew, Jogendranath Sen, clerk to Messrs. Gray and Sen Solicitors.

Jogendranath Sen.
Seal of Registrar. C. M. Chatterjee, Registrar

It will be noted that no one signed expressly as an attesting witness, but it was held, that, in the circumstances of the case, it would be sufficient of the Registrar had signed in the presence of the testator, and that, even if he did not sign in her presence, the signatures of the two persons, one of whom wrote the testatrix's name at her directlon and, when she had affixed her marks, wrote "by the pen of Jadub Chunder Sen" and the other of whom saw the testatrix put her mark and identified her, writing his name as having done so, would be a sufficient attestation by two witnesses to satisfy the Act.

The present case differs from the above, only in this, that there was an attesting witness, Girdhari Prasad Roy who has given evidence of the attestation and that Ramnarain Roy who identified Bhubonmoni Dasi before the Registrar signs, merely as being the person by whose pen the name of Bhubonmoni Dasi was written under the endorsement admitting execution, and not as identifying the lady.

In *Hurro Sundari Debea* v. *Chunder Kant Bhattacharjee* (2), it was held that,

(1) (1876) 1 Cal. 150.
(2) (1881) 6 Cal. 17 = 6 C.L. R. 303,

if a testatrix admits a signature on a Will to be hers before a Registrar of Assurances and is identified before him by one of the witnesses to the signature and both the Registrar and the identifier sign their names as witnesses to the admission made, such attestation would be sufficient to satisfy section 50 of Act X of 1865. Again the question arises, whether the signature of Ramnarayan Roy under the Registrar's endorsement can be taken to be an attestation of Bhubonmoni's admission of execution.

The above case was followd in *Nitya Gopal Sircar* v. *Nagendra Nath Mitter Mazumdar* (3) and there too the requirement was that the identifier and Registrar should sign as witnesses to the admission of the testator. In the last case the Registrar was called as a witness and gave evidence that the testatrix signed the admission in his presence.

In *Tofaludda Peada* v. *Mahar Ali Shaha* (4) Banerjee, J. remarked, "It is quite true, that the signature of the Registrar at the foot of the registration endorsement embodying the admission of the executant has been held to be sufficient attestation within the meaning of section 50 of the Indian Succession Act . . . . . the Registrar's signature would come under the last description of attestation referred to, in the third clause of section 50 of the Indian Succession Act."

In the case of *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee* (5) the decisions above cited were again followed, and there again the admission of execution was attested not only by the signature of the Registrar but also of another witness.

In the present case, though the admission before the Sub-Registrar is attested by the Sub-Registrar alone, and not by a second witness as in the cases mentioned above, we have the evidence of Girdhari Prasad Roy who saw the testatrix make her mark when she executed the Will and himself signed as an attesting witness. Therefore, taking the signature of the Sub-Registrar as an attestation, together with the attestation of Girdhari Prasad Roy, the requirements of section 50 have been fulfilled.

(3) (1885) 11 Cal. 429.
(4) (1898) 26 Cal. 78.
(5) (1900) 27 Cal. 169.

It has not been argued before us that the Will was a forgery, and in fact the respondent's case is not that the Will was not executed but that some years after execution the original Will was torn up by the executrix. The respondent did not produce any evidence to prove this.

In my opinion, the Will has been attested according to the requirements of law and therefore, the appeal must be allowed. The decree of the Lower Court will be set aside, and letters of administration with a copy of the Will annexed will be granted to the petitioners, appellants, in respect of the entire estate of the testatrix.

Das, J.—I agree.

Appeal allowed.

A. I. R. 1922 Patna 404

DAS AND BUCKNILL, JJ.

Surendra Narain Singh— Appellant.

v.

Shambihari Singh—Respondent.

F. A. No. 34 of 1921 decided on 27th May 1921.

Court Fees Act (1870), *S.* 7 *(IV) (c)—Sale in execution of decree against one member of joint family—Suit by others for declaration of invalidity—S.* 7, *cl (IV) (c) applies.*

Where the members of a joint Hindu family sue for a declaration that a sale of joint family property held in execution of a decree obtained on a handnote against some members of the family, is null and void to the extent of the plaintiffs' shares in the property, the suit is a suit for a declaration with consequential relief.

[P. 405, C, 2; P. 406 C. 1,]

Zinnatunnessa Khatun v. *Girindra Nath Mukerjee*, 30 Cal. 788 referred to.

S. Roy and *A. C. Das*—for Appellant.

Taxing Officer.—Plaintiffs 1 to 4 are sons of defendant No. 2 who is a brother of defendant No. 1, Plaintiffs 5 to 7 are their female relations. Defendants 1 and 2 were sued in respect of a handnote executed by them in favour of the principal defendants, who obtained an *ex-parte* decree in execution of which they attached and sold the joint family property.

In this suit the plaintiffs challenge the validity of the handnote, the decree, the attachment and the sale, both as a whole and so far as the attachment and sale affect the shares of all the members of the joint family except

defendants 1 and 2. The formal reliefs claimed are :—

"(1) That it may be declared that the property in suit is the joint-family property of the plaintiffs and *pro forma* defendants and that it is not the exclusive property of the *pro forma* defendants and that the plaintiffs' shares in the said property are 13 annas 1-pie 8-15-*karant*, and that these shares are not liable, for the payment of the said decree, and the said attachment, and the sale are null and void to the extent of the shares of the plaintiffs, and the principal defendants have acquired no title by the said auction purchase in the entire property in suit and that they have purchased only the right, title and interest of the *pro forma* defendants 1 and 2, 2-annas 10 pies 7-15 *karant* shares of the property.

"(2) That any further reliefs to which the plaintiff may be entitled may be granted to them."

The plaintiffs valued the reliefs sought at Rs. 29,000 but paid a court-fee of Rs. 10 as on a suit for a declaration. They secured from the lower court an order staying delivery of possession of the property to the defendants-purchasers pending the disposal of the suit.

The court held that the plaint was sufficiently stamped as a suit for a mere declaration and relied upon *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (1) but on the merits dismissed the suit. The plaintiffs appeal.

On behalf of the revenue it is contended that the suit as framed is one for a declaratory decree and consequential relief and falls under section 7 (IV) (c) of the Court-Fees Act, so that an *ad valorem* fee is payable.

On behalf of the appellants it is urged that the prayer is merely one for a declaration and it is admitted that in an attempt to save court-fee the plaint was framed on the lines of the case reported in *Zinnatunnessa Khanam* v. *Girindra Nath Mukerjee* (2). The question, therefore is, whether in the words of Jenkins, C. J., in *Deokali Kuer* v. *Kadir Nath* (3), the attempted evasion of the statutory provision as to court-fee is successful.

The proposition, that the mere fact that the prayer is cast in the form for a declaration does not necessarily mean that it is not in fact a prayer for consequential relief and that *ad valorem* court-fee has not to be paid, is well established [Order of the Taxing Judge, dated the 14th January, 1920, in *Kant Kamal Mukhi Kuar* v. *Udit Narain Singh* (4).]

In the present case it is to be observed that by an order staying delivery of possession the plaintiffs practically obtained a relief in the suit. But apart from that, they came into court to meet the challenge thrown upon their title. *Inter alia* they pray that it be declared that their shares are not liable for the payment of the said decree and the said attachment and sale are null and void to the extent of their shares. It is clear that if they had not made this prayer, their suit could not have been entertained by reason of the proviso to section 42 of the Specific Relief Act.

Thus, the suit is not one for a mere declaration, but the relief No. 1 implies consequential relief without which claim, the prayer for declaration would have been unentertainable under the provisions of section 42.

The only difference between *Lachmi Narain* v. *Gauri Shanker* (5) and the present case is that the prayer for injunction was, in the Allahabad case, made in the plaint, whereas in the present instance the prayer in the plaint is that the plaintiffs' "shares are not liable for the payment of the said decree, and the said attachment and sale are null and void to the extent of the shares of the plaintiffs", the stay of sale being obtained by an order in the suit. This difference is immaterial.

In *Deokali Koer* v. *Kedarnath* (3) the prayer for a temporary injunction granted in the suit was held by Jenkins, C. J., to be a consequential relief. The case is similar to *Bankey Behari* v. *Ram Bahadur* (6) in which the plaint framed on the same lines as the plaint under consideration, was held by the court to constitute a suit for a declaratory decree with a consequential relief.

(1) (1907) 30 Mad. 18.
(2) (1903) 30 Cal. 788.
(3) (1912) 39 Cal. 704.
(4) F. A. No. 102 of 1920.
(5) (1886) 6 A. W. N. 54.
(6) (1919) 4 Pat. L. J. 191.

As regards the ruling in *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (1) it is sufficient to state that it is contrary to the view taken by the Taxing Judge in *Mussammat Noowooagar Ojain* v *Shidhar Jha* (7). Chief reliance is placed upon *Zinnatunnessa Khatun* v. *Girindra Nath Mukherjee* (2) and it is urged that it is not correct to say that this case has been superseded by *Deokali Koer* v. *Kedaranath* (3).

But the latter ruling has been followed in many cases in this court while the case upon which *Zinnatunnessa Khatun* v. *Girendra Nath Mukherjee* (2) is based, namely, *Shrimant Sagajirao Khanaderao Naik Nimbalkar* v. *S. Smith* (8) has itself not been followed by the Taxing Judge of this court. It also seems to ignore the provisions of section 42 of the Specific Relief Act.

It appears to me that the plaintiffs cannot evade the payment of *ad valorem* court-fee by reason of the form into which they have thrown their plaint That is to say, their device is unsuccesful. Accordingly I hold that the appellants must pay the deficit court-fee of Rs. 945, that is, the difference between the *ad valorem* fee of Rs. 955 on jurisdiction valuation of Rs. 29,000 and the fee of Rs. 10 paid on the memorandum of appeal. The payment should be made by the 8th of January. The question of payment of the deficit on the plaint will be considered after the realization of the deficit court-fee on the memorandum of appeal.

Das and Bucknill, JJ.—The view taken by the learned Registrar is entirely correct. The Appellant must make good the deficiency within a month from to-day. If the deficiency is not made good within a month from to-day, let the matter be put up to the Bench for disposal.

Court Fee ordered to be paid.

(7) (1918) 3 P.L.J. 194.
(8) (1896) 20 Bom, 736.

A. I. R. 1922 Patna 406.

ADAMI AND DAS, JJ.

Kanhai Raut.—Appellant

v.

Jogendra Rout—Respondent.

App. No. 8 of 1920, decided on 23rd Nov. 1921 from Ori. Decree of the District Judge Cuttack, dated 24th April 1920.

Probate and Administration Act (V of 1881 S. 50, Expl. (1)—Letters of Administration—Person entitled to special citation not cited but otherwise aware of the proceedings is bound by the proceedings.

A person is bound by the proceedings for obtainning Letters of Administration to which he is no party but of which he has received knowledge and whereto he has had a capacity to make himself a party, 21 Cal. L. J. 557 Followed. 2 Phillim 224 ; Referred to.

[P. 407, C. 1]

S. C. Chatterji.—for Appellant.

Bichitrananda Das.—for Respondent.

Adami, J.—This is an appeal against the order of the District Judge dismissing an application for revocation of Letters of Administration granted to one Jogendra Rout on the 7th April, 1919. The widow of the deceased testator had applied for revocation on the 26th April, 1919, but her application was dismissed and now the present appellants have come forward alleging that they had no knowledge of Jagendra's application of the 7th April 1919, and that, therefore, the grant should have been revoked.

The learned District Judge has found that both the appellants had as a fact notice of the application by Jogendra, they being summoned by Rajan Dei the caveatrix in the first application of Jogendra and again on the 21st October, 1918.

The point taken by the learned vakil for the appellants is that Jogendra in his application stated in paragraph 2, that the testator had left behind him only his married widow, Rajan Dei, and his sister, Banki Dei, and that the deceased had no relations except them. One appellant is uncle of the testator and the other is a cousin and it is urged that as reversioners they were entitled to have a special citation issued upon them at the time when Jogendra made his application.

The learned vakil has relied on the case of *Shyama Charan Baisya* v. *Prafulla Sundari Gupta* (1) to the effect that where an incorrect statement as to the relations of the deceased is made, and, misled thereby, the Court does not direct the issue of special citation on a person who is entitled to

(1) (1915) 21 C. L. J. 557=30 I.C. 161=19 C.W.N. 882.

intervene, the proceeding to obtain the grant is defective in substance. But the same case lays down that a person is bound by proceeding to which he is no party but of which he has received knowledge and whereto he has had a capacity to make himself a party.

The learned Judge in that case cited the judgment of Sir John Nicholl in *Newell* v. *Weeks* (2) to the effect that "the process of citing parties is a convenient one for all suitors, because when that is done you need not prove actual privity—the law presumes privity after the legal process—the *lis pendens* is sufficient notice that persons should appear and protect their own interests but if you can prove actual privity, the legal process, in point of solid justice and sound reason, is superfluous; though *abundanti cautela*, it may still be convenient to resort to it and have it upon record."

In the present case the District Judge has found as a fact that at the time of the application of Jogendra for probate, Rajan Dei the widow issued summonses on the two appellants and those summonses were duly served upon them. They thus had full notice that an application was being made and they had an opportunity of intervening. The notice was served upon them a full month before a compromise was arrived at between Jogendra and the widow, but they took no steps.

Under the circumstances it was unnecessary that special citations should have been served upon them and the failure to serve those citations cannot give a good ground for revocation of the grant of probate.

Under the circumstances, I do not consider that the appellants are entitled to the relief and I would dismiss this appeal.

Das, J.—I agree.

Appeals dismissed.

(2) (1814) 2 Phillim. 224.

A. I. R. 1922 Patna 407

DAS AND ADAMI, JJ.

Sovani Jena—Appellant.

v.

Bhima Ray—Respondent.

S. A. No. 22 of 1921, decided on 1st December 1921 from Dist. J., Cuttack, dated 4th May 1921.

Civil P. C., S. 47—Decree for possession—Possession not got by decree-holder—Suit for declaration of title against defendants is barred.

After a decree for possession in a suit against defendant No. 1 the plaintiff instituted another suit for a declaration of his title to the land. Plaintiff alleged that after he had obtained possession of the land in execution of his final decree he had been dispossessed by the defendants The lower courts found that he had not obtained actual possession under the first decree,

Held: The second suit was barred by section 47.

[P. 407, C. 2.]

S. C. Chatterjee—for Appellant.

D. P. Das Gupta—for Respondent.

Das, J.—We must affirm the decree passed by the court below. The plaintiff obtained a decree against the defendant 1. His allegation is that in execution of that decree he recovered possession of the property but that he was subsequently dispossessed by defendants 1 and 2. On that allegation he instituted a suit for declaration of title and for recovery of possession. His allegation that he recovered possession but was subsequently dispossessed is disbelieved

The learned Judge in the court below has come to the conclusion that so far as the defendant No. 1 is concerned the plaintiff's suit is barred by the provisions of section 47 of the Code and so far as the defendant No. 2 is concerned he must fail because he has not proved his title against him. Now the learned Vakil who appears on behalf of the appellant urges before us that section 47 is not applicable to his suit.

I am of opinion that it is. His remedy was to proceed under the Code and if he was obstructed at all either by defendant No. 1 or defendant No. 2 he should have applied under Order XXI, rule 97, of the Code for investigation of the matter. The court would then have fixed a day for investigating the matter and would have summoned the party against whom the application was made for him to appear and answer the same.

Then the court would have passed an order either under rule 99 or rule 100 of Order XXI and that would have given a right to the plaintiff to sue the party successfully obstructing him. So far as the defendant No. 2 is concerned the learned Judge in the Court below has recorded a finding that the plaintiff has

not established his title as against him.

This appeal must be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 408 (1).

DAS AND ADAMI, JJ.

Biswanath Patra—Petitioner

v.

Lingarai Patra—Opposite Party.

Civil Rev. No. 8 of 1921 decided on 1st December 1921 from Munsif, Puri dated 19th February, 1921.

Civil P. C. Order XXI, rules 58, 63 and 100—Usufructuary mortgagee claim disallowed—R. 63 does not bar him from applying under R. 100 when dispossessed.

A usufructuary mortgagee is not entitled to object, under Order XXI, rules 58, C. P. C., to the attachment of the property by a person who holds a decree against the mortgagor. If such an objection is made and disallowed, rule 63 does not debar him from making an application under rule 100 when he is dispossessed by the purchaser in execution of the money decree. [P. 408, C. 2.]

B. Chawdhury—for Petitioner.

S. C. Chatterjee—for Opposite party.

Das, J.—This application must succeed. The opposite-party No. 3 executed usufructuary mortgage so far back as the 17th August, 1916, in favour of the petitioner. On the 19th February, 1917, the opposite-party No. 3 borrowed another sum and executed another bond for the consolidated sum of Rs. 1,000. The opposite-party 1 and 2 obtained a money decree against opposite-party No. 3 and in execution of that money decree attached the properties which were in the possession of the petitioner.

On the 5th July, 1919, the petitioner made an application under Order XXI, rule 58. The court rejected that application on two grounds: *first*, on the ground that there was no necessity for him to apply under Order XXI, rule 58, and, *secondly*, on the ground that his application was too late.

It appears that the properties have now been purchased by the decree-holder and he has now obtained possession of the properties through court. The application out of which the present proceedings have arisen was an application by the petitioner under Order XXI, rule 100, of the Code. The learned Munsif has taken the view that Order XXI, rule 63, is a complete answer to the case of the petitioner. I am wholly unable to accept this view. Order XXI, rule 63, provides that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to property "in dispute, but subject to the result of such suit, the order shall be conclusive".

Now the question arises whether it was at all necessary for the petitioner to apply under Order XXI, rule 58. The learned Munsif says that the applicant "could come" under Order XXI, rule 58, and as he "did come" he cannot now apply under Order XXI, rule 100. Now this view is quite erroneous. He could only apply under Order XXI, rule 58, on the ground that the property was not liable to attachment.

But then his position as a mortgagee did not entitle him to come to court and argue that the property was not liable to attachment. The order passed by the court in no way touched the interest of the mortgagee. He is now prejudiced because he has been dispossessed by the order of the Civil Court and in my opinion it was obligatory on the learned Munsif to dispose of the application in accordance with law. I hold that Order XXI, rule 63, does not bar the application of the petitioner.

I must allow the application, set aside the order of the learned Munsif and remand the case to him for disposal according to law.

Adami, J.—I agree.

Application allowed.

A. I. R. 1922 Patna 408 (2).

DAS AND ADAMI, JJ.

Mirza Muhammad Ismail Beg and others—Appellants.

v.

Sricharan Das and others—Respondents.

Appeal No. 45 of 1920 decided on 25th Nov., 1921, from Dist. J, Cuttack, dated 14th Sept., 1920.

Registration Act, Ss. 77 (2) and (3), 75 Decree for registration—Document must be presented within 30 days of date of decree.

A document must be presented for registration within 30 days from the date of a decree, where, in a suit under section 77 the Court has passed the decree directing registration of a document. 33 Cal. 1020, referred to. [P. 409, C. 1.]

S. M. Mullick and *D. P. Das Gupta*—for Appellants.

A. S. Ashgar and *Bichitranand Das*—for Respondents.

Das, J.—I am unable to agree with the view taken by the learned Judge in the court below. The defendants instituted a suit under the provisions of section 77 of the Registration Act for a decree directing the registration of a document. The Civil Court passed a decree in favour of the respondents but did not specify the time within which the document was to be presented for registration. In point of fact the document was presented five months after the decree was pronounced by the Civil Court.

The question arises, had the registering officer any jurisdiction to register the document Mr. *Asghar*, on behalf of the respondents, relies upon a decision of the Calcutta High Court in the case of *Gopinath Adhikary* v. *Gadadhar Das* (1). Mr. *Sushhil Madhab Mullick*, on the other hand, relies upon a decision of the Allahabad High Court in the case of *Udit Upadhia* v. *Imam Bandi Bibi* (2). As a matter of fact the point did not arise in either of these cases.

In the Calcutta case the document was as a matter of fact presented for registration within thirty days from the order of the Civil Court and in the Allahabad case the point arose only very remotely. But Sir Francis Maclean, delivering the judgment of the Calcutta High Court in the case already cited, did express an opinion that there was no positive enactment in the section, that is to say in section 77, that the document must be presented for registration within thirty days after the passing of the decree.

With all respect I am unable to agree with the construction placed upon this section by the late Chief Justice of the Calcutta High Court. It is quite true that so far as the first paragraph of section 77 is concerned, it relates to the suit and not to the decree which is to be passed by the Civil Court; but then paragraph (2) provides as follows:—

"The provisions contained in sub-sections (2) and (3) of section 75 shall *mutatis mutandis*, apply to all documents presented for registration in accordance with any such decree, and notwithstanding anything contained in this Act the document shall be receivable in evidence in such suit."

This takes us back to the provisions of sub-sections (2) and (3) of section 75. Now those sub-sections are as follows:—

"*Sub-section* (2). If the document is duly presented for registration within thirty days after the making of such order, the registering officer shall obey the same and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60.

Sub-section (3). Such registration shall take effect as if the document had been registered when it was first duly presented for registration."

Reading sub-sections (2) and (3) of section 75 with section 77, it appears to me that the registering officer has jurisdiction to register a document if it be duly presented for registration within thirty days of the decree passed by the Civil Court.

It is in my opinion impossible to escape from the very clear words that have been used by the Legislature in this connection. Obviously the Legislature thought that it was necessary to impose some limitation of time for the presentation of a document for registration, and it did think that thirty days ought to be the limit of time.

I must allow this appeal and set aside the judgments and decrees passed by the courts below. The plaintiffs are entitled to a decree in terms of prayer (1) in the plaint; they are also entitled to their costs throughout.

Adami, J—I agree.

Appeal allowed.

(1) (1906) 33 Cal. 1020.

(2) (1902) 24 All. 402=1902 A-W.N. 99.

A.I.R. 1922 Patna 409.

DAS AND ADAMI, JJ.

Chintamoni Mahapatra—Appellant.

v.

Manmohini Debi—Respondent.

Appeal No. 18 of 1920 decided on 26th November 1921 from Dist. J., Cuttack, dated 14th August 1920.

(a) *Civil P.C., Order XXI, rules* 11 (2) (g) *and* 17, *S.* 151—*Interest wrongly mentioned in execution application—Court is not bound to verify correctness but to see if form is correct.*

Order XXI, rule 17, merely requires the court, to which an application for execution is made, to ascertain that the application complies in form with the provisions of rules 11 to 14. It does not impose upon the Court the duty to see that the amount,

entered in the application as due by way of interest under rule 11 (2) (g), is correct
[P. 411, C. 1]

(b) *Civil P., C. S. 151—Execution, application for—Overstating the amount—Court can order amendment.*

Where in his application for execution, a decree-holder has overstated the amount due on account of interest, the court is competent under S. 151 to direct that the application be so amended as to show the correct amount due.
[P. 411, C. 1.]

M. Subba Rao—for Appellant.

G. C. Ray—for Respondent.

Das, J—The view taken by the learned Judge in the court below is entirely correct. The decree holder obtained a decree so far back as the 20th November, 1907. It is unnecessary to go through the different stages of execution proceedings: it is sufficient to say that the execution case with which we are concerned was instituted on the 18th November, 1919. By that application the decree-holder claimed Rs. 1,510-12-1½ for and by way of interest. It appears however that she was only entitled to Rs. 1,406-1-6.

Subsequently, on the 27th April, 1920, the judgment-debtor brought this matter to the notice of the court; the decree-holder asked for an amendment and the court directed the application to be amended. It was accordingly amended and the courts below have allowed execution.

It is contended by the learned Vakil on behalf of the appellant that the course which was adopted by the courts below was entirely illegal. It is urged before us that Order XXI, rule. 11, sub-rule (2), clause (*g*), provides that

"Every application for the execution of a decree shall state the amount with interest, if any, due upon the decree."

It is then pointed out that under Order XXI, rule 17, it is the duty of the court to ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with, and if they have not been complied with, the court has the power to reject the application or allow the defect to be remedied then and there or within a time to be fixed by it. The learned Vakil argues that there was a defect in the execution petition as presented by the decree-holder in so far as it did not state the interest due to the decree-holder correctly.

According to him, since the court under rule 17 of Order XXI, did not ascertain whether the requirements of rule 11, sub-rule (2), clause (*g*), had been complied with the petition for execution should have been dismissed by the court when the defect was brought to its notice.

I do not read Order XXI, rule 17, in the way in which the learned Vakil for the appellant reads that rule. That rule provides:—

"On receiving an application for the execution of a decree as provided by rule 11, sub rule (2), the court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with, and if they have not been complied with, the court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it.

I have no doubt whatever that this rule relates to the formalities that must be complied with by the decree-holder before his petition can at all be regarded by the Court. Now take for instance Order XXI, rule 11 (2). That rule provides that:—

"Every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case and shall contain in tabular form certain particulars."

Now rule 18 imposes upon the court the duty, when the execution petition is presented before it, to see whether the application is in fact in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and whether it contains in tabular form the particulars which are required to be stated in the petition by rule 11 (2)

If the petition is not in the form which is contemplated by Order XXI, rule 11, the court has, under rule 17, the power either to reject the application or to allow the defect to be removed there and then or within a time to be fixed by it.

Take again rule 12. That rule provides that:—

"Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not

in his possession the decree-holder shall annex to the application an inventory of the property to be attached containing reasonably accurate description of the same."

Rule 17 imposes the duty upon the court to see whether the decree-holder has in fact annexed to the application when the application is for the attachment of any moveable property belonging to the judgment-debtor but not in his possession, an inventory of the property to be attached containing a reasonably accurate description of the same.

If the decree-holder has not complied with the formalities required from him under rule 12, the court, under rule 17, has the power either to reject the application or to allow the defect to be remedied there and then or within a time to be fixed by it. I do not understand that rule 17 at all imposes the duty upon the court to calculate the interest that may be due to the decree-holder from the judgment-debtor.

In my opinion the argument of the learned Vakil on the first point before us is entirely unsustainable. On the second point there is no question of amendment. The Court has inherent power to do justice between the parties under section 151 of the Code and that power the court has exercised in this case.

The appeal fails and must be dismissed with costs.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 411

DAS AND ADAMI, JJ.

Gulam Nabi—Plaintiff-Appellant

v.

Basudeo Das—Defendant-Respondent.

Appeal No. 14 of 1919 decided on 2nd December 1921 from Sub. J., Cuttack, dated 20th August 1919.

(a) *Bengal Revenue Free (Badshahi Grants) Regulation (37 of 1793), S 15—Section includes grant to grantee and his heirs*

Words "otherwise expressed in the grant" in S. 15 include a grant to the grantee and his heirs [P 413, C. 2.]

(b) *Ben. Reg XII of 1805 (Cuttack Land Revenue Reg), S. 34*—Sanad *to grantee and his heirs—Grantee takes absolute estate with full rights of alienation.*

The words 'for ever' in S. 34 merely express the intention of the paramount power not to *resume* the grant and does not restrict the grantee's power of alienation.

Where by terms of the *sanad* a grant was made to the grantee and his heirs of certain properties in the District of Cuttack.

Held: The grantee took an absolute and hereditary interest in the property under the *sanad* and therefore he or his successors-in-title could as of right alienate the properties. S 34 of Beng Reg. 1805 merely confirmed the grant but the grantee derived his title from the *sanad*. [P. 412, C, 2, P.413, C. 1, 2, P.414, C. 1.]

B. N. Dutt, G. C. Roy and *S. C. Chatterjee*—for Appellant.

J N. Bose, B. N. Sinha, S N. Mullick and *P. C. Palit*—for Respondent.

Das, J.—This appeal arises out of a suit for declaration of title to certain *jagir mahals* which formed the subject-matter of a grant by the British Government to one Fateh Muhammad on the 23rd December, 1803. The main question raised in this appeal is whether, by the terms of the grant, the properties became inalienable in the hands of Fateh Muhammad and his successors-in-interest.

The plaintiff claims that the properties which were the subject-matter of the grant are inalienable and asks for a declaration that certain *kabalas* executed by his predecessors-in-title are wholly inoperative so as to affect his interest.

There are two sets of defendants, the Chowdhury defendants and the Muhammadan defendants, the latter being members of the family of Fateh Muhammad. The suit is contested by the Chowdhury defendants who base their title on the *kabalas* executed in their favour by the predecessors-in-title of the plaintiff. Of the Muhammadan defendants, the majority did not appear; but three of them, defendants 20-22, in the first instance filed a written statement contesting the plaintiff's claim, but subsequently they withdrew from that position and admitted the plaintiff's title. A question arises whether the plaintiff was not in any event entitled to a decree in regard to the interest that is in defendants 20-22.

It is unnecessary to trace the devolution of the property in all its stages; but it is common ground that Mohiuddin Bibi became ultimately entitled to 2-as 19-*gandas* 2 *karas* share in the *jagir mahals*. Mohiuddin Bibi was the widow of Muhammad Ismail who was one of the sons of the

original-grantee.

It is also common ground that upon the death of Mohiuddin her share devolved, under the Muhammadan law, on her mother Mukdum Bibi and her brother Kadir and that upon Mukdum's death. Kadir, became solely entitled to her share. The plaintiff is the son of Kadir; and it is not disputed that he would be entitled to succeed in the action, provided he makes good his point that the properties are inalienable and provided he can get over certain other defects which have been raised in the written statement.

The *khabalas* on which the defendants rely are four in number; *first*, the *kabala* of the 1st January, 1857, by which Mohiuddin Bibi conveyed to her son-in-law, Rosan, 2-as. in the *Jagir mahals* except Parikud; *secondly*, the *kabala* of the 7th May 1857, by which Mukdum Bibi and Kadir conveyed 10-gandas 1-kara and 2-krants in all the *mahals* except Parikud to Sultan Mahammad, the son of Rosan Mohammad; *thirdly*, the *kabala* of the 24th May, 1858, by which Mukdum Bibi and Kadir conveyed 8-as. 3-krants in all the *mahals* except Gopinathpur to the predecessors-in-title of the Chowdhury defendants, and, *lastly*, the *kabala* of the 7th September, 1859, by which Rosan Muhammad conveyed 1-as. 5-gandas in all the *mahals* except Parikud and Gopinathpur to the Chowdhury defendants.

Various subsidiary questions have been raised by the defendants in their written statements, the most important of these being, whether the plaintiff ever obtained possession, as he asserts, of the *jagir mahals*. If he did not, then his suit must fail on two other grounds; *first*, on the ground of limitation; and *secondly*, on the ground that he has not in this suit asked for consequential relief though on his own allegations he is entitled to a decree for possession, (*See* section 42 of the Specific Relief Act).

I have, however, not thought it necessary to go into these questions, because, in my opinion, the plaintiff's suit must fail on the main question that has been argued before us; it is that question which I proceed to discuss.

The terms of the grant are to be found in the *sanad*, dated the 23rd December, 1803. The appellant contends that the terms are also to be found in section 34 of Regulation 12 of 1805.

So far as the *sanad* is concerned it recites that the grantee has for a very long time served at Thana Malwa and other *mahals* mentioned in the *sanad* and has, after deducting the usual costs of collection from the annual income of the *mahals*, appropriated the balance which the Government was entitled to receive, in lieu of his salary, and then the *sanad* proceeds to make the grant in the following terms—

"You and your heirs have the right to receive the whole of the balance, if any, of the amount of the fair annual rent aforesaid left after deducting therefrom the said usual costs, the collection of rent of the aforesaid *mahals* shall be managed by you and your heirs in accordance with the laws and orders of the said Government and you and your heirs shall exercise your right in this respect."

In my opinion, there is nothing in this document to suggest that the properties were by the terms of the grant made inalienable as a condition of the grant. It was a grant not in indefinite terms, but to Fateh Muhammad and his heirs, and there is nothing in the grant to control the ordinary meaning of the words. The terms of the grant in no way differ from the terms of the grant which their Lordships of the Judicial Committee had to consider in the case of *Dosibai* v. *Ishvardas Jagjivandas* (1).

It was argued in that case that the grant being a grant of the *jagir* operated as giving a succession of life-interests to the grantee and his heirs for the time being. To this contention, the Judicial Committee replied as follows.—"There is no principle or authority which gives any warrant for such a contention. It is true that when a *jagir* is granted in indefinite terms, it is taken to be for the life only of the *jagirdar*. But where there is a grant to a man and his heirs, and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest."

The decision of the Judicial Committee is a distinct authority in favour of the view pressed before us on behalf of the respondents; and I must hold that there being nothing in the grant to control the ordinary meaning of the words, Fateh Muhammad, on the construction

(1) (1891) 15 Bom. 222=18 I.A. 22=6 Sar.-10 (P.C.)

of the *sanad* itself and apart from the consideration of the Regulation which I shall presently consider, took an absolute interest in the properties which were conveyed to him by the *sanad*.

But it was argued that whatever construction may be placed on the *sanad* itself, the effect of section 34 of Regulation 12 of 1805, which confirmed the grant made to Fateh Muhammad, was to make the subject matter of the grant inalienable. That section runs as follows :—

"The Commissioners having likewise granted a *sanad* to Fateh Muhammad, *jagirdar* of Malud, entitling him and his heirs for ever in consideration of certain services performed towards the British Government, to hold his lands exempt from assessment, such *sanad* is hereby confirmed."

In my opinion, there is nothing in this section which controls or in any way limits the grant already made to Fateh Muhammad. It purports to do nothing more than confirm the *sanad* granted by the Commissioners to Fateh Muhammad. The title of Fateh Muhammad was based not on section 34 of the Regulation but on the *sanad* granted by the Commissioners, and for the terms of the grant we must go, not to the Regulation, but to the *sanad* itself.

Now it will appear that section 25 of Regulation XII of 1805 provides that all the provisions of Regulation 37 of 1793 shall be in force in the Zillah of Cuttack which are not superseded and rendered of no effect by the rules following section 25 of Regulation 12 of 1805. Section 15 of Regulation 37 of 1793 provides that *jagirs* are to be considered as life-tenures only, and that the life-tenures are to expire with the life of the grantee, unless otherwise expressed in the grant.

The question, therefore, resolves itself into this: Is there anything in the grant itself which makes the *jagir* conferred on Fateh Muhammad hereditary; if not, the *jagir* must be considered to be a life-tenure of Fateh Muhammad. On this point the decision of the Judicial Committee in the case already cited is conclusive. In that case, the Judicial Committee had to consider the effect of section 15 of Regulation 37 of 1793. Their Lordships said: "The principle that *jagirs* are to be considered life-tenures" only "unless otherwise expressed in the grant" is expressly laid down in the Bengal Regulations [See Regulation XXXVII of 1793, section 15].

Their Lordships considered that it is "otherwise expressed in the grant" when the grant is made to the grantee and his heirs. In the case before us, the grant was expressly made to the grantee and his heirs. I must hold, therefore, that the *jagir*, being a grant to the grantee and his heirs, could not be considered the life-tenure of Fateh Muhammad.

It was strenuously pressed before us that the words "for ever" occurring in section 34 of Regulation 12 of 1805 are sufficient in themselves to cut down the ordinary meaning of the words employed in the *sanad*. Now section 15 of Regulation 37 of 1793 enacts that, if it is otherwise expressed in the grant, the *jagirs* will not be considered as life-tenures.

The question is, not whether section 34 provides that the grant made to Fateh Muhammad was to be considered the life-tenure of Fateh Muhammad, but whether in considering the grant itself we are able to come to the conclusion that the *jagir* is not to be considered the life-tenure of the grantee. But quite apart from this consideration.

I do not think that the words "for ever" in any way touch the point in controversy between the parties. In my opinion those words express the intention of the paramount authority not to resume the grant; they do not in any way make the grant inalienable.

When we consider Regulation 12 of 1805 as a whole, it will appear that there are distinct provisions in the Regulation itself prohibiting, in certain cases specified in the Regulation, the holders of the grants from selling or otherwise transferring the properties. For instance section 18, clause (6), runs as follows :—

"The present possessors of lands held exempt from the payment of revenue, under all life grants declared by the preceding clause not to be hereditary, are prohibited from selling or otherwise transferring them, or mortgaging the revenue of them for a longer period than their own lives; and all such transfers and mortgages are declared illegal and void."

So again the 6th clause of section 26 runs as follows :—

"The present possessors of lands now exempt from the payment of revenue, under such *jagir* or other life grants made previous to the 14th October, 1803, and declared by the preceding clause not to be hereditary, are prohibited from selling or otherwise transferring them, or mortgaging the revenue of the lands for a longer period than their own lives; and all such transfers and mortgages which have been or may be made are declared illegal and void."

It seems to me, that if there was any intention on the part of the legislature to prohibit Fateh Muhammad or his heirs from either selling or mortgaging the properties which were conveyed to them by the *sanad* already referred to, it could have carried out the intention far more clearly by expressly prohibiting him or his heirs from selling or otherwise transferring them as it has done in the 6th clause of section 18 and in the 6th clause of section 26. In my opinion the words "for ever" occurring in section 34 cannot receive the construction which has been suggested by the learned Vakil on behalf of the appellant.

It was argued lastly that there are decisions of the Calcutta High Court which conclude the point. Now it is not suggested that those decisions operate as *res-judicata* between the parties; but it has been argued that they are decisions of very high authority and that as such they ought to be followed by this court. The first of these decisions is referred to in *Shaikh Zamiloodeen Mohamed* v. *Russick Chand Addy* (2).

It appears that the original grantee incurred certain debts to Russick Chand Addy, and Russick, in execution of the decree which he obtained, attached, the rights and interests of the judgment-debtor in the *jagir*. After the death of the original grantee the question arose as between his son Md. Jamiruddin, the grandson of the original grantee, and the judgment-debtor, and it was urged on behalf of Jamiruddin that the grant being for the life of Fateh Muhammad and inalienable in its nature the properties which were comprised under the grant could not be sold in execution of any decree either against Fateh Muhammad or Md. Ismail.

The case first came up before Mr. Justice Steer and Mr. Justice Campbell. Mr. Justice Steer declined to decide the question which was raised by Jamiruddin. He thought that the right, title and interest of the judgment-debtor whatever it was, could be sold in execution of the decree, leaving the question as to what passed by the sale to be determined in a title suit between the parties. Mr. Justice Campbell took the opposite view. He thought that in order to prevent multiplicity of proceedings it was absolutely necessary to decide the question in controversy between the parties. He conceded that if the land had merely been held under a Government grant to the donee and his heirs for ever the tenure might be held alienable; but he thought that as the grant was confirmed by an express law, that is to say by section 34 of Regulation 12 of 1805, it followed that the grant so made by law to a man and his heirs for ever was of the nature of a perpetual entail.

Stopping here for a moment, I do not think that perpetual entail is recognised either amongst the Hindus or the Muhammadans; but the learned Judge thought that the case was analogous to the case of the Parsee Baronet. The statute of which the learned Judge was thinking is Act 20 of 1860 which was an Act for settling certain properties which belonged to Sir Jamsetjee Jeejeebhoy so as to accompany and support the title and dignity of a baronetcy conferred on him and the heirs male of his body by Her Majesty the Queen-Empress of India.

It will appear, however, on a reference to that statute that there was a perpetual entail expressly created by the statute and section 10 of that Act provided in express terms that—

"neither the present Baronet nor any of the heirs male of the body of the first Baronet in whose favour trusts are hereinbefore declared of the dividends, interest, and annual income of the said stocks, funds, and securities, or to whom the said Mansion House and hereditaments called Mazagon Castle shall stand limited under this Act shall transfer, dispose of, alien, convey, charge or encumber the said stocks, funds and securities, or any part thereof."

In other words, the grantee was ex-

(2) (1862-64) W. R. 85 (F. B.)

pressly prohibited from alienating the properties which formed the subject-matter of the settlement or any portion thereof. There is in the case before us no express prohibition at all in the case of Fateh Muhammad and I am wholly unable to agree with the view which was taken by Mr. Justice Campbell in the case cited.

The next case is not reported, but is to be found at page 61 of the paper-book. That was a decision of Mr. Justice Kemp and Mr. Justice Campbell, dated the 9th February, 1864, and between the same parties There is no decision there; it merely followed the previous decision which has already been referred to.

As I have said before, these decisions do not operate as *res-judicata* between the parties. They are undoubtedly entitled to weight as authoritative decisions of the Calcutta High Court, but I am unable to agree with the view which was taken in those cases.

I am compelled to follow the decision of the Judicial Committee, and as I am of opinion that the decision of the Judicial Committee in the case to which I have referred is conclusive on the point, I must hold that there is nothing either in the grant or in the Regulation which in any way makes the subject matter of the grant inalienable I agree with the view which has been taken by the learned Judge in the Court below on this point.

A question was raised as to whether the plaintiff is not in any event entitled to a decree as against the defendants Nos. 20 to 22. As I have already mentioned, these defendants in the first instance filed a written statement contesting the claim of the plaintiff but subsequently they withdrew from that position and admitted the plaintiff's title. The question is: is the plaintiff in any event entitled to a decree as against them?

Now it will appear that they filed a joint written statement. So far as defendants Nos. 21 and 22 are concerned, they are minors, and in view of the decision at which the learned Subordinate Judge arrived, it was plainly impossible for him to grant the plaintiff a decree as against the interests of the minors. So far as Sona Bibi, defendant No. 20, is concerned the learned Subordinate Judge ignored altogether the admission made by her. It is within the discretion of the court to ignore an admission made on a point of law if it so thinks and I am not prepared to say that in dismissing the plaintiff's suit in its entirety, the learned Subordinate Judge committed any error. The question as to whether the plaintiff was in any event entitled to a decree as against Sona Bibi was not argued before the learned Subordinate Judge, and I do not propose now to go into that question It is unnecessary to enter into other questions, because the plaintiff's suit must fail on the construction of the *sanad* and the Regulation.

I must dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 415

DAS AND ADAMI, JJ.

Lakshman Sahu—Appellant.

v.

Gokhul Maharana—Respondent.

Appeal No. 31 of 1921 decided on 1st Dec., 1921 from Dist. J., Cuttack, dated 27th April 1921.

Evidence Act, S 71—*Attestation—Mortgage—One attesting witness dead—Others having no recollection—Document can be proved by other evidence.*

Where one of the attesting witnesses to a mortgage bond is dead, and the other does not recollect the execution of the document the plaintiff will be entitled, under section 71, to succeed on the bond, if he proves the due execution of the bond. [P. 415, C. 1.]

G. C. Roy.—for Appellant.

S. Chatterji—for Respondent.

Das, J.—This appeal arises out of a suit instituted by the appellant to enforce a mortgage bond. There were two attesting witnesses to the mortgage bond. One of them is admittedly dead but the other was called by the plaintiff to prove that he did attest the mortgage bond The attesting witness who was called by the plaintiff stated in court that he attached his signature to the document without knowing what it was and without seeing the executant sign it and that he did so at the request of the plaintiff who was his friend.

The court of first instance thought that he was a witness unworthy of credit, and, relying upon

the evidence of the plaintiff and the scribe, gave a decree to the plaintiff substantially as claimed by him. The lower appellate court has differed from the view which was taken by the court of first instance.

The lower appellate court, however, admits that the memory of this witness in all probability would be quite blank regarding the circumstances after the expiry of 13 years from the date of the execution of the mortgage bond. I regard the finding of the lower appellate court on this point as a finding that the attesting witness who was called by the plaintiff denied or did not recollect the execution of the document.

If that be so then section 71 of the Evidence Act provides that the execution of the document must be proved by other evidence. The learned Vakil who has argued this case on behalf of the respondent urges before us that the proof of execution will not help the plaintiff; it must be proved that the document was properly attested.

In my opinion, so far as section 71 of the Evidence Act is concerned, execution includes attestation, for section 71 only operates if the attesting witness denies or does not recollect the execution of the document. We have, therefore, to see whether the plaintiff has proved the due execution of the document. Now on this point again the learned Judge says that there is again a strong probability that neither the plaintiff nor the scribe can in fact remember the details after so long a lapse of time. In my opinion the evidence of the plaintiff and the scribe should be reconsidered by the learned District Judge.

The suit is on a mortgage and as I read the judgments of the courts below there is no doubt that the money was advanced and the document was executed at any rate by the defendants ; and as the learned District Judge did not examine the evidence of the plaintiff and the scribe from the point of view which I have suggested in my judgment, I think it only fair that their evidence should be reconsidered by the learned District Judge.

I would allow the appeal, set aside the judgment and decree of the court below and remand the case to that court for decision. Costs will abide the result and will be disposed of by the learned District Judge.

Adami, J.—I agree.

Case remanded.

A.I.R. 1922 Patna 416

DAS AND ADAMI, JJ.

Kanduri Sahu—Appellant

v.

Arjun Sahu—Respondent.

S. A. No. 7 of 1921 decided on 1st December 1921 from District J., Cuttack, dated 5th January 1921.

Orissa Tenancy Act, (B. and O. II of 1913)—S. 236—Under tenant of homestead land is not liable to ejectment on notice to quit.

Section 236 applies to an under-tenant of homestead land, whereby he is not liable to ejectment on mere notice to quit. 21 Cal. L J. 478. followed. [P. 146, C 2.]

Bishitrananda Das—for Appellant.

S. C. Chatterjee—for Respondent.

Adami, J.—The contention raised by the learned Vakil in this second appeal is, that the District Judge was wrong in applying the provisions of section 236 of the Orissa Tenancy Act to the present case which was one in which the plaintiff as an occupancy *raiyat* tried to eject the defendants who were *shikmi* tenants under him from the homestead land which they were occupying under him.

It is argued that section 236 cannot apply to the case of an under-tenant and can only apply to a case where a *raiyat* holds homestead land which is not a part of his occupancy holding. The case, however, is concluded by the finding in the case of *Mohim Chandra Day* v. *Baidyanath Kapali* (1) That decision upholds the finding of the District Judge and, therefore, there is no reason to find that his decision was wrong.

The appeal must accordingly be dismissed. There will be no order as to costs.

Das, J.—I agree.

Appeal dismissed.

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(1) (1915) 21 Cal. L. J. 478=29 I. C 879.

A.I.R. 1922 Patna 417

DAWSON MILLER, C. J. AND JWALA PRASAD, J.

Lochan Rai and others—Appellants

v

Sant Prasad—Respondent

L. P. A. Nos. 50 and 51 of 1921, decided on 18th January 1922.

Civil P C. (Act V of 1908), Ss. 100 and 103—O. XLI, Rr. 23, 24 and 25—O. XLII—High Court holding in second appeal that certain evidence was improperly rejected in lower court, cannot weigh the evidence and decide question of fact but must remand the case.

Per *Dawson Miller, C.J.*—It is not for the High Court, sitting in second appeal, even if it thinks that certain evidence had been improperly rejected by the lower Court, to weigh that evidence as against the evidences on the other side and arrive at a conclusion of fact upon the matter. There may be cases which in second appeal, the appellate court is entitled to decide itself, because the matter is so clear that no court acting reasonably can come to any conclusion but one. But if there is evidence on both sides, and the case does not come under S. 103, C. P. C. the only possible thing to do is to remand the case for determination of the question of fact, taking into consideration the evidence improperly rejected along with the other evidence in the case.

[P. 417, C. 2, P. 418, C. 1.]

Per *Jwala Prasad, J.*—Once a second appeal has been properly laid, Rules 23, 24 and 25 under O. XLI and XLII will apply for the disposal of that appeal. The finding of fact of the lower appellate court having been set aside under S. 100, C.P.C., if evidence on the record is sufficient, there is nothing to prevent the High Court from going into evidence and determining the case finally under R. 24 of O. 41, S. 103, which has been added in the new Code (1908) has widened the power of the High Court to determine any issue not determined by the Court below after going into evidence. [P. 419, C. 1.]

Kailaspati—for Appellants.

L. N. Singh, S. Dayal and *Devaki P. Sinha*—for Respondent.

Dawson Miller, C. J.—I very much regret that, in my opinion, these appeals will have to be remanded for decision by the lower Appellate Court. The only points in dispute were as to the rate of *Nagdi* rent and the landlord's share of the produce in the *Bhowli* rent. The landlord was claiming Rs. 2-8-6 as *Nagdi* rent whilst the tenants were asserting that the rent was Rs. 2-1-9. The landlord was claiming *Bhowli* rent in certain proportions whilst the tenants were asserting different proportions.

The learned Munsif allowed the plaintiff's claim in the manner asserted by him except that, in making a calculation of the average produce of the paddy he arrived at it as 10 maunds per *bigha*, whereas in fact it ought to have been 14 maunds per *bigha*.

The tenants appealed to the Subordinate Judge. The Subordinate Judge allowed the appeal and also allowed the cross-objection of the landlord, who contended that a miscalculation had been made by the Munsif in arriving at the average produce of the paddy, so that both appeals were allowed.

The landlord appealed to this Court from the decision of the Subordinate Judge in so far as it allowed the tenants' appeal. The appeal came before Mr. Justice Ross. The points taken in appeal by the tenants were that the learned Subordinate Judge had, for improper reasons, rejected the evidence of the village papers as well as the report of the Assistant Settlement Officer, and had improperly relied upon the non-production of certain village papers relating to the land in question at an earlier period when it was under *Musammat* Jaipati Kuer.

The learned Judge of this Court found, and we agree with him, that the Subordinate Judge was wrong in rejecting the village papers and in rejecting the Assistant Settlement Officer's report, and to that extent we entirely agree with his decision. We also think that the learned Judge of this Court was right in pointing out that the Subordinate Judge was in error in drawing any inference from the fact that earlier village papers had not been produced when the defendants held under *Musammat* Jaipati Kuer, because at that time their holdings were not the same and the rent was entirely different. The learned Judge, however, having arrived at the conclusion that certain evidence had been improperly rejected seems to have considered that if that evidence were admitted it disposed of the whole case. In my opinion, it was clearly not for this Court, sitting in second appeal, even if it thought that certain evidence had been improperly rejected by the lower Court, to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter. There may be certain cases in which the matter is so clear that the Appellate Court is driven to the conclusion that no court acting reasonably could come to any conclusion but one, and in such cases it may be that the Appellate

Court in second appeal would be entitled to decide the case without putting the parties to the trouble and expenses of having the question determined by the lower Appellate Court: but in the present case there undoubtedly was evidence on both sides as to the rate of rent both *Nagdi* and *Bhowli*. There was, on the one hand, the record of rights and there was some evidence given by the only witness called for the defendants which supported the record of rights. There was, on the other hand, the evidence which has been rejected by the Subordinate Judge, and it seems to me that the only possible course in this case is to remand the case to the lower Appellate Court to come to a conclusion of fact after considering not only the evidence which it has accepted (excluding the earlier village papers) but the evidence which Mr. Justice Ross found it has improperly rejected. Had we to determine this case for ourselves it might be an easy matter for us to arrive at a conclusion, but as I have already said the determination questions of fact in second appeal not coming under section 103 of the Civil Procedure Code which is applicable in this case are not for the second Appellate Court. I, therefore, consider that the judgment of Mr. Justice Ross appealed from should be set aside and the case should be remanded to the lower Appellate Court for determining the issues of fact upon the evidence, including that which we have held was properly admissible in the case.

The decision of the Subordinate Judge in so far as it found that the average produce of the paddy was 14 maunds per *bigha*, and 10 maunds per *bigha*, will remain. There is no appeal upon that question, but so far as the rest of his decision is concerned that will be set aside. The result, therefore, is that the judgment and decree of the learned Subordinate Judge are modified, as stated, and the case is remanded for decision on the facts in so far as the decree of the Subordinate Judge has been set aside. I think in the circumstances, the costs of this appeal will abide the result of the final determination of the case.

Jwala Prasad, J.—I agree with the order proposed. I am not sure, however, whether in this case we could not determine the appeal without remanding the case. The question is, how are we to deal with this appeal. Are we debarred from dealing with the case on merits and disposing of it instead of remanding it?

Order XLII, rule 1, of the Code of Civil Procedure says that the rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees, Order XLI, rules 23 and 25, lay down the circumstances under which a remand can be made. Under rule 23 a remand is allowed when a suit is disposed of by the lower Court upon a preliminary point and the decree is reversed in appeal. Under that rule the Court to which the case is remanded is directed to determine certain issues left undetermined on account of the disposal of the case upon a preliminary point. Under rule 25 the remand is made when the Court trying the suit omits to frame or to try any issue or to determine any question of fact which appears to the Appellate Court essential to the right decision of the suit upon the merits. In the present case none of these contingencies has arisen for a remand either under rule 23 or under rule 25. Rule 24 empowers the Appellate Court to pronounce judgment where the evidence upon the record is sufficient and finally determine the suit notwithstanding that the judgment of the Court from whose decree the appeal preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. Generally speaking, the present case will come under rule 24, that is to say, this Court will have power to dispose of this appeal finally upon the evidence on the record I do not find anywnere in the Code any indication that in second appeal the Appellate Court's power under rule 24 has been curtailed. On the other hand, Order XLII makes this rule applicable to second appeals. No doubt, under section 100, read with section 101, no appeal shall lie to the High Court from a decree passed in appeal from any Court subordinate to it except upon the grounds mentioned therein, viz.,

(a) the decision being contrary to law or to some usage having the force of law;

(b) The decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the

procedure provided by the Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

A second appeal to this Court did lie in this case and, as a matter of fact, we have decided that the Judgment of the lower Appellate Court was illegal, inasmuch as it exercised its jurisdiction irregularly in not having considered certain evidence upon the record. We are going to set aside the judgment and, therefore, the appeal to this Court was properly, "laid." When once an appeal has been properly laid, then the ordinary rules under Order XLI and XLII will apply for the disposal of that appeal. We can remand the case under rule 23 or 25 or we can determine the case finally upon the evidence under rule 24. True, no second appeal can lie upon facts, but when once an appeal is properly preferred and is entertained by this Court and the finding of fact of the lower Appellate Court is set aside and the evidence on the record is sufficient, then there is nothing to prevent the Court from going into the evidence and determining the case finally under rule 24. It has been recognised that the Appellate Court has power to remand also irrespective of rules 23 and 25 of Order XLI. I do not dispute that, and perhaps, the present order of remand, though not coming under rules 23 and 25, come under the general powers of this Court to remand the case, but I do not admit that this Court has no power to determine the case finally upon the merits and on consideration of the evidence under rule 24 of Order XLI.

I may add that section 103, which has now been added to the Code of 1908, has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below. This was in order to settle a conflict of decisions prior to 1907 as to whether the High Court could at all go into questions of fact and determine an appeal on evidence: Vide *Girdhari Lal* v. *Crawford* (1); *Deokishen* v. *Bansi* (2); and *Bal Kishen* v. *Jasoda Kuer* (3). In the case of *Seturatnam Aiyar* v. *Venkatachala Gounden* (4) their Lordships of the Privy Council held that the High Court in second appeal had jurisdiction to deal with the case and to decide the issues upon the materials before the Court when the District Judge returned his finding without dealing with those materials in a satisfactory manner. In the case of *Damusa* v. *Abdul Samad* (5) their Lordships of the Privy Council held that the Judicial Commissioner had in second appeal on terms of section 100 of the Code (1903) power to decide what was the real question in the case notwithstanding that an issue had not been framed on it.

While I agree that a finding of fact of a lower Appellate Court is conclusive in second appeal, there is nothing to prevent the High Court from going into the evidence on the record and deciding an issue whether actually raised or not in the Court below, if the finding of fact is set aside on the grounds mentioned in section 100 of the Code. In the present case the evidence on the record is sufficient and almost all of them appear to have been dealt with by the Munsif. The remand is only for the purpose of the lower Appellate Court to record its finding upon the evidence on the record. This could be done by us here without much loss of time. The remand could, therefore, have been obviated.

However, as my Lord the Chief Justice is of opinion that the case should be remanded, I subscribe to it. *Case remanded.*

(1) (1886) 9 All. 147=1886 A.W.N. 325 (F.B.)
(2) (1886) 8 All. 172=1886 A.W.N. 35 (F.B.)
(3) (1885) 7 All. 765=1885 A.W.N. 225 (F.B).
(4) A.I.R. 1920 P.C. 67=43 Mad. 567=47 I.A. 76 (P.C.)
(5) A.I.R. 1919 P.C 29=47 Cal. 107=46 I.A. 140 (P.C.)

A.I.R. 1922 Patna 419

ADAMI, J.

Bengal North Western Railway Co.—Petitioner v.

Abdul Karim—Opp. Party.

Civil Rev. No. 73 of 1922 decided on 20th June 1922.

Railways Act—Risk notes H. or B.—Liability of railways—Plaintiff must prove wilful neglect or theft.

In cases where goods are consigned under risk notes B. or H. it is incumbent on the plaintiffs to prove in order to succeed wilful neglect on the part of the railways or theft.

S. N. Bose—for Petitioner.

Kailaspati—for Opp. Party.

Judgment.—This application arises out of a suit in which the plaintiffs made a claim against the East Indian Railway, the Bengal North Western Railway, and the Eastern Bengal State Railway Companies, in respect of twenty bags of lime consigned by their Agent at Dehri-on-Sone to the plaintiffs at Purnea. The Secretary of State was made a party defendant. The claim was for Rs. 99-4 as. as damages, and consequently the suit was triable by a Court of Small Causes.

The Munsif, who was vested with the powers of a Small Cause Court Judge, preferred to try the suit by the ordinary procedure, and gave a decree in favour of the plaintiffs as against the Bengal North Western Railway only for a sum of Rs. 68-15 as.

No appeal lay against this decision, and the only course open to the defendants-petitioners was to move this Court in revision—*Indra Chandra Mukherjee* v. *Srish Chandra Bannerjee* (1).

The bags were despatched from Dehri-on-Sone station under a Risk Note in Form H which in consideration of the reduced rate, exonerated the Railway Company for loss or damage to the consignment except loss of the complete consignment or of one or more packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of its servants or agents.

The Munsif found that the 212 bags were safely carried by the East Indian Railway Company as far as Mokameh Ghat, where they were made over to the Bengal North Western Company for transhipment, so that the East Indian Railway Company were held not to be liable. The Transhipment Book of the Bengal North Western Company showed that 212 bags had been taken delivery of by that Railway, and therefore the Munsif held that the Bengal North Western Railway must be held liable for the loss of complete bags found to be short on delivery at Purnea.

The contentions raised against this finding are that the Munsif did not consider the whole of the entry in the Transhipment Register which, though in one column 212 bags were shown as received, had an entry in another column to the effect that on weighment the bags were found to be 29 maunds short in weight, and that on failure of the plaintiffs to show wilful neglect by the Railway Administration or its servants, or theft by their servants or agents, the plaintiffs could not succeed under the terms of the Risk Note.

It is a fact that there is an entry of a shortage of 29 maunds, for which the Bengal North Western Railway could not be held responsible; and it is also a fact that it was not proved that the loss was due to the wilful neglect of the petitioner or their servants or the theft by their servants or agents, nor is it argued before me that such neglect or theft were sought to be proved by the plaintiffs. It has been held on many occasions by various High Courts in India that in cases where goods are consigned under risk notes B or H it is incumbent on the plaintiffs to prove such wilful neglect or theft; I need only refer to the cases of *Sheobarat Ram* v. *Bengal North Western Railway Co.*, (2) the *East Indian Railway Co.*, v. *Kanak Behari Haldar* (3): and *East Indian Railway Co.* v. *Nilkanta Roy* (4). Though it may be very difficult for a consignor to prove neglect or theft in these cases, I am bound to follow the above decisions and to find that the decree of the lower Court cannot be sustained.

The application is therefore granted and the decree of the Munsif is set aside. Hearing fee three gold mohurs.

The suit will therefore be dismissed with costs. *Decree set aside.*

(1) (1913) 40 Cal. 537=21 I.C. 120.

(2) (1912) 16 C.W.N. 766=15 I C. 56.

(3) (1918) 22 C.W.N. 622=44 I.C. 691.

(4) (1914) 41 Cal 576=19 C L.J. 142=22 I.C. 679=19 C.W N. 95.

A. I. R. 1922 Patna 420

ADAMI, J.

Manmohan Dass—Petitioner

v.

Babu Lall and others—Opposite Party.

Cr. Rev. No. 301 of 1922 decided on 20th June 1922.

Criminal P. C., Ss. 125 and 107—Order for security made by lower Court—District Magistrate can set aside the order in executive capacity.

Though no appeal lies from an order under S 107, the Dt. Magst. can order the discharge of the appellants from the necessity of giving security for their future behaviour, setting

aside the order of the lower court, in his executive capacity, as well as cancel the bond for keeping peace or for good behaviour. [P. 422, C. 1].

G. C. Pal—for Petitioner.

S. P. Varma—for Opp. Party.

Judgment :—The petitioner seeks in this application to have the order of the District Magistrate of Monghyr discharging the opposite party from the necessity to execute bonds under Sec. 107, Cr. P. Code, set aside.

It appears that the Zamindar of Ulao demanded enhanced rents from the tenants of village of Rani Shankarpura and, on their refusal to pay, instituted suits for enhancement, and this caused great discontent among the villagers, who determined to resist. They decided to refuse payment of rent to the landlord and to boycott his amla and servants; great friction arose and there were acts, and threats of violence which eventually led to an order being passed against the tenants, the five leaders of the opposite party, under Sec. 107, Cr. P. Code, binding them down to keep the peace.

The Opposite party then made an application to the District Magistrate to consider the case under Sec. 125 and cancel the bonds.

On the 25th October 1921, the District Magistrate passed the order:

"Admit appeal, send for record. Notice other party. As I shall be out on tour almost continuously for the next few months, I must hear the appeal in Camp. Beguserai will suit both parties. I will hear it on 11th November."

The District Magistrate accordingly started hearing the case on November 11th but came to the conclusion that it would be better if the parties came to terms, and gave time for this purpose. On January 12th he noted that the parties agreed to an enhancement of 3 annas 3 pies in the rupee instead of the admissible enhancement of 5 annas in the rupee. He then settled that time should be given for the deposit of rents by the tenants.

On the 6th of March he recorded that the parties had more or less settled their dispute and that 232 tenants had agreed to the figures of the rent settled and some 80 others were likely to settle their differences with the landlord. It was also agreed to settle the rent suits. On the 21st March, after distribution of the rent receipts, the District Magistrate noted that though the five present petitioners had not settled their dispute direct with the landlord, there was no sufficient reason for postponing the disposal of the case. He remarked that the landlord had been almost as much to blame for the trouble as the tenants and then he wrote in the order sheet.

"I do not consider that after the present settlement there is any danger of a breach of the peace. I accordingly allow the appeal and discharge, the appellants from the necessity of giving security for their future behaviour, setting aside the order of the lower Court.

A *patwari* of the landlord has moved this Court against the said order. Mr. Gour Chandra Pal, on his behalf, argues that the District Magistrate had no jurisdiction to hear an appeal against an order in proceedings under Sec. 107, and that the only order he could pass under Sec. 125 was an order cancelling the bond. He relies on the decision in *Dayanath Thakoor* v. *Emperor* (1) and on a judgment of mine in the case of *Durga Singh* v. *Amar Dayal Singh* (2).

There is no doubt as to the correctness of the contention that no right of appeal lies against an order under Sect. 107, and that the order to be passed under Sec. 125 is an order cancelling the bond. In the present case we find however that there was no appeal by the opposite party, in their petition they asked the Magistrate to consider their case under Sec. 125, to set aside the order of the Court below and direct cancellation of the bonds. It is true that the Magistrate in the order sheet described the petition as an appeal and proceeded to hear the parties, but he subsequently took purely executive action in bringing about a settlement between the landlord and tenants, and in his final order, though he states that he allowed the appeal, he also stated that in his opinion there was no real danger of a breach of the peace and discharged the petitioners from the necessity of giving security, and this was equivalent to a cancellation of the bonds. The case of *Durga Singh* v. *Amar Dayal Singh* (2) mentioned above, was of a very different nature. There the Deputy Com-

(1) (1910) 37 Cal. 72=5 I C. 555=14 C.W.N. 306.

(2) A I.R. 1922 Patna 334.

missioner discussed the property and validity of the Deputy Magistrate's procedure and came to a finding that the proceedings were void as being without jurisdiction. He said nothing about cancellation of the bonds or discharge of the men bound down for their security.

I can find no reason to hold that in the present case the District Magistrate acted without jurisdiction. He took executive action for the settlement of the dispute and then came to a finding that there was no real danger of a breach of the peace and directed the opposite party to be discharged from their security, which meant cancelment of the bonds. That the District Magistrate wrongly described the proceedings as an appeal makes no difference.

It is complained that the petitioner was not given a hearing before the order was passed; the order sheet shows that notice was issued to the landlord's party and that throughout the landlord was represented. Furthermore the petitioner cannot contend that the proceeding before the District Magistrate was an appeal, and at the same time demand that he should have the rights of a respondent to an appeal.

It is lastly argued that though other tenants settled their dispute the five members of the opposite party did not do so. The finding of the District Magistrate that there was no further danger of a breach of the peace was sufficient for an order for cancelment of the bonds.

I can see no good reason to interfere; the application is rejected.

Application rejected.

A. I. R. 1922 Patna 422

ADAMI, J.

Ram Pershad Lal and others—Petitioners.

v.

Chamari Singh and others—Opp. Party.

Civil Rev. No. 30 of 1922 decided on 30th June 1922.

Civil P. C. O 21, R. 90—Fraud—Application under the rule can be made when fraud becomes known to applicant though it is after confirmation of the sale.

Where the sale or an irregularity affecting the sale has by the fraud of the decree-holder or other parties to the sale been kept concealed from the judgment-debtor, he is entitled to apply under R. 90 whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him. There is nothing in O. 21, R. 90 which limits the filing of an application to the period prior to confirmation of the sale. [P. 423, C. 1.]

Bimla Ch. Sinha—for Petitioners.

Sunder Lal for *Rugho Prasad*—for Opp. Party.

Judgment:—This is an application directed against an order passed by the Munsif at Barh setting aside a sale in execution of a rent decree under O. 21, Rr. 90 and 92 of the Civil Procedure Code.

It appears that the petitioner, having obtained a rent decree, brought the holding to sale on the 16th February 1920, and purchased it himself. The sale was confirmed on the 22nd March, and possession was delivered on the 25th May. Thereafter the petitioner sold the holding to one Punit, for about double the amount he had paid for it at the auction sale. The opposite party applied on the 11th September 1920 under O. 21, rule 90 to have the sale set aside on the ground of material irregularity in the service of notices and in the sale proclamation, and of fraud. He asserted that by reason of the irregularities and fraud an altogether inadequate amount had been paid for the holding, and that owing to want of notice and fraud and his absence from the village by reason of illness he had had no knowledge of the sale proceedings until the 26th August 1920.

The Munsif held that notices had not been properly issued, that an inadequate value was entered in the sale proclamation, that owing to this a wholly inadequate price had been paid at the auction, that there had been fraudulent collusion between the decree-holder and judgment-debtor, and that notices had not been issued under section 158-B to the co-sharer landlords of whom the opposite party was one. He therefore set aside the sale, holding that the opposite party's application was within time, since he had been kept out of knowledge of the proceedings by the petitioners until 26th August 1920. The District Judge has upheld the Munsif's findings and dismissed the petitioner's appeal.

The opposite party claimed to have purchased part of the holding and to have possession of another portion under a mortgage, the kabala and mortgage

deed having been executed before the suit of the decree-holder.

It is contended now before me that an application under O. 21, R. 90, to set aside a sale on the ground of fraud can only be made prior to confirmation of the sale, and that therefore the Munsif had no jurisdiction to entertain the application of the opposite party.

I do not think that this contention can be supported. I have been referred to a decision by Broadway, J. of the Lahore High Court *Bashiram* v. *Hasan Mahomed* (1) but am not able to follow the reasoning given therein. Where the sale or an irregularity affecting the sale has by the fraud of the decree-holder or other parties to the sale been kept concealed from the judgment-debtor, he is entitled to apply under R. 90 whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him, *Mohendra Narain* v. *Gopal* (2), *Golam Ahad* v. *Judishthur* (3). There is nothing in O. 21, R. 90 which limits the filing of an application to the period prior to confirmation of the sale.

It is next contended that in order to enable the opposite party to plead extension of time for his application to the date of knowledge, he must show that he was kept ignorant through fraud, and that there is no finding that in this case the petitioner was aware of the opposite-party's purchase and mortgage, or that he fraudulently withheld knowledge from him, the case being that the opposite party was away through illness. It has been found however that notices at various stages were not served, especially the notice required under Section 158-B, and the whole tenor of the decisions of the Lower Courts is that the petitioner purposely prevented service of notices.

The third ground taken is that the opposite party being a purchaser of only a portion of the holding and mortgagee of another portion, the landlord decree-holder was not bound to recognise him, and he had no right to file an application under O. 21, R. 90. This point was not taken in the Lower Courts and I have not material before me to show whether the kobala and mortgage covered the whole of the holding so as to effect a transfer of the whole.

On the findings of the lower Courts I can see no good ground to interfere: The application is rejected. Hearing fee three gold mohurs. *Application rejected.*

(1) (1919) 51 I.C. 447.
(2) (1890) 17 Cal. 769.
(3) (1903) 30 Cal. 142=7 C.W.N. 305.

A. I. R. 1922 Patna 423

ADAMI, J.

Rampabitar Singh and others—Petitioners v.

Kasim Ali Khan and others—Opposite-Party.

Cr. Rev. No. 242 of 1922 decided on 2nd June 1922 against an order of Deputy Magistrate, Gaya.

Criminal P. C., Ss. 145 and 144—Valid claim to joint possession made out—Proceedings cannot be taken under S. 145.

Where there is a good and valid claim to joint possession the Magistrate has no jurisdiction to take proceedings under section 145. [P. 425, C. 1.]

K. P. Jayaswal, S. S. Bose and *H. Chakravarty*—for Petitioner.

Hasan Jan—for Opposite Party.

Judgment.—This application is directed against an order passed in proceedings taken under Section 145, Cr. Procedure Code, declaring the first party to be in possession of an area of 42·36 acres of land in village Horio.

The first and second parties were co-sharer landlords of the village, each having an eight annas share.

In 1914 Gajadhar Singh and other, in order to pay off the amount due by them under three decrees obtained by Karan Singh, sold 50 bighas of kasht land to Kali Charan Singh and mortgaged 26 bighas of their kasht holding to him. In 1917 Kalicharan Singh sold the 50 bighas to Bechankhan and Danukdhari Singh and assigned the mortgage to Bechankhan and Sadho Lal. Bechan Khan was admittedly the farzidar of Kasim Ali the 1st party, and Dhanukdhari and Sadho are claimed by the 2nd party as the farzidars of their brother and karta, Ram Charitar Singh. One Bhageswari Prasad held a money-decree against Karan Singh, and in 1914 attached the three decrees obtained by Karan against Gajadhar, but he sold the decree to Kasim Ali 1st party in 1915, and the later in execution of the three decrees of Karan Singh, entered a petition of satis-

faction stating that the whole amount due on the three decrees had been paid. It is the case of the first party, that Kasim alone paid the amount, the second party ever that they paid their half share of the amount in the name of Dhanukdhari their *farzidar*, while the first party claim to have been in sole possession of the *kasht* lands after their purchase, the second party claim that they held joint possession, having paid half the purchase price.

The first party in 1920 instituted a suit on the basis of the mortgage assigned to Bechan and Dhanukdhari in 1917, making the second party among others defendants. In that suit it was found that the mortgage bond was not properly attested and valid and that consideration did not pass, it was also held that Kasim Ali had not acted fairly and that he had managed to abstract certain documents which went to help the defendant's case. The Subordinate Judge also held that Kasim Ali did not alone pay the amount which satisfied Karan's decrees. The suit was dismissed. While the suit was pending the second party instituted a suit for partition and obtained a preliminary decree in 1920. After that decree trouble arose between the parties as to possession of the lands and on a police report, proceedings under section 144 were started, the first party claiming exclusive possession and the second party joint possession.

Thereafter the proceedings under section 144 were converted into proceedings under section 145 and later, on the proceedings were revised but the revised proceedings did not contain clear particulars of the disputed land. The second party were called on to supply particulars of the lands they claimed, but as the final decree in the partition suit had not been passed the lands allotted to them had not been demarcated, they delayed filling the particulars until after the final decree had been passed. They eventually claimed possession of 32½ bighas out of the disputed area, being lands in the area allotted to them by partition. The learned Magistrate considered that the delay in furnishing particulars told against the second party petitioners but I am inclined to think that having obtained a preliminary decree in the partition suit, it was natural that they should be anxious to wait until they knew which of the lands in dispute fell into their *takhta*. The Magistrate took no notice of the findings in the judgment of the mortgage suit brought by Kasim or of the petition of satisfaction filed by Kasim. These show without doubt not only that Dhanukdhari was a *farzidar* of the second party and thus the second party had share in the purchase from Kalicharan, but also that the second party through Dhanukdhari paid their share of the amount due to satisfy the decrees. The petition of satisfaction clearly proves this. It was virtually held by the Magistrate that the second party had failed to show that Dhanukdhari was *farzidar* or that the second party contributed to the satisfaction of the decrees. He considered the oral evidence as to possession and decided that if the first party was preferable to that of the second party, and observed that possession under partition decree could not help the second party, since the demarcation of the second party's *takhta* was made within two months of the order starting the proceedings. I might point out for the information of the Magistrate that for the purpose of a decision under Section 145, the dispossession within two months must be a forcible and wrongful dispossession, and possession delivered under a decree would not be a possession of that character. However that is besides the point, for possession delivered by the court after a decree for partition of lands held in proprietary right cannot affect in this case the possession of the *kasht* lands which are in dispute; the parties base their claim on a purchase of *kasht* lands.

It is contended that inasmuch as the second party claimed joint possession of the purchase lands with the first party the Magistrate had no jurisdiction to take proceedings under section 145.

Now I think it is clear on the strength of the judgment in the mortgage suit and on the petition of satisfaction which Kasim Ali filed that the second party had a rightful claim to joint possession of the purchased *kasht* lands, and that claim was virtually asserted in the mortgage suit, though the question of possession did not form an issue. It might be said that in that suit Kasim

claimed exclusive rights and that the possession which has been found to be his by the Magistrate was all along adverse to the second party. That may be so, but all along the second party were claiming that any possession which Qasim Ali might have was partly on their behalf, and as I have found, they were justified in that claim.

That being so, as has been consistently held by this Court there being a good and valid claim to joint possession the Magistrate has no jurisdiction to take proceedings under S. 145 and pass the order he did. The order declaring the first party to be in possession is therefore set aside.

Order set aside.

A. I. R. 1922 Patna 425

JWALA PRASAD AND BUCKNILL, JJ.

Beni Chaudhuri and others—Appellants

v.

Trilokenath Tewari and another—Respondents.

Appeal No. 210 of 1919, decided on 29th June 1922.

(a) *Bengal Tenancy Act, Ss. 5, 5 (5), 120 and 120 (2)—Lessee holding less than 100* bighas—*S. 5 (5) does not apply—Land let out expressly for cultivation—Lessee is not a tenure-holder.*

Section 5 (5) has no application to the case of a person who does not hold more than one hundred standard *bighas* of land, and there will be no presumption as to his being a tenure-holder. The true scope and meaning of S 5, are that, where the purpose for which the tenancy was originally created is known and clearly proved, no other presumption as to the tenancy being otherwise than what the original purpose is, is admissible. If land is expressly leased out to a person for the purpose of cultivation and he was prohibited from making settlement of it with any other person, or granting *shikma patta* in respect thereof, or using the land in any way which would interfere with the cultivable nature thereof, the lessee is only a *Shikamidar* and not a tenure-holder under S. 5. [P 426, C. 1, 2; P. 427, C. 1.]

(b) *B. T. Act, S. 120—Zerait Land—Recital of Zerait is not enough—There must be evidence required by the section—Survey Record—Presumption arising from is a rebuttable one.*

A description of a land as *Zerait* in a lease will not be any evidence to show that the land was really *zerait* for there must be evidence under S. 120 to show either that the land was held in the *seer* cultivation of the landlord for 12 continuous years immediately before the passing of the Act or that it was recognised by village usage as proprietor's *Khamar, Zerait, Seer, Nij Jote* or *Kamat.*

Clause 2 of S. 120 allows the evidence of the land being specifically let as proprietor's private land, before the 2nd of March 1883. The persumption afforded by the survey of record-of-rights is a rebuttable one.

[P. 427, C. 1.P. 428, C. 2,]

Siveshwar Dayal—for Appellants.

Shambhu Saran and *Nirsu Narain Sinha*—for Respondents.

Judgment:—This appeal arises out of a suit brought by the plaintiff for a declaration of his status as the Gujashtadar *raiyat* with respect to the lands in question about 42 acres 33 decimals situate in Mouza Rajpur Kalan Dearah Parsanpali, and that the defendants Nos. 1 to 27 and 29 are his Shikmidars. Defendant No. 28 is the Maharaja of Dumraon who is the proprietor of the mouza. Defendants Nos. 13 to 15, 23 and 24 did not appear in the suit. Defendant No. 22 confessed judgment and relinquished the lands. Defendants 25 to 27 admitted the plaintiff's right. Defendants 1 to 12, 16 to 21 and 29 as well as the proprietor defendant No. 28 contested the suit by urging that the plaintiff is a tenure-holder in respect of the lands in dispute and that the defendants are occupancy *raiyats* in respect thereof.

The Court below has decreed the plaintiff's suit. Out of the contesting defendants, only defendants 7 to 10 have appealed to this Court The plaintiff as respondent resists this appeal. The Maharaja has also entered appearance. The learned Vakil, who appeared on his behalf, supports the appellants.

The lands in dispute were settled first with the plaintiff's father in the name of Tilakdhari Thakur and Ramyad Rai on 20th Asadh 1299, per Patta (Exhibit 1), for 9 years, from 1299 to 1307. After the expiry of the above lease, the lands were settled with the plaintiff, his father being dead by that time, for 9 years from 1308 to 1316. The plaintiff's case is that the lands in question have been in his possession for a continuous period from 1299 up to date as a cultivating tenant and *raiyat* thereof and that the lands were sub-let to the defendants only for a year in 1315 and that they fraudulently got their names recorded in the survey record-of-rights as the occupancy tenants of the lands and the plaintiff is a tenure-holder. The survey record-of-rights was finally published in 1912. The plaintiff disputes the correctness of the entry and seeks a declaration with respect to his status as occupancy raiyat and that of the defendants as merely Shikmidars. The tenants defendants urge that they have been in

posse sion of the disputed lands from before the date of settlement relied upon by the plaintiff and assert that the entries in the record-of-rights are correct.

Therefore the simple question for determination in the case is whether the plaintiff is a cultivating tenant of the lands in question, or is a tenure holder.

"Section 5 of the Bengal Tenancy Act defines "tenure-holder" as meaning primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors-in-interest of persons who have acquired such a right". Clause (2) of the section defines "raiyat" as meaning :—

> "Primarily a person who has acquired such a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest of persons who have acquired such a right."

Clause 3 of the section says

> "A person shall not be deemed to be a *raiyat* unless he holds land either immediately under a proprietor or immediately under a tenure-holder."

Clause 4 says

> "In determining whether a tenant is a tenure-holder or a *raiyat*, the Court shall have regard to (*a*) local custom and (*b*) the purpose for which the right of tenancy was originally acquired."

Clause 5 says

> "Where the area held by a tenant exceeds one hundred standard *bighas*, the tenant shall be presumed to be a tenure-holder until the contrary is shown."

In the present case the land in dispute is only 42 acres 33 decimals, and the lands settled by the plaintiff per Pattas (Exhibits 1 and 2) referred to above did not exceed 100 standard bighas. Therefore clause (5) has no application and there will be no presumption as to the plaintiff being a tenure-holder.

The plaintiff was let into the occupation of the lands by means of two *Pattas*, referred to above, of such a recent date as the year 1299, (that is 1891). The terms of these *Pattas* clearly indicate that the lands were let out for the purpose of cultivation. The lessee was by the terms of the *Patta* prohibited from making settlement of the lands with any other person, or granting *Shikmi Patta* in respect thereof, and from planting any kind of trees or bamboos or building houses on the lands which would naturally interfere with the cultivable nature of the land. There is also a clause in the lease that the lessee will keep the land in his *sir zerait* of cultivation

The aforesaid terms of the *Patta* not only make the purpose of the tenancy strictly agriculture or cultivation, but also prohibited the lessee from establishing tenants thereon, a right which belongs to a tenure holder under the definition referred to above. Therefore the leases whereby the plaintiff and his father were granted these lands are clear, and unambiguous and explicit to confer only the cultivating rights and are against his acquiring the right of a tenure holder. Here, the determining factor as to the status of the plaintiff is to be found in the leases which declare the purpose for which the right of tenancy was originally acquired, as is expressly set forth in sub-clause (*b*) of clause (4) of Sec. 5.

The learned Vakil on behalf of the appellants very frankly and rightly concedes that upon the terms of the lease the plaintiff could not be held to be a tenure-holder. The evidence in the case given by the parties clearly shows, that the lands were let out for cultivating purposes; that the plaintiff cultivated it for some time and thereafter the defendants. This is the evidence on behalf of the defendants themselves, for it is admitted by the defendant himself in his deposition that the plaintiff's father first got a lease 33 years ago in respect of these lands and thereafter the plaintiff got it.

Therefore the survey record-of-rights is obviously incorrect. The lands were at that time held by the defendants appellants under a sub lease as Shikmidars under the plaintiff and therefore the survey authorities recorded the plaintiff as a superior landlord of the appellants describing his status as a tenure-holder; whereas the plaintiff

was only a cultivating raiyat and the defendants were Shikmidars under him. It is said that it appears from the order sheet (Exhibit A) of the survey proceedings that the plaintiff himself was present in person at the time during the survey proceedings, but he objected only to the amount of rent payable by the defendants and did not make any objection as to his status or that of the defendants as recorded in the proceedings under S 103(A). This may be so, but the presumption afforded by the survey record-of-rights, is a rebuttable one. The conduct of the plaintiff might strengthen the presumption which nonetheless remains rebuttable. The question is whether in the present suit, which is brought within six years from the final publication of the survey record-of-rights, the plaintiff has been able to rebut the presumption and to show that the entries therein are incorrect.

The plaintiff in this case has been able to show from the very *Pattas*, the documents whereby he was let into the occupation of the lands, that the purpose of the tenancy was only for cultivation and therefore the entries in the survey record-of-rights are on the face of them incorrect. It may be that the survey authorities did not apprehend the true scope and meaning of section 5, namely, that where the purpose for which the tenancy was originally created is known and clearly proved, then no other presumption as to the tenancy being otherwise than what the original purpose is, is admissible. Therefore the defendants-appellants were merely Shikmidars of the plaintiff.

But it is said that the alleged settlement of the land in question, which was made by the plaintiff with the defendants in the year 1315, must be held to be impossible or improbable in view of the fact that the survey operations had then already commenced or were about to commence. It is said that the plaintiff at that stage would not sub-let any land lest the defendants would have been successful in recording their names as occupancy raiyats, as they have done in the present case. This again is only a probability. The Court below has held upon the evidence in the case that the settlement was made in the year 1315, only for a year. This inference he draws from the absence of any rent receipt filed by the defendants-appellants showing that they held the lands prior to 1315. Therefore there may be probabilities on both sides, namely, as to whether the lands were held by the defendants before 1315, or whether they were let into the occupation thereof for the first time in 1315. But the question as to when the lands were settled by the defendants with the plaintiff does not go to the root of the case, namely, as to whether they had any status higher than that of a Shikmidar. To prove that, it was said that they were holding these lands long before the plaintiff came upon the scene and took the lease in the year 1299. The case set up by the defendants has signally failed. The learned Subordinate Judge very rightly points out that if the defendants were holding the lands from before 1299 they would certainly have used the rent receipts granted by the Dumraon Raj, but they have not done so.

The following passage from the judgment of the learned Subordinate Judge would seem to dispose of the contention of the defendants conclusively :—

"The evidence on the side of the defendants shows that the lands came into the possession of the plaintiff's father at least 35 or 36 years ago. They say, however, that they had obtained raiyati settlement thereof 4 or 5 years before that; but apart from the oral testimony of a few of the defendants and some of their caste-men, there is nothing substantial in support of that story, though it was capable of being proved by very satisfactory evidence. It is said that at the time of the settlement of the lands to them by Raj Tehsildar, Khesra papers were written out showing how much land was let out to each and the rental thereof; that those Khesra were signed by the tenants and that they got documents from the said Tehsildar with every detail entered therein. Not a scrap of those papers is forthcoming and no attempt was made to have those papers before the Court. It is further said that rent receipts were received from the Raj; but not a single one thereof is forthcoming. The allegation is, however, that owing to flood all those papers were washed away. That may or may not be true so far as the papers

in possession of the tenants defendants are concerned, but cannot, on any account, be alleged with regard to the papers in the possession of the Raj. It cannot be denied that the Raj is on the side of those tenants defendants, and it cannot, therefore, be urged, with any show of reason, that it was difficult for them to have those papers from the proprietor. Again it appears that the lands were every year measured on behalf of the Raj and that it was the plaintiff's servants who got the work done, the defendants or any of them not taking any interest therein. If they had any Qaimi right in the lands, as they now allege they had, they would not certainly have kept themselves so much aloof while the lands were being measured. Furthermore, these measurement papers, if produced, would surely have shown whether the defendants had any concern with the lands before 1315 fasli. The defendants, however, remained quite apathetic in the matter."

Thus the learned Subordinate Judge is right in declaring the status of the defendants as mere Shikmidars.

Mr. Siveshwar Dayal then contends that, although the plaintiff was a cultivating tenant of the land, he has failed to show that he is a "Gujashtadar *raiyat*" thereof which he seeks to be declared.

This contention is based upon the words "*zerait*" occurring in the following concluding sentence of the lease:—"after the expiry of the term of the Patta, the proprietor has power by all means to keep the land in his seer *zeraitor*, make settlement with the aforesaid persons or with some other person."

The use of the word "*Zerait*" in the above passage is in itself not sufficient to show that the land was really *zerait*. The words "*seer zerait*" there really mean cultivation, that is, after the expiry of the lease the proprietor reserves to himself the right to cultivate the land himself or to settle it with some other person. If the lands were *zerait*, they would have been described in the beginning of the lease where the lands were mentioned as is usually done in leases of *zerait* lands. The description of the land as *zerait* in a lease will not be any evidence to show that the land was really zerait, for there must be evidence under Sec. 120 of the Bengal Tenancy Act to show either that the land was held in the *seer* cultivation of the landlord for 12 continuous years' immediately before the passing of the Act, or that it was recognized by village usage as proprietor's *Khamar*, *zerait*, *seer*, *nij jote* or *Kamat*. There is no evidence under clause (*a*) of the section as to the land having been ever in the direct possession of the landlord before the passing of the Bengal Tenancy Act, nor is there any evidence of the land being known or recognized by village usage as *zerait* of the landlord. Clause (2) of S. 120 allows the evidence of the lands being specifically let as proprietor's private land before the 2nd of March 1883; but the lease in question, assuming that the land was let out as *seer zerait*, which was not, was of the year 1891 long after the year 1883. Therefore the leases in this case cannot be accepted as any evidence of the character of the land being *zerait*.

On the other hand, the defendants-appellants in their written statement admitted the raiyati interest of the lands, inasmuch as they claimed their occupancy right in the same. The Maharaja also did not claim the lands as *zerait* in his written statement. The evidence in this case of both sides pointed to the land being the *raiyati*, and not *seer zerait*. If really the land was the *seer zerait* and the plaintiff had not acquired any right of occupancy and was a mere trespasser after the expiry of the lease, certainly the Maharaja would have contested the claim of both the plaintiff and the defendants as being trespassers of the land, he himself being entitled to *seer* possession of the same after the expiry of the lease, as he did successfully in the case of *Jogendra Singh* v. *Maharaja Kesho Prasad Singh* (1) but no evidence has been given on his side, though he was a contesting defendant, that the land was really *zerait* and let out as such. The Maharaja has not appealed even from the decree and the finding of the Court below. He does not even claim to raise the question as to whether the land was *zerait* or not.

(1) A. I. R. 1922 Patna 420.

In the circumstances therefore the only inference is that the land is not *zerait* and that the defendant having held it as a *raiyat* for a continuous period of over 12 years under the lease acquired the right of occupancy therein, and that the learned Subordinate Judge was right in declaring his status as Gujashtadar *raiyat*.

The result is that we uphold the decision of the Court below and dismiss the appeal with costs to the plaintiff respondent. *Appeal dismissed.*

A.I.R. 1922 Patna 429.

JWALA PRASAD AND BUCKNILL, JJ.

Jogendra Singh and others—Appellants

v.

Kesho Prasad Singh and others—Respondents.

Appeal No. 70 of 1919, decided on 28th June 1922.

Landlord and Tenant—Tenancy—Creation of —Lessee for a term of year cannot create another tenancy beyond his term.

A lessee who is a *raiyat* for a term of years, cannot create tenancy rights in favour of another extending his own term against the wishes of his landlord. A tenancy can be created only by a contract either express or implied between the landlord and the tenant or by statute. [P 430, C. 2.]

L. Narayan Singh and *G. C. Pal*—for Appellants

Shiva Saran Lal, Kulwant Sahay and *N. N. Sinha*—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit in ejectment.

The plaintiff is the Maharaja of Dumraon. Briefly speaking his case is that the land in suit measuring about 125 *bighas*, situate in two *Mouzas* called Katar and Batra is his *zerait* land known as Deori *zerait* land, and was let out from time to time for a fixed term of years; the last lease was in favour of Nakchhedi Lal and Ram Bahadur Singh, from 1307 to 1316; that on the expiry of this lease it was again given to Ram Bahadur Singh under the orders of the Court of Wards which was then in charge of the estate, for three years from 1317; that defendants 1 to 46 are residents of the same village and are related to each other and they in collusion and with the consent of one another took various proceedings with a view to establish their raiyati claim to the land in suit and to the prejudice of the plaintiffs, and refused to give up possession after the expiry of the lease in spite of the notice served upon them. The plaintiff therefore brought the present action in the Court of the Subordinate Judge of Shahabad for recovery of possession of the land in dispute and for mesne profits.

The Court below has decreed the plaintiff's suit for possession directing the amount of mesne profits to be determined later on, evidence on which was reserved.

There were 46 defendants in this case; some of them did not enter appearance and some did not contest the plaintiff's claim. The defendants mentioned in Issue No. 4 of the Court below claimed portions of the disputed lands as their *gujashta* holding.

The defendants 25 in number have appealed to this Court and repeat the contentions which were made on their behalf in the Court below and disposed of by the learned Subordinate Judge. They dispute the finding of the Court below that the land in dispute is their *zerait* land.

The land has been described as *zerait* in all the *Kabuliats* whereby the land was in possession of the lessees from time to time. The first *Kabuliat* (Exhibit 7) is dated the 20th July 1872, for 1280 to 1286, executed by Hari Singh. The second *Kabuliat*, Exhibit 7(*b*) is dated the 27th May 1879, executed by Gopi Raut, for 1287 to 1296. The third *Kabuliat* (Exhibit 2) is dated the 18th April 1888, executed by Nakchhedi Lal and Rajpat Singh, for 1296 to 1306. The fourth *Kabuliat* (Exhibit 1) is dated the 23rd June 1899, executed by Nakchhedi Lal and Ram Bahadur Singh, defendant No. 1, for 1307 to 1317. All these *Kabuliats* describe the land as *zerait* of the proprietor, the lessee having covenanted not to "sub let the leasehold property on Kaikana settlement unless the proprietor permits him to do so and that on the expiry of the term of lease the proprietor shall be at liberty to settle the land with whomsoever he may like." The lessees were further prohibited from planting any tree themselves or through anybody else. This was obviously with the object of preserving the cultivable nature of the land, for the plantation of such permanent trees would impair the character of the land for culti-

vation purposes. In the body of these *Kabuliats* the land is described, in places more than one, as the *zerait* of the proprietor and the object of the covenants in the lease was to preserve that character. Ram Bahadur Singh defendant No. 1 who is one of the executants of the last *Kabuliat* (Exhibit 1) cannot, in face of the covenants in the document, contend that the land in suit was not the *zerait* of the proprietor, or that he or any of the lessees had any right to settle the land for term exceeding those of their own.

The Dumraon Raj Treasury Chalan, dated the 26th May 1909, (Exhibit 3) shows payment of rent of the land in dispute in the treasury of the Raj. It describes the land as *zerait* Katar and Barah Batra. This Chalan bears the signature of lessee Ram Bahadur Singh, defendant No. 1. Even the rent receipts filed on behalf of the defendants describe the land as *zerait*; in some of the receipts the tenants have been described as Shikmidars, in some as Thicadars and in others as Jotedars. The oral evidence adduced in this case also shows that the land was commonly known as the Deori *zerait*. Even the defendant, witness No. 2, a son of the former lessee, and the lessee himself for a pretty long time admitted in cross-examination that the land in suit is called the *zerait* land. Mr. Lakshmi Narain Singh contended that the description in the *Kabuliats* and in the rent receipts only showed that the Badhar in which the land lies is called *zerait*, but that the land itself is not *zerait* in the true sense of the term as referred to in Chapter XI of the Bengal Tenancy Act. The learned Subordinate Judge has pointed out that it is true that in this case the landlord has not been able to prove that the land in question was cultivated as *zerait* by the proprietor himself with his own stock and by his own servants for 12 continuous years immediately before the passing of the Act as is required by clause (*a*) of S. 120; but that the land was recognized by village usage as proprietor's *zerait* land, as is required by clause (*b*) of the Section.

Now, two of the leases, Exhibits 7 and 7 (*a*) are of a period before the 2nd of March 1883, and these *Kabuliats* show that land in question was let out as proprietor's private or *zerait* land. The description of the land therefore in these exhibits assuming for the sake of argument that it referred to the Badhar shows the notoriety of the land in the locality and is an evidence which under the section may be considered as proof of the character of the land being *zerait*. We therefore agree with the view of the Court below that the land in dispute has been proved to be the *zerait* land of the plaintiff.

Mr. Lakshmi Narain Singh then contends that even if the land were *zerait* land, the appellants acquired tenancy right by being in possession thereof as tenants for a long period, more than 12 years prior to the institution of the suit. This contention is based upon the rent receipts filed in this case (Exhibits A, B, C, D, E, F and G series). All these receipts are of the time of the lessees. There is no receipt of a prior date. These defendants, claim that they were let into the occupation of the land by the lessees of the Dumraon Raj from time to time and, although they did not take any settlement directly from the Raj, they are entitled to claim the tenancy right against the Raj. The proposition put forward by Mr. Lakshmi Narain Singh appears to me to be fundamentally unsound. Tenancy is created by contract, either express or implied, between the landlord and the tenant, or by statute. In the present case there was no privity between the Raj and the defendants. There was therefore no tenancy created by contract. The lessees had no authority to settle the lands, and to create *raiyati* interest therein. Therefore the Dumraon Raj, proprietor of the land is not bound by the settlement made by its lessees in excess of the rights conferred upon them by the several leases. Now, their possession over the land for a number of years would not in the least create by statute any tenancy right in them as against the Dumraon Raj, inasmuch as there must be at the inception a tenancy created by a contract between the landlord and the tenant; and holding possession of the same as a tenant or *raiyat* for a continuous period of 12 years might under the statute called the Bengal Tenancy Act create a right of occupancy against the will of the landlord. As observed above, these defendants did not take any settlement of the land directly from the Maharaja, nor was there any acquiescence on

the part of the Raja in their holding possession of the land. After the expiry of the lease no receipt has been granted by the Raj and there was therefore no recognition and consequently no implied contract of tenancy in favour of the defendants.

Mr. Lakshmi Narain Singh relied upon the well known case of *Binad Lal Pakrashi* v. *Kalu Parmanik* (1) in support of his contention that, although the lessees of the *zerait* land had no occupancy right in themselves and were merely trespassers after the expiry of the lease, yet the right created by them in favour of the defendants will be binding upon the real proprietor, the Maharaja of Dumraon. I have tried to quote the essence of that ruling in the way that Mr. Lakshmi Narain Singh put it so as to make it applicable to his contention; but that is not the essence of the ruling, nor is that principle deducible either directly or by implication from any thing observed by their Lordships in that case. There the title was unknown. The man in possession of the subject-matter and exercising all the powers and functions of a title-holder made settlement with tenants who *bona fide* believed that the lessor had title in him. It ultimately turned out that the lessor was only a trespasser, and that the real proprietor was a third person. Here there was no mistake as to the rights of the lessees who are said to have granted the tenancy right to the defendants. It was well known that the proprietor of the land was the Maharaja of Dumraon. It was equally known that the lessees had only limited interest for a fixed term of years.

Therefore the principle of that ruling will not apply, and it was pointed out in a later case, which I appropriated in my decision in the case of *Kuman Das* v. *Gulam Ali Nadaf* (2) that the case of *Binad Lal Pakrashi* v. *Kalu Parmanic* (1) "is an encroachment upon the ordinary rule of law, *viz.*, a grantor is not competent to confer upon the grantee a better title than what he himself possesses and it must be cautiously applied and is not to be extended." The result will be disastrous if the decision in that case were extended to apply to the facts of the present case. A lessee then holding for a term of years: say for 5 years, who after the expiry of that term ceases to hold the land, will upon the contention of Mr. Lakshmi Narain Singh be able to grant permanent right of tenancy upon a third person without the permission and knowledge of the landlord. Nothing will be more profitable than to take a lease of short term and to settle it on large premiums with third persons giving them permanent right of occupancy against the landlord. The proposition is preposterous. Here, the lease of defendant No. 1 expired in 1917 and was extended by permission of the Court of Wards, which then had charge of the property, till 1319 fasli. After the expiry of the lease defendant No 1 became a trespasser All sub-tenants described as Shikmidars, Thicadars and Jotedars (call them by whatever term you like) must also go with the lessee, defendant No. 1. They did not ever acquire the right to remain on the land even for a moment beyond what defendant No. 1 had. The title was derived from defendant No. 1, and the previous lessees, and their title extinguished also with the title of the former. Therefore the rent receipts in the present case do not help the defendants.

The survey entry in the record-of-rights was then relied upon: but this entry also does not help the defendants, for in respect of the Katar land the rights of the defendants have been described as Qaimi zerait, and in respect of the land in Mouza Barah Batra the defendants 1 to 6, the lessees, are shewn as holding the land as their bakasht, some in their own possession and most of it in possession of the remaining defendants Therefore the survey entry described the land as *zerait* and the *bakasht* of defendants 1 to 6, the lessees. It cannot in any way support the claim of the defendants. The effect of this survey entry would seem to have been nullified by the decision of this Court (Exhibit 13), dated the 27th March 1916, brought by the defendants against the plaintiff.

The defendants appellants in the present case disputed the right of the Maharaja to distrain the crops for arrears of rent describing the land as having been settled with defendant No. 1, the lessee. The contention of the defendants was, in that

(1) (1893) 20 Cal. 708 (F. B.)
(2) (1920) 1 P. L. T. 184=57 I. C. 328.

case as in the present one, that they were the tenants of the land and that the defendant No. 1 was tenure-holder and consequently the distraint proceedings, which applied only to the case of cultivating tenants, were illegally instituted by the Maharaja. It was held there that the cultivating tenant was Ram Bahadur Singh lessee, who was defendant No. 2 in that case, and that the defendants-appellants in the present case, the appellants before us, could not claim to be tenants of the land as holding directly under the Maharaja. The leases in the present case were all construed as conferring only the right of cultivation in the land in suit upon the lessees including defendant No. 1. In this view the lessee was a raiyat for a term of years, and a raiyat cannot create a tenancy right in favour of another extending his own term. For all considerations we think that, after the expiry of the lease not only the lessee defendant No. 1 but all the defendants, who may have been holding the land under a settlement made by him, must be treated as trespassers: vide the case of *Jajarnath Das* v. *Janki Singh* (3). As the landlord is therefore entitled to recover *khas* possession of the land, the defendants are also liable to mesne profits.

The appeal must therefore be dismissed with costs to the plaintiff respondent only, who has contested the appeal.

Now, defendants 10, 15, 29 to 31, who are respondents in this case, say that they had in their written statement disclaimed all connections with the land in dispute and therefore they are not liable to any Wasilat. Their contention is that the concluding words in the penultimate paragraph of the judgment of the learned Subordinate Judge apply to defendants Nos. 1 to 6, who had by means of a Salehnama entered into an agreement with the plaintiff for reduction of the *Wasilat*, and do not apply to the defendants such as those referred to above who did not contest the plaintiff's claim. No doubt these defendants stated in their written statement filed on the 27th of November 1915 (corresponding to Aghan 1323) that they were no longer in possession of the land. Therefore it would seem that they are not liable for mesne profits after the institution of the suit; but it is not clear whether they were or were not in possession of the land after the expiry of the term up to the institution of the suit, that is, 1320, 1321 and 1322. The evidence on this point on behalf of the plaintiff was reserved. The defendant No. 10 (Witness No. 9) examined himself and said that these defendants had given up the land from 1320. It will therefore be open to these defendants when the plaintiff gives evidence as to the amount of *Wasilat*, to show that they had abandoned the lands from 1320 and that they themselves were not responsible directly or indirectly for the lands not being in possession of the plaintiff during the years in suit. In any case, the other defendants who disputed the right of the plaintiff, and according to the finding of the Court below, kept him out of possession, are liable to the plaintiff for mesne profits of the years in suit.

Bucknill, J.—I agree. *Appeal dismissed.*

(3) A. I. R. 1922 P. C. 142=1 Pat. 340=49 I. A. 81 (P. C.)

A.I.R. 1922 Patna 432

DAWSON MILLER, C. J. AND MULLICK, J.

Tian Sahu—Plaintiff-Appellant

v.

Mulchand Sahu and others—Defendants-Respondents.

L.P.A. No. 77 of 1921 decided on 18th May 1922, from the decision of Ross, J. in S.A. No. 25 of 1921 dated 21st July 1921.

Ejectment—Evidence given by both sides as to dispossession but judge finding difficulty in arriving at conclusion—Court can consider probabilities of the case.

It is only in cases where there is no evidence of the plaintiff as to dispossession or, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession and it must not be considered that, merely because where evidence was given by both sides and the learned Judge who had to determine the case, had a difficulty upon that evidence or even considered that evidence not altogether satisfactory, he was not entitled to give weight to the probabilities of the case or to any presumptions which might properly arise from the fact that the plaintiff had previously been in possession and had title. Merely because the Judge has some difficulty in arriving at a conclusion upon the evidence or that he does not consider the evidence altogether satisfactory, he is thereby not precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumption which might arise from the plaintiff's title. [P. 434, C. 1, 2.]

Bhagwan Prasad—for Appellant.

Harnarayan Prasad—for Respondents.

Dawson Miller, C. J.—In this case the plaintiff who is the appellant before us purchased the land in suit from one Mulchand Sahu in June 1917 and according to his case came into possession and was a few months later dispossessed by the defendant Matuk. He thereupon instituted the present suit claiming a declaration of his title and possession after ejectment of the defendant Matuk.

The learned Munsif before whom the case came for trial found upon the facts that neither the plaintiff nor his predecessor Mulchand had in fact been in possession of the land at any period within 12 years antecedent to the suit and he dismissed the claim. The case put forward by the defendant Matuk and supported to some extent by Mulchand was that in the year 1903 Mulchand had transferred this very land in exchange for another piece of land to the defendant Matuk and that Matuk had been in possession of the land ever since. The plaintiff questioned the genuineness of that transaction and the defendant questioned the genuineness of the *kabala* executed in favour of the plaintiff in 1917. On the finding come to by the Munsif it did not become necessary for him, in his opinion to decide any question about the genuineness of the title of either party.

The case then went on appeal to the District Judge and he considered that the oral evidence of the parties as to possession was not satisfactory on either side and he referred to certain discrepancies in the evidence which had been pointed out by the Munsif, and apparently the view which the learned District Judge arrived at was that, in so far as the oral evidence went, although he nowhere says that it was of no value, nevertheless was not such as without reference to probabilities and other circumstances arising in the case, would be sufficient in itself to enable him to come to a satisfactory decision on the question of possession. He had no doubt, however, that the exchange transaction set up by the defendant in 1903 was not genuine and in dealing with that part of the case he says, "the land which is said to have been given in exchange is also said to have been the abandoned holding of Babu Kurmi and others", that is, that the land which Matuk is said to have given in exchange for the land in suit did not belong to Matuk at all. He then goes on, "but action under Section 97 of the Bengal Tenancy Act was not taken till 1917. Moreover the date of the *chithi*" that is, the *chithi* which evidenced this transaction of 1903, "has certainly been altered; and though it is not possible to say what the real date was, the inference to be drawn from the alteration must be hostile to the defendants-respondents."

Now that seems to me to be a distinct finding that upon the evidence before him, which was put forward in support of the defendant's possession and title (I mean the defendant Matuk), the natural inference must be drawn that Matuk's possession was in fact not as long as he alleged and as it was necessary for him to allege in order to obtain a title by adverse possession. The inference drawn from this by the learned Judge seems to me to be that it was certainly not more than 12 years ago and must have been within 12 years that Matuk ever had anything to do with the land. Then he deals with certain huts and structures upon the land which had been dealt with by the Munsif as evidence in support of the defendant Matuk's possession and comes to the conclusion that no satisfactory inference could be drawn from their appearance as to how long they had been upon the land and, therefore, that part of the evidence was treated by him as being of really no assistance. He then further says, "the story of the exchange having failed" that is, the exchange by which Matuk claimed his title "the possession of Matuk is probably much later than he asserts."

The learned Judge then finds that, in his opinion, Matuk had entirely failed to prove possession for 12 years before the suit. Then on the question of the plaintiff's title he came to the conclusion that as Mulchand's previous title and possession were admitted by Matuk and as Mulchand admitted the execution of the *kabala* in favour of the plaintiff and as Mulchand had failed to prove that the *kabala* was void for any reason and as Matuk had failed to prove adverse possession for 12 years he, therefore, held

that the appellant's claim be decreed and he allowed the appeal.

From that decision, the defendant appealed to this Court and the appeal was heard before a single Judge. The learned Judge, before whom the case came, was of opinion that the findings arrived at by the learned District Judge in first appeal were not sufficient to entitle the plaintiff to a decree and he considered that the decision of the Full Bench of this Court in *Raja Shiva Prasad Singh* v. *Hira Singh* (1) governed the case. He, therefore, allowed the appeal and dismissed the plaintiff's suit.

The reason why the learned Judge of this Court came to that conclusion was because the District Judge had held that the oral evidence of possession was not satisfactory on either side, and he appears to have thought that in such a case it was not open to the learned District Judge, who was the ultimate Judge of fact, to take into account either the probabilities of the case or any presumption that might arise in favour of possession remaining in the person who had proved his title.

The Full Bench case to which I have referred did not lay down the proposition that in no case could the probabilities and presumptions be taken into account The rule there laid down was that it is only in cases where there is no evidence of the plaintiff as to dispossession or, what amounted in the opinion of the Full Bench to the same thing, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession and it must not be considered that merely because where evidence was given by both sides and the learned Judge who had to determine the case had a difficulty upon that evidence or even considered that evidence not altogether satisfactory, that in such circumstances he was not entitled to give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title. I think it would be extending the doctrine laid down in that case too far if we were to say that merely because the Judge had some difficulty in arriving at a conclusion upon the evidence or that he did not consider the evidence altogether satisfactory, he was thereby precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumptions which might arise from the plaintiff's title.

What happened in the present case was that the learned Judge considered that although there was evidence on both sides it was not altogether satisfactory. He then dealt with the probabilities. He pointed out that from the defendant's own evidence an adverse inference must be drawn against him as to the actual date when this exchange transaction set up by him took place. The date had been altered and that, I think, was a very important point in assisting the learned Judge to come to a conclusion upon this vital matter in the case, namely, when did the defendant Matuk first have anything to do with this property. If you find him putting in a document in support of his claim intending thereby to shew that he had in fact been in possession of the property for over 12 years and you then find that the date of that document has been deliberately altered, I think, a very strong presumption must arise against him. This is not a case where no evidence has been given. It is a case where both parties have spoken to their possession although the actual oral evidence is such that the Judge had great difficulty in coming to a conclusion upon it. There were, however, as I said, the other circumstances in the case and there was the fact that the plaintiff's title was proved and the plaintiff's predecessor's possession was admitted at all events up to the period when Matuk first had anything to do with the property. There was the further point that the Judge entirely failed to believe the evidence put forward by Matuk and that was a matter which he was entitled to take into consideration just as their Lordships of the Privy Council did in the case of *Ranjeet Ram Pandey* v. *Goburdhun Ram Pandey* (2) where they observed :—

"It may also be observed that their Lordships are not disposed to give credit to the evidence brought forward by the appellant, inasmuch as his case which rested upon the theory that he had ac-

(1) A.I.R. 1921 Pat. 237=6 P.L.J. 478 (F.B.)

(2) (1873) 20 W.R. 25 (P.C.)

quired this property for himself, has been found to be wholly untrue."

That was a case where their Lordships had difficulty in coming to a conclusion upon the facts of the case. In that case there was undoubtedly evidence and strong evidence upon both sides, but in the contradictory state of the evidence they said that it was difficult to come to a conclusion which was satisfactory to the mind, where the evidence was so conflicting and in that case they regarded the probabilities of the case and they further regarded the fact that the appellant's evidence upon another part of the story had been entirely disproved. This is not, in my opinion a case in which there is no evidence or where, what amounts to the same thing, the evidence is absolutely valueless.

There was evidence on both sides and I think the learned Judge was entitled to arrive at the conclusion he did by taking into consideration and weighing that evidence and the probabilities of the case coupled with the fact that the plaintiff originally or rather his predecessor was undoubtedly proved to have been in possession of the land. The result is that the appeal is allowed, and the plaintiff's suit is decreed with costs here and in the courts below.

Mullick, J.—I agree. The only point is whether the findings in this case bring it under the rule propounded in the Full Bench decision of *Raja Shiva Prasad Singh* v. *Hira Singh*. (1) In my opinion the findings are not sufficient to attract the operation of that rule. *Appeal allowed.*

A. I. R. 1922 Patna 435.

(FULL BENCH.)

DAWSON MILLER, C. J., MULLICK AND JWALA PRASAD, JJ.

Shebalak Singh—Petitioner.

v.

Kamaruddin Mandal and others—Opposite Parties.

Cr. Rev. No. 298 of 1922, decided on 19th June 1922, against an order of the Dist. Mag., Purnea, dated 3rd May 1922.

(a) *Interpretation of Statutes—Courts cannot import words limiting operation of section.*

To read into a section words limiting its operation would be to usurp the functions of the Legislature which it is not within the competence of the High Court or any other Court to do. [P. 436, C. 2.]

(b) *Cr. P. C., Ss 144, (4) and 145—Scope—Government of India Act, S. 107.*

There is no reason why the power given in the 4th clause of the section should be confined to cases where there has been a change of circumstances since the original order was made. There is nothing in the wording of the 4th clause which limits the powers of the Magistrate in the sense indicated, and I can see no valid reason why words of limitation should be read into the section which would have the effect suggested. The word "alter or rescind" clearly empower the District Magistrate to modify or cancel the order upon any ground whatsoever. [P. 436, C. 2, P 437, C. 2.]

Per *Mullick, J*—Where S. 107 or S. 145 will meet the requirements of the case, S 144 is not an appropriate remedy, and if it is found that the danger was not so imminent that it could not be otherwise averted an order under S. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another, whose claim to possession is a mere pretence, is threatening to interfere with that possession, the Magistrate is clearly entitled to resort to the special summary procedure of S. 144 if immediate prevention or speedy remedy is desirable Sometimes it may even be necessary to take action against the party who is actually in possession, but in every case it must be shown that the condition required by the section exist, What is deprecated is the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145. [P. 438, C. 1, 2]

Per *Jwala Prasad, J.*—S. 144 is a larger and more general section than S. 145. An order under that section can be made under various circumstances including a danger of a breach of the peace S 145 is of limited scope and applies only when there is a danger of a breach of the peace. The former is discretionary; the latter is mandatory. The latter provides for a thorough enquiry into the dispute as to possession of the parties which tends to breach of the peace. Therefore when the special condition of S. 145 is fulfilled S. 144 then yields to S. 145 in the sense that when he finds that there is a real dispute tending to a breach of the peace the Magistrate is bound to institute a proceeding under S. 145 and enquire into the possession of the parties, irrespective of any order that he might have originally passed under S. 144. [P. 441, C. 1]

When one party is clearly in the wrong and threatens to usurp the rights of another, who is in actual possession of the land in dispute, the proper remedy is an order under S. 144 or S. 107, Criminal Procedure Code.

G. C. Pal—for Petitioner.

Sultan Ahamad—for Opposite Parties.

Dawson Miller, C. J.—The petitioner in this case moved the Sub-Divisional Magistate to take action under S. 144 of the Criminal Procedure Code against the Opposite Party and pass orders restrain-

ing them from interfering with his possession of certain land. The Petitioner's case was that he purchased the land at a Court sale and obtained delivery of possession from the Court in August 1921 and that a speedy remedy was necessary to prevent him from being obstructed, annoyed or injured by the Opposite Party. When the party presented themselves before the Magistrate it appeared that the Opposite Party were the usufructuary mortgagees of the land under a mortgage dated November 1920, and that the sale to the Petitioner in 1921 had been declared at the time to be subject to the mortgage and that the mortgagees were in actual possession; and, at the instance of the latter who complained that their possession had been obstructed by the Petitioner, the Magistrate passed an order under S. 144 directing that the Petitioner should abstain from interfering with the possession of the Opposite Party for a period of two months.

The petitioner then moved the District Magistrate to rescind or alter the order under Cl. 4 of the section. The grounds of the application as stated by the District Magistrate were (1) that the order of the Sub-Divisional Magistrate was not sound and, (2) that the Sub-Divisional Magistrate should have referred the Opposite Party to the Civil Court and upheld the Petitioner's possession.

The District Magistrate in view of certain rulings of this Court considered that he had no jurisdiction under S. 144 (4) to interfere and refused to entertain the application. The rulings upon which he relied are to the effect that the powers conferred by the 4th clause of the section are only exercisable, when it is shewn that the circumstances existing at the time the order was made had changed rendering the order no longer necessary. The petitioner now moves this Court against the order. He does not contend before us that the District Magistrate had power to rescind the order of his subordinate; on the contrary he says that the District Magistrate had no powers either of appeal or revision under S. 144 (4). his powers of interference under the 4th clause being confined to cases where circumstances have arisen, since the original order was made, rendering the continuation of the order unnecessary or an alteration of its terms, desirable as laid down by the rulings referred to, and as no new circumstances have arisen in the present case he admits that the District Magistrate could not have taken any action. Why he approached the District Magistrate at all if this contention is right, I have some difficulty in appreciating and no satisfactory explanation was forthcoming. The only reason that I can conceive for adopting the course taken is that he apprehended that this Court might refuse to exercise its powers of superintendence until all possible remedies by a Subordinate Court had been exhausted. For my own part I can see no reason why the powers given in the 4th clause of the section should be confined to cases where there has been a change of circumstances since the original order was made.

It seems to me that if the Magistrate has power to rescind an order previously made by himself or his predecessor or his subordinate under the section because the circumstances no longer require it to remain in force, he should equally have power to rescind it, if he is satisfied that it never ought to have been made. There is nothing in the wording of the 4th clause which limits the powers of the Magistrate in the sense indicated, and I can see no valid reason why words of limitation should be read into the section which would have the effect suggested. It is clearly desirable that a Magistrate should not interfere with an order once made under the section unless very good reasons are disclosed for doing so. It may be equally desirable that those reasons should be clearly defined in the section itself, but that is a matter for the Legislature and, as the section at present stands, the powers given are in no way limited to cases in which the circumstances have altered. To read into the section words limiting its operation in the sense contended for would be to usurp the functions of the Legislature which it is not within the competence of the High Court or any other Court to do.

It was argued before us however that this order originally made was one which was outside the scope of S. 144 (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 unauthorized order made without jurisdiction and that this

Court should exercise its powers of superintendence under S. 107 of the Government of India Act and set aside the order. No doubt this Court has interfered and exercised its jurisdiction in such cases, and if it could be shewn that the order in the present case did not come within the powers conferred by the first clause of S. 144 we would be entitled to interfere and set it aside.

It was also contended that an order which purported to be made under the first clause of the section but was not in fact authorised thereby could not be dealt with by the Magistrate under the 4th clause, not being an order made under the section at all, and that the Magistrate had no powers of revision in such a case It is unnecessary to determine this question or even to determine the exact limits if any, of the Magistrate's power under the 4th clause of the section as in my opinion the order originally made appears to have been properly made under the powers granted by Cl 1 and no ground for interference either by this Court or by the District Magistrate is made out. We might have sent the case back to be dealt with by the District Magistrate under the 4th clause but as the order appears to have been properly made by the Sub-Divisional Magistrate, acting under the first clause of the section, and as no other ground for interference is made out it would be a waste of time to remand the case to the District Magistrate merely for him to refuse the application. In my opinion this application should be rejected.

Mullick, J.—I am of the same opinion. If I have understood him correctly, the learned Vakil for the Petitioner puts his argument in two alternative forms.

"First," he says, "assume that this was a case in which the Sub-Divisional Officer had jurisdiction to make an order under S. 144, Cr. P. C. In that event the District Magistrate had jurisdiction to alter or rescind that order and he having declined to hear the Petitioner's application to this end, the Court might, but for the objection about to be mentioned, have sent back the case to him to be dealt with according to law. I admit that this course is in conformity with the practice of this Court which requires that the Petitioner shall exhaust his remedies in the Courts below before invoking the aid of this Court. But in this case the District Magistrate had no jurisdiction to grant my prayer and so I have a right to come direct to the High Court. He only had jurisdiction to alter or rescind the order on the ground that there had been a change in the circumstances since the making of the order but as I am attacking the propriety and legality of the order he had no jurisdiction to entertain my application."

The reply to these contentions appears to be this. It is true that there are some decisions of this Court which support the learned Vakil's construction of Cl. 4 of S. 144, but I think with the greatest respect that they unduly restrict the plain and unambiguous terms of the Statute. The words "alter or rescind" clearly empower the District Magistrate to modify or cancel the order upon any ground whatsoever. I am not impressed by the argument that to give the District Magistrate the power to examine the propriety and legality of the order would be to confer upon him powers higher than the Code accords to the High Court. The Legislature had chosen in appropriate language within the section itself to vest the District Magistrate with a wide and unrestricted power of review and to render him independent of the provisions relating to appeal and revision and it is not open to us by reference to questions of policy to endeavour to give that language an arbitrary and limited meaning. The High Court of Calcutta took a somewhat similar view in regard to S. 125, C. P C, which relates to the cancellation by District Magistrate of bonds for keeping the peace. *Nabu Sardor* v. *Emperor* (1).

I think therefore that the District Magistrate had jurisdiction to entertain the Petitioner's application but as the whole case is before us we should, in order to avoid delay, deal, with the application ourselves in exercise of our powers of superintendence.

The learned Vakil's alternative contention is that the Sub-Divisional Officer had no jurisdiction to make an order under S. 144, in a case where there was a *bona fide* dispute between two parties as to possession: that his order in this case was

(1) (1906) 34 Cal. 1 = 11 C.W.N. 25 (F.B.)

not an order under the section and that he had no jurisdiction to alter or rescind it; in other words the District Magistrate had no jurisdiction to cancel an order even if satisfied that it was made without jurisdiction.

The conclusion is startling and is clearly not supported by the section. It would indeed be a strange result, if the District Magistrate could interfere where his subordinate had acted with perfect regularity and not when he had been guilty of clear error and irregularity by assuming jurisdiction where he had no jurisdiction. The words "made under this section" in Cl. 4 of S. 144, clearly mean "legally made or purporting to be made under this section." No other interpretation would make the section intelligible.

As for the contention that a *bona fide* dispute as to possession ousts the jurisdiction of Magistrates to make an order under S. 144 we have been referred to a number of decisions of this Court which may possibly seem to give some support to that view but in this particular case it cannot be said that the point directly arises. Here it is clear that there was no *bona fide* dispute as to possession and that the Petitioner was acting unlawfullly in attempting to disturb a *zurpeshgi* mortgagee whose interest had been declared not to have passed by the sale at which Petitioner purchased.

But as the question has been argued at some length and is of some importance I think that I should state my view of the law.

Section 144 is of general application and contains nothing which ousts the Magistrate's jurisdiction in cases of *bona fide* dispute as to possession of land. But where Section 107 or Section 145 will meet the requirements of the case, Section 144 is not an appropriate remedy, and if it is found that the danger was not so imminent that it could not be otherwise averted, an order under Section 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another whose claim to possession is a mere pretence is threatening to interfere with that possession, the Magistrate is clearly entitled to resort to the special summary procedure of Section 144 if immediate prevention or speedy remedy is desirable. Sometimes it may even be necessary to take action against the party who is actually in possession, but in every case it must be shown that the conditions required by the section exist. What the Court deprecates is the habitual and unjustifiable use of Section 144 as a substitute for sections 107 and 145.

The expression *bona fide* dispute as to possession is ambiguous. A party may be acting with perfect *bona fide* in asserting a right to possession though he has no justification in law for doing so. On the other hand the materials before the Magistrate may show that evidence of possession on both sides is more or less equally balanced and that both are acting *bona fide*. Though jurisdiction to issue an order under Section 144 exists in either case the question will arise whether the issue of an order under Section 144 will not involve the recognition of condition which will coerce the Magistrate into taking action under section 145. The language of Section 145 seems mandatory but on this point I need express no final opinion here.

It remains to consider what order should now be passed by us.

We have as stated above decided not to insist upon the Petitioner's invoking the aid of the District Magistrate but to dispose of the whole matter ourselves. As to our jurisdiction there can be no doubt.

Now, if it had been shown that upon the information before the Magistrate the conditions required by Section 144 had not been established so that the use of Section 144 instead of Section 107 or Section 145 was a mere abuse of the process of the Court or that though made with jurisdiction the order had resulted in something akin to the denial of the right of fair trial, we should certainly have interfered in exercise of our powers of superintendence.

But here the proceedings disclose no such defects and consequently there is no reason whatsoever to interfere.

Jwala Prasad, J.—I would dismiss this application.

True, this Court has power under S. 107 of the Government of India Act to set aside an order passed under S. 144 of the Code of Criminal Procedure, if the order is outside the scope of S. 144, Cl. (1) and is *ultra vires* or has resulted in the denial of the right of fair trial as my learn

ed brother, Mullick, J., puts it. Mr. Pal, whohas argued the case on behalf of the Petitioner has failed to make out any such ground. He relies upon what he calls

"the recent delivery of possession through the Civil Court"

(to quote the words of ground No. 1 in his petition) as giving him *khas* possession of the land in dispute. The Petitioner, however, purchased the property in execution of a money decree obtained in a Small Cause Court. At the time of the sale the Opposite Party filed an usufructuary mortgage deed dated the 8th November 1920, on the basis of which he alleged that he was in possession of the property. The fact was noted, and the Petitioner purchased the property subject to the usufructuary mortgage. He could not possibly therefore obtain *khas* possession under writ of the Civil Court, dated the 17th August 1921. Mr. Pal contends that inasmuch as he had obtained possession under O. XXI, R. 95 of the Code of Civil Procedure he must be deemed to have been put in *khas* possession of the land by the Civil Court.

Assuming for the sake of argument that the writ of the Civil Court, *dakhaldehani*, purported to have been executed under O. XXI, R. 95, it cannot possibly have the effect of ousting the mortgagee whose rights were expressly declared and protected at the time of the sale. The writ of the delivery of possession upon which the whole contention of Mr. Pal is founded is of no avail to him, inasmuch as no actual possession of the land was delivered to his client. Mr. Pal then says that the *dakhaldehani* at least raised a *bona fide* dispute as to the possession of the property in question, which can only be enquired into in a proceeding under S. 145 of the Code of Criminal Procedure. There is no substance in this contention. The Petitioner purchased the property with full knowledge of the possession of the Opposite Party. His initial move in the matter by petitioning the Magistrate to take action under S. 144 of the Code of Criminal Procedure was obviously an attempt to obtain an order of the Magistrate with a view to interfere with the lawful possession of the Opposite Party. He must thank himself if the Magistrate finding that the Opposite Party and not he, was in possession of the land, passed an order against him under S. 144 restraining him from interfering with the possession of the Opposite Party. His claim for possession was therefore a mere pretence and with a view to interfere with the undoubted possession of the Opposite Party. There was therefore no dispute, not to speak of a *bona fide* dispute, as to the possession of the land in question. The case clearly comes within the observations made in the cases of *Gouri Dutt* v. *Gobind Singh*, (2). *Sukan Singh* v *Prayag Singh*, (3) *Jhaman Mahto* v. *Thakurai Mahto*, (4) *Kali Prasad Gope* v. *Dhadhai Gope*, (5) and *Nand Kishore Sao* v. *Bikan Singh* (6). In those cases it has been laid down that when one party is clearly in the wrong and threatens to usurp the rights of another, who is in actual possession of the land in dispute, the proper remedy is an order under S. 144 or S. 107 of the Code of Criminal Procedure. In such a case S. 145 has no application inasmuch as there is no dispute as to the possession of land. The Petitioner has therefore failed to show that the Magistrate's order was without jurisdiction. He has equally failed to show that there was any denial of a fair trial of the case. The order sheet of the Magistrate shows that he passed the order in question after having heard the parties and considered the documents produced by them. The finding of the Magistrate that the Opposite Party was in actual possession, and not the Petitioner is unimpeachable.

In this view it is unnecessary to decide as to whether in a *bona fide* dispute as to possession of the land the jurisdiction of the Magistrate under S. 144 is ousted and that the only section applicable is S. 145 of the Code. The point has been strenuously argued at the Bar and we have been invited to give our opinion. My learned brother, Mullick, J, has gone into this question. I would venture to give my own view on the point.

To me it appears that when in the course of proceeding under S. 144 of the Code of Criminal Procedure the Magistrate finds that there is a *bona fide* dispute as to possession of a land likely to

(2) (1918) 1 P.L.T 44=53 I.C 829.
(3) (1920) 1 P.L.T. 81=57 I.C. 95=1920 P H. C C 124.
(4) (1920) 1 P L T. 369=57 I.C. 449.
(5) (1921) 62 I.C, 590
(6) A.I.R. 1922 Patna 557.

cause a breach of the peace he is bound to immediately take action under S 145. Chapter XII comprising that section is headed " Disputes as to immoveable property." The section says—

"Whenever a District Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof . . . . he shall make an order in writing"

and enquire into the fact of actual possession of the subject-matter in dispute. The word " shall " is mandatory. Therefore when the conditions laid down in the section, namely, (1) that a dispute likely to cause a breach of the peace exists, and (2) that the dispute is with respect to any land or water the Magistrate is bound to take action under S. 145 and to declare that the party found in possession shall be so maintained until evicted therefrom in due course of law, or is he unable to decide which of the parties is in possession, to attach the subject-matter under S. 146. The object of S. 145 is to provide effectively against a breach of the peace by making a permanent order regarding the possession of the parties.

S. 144 is a temporary measure which the magistrate in his discretion may adopt for the immediate prevention amongst others of "a disturbance of public tranquility or a riot or an affray." Now, the threatened breach of the peace may be in connection with land. In this sense the Magistrate may in the first instance pass an order under S. 144 against both or any one of the parties threatening to commit a breach of the peace in connection with the possession of land. Therefore the real question is not as to the power of the Magistrate in the first instance to issue an order under S 144 to prevent a breach of the peace concerning any land, but that what action the Magistrate ought to take after he comes to know at any stage of the proceeding under S. 144 that the danger of a breach of the peace is due to a *bona fide* dispute and not a mere pretence as to the possession of land. The answer is that the Magistrate must then at once start an enquiry under S. 145 of the Code either in continuation of the order passed under S. 144 or in supersession thereof inasmuch the condition laid down for an enquiry under S. 145

"that a dispute likely to cause a breach of the peace exists concerning any land"

to quote the words of the section, will then have been satisfied. The section is imperative and enjoins upon the Magistrate to start an enquiry under that section whenever (directly) he

"is satisfied from the police report or otherwise, such as an enquiry under S. 144, that a dispute (real and *bona fide*, and not a mere pretence) exists."

The magistrate cannot refuse in such a case to initiate a proceeding under S. 145, for in that case he will be refusing to exercise jurisdiction vested in him by law and shirking the duty enjoined upon him by the section, in such a case the retention of the order under S. 144 must lead to an irreparable injury to one of the parties who must be in actual possession of the land, by his possession being interfered with, though for a temporary period, for one of the objects of S. 144 is to prevent an obstruction, annoyance or injury, etc., "to any person lawfully employed " There will then be obviously an improper use of S. 144 and an abuse of the process of the Court which my learned brother Mullick, J., lays down as affording valid grounds to vacate an order of a Magistrate under S. 144. Therefore, though the Magistrate may initiate a proceeding under S. 144 and issue an order under that section in disputes concerning land, he will be justified in converting the proceeding into an enquiry under S. 145 when he finds that there is a *bona fide* dispute concerning the possession of land. In this case the Magistrate was informed by the Petitioner that there was a danger of a breach of the peace concerning the possession of the land in dispute. He issued notice and made an enquiry as to possession on the date fixed. He came to the conclusion that the Opposite Party was in undoubted possession of the land and there was no dispute as to possession of the land in question. He therefore properly made his order under S. 144 as against the Petitioner. If on the other hand, he had upon the evidence placed before him by the parties come to conclusion that there was *bona fide* dispute as to the possession of the parties, then he was bound to start an enquiry under S. 145 either in continuation of his order under S. 144 or in supersession thereof, for S. 145 is the only section under which an enquiry in such a case *i.e.*, where

there is a danger of a breach of the peace concerning a dispute as to land, could be made. The continuance of the order under S. 144 without forthwith instituting proceedings under S. 145 as observed above would then have been an improper use of S. 144 and an abuse of the process of the Court, and a refusal to exercise jurisdiction vested by statute, and we would have directed the Magistrate to exercise his jurisdiction under S. 145 of the Code. S. 144 is a larger and more general section than S. 145. An order under that section can be made under various circumstances including a danger of a breach of the peace. S. 145 is of limited scope and applies only when there is a danger of a breach of the peace. The former is discretionary; the latter is mandatory, the latter provides for a thorough enquiry into the dispute as to possession of the parties which tends to a breach of the peace. Therefore when the special condition of S. 145 is fulfilled, S. 144 then yields to S. 145 in the sense that when he finds that there is a real dispute tending to a breach of the peace the Magistrate is bound to institute a proceeding under S 145 and enquire into the possession of the parties, irrespective of any order that he might have originally passed under S. 144. This is a legal obligation cast upon the Magistrate under S. 145.

I have carefully considered the authorities on the subject and particularly the language of Ss 144 and 145, and the above appears to me to be the true scope and meaning of these sections. The language is clear and unambiguous. We have simply to interpret the sections as they are and cannot in any way limit or extend their scope on grounds of policy and other considerations which my learned brother Mullick, J., rightly deprecates and which is not our function but that of the Legislature. In addition to the authorities already quoted, the following may also be referred to: *Parkar Mahton* v. *Ram Khelwan* (7), *Khanis Amina* v. *Emperor* (8), *Tarapada Bhattachari* v. *Emperor* (9), and *Joyanti Kumar Mookerjee* v. *J. B. Middleton* (10).

(7) (1906) 11 C.W.N. 271.
(8) (1918) 3 P.L.J. 243=47 I.C. 65=4 Pat.L.W. 354.
(9) (1920) 1 P.L.T 72=55 I.C. 193.
(10) (1900) 27 Cal. 785=4 C.W.N. 562.

The next question raised by Mr. Pal is as to the power of the Magistrate under Cl. (4) of S. 144 to rescind or alter any order made under Cl. (1) of the section by himself or any Magistrate subordinate to him or his predecessor in office. This question also does not really arise for Mr. Pal did invoke the power of the District Magistrate, who refused to interfere with the order passed by the Sub-Divisional Magistrate. He has come to this Court. We have, no doubt, jurisdiction to deal with the order of the Magistrate and to interfere or set it aside in case it was without jurisdiction or resulted in a denial of a fair trial. No doubt, we insist that a party should exhaust all his remedies in the Courts below before he comes to this Court. This only is a practice and a very desirable one; but there is no absolute bar in law to the party coming direct to us under S. 107 of the Government of India Act when there is no right of appeal. Even if it was necessary that Mr. Pal should have gone to the District Magistrate, which he actually did, and the District Magistrate whether for reasons good or bad refused to interfere.

I do not know why he has raised this question now. In ground No. 2 of his petition to this Court he has attacked the order of the Dt. Magistrate of the 3rd of May as being without jurisdiction and has urged that

"the learned District Magistrate ought to have interfered under S. 144, Cl. (4) of the Code of Criminal Procedure even on the merits of the case,"

to use the exact wording of the petition; yet Mr. Pal curiously enough argues that the District Magistrate had no power to interfere with the order of the Sub-Divisional Magistrate inasmuch as the order was attacked as being without jurisdiction. Why Mr. Pal is anxious to limit the power of the Dt. Magistrate is better known to himself, but the words in that section "rescind or alter" are wide enough to vest the Dt. Magistrates mentioned in that clause with unlimited power to deal with an order passed under Cl. (1) of the section on the question of jurisdiction as well as upon the merits. Mr. Pal was trying to limit the meaning of the word "rescind" which it naturally bears. The word "rescind" literally means "re" again, "scindere" to cut off, to cut short, to remove. In the Imperial Dictionary the word "rescind" is said to bear the

following meaning: "to abrogate, to revoke, to annul, to recall, to reverse, to vacate, by the enacting authority or by superior authority; as to rescind a law, a resolution or a vote; to rescind an edict or decree; to rescind a judgment." This makes quite clear the sense in which the word has been used in Cl. (4) of S. 144 of the Code of Criminal Procedure. The Magistrate himself who passes an order under Cl. (1) of the section, or his superior authority may set aside or vacate when it is found to be void *ab initio* for want of jurisdiction, or is bad on merits or is rendered unnecessary by subsequent event, such as the danger of a breach of the peace ceasing or for any other cause. Under this clause the Magistrate, who issues an order under Cl. (1) in the first instance, often discharges or sets aside the same against both or one of the parties as the case may be, or alters it by drawing up a proceeding under S. 145 of the Code when he finds that the case is a fit one for an enquiry under that section. The clause therefore is not capable of bearing the limited meaning sought to be imposed upon it by Mr. Pal. I confess that I had not so clear a view of the clause when in the case of *Madan Lal* v. *Ful Chand Ram* (11), I followed the view expressed in the case of *Lala Gopal Nath Sahi* v. *Bahadur Baldeo Das Birla* (12). The point arose only incidentally in that case and my attention was not drawn to the Full Bench decision of the Calcutta High Court in the case of *Nabu Sardar* v. *Emperor* (1) and the case of *Re, Mare Gowd* (13), where a similar clause in S. 107 of the Code of Criminal Procedure has been interpreted to have a wide meaning. I therefore agree with the view of the learned Chief Justice and Mullick, J., on this point.

Application dismissed.

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(11) A. I. R. 1921 Pat. 392.

(12) Cr. Rev. No. 299 of 1919, decided on 22nd September 1919 by Das, J.

(13) (1913) 37 Mad. 125=25 M. L. J. 459=21 I. C. 146=(1913) M. W. N. 715 (F. B.)

A.I.R. 1922 Patna 442.

JWALA PRASAD AND ROSS, JJ.

Jaipal Bhagat—Petitioners

v.

Emperor—Opposite Party.

Cr. Mis. Rev. No. 87 of 1921, decided on 2-12-1921 from Sub-Div. Officer, Bettiah.

Extradition Act (1903), Ss. 7, 10, 15 and 18—Absconding from jail in Nepal State—Extradition warrant sent by British envoy at Nepal to Dt. Magistrate in British India is without jurisdiction and cannot be acted upon by Magistrate—High Court can interfere with order of Magistrate.

Absconding from jail is not one of the offences mentioned in first Schedule. Therefore S 7 has no application at all to a warrant issued by the British Envoy at the Court of Nepal for the arrest of a person who has absconded from a jail in Nepal and has come into Br. India. Such a warrant is without jurisdiction. S. 10 of the Act could only apply, if the warrant is wholly illegal and without jurisdiction. Therefore the arrest is without any authority. [P. 443, C 2.]

S. 15 of the Act empowers the Government of India and the Local Government to stay any proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the person arrested to be discharged But that does not necessarily oust the jurisdiction of High Court to interfere in a case where the action under the Act has not been taken under a valid warrant. This section ousts the jurisdiction of High Court to inquire into the propriety of the warrant but leaves open the question of High Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal. The procedure for requisitioning the surrender of any person accused of having committed any offence not necessarily an extradition crime is laid down in S. 9 of the Act but the requisition of such a case has to be made "to the Government of India or to any Local Government". Where no such requisition is made, the warrant addressed to the Dt. Magistrate cannot possibly be supported under S. 9. (41 C. 400; 18 C. W. N. 869; 14 Cr. L.J. 673.) If the treaty between British and Nepal Governments prohibits extradition for offences not specified therein, such prohibition overrides the provisions of the schedule by virtue of S. 18, but there is no such prohibition in the Treaty and therefore S. 9 does not in any way derogate from the provision of the Treaty. The Act practically enhances the power of the Nepal Government to requisition the authorities in the British territories to arrest and deliver fugitive offenders of their territory. 39 C. 164; 7 Bom. L.R. 463 followed. [P 444, C. 1, 2.]

S. P. Varma—for Petitioner.

The Gov. Advocate—for Opp-party.

Jwala Prasad, J.—The case raises a very important question relating to the power of the High Court with respect to ugitive offenders. The petitioner was

arrested in Nepal on a charge of abetment of murder and was put in Birgunj Jail within the jurisdiction of Nepal Government. He, however, managed to escape from the jail and came to the neighbouring British territory in Bheriharwa, within the jurisdiction of the Bhaura Police Station. The Sub-Inspector of Bhaura, on 12th April 1921, reported the above fact to the Sub-Divisional Officer of Bettiah requesting him to communicate with the Hakim of Birgunj and to pass an order for the arrest of the petitioner. On 14th April the Hakim of Birgunj wrote to the Sub-Divisional Officer of Bettiah requesting him to have the petitioner arrested and promising to send the evidence of nationality and criminality to the Sub-Divisional Officer of Bettiah. Thereupon, under the orders of the Sub-Divisional Officer the petitioner was arrested on the 16th April 1921 and was remanded to Jail Hajat till the 1st May 1921. He remained in jail till the 31st May 1921 when he was released on bail under the orders of the Sessions Judge of Muzaffarpur. On the 11th June 1921 the Hakim of Birgunj forwarded to the Sub-Divisional Officer of Bettiah the evidence of nationality and criminality referred to in his letter of the 14th April 1921. The British Envoy at the Court of Nepal sent the extradition warrant under S. 7 of Act XV of 1903 (Indian Extradition Act) dated the 1st August 1921 to the District Magistrate of Champaran for the arrest and delivery of the petitioner to the Nepalese Officer of the Birgunj Amini Court. The petitioner was then arrested on the 2nd September 1921 and was remanded to Hajat pending arrangements for escort from Nepal authorities.

His petition for bail having been rejected on the 3rd September 1921 the Sub-Divisional Officer cancelled his order of the 2nd September and sent his report and finding to the District Magistrate to be forwarded to the higher authorities under S. 3 (3), Cl. 6 of the Extradition Act. The District Magistrate forwarded the papers of the case to the Commissioner of the Tirhut Division by his letter No. 8176, dated the 30th September 1921 pointing out that the order of the Magistrate sending the case to the District Magistrate for reference to the higher authorities under S. 3(3), Cl. 6 was wrong as well as his omission to report the detention of the accused for more than two months. The District Magistrate thought that the case was governed by S. 7 of the Extradition Act, that the accused was arrested under S. 10 of the Act, that the Magistrate was bound to execute the warrant and to forward the petitioner to the Nepal authorities as directed therein, and that the petitioner's only course was to move the Local Government under S. 15 of the Act. The Commissioner agreed with the District Magistrate and returned the papers to him with the result that the matter has not been referred to the Local Government and the petitioner is now in Bettiah Jail to be forwarded to the Nepal authorities. In the meantime the petitioner came up to this Court with a petition challenging the jurisdiction of the Bettiah Magistrate to arrest him and detain him in the jail as stated above. A rule was accordingly issued by this Court upon the District Magistrate to show cause and the case has now come before us.

The warrant in execution of which the petitioner has been arrested is expressed to have been issued under S. 7, Act XV of 1903 (The Indian Extradition Act) and is addressed to the District Magistrate of Champaran, Motihari. It runs as follows:

"whereas Jaipal Bhagat, being a Nepalese subject, accused of absconding from jail has fled from Nepal to British territory and is at present in your jurisdiction this warrant is to authorise you to arrest and deliver the above-named person to the Nepalese Officer of the Biraganj Amini Court at Birganj in Nepal."

S.7 applies only to an "extradition offence". "Extradition offence" has been defined by S. 2 of the Act to mean "any such offence as is described in the First Schedule". Absconding from jail is not one of the offences mentioned in that Schedule. Therefore, S. 7 has no application at all and the warrant in question issued by the British Envoy at the Court of Nepal for the arrest of the petitioner is without jurisdiction. The report of this District Magistrate to the Commissioner referred to above shows that the petitioner was arrested under the provisions of S. 10 of the Act; but that section could only apply if the warrant under S. 7 was legal; but, as shown above, the warrant was wholly illegal and without jurisdiction,

Therefore, the arrest of the petitioner also was without any authority.

No doubt, S. 15 of the Act empowers the Government of India and the Local Government to stay any proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the person arrested to be discharged. But that does not necessarily oust the jurisdiction of this Court to interfere in a case where the action under the Act has not been taken under a valid warrant.

In *Rudolph Stallman, In re* (1) it was pointed out that the section does not take away the power of the Court to issue a *habeas corpus* or directions in the nature of that writ, inasmuch as neither that section nor any other provision of the Act has expressly taken away the power of the Court with respect to *habeas corpus*. Similar was the view expressed in the case of *Emperor* v. *Haseinaly Nizally* (2). Russell, J., observed as follows:—"As was pointed out by Mr. Branson in his argument, there was some difficulty in ascertaining what the accused really were praying for; but Mr. Dabar in his reply put it thus:—'This Court can order the District Magistrate to hold his hand until the warrant is shown to be legal.' The objection to this, however, is that by S. 15 of the Extradition Act it is the Government of India or the Local Government and (not the High Court) who may, by order, stay any proceedings taken under this Chapter and may direct any warrant issued under this Chapter to be cancelled. This section ousts the jurisdiction of this Court to inquire into the propriety of the warrant but leaves open the question of this Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal."

The above remark exactly applies to the present case. The procedure for requisitioning the surrender of any person accused of having committed any offence, not necessarily an extradition crime, is laid down in S. 9 of the Act but the requisition in such a case has to be made "to the Government of India or to any Local Government." In the present case no such requisition was made, therefore, the warrant in question, which was addressed to the District Magistrate of Champaran, cannot possibly be supported under S. 9 either *vide* also *Gulli Sahu* v. *Emperor* (3).

The contention of the learned Counsel on behalf of the petitioner as to the illegality of the warrant and the want of jurisdiction of the Magistrate of Champaran to arrest the petitioner and detain him in jail under the authority of that warrant appears to us to be substantial. We, however, do not think that there is any substance in the other contentions of the learned Counsel. If proper action was taken under S. 9 of the Act, perhaps the objection of the learned Counsel as to legality of the arrest and detention of the prisoner would not have been valid nor his contention that a fugitive offender of the Nepal territory could not be arrested in British India for offences other than those enumerated in the Treaty between the Nepal Government and the British Government, dated the 10th February 1855 A. D., together with memorandum, dated 24th June 1881 supplemented thereto.

Reliance is placed upon S. 18 of the Extradition Act to show that S. 9 should be deemed to have been controlled by the Treaty, inasmuch as nothing in the Act has been declared to derogate from the provisions of the Treaty for the extradition of offenders. That contention does not appear to be sound. If the Treaty prohibits extradition for offences not specified therein, such prohibition overrides the provisions of the Schedule by virtue of S. 18, but there is no such prohibition in the Treaty and, therefore, S. 9 does not in any way derogate from the provisions of treaty. The Act practically enhances the power of the Nepal Government to requisition the authorities in the British territories to arrest and deliver fugitive offenders of their territory.

There appears to be some misapprehension of the offence said to have been committed by the prisoner in Nepal. The report of the District Magistrate says that the petitioner escaped from the Nepal territory where he was kept awaiting trial

(1) (1912) 39 Cal. 164=15 C.W.N.1053=12 I. C. 273=14 C. L. J. 375.
(2) (1905) 7 Bom. L.R. 463.
(3) (1914) 41 Cal. 400=21 I. C. 993=18 C. W. N. 869.

for murder. The evidence forwarded by the Nepal Government to prove the criminality of the prisoner disclose "would only at the best" a charge of abetment of murder. Abetment of murder is not one of the offences mentioned in the Treaty. Section 13 of the Act, however, makes the provisions of Chapter III apply to abetment of offences also. The evidence, however, forwarded by the Nepal authority does not disclose anything against the petitioner beyond a vague hearsay evidence of his having offered to certain people some money to cause murder of certain persons.

The matter raised in this application is of great importance and we do not think that we would be justified in passing final orders in this case until we hear the learned Government Advocate. We, therefore, request the learned Government Advocate to go through the papers of the case and to appear in the case at an early date.

Ross, J.—I agree.

Jwala Prasad and Ross, JJ.—We have heard the learned Government Advocate who says that he has considered the law and authorities in the case and that he cannot take any exception to the view expressed in our decision of the 23rd November 1921.

We, therefore, hold that the petitioner was arrested under an illegal warrant and we, therefore, direct that he be released at once.

Petitioner released.

A. I. R. 1922 Patna 445.

COUTTS AND ADAMI, JJ.

Mohammad Waheed and others—Appellants

v.

Mt. Sunder Basi Kuar and others—Respondents.

S. A. No. 90 of 1921, decided on 9th June 1922.

Revenue Recovery Act, (1890), S 5—Sale of estate not in arrears is without jurisdiction and the title of real owner is not affected thereby.

A Collector acts without jurisdiction in selling estates which are not in arrears under the Revenue Sale Law, as his power is restricted to a sale of estates in arrears only. The real owner's title is not affected by the sale by the Collector of an estate not in arrears.

[P. 445, C. 2.]

Hasan Jan—for Appellants.

Sivnandan Rai—for Respondents.

Judgment:—This was a suit for a declaration of the plaintiff's title to and for confirmation of, or, in the alternative, for possession of a share in *mauza* Rampur Kumhaila, Tauzi No. 88 in the district of Shahabad.

The suit was dismissed in the Court of first instance but was decreed on appeal and against this decree the defendants have appealed to this Court. It appears that in this *mauza* there were a number of co-sharers and there were various partitions and various separate accounts the last of which resulted in the plaintiff having a share of 1 anna 2 pies in Khata No. 1. This share was in her possession and for it she paid Government revenue. There was a mistake, however, in the Collector's register in regard to this share and it was included in the residuary share of the *mahal*. This residuary share was entered in the Collector's register as 1 anna 4½ pies but it was in reality 6 pies made up of 2½ pies plus 3½ pies wrongly entered in another khata. Subsequently the residuary share fell into arrears and was sold by the Collector to the contesting defendants who on the strength of the purchase took possession of the whole share as entered in the Collector's register. The plaintiff brought this suit to recover her share which had never in fact been in arrears.

The only question in this appeal is whether the defendants acquired by their purchase a title to the residuary share as recorded in the Collector's register or whether they only acquired a title to the real residuary share. The learned Subordinate Judge has found that they only acquired a title to the real residuary share and that the plaintiff's share which had been wrongly included was not affected by the sale. This view is, in my opinion, undoubtedly correct. Under the Revenue Sale Law the Collector is given power to sell estates and shares which are in arrears; it gives him no jurisdiction to sell shares which are not in arrears. If by mistake a share be sold which is not in arrears the Collector acts without jurisdiction; and, that being so, the real owner's title is not affected by the sale. This has been held in a long series of cases of which I need only refer to the

decision in *Ganga Prasad Sahu* v. *Irshad Ali Khan* (1).

In my opinion the matter has been rightly decided by the learned Subordinate Judge and I would dismiss this appeal with costs.

Appeal dismissed.

(1) (1911) 15 C.L.J. 54=13 I.C. 959.

A. I. R. 1922 Patna 446 (1)

COUTTS AND ADAMI, JJ.

Sibnarayan Sah and others—Appellants

v.

Maisa Tada Pradhan and another—Respondents.

S. A. No. 73 of 1921, decided on 6th June 1922.

Contract Act, S. 60—Payments for rent—Creditor, if he wishes to credit them for arrears of previous years, must show that such arrears were actually due.

If a creditor has credited certain payments towards arrears of rents, it is for him to show that arrears were due and what they amounted to, and in the absence of evidence on these points it must be held that he was not entitled to do so. [P. 446, C. 2].

N. C. Sinha and *N. C. Ghose*—for Appellants.

Saiyid Muhammad Tahir—for Respondents.

Coutts, J.—This is an appeal in respect of a rent suit brought in the Santal Parganas. The suit was by the proprietors against the Prodhan for arrears of rent for 1325 and 1326 *Fasli*. The defendants pleaded payment.

The Court of first instance found that arrears of rent for these years, except for a small amount of Rs. 188-13-9, had been paid but that the plaintiffs credited the payments to arrears which they said were due for previous years which they were not entitled to do. This decree was upheld on appeal to the learned District Judge except that he has found that the calculation of the learned Subordinate Judge was wrong and he decreed the suit for Rs. 465-7-9½ with Rs. 42-11-0 as interest. The plaintiffs have appealed and the contention made on their behalf is that they were entitled to credit the payments to arrears of previous years.

Both the Court below have found that by the law which applies in the Santal Parganas, payments of rent must be credited to current kists unless there is an express agreement to the contrary. The learned Vakil for the appellants has very strongly contended that there is no such special law and that S 61 of the Contract Act applies. Neither the learned District Judge nor the learned Subordinate Judge has given us his authorities for holding that S. 61 of the Contract Act does not apply, but it is unnecessary to consider the point, because the appeal fails on another ground, namely, that both the Courts below have disbelieved the accounts filed by the plaintiffs and have found that they have failed to establish what the arrears for previous years were. When the plaintiffs credited the payments to arrears alleged by them to be due for previous years it was certainly for them to establish that arrears were due and what the amount of the arrears was; and, having failed to do this, they were not entitled to credit the payments as they have done. The appeal therefore fails.

A cross-appeal has been filed to the effect that the calculation of the learned District Judge is not correct. I fail, however, to see anything wrong in the calculation. The cross-appeal therefore also fails. I would accordingly dismiss both the appeal and the cross-appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

A.I.R. 1922 Patna 446 (2).

COUTTS, J.

Ambika Prasad—Petitioner

v.

Gaya Loan Office, Ltd.—Opp. party.

Civ. Rev. No. 142 of 1922, decided on 20th July 1922.

Limitation Act, S. 20—Payment towards principal must be in handwriting of debtor.

Limitation under S. 20 cannot be extended, unless the payment towards the principal is in the handwriting of the debtor.

[P. 447, C. 1.]

S. Sahay—for Petitioner.

Bankim Ch. De—for Opposite Party.

Coutts, J.—The facts of the case as found by the learned Additional Subordinate Judge are that the decree-holder obtained a money decree in 1910. Certain applications for execution were made and the last step-in-aid of execution was taken on 14—5—1918. On 27—7—1918 a sum of Rs. 5 was paid towards the principal and the present application was filed on

27-7-1921. The judgment-debtor objected that the application was barred by limitation but the learned Additional Subordinate Judge has found that limitation is saved by the payment of Rs. 5 on 27-7-1918. I am unable to understand how he arrived at this conclusion. Limitation is not saved under S. 20 of the Limitation Act because the fact of the payment does not appear in the handwriting of the judgment-debtor. No step-in-aid of execution has been taken since 14-5-1918; consequently, the present application is clearly barred. The decision of the learned Addl. Sub. Judge must be set aside and the application for execution must be dismissed. The petitioner will be entitled to costs. Hearing fee two gold mohurs.

Application dismissed.

A.I.R. 1922 Patna 447.

COUTTS AND DAS, JJ.

Triloke Prasad Singh—Appellant

v.

Umanand Lal and others—Respondents.

S. A. Nos. 936 and 937 of 1921, decided on 21st July 1922.

(a) *Civil P. C., O. 1, R. 9—Land recorded as* Gairmazrua Am—*Suit for declaration of title to —General public are not necessary parties.*

A suit for declaration of title to land entered in the Survey Khataian as *Gairmazrua Am* is not bad for non-joinder of parties, if the general public are not made parties to it. [P. 447 C. 2.]

(b) *Evidence Act, S. 35—Batwara Khashra is admissible in evidence.*

A Batwara Khashra is admissible in evidence. 38 I.C. 491 foll. [P. 447, C. 2]

R. T. N. Sahay—for Appellant.

Kailashpati—for Respondents.

Coutts, J.—The plaintiffs in the two suits out of which these appeals arise are tenants in mauza Dajipur of which the defendants are the Maliks. The land in dispute has been entered in the survey khatian as *Gairmazrua Am*. The plaintiffs claimed that it appertained to their ancestral holding consisting of some 34 bighas which are said to be covered by plots Nos. 88 and 89 in an old Batwara proceeding and they alleged that the land has been always in their possession. They therefore prayed for a declaration of their title to the disputed land as appertaining to their raiyati and for recovery of possession. The suit was contested by the defendant No. 2 who alleged that the land was the exclusive land of the Maliks which had been settled with tenants under various pattas and *kabuliats*. The suits were dismissed in the Court of first instance, but on appeal the suits have been decreed. The defendant No. 2 has appealed to this Court.

The first point urged in appeal is that the land having been recorded in the record-of-rights as *Gairmazrua Am* the suits cannot proceed, the general public not being made parties. This is obviously an unsustainable contention, because the decree will be good as against the parties to the suit and will not affect the general public.

The second point urged is that the lower Appellate Court has relied to a great extent in coming to its decision on the Kheshra which was prepared in the old Batwara proceeding and it is contended that this is inadmissible in evidence. There are various authorities that the Batwara Khashra is admissible in evidence and I need only refer to a decision of this Court in *Ajodhya Prasad Singh Kumar* v. *Kamal Narain Singh* (1) in which it was held that such a Batwara Kheshra was admissible in evidence. This was a decision of a Judge of this Court sitting alone whose decision on this finding was upheld in Letters Patent appeal. The Batwara Kheshra is evidence for what it may be worth and in a case such as the present case where the entry in the Kheshra is in favour of the tenants it is, in my opinion, very good evidence and evidence on which the Court was entitled to reply.

The last point urged is that a partition decree (Ex. E) which was filed on behalf of the defendant has not been considered by the Lower Appellate Court. I find, however, from the judgment of the learned Additional Subordinate Judge that he has considered this document and, although he has not discussed it at length, he has certainly considered it. In the result I see no reason to interfere with the decision of the Lower Appellate Court and I would dismiss these appeals with costs.

There will be only one set of costs.

Das, J.—I agree.

Appeals dismissed.

(1) (1917) 38 I.C. 491.

A. I. R. 1922 Patna 448.

COUTTS AND DAS, JJ.

Sajjad Husain and others—Defendants-Appellants

v.

Sakai Rai and others—Plaintiffs

and another—Defendant-Respondents.

S. A. No. 578 of 1920, decided on 21st July 1922.

Civil P. C., O. 32, R. 4 (3)—Minor—Appointment of guardian without his consent is without jurisdiction.

An appointment without his consent of a guardian for a minor in a suit is without jurisdiction. The provisions of O. 32, R. 4 (3) in respect of consent are mandatory and there is nothing in the law to suggest that, unless it is established that the minor is prejudiced, he cannot get relief.

[P. 448, C. 2, P. 449, C. 1.]

B. N. Mitter—for Appellants.

Sambhu Saran—for Respondents.

Coutts, J.—The facts of the case are shortly as follows: Defendants Nos. 1 and 2 are Maliks of the 'patti in which the land in suit lies. Defendant No. 1 and the mother of defendant No. 2 brought a suit for arrears of rent of this land against defendant No. 5, plaintiff No. 4, and his brother Gajadhar Rai, raiyats of the holding. They obtained a decree and in execution of the decree they purchased the holding subsequently parting with some of their interest to the other defendants. The plaintiffs Nos. 1 to 3 were not parties to the rent suit and their case is that they were necessary parties as they were co-sharers in the holding. The case of the plaintiff No. 4 is that although the decree was against him he was a minor at the time of the suit and was not properly represented. The plaintiffs accordingly brought this suit for a declaration that they were entitled to the land in suit. The defendants contended that the plaintiffs Nos. 1 to 3 had no interest in the holding and that the plaintiff No. 4 was properly represented by his mother who had been appointed his guardian *ad litem* by the Court.

The Court of first instance found that the plaintiffs Nos. 1 to 3 had no interest in the holding and that the plaintiff No. 4 was properly represented. The suit was accordingly dismissed. The plaintiffs appealed and on appeal the decision of the Court of first instance has been upheld in so far as the plaintiffs Nos. 1 to 3 are concerned but so far as the plaintiff No. 4 is concerned it has been held that he was not properly represented and that the suit in so far as his half share in the holding is concerned must succeed. The defendants have appealed to this Court.

The only question in appeal is whether in fact the plaintiff No. 4 was properly represented by his mother in the rent suit. It appears that the Court appointed plaintiff No. 4's mother as his guardian; notices were issued on her, but her consent was not taken and she did not appear in the suit which was decreed *ex parte* as against the plaintiff No. 4. The learned Subordinate Judge has held on the authority of *Narain Chandra Mandal* v *Joy Narain Rai* (1) that it was not competent to the Court to appoint the mother of plaintiff No. 4 as his guardian without her express consent, that the appointment was without jurisdiction and that the minor was not represented. I am in agreement with this view. It is the view which has been expressed in this Court in the case of *Pandit Mohan Krishna Dar* v. *Chowdhuri Har Prasad* (2) it is the view which has been uniformly adopted in Calcutta *vide Annada Prasad Ghosh* v. *Upendra Nath Dey Sircar* (3) and it is undoubtedly in my opinion the correct view of the law. We have been referred by the learned Vakil for the appellants to certain decisions of the Privy Council and of this and other High Courts in India in which it has been held that although no appointment of a guardian has actually been made by the Court yet if the mother appears and effectively represents her minor son a formal order for her appointment is not necessary. These, however, are entirely different cases. In the present case the minor was not only effectively represented but was not represented at all. We have also been referred to certain decision of the Allahabad High Court in which it has been held that where an appointment has been made without consent and where a decree has been passed *ex parte* unless it has been shown that the minor's interests have

(1) (1915) 19 C.W.N. 537.
(2) (1917) 40 I.C. 2.
(3) A.I.R. 1921 Cal. 600.

been prejudiced by the irregularity the minor has no right to set aside the proceedings. *Chhatter Singh* v. *Tej Singh* (4). With all respect to the learned Judges of the Allahabad High Court who decided this case and other cases relied on in this decision I am unable to accept the view. The provision of O. 32, R. 4 (3) in respect of consent is mandatory and I can find nothing in the law to suggest that unless it is established that the minor is prejudiced he cannot get relief.

This case has, in my opinion, been rightly decided and I would dismiss the appeal with costs.

Das, J.—I agree. *Appeal dismissed.*

(4) (1920) 59 I. C. 671.

A. I. R. 1922 Patna 449.

BUCKNILL, J.

Jagu Pal—Petitioner

v.

Makunda Koer—Opposite Party.

Cr. Rev. No. 278 of 1922 decided on 6th June 1922.

Criminal P. C., S. 145—Revision—Order purporting to be under—Review by Deputy Commissioner ex-parte, is illegal.

A complaint was lodged as to the possession of certain property and the Sub-Divisional Magistrate made an enquiry, heard evidence and made an order purporting to be under S. 145. He found that the proceedings under S. 145 were no longer necessary as there had been no breach of the peace during four months previous to the proceedings. He found actual possession in favour of the first party and ordered the crops to be delivered to them. On second party applying for review to District Magistrate, he set aside the order of the Sub-Divisional Magistrate and ordered the crops to be delivered to second party. *Held*, although the procedure followed by the Sub-Divisional Magistrate was irregular and was not according to the procedure as laid down by S. 145, Cr. P. C. he must be considered to have contemplated the proceedings to be under S. 145. Under the circumstances it was not open to the Deputy Commissioner to review the Sub-Divisional Magistrate's decision and in any case to do so *ex-parte*, and the order of the Deputy Commissioner should be set aside.

Further *held* that the order of Sub-Divisional Magistrate was not passed on proper procedure and must be set aside. [P. 450, C. 1, 2.]

A. B. Mukherjee—for Petitioner.

G. C Pal—for Opposite Party.

Judgment—This is an application in Criminal Revisional Jurisdiction, asking that an order of the Deputy Commissioner of Manbhum, dated the 30th of March last, setting aside an order of the Sub-Divisional Magistrate of Purulia, dated the 28th February last may be reversed. The matter is certainly a curious one. In order to understand, so far as can be gathered from the somewhat scanty record, what has really taken place, it is necessary to examine carefully the order sheet of the Sub-Divisional Magistrate. It would seem that a complaint was lodged by a person as to the possession of certain property, and the Magistrate on the 18th November 1921 seems to have forwarded this complaint to the police for inquiry and report. At the same time it appears that he ordered that the paddy which was standing on the land should be cut and kept with some third person "until it is decided."

The Sub Divisional Magistrate who subsequently had control of the case appears to have observed that notices or summonses upon the disputing parties were served. It would seem that from the beginning it was under contemplation of this Judiciary that the proceedings were being taken under the provisions of S. 145 of the Criminal Procedure Code. I cannot, however, ascertain that any proceedings as are contemplated in S. 145 were actually drawn up, but at any rate whether that is so or, not, or whether what was done constituted a proper procedure under S. 145, the fact remains that the parties did come before the Sub-Divisional Magistrate who seems to have made an investigation and an enquiry, to have heard evidence and, as I mentioned before, at a later stage it was transferred to the Sub-Divisional Magistrate for final disposal.

Now on the 28th of February 1922 the Sub-Divisional Magistrate who was dealing with the matter wrote a decision or as he calls it an order purporting to be under S. 145, Criminal Procedure Code. It is really rather difficult to understand exactly what the Sub Divisional Magistrate considered that he was doing. He finds that no proceedings under S. 145 of the Criminal Procedure Code are any longer necessary because there had been no breach of the peace during the four months prior to his decision. One would have thought that had that been so he might simply have set aside the proceedings whatever they were and have made no order except possible as to the disposal

of the already cut crops, however, as a matter of fact he did find that actual possession was with the first party and he ordered that the rice which had been cut and which was in the hands of a third party should be handed over to the first party. One cannot regard this order as very satisfactory and indeed under the circumstances it is one the propriety of which is extremely doubtful. It is said that what took place next was that the second party applied to the Deputy Commissioner of Manbhum *ex parte* and that this officer, without issuing any notice to the present applicant and without giving the present applicant an opportunity of being heard, passed an *ex parte* order setting aside the order of the Sub-divisional Magistrate and directed that the rice should be handed over to the second party that is the opposite party now before me. The Deputy Commissioner quite rightly I think criticised somewhat strongly the procedure which the Sub-divisional Magistrate had adopted. He says, "this is another case in which the Sub-divisional Officer has made a mess of law and procedure and written a judgment which is not a judgment under any section of the Criminal Procedure Code or any Code."

I suppose that it is because he thinks that all the proceedings taken by the Sub-divisional Magistrate were so irregular that he thought that he was justified in not only revising or reviewing or cancelling as he did the order of the Sub-divisional Magistrate but also in doing so *ex parte*. The Deputy Commissioner points out that apparently no proper proceedings were drawn up under the provisions of S. 145 and that so far as he can gather notices under S. 144 were issued with regard I take it to the attachment of the crops. He also points out that the Sub-divisional Magistrate thought that there never was a likelihood of a breach of the peace. My practical difficulty in dealing with this question is that I find that the Sub-divisional Magistrate certainly contemplated proceedings under the provisions of S. 145 although it is true that his order made thereunder is somewhat incomprehensible and although it may be also true that he did not carry out the proper procedure laid down by the provisions of that section. But at the same time the order does find possession in one party and does order, as I think he could order, the attached crops to be handed to one of the parties. I am unable to see how under those circumstances it was open to the Deputy Commissioner to review the Sub-divisional Magistrate's decision and in any case even had he been able so to do. I do not appreciate how such action could with propriety be taken *ex parte*. Under these circumstances I have no hesitation in setting aside the order of the Deputy Commissioner of Manbhum, dated the 30th March 1922.

There remains then on the record, that having been done, the order of the 28th February, that is the order of the Sub-divisional Magistrate, and although it may be that the primary application to me now is merely relative to the order of the Deputy Commissioner, I cannot think that it would be right for me to refrain from dealing also with what I regard as the defective order of the Sub-divisional Magistrate. His order was not passed upon proper procedure and it must be set aside. The finding of possession is, so far as I can gather, not found in accordance with the provisions of the law. With regard to the way in which he has dealt with the disposal of the crops, his order simply follows his finding of possession and therefore in respect of that part of his order it is no better than the finding of possession itself. The very fact that he says that no proceedings under S. 145 of the Criminal Procedure Code are necessary does not itself render the possibility of proper proceedings under that section being commenced *de novo* should such be necessary. In the meantime his order must be set aside and the crops or the proceeds thereof retained in the custody of the Court until the rights of the parties have been properly settled in accordance with law.

Order set aside.

A.I.R. 1922 Patna 450.

DAWSON MILLER, C.J. AND BUCKNILL, J.

Hari Prasad Singha and others—Appellants

v.

Sourendra Mohan Sinha and others—Respondents.

F. A. No. 191 of 1918, decided on 12th April 1922, from a decision of Sub-Judge, Bhagalpur, dated 17th June 1918.

(a) *Santhal Perganas Settlement Regulation (III of 1872), S. 5—Absence of proof of Notification—Section does not apply.*

Where there was no evidence of any notification placing certain lands under settlement nor was there a notification concluding the settlement *Held*, S.5. did not apply in such a case. [P. 454, C. 2.]

(b) *Santhal Pergannas Settlement Regulation (III of 1872), S.6—Interest cannot be awarded on decretal amount or in excess of the principal sum after crediting for interest already paid.*

Interest should not be awarded upon the decretal amount in so far as it includes interest on the principal debt itself, as to do so, would contravene the provisions of the Regulation, relating to compound interest. This principle applies equally where the amount decreed as interest already equals the sum advanced. All courts, wherever they may be situated, having jurisdiction within the Santhal Pergannas, must, when exercising jurisdiction in cases arising within the Santhal Perganas, follow the rules relating to usury set out in the section. The intention of the section is that the liability for interest decreed can be in no case in excess of the amount actually advanced. (1918) Pat (Sup C W. N) 305 Doubted but followed.

Interest already paid must be credited in arriving at the amount which may be decreed. [P. 455, C. 1, 2; P. 456, C. 1, 2.]

(c) *Limitation Act, S. 2 (4)—Son in a joint Hindu family "claims through" other members.*

In the case of a new-born son in a Mitakshara family the person or persons through whom he derives this liability, must be the other members of the family in whom the property which the son acquires by birth was previously vested. [P. 457, C. 2.]

(d) *Civil P.C., O. 34, R. 6—Omission to claim personal decree will bar mortgagee from suing therefor afterwards—Civil P. C., S. 11.*

Where the cause of action is the failure to repay the principal and interest due under the bond and the relief claimable is both against the property hypothecated and against the executants of the bond on their covenant to repay, if the mortgagees omitted to sue for a personal decree against the mortgagors on the covenant, they could not afterwards sue for that which was omitted. It is not usual or necessary to ask for a personal decree where the property is held liable for the whole of the principal debt and interest except in so far as the proceeds may be insufficient but it is quite open to the court to pass a decree against the mortgagors on their covenant to repay the whole if a part of the claim should be held not to be chargeable on the property. [P. 458, C. 2.]

(e) *Hindu Law—Debt—Antecedent debt—Debt must be one incurred in substance and in reality antecedent to transaction.*

The doctrine of antecedency applies where the debt is one incurred in substance and reality antecedently to the mortgage whether or not the debt so incurred was secured by a charge on the family property.

(f) *Hindu Law—Debt—Sons' liability—Exists during father's lifetime.*

Where the debt is incurred by each of the heads of the four different branches of the joint family and all the other defendants are their sons and grandsons so that all the interests were involved, the charge would be binding upon the property in the hands of all the defendants. The doctrine of the liability of sons for father's debt during the lifetime of the father is too well established at the present day to admit of its being questioned by a reference to the texts of the commentators. 15 Cal. 717 and 20 Cal. 328, Foll. [P. 459, C. 2.]

(g) *Hindu Law—Debt—Legal necessity—Old transaction—Proof of inquiry, by creditor and of necessity for major portion of debt, let in—Court may presume necessity for the balance also—Marriage—Lavish expenses, if consonant with prestige of family will be justified.*

Whilst it is true that the *onus* of proving necessity rests upon the mortgagees, if they have the assurances of the borrowers that the debts incurred were for family necessity and they made exhaustive enquiries as to the existence of debts which amounted to a very large sum and even if a few small items out of the total might appear to be doubtful, the Court should not scrutinize with meticulous care after a lapse of twenty years each small item about which the existence of family necessity is doubtful so as to give to the mortgagors the benefit of the doubt when the enquiries made by the mortgagees showed that the vast bulk of the debt appeared to have been incurred for family necessity and was subsequently acknowledged as a joint debt by the responsible heads of the different branches of the family. [P. 461, C. 2.]

Marriage expenses though lavish and improvident from a European's point of view are justified if they are in consonance with the position and prestige of the family. [P. 462, C. 1.]

If 20 years later it should appear that in a few instances there is no conclusive proof that the debts were actually incurred for family necessity or with the active participation of all the adult members of the family still if the circumstances show that the needs of the family were such that it is probable that the money even in those cases were required for family necessities, a court should not require absolute proof in every case but may presume that the lender satisfied himself at the time that the debts were of such a nature as had been represented to him and as appear from the recitals in the bond [P. 463, C. 1.]

(h) *Hindu Law—Ancestral property—Property from mother is not.*

Per *Bucknill, J*:—Property acquired through the mother cannot be regarded as joint ancestral family property, 25 M. 678; 35 Cal. 1039; 3 P. L. J. 188, Foll. [P. 466, C. 2]

(i) *Civil P. C., O. 34, R. 1—Non-joinder—Necessary party—Omission to implead not due to negligence of party is not fatal.*

Bucknill, J:—It would be altogether unreasonable to suggest that where a necessary party has been, not through negligence but

under circumstances which are properly explicable, omitted from being made a party to the suit, such non-joinder would necessarily be a fatal bar to the progress of the action.
[P. 473, C. 1]

(j) *Hindu Law—Debt—Mortgage by father—Suit on—Father cannot represent minor son as his guardian* ad litem—*Civil P. C., O. 32, R. 4*

Bucknill, J.—The interest of son in a suit on a mortgage by the father is against that of the father and therefore the father cannot represent son but persons who could plead illegality or immorality of the debt can represent the son. 9 C.L. J. 485; 15 C L. J, 446; 34 A. 549; 16 C.L.J. 264; A.I.R. 1914, P.C. 136 Foll. [P. 474, C 1.]

(k) *Hindu Law—Alienation—Legal necessity—Enquiry by creditor—Reason given by alienor found to be proper by creditor—No enquiry into all circumstances is necessary.*

Bucknill, J. :—When a lender contemplates lending money to a *karta* of a joint family, it is probable that according to the present law, he should make some clear enquiry as to the reason for which the loan is being arranged but provided that he is told that reason and that reason seems to him a proper one, it is not necessary for him to make any further enquiry. A lender need not examine entirely the circumstances of the borrowers or to do more than be assured by him that the money is required for the legal necessity or the family benefit of the family which the borrower represents.
[P. 477, C. 2].

B. C. Manuk, K. B. Dutt, C. C. Dass, S. M. Mullick, S. C. Rai, and *L. K. Jha*—for Appellants.

S.H. Imam, P.K. Sen, L.N. Singh, N.C. Sinha and *N. C. Ghosh*—for Respondents.

Dawson Miller, C. J.—The suit out of which this appeal arises was instituted in the Court of the Subordinate Judge of Bhagalpur on the 5th February 1915 by the respondents claiming Rs. 11,81,811 principal and interest due under a mortgage bond, dated the 21st December 1896 executed by some of the appellants to secure a sum of Rs. 3,50,000 of which Rs. 1,36,142 were advanced in cash the balance being the amount due under a previous bond. The bond in suit provided that the principal sum was to carry 7½ per cent. compound interest with yearly rests. The principal was repayable in the month of Falgoon 1310 F. The last day of Falgun 1310 F. corresponds to the 14th March 1903 A. D. The first party defendants are the surviving executants of the bond and other members of their family who form a joint Hindu family governed by the Mithila law. The second party defendant Dwarka Prasad Singh is no longer a member of the family having been adopted into another family. The third party defendants are subsequent transferees of some of the mortgaged property. The remainder are those having varying interest in the property and who have been substituted for others. The plaintiffs are the successors-in-interest of the mortgagee Rai Bahadur Surjya Narain Singh, deceased. Various issues were raised at the trial. The Subordinate Judge before whom the case came found all the issues in favour of the plaintiff's except as to certain items of the loan which he found were not justified by legal necessity. He passed a mortgage decree in favour of the plaintiffs for Rs. 15,27,997 including costs and interest up to the expiry of the days of grace and as against the executants of the bond a further personal decree for the sum of Rs. 44,164 including interest and proportionate costs in respect of that part of the advance which he considered was not justified by family necessity. He further ordered that the latter sum should carry interest at 6 % per annum from the date of the decree until realization.

From that decree the defendants first party have appealed to this Court. Six points have been urged before us on behalf of the appellants :—(1) That the Bhagalpur Court had no jurisdiction to try the suit. (2) That the mortgaged property being situated within the Santhal Perganas the amount of interest that can be decreed is limited by the provisions of S. 6 of Regulation III of 1872 relating to the Santhal Perganas. (3) That the suit is barred by limitation. (4) That the claim for a personal decree is barred by the provisions of Order 2, Rule 2 of the Civil Procedure Code. (5) That there being no legal necessity or antecedent debt justifying the greater part of the loan the mortgage is to that extent not binding on the joint family property. (6) The interest at 6 per cent. awarded by the decree is contrary to the provisions of S. 6 of Regulation III of 1872. The determination of the first point depends upon whether S. 5 of the Regulation of 1822 as amended by subsequent legislation bars the jurisdiction of the Civil Courts in the circumstances existing when the suit was instituted. S. 5 as amended by Regulation III of 1908 is as follows:—

5. (1) From the date on which, under S. 9, the Lieutenant-Governor declares by a notification in the *Calcutta Gazette*

that a settlement should be made of the whole or any part of the Santhal Perganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to

(*a*) any land or any interest, in, or arising out of, land or

(*b*) the rent or profits of any land, or

(*c*) any village headship or other office connected with any land, in the area covered by such first mentioned notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it."

The second clause of the section states that the Courts in which the suits referred to shall be tried are those appointed by the Lieutenant-Governor under the provisions of the Santhal Perganas Act, 1885 or under S. 10 of this Regulation. The 9th section referred to in S. 5 enables the Lieutenant-Governor from time to time by notification in the *Calcutta Gazette* to declare that a settlement shall be made of the whole or any part of the Santhal Perganas.

Whether at the date of this suit settlement operations which began in 1873 had been completed and notified in the *Calcutta Gazette* is a question of fact.

On the 20th June 1904 the same plaintiffs or their predecessors-in-interest instituted a suit on the same bond against the defendant's family and obtained a decree which was affirmed on appeal by the High Court of Calcutta. The defendants carried the same on appeal to His Majesty in Council on the 19th May 1914; that appeal was allowed and the suit was dismissed on the ground that S. 5 of Regulation III of 1872 was a bar to the jurisdiction of the Bhagalpur Court, at the date when the suit was instituted. The reason for that decision was that the greater portion of the land included in the bond was situated within the Santhal Perganas and although some portions of it had been settled and notification to that effect had been made as provided in the section, other portions were still under settlement, their completion not having been notified when the suit was instituted See *Maha Prasad Singh* v. *Ramani Mohan Singh*(1)

The respondents contend however that on the 5th February 1915 when the plaint in the present suit was filed, the settlement had been completed and duly notified and S. 5 of the Regulation had therefore ceased to operate. The appellants on the other hand say that although the last settlement operations in Santhal Perganas were completed in the year 1910 there was never any notification in the *Calcutta Gazette* to show that all the lands mortgaged and placed under settlement had been so settled.

There have been altogether four settlement operations in the Santhal Perganas since the Regulation of 1872 was passed. The first was that conducted by Mr. Wood which continued from 1873 to 1879; the second was Mr. Craven's settlement which began in 1889 and ended in 1894. Between 1898 and 1905 Mr H. McPherson continued the work of re-settlement begun by Mr. Craven. Certain villages still remained unsettled when Mr. McPherson made his final report and these were dealt with in Mr. Allenson's settlement between 1906 and 1910. Since that date no further settlement operations have taken place in the Santhal Perganas. The appellants' case is that the whole of the Santhal Perganas was placed under settlement in 1873, Mr. Wood being deputed as Settlement Officer for the purpose and that no notification was ever published in the *Calcutta Gazette* relating to the completion of that settlement. For the first part of this contention they rely upon a statement in Mr. McPherson's settlement report. For the second part they rely upon the fact that no notification of the completion of Wood's settlement was produced. Since Mr. Wood's time however there has been a re settlement by other Settlement Officers and in each case the notification required by S. 5 have been issued and are in evidence before us. The passage relied on in Mr. McPherson's report to the effect that the whole of the Santhal Perganas was placed under settlement in 1873 is to be found at the beginning of his report and may be quoted here. It states "The whole of the District which has an area of 6,470 square miles was settled for the settlement, the period being reckoned from the time when the land is notified

(1) A.I.R. 1914 P.C. 140=42 Cal. 116=41 I.A. 197 (P.C.)

as under settlement to the time when the settlement is notified as completed." The appellants who rely on the absence of a notification declaring that Wood's settlement was completed have given no evidence to show that that settlement was made under any notification in the *Calcutta Gazette* or to show that the notification, if any, authorizing that settlement included the lands in suit. The passage relied on in Mr. McPherson's report shews that the whole district was settled between 1873 and 1879 and on the evidence produced there is nothing to show that the lands in suit were the subject of a notification either at the beginning or at the end of the first settlement. It is not disputed that Wood's settlement ended more than 35 years before the suit was instituted and the appellants are raising a purely technical objection that there is no notification to that effect. I think they are met however upon their own ground by the reply that they have failed to show that the lands in suit were ever brought under settlement by notification in the *Calcutta Gazette*. In effect we are asked in the first place to assume without evidence that there was a notification placing the lands in suit under settlement in 1873 and in the second place that although that settlement was concluded many years ago and a re-settlement has since taken place there was no notification of the completion of the settlement of those lands by Mr. Wood. It appears to me that the appellants fail at the outset to establish their plea in so far as it depends upon the first settlement.

It is contended however that even under the subsequent settlements the whole of the lands in suit were never notified as out of settlement. Reliance was placed upon a passage in S. 103 at Para 66 of Mr. Allenson's report to the effect that 45 villages of Taluk Barcope which had not been settled by Mr. Craven were included in Mr. McPherson's second programme, and that the notification of the completion of the settlement under Mr. McPherson's first and second programme showed only three villages and forty villages respectively as having been settled. Mr. Allenson adds however in his report "But the bulk of the estate, *viz.*, 6,686 squire miles has been re-settled in the present programme." The notification authorizing Mr. Allenson's settlement includes 201 villages in Barcope Tauzi No. 481 and the notification of completion of that settlement has been produced and proved. Assuming that a few villages in Barcope were not settled by Mr. McPherson there is no evidence to show that these villages were not included in the settlement made by Mr. Allenson who took over charge from Mr. Mc Pherson in 1905. There is nothing to show what villages they were and there is certainly nothing to show that they were compromised in Tauzi No. 481 of Barcope within which Tauzi alone the mortgaged property in Barcope is situated. This tauzi now comprises only a portion of what is known as Taluk Barcope or Tappa Barcope. The appellants have therefore failed to show that any of the mortgaged properties was notified for settlement and not notified as settled. The plea as to jurisdiction accordingly fails.

The second point raised is whether the restriction as to interest contained in S. 6 of the Regulation of 1872 as binding upon the ordinary Civil Courts locally situated outside the Santhal Pergannas but exercising jurisdiction over property within that area, and, if so, whether the section applies when no settlement operations are going on. The second branch of this question can hardly arise independently of the first as it is only during settlement operations that the jurisdiction of the ordinary courts is barred. S. 6 is as follows :—

"6. All courts having jurisdiction in the Santhal Perganas shall observe the following rules relating to usury namely:—

(*a*) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent. per mensem notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed ;

(*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

(*Explanation*).—The expression 'intermediate adjustment of account' in Cl. (*a*) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by

bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

Illustration.—A bond is given for Rs. 75 of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100."

The explanation and the illustration appended to the section were added in 1893 by the Santhal Pergannas Justice Regulation, (V of 1893).

There appears to me to be no reason for limiting the operation of Section 6 to such time as settlement operations may be in progress. Had this been the intention, one would have expected that words limiting its operation to a particular period, as in Section 6 would have been inserted; nor can I see any reason why Section 6 any more than Section 7 should be limited in the manner suggested. The latter section which exempts certain agreements as to rents and rights in land from stamp duty is clearly intended to be general and permanent in its application. The reason for the enactment of the section is no doubt to be found in the preamble of Act, XXXVII of 1885 which by Section 2 of the Regulation must be read with it, and which recited that the general Regulations and Acts are not adopted to the uncivilized race of people called Santhals who inhabit the district. It would be a curious result of this legislation if the protection from their own ignorance and improvidence afforded to the Santhals by the section should depend upon the fortuitous circumstances of a settlement being in operation. I am unable to accept this view. The considerations just mentioned apply to some extent also in determining whether the courts mentioned in the section are only courts locally situated in the Santhal Pergannas or all courts having jurisdiction within, even when situated outside, that area. I think the plain meaning of the section is that all courts, wherever they may be locally situated, having jurisdiction within the Santhal Perganas must, when exercising jurisdiction in cases arising within the Santhal Perganas, follow the rules relating to usury set out in the section. This was the view expressed by Lord Moulton in deliveringthe judgment of the Judicial Committee in *Maha Prasad Singh* v. *Rumani Mohon Singh* (1). It is contended that the view there expressed was *obiter* as the case was decided upon the inter-relation of Cl. 5 of the Regulation. The case however went before their Lordships on appeal upon this very question, and, although their decision was ultimately based upon the question of jurisdiction, they thought fit to express an opinion upon the interpretation of the clause.

6. The whole of the Acts and Regulations relating to the Santhal Perganas were there considered and it was found that the ordinary courts had no jurisdiction to try suits relating to land in the Santhal Perganas so long as the land was under settlement " and further that whatever be the court that has jurisdiction to decide cases within the Santhal Perganas and is exercising that jurisdiction it must observe the 2 rules relating to usury above referred to and in a latter passage in the judgment their Lordships are also of opinion that apart from the question of jurisdiction, any court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of Section 6 of the Santhal Perganas Settlement Regulation, 1872, relating to usury and therefore ought to refuse to decree any compound interest arising from any intermediate adjustment of interest or any amount of total interest exceeding the principal of the original debt or loan." This can only mean as I interpret it that even if the Bhagalpur Court which had tried the suit then under appeal had had jurisdiction, it would have been bound by the provisions of S. 6. Whether this part of the decision of their Lordships is binding upon this Court or whether it is to be treated merely as *obiter dictum*, need not be determined as I should have taken the same view even without the assistance of that decision.

It remains to consider the interpretation of the rules contained in S. 6 and how they affect the facts of the present case. The bond in suit was the fifth of the series, the last three of which were

renewals of the previous bonds and interest then in arrears and the last two of which included additional cash loan. The following table shews some particulars of the different bonds which may conveniently be stated here :—

Date of bond	Principal and rate of interest.	Cash consideration.	Payments admitted.
	Rs.		Rs. a. p.
(1) 3rd October 1883	73,000 12 p.c.	Rs. 73,000	12,000-0-0 Principal. 43,917 8 0 interest.
(2) 20th September 1888	12,000 11 p.c.	Rs. 12,000	443-10-7½ interest.
(3) 10th May 1890	95,600 10 p.c.	nil	7,037-13-3 interest.
(4) 29th September 1891	1,67,000 9 p.c.	Rs.64,761-1-9	39,705 13-3 interest.
(5) 21st December 1896	3,50,000 7½ p.c	Rs. 1,36,142	35,248-3-7½ interest.
		2,85,903-1-9	1,48,352-7-1½

Some argument was addressed to us as to the meaning of compound interest arising from any intermediate adjustment of account, and the explanation added to the section. It is admitted however by the appellant that simple interest calculated on the actual cash advanced beginning with the first bond amounts to more than the total sums advanced which, it is contended, form the principal of the original debt or loan. The actual sums advanced amount to Rs. 2,85,903-1-9 of which Rs. 12,000 were repaid on the 13th January 1884 leaving a balance of Rs. 2,73,903-1-9 which according to the appellants is the limit of the total amount of interest payable. The total amount of interest admittedly paid was Rs. 1,36,357-7-1½ leaving a balance of Rs. 1,37,951-10-7½ as interest payable in addition to the principal. If the appellants should fail to establish their other contentions they admit this basis of calculation as establishing their liability. The respondents on the other hand say that the principal of the original debt or loan is Rs. 3,50,000, the amount of the last bond, as this was a new settlement for which consideration was given by a reduction of interest. Clause (*b*) however of the section provides in terms that the total interest decreed shall not exceed the principal of the original debt or loan and makes no exception in cases of renewal or intermediate adjustment and the illustration seems to make it clear that in no case can more than the total sum advanced be decreed as interest. I think the intention of the section is that the liability for interest decreed can be in no case in excess of the amount actually advanced.

The respondents further contend that the interest already paid should not be credited in arriving at the amount which may be decreed. The working of clause (*b*) of the section, if taken in its literal sense, would appear to support this view. This interpretation is, I think, contrary to the apparent purpose of the enactment as pointed out by Sir Francis Maclean, C. J., and Pargiter, J. in *Ram Chandra Marwari* v. *Rani Keshobati Kumari*, (2) where the question was fully considered and I see no reason to differ from the view expressed by the majority of the Court in case I think the intention of the legislature was that the amount decreed should not be such as to increase the total liability of interest on the bond beyond the amount of the principal debt and this intention is to some extent borne out by reference to Cl. (*a*) which restricts the rate of interest; I hold therefore that the interest recoverable should be limited to the amount of the principal of the original debt or loan after crediting the interest already paid.

The third question relates to limitation and arises under the following circumstances. The due date of the fifth and last bond was the 14th March 1903 and no interest has been paid since then or any acknowledgment made which would postpone the commencement of the limitation period which in the present case is 12 years. The present suit was instituted on the 5th February 1915 after an unsuccessful attempt to sue in the Bhagalpur Court which was dismissed by the Privy Council as already stated for want of jurisdiction. The previous suit from the time of its institution to the date when it was finally disposed of by the Judicial Committee occupied a period of about 10 years, *viz.*, from the 20th June 1904 to the 19th May 1914 and even without

(2) (1905) 1 C. L.J. 182.

deducting this period the suit was instituted within the limitation period. But the defendant 16 (a) Sripati Singh was not originally a party to the suit. He was added as a defendant on the 30th May 1916 that is more than 12 years after the cause of action arose. By S. 22 of the Limitation Act, the suit must be deemed to have been instituted against him on that date. Sripati is the minor son of Sasi Bhusan Singh, defendant No. 5 and grandson of Maha Prasad Singh, deceased, both of whom were executants of the bond. He was born in 1910 after the bond was executed and whilst the previous suit was pending. He therefore as a member of the family acquired an interest by birth in the equity of redemption in the mortgaged property. It is contended by the appellants that under O. 34, R. 1, of the Civil Procedure Code he was a necessary party to the suit and as he was not joined as a party until after the limitation period had expired, the suit cannot now be entertained and should be dismissed.

To this contention the respondents reply, first, that by S. 14 of the Limitation Act the 10 years during which they were prosecuting the previous suit should be excluded in computing the period of limitation; secondly that Sripati was not a necessary party as his interest was sufficiently represented by his father or by one or other of the members of his family who were originally joined, some of whom at least were not executants of the bond and have raised all the pleas that are open to Sripati; thirdly the respondents had no notice of Sripati's existence and could not reasonably be expected to have such notice until the 25th April 1916 when it was first disclosed in the written statement of the appellant Lakhi Prasad and that immediately afterwards they made enquiries which disclosed that Sripati had not been living with his father's family but with his maternal grandfather of Mahagaon since his birth, and that he was thereupon added as a party on the 30th May; and that O. 34, R 1 only applies provided the plaintiff had notice of the interest there referred to, as under the law previously in force under S. 85 of the Transfer of Property Act; fourthly, that the defendant Sripati, not having been born at the date of the mortgage, at most only acquired a right in the equity of redemption remaining in his father's family. And the effect of his non-joinder would merely be to keep his right of redemption alive.

In my opinion the first point raised by the respondents, *viz.*, S. 14 of the Limitation Act is a complete answer to the plea of limitation. When the previous suit was instituted Sripati was not born and could not then be made a party. He was added about a year and two months after the limitation period expired, and even if the period between the institution of the first suit in 1904 and Sripati's birth in 1910 be alone excluded, the limitation period as against him had not expired. It is argued however that he was not a defendant in the first suit and that S. 14 of the Act only applies to cases where the defendants are the same. By S. 2 (4) of the Act "defendant" includes any person from or through whom a defendant derives his liability to be sued. It is in my opinion through his father and the other members of his family that Sripati derives his liability to be sued. It is by reason of the charge created on the family property by them that Sripati, as a member of the family with an interest in that property acquired at his birth, derives his liability to be impleaded as a defendant in a suit against the family property. We have been referred to certain decisions, of which *Sunder Lal* v. *Chitar Mal* (3) may be cited as typical to show that a son in a Mitakshara family does not claim under his father within the meaning of S. 13 (now S. 11) of the Civil Procedure Code.

Whatever may be the weight of those authorities, and I express no opinion about them, they are not authorities as to the interpretation of S. 2 of the Limitation Act. That section seems to assume that every person who acquired an interest by devolution or otherwise in the subject-matter of litigation previously vested in others, which renders him liable to be impleaded as a defendant, derives his liability to be sued from or through somebody. In the case of a new born son in a Mitakshara family, the person or persons through whom he derives this liability must be the other members of the family in whom the property which the son acquires by birth was previously vested. If the appellant's contention be accepted it would in many cases work a manifest injustice. They contend that each member of the joint family alive

(3) (1906) 29 All. 1=3 A. L. J. 644=1906 A. W. N. 242.

at the date of the suit is a necessary party, in whose absence the suit is not maintainable and further that the time occupied in the previous fruitless litigation cannot be deducted in estimating the limitation period as against him even if he was born the day before the second suit was instituted. In such a case if the second suit was instituted after 12 years from the date when the cause of action arose the non-joinder of the newly born son, of whose existence the plaintiffs had no knowledge, would render the whole suit liable to dismissal unless, it can be said that the new member of the family derives his liability to be sued from or through his father or those who before his birth represented the property. In my opinion S. 14 of the Limitation Act applies and the suit is not barred. It is not necessary therefore to consider the other points taken by the respondents on this part of the case.

The fourth point taken by the appellants relates only to the respondent's right to a personal decree against the executants of the bond. It is contended by the appellants that in the previous suit no claim was made for a personal decree and therefore the respondents are precluded by O. 2, R. 2 from suing for the relief which they omitted from the previous suit. As an alternative argument they contend that if a claim for a personal decree must be taken to have been included in the previous suit then it must be regarded as having been dismissed, not for want of jurisdiction, but on some other ground and the matter is *res-judicata* and cannot be re-opened. For this part of the argument they rely upon S. 2 of the Civil Procedure Code read in the light of the 4th and 5th explanations appended to the section.

The relief asked for in the previous suit was in the form usually employed in such cases. It asked for (1) an account of the amount due under the bond with directions to the defendants to pay the amount found due within six months and in default a sale of the mortgaged property and extinguishment of the right of redemption. (2) In the event of the mortgaged property proving insufficient to cover the decretal amount and costs a decree against the person of the defendants 1 to 7 (the surviving executants of the bond) and the properties of the 1st party defendants (all the members of the family) and (3) such other relief as may be deemed proper. The second prayer is no doubt in pursuance of O. 34, R. 6 of the Civil Procedure Code. The cause of action in the present case was the failure to repay the principal and interest due under the bond and the relief claimable both against the property hypothecated and against the executants of the bond on their covenant to repay. It would follow therefore that if the respondents omitted to sue for a personal decree against the mortgagors on the covenant, they could not afterwards sue for that which was omitted. It is not usual or necessary to ask for a personal decree where the property is held liable for the whole of the principal debt and interest except in so far as the proceeds may be insufficient but it is quite open to the Court in a suit, framed as this was, to pass a decree against the mortgagors on their covenant to repay the whole if a part of the claim should be held not to be chargeable on the property.

I think it must be held therefore that the respondents did not omit to sue for a personal decree which might be granted under the third prayer set out in the plaint. It is urged however that, even so, no effort was made in the previous suit to obtain a personal decree when the decree for sale of the property failed, and if such a claim was involved it must be taken to have been dismissed by their Lordships when the matter came before the Judicial Committee. It must be conceded that the relief, if claimed, must be deemed to have been dismissed for want of jurisdiction. I think it would be fruitless to speculate as to the reasons why the relief was refused. It was merely auxiliary to a claim in regard to land over which the Bhagalpur Court had no jurisdiction and the whole suit was dismissed upon that ground and no other. I do not think it is open to us to assume that their Lordships had any other reason for refusing this relief and I would hold that it is still open to the respondents to claim a personal decree to the extent to which they may fail against the mortgaged property. I may mention that the point does not appear to have been urged before the Subordinate Judge and we have not the advantage of having his opinion before us.

The fifth point raises two questions (1) whether there was an antecedent debt

which would justify the alienation of the family property, and (2) whether, failing such justification, the loan was for the benefit of the family or warranted by family necessities. In the former case the charge would be valid. In the latter case the consent of the minor members of the family to the transaction would be implied although not expressly given.

As to Rs. 2,13,858 advanced under the bond this sum was the balance due under the previous bond for which the fathers of all the minor defendants were liable. To this extent therefore there was presumably an antecedent debt for which the debtors could validly charge the family property without the express consent of their sons or grandsons. Two points however were raised by the appellants which require consideration. In the first place it was argued that the principle laid down in *Sahu Ram Chandra* v. *Bhup Singh*, (4) had the effect of limiting the doctrine of antecedency to such debts only as are not themselves secured by a charge on the immoveable property of the family. So far as this Court is concerned we are bound by the decision of the majority of the Full Bench in the recent case of *Mathura Misra* v. *Raj Kumar Misra*, (5) which decided, following the decision of the High Court at Madras in *Arumugham Chetty* v. *Muthu Koundan*, (6) that the doctrine of antecedency applies where the debt is one incurred in substance and reality antecedently to the mortgage, whether or not the debt so incurred was secured by a charge on the family property. The point must therefore be decided against the appellants.

In the second place the appellants contended that the rule as to antecedent debt cannot apply where it is the joint debt of the heads of the different branch of the joint family. They rely for this proposition upon certain passages in the Vivada Chintamani,—an authority binding upon those governed by the Mithila school of Mitakshara Law,—to the effect that the sons are only responsible for the share of their father and not of others, and if two brothers have a joint debt, the son of the survivor is not bound for more than the father's share. (Vivada Chintamani, Tagore's Translation pp. 34, 35). It is argued from this, that the liability of the different branches of the family is a several liability, which cannot support a charge upon the joint family property of the members as a whole. In the present case, however, the debt was incurred by each of the heads of the four different branches of the joint family and all the other defendants are their sons and grandsons so that all the interests were involved. There seems to me therefore no reason why the charge should not be binding upon the property in the hands of all the defendants. Moreover the doctrine of antecedent debt in so far as it enables the debtor to charge the family property during his lifetime so as to bind his son's interest is not justified by the actual text of the Mitakshara. It is a modern development of the pious obligations of the sons to pay their father's debts and an obligation which according to the text of the commentators only arises after the father's death, but which has in comparatively recent times formed the basis of an exception to the general rule that the manager of a Mitakshara family cannot validly alienate the family property for purposes unconnected with the needs of the family or the benefit of the estate. The doctrine is too well established at the present day to admit of its being questioned by a reference to the text of the commentators. Admitting that it applies only as against the sons and grandsons of the debtor and could not apply so as to permit of a valid charge on the family property where the interests of collaterals are involved, nevertheless, where all the adult members of the family are themselves the debtors and the only other persons interested are their minor sons or grandsons, I can see no reason why the doctrine should not be applied. Although, so far as I am aware, the objection now raised has not hitherto been the subject of express decision there are many instances in reported cases where the doctrine of antecedent debt has been applied in circumstances similar to the present. (See *Bhagbut Pd. Singh* v. *Girja Kuer* (7); *Khalilul Rahman* v. *Gobind Prasad* (8). In my opinion the

(4) A.I.R. 19 7 P.C. 61=39 All. 437=44 I.A. 126 (P.C.)
(5) A.I.R. 1921 Patna 447=6 P.L.J. 526 (F.B.)
(6) (1919) 42 Mad 711=37 M.L.J. 166 (F.B.)
(7) (1888) 15 Cal. 717=15 I.A. 99=5 Sar. 186 (P.C.)
(8) (1892) 20 Cal. 328.

appellant's contention on this part of the case fails. It follows, therefore, subject to the question of interest, that in so far as the claim for Rs. 2,13,858 retained in discharge of the previous bond is concerned, the mortgage creates a valid charge upon the estate, and it is necessary to consider how far cash sum can be justified by family necessity.

With regard to the balance of Rs. 36,142 representing the cash consideration for the bond in suit, the learned Subordinate Judge considered that the bulk of this amounting to Rs. 1,23,178-4-9 was justified by legal necessity or antecedent debt and included it together with the amount due to the previous bond in the mortgage decree giving a personal decree for the balance of Rs. 12,963-11-3 with interest, considering that the plaintiffs had failed to establish legal necessity for the latter sum which had been taken for the personal purpose of the borrowers. The deduction of this sum from the mortgage decree was not challenged by the respondents and there is no cross appeal. The appellants however contend that the greater part of the cash consideration included in the mortgage decree cannot be justified either on the ground of family necessity or antecedent debt.

Evidence has been given in great detail relating to a large number of items of debts which were discharged out of the cash advance. Seventeen items including the principal and interest due on the previous bond are set out in Schedule No. 1 of the bond in suit and amount together to Rs. 3,10,763-9-5. To most of these items however must be added interest up to the date when they were paid off, out of the consideration money obtained for the purpose. Other debts not shown in the schedule were proved amounting to Rs. 10,573 which were paid off, out of the amount advanced. In addition, the cost of the stamp for the bond, the writer's remuneration and the registration fee were paid and proved. The total sum thus accounted for, including the sum due under the previous bond and after adding interest on the scheduled debts amounted to Rs. 3,37,036-4-9 for which the Subordinate Judge gave a mortgage decree with interest at the bond rate leaving a balance of Rs. 12,963-11-3 taken for personal purposes of the borrowers and not accounted for. The various items shewing the payments of the debts out of the consideration money for the bonds have been set out in tabular form and printed by the respondents in the schedules marked G. & H. which have proved very useful for purposes of reference during the hearing of the appeal. It will be useful to set out an analysis of the different items shewing how the total is arrived at :—

		Rs.
(1)	Amount due under the previous bond ...	2,13,858
(2)	Antecedent debts incurred by the heads of the four branches of the family ...	56,573
(3)	Antecedent debts incurred by one or more but not by all the heads of the different branches of the family ...	62,736
(4)	Stamp fee on bond ...	1,750
(5)	Writer's remuneration ...	1,750
(6)	Registration fee ...	[illegible]
(7)	Taken for personal purposes and not accounted for ...	[illegible]
	Total ...	[illegible]

With regard to the second item representing the antecedent debts incurred by the four branches of the family I have already held that the doctrine of antecedency applied. This sum includes the items numbered 2, 9, 10, 11, 13, 14 and 17 set out in the Schedule No. 1 of the bond which when the interest at the date of the bond is added amount to Rs. 55,573 and a further debt of Rs. 1,000 under a *rokkar* (Ex. 4-K) which was proved but not included in that schedule. With regard to the 17th item in the schedule amounting with interest to Rs. 21,570 8-0 the appellants took a further point. This sum was due to Anand Ram Marvari under a *rokkar* (Ex. 4-J) dated the 20th Aughan 1304 F. (10th December 1896 A.D.). It was a consolidation of 4 earlier *rokkars* of various debts between September 1893 and September 1896 some of which were stated in the *rokkar* to be for cash for meeting necessary expense, others for the price of cloths and one small sum of Rs 265-9-0 for the price of gold apparently for ornaments. The original *rokkars* were for sums borrowed by one or others of the heads of the family but never by all four and it was only on the 10th December 1896 that they all acknowledged their joint liability for these sums. There can be no doubt that at that time, the negotiations for the loan from

the respondents were going on, if not actually completed, and the stamp for the bond had in fact been purchased. It would be difficult in my opinion to find that the transaction of the 10th December was dissociated in fact from the mortgage transaction. These debts were consolidated under the general transaction creating a joint liability so near the date of the mortgage that it cannot be said to be dissociated in point of time. I think that the only reliable inference to draw is that the respondents when they undertook a joint liability had in mind the necessity of creating such a liability in order to obviate any question in future as to their right to charge the family estate with this sum. It was Surjya Narain the mortgagee himself who discharged this debt and he must have been aware of the circumstances under which the *rokkar* of the 10th December came into existence or at least had sufficient information to put him upon enquiry as it refers to the previous *rokkars*. I am of opinion that the transaction of the 10th December in itself affords no justification for a charge upon the family property on the ground of antecedent debt. This however does not conclude the case. It is necessary to consider how far the original loans consolidated in the *rokkar* of the 10th December can be justified on the ground of legal necessity. There is evidence to show that the mortgagee made exhaustive enquiries upon the evidence supplied him by the mortgagors as to the existence of this and other debts stated to be due, and on referring to the different *rokkars* consolidated under the transaction of the 10th December it appears that the sums borrowed are in almost every case stated to be for meeting necessary expenses or for urgent necessity. In one case the sum of Rs. 500 was advanced to Gajadhar Singh, the defendant No. 3, without any statement as to the purpose for which it was borrowed Ex. 4 B. B. In another case, Rs. 15 was borrowed by Maha Prasad without stating the reason (Ex. 4 M. M.) and in a third case Rs. 200 was in cash by Maha Prasad without stating the reason (Ex. A. O. O.) The bond in suit recited that the advance was required to enable the mortgagors to repay the dues of creditors and to meet the necessary expenses of the family and no evidence has been called on behalf of the appellants to prove that the debts were not incurred to meet the family necessity. Whilst it is true that the onus of proving such necessity rests upon the respondents, one must not lose sight of the fact that they had the assurances of the borrowers that the debts incurred were for family necessity and they made exhaustive enquiries as to the extent of these debts which undoubtedly amounted to a very large sum and even if a few small items out of the total might appear to be doubtful, I do not think we should scrutinize with meticulous care after a lapse of twenty years, each small item about which the existence of family necessity is doubtful so as to give to the appellants the benefit of the doubt when the enquiries made by the respondents must have shewn that the vast bulk of his particular debt appeared to have been incurred for family necessity and was subsequently acknowledged as a joint debt by the four responsible heads of the different branches of the family. I shall refer to this question further when considering the next item.

As to the sum of Rs. 62,736 the antecedent debts incurred by one or other of the different members of the family, this is comprised of over 20 different items including nine of the items set out in the schedule to the bond, namely those numbered 3 to 6, 12, 15 and 16. The scheduled items together with items up to the date of payment account for over Rs. 52,100. There can be no doubt that these debts as well as the balance making up the sum of Rs. 62,736 existed and were carrying interest at a much larger rate than that stipulated in the bond. They were incurred sometimes in the name of one of the adult members of the family, frequently in the name of three but never apparently of all four. The rokas in each case have been produced and they refer to transaction between the years 1894 and 1896. From these and from the evidence given on behalf of the respondents it appears that for the greater portions of the debts, were incurred in connection with the marriages, ceremonies of different members of the family and for *wiragawan* and *upanayan* ceremonies. In other cases they were for household expenses and for purposes of cultivation. The household expenses were the ordinary tradesman's bills for sugar, spices and similar articles including a few household utensils and some cloth. The marriages and other ceremonies account for roughly

Rs. 40,000, the household expenses amount to between thirteen and fourteen thousand rupees. There are also certain items for cash borrowed for purposes which are not clearly explained. The latter items in particular have been challenged as not being justified by legal necessities. They come to Rs. 9,335. In so far as the debts incurred for the marriages and other ceremonies and the household expenses are concerned, I think these may fairly be taken to come under the heading of necessary expenses of the family. It may be asked why in the space of two years it was necessary to incur debts for such purposes amounting to rather more than a year's income, but it must be remembered that since 1883 when the first mortgage bond was executed in order to raise money for litgation in connection wih the original acquisition of the estate, this family had always been in debt and was paying large sums periodically for interest on the loans. Between 1894 and 1895 about Rs. 35,000 were paid as interest on the previous bond and the resources of this large family were consequently restricted. The marriage of the younger members had to be provided for and the custom of conducting such ceremonies with some ostentation is a well recognized feature of the social conditions existing in this country. According to Western ideas it may seem improvident but western standards of economy afford no criterion for determining the necessary requirements of an Indian family in the position of the appellants. Their prestige as Zamindars of some position demands and their friends expect an amount of display in such ceremonies which might appear lavish and unnecessary for people of similar means in Western countries. I do not think that having regard to the then existing income of the family which was according to the evidence in round figures about Rs. 40,000 a year, it can be said that these expenses ought to have been met out of the income or that they were in themselves excessive and they are expenses which do not arise every year but only upon occasions when the youngermembers of the family are of marriageable age.

With regard to the items for which cash was borrowed for purpose not clearly shown by the evidence, these appear from certain rokas which have been produced and filed as exhibits in the case. The exhibits in question are those marked 4^u, 4°, 4^d, 4^r, 4^{xx}. They were paid off in December 1896 at the time when the bond was executed and the money advanced, and, the amount is stated to be Rs. 9,335. It appears from the rokas that these were sums borrowed in two cases by Ram Charan Singh and others, in two cases by Hari Parsad Singh, and in one case by Ram Charan Singh alone. The lenders are in some cases dead and the only evidence we have about them is that these sums were borrowed by the members of the family whose names appear in the rokas and who had been in the habit of taking such loans for family purposes.

Had the mortgage been granted for an advance to pay off these debts alone, it might have been difficult upon this evidence to find that they were in fact justified by family necessity, but it must be remembered that these sums were borrowed about 20 years before the suit was instituted. The original mortgagee is dead as well as others who might have been able to throw some light upon the exact purpose for which the loans were taken. Moreover the defendants themselves who admit that they have accounts which might throw some light upon the transactions have not produced these accounts and have given no evidence in support of the contention that there was no legal necessity for the loans. This was a matter within their own special knowledge and the representation made at the time of the loan was that the debts were incurred for necessities of the family and the evidence shows that *bona fide* enquiries were made at the time by the lender as to the nature and existence of these debts. But the circumstances under which the family found itself at that time must also not be lost sight of. Its history has been dealt with by the learned Subordinate Judge and need not be repeated here. It is the history of a collateral branch of a family living in comparative obscurity and poverty suddenly finding themselves within measurable distance of comparative wealth through the death of the maternal great-grandfather without male issue. Opposition to their claim is made by the alleged adopted son of the maternal ancestor's second wife resulting in litigation and an eventual compromise by which the

family secured a substantial share of the estate. This is followed by further litigation to defend the property so acquired, against the claims of other relatives of the original holder and still further litigation to get rid of incumbrances. To find money for the purpose of litigation in the first instance borrowing is resorted to and the family income is largely diverted towards paying interest on the loans which are borrowed for the purpose of maintaining the family. The loans began in 1883 and ended in 1896 when the bond now in suit was executed. At that time, in addition to the indebtedness under the previous bonds amounting to over two lakhs of rupees, debts had been incurred, the nature of which I have already referred to, of well over a lakh. The great majority of these were debts manifestly falling either within the category of antecedent debts or debts incurred for family necessity and recourse is again had to the money lender who, the evidence shows, satisfied himself as to the existence of the debts and their nature after an exhaustive enquiry. He was also assured that the creditors were pressing for payment and that the debts were those of the family and for legal necessity.

I am satisfied that *bona fide* enquiries were made by the lender and that the enquiries show that in the vast majority of cases the debts were such as to lay the foundation for a valid charge upon the family property. If 20 years later it should appear that in a few instances there is no conclusive proof that the debts were actually incurred for family necessity or with the active participation of all the adult members of the family, still if the circumstances show that the needs of the family, were such that it is probable that the money, even in those cases, were required for family necessities I do not think we should require absolute proof in every case but may presume that the lender satisfied himself at the time that the debts were of such a nature as had been represented to him and as appear from the recitals in the bond. In these circumstances, I think the silence of the defendants as to the nature of these debts is not without significance and may be taken into account as affording some presumption in favour of the plaintiffs. In the circumstances I am not prepared to differ from the Subordinate Judge upon this part of the case. I may add in the previous suit which proved infructuous no such defence was set up although it would have been easier at that date to have determined by evidence the exact purpose for which these doubtful sums were borrowed.

With regard to the stamp fee on the bond and the registration fee these items were not challenged. The writer's remuneration amounting to Rs. 1,750 which was the same as the stamp duty has been challenged as exorbitant and unnecessary. At first sight this would certainly appear to be so but the uncontradicted evidence shows that it is customary in such cases to pay the writer a fee of not less than the stamp duty on the bond, and I see no reason for differing from the decision arrived at by the learned Subordinate Judge upon this question.

The sixth and last point raised by the appellants relates to that part of the decree whereby the learned Judge allowed interest on the amount of the personal decree and costs in respect thereof at the rate of 6 per cent. per annum until realization.

It is not very clear why the learned Judge awarded interest only upon the amount of the personal decree and not on the amount of the mortgage decree but there is no cross appeal on this question. I think there is much to be said for the argument that the Santhal Perganas regulation applies only to the interest to be decreed under the bond and does not limit the powers of a Court under S. 34 of the Civil Procedure Code to award interest in the decretal amount until realization. But it has been held in this Court in *Rani Keshobari Kumari* v. *Kumar Satya Niranjan Chakravarti*, (9) that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt itself, as to do so, would contravene the provisions of the Regulation relating to compound interest. The principle underlying this decision applies equally where the amount decreed as interest already equals the sum advanced. Although I have some doubt as to the propriety of the decision mentioned I am not prepared to differ from the conclusion there arrived at and I think we should follow the decision. The result of my judgment is that the appeal is allowed in part and that the

(9) (1918) P. H. C. C. 305=47 I.C. 179

decree of the Lower Court must be modified in accordance with the above findings.

There will be the usual mortgage decree for the amount of the principal sum advanced as shown below together with a like amount as interest thereon after giving credit for the sums already paid in respect of principal and interest. The total sums advanced were Rs. 2,85,903-1-9 of which Rs. 12,000 were paid on the 13th January 1884, leaving a balance of Rs. 2,73,903-1-9. From this must be deducted the sum of Rs. 12,963 disallowed by the Subordinate Judge as not justified by legal necessity for which there will be a personal decree with interest to a like amount after deducting the proportion of interest already paid as shown below. The total interest paid was Rs. 1,36 352-7-1. A difficulty arises as to how much of this should be deducted from the interest payable under the personal decree. As the amount of the personal decree is deducted from the cash advance at the date of the last bond on the 21st December 1896 it would appear that the interest paid before that date under the previous bonds should be allocated to the previous advances which are included in the mortgage decree. After deducting the Rs. 400 already mentioned this sum amounts to Rs. 80,804-3-6; the balance paid since that date amounting to Rs. 55,248-3-7 should be deducted rateably from the amount of interest payable under the mortgage decree and the personal decree that is to say in the proportion which Rs. 2,60,940 bears to Rs. 12,963.

I see no reason for departing from the ordinary rule as to costs. I think the appellants who have reduced the amount awarded against them from something like 15 lakhs to something like 5 lakhs are entitled to their proportionate costs of this appeal.

Bucknill, J.—This was an appeal from a decision of the Subordinate Judge of the first Court of Bhagalpur given on the 17th June 1918. The general circumstances which gave rise to the present litigation are of a very simple kind. They present many features which are familiar in the Courts of this and other Provinces; and they raise questions, which perhaps unfortunately, in the existing state of the law relating to the position of the joint Hindu family, occupy, and must continue to occupy unless and until this branch of Hindu law is further explained by judicial decisions or clarified by litigation, much of the time of the judiciary will not be saved.

In this case are to be found factors of very usual type; an action brought by the plaintiffs on a mortgage bond purporting to be executed in the plaintiff's favour by some members of a joint family of Hindus subject to the Mitakshara law on their own behalf and as guardians of minor and entered into for the purpose of giving to the plaintiffs security for large sums of money lent by the plaintiffs to some of the defendants. Again also is to be found the usual defence (which always demands, as the law is at present constituted, laborious investigation) of the suggestion by certain members of the joint defendant family that the debts constructed were not debts of necessity or for the family benefit and cannot be supported by any adaptation of the modern doctrine of antecedent debt. In this particular case there are, however, other special and somewhat peculiar features which raise points of considerable difficulty and interest. It is desirable therefore at this stage to give in some slight detail short summary of the events which gave rise to the present suit. (His Lordship then recited fact which are given in the other judgment and then continued as follows). It will be at once observed that it cannot be contended that the rates of interest charged were in any way extravagant but it must be mentioned that, at the date of the suit the claim had reached the large figure of Rs. 11,81,811 and the amount had swollen considerably by the date the suit was heard. Indeed it may also be noted here that the Subordinate Judge decided substantially entirely in favour of the plaintiffs awarding them a sum of Rs. 15,27,997 as against the property and together with a personal decree of some Rs. 44,164-7-6 together with costs. It is from this decree that this appeal has now been prosecuted.

The records printed for the purpose of this appeal are so massive that it will probably be advantageous at once to endeavour to set out with precision the points which have been very ably argued on the part of the appellants, *i.e.*, the defendants. They may be summarised thus.

(1) A question relating to jurisdiction.

This arises in the following way. The Barcope estate is situated in the locality known as the Santhal Perganas an area removed broadly speaking, from the operation of ordinary law in many respects and governed largely by special Regulations (which have been varied from time to time) known as "the Regulations for the Peace and good Government of the Territory known as the Santhal Perganas." So far as this question of jurisdiction is here material, Regulation V contemplated that no suit connected with land should be heard in any Civil Court other than the special Courts provided under the Regulation so long as the place had not emerged from what is here known as the process of "Settlement";—that is to say, until the completion of the territorial and revenue survey. It is argued here that it is not certain that the area within which the Barcope estate was situated was actually clear from this embargo; and it may conveniently be pointed out here also that in an earlier action brought by the plaintiffs in 1904 upon the same bond and that now sued upon, the defendant was successful on this self-same ground.

(2) A question arising as to the amount of interest which can be claimed by the plaintiffs. Here, again, this point arises out of the special arrangements made applicable to the Santhal Pergannas under the Regulations mentioned above. By Regulation VI, which purports to be directed against usury, there are certain very important limitations laid down prohibiting in various ways the amount of interest which can be claimed within the area in question. It is argued here that these Regulations are applicable in this case; and, indeed this point, was together with the question of jurisdiction, a subject of considerable discussion in the previous action, to which reference had already been made, when it came before the Judicial Committee of the Privy Council.

(3) A question arising as to whether this suit is not, under certain peculiar circumstances, barred by the operation of the provisions of the Limitation Act. The point arises in this way. The present suit was commenced on the 5th February 1915; at the time it is admitted that there was a child in existence, who is said to have been born in about 1910, whose name was Sripati Singh. He was the son of Sasi Bhusan Singh and a grandson of Maha Prasad Singh. He was not joined as a party in the proceedings until 30th May 1916 The plaintiffs state that as soon as they discovered the existence of this child, they took the step of having him joined in proper manner; and, in fact, he was, at the date given above, put on the record under the order of the Court as defendant No. 16 (a). The date upon which payment of the bond was strictly due was the 14th March 1903, and it is argued that, as more than 12 years had elapsed from that date before the child was joined, the suit would be barred by the provisions of the Limitation Act on the ground that it was obligatory that he, having an interest in the right of redemption of the mortgage, was a necessary party to the suit.

(4) A question as to the non-existence of legal necessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very careful consideration of the elements, of which the loan was in fact composed and it has also been the subject of laborious enquiry and research before this Court. In cases such as the e, where, in order to find the actual origin of portions, very often small and very often numerous, of what is a large aggregate sum of money, one has to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in a very satisfactory manner, and indeed, it is probably doubtful if it is right or necessary so to do. The Subordinate Judge took the broad view that, in the main, old loans contracted for the purpose of paying off earlier debts of a compositive character should be regarded as carrying their own burden of proof that they fell, roughly speaking, within the confines of what may properly be regarded as legal necessity orfamily benefit.

(5) A question arising as to how far the provisions of this bond are capable of being enforced against the defendant family under the doctrine of antecedent debt. It is argued here that the doctrine of antecedent debt only applies when the exact relationship of father and son is present. It is suggested that a man, who is a member of a joint Hindu family sub-

ject to the Mitakshara law, cannot in any way bind his nephew. It is freely admitted that some of the debts, which were originally contracted and which purported to be met by their entry into the bond on or in connection with the previous bonds, were contracted nominally, sometimes by one, sometimes by another and sometimes by a combination of the heads of the family; and the contention here put forward is that in cases where any particular original debt purported to be contracted by, for example, one member of the family, such a transaction cannot, on the doctrine of antecedent debt, be held to bind the nephews of the person who contracted such a debt but only to bind his sons.

6. A question as to the barring of the claim of a personal decree by the provisions of O. 2, R. 2, Civil Procedure Code.

Before dealing with those points in detail it is necessary to ascertain what was really the position of the defendant family with regard to their possession of the property in question; for it has been seriously suggested that they were not a joint family at all so far as this property is concerned. The facts, however, with regard to this matter are not complicated.

A certain Raja Ajit Barham was the proprietor of the Barcope property, and at his death left two widows, the Ranis Dilabati and Bhulanbati, who succeeded to the estate. Upon the decease of the Rani Dilabati, Rani Bhulanbati came into possession of the whole property, and on her death, the Court of Wards took possession of it on behalf of one B. Chandra Dyal Barham, a son of Mongal Barham, on the ground that it was alleged that he had been adopted by the Rani Bhulanbati as a son to her deceased husband. Now, Ram Charan Singh, Guru Charan Singh, and Maha Prasad Singh, the three sons of Balbhadra Singh, had as their mother one Mussammat Barbati, who was a daughter of Raja Ajit Barham, and they brought a suit for recovery of the estate from the Court of Wards, joining in their action the sons of another daughter of Raja Ajit Barham. The suit was compromised by Guru Charan, Ram Charan and Maha Prasad Singh obtaining 7 annas 17½ *gandas* share of the Barcope Raj whilst Chandra Dyal Barham obtained a 4 annas share. It would appear that in this litigation these three men incurred legal expenses in order to pay which they had to borrow. *See Appoovier* v. *Rama Subba Aiyan* (10), *Mahabeerkuer* v. *Jhubba Singh* (11).

Subsequent to this compromise these three men became involved in another piece of litigation, one Batan Barham and other relatives of the deceased Raja Ajit Barham having unsuccessfully brought a suit against them and others for the possession of the Raj; and here again further legal expenses were necessarily incurred. I think that there can be no doubt that the property having been thus acquired through their mother it could not be regarded, when it reached the hands of Balbhadra Singh's there sons, as their joint ancestral family property; *Venkayyamman Garu* v. *Venkataramanayyamma Bahadur Guru* (12); *Atar Singh* v. *Thakur Singh* (13); *Bishwanath Prasad Sahu* v. *Gangadhar Prasad* (14); but I think that from an examination of what these men themselves stated in various bonds into which they entered that, as the Subordinate Judge has found, they undoubtedly elected to treat the estate, which they had thus acquired, as joint family property. (His Lordship then referred to each deed in detail and continued as follows.) I now propose to endeavour to deal with the question of jurisdiction. This suit was instituted in the court at Bhagalpur, which is in this province. The properties which were mortgaged by the plaintiff's predecessor to the defendants were very largely situated in the Santhal Perganas District and only a small portion lay within the District of Bhagalpur. Under Regulation V, Sub-S. (1) of the Santhal Perganas Regulation, it is laid down that "from the date on which under S. 9, (to which reference will be made presently) of the Regulation, the Lieutenant-Governor declared by a notification in the *Calcutta Gazette*, that a settlement shall be made of a whole or any part of the Santhal Perganas until the date on which such settlement is declared, by a

(10) (1866) 11 M I.A. 75=2 Sur. 218 (P.C.)
(11) (1871) 16 W.R. 221=8 B L.R 38.
(12) (1902) 25 M 678.=29 I.A. 156 (P.C.)
(13) (1908) 35 Cal. 1095=35 I.A. 206 (P.C.)
(14) (1917) 3 P.L J. 168=1917 P.H.C.C. 268.

like modification, to have been completed, no suit shall lie in any Civil Court established under the Bengal, Agra and Assam Civil Courts Act of 1887, in regard to

"(a) any land, or any interest in, or arising out of land or

"(b) the rent or profits of any land, or

"(c) any village headship or other office connected with any land, in the area covered by each first mentioned notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it."

Whilst by Sub-S. (2) it is enacted that "between the dates referred to in Sub-S. (1) all suits of the nature therein described shall be filed before or transferred to an officer appointed by the "Lieutenant-Governor under S. 2 of the Santhal Perganas Act, 1885, or S. 10 of this Regulation according as the Lieutenant-Governor may from time to time direct, and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed; determine them." S. 9 lays down that the "Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, declare that a settlement shall be made of the whole or any part of the Santhal Perganas for the purpose of ascertaining and recording the various interests and rights in the land."

It is unnecessary to consider here what is the precise meaning of this section for the matter has already been dealt with by Judicial Committee of the Privy Council, as I have already had occasion to mention, in a case brought in connection with this bond now sued upon by and against substantially the same parties in the year 1904, but decided, however, in the Privy Council in 1914 *Maha Prasad Singh* v. *Ramani Mohan Singh* (1). It is sufficient to say here that it was held in that case that although it appeared that there had been a notification declaring that a settlement of the Santhal Perganas was to take place, yet, as no notification had issued that the settlement had been completed, the court at Bhagalpur had no jurisdiction to entertain the suit. It is, therefore, unnecessary for me to enter upon any close examination as to how it comes about that the Santhal Perganas now falling within the Province of Bihar and Orissa, are amenable to the special Regulations, which were in existence prior to the separation of this Province from that of Bengal, or as to why suits even of such large amount as the one in question, were under the circumstances, which existed when the case dealt with by the Privy Council was instituted, still incapable of being tried by other than the Special Tribunals instituted under the Regulations and it is common ground that it is sufficient here merely to ascertain whether anything has happened since the date of institution of the prior suit which indicates that settlement of such part of the Santhal Perganas as includes Barcope has been completed. If that settlement has not been completed, it is obvious that the Court at Bhagalpur could not have entertained this suit, if however, it has been satisfactorily shown or a suitable inference can be drawn that such settlement is now over, the question of jurisdiction must obviously be decided in favour of the plaintiffs. The Subordinate Judge has found against the defendant on this point. What really happened appears to have been that the Government many years ago declared a settlement of, apparently, the whole of the Santhal Perganas which was commenced and carried on by a Mr Wood from 1873 to 1879; there is no definite evidence to indicate that this settlement was ever finally completed and no notification of completion has been discovered. It may have been that it was too great a task at that time and that it was in fact never completed or it may have been that a notification of a partial completion or of a whole completion may have been in existence but has not been discovered; at any rate, what is certain is that, at later dates the Government began to deal piecemeal with comparatively small arrears of these Perganas notifying for settlement of various places from time to time; the work was carried out by different persons at different periods notably by Mr. Craven in 1892, Mr. H. McPherson between 1903 and 1905 and Mr. Allenson between 1906 and 1908. It will be found that the Barcope estate was dealt with in these settlements to which I have referred. The

Subordinate Judge in dealing with this question says; "The plaintiffs have shown that though the settlement made by Mr Wood, was completed, but not published, the Local Government brought the portion of Barcope, under settlement from time to time." (*Vide* the copies of the *Calcutta Gazette* filed in this respect on behalf of the plaintiff) and finally published it after its completion. It is, therefore, clear that the Local Government has superseded the settlement completed by Mr. Wood and has not allowed it to exist in the eyes of Law. I, therefore, reject the defendant's contention as frivolous."

I think that this is by no means an improper expression of what the real situation is. In 1889 a notification dated the 29th January of that year was issued by the Government of Bengal declaring that a settlement should be made of the villages comprised in certain scheduled estates amongst which was Tuppa Barcope (Ex 28). On the 10th September of the same year, however, this notification was amended and a corrected list of arrears substituted. This included Taluk Barcope, or Tuppa Barcope. On the 1st July, 1892 (Ex. 27) we find that Mr. Craven, the Settlement Officer, submits his final report upon this settlement of the Taluks, which includes the Taluk Barcope (Ex. 27) and on the 13th March 1893 (Ex. 28-B) appears a notification by the Government of Bengal declaring that Mr Craven's settlement had been included and completed; and in the list given is to be found the Barcope Tuppa. It will, however, be seen from Mr. Craven's report that the settlement proceedings were not a precisely exhaustive character, and they were in part. apparently completed later. On the 14th October 1903 there is a notification (Ex. 28-C) of the list of arrears in which settlement has been completed which includes three villages in Tappa Barcope. Again on the 29th October 1906 there is another notification (Ex. 28-D) declaring that there should be a revision of the settlement made in the case of certain areas which includes the Zamindari of Barcope, Touzi No. 481. On the 16th September 1907 there is a further notification (Ex. 28-E) that a settlement thereof has now been completed and concluded. The list of places where settlement has been so effected includes a large number of places in Barcope, whilst on the 12th January 1910 a further notification (Ex. 28-F) of conclusion of settlement includes the estate of Barcope, Touzi No. 481.

Now some endeavour has been made by Counsel for the appellants to show that if one examines the reports of Mr. Mac Pherson and Mr. Allenson and the number of villages which are there mentioned, one may find certain discrepancies in the number, and that it is therefore not clear that all the property has been duly and completely settled. I myself, however, think that this endeavour has been a failure. I consider that there was on the face of the documents, to which I have referred a very clear indication that the settlement of the whole of the Barcope estate was in fact completed, and although it may be that there is some little difficulty in following through and identifying each village, (the names of which may be differently spelled at different times) and although there may be some further difficulty in reconciling exactly the numbers of villages which are sometimes referred to as having been within the confines of the estate, I do not think that there is any satisfactory evidence to show that anything was left out of settlement. Under these circumstances it would appear that, since the institution of the last suit, the settlement has been concluded, and consequently that the difficulty, which stood in the plaintiff's way in the previous case as to the court at Bhagalpur not having jurisdiction to deal with the matter, no longer, now applies. The following cases are of interest in connection with this point:—

Dungaram Marwari v. *Rajkishore Deo* (15) and another *Shah Deo Narain Deo* v. *Kusum Kumari* (16).

I now pass to the second and important question of interest.

S. 6 of Regulation (III of 1872) of the Santhal Pergannas lays down the following order:—

All courts having jurisdiction in the Santhal Pergannas shall observe the

(15) (1890) 18 Cal. 133.
(16) (1918) 5 P. L. J. 164=46 I. C. 929.

following rules relating to usury, namely:—

(*a*) " Interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent. per annum, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed.

(*b*) The total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

We get an explanation and illustration which are both as such salient features of Indian codified legislation and which, as is sometimes the case, although intended to be of an explanatory character are so worded as to give rise to no little confusion. The explanation and illustration which were added in 1893 read thus :—

" *Explanation.*—The 'intermediate adjustment of account' in clause (*a*) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal."

" *Illustration.*—A bond is given for Rs. 75, of which Rs. 25 are interest, unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100.

The section is directed, according also to the side note, against usurious practices; and, of course, the object of all this particular legislation of very paternal character which is operative in the District of the Santhal perganas was and is to protect the inhabitants there, who were of a simple type and backward culture, against what might appear to be the imposition of unscrupulous and adroit persons who might take advantage of processes available to them under the ordinary law. In Act No. XXXVII of 1855 we see in the preamble that it is stated that the ordinary law in force in the Presidency of Bengal is not regarded as being adoptable to the uncivilized race of people called Santhals and in the Regulation, to which reference has already been made, one finds numerous instances in which it is endeavoured to safeguard the interests of these people of early culture. It is no doubt rather hard to reconcile the undertaking of great transactions in connection with these ideas of the protection of a primitive race but whilst, in the ordinary way, one would have contemplated, as no doubt was the case, affairs only of small degree, the fact remains that, as the settlement of the District proceeded, it was discovered that there existed persons possessed of large and valuable territorial rights. In the case now before us, we have, exhibited, individuals blessed with a large income and borrowing great sums of money; but there is nothing to indicate that the Regulation is other than of general application to all affairs of whatever magnitude conducted in the District. The broad contention which is put forward on behalf of the appellants is that the Regulation which has been quoted above must here apply. The Subordinate Judge, however did not think that the appellants could in any way take advantage of the provisions of this section VI of the Regulation. In the issues, which were raised for his consideration, issue No. 11 was : " Are the plaintiffs entitled to compound interest, or interest exceeding the amount of the principal keeping in view the S. 6 of the Regulation III of 1872 ?" In dealing with this issue, the Subordinate Judge writes in his decision : the plaintiffs have successfully shown that the father of the plaintiff No. 1 lent " the executants of the bond in suit, Rs. 3,50,000 out of which Rs. 1,36,142 were paid to them in cash, the rest having been applied to the payment of their previous debts due to him and that when he did so, the terms of third and the fourth bonds which are executed in his favour did not expire and that he not only allowed the bonds to be renewed but also reduced the rate of interest thereof the result of which has been that there has been a gain of over Rs. 12,000 to the executants of the bond in suit. It is, therefore, clear that the transaction under the bond, has been fair and equitable within the meaning of the illustration attached to the S. 6

of the Regulation III of 1872. It appears that this question was not under controversy in the suit, before the Judicial Committee and has not been judicially considered. This being so, I find that the plaintiffs are also entitled to the interest claimed within the meaning of the illustration."

The Subordinate Judge did not think that there were any intermediate adjustments of account within the meaning of the explanation attached to the section and considered that the plaintiffs had a right to recover the interest as claimed; and he, therefore found this issue against the defendant.

I greatly doubt whether the Subordinate Judge is here correct.

The exact proposition which has been put forward by counsel on behalf of the appellants is divisible into three definite suggestions:

Firstly that the amount of interest which can be obtained by the plaintiffs cannot exceed the actual principal sums advanced; secondly that the amount of interest which has been in fact paid must be deducted from the amount of money which, payable as interest, equals the amount of the principal loan, and thirdly, that interest cannot be granted on the decretal sum for any period after the date of the judgment if it would result in the amount thereby recoverable exceeding the total of the principal actually advanced. We are fortunately, I think, not altogether without authority on part of these questions. In the case to which reference has been made above in connection with the consideration of the question of jurisdiction *Maha Prasad Singh* v. *Ramani Mohan Singh* (1) the general point has, to my mind been the subject of what amounts to judicial decision. In the judgment of their Lordships delivered by Lord Moulton it is stated that "Their Lordships are also of opinion that apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of S. 6 of the Santhal Perganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree any "compound interest arising from any intermediate adjustment of interest or on account of total interest exceeding the principal of the original debt or loan."

Their Lordships also, in my view, disposed of the question (advanced here but not very strongly urged) as to how far this section of the Regulation was observable by Courts other than those which were physically situated in the District. Lord Moulton states, after quoting *in extenso* S. 6 of the Regulation, "the respondents sought to establish that the phrase "All Courts having jurisdiction in the Santhal Perganas" meant Courts situated in the Santhal Perganas dealing with matters purely local. Their Lordships cannot accept this interpretation. The words are definite and precise, and must be applied in their natural signification. It was urged that, taken literally, they would apply to everything done by a Court having jurisdiction in the Santhal Perganas, whether the matter related to those districts or not, inasmuch as the language used makes the application of the enactment depend on the Court and not on the matter in dispute. But this is to ignore the fact that the Regulation is only applicable to the Santhal Perganas and that, therefore, it would not apply to Courts having jurisdiction wider than these local limits when such Courts were dealing with matters relating solely to other parts of India. The enactment therefore, applies to Courts having jurisdiction in the Santhal Perganas, and acting under and by virtue of such jurisdiction."

I am bound to say that I think that Lord Moulton's dicta in the earlier case relieve this Court from considering a question, which, I confess, presents to me very considerable difficulty. Here there lie a series of bonds, the amount of what one may perhaps term the original debt, (that is to say the actual fresh cash advanced) is not in dispute but, with the exception of the second bond of 1886, which was, as I have mentioned before, an independent transaction, each of the five bonds, which are consolidated eventually in the mortgage bond which is now the subject of this suit, brought to itself an accumulation of interest coupled with an addition of a new advance; and the accumulated interest was added to the old capital and with the fresh advance,

forms the aggregate sum for which the new bond is executed. I cannot but imagine that these proceedings constitute what I may term into the phraseology of the Regulation "intermediate adjustment" indeed I am not at all sure that each pause in compound interest, represented by what is known as the "yearly rest", is not also an intermediate adjustment, and I am quite prepared to regard them as such. For three reasons I am afraid I must hold that the plaintiffs cannot recover on their decree a sum in excess of that which was actually advanced to them in cash, which I understand, amounts in all to the considerable sum of about Rs. 2,85,000.

The second suggestion which is put forward on behalf of the appellants is that what has been in fact paid by way of interest must be deducted from the amount of interest to which the plaintiffs are restricted under the provisions of the section of the Regulation to which reference has been made. I cannot but think that this contention is sound, for if any really effective meaning is to be given to the restricted character of the section of the Regulation under consideration, any other decision might result in absurdity; for example, in the supposition even of a borrower having paid to his lender a very large quantity of interest, he might yet be liable under any construction of the Regulation other than that which, I think should be given to it, to pay further accumulated interest which might amount together with what he had already paid, too far more than the aggregate of the original sum lent; and this would be a result which would, in my opinion, be wholly inimical to the purview of this S. 6 of the Regulation. I, therefore, have come to the conclusion that the amount of interest already paid must be deducted from the total sum claimed by the plaintiffs by way of interest. In this particular case the accumulations of interest are so great that they far exceed the original amounts from time to time lent and so the figure due is a matter of simple calculation.

The third suggestion made by the appellant is that no interest can be granted on the sum actually decreed after the date of judgment, if, at any rate, that would result in the amount so recoverable exceeding the total of the principal actually advanced. Now in this Court in the case of *Rani Keshobati Kumari* v. *Kumar Satya Niranjan Chakerverty* (9) it has been in effect held that the incidents of S. 6 of the Regulation pursue the decretal sum; in this decision by Roe and Coutts, JJ., it was laid down that interest subsequent to the decree must be limited to interest on the principal advanced and the costs of the suit. If thus the operation of S. 6 of the Regulation is thus, after the decree, applicable to the amount decreed it must logically follow, if that view is correct, that when the interest accruing after the decree amounts, together with the interest already paid before or afterwards by the decree to more than the principal, it must stop; or, if, as in this case, the amount of interest already paid prior to and awarded by the decree equals the principal, no more can accrue after the decree. Had it not been for this decision, with this proposition I am not sure that I should have been content to agree. I should have felt inclined to think that when judgment has been given for a specific amount and for the right amount, interest at the usual judicial rate follows as a matter of course that the matter no longer lies within the embargo of the Santhal Perganas Regulation but follow the normal course, and, that, even though by accumulation of interest after judgment, the amount ultimately recoverable by way of interest may in fact exceed the total amount of the principal actually advanced the position thus achieved is a regular one. In connection with this question of interest one may refer to the following cases:—*Shama Charan Misser* v *Chuni Lal Marwari* (17), *Ramchandra Marwari* v. *Rani Keshobati Kumari* (18), *Ramjiban Shah* v. *Dhiku Singh* (19). *Maha Prasad Singh* v. *Ramani Mohan Singh* (1), *Atikulla Munshi* v. *Azim Uldin Harri* (20), *Chiranjib Lal Chaubey* v. *M. Daleta.* (21) (Patna High Court): *Rani Keshobati Kumari* v. *Satya Niranjan Chakerverty* (9)

(17) (1898) 26 Cal 238.
(18) (1909) 36 Cal. 840=2 I C. 935=36 I.A. 85 (P C.)
(19) 1912) 15 C L.J 264=16 I.C. 246.
(20) (1917) 40 I.C. 415
(21) (1917) 2 Pat. L.W. 20=41 I.C. 677.

Having now dealt with the question of interest, I pass to the third point namely, as to whether the suit is affected by the Limitation Act.

The argument which is put forward on behalf of the appellants in connection with this point may be explained in the following manner. The bond, upon which the action is now brought, was dated the 21st December 1896 and it is common ground that the right of action accrued on the 14th March 1903. The last payment of interest was in fact made on 16th March 1902. The first suit was commenced on the 20th June 1904; it was dealt with in the Court of first instance on 12th February 1906, and was finally decided by the Judicial Committee of the Privy Council on the 19th May 1914. The present action was started on the 5th February 1915. It is admitted that about 1910 there was born to Sasi Bhusan Singh a son, whose name is Sripati Singh, and that this child was not joined as a party to these proceedings until the 30th May 1916, when he was added as defendant 16 (*a*) by the Court's order. It is contended by the appellants that under the provisions of O. 34, R. 1, C. P. C. which reads:

"Subject to the provisions of this Code, all persons having an interest in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgages", this Sripati Singh was a necessary party in the suit; and that as he was not joined until after the expiration of 12 years from the date when the right of action accrued, the suit must fail. See *M. Nabomi Bhusan* v. *Madan Mohan* (22), *Bholanath Khatery* v. *Kartik Kishun Das Khattery*, (23) *Ajodhya Ray* v *Harbar Ray* (24), *Chuttan Lal* v *Kallu* (25), *Tulshi Ram* v. *Kabu* (26), *Golan Lal* v *Babu Ram* (27), *Shyam Sunder Lal* v. *Budhu Lal* (28), *Debi Prasad Sahi* v. *Dharamjit Narain Singh* (29), *Girwer Narain Mahton* v. *Makbun'sa* (30), *Jwala Prasad* v. *Udai Nath Shah Deo* (31), *Ranjit Prasad Tewari* v. *Ram Jatan Pande* (32), *Lachman Prasad* v. *Suman Singh* (33), *Bishwanath Prasad Sahu* v. *Gajadhar Prasad* (14), *Bulhmal Kewal Chand* v. *Rama* (34).

It is agreed that the period of limitation applicable in this case is 12 years and it is also common ground that the child Sripati Singh is one of that class of persons contemplated by the provisions of O. 34, R. 1. To the argument adduced by the appellants, the respondents put forward several suggested answers In the first place, they saw that the provisions of O. 34, R. 1, are not such as necessarily entail the failure of the suit, if a person who ought to be a party is not in fact joined but that the only result should be that as against such individual the decree in the suit would not be binding This point raises a question which is by no means free from difficulty; and with it too is involved the point as to whether the omission to join Sripati Singh in this case was an act of negligence or not. It is noticeable that the provisions of O. 34, R. 1 reproduced with certain alteration those of S. 85 of the Transfer of Property Act, IV of 1882. This ran as follows:—

"Subject to the provisions of the Code of Civil Procedure, S. 437 (now O. 31, R. 1) all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage; provided that the plaintiff has notice of "such interest" It will be observed at once that this provision, as to the plaintiff having some notice of the interest of the individual who is not joined as a party to the suit, does not find place in the phraseology of O. 31, R. 4. In this particular case the respondents allege that, owing to the fact that this Sripati Singh did not reside with his parent, they were not aware of his existence, until shortly before they

(22) (1885) 13 Cal. 21=13 I A. 1 (P. C.)
(23) (1907) 34 Cal. 371=11 C. W. N. 462.
(24) (1909) 9 C L J. 485.
(25) (1910) 33 All 283.
(26) (1911) 33 All 654=8 A. L. J. 733.
(27) (1911) 9 A. L. J 86=13 I C. 197.
(28) (1914) 12 A L. J. 794=24 I C. 252
(29) (1914) 41 Cal. 727=22 I. C. 570=19 C. L. J. 437.
(30) (1916) 1 P. L. J. 468.
(31) (1917) P H C. C. 27=1 Pat. L. J. 497.
(32) (1917) P H. C C. 113.
(33) (1917) A. I R. 1917 P. C. 41=39 All. 500 =44 I. A. 163 (P. C)
(34) (1919) 44 Bom. 223=22 Bom. L.R. 68.

actually caused him to be as a party; and the Subordinate Judge has accepted this evidence, a conclusion with which I see no ground for disagreeing. He thinks that although the provision as to notice which existed in section 85 of the Transfer of Property Act 1882 is omitted from the provision of Order 34, R. 1, it would be altogether unreasonable to suggest that where a necessary party has been, not through negligence but under circumstances which are properly explicable, omitted from being made a party to the suit, such non-joinder would necessarily be a fatal bar to the progress of the action. There is, I must confess, much to be said in favour of this view. I take it that the principle which must underlie the idea that where there is a non-joinder of necessary parties, the suit must fail, must be that it is undesirable and contrary to public policy, that the courts should expend their time and energy in dealing with matters, the judgment upon which might, because they would not be binding upon necessary parties not joined, be unfructuous or materially incapable of effective enforcement. There are obviously in the class of cases to which this suit belongs, very considerable difficulties in the way of a plaintiff who really desires to know who are, and to join these who are, necessary parties to this suit; for in a joint Hindu family, often composed of many adult members, there are, and during lengthy periods over which litigation of this character is drawn out, must naturally be, persons who from time to time have children all of whom presumably on their birth acquire at once some kind of interest in the joint family property. It seems to me to be expecting almost too much to suggest that it is always possible for a plaintiff to become acquainted immediately with the occurrence of such births; and the facts that they may not be so acquainted and that the defendants do not intimate the birth of another individual, who has an interest in the subject matter of the action, should not, I think, be capable of being seized upon as an opportunity to the defendants, for perchance, availing themselves, owing to the non-joinder of such a child, of the highly technical provisions of the Limitation Act. (See *Kundan Lall* v. *Faqir Chand* (35), *Ragho Ram Singh* v. *Rajni Kanta Banerji* (36), *Raghunandan Singh* v. *Parmeshwar Dyal Singh* (37).

However, in this case, there are other contentions on behalf of the respondents, which are, perhaps, of more general value to them. In the first place they call into aid provisions of section 14 of the Limitation Act No. IX of 1908. Sub-Sec. (1) of Section 14 reads thus:

> "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."

There was placed before us a good deal of technical argument as to the precise construction of this section (See *Ali Saheb* v. *Kaji Ahmad* (38), *Bhogi Lal* v. *Amrit Lal* (39), *Sunder Lal* v. *Chhitermal* (3), *Chuni Lal Hari Lal* v. *Bai Muni* (40) it must be remembered that the first suit was commenced on the 20th June, 1904. It appears to me that it was clearly based upon the same cause of action and was certainly between substantially the same parties, allowance being made for devolution or transmissions of interest; there is also no doubt that it was on a question of jurisdiction that the suit could not be entertained, nor is there any controversy that the plaintiff's predecessor was prosecuting that suit *bona fide* and with diligence.

Under these circumstances, therefore, I am of opinion that the time under the Limitation Act did not begin to run against the respondents until after the decision in 1914 by the Judicial Committee of the Privy Council.

There is a further point which is raised by the respondents, which is of some importance and upon which I think it is desirable that I should express my view. It is that even though the name of Sripati Singh was placed upon the record after the expiration of the period prescribed by the Limitation Act it was not in

(35) (1904) 27 All. 75=1 A. L. J. 476.
(36) (1915) 21 Cal L. J. 452=29 I.C. 752.
(37) (1917) 2 Pat. L. J. 306=39 I. C. 779=1917 P.H.C.C. 137.
(38) (1891) 16 Bom. 197.
(39) (1892) 17 Bom. 173. [660.
(40) (1918)42 Bom. 504=46I.C.745=20Bom L.R.

fact necessary that he should be joined at all, he being sufficiently represented by the many adult members of the joint family who were already joined as parties to the suit. The Subordinate Judge considers that Sripati Singh was amply represented in the suit by his father until the date when he was joined. I am not prepared to subscribe exactly to the conclusion which the Subordinate Judge has come to; for it must be borne in mind that the interest of Sripati Singh was not the same as that of his father, but, on the contrary opposed to that of his parent. (See *Ajodhya Roy* v. *Hardwar Roy* (24), *Balkishan Lal* v. *Tapeshwar Singh* (41), *Hari Lal* v. *Hanuman Kumar* (42), *Ram Bijan Saha* v. *Dukku Singh* (19). On the other hand there were persons on the record with whose interest those of Sripati were identical and these persons may, I think, well be regarded as forming a class of which Sripati Singh was one and as, for all practical purposes, representing him adequately. (*Vide Shio Shanker Ram* v. *Juddo Kuwar* (43). For the above reasons therefore, I have come to the conclusion that the arguments adduced in connection with limitation by the appellants must fail. I now pass to the fourth point which has engaged our attention for a very lengthy period. (See *Hanuman Prasad Pandey* v. *Must. Babooee Munraj Koonwree* (44), *Sinnachami* v. *V. A. E. Ramasamy Chettiar* (45), *Mst. Dhanvanta* v. *Benarsi Lal* (46), *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (47), *Ravaneshwar Pd Singh* v. *Chandi Pd. Singh* (48) and *Banga Chandra Dhur Biswar* v. *Jagga Kishore Acharya Chawdhuri* (49), *Mandil Das* v. *Meghu Narain Dubey* (50), *T. S. Murugesam Pillay* v. *Sambandha Pandara Sanadhi* (51), *Ram Bahadur* v. *Jagger Nath Prasad* (52), *Kalika Nand Singh* v. *Shiv Nandan Singh* (53).

This question is as to the non-existence of any legal necessity for a portion of the loan in question. Very laborious efforts have been made to trace back to their origin the different sums of money, of which it is alleged that this loan of Rs. 3,50,000 was composed. The Subordinate Judge has gone into the question in great detail. He has arrived at the conclusion, after a careful examination, that, whilst in certain instances too great a period of time has elapsed for the plaintiffs indubitably to show that the debts incurred were for family necessity, yet, in the main, the material evidence adduced shows that the bulk of the purposes for which money was borrowed from the plaintiffs was undoubtedly such as would be regarded as being for legal necessity or family benefit and that proper enquiry was made there anent, and, on this basis, he decides substantially in favour of the plaintiffs with the exception of excluding a small sum of about Rs. 12,000 for which he only gives a personal decree. I think that the Subordinate Judge has taken on the whole, a very proper view of the position. The loan contracted under the fifth bond was, as I have said for Rs. 3,50,000. The way in which this sum is made up is detailed in the 1st schedule of the bond, and it will be seen from that that Rs. 2,13,858, were appropriated towards what is in substance, a renewal of the 4th bond, both in respect of the capital and the interest which has accrued thereon; whilst with regard to the remaining sum of Rs. 1,36,142, that represented a variety of debts which purported to have been incurred by the adult members or some of them, of the appellants' family for various purposes. It is a curious fact which has markedly engaged my attention, to observe the method, in which throughout the whole course of this long stretching series, borrowings, sometimes all, sometimes some and sometime one only of the adult members of the family incurred debts; (that is to say signed documents of indebtedness for many kinds of different purposes); how these debts are apparently always regarded by the other adult members of the family and how those adult members of the joint family, who had not participated in the actual execution of individual documents of indebtedness, have been invariably prepared

(41) (1911) 15 C L.J. 446=14 I.C. 845.
(42) (1912) 34 All 549=9 A.L.J. 819.
(43) A.I.R. 1914 P.C. 136=36 All 333=41 I.A. 216 (P.C.) (44) (1856) 6 M.I.A. 393 (P.C.)
(45) (1906) 22 M.L.J. 85=13 I.C. 7.
(46) (1910) 6 I.C. 191.
(47) (1911) 38 Cal. 721=12 I.C. 931.
(48) A.I.R. 1915 P.C. 57=43 Cal. 417 (P.C.)
(49) A.I.R. 1916 P.C. 110=44 Cal. 186=43 I.A. 249 (P.C.) (50) (1916) 1 P.L.J. 89.
(51) A.I.R. 1917 P.C. 6=40 Mad. 402=44 I.A. 98 (P.C.) (52) (1915) 3 P.L.J. 199.
(53) A.I.R. 1922 Patna 122.

to shoulder the burden as a common one, as is seen by the inclusion of all such in the series of bonds of which mention has already been made; and, in particular, in the list of debts annexed to the bond now sued upon included in the sum of Rs. 1,39,142 (which is the fresh money advanced by the plaintiff to the defdt. under the fifth bond, that is to say, the bond, in suit) we find, in exemplification of what I have just stated, that some of the debts, to which this new money is added are evidenced by documents of indebtedness signed in some cases by four, in some cases by three, and in some cases by one of the adult members of the family. Similarly too, it will be observed that the purposes for which these debts (embracing the new loan in the 5th bond) purported to have been contracted over a wide range. I do not propose to deal with all these debts in any great detail, but I think it is necessary that I should refer to them shortly. (His Lordship discussed the evidence and proceeded as follows.)

The last item in the schedule indicates a sum of Rs. 21,469-14-0, and with regard to this, the position is, perhaps, somewhat slightly different to that which may obtain in the other items to which I have already referred. It is a loan purporting to be made on the 16th December 1896 in favour of one Babu Anand Ram Marwari and is evidenced by a Roka signed by Ram Charan Singh Maha Prasad Singh and Hari Prasad Singh. It recites that the sum of Rs. 21,469-14-0 due by the executants on account of principal and interest on that day in respect of a considerable number of previously contracted debts evidenced by Rokas of certain dates which are given on the face of the document. It will be observed that the date of the document being the 16th December 1906 is only a few days prior in date to the bond upon which action has been brought and it may be thought that in considering the next point in this case relative to antecedent debt, this close juxtaposition of dates may be of some importance. I am not sure that essentially that is the case. I proceed at once to enquire into some of the component portions of this Rokka and shall at the moment content myself with saying that it would appear at first sight to be a bond of a consolidating character bringing together merely for the sake of convenience into one, a number of small debts contracted at prior dates. I do not propose to enter in any great detail upon all the items out of which this sum of Rs. 21,469-14-0 is made up and will content myself by referring to two:—

(1) an account rendered for Rs. 2,623-0-0 by one Sakh Ram Marwari for debts on account of cloth etc., and cash; dated the 30th Sawan 1304 which includes certain interest and

(2) account rendered due to Surju Ram dated the 30th Assin 1304 for Rs. 5,516 on current account for grocer's stores, cloth and cash which includes interest on the running account. I see no reason to attempt, even if, one had the material to dive deeply into each petty item of old accounts or Rokas such as these. There is ample general evidence, that the lender did not lend haphazard but with prudent and reasonable enquiry and I see no reason why this item should be disallowed. Now the total of the amounts, which I have already dealt with in detail and which were the scheduled amounts mentioned in the bond itself, aggregate only about the sum of Rs. 1,10,000; and as has been stated before, the amount of fresh money advanced was considerably greater than that, namely Rs. 1,36,000 odd. This surplus is represented, except for a small amount by a variety of small loans, incurred, as was the case with those to which I have already referred in detail, for various purposes and contracted by one or sometimes more of the principal members of the controlling adults of the family in question; in addition to this there were also certain legal expenses connected with the bond, such as for example, Rs. 1,750 for the stamp, Rs. 370 for registration and Rs. 750 for what is called the writing fee, that is to say for the drawing up of the bond (a sum which to my mind, appears to be somewhat excessive but which is, I understand, conventionally, correct); speaking very generally with regard to this surplus, although there are certain number of loans, amounting in an aggregate to a small sum, as to the reason for which there is no evidence as to why they were made, it may be said that it purports to be composed of petty borrowings made, in the cases

with which I have dealt in detail, to meet household purposes, such as the purchase of cloth for the family for domestibles and similar commodities; for a certain portion of this borrowing, the Subordinate Judge has thought fit, after seeing the witnesses and hearing the evidence, to consider that there should be no decree against the family as such, and so far as I am concerned, I am not ready to disagree with the conclusions to which he has come. It will have been observed that, hitherto, I have only dealt in detail with the actual items of debt which are referred to as appertaining to the new advance of capital on the loan arranged by the bond now sued upon and have in no way considered that part of the Rs. 3,50,000 which constituted in effect a renewal of the older (the 4th) bond aggregating in itself the capital and interest then due thereon; and here before dealing with the other side of this transaction, that is to say, with that part of it which constituted the renewal of the 4th bond of 1891, I should like to venture a few general remarks.

This case is one which exemplifies very fully the difficulties which occur in this country in endeavouring to apply principles of British Jurisprudence to the incidences of the law relating to the Hindu Joint family. In my short experience I have here already expressed my view in the case of *Mathura Missra* v. *Raj Kumar Missra* (5) that it is hard to apply to its consideration the exact logical processes of mind upon which the British Jurisprudence is founded, and I have already there stated that I have been told that one must not attempt to do so; but one cannot help feeling that the position which, partially obtains here in litigious proceedings, in connection with the status of the Joint Hindu Family, is the occasion for giving rise to much expensive and socially unnecessary litigation. More than that, it seems to me that, as at present viewed, the communal aspect of the Hindu Joint family is in some respects a serious bar to real progress in the satisfactory administration of Law and Justice quite apart from the Revenual impasse which it seems to produce. In this court much energy and labour is devoted towards the enquiry, which is very often more or less uncertain or fruitless, as to whether in fact, debts, incurred by adult members of a Hindu family affecting the joint family property can be later on repudiated by persons such as either minors or children, not even born when the debts were contracted on the grounds that they were not binding upon the challengers on account of the facts that they were contracted for immoral purposes, or for reasons disconnected with what is known as legal necessity or family benefit; I omit altogether, for the moment, the conditions in which it is proved that such debts were incurred for improper purposes, as, so far as this case is concerned, there is no real suggestion now that the position occupied was ever of that character. On the other hand, it has been pointed out by the Judicial Committee of the Privy Council that when in cases of this character, one finds debts contracted long ago by the heads of the family it may be difficult and often impossible for the successor of the lender to prove within the close four corners of the doctrines of legal necessity or family benefit the cause why such money was advanced. It is interesting to observe in this connection in this case that the bond now sued upon was dated so long ago as the 21st December 1896. I cannot help thinking that, where one finds the principal adult members of a joint family borrowing money without any evidence being shown against such transaction as being of an improper character, it is very difficult for minors at a few later date to dispute them or to allege casually, without positive evidence that those transactions were not designed for the benefit of the family or for some legal necessity. I cannot help thinking that to embark upon any very serious enquiry into such circumstances would almost render the task of the judiciary here practically impossible. It is true that in this Province we have very frequently before us the spectacles of the historical position, which one has observed similarly in other countries many years ago. We see well-to-do gentlemen with, what the ordinary person would regard as, quite adequate incomes belonging to the Zamindari class apparently unable to, and sometimes careless of whether they can, meet, their expenses out of their revenues; these gentlemen are sometimes really extrava-

gant and on the other hand sometimes unwilling on account of the position which they hold to lower their standard of expense of living for fear of not retaining themselves in the high estimation in which they have hitherto been held. The consequence of either of these two conditions is often disastrous as they often resort to borrowing. In this case now before us there is now no suggestion of any thing other than that the revenue derived from the defendant's estates did not altogether suffice to support the altitude of the dignity of the position which they thought it fit and incumbent on themselves to maintain. For persons situated such as these are and surrounded, no doubt, by considerable difficulties, it seems to me that one must make considerable allowances; and, although they may be regarded as perhaps improvident, I am not at all prepared to say that, under the views which I have indicated, the debts which they contracted can be regarded under normal circumstances in law as incapable of recovery by the lender.

The difficulty of understanding the position of the Hindu joint family as it is to be regarded by modern conceptions of Case Law, seems, in my respectful opinion to be due to the fact that the trend of recent decisions appears to have been and perhaps rightly directed towards the clarifying of the curious legal results due to the somewhat anomalous and archaic conditions created by the legal incidents attached under Hindu Law to the joint Hindu family: this attitude appears to be of comparatively recent date and seems to be founded largely on legal fictions, which do not, so far as I can see, emanate directly from the Hindu law; but, on the other hand it seems probably useful and salutary, and, I should imagine, is still in a very transitional stage. So far as one can judge from the constant questions on the matter which are brought before this court, there must arise out of, for example, the doctrine of antecedent debt, numerous important enquiries which have not as yet been decided; and yet one cannot help thinking that that doctrine is an artificial one, and that legislation is the real remedy to place the present unsatisfactory state of affairs upon an intelligent footing. It is practically impossible for the courts here successfully to grope back into years long past in order to ascertain, with regard to debts contracted long before the date of the suit, whether they were for improper purpose or for legal necessity or family benefit. If, where the onus is on the plaintiff who lent the money, he or his successor can substantially prove that he (the lender) made at the time some sort of reasonable enquiry, that is the utmost in my humble opinion which he or they should be required to prove; indeed as to what this enquiry should be I have no doubt, for, if it was necessary for a person approached by another person—a member of a joint Hindu family—for a loan to investigate completely and exhaustively the reason why a loan should be required and whether it would properly be given, all lending transactions of that category between the public in this country would almost be for practical purposes at a standstill. When a lender contemplates lending money to a *Karta* of a joint family, it is probable that according to the present law, he should make some clear enquiry as to the reason for which the loan is being arranged but provided that he is told that reason and that reason seems to him a proper one, it does not appear to me that it is necessary for him to make any further enquiry. It occurs to me to be indeed absurd that it should be contemplated that a lender should examine entirely the circumstances of the borrowers or to do more than be assured by him that the money is required for the legal necessity or the family benefit of the family which the borrower represents. For these reasons, therefore, I consider that the view which the Subordinate Judge expressed with regard to the new money advanced in connection with the bond sued upon is substantially correct: apart always from the question of the amount of interest which can be claimed under the limitations imposed by the Santhal Pergannas Regulation, I have dealt, so far, with the question of, what I call, the fresh capital which was advanced under the bond sued upon but I have, still, now to deal with that portion which constituted the basis of the renewal of the old bond of the 29th September 1891. Now, with regard to this, of course, we have the application of the doctrine of antecedent debt, and it

is necessary, therefore, that one must regard the question from that standpoint. (See *Bhagbat Persad Singh* v. *Girja Kuer* (7); *Khalilur Rahman* v. *Gobind Prasad* (8), *Sahu Ram Chandra* v. *Bhup Singh* (4), *Mathura Misra* v. *Raj Kumar Missra* (5). So far as the principle is concerned, the Patna High Court in *Mathura Missra* v. *Raj Kumar Missra* (5) has decided that where the *Karta* of a family has, hypothecating the family property, entered into an obligation which was based upon a previous similar obligation disconnected with it in fact and in time, the doctrine of antecedent debt applies, and of course, I do not recede from the judgment to which I was a party. This may be right or wrong, but I believe it is in consonance with the present idea of the development of the antecedent debt theory and incidentally, as an instance of encroachment on the ancient legal incidences attaching themselves to the joint Hindu family, some of which are opposed to modern thought. It will be observed, here, that, in the case of this 5th bond the fresh capital borrowed amounted to Rs. 1,36,142; the balance, which, consisting both of capital and accrued interest, constituted a renewal of the 4th bond dated the 29th September 1891 being Rs. 2,13,858. This 4th bond was entered into by Ram Charan Singh for himself and for Rup Narain Singh, his minor sons; by Hari Prasad Singh for himself and for Lukhi Prasad Singh and Bishun Prasad Singh, his minor sons; by Biswanath Singh, by Maha Prasad Singh for himself and for Sasi Bhusan Singh his minor son and by Gajadhar Singh. So far, therefore, as can be seen, it would appear to be binding in every manner possible and if this Court's Full Bench decision—*Mathura Missra* v. *Raj Kumar Missra* (5) is correct, the obligation incurred in the 4th bond is binding.

A curious question has been raised in connection with the position which, it is suggested, might obtain in certain circumstances which might be applicable both in connection with some of the debts which are paid by the fresh capital which was borrowed under the 5th bond and in connection with some of the debts which similarly were paid off under the 4th bond; the question relates to how far the doctrine of antecedent debt may properly be extended and it arises in this way. The doctrine of antecedent debt is supposed to be founded upon Hindu Law (See Mayne's Hindu Law and Usage. 8th Edition p. 395; Gharpure's Mitakshara p. 86) (Yajnavalkya Verse 55); Tagore's Daya Bhaga and Vivada Chintamani Pp. 34 and 35; Colebrook's Mitakshara P. 22. On the other hand, it has been equally strenuously contended before us that the development of this doctrine has now gone past the mere application of the ancient texts and is based at present upon much case law. It is common ground, however, that where a mortgage of family property is executed by a father to pay off a proper prior debt, it is binding upon his son. But what is the position in the event of all the adult members of a joint family joining in entering into a mortgage for a like purpose? Are all the sons of all the adults liable and is the whole of the family property mortgaged by all these adult members of the family liable in the same way as the sons of a father would be liable in respect of a family property for such a debt so incurred by their father? I cannot see that any other answer can be given save in the affirmative. But the matter does not rest there. It has already been observed that there were at least four adult members of this joint family and that the fresh capital was borrowed by them under the 5th bond for the purpose of paying off previously incurred debts, which had been incurred in some case, under documents executed by all, 4 adults in other cases only of three of them and in other instances by only one. The question arises as to what is the position with regard to the application of the doctrine of antecedent debt to the family property with respect to, let us say, for example, a debt previously incurred by a single one of these four adult members. It is true that it may, perhaps be taken that although the document, which constitutes the evidence of such a debt, is only executed by one of the 4 adults, no doubt, the transaction was at the time impliedly acquiesced in by the other three adult members of the family and expressly ratified by the act that it is aggregated into the lump sum, which finally forms the principal part of the fresh capital borrowed under the 5th bond for the purpose of pay-

ing of all these antecedent debts however contracted; and in that way it might perhaps be argued that, provided, it is clear that at least implied or expressed acquiescence was really present, it would not matter in law that the debt purported to have been incurred by one or, for that matter, by three of the four adult members of the family. I think this raises a question of no little difficulty and to some extent it is difficult to avoid being led into a confusion of mind between the incidences of the doctrine of antecedent debt and the incidences which are capable of application in the case where debts incurred by representative members of a joint family are for the purpose of legal necessity or family benefit. If the doctrine of antecedent debt, as it now stands, has to be based upon the Hindu Law alone, I doubt, if, in cases such as those which I have quoted above, it would be possible to apply it. But if, on the other hand, the doctrine may be regarded as in course of development under the moulding of judicial decisions, I am inclined to think that the doctrine is capable of extension to cover instances of the character which I have indicated.

The sixth point is as to whether the personal decree should not be regarded as barred by O. 2, R. 2 of the C. P. C. in view of the previous suit. On this question I have had the advantage of seeing my Lord the Chief Justice's judgment and with his conclusions I entirely agree. It may be now advantageous here to summarise the conclusions to which I have come. They are as follows:—

(1) I think that the Court had jurisdiction to try the case.

(2) I do not consider that the plaintiffs can recover more interest than the amount equivalent to the total fresh capital actually advanced by the plaintiffs and that from this sum must be deducted that interest which has already been paid. It is fortunate that here it is common ground that on the calculation of interest on this basis, the amount due is not less than the amount which would thus be awarded and the calculation of this sum is merely a matter of simple arithmetic.

(3) I bow to the opinion held by this Court that the ordinary legal interest cannot run on the decretal amount if such accruer increases the amount of interest to a sum greater than the principal advanced.

(4) I am not prepared to disagree with the views expressed by the Sub. Judge as to the amounts of the debt which he considers to have been incurred on account of legal necessity or family benefit or with regard to that amount for which he has given a personal decree. (5) I do not consider that the personal decree is in any way barred by the previous proceedings. (6) I do not think that the suit is barred in any way by limitation. (7) I think that the 4th bond is an antecedent debt upon which that part of the 5th bond, which relates to it, can be entirely supported subject to the question of interest. (8) In all other respects I agree with the judgment of my Lord the Chief Justice.

Appeal allowed in part.

A. I. R. 1922 Patna 479.

COUTTS AND ROSS, JJ.

Ajodhya Mahton and another—Petrs.

v.

Mt. Phul Kuer—Opposite party.

Civil Rev. No. 366 of 1921 decided on 10th January 1922 from D.J., Gaya, dated 4th July, 1921.

(a) *C. P. C., (1908), O. 9, R 13 and S. 151*—Ex parte *decree cannot be set aside under inherent powers.*

A Court cannot set aside an *ex parte* decree in exercise of its inherent powers under section 151, C P. C 43 Mad 94 followed. [P. 480, C 1.]

(b) *C. P. C., S. 151—Section does not enable Court to extend limitation.*

S 151 does not apply where a definite period is provided. An appeal does not lie against order refusing to act under S 151. [P 480, C. 1.]

(c) *C. P C (1908), O. IX, R. 13—Passing a final decree after application therefor was time barred is no ground for setting it aside under the rule.*

An *ex parte* final decree cannot be set aside under O. IX, R 13, on the ground that the application for making decree final was time barred. [P. 479, C. 2.]

Ross, J.—This is an application for revision of an order passed by the learned Dt. Judge of Gaya allowing an appeal from an order passed by the Sub. Judge, by which he rejected an application under Order IX, rule 13, to set aside an *ex parte* final decree in a mortgage suit. It appears that in this application which was made long after the time limited by Article 164 and which was expressed to be an application under O. IX, R. 13, two grounds were taken: (1) that no notice had been served on the applicant and (2) that the application for the final decree was barred by time. The latter ground is not appropriate to an application under Order IX, rule 13, and would not provide a reason for the Court to exercise its power under that rule. Apparently for this

reason there is no reference to that part of the application in the decision of the Sub. Judge. He deals only with the question of the service of notice and finding that this service was proved he dismissed the application on the merits. The Dt. Judge, while agreeing with the finding of the Sub. Judge as to the service of notice, acted under section 151 of the Code and set aside the *ex parte* decree on the ground that when it was passed it was barred by time. Now, if it is taken that there was an application before the Sub. Judge under section 151 of the Code then his judgment must be read as having refused that application and against that refusal no appeal lay to the Dt. Judge. But there is authority for the view that S. 151 of the Code cannot be used in this way. *Neelaveni* v. *Narayan Reddi* (1) Moreover a definite period of limitation has been prescribed by Art. 164 of Sch. I to the Limitation Act for an application to set aside an *ex parte* decree and the Court would not be entitled by purporting to act under S. 151 in effect to extend that period. I would therefore allow this application with costs, set aside the order of the Dt. Judge and restore the order of the Sub. Judge.

Coutts, J—I agree. (*Application allowed*)

(1) (1920) 43 Mad. 94=37 M L J. 599.

A. I. R. 1922 Patna 480

DAS AND ADAMI, JJ.

Balki Lal—Appellant v.

Surendra Nath Roy—Respondent.

App. Cal. Nos. 315, 525 and 626 of 1920 decided on 4th January 1922 from J.C., Hazaribagh dated 10th January 1920.

(a) *Receiver—Can sue for rent accrued due prior to his appointment—Civil P.C.O. 40, r. 1.*

A receiver is entitled to bring a suit for recovery of rent which accrued due prior to his appointment. [P. 480, C. 2.]

(b) *Chota Nagpur Tenancy Act, 1908 (Ben Act VI of 1908), S. 177—Rent suit—Plea of payment to third person—S 177 does not apply.*

In a suit for recovery of rent, the defendants pleaded that they paid the rent to a third person namely the minor son of the previous proprietor *Held*: the case did not fall within Section 177, no claim to receive payment having been made by or on behalf of a third person. [P. 480 C. 2.]

Rai Guru Saran Prasad—for Appellant.

Hasan Imam, Jalgobind Pd. Sinha and *Sivanandan Ray*—for Respondent.

Das, J:—These appeals arise out of suits instituted by the respondent Surendra Nath Roy who was appointed a Receiver in a certain action before the learned Subordinate Judge.

Two questions arise in appeal, first, whether the Receiver was competent to sue in respect of rent which had accrued due prior to his appointment, and, secondly whether the Court below was bound to add a person as party defendant to these rent suits to whom, it is alleged, the tenants paid rent in good faith. The action in which the Receiver was appointed was an action between the auction purchaser and the infant son of the previous landlord whose estate was purchased by the auction-purchaser. It seems to me that the Receiver was the only person who could sue in respect of rent whether it accrued due prior to his appointment or subsequent to his appointment. If he was not the person who was entitled to bring these suits then there was no other person because the title of the auction-purchaser was disputed by the minor son of the previous landlord and the title of the minor son was itself disputed by the auction-purchaser. There are passages in Woodroffee's book on Receivers which clearly establish the proposition on which the respondents rely. The learned Vakil relies upon *Ganpati Singh* v. *Mt. Sachi Ojhain* (1). That was a case which was decided on its own facts and I am not prepared to take the view that that case must decide the dispute between the parties in this case. The only other point is whether the learned Sub. Judge was bound to make the minor son of the previous proprietor a party to the action. The defendants took the plea that they paid the rent in good faith to the previous landlord. The learned Dt. Judge has come to the conclusion first that there was no evidence that the rent was paid, and, secondly, that if it was paid it was not paid in good faith. S. 177 of the Chota Nagpur Tenancy Act applies when a right is claimed by or on behalf of a third person. In this case it is not suggested that the right to receive payment was claimed by or on behalf of the third person. It is quite true that the tenants took the plea that this third person was entitled to receive the rent, but that does not bring into operation section 177 of the Chota Nagpur Tenancy Act. In my opinion the decision of the learned Dt. Judge was right and must be affirmed. I would dismiss these appeals with costs.

Adami, J.—I agree. *Appeal dismissed.*

(1) (1917) P.H.C.C. 311=42 I.C. 785.

A.I.R. 1922 Patna 481

JWALA PRASAD, J.

Gobind Raut—Appellant

v.

Chaudhari Thakur Prasad and another—Respondents

S. A. No. 958 of 1920 decided on 18th July 1922.

Record-of-rights—Entry—Construction.

In a suit for rent where the Khatian contained an entry as to rent as follows, "Every year the land which actually grows crop is measured. The tenant pays to the malik Rs 3—5—6 Dhan and 4 annas Moong. Laggi 9 feet 9 inches."

Held—The entry meant that the rent was payable at the rate of Rs. 3-5-6 per *Bigha* of land grown with Dhan and 4 annas per *bigha* of the land grown with *moong* the actual quantity of land grown with *Dhan* and *Moong* being ascertained by measurement every year.

[P 482, Col 1, 2.]

Md. Hasan Jan—for Appellant.

Parmeshwar Dayal—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit for rent. The Munsif had dismissed the suit accepting the contentions of the defendant that (1) the rent payable was *nakdi* at the rate of Rs. 3-5-6 for each *bigha* of paddy and 4 annas for each *bigha* of *Moong*, and not produce rent as claimed by the plaintiffs, in the years when crops are produced; and (2) no crop was produced in the year 1323–24, but only in the years 1325 and 1326 and the rent for those years was paid.

On appeal by the plaintiffs, the learned District Judge agreed with the Munsif that the crops were grown only in the years 1325 and 1326, but he disagreed with him as to the rate of rent and as to the rent having been paid. He held that every year the land which actually grows crop is measured and for every *bigha*, 3 maunds 10 *seers* 1½ *kanwas* is paid to the Malik for Dhan and 4 annas for *Moong*. Accordingly, he decreed the appeal and the plaintiffs' claim for rent for the years 1325 and 1326 with proportionate costs to each party in both the Courts. The defendant is aggrieved by the decision of the learned District Judge and has come to us in second appeal. He disputes the findings of the Court below both as to the rate of rent payable by him for the lands in suit and as to his plea of payment having been rejected. I do not think, it is open to us to dispute the finding of the Court below on the question of payment. This is a finding of fact and has been arrived at on an appreciation of the evidence in the case It has not been shewn that the Court below has contravened any provision of law or procedure in arriving at the finding that the defendant failed to substantiate the plea of payment. It may, however, be mentioned that the two receipts (Exhibits A and A–1) relied upon by the defendant in proof of his payment have not been properly proved. They were filed after the close of the plaintiffs' case and during the cross-examination of the defendant. He did not mention them in his examination-in-chief and when his oral testimony as to the payment of rent was challenged in cross-examination he suddenly produced these two receipts. He admitted that the receipts were brought for the first time. They purport to have been granted by the plaintiffs' Patwari, Nenalal Das, who was examined as witness No. 1 for the plaintiffs. The receipts were not shown to him. Therefore no opportunity was given to the plaintiffs to rebut them. The Munsif accepted these receipts only upon the ground that they bore striking similarity to the Khisras written by the Patwari. I myself have looked into the writing with the help of a magnifying glass, but do not find any similarity. Besides, similarity in itself is not a sufficient proof. The Patwari as observed above, was in the box and the receipts should have been shown to him. Anyhow the Court below has held that the receipts are suspicious and has rejected the evidence of the defendant on the plea of payment. The finding is conclusive and cannot be reopened in second appeal The learned Vakil on behalf of the defendant ultimately conceded that he did not want to press the plea of payment and to question the finding of the District Judge.

The contention of the learned Vakil on behalf of the defendant as to the finding of the Court below with respect to the rate of rent payable by the defendant seems to be substantial. The determination of the question as to the rate of rent depends entirely upon the construction of the entry in the record-

of rights. The Courts below have differed as to the true construction to be placed upon the entry in question. The Munsif says that the entry means a *naqdi* rent at the rate of Rs. 3-5-6 for paddy and 4 annas for *Moong* per year, for every *bigha* of the land which actually grows crop in the year.

The learned District Judge, on the other hand, interprets the entry to mean that the rent is payable at the rate of 3 *maunds* 10 *seer* 1½ *Kanwas* for *Dhan* and 10 seers for *Moong* per year for every *bigha* of the land which actually grows crop in the year. The difference between the two Courts below is as to what the figures about the rent mentioned in the Khatian indicate: whether they read as *maunds*, *seers* and *kanwas* or as rupees, annas and pies. The entry is as follows:—

"Every year the land which actually grows crop is measured. (The tenant) pays (to the Malik) Rs. 3-5-6 Dhan and 4 annas *Moong*. Laggi 9 feet 9 in.—" The amount of rent entered in column 10 is "what was paid in the previous year." [*N. B.*—The words within the brackets. (The tenant) and (to the Malik) are mine.] The original Khatian had the words "*Deta hai*" (pays) which I have retained in place of the words "*Diya Jata Hai*" (is paid) in the certified copy.

These are, however, immaterial. The question is—what do the figures in the aforesaid entry, namely, Rs. 3-5-6 and 4 annas indicate. Obviously they mean Rs. 3-5-6 and 4 annas respectively. *Maunds*, *seers* and *Kanwas* would be written as (?) and 15 meaning 3 *maunds* 10 *seers* and 1½ *Kanwas* and 10 *seers* respectively: *vide* page 27 of *Desi Hisab*, *Pahila Bhag*, by Ram Lochan Sharan. This note of writing is prevalent in this part of the country. The learned District Judge however, thinks that the aforesaid figures might either indicate *maunds*, *seers* and *Kanwas* or rupees, annas and pies; but he prefers to read them as indicating the latter on account of the words "Dhan" and "Moong" having been affixed to the respective figures. The words "Dhan and Moong" were, however, affixed to indicate that the rate of rent will be so much per *bigha* in respect of the Dhan and Moong growing lands respectively; in other words, the entry means that the rent payable was at the rate of Rs 3-5-6 per *bigha* of land grown with Dhan and 4 annas per *bigha* of the land grown with Moong. The actual quantity of land grown with Dhan and Moong was to be ascertained by measurement every year. This interpretation is corroborated by the fact that in accordance with the concluding words of the entry referred to above, each rent has been shewn in column 10 of the Khatian as the rent paid for the year previous to the one in which the entry was made, and not in *maunds* or *seers* which would have been if the aforesaid figures meant to indicate the rent payable in kind. Further, cash rents have been written in the same way in column 10 as the figure in question in the disputed entry. Had the rent been payable in kind the word "*bhaoli* or *batai*" "*Kankut*" or other local word in use would have been entered in accordance with rule 278, page 88 of the Bengal Survey Manual [1908] There is no such word in question and therefore the entry means cash rent and the figures indicate rupees, annas and pies which ordinarily they would read like The tenancy in question is "*Jaidadi* tenancy" specially found in the Bahera Thana in the District of Darbhanga where the lands in question are situate. A reference has been made to the District Gazetteer of Darbhanga, volume VI, page 123 [1907.]

It shows that in Jaidadi tenancies, such as the present one "on account of the marshy condition of the lands, a crop can only be grown in an exceptionally dry year and the cultivators of such lands pay rent only in the year in which a crop is grown and only for such areas as produce a crop. These areas are measured at the time of harvest and pay either a cash rent previously agreed upon or a produce rent." The learned District Judge very rightly holds that the remarks in the District Gazetteer do not help in the interpretation of the entry in question, for rents of such tenures are sometimes paid in cash and sometimes in produce. The plaintiffs have not produced their collection papers of the village to show that they had ever realised rents in kind, and not

in cash, from the defendant in the suit or from any other tenant in the locality although the entries with respect to all of them are similar, and the record-of-rights was finally published on the 31st of January 1902. This omission on their part raises a presumption against the plaintiffs realising produce rent. The learned District Judge, to my mind, has misread the figures in the survey entry as indicating bhaoli rent payable for the lands in question. His finding therefore is illegal and is liable to be set aside, in second appeal. I accordingly set aside his finding and hold that the rent payable is in cash as indicated above, namely, at the rate of Rs. 3-5-6 for Dhan and 4 annas for Moong for every *bigha* of land which actually grows crop.

I accept the finding of the learned District Judge that the crops were grown on two *bighas* of land in the years 1325 and 1326, as admitted by the defendant. The defendant's plea of payment having failed, he is liable to pay *naqdi* rent at the above rate for the crops grown in 1325 and 1326 as admitted by the defendant himself. We are not at all concerned with the quantity of crop but are only concerned with the quantity of land on which crops were grown, that is, two *bighas*.

The decree of the Court below is accordingly modified and, the appeal is partially decreed, with proportionate costs to each party in all the Courts, with interest at six per cent per annum.

Decree modified.

A. I. R. 1922 Patna 483 (1)

DAS AND ADAMI, JJ.

Nidhi Parida—Appellant

v.

Karunakar Padhan—Respondent.

S. A. No. 14 of 1920, decided on 26th November 1921 from Dist. J., Cuttack, dated 18th March 1920.

Evidence Act, S. 115—Plaintiff compromising suit on defendant's allowing property to be sold on certain conditions—Defendant cannot afterwards say that holding is non-transferable.

In a suit for the rent of a holding consisting of *pahi* land, which was compromised, the condition of compromise was that if the defendant did not pay the decretal amount within the specified time, the decree-holder would be entitled to sell the holding, *held*, the defendant could not afterwards object to the sale on the ground that the holding was not transferable without the landlord's consent.

G. C. Ray—for Appellant.

B. N. Das—for Respondent.

Das, J.—The only point that has been argued before us is that there was no waiver of the legal right of the petitioner. In my opinion, there was. He did compromise the suit on an agreement that in default of payment of the decretal money, the decree-holder would be entitled to realize the sum by the sale of the attached holding. There was a clear representation made to the decree-holder that his occupancy holding was attachable by the judgment-debtor. The decree-holder acted upon that representation and changed his position to his detriment. In my opinion the judgment-debtor must make good his representation.

This application is dismissed with costs.

Adami, J.—I agree.

Application dismissed.

A.I.R. 1922 Patna 483 (2)

ROE, J.

Sahdeo Narain Deo—Appellant

v.

Kusum Kumari—Respondent.

F.A. No. 86 of 1916 decided on 7th March 1917.

(a) *Civil P. C., Order XLI, rule 22—Petition by respondent criticising judgment is not a cross objection and cannot be filed.*

Where a suit has been dismissed in its entirety and, on the plaintiff's appeal, the defendant files objections to certain terms in the judgment, the petition of objections is not a petition of cross-objections within the meaning of Order XLI, Rule 22; mere criticisms of a judgment cannot be filed as cross-objections nor should they be accepted by the office, if filed [P. 484, C. 1.]

(b) *Court Fees Act, Sch. I, Art. 1—Criticism of judgment is not cross-objection and need not be stamped as such.*

Mere criticism of judgment cannot be allowed to be filed as a petition of cross objection and do not amount to cross-objection, so as to require to be stamped. [P. 484, C. 1].

P. R. Das, N. C. Sinha, L. M. Ganguly, D. N. Sirkar, L. M. Ghosh and *Ranjit Singh*—for Appellants.

Manuk, S. N. Palit, Jagannath Prasad, Ray Guru Saran Prasad, S. N.

Bose and *P. C Bose*—for Respondents.

Roe, J.—In this case the plaintiffs sued for possession of an estate valued at 42 lacs of rupees. That suit was dismissed in its entirety and full costs of the suit were awarded to the defendants. The plaintiffs appealed and on receipt of notice of the appeal, the defendants put in what they were pleased to call cross-objections. They were not objections to anything contained in the decree; indeed it was obvious that, seeing that the whole suit had been dismissed and the whole costs awarded to the defendants by the decree, there was nothing whatever in the decree to which they could either take exception or make objection. What they objected to were certain terms in the judgment. Having regard to the provisions of Order XLI, rule 22, it is apparent that criticisms of a judgment cannot be filed as cross-objections. If filed they should not be accepted by the office. The first portion of the rule completely covers the defendant-respondent's case. He will be entitled to support the decree at the time of argument on any of the grounds decided against him in the court below. The petition which is described as a cross-objection is not a cross-objection as contemplated by the Code of Civil Procedure. It does not in my view require any stamp at all. It should not be a part of the record. It should certainly not be printed in the paper book. If at the time of hearing the respondent insists on referring to it, the question whether he should be allowed to do so and if so upon what terms may be considered by the Divisional Bench. In my view, the office will be well advised in refusing to accept such petitions as cross-objections. *Order accordingly.*

A. I. R. 1922 Patna 484

COUTTS AND MACPHERSON, JJ.

Ramdhani Lal—Appellant

v.

Chairman of the Patna Municipality—Respondent.

Appeal No. 795 of 1919 decided on 4th August 1921 from Dist., J., Patna, dated 16th May 1919.

Bengal Municipal Act, (III of 1884), S. 238.—"Within 15 days"—Time runs from commencement of building.

There is absolutely nothing in the section to suggest that the period should run from the date on which the Commissioners have knowledge of the building and the words of the section are open to no other construction than that the period should run from the date of the commencement of the erection of the building.

[P. 484, C. 2.]

Coutts, J.—The facts of this case are simple. The plaintiffs built a verandah to their house without the sanction of the Municipality. A notice under section 238 of the Bengal Municipal Act was served on one Budhan Lal, son of the plaintiff Ramdhani who was in charge of the construction. The notice was not obeyed, action was taken under section 180 by the Municipality and the verandah was demolished at the cost of the plaintiffs. The plaintiffs then brought this suit for Rs. 1,000 damages. They contended that the notice was not properly served and that in any case it was bad as it was not served within fifteen days of the commencement of building.

It was found by the trial Court that although the notice was properly served it was not a valid notice as it was served more than fifteen days after the building had commenced and the suit was decreed for Rs. 125. On appeal to the District Judge this decree has been set aside on the ground that the fifteen days referred to in section 238, runs from the date of knowledge of building, which he finds was the 8th of June and as the notice was served on the 20th of June it was a valid notice.

The plaintiffs have appealed and the whole question for consideration is, from what time the period of fifteen days referred to, in section 238, should run. Section 238 of the Bengal Municipal Act is as follows:

"Should any person commence to erect or re-erect such house, not being a hut, without giving notice.....the Commissioners may, by notice, to be delivered within fifteen days require the building to be altered or demolished as they may deem necessary."

There is absolutely nothing in the section to suggest that the period should run from the date on which the Commissioners have knowledge of the building and the words of the section seem to me to be open to no other construction than that the period should run from the date of the commencement of

the erection of the building.

I would set aside the decision of the learned District Judge and would decree this appeal with costs and restore the decree of the trial Court.

Macpherson, J.—I agree.

Appeal decreed.

A.I.R. 1922 Patna 485.

DAWSON MILLER, C. J. AND COUTTS, J.

Damodar Das—Appellant.

v.

Raj Kumar Das—Respondent.

Mis. App. No. 284 of 1919 decided on 15th Dec. 1921 from Dist. J., Darbhanga, dated 20th Sept. 1919.

Civil P.C., Order 9, rules 13 and 6; Order XVII, rules 2 and 3—Ex-parte *decree—Party present but not for the purpose of the case—Vakil instructed only to apply for adjournment—Decree passed is* ex parte—*Suit to remove Defendant from mahantship of Asthal—Receiver appointed therein not putting defendant in possession of funds for conducting case is a sufficient ground for non appearance.*

The mere presence of a party in court unless he is there for the purpose of conducting his case, is not an appearance within the meaning of C.P.C; nor does the presence of his pleader who has been instructed to represent him on previous occasions constitute an appearance, unless he is instructed to represent him on the occasion in question and attends for that purpose. Where defendant's pleader who was present took no part in the trial except to ask for an adjournment, which was refused, and the defendant, although present in court also took no part in the trial, and the court, after hearing evidence and arguments on plaintiff's behalf, decreed the suit, *held* the decree being *ex parte* was liable to be set aside under Order IX, rule 13, for sufficient cause.

Held further, where in a suit to remove the defendant from the *mahantship* of an *asthal*, a Receiver was appointed and the court refused to direct the Receiver to furnish the defendant with funds to defend the action which resulted in the suit being decreed *ex-parte*, the above facts disclose sufficient cause for defendants' non-appearance and restoration of the suit under Order IX, rule 13. Order IX, rule 6, contemplates a hearing of the suit on the day fixed in the summons for the defendant's appearance, whereas Order XVII, rule 2, contemplates a hearing of the suit at some later stage to which it has been adjourned. In either case what is contemplated in these two rules is the procedure on the first day on which the hearing of the suit, as distinguished from interlocutory proceedings, takes place. Order XVII, rule 3, does not contemplate a case of default in appearance but a case, in which a party who has appeared and has been given time to do some act in further prosecution of his case has failed to do so within the time allowed In such a case the court may proceed with the suit notwithstanding the default and the decision is not *ex parte*. But subject to Order IX, rule 7, in all cases, where there is default of appearance at all events at the first hearing whether on the original date fixed in the summons or on some later date to which that hearing is adjourned, the modes of disposing of the suit directed by Order IX apply and the decision is *ex parte*. 35 Cal. 1023, 14 Cal. L J. 603 referred to. [P. 487; C. 2; P. 488, Col 1.]

P. N. Sinha, Murari Prasad and *H. P. Sinha*—for Appellant.

K. Sahay and *L. Kant Jha*—for Respondent.

Dawson Miller, C.J.—The suit out of which this appeal arises was instituted by the plaintiffs in the Court of the District Judge of Darbhanga on the 21st February 1918, claiming to remove the defendant from the *mahantship* of the Pakhrani Asthal on the ground that he was unfit and incompetent to exercise that office. During the pendency of the suit a Receiver was appointed by the Court and put in possession of the properties which the defendant claims as his own. The defendant being deprived of the control of the estate and unable to obtain from the Receiver sufficient money to conduct his defence was, according to his case, unable to be represented at the trial, and on the 28th August 1919, the District Judge, after hearing evidence and arguments for the plaintiffs, passed a decree against the defendant in his absence. On the 20th September, 1919, the defendant applied under Order IX, rule 13 of the Civil Procedure Code to have the decree set aside and the case restored for hearing on the ground that the refusal of the District Judge to direct the Receiver to advance him funds to conduct his defence was sufficient ground for his non-appearance. The learned District Judge, without serving notice of the application upon the plaintiffs, dismissed the defendant's petition on the ground that

he was personally present at the hearing and was therefore not prevented from appearing when the suit was called on for hearing within the meaning of Order IX, rule 13.

From that order the defendant preferred an appeal to the High Court. The appeal came before a Division Bench of the Court on the 21st April last. The learned Judges who heard the appeal came to the conclusion that the defendant did not appear at the hearing and that he had sufficient ground for non-appearance. The reasons accepted by the learned Judges for arriving at that conclusion were that the District Judge had refused to order the Receiver of the defendant's estate to put him in possession of an adequate sum to defend the suit, and that the Receiver had not even paid the defendant his subsistence allowance, and, in consequence, the defendant was not ready to proceed with the case on the 11th August, the date fixed for the trial, his non-appearance being in the circumstances justified by sufficient cause. They then ordered that the order refusing to set aside the *ex parte* decree and restore the suit should be set aside, but as the application under Order IX, rule 13, had been dismissed by the District Judge without serving notice on the plaintiffs, the court, on having its attention drawn to the matter, did not set aside the decree or restore the case for hearing, which would have prejudiced the plaintiffs' rights without giving them a chance of appearing and adducing evidence on the question for consideration under Order IX, rule 13. What the Court did was, after setting aside the order, to remand the case to the Court of the District Judge for a finding on the issue "was the defendant prevented by sufficient cause from appearing when the suit was called on for hearing?", and they directed the Judge to return his finding to the High Court within three weeks and the appeal to be put up again for hearing after the record had been received back from the District Court. No direction was given to the District Judge to pass any orders upon the application before him and it will be observed at once that this form of procedure was likely to cause some embarrassment when the case came back after remand. The order of the 20th September, had been set aside, and the District Judge was not asked to make any fresh order on the matter referred to him which could be the subject of a fresh appeal, but merely to come to a finding on an issue. The only order from which any appeal could be brought again before this Court was the order of the 20th September, but that order was already set aside.

With great respect to the learned Judges, it appears to me that the course adopted was irregular and should be avoided in future. The proper course after vacating the order of the 20th September, was to remand the case, with such direction as to the law as they thought fit, to the Court of the District Judge, for a re-hearing of the application under Order IX, rule 13, in the presence of both parties, directing the Judge to come to a finding on the evidence and to make an order either refusing or allowing the application. The matter could then come up to the High Court on appeal from the new order if the unsuccessful party should be so advised. As it is, the learned District Judge, after hearing the parties and considering their evidence, has determined the issue submitted to him in favour of the defendant, holding that the defendant did not appear and had sufficient cause for non-appearance, but no order was passed by him nor indeed could he do so under the terms of the order of remand.

The appeal has now been restored to the list for further hearing, as provided in the remand order, and in the absence on Circuit of one of the learned Judges who remanded the case it has come before this Bench. The defendant is still nominally the appellant as the only order under appeal is that of the 20th September, 1919, which has already been set aside; and he contends that it is not open to us to call in question an order already made by a court of collateral jurisdiction, or, in other words, that we cannot now restore the order of the 20th September, 1919, even if we should be satisfied that that order was rightly made and that the finding of the District Judge on remand was not justified either in law or upon the facts, as the effect of so doing would be to set aside the order of this Court of the 21st April which we have no power to do. If this contention must prevail there is nothing more to do

but to set aside the decree and restore the case for hearing without considering any argument that may be put forward by the respondents (plaintiffs). The learned Government Pleader on behalf of the respondents contends that this cannot have been the intention of the learned Judges who made the order of remand on the 21st April and that, notwithstanding the wording of that part of their order which set aside the order of the 20th September, 1919, we ought to treat it as if the final decision had been kept open until the finding of the District Judge on remand had been received back. There is some justification for this view from the fact that the order of the 21st April, did not finally dispose of the appeal before the High Court. It set aside the previous order refusing to restore the case but left the decree in the plaintiffs' favour still standing, and whether that decree should be set aside and the case restored are matters still to be determined. It seems to me that the intention of the learned Judges was to reserve their final decision on this question until after the plaintiffs had an opportunity of appearing and calling evidence before the District Judge and then either to complete their order by setting aside the decree or to refrain from doing so. We, therefore, agreed to hear the arguments of the learned Government Pleader on behalf of the respondents. He contends that the decree should not be set aside or the case restored for hearing. His first point is that as the defendant was present in Court, at least on one of the three days when the case was heard, there was an appearance by him within the meaning of Order IX of the Civil Procedure Code, so that the provisions of rule 13 of that Order are not applicable to the case. The word "appearance", however, as used in the Code has, in my opinion, a well recognised meaning, and implies that the party is present at the trial either in person or through a pleader properly authorised on his behalf or through a recognised agent under Order III, rule 1, or through a co-party under Order I, rule 12, but in either case the party or the person authorised on his behalf must be present for the purpose of conducting the case. The mere presence of the party unless he is there for that purpose is not an appearance within the meaning of the rules nor does the presence of his pleader who has been instructed to represent him on previous occasions constitute an appearance unless he is instructed to represent him on the occasion in question and attends for that purpose. In the present case the trial took place on the 11th, 12th, and 13th August, 1919. On the 11th the defendant's pleader appeared and asked for an adjournment which was refused. He renewed the application on the following day stating that he had no instructions from his client to cross-examine the plaintiff whose evidence had been taken on the 11th. His application was again refused. The pleader took no part in the trial on either day and the defendant who was apparently present on one of the days was not there for the purpose of conducting his case and the learned Judge stated that the case would proceed *ex parte*. After further evidence on behalf of the plaintiffs and after hearing arguments on their behalf the trial concluded on the 13th and judgment was reserved. On the 20th judgment was delivered and a decree was passed in the plaintiffs' favour with costs on the *ex-parte* scale. It is clear from this short statement of the facts that there was no appearance at the trial from first to last on behalf of the defendant and in my opinion the provisions of Order IX, rule 13, apply.

Some discussion arose as to the exact rule under which the District Judge disposed of the suit, *viz.*, whether under Order IX, rule 6, which provides for non-appearance of the defendant when the suit is called on for hearing, or under Order XVII, and if under Order XVII, whether under rule 2 or rule 3 of that Order. It is immaterial whether the case was one falling under Order IX, rule 6, or Order XVII, rule 2, because in either case the procedure is the same where the defendant fails to appear at the first hearing whether that first hearing takes place on the day fixed in the summons under Order IX, rule 1, or at a later date to which the hearing may be adjourned. It would appear, however, that Order IX, rule 6, contemplates a hearing of the suit on the day fixed in the summons for the defendant's appearance, whereas Order XVII, rule 2, contemplates a hearing of the suit at

some later date to which it has been adjourned. In either case, I think what is contemplated in these two rules is the procedure on the first day on which the hearing of the suit, as distinguished from interlocutory proceedings, takes place. It is urged, however, on behalf of the respondents that the case is one falling not under rule 2 but under rule 3 of Order XVII in which case the only remedy is by way of appeal or review and not by restitution of the suit. I am unable to accede to this contention. Rule 3 of Order XVII does not contemplate a case of default in appearance but a case in which a party who has appeared and has been given time to do some act in further prosecution of his case has failed to do so within the time allowed. The Court may in such a case proceed with the suit notwithstanding the default and the decision is not *ex parte*; but in all cases where there is default of appearance at all events at the first hearing whether on the original date fixed in the summons or on some later date to which that hearing is adjourned, the modes of disposing of the suit directed by Order IX apply and the decision is *ex-parte*. This is subject of course to the special provisions prescribed in Order IX, rule 7. In the present case the defendant did not appear at all either at the first hearing or subsequently. It is unnecessary, therefore, to consider whether when a party has once appeared, either personally or through his pleader or other representative, to conduct his case at the first hearing, and has subsequently withdrawn from the suit or failed to appear further, the decision afterwards come to, must be regarded as *ex parte*. I apprehend that in such a case the decision would be one *inter partes* [See *Kader Khan* v. *Juggeswar Prasad Singh* (1) and *Jasoda Dassi* v. *Rameshwari Dassi* (2)] but I wish to express no opinion on this point as in the view, I take, there never was an appearance by the defendant and the question does not arise. In my opinion, the provisions of Order IX, rule 13, were properly applied.

The only other question raised is whether on the facts stated there was sufficient cause for the defendant's failure to appear. The learned Judges who remanded the case thought that the facts disclosed, which are not in dispute, were sufficient cause for the defendant's non-appearance; and, after considering the matter further, I am not prepared to differ from the conclusion at which they arrived. The appeal will be allowed, the decree of the District Judge will be set aside and the case restored to his file for hearing.

Coutts, J.—I agree.

Appeal allowed.

(1) (1908) 35 Cal. 1023.
(2) (1911) 14 Cal. L.J. 603=13 I. C. 874.

A. I. R. 1922 Patna 488.

COUTTS AND ROSS, JJ.

Sabran Sheikh—Defendant-Appellant

v.

Odoy Mahto—Plaintiff-Respondent.

Appeal No 195 of 1920, decided on 6th Feb., 1922 from the Appellate decree of Sub-Judge, Purulia, dated 17th Nov., 1919.

Evidence Act, S. 13—Document by third party recognising plaintiff's right is admissible in evidence

The plaintiffs claimed the land in dispute as their *man* land and the defendant claimed it as his *jote*. The plaintiffs produced an *ekrarnama* addressed by a third party to an ancestor of the plaintiffs in which the land in suit was described as *man* land; *Held*: the *ekrarnama* was admissible under both clauses (a) and (b) of section 13 [P. 489, C. 1]

A. B. Mookerjee—for Appellant.

H. B. Mookerjee—for Respondent.

Coutts, J.—The plaintiffs in this case are the *darpatnidars* of a *taluk* in which the land in dispute lies. They claim that the land is their *man* land and that they have always been in possession up till the 9th *Agrahayan*, 1325, when they were dispossessed by the defendant who is a tenant of the village and who claims the land as his *jote* land. The suit was dismissed in the court of first instance but has been decreed on appeal by the Subordinate Judge of Manbhum. The defendant has appealed.

The sole point before the lower appellate court was whether the land was the plaintiff's *man* land or the defendant's *jote* land and the learned Subordinate Judge based his decision, that the land was the plaintiffs' *man* land, on an *ekrarnama* (*Ex.* 1) as well as on other evidence in the case.

In appeal before us the contention is that the learned Subordinate Judge was not entitled to use the *ekrarnama* as

evidence and that consequently his decision is vitiated. If in fact *Ex.* 1 were not admissible in evidence, as the decision of the Subordinate Judge is very largely based on this document, it would be for consideration whether the appeal should not be remanded for re-hearing after excluding this document from consideration. If, however, *Ex.* 1 be evidence the finding of the Subordinate Judge is a finding of fact based on legal evidence, with which we cannot interfere. The question then is whether *Ex.* 1 is evidence or not.

Ex. 1 is an *ekrarnama* by one Asiroad Mahto addressed to an ancestor of the plaintiffs and in the document the land in suit is described as *man* land. It is contended, however, that the document is not evidence because it is not *inter partes*. On the other hand it is contended that the document is admissible under section 13 of the Evidence Act. Section 13 runs as follows:—

"Where the question is as to the existence of any right or custom the following facts are relevant:—

(*a*) Any transaction by which the right or custom in question was created claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(*b*) Particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from."

Now in the present case the question is of the existence of a right and the *ekrarnama* comes both within clauses (*a*) and (*b*); it is both a transaction in which the right was claimed and an instance in which the right was exercised. If authority that such a document is relevant were needed there are the cases of *Jones* v. *Williams* (1), *Marquis of Anglesey* v. *Lord Hatherton* (2), *Daituri Mohanti* v. *Jugo Bundhoo Mohanti* (3) and *Vythilinga* v *Venkatachela* (4). We have, however, been referred by the learned Vakil for the appellant to the case *Abdul Ali* v. *Syed Rejan Ali* (5). I confess that this decision appears to lend support to the contention of the learned Vakil for the appellant, but if it lays down the proposition that in such a case as the one before us, a transaction by which a right is claimed or a particular instance in which the right is exercised is not evidence under section 13 of the Evidence Act. I must respectfully differ from this view. The law appears to me to be perfectly clear both from the section itself and from the decisions to which I have already referred, and in my opinion the *ekrarnama*, *Ex.* 1, is evidence. This being so, the decision of the learned Subordinate Judge is based on legal evidence and is a finding of fact with which we cannot interfere in second appeal. I would accordingly dismiss this appeal with costs.

Ross, J.:—I agree. There is direct authority for the admissibility of the counterpart of a lease executed in favour of a third party, in proof of title, in *Earl of Egremont* v. *Pulman* (6) and *Magdalen Hospital* v. *Knotts* (7).

Appeal dismissed.

(1) (1837) 2 M. & W. 326=150 E.R. 781=1 M. & H 51.
(2) (1842) 10 M. & W. 218=152 E.R. 448=12 L.J. Ex 57.
(3) (1875) 23 W.R. 293.
(4) (1893) 16 Mad 194.
(5) (1913) 19 C.W.N. 468=21 I.C 618.
(6) (1842) 3 Q.B 622=11 L.J. Q.B 319.
(7) (1878) 8 Ch. D. 709=47 L.J. Ch. 726.

A. I. R. 1922 Patna 489

JWALA PRASAD AND ROSS, JJ.

Mt. Ram Dei—Appellant.

v

Mt. Bahu Rani—Respondent

F. A. No. 96 of 1918, decided on 16th December 1921 from S. J., Patna, 17th November 1917.

Civil P. C., S. 11 *and O.* 23, *Rule* 1 (*4*)—*Order allowing some plaintiffs to withdraw without consent of others is without jurisdiction—Fresh suit for partition is not barred by previous suit.*

Where a Court allows a suit to be withdrawn in contravention of Order XXIII, Rule 1 (4) *i.e*, without the consent of other plaintiffs and grants leave for a fresh suit to be brought on the same cause of action,

Held that the order is without jurisdiction and the suit must be deemed not to be withdrawn. A fresh suit for partition is however maintainable as the cause of action is a recurring one.

A.I R. 1922 Pat. 44 Dist

[P. 490, C. 2; P. 491, C. 1, 2.]

B. Chandra De—for Appellant.

P. N. Sinha and *Murari Prasad*—for Respondent.

Ross, J.—This is an appeal by the plaintiff in a suit for partition which was dismissed by the Subordinate Judge

of Patna. The parties are widows of two persons who were descended from one Ram Bahadur, the common ancestor. Ram Bahadur had three sons. One of these sons had a son Bal Kishun Lal who was married to one Jeona Bahu and had a son Radha Kishun, the husband of the plaintiff. Another son had a son Naunidh, whose son was Banwari the husband of the two defendants. In 1878 there was a partition between Bal Kishun and his cousin Naunidh by which most of the ancestral properties were divided, but certain houses, gardens and movables remained joint. Naunidh as the elder was the custodian of this property. In 1886 a partition was effected between Bal Kishun and his son Radha Kishun by which the share of Bal Kishun's branch in the properties which had remained joint became exclusively Bal Kishun's. On the 17th of February, 1888, Bal Kishun executed a Will which, so far as it related to ancestral property, was in favour of his Jeona Bahu, and in April 1888, he died. In June, 1888 an agreement purported to be made between Radha Kishun and Naunidh by which the latter obtained exclusive title to the ancestral properties which had hitherto been joint and granted in exchange certain of his own properties to the former. Radha Kishun died two years later, in April, 1890. In December, 1890, an *ekrarnama* was executed by Jeona Bahu by which she gave 8-annas of her share in the properties in suit to the plaintiff Msi. Ram Dei. In 1898 a Will of all the properties formerly joint was executed by Naunidh by which these properties were dedicated to the family deity and the two defendants were appointed administrators. In 1901 the plaintiff sued for partition of these properties, but the suit was withdrawn with liberty to bring a fresh suit. This fresh suit has now been instituted in 1916 in respect of the same properties.

The defence was, that the suit was barred by the rule of *res judicata* and by limitation and also that the plaintiff had neither title nor possession and that the property in suit was in possession of the *thakur*.

The learned Subordinate Judge held that the rule of *res judicata* barred the suit. The appellant relies on the recent decision of a Full Bench of this court *Raj Kumar Manton* v. *Ram Khelawan Singh* (1) and argues that the Subordinate Judge was not entitled to question the order of his predecessor even if that order was not strictly within the terms of Order XXIII, rule 1. It appears to me, however, that that case was distinguishable from the present. Clause (4) of Order XXIII, rule 1, lays down that "nothing in this rule shall be deemed to authorize the court to permit one of several plaintiffs to withdraw without the consent of the others." This clause limits the jurisdiction of the court to grant permission to withdraw a suit to cases where all the plaintiffs join in the application. In the suit of 1901 there were four plaintiffs, Ram Dei, Jeona Bahu and two persons Kuldip Sahai and Raghunath Sahai who were apparently financing the litigation. The application for withdrawal was on behalf of Ram Dei and Jeona Bahu alone, and in my opinion on such an application, the Subordinate Judge had no jurisdiction to permit the suit to be withdrawn at all. (His Lordship then held that a suit for partition was however not barred. The rest of Judgment is not material for our purpose).

Jwala Prasad, J.—[The learned Judge after stating facts proceeds as follows.] During the hearing of the previous case and after the examination of some witnesses, a petition for withdrawal was filed on behalf of two of the plaintiffs. Jeona Bahu and Ram Dei, stating that the said partners Raghunath and Kuldip had stopped defraying the expenses of the litigation. The court recorded the following order on 2-12-1902.

"On application the plaintiffs are allowed to withdraw from the suit with permission for a fresh suit as per judgment recorded.

The Judgment referred to in this order has not been printed, but I called for the judgment from the court below. It is in the following words:

"On application the plaintiffs are allowed to withdraw from the suit with permission for a fresh suit, Plaintiffs Nos. 1 and 4 shall pay costs to defendants."

The plaintiff No. 1 is Ram Dei, and 4 is Jeona Bahu Neither the judgment nor the order-sheet make any reference to plaintiffs 2 and 3, Raghunath and Kuldip. They did not also join in the

(1) A. I.R. 1922 Patna 44=1 Patna 90 (F.B.)

petition for withdrawal. Fourteen years after, the present suit had been instituted by Ram Dei alone (Jeona Bahu having been dead by this time) for the partition of the properties in dispute.

The first question then arises whether the withdrawal of the suit in 1902 in any way bars the present suit. No doubt under Order XXIII, rule 1, a suit may be withdrawn with permission to bring a fresh suit, and when once this permission is given, no other court will question the propriety of the permission. This view is now settled in this Court by the last Full Bench decision in the case of *Raj Kumar Mahton* v. *Ram Khelawan Singh* (1). In the present case, however, the suit was withdrawn by only two out of the four plaintiffs, and the question then arises whether the Full Bench decision governs the present case. Order XXIII, rule 1, clause (4), prohibits the court to permit one of several plaintiffs to withdraw without the consent of the others. Therefore in order to exercise the jurisdiction vested in the court to permit the withdrawal of a suit with permission to bring a fresh suit, it is necessary that the court should obtain previously the consent of all the parties. If this condition be not fulfilled, there is no jurisdiction in the court to permit the plaintiff to withdraw. When jurisdiction is conferred upon the fulfilment of a condition, it is necessary that the condition should have been fulfilled before the jurisdiction could be exercised. The Full Bench decision, therefore, does not apply to the present case. Here two of the plaintiffs, who were alleged to have acquired an interest in the property, were left out of account altogether. As a matter of fact they were said to have turned back upon their promise. If that were so it was absolutely essential for the court to find out whether those plaintiffs had consented to the withdrawal of the suit or not. Neither the judgment nor the order-sheet makes any reference to those plaintiffs Nos 2 and 3. There is nothing in the petition also to show that they have expressed their consent in any manner that the suit should be withdrawn. I have therefore no hesitation in agreeing with my learned brother that the suit in the present case was not withdrawn; but that does not preclude the present plaintiff from instituting a suit for partition inasmuch as the cause of action in a suit for partition is a recurring one and a joint owner at any time has a right to come to court, provided he proves that he has a subsisting joint title and possession in the property, within the period of limitation. Ram Dei, therefore, had a right to institute the suit for partition if she was able to prove that she had a joint title in the property and that she was in possession with the defendants or their predecessors-in-interest within the period of limitation; in other words she is entitled to bring a suit if her title to the property, if any, is not lost by adverse possession in favour of the opposite party. (The rest of the judgment is not material for our purpose.) —— *Appeal allowed.*

A. I. R. 1922 Patna 491.

DAS AND ADAMI, JJ.

Chota Nagpur Banking Association Ltd. —Appellant

v.

Bhagwat Bax Rai —Respondent.

Appeal No. 95 of 1919 decided on 6th January 1922 from Special Sub-J., Palamau, dated 2nd April 1919.

(a) *Contract Act, S 74—High rate of interest —No rule exists against disallowing it.*

It is an error to say that the tendency in the modern decisions is always to disallow high rate of interest on security bonds where a property is sufficient for payment of a loan advanced by the creditors. [P. 492, C. 1.]

Baluaki Mahapatra v. *Krupasindhu Mahapatra* (1917) P. H. C. C. 135, referred to. [P. 492, C. 1.]

(b) *Contract Act, (Act IX of 1872), section 16—Borrower in need of money—Creditor only person that could advance it—Undue influence is not established thereby.*

The fact that the borrower was in need of money, and that the creditor was the only person who could advance the sum required is not sufficient to establish undue influence by the creditor nor that the creditor was in a position to dominate within the meaning of section 16. [P. 492, C. 1.]

B. Chandra De—for Appellant.

Sambhu Saran and *Devaki Prasad Sinha*—for Respondent.

Das, J.—This appeal arises out of a suit instituted by the appellant Bank against the respondent to enforce a mortgage bond executed by the respondent in favour of the appellant Bank.

The only question that arises in this appeal is as to the interest claimed by the appellant Bank.

The bond provided that interest should run at the rate of 12 *per cent*

with annual rests. The learned Subordinate Judge has taken the view that the provision as to "the high and exorbitant rate of interest with stipulation for compound interest was a hard and unconscionable bargain and operated by way of penalty under section 74 of the Contract Act." I am wholly unable to agree with this view. The learned Subordinate Judge is in error in thinking that the tendency in the modern decisions is to disallow high rate of interest on security bonds where a property is sufficient for payment of a loan advanced by the creditors. I may refer to the decision of this Court in *Baluaki Mahapatra* v. *Krupasindhu Mahapatra* (1). In that case the rate of interest was 37 *per cent.* The learned Judges thought that the Court had no jurisdiction whatever to reduce the rate of interest. It was pointed out that the "Indian law does not recognize the English principle of equity which gives relief to a debtor whenever a Court considers the rate of interest unduly high"

"The law of India," as Mr. Justice Mullick has pointed out in that case, 'is that unless the debtor can bring himself within the four corners of section 16 of the Indian Contract Act, he is entitled to no relief".

Now the learned Subordinate Judge was aware of these decisions, and so he tried to make out a case of section 16 of the Indian Contract Act for the defendant. His reasoning may be given in his own words:

"The defendant was in need of money to meet the expenses of certain litigations. The Bank was the only capitalist which could advance a loan of Rs. 30,000. It is in evidence that the security offered by the defendant was found sufficient and satisfactory on enquiry made by the officers of the Bank. The defendant, therefore, urges that the Bank really took advantage of his position and embodied the said stipulation in the bond."

All that I can say is that this reasoning does not convince me at all. If this reasoning be correct, then it might be said that whenever a person is in need of money, the creditor is in a position to dominate the will of the debtor. A case under section 16 is not made out by the finding arrived at by the learned Subordinate Judge in this case.

I would allow the appeal, modify the decree passed by the learned Subordinate Judge and allow interest at 12 *per cent.* with yearly rests.

The mortgage decree must be drawn up by the office in accordance with this decision. Period of grace 3 months from the date of this decree.

The appellant Bank is entitled to the costs of this appeal.

Adami, J.—I agree. *Appeal allowed.*

(1) (1917) P.H.C.C. 135 = 42 I.C. 680 = 2 Pat. L.W. 175.

A. I. R. 1922 Patna 492.

DAS AND ADAMI, JJ.

Behari Adraki—Appellant

v.

Emperor—Respondent.

Cr. Ap No. 204 of 1920 decided on 11th Jan, 1921 from S.J., Gaya, dated 2nd Sep., 1920.

Criminal P.C., S. 164—Retracted confession is sufficient for conviction if Court finds it was voluntarily made.

A confession made and retracted must always be open to some suspicion. But it is sufficient for a conviction, if the Court is satisfied that it was voluntarily made and true. The credibility of such a confession in each case is a matter for the Court to decide, according to circumstances of each particular case. 8 W.R. 40 Cr, 22 Cal. 164 Followed. [P. 493, C. 1.]

W. H. Akbari—for Appellant.

Manohar Lal—for the Crown.

Judgment:—The appellant Behari Adraki has been convicted by the Sessions Judge of Gaya under section 302, read with section 149, and sentenced to transportation for life.

The conviction of Behari has been based on his retracted confession and on two pieces of circumstantial evidence which the learned Sessions Judge accepts namely, that Behari was seen at a well near the place where the body was buried at about midnight, and that he returned to his house after midnight, and was displeased when asked where he had been. Neither of these pieces of evidence can be said to directly corroborate the confession, for there is no mention in the confession, either that Behari went to the well to get water or that he returned home after it, but they are no doubt circumstantial evidence supporting the likelihood of the confession being true.

There is nothing to show that the confession was made otherwise than voluntarily, as shown by the Sessions Judge. The appellant failed to show that there was any coercion employed by the Police or any

one else, or that there was any irregularity in recording the confession. The motive for the murder is well proved, and the confession makes out that the appellant took an equal share with all the rest in causing the death of Ragho. He did not attempt to minimize the part he took in any way.

It is contended that Jagan was named as an assailant out of enmity, because Jagan had named the appellant as one of the murderers; even if this is the case the appellant still stated that he himself was one of the murderers, as stated by Jagan.

A confession made and retracted must always be open to some suspicion. *Deputy Legal Remembrancer on behalf of the Government of Bengal* v. *Karuna Baistobi* (1) and *Reg.* v. *Thompson* (2). But it is sufficient for a conviction if the Court is satisfied that it was voluntarily made and true, *Queen* v. *Sreemutty Mongola* (3), *Queen* v. *Bhuttun Rajwun* (4), *Queen* v. *Mt. Jema* (5), *Queen Empress* v. *Ghorya* (6), *Queen Empress* v. *Maiku Lal* (7), *Queen Empress* v. *Raman* (8), *Queen Empress* v. *Gungia* (9).

When the appellant asserted that the confession was due to Police influence, the learned Sessions Judge made careful inquiry and found that there was no such influence or coercion.

In *Queen Empress* v. *Maiku Lal* (7) it was decided that a retracted confession should not necessarily be rejected, if there is no evidence on record to support the confession.

The credibility of such confession in each case is a matter for the Court to decide, according to the circumstances of each particular case. If the Court is of opinion that the confession is true, it is bound to act, so far as the person making it is concerned, on that belief.

In *Raghu Bhumij* v. *Emperor* (10) it was held by this Court that, even a retracted confession may be acted upon so far as the confessing accused is concerned if, after applying the proper tests the Judge is convinced of its truth.

In *Cheria* v. *Emperor* (11) Chamier, C. J., held the conviction, on a retracted confession to be bad, because the accused was a weak person who was likely to be easily influenced; the Court in fact was not satisfied that the confession was voluntarily made.

In *Guja Majhi* v. *Emperor* (12) this Court held that a conviction, based on a retracted confession which was the only evidence connecting the accused with the murder, was sustainable, and in *Emperor* v. *Kehri* (13), the Allahabad High Court decided that, as regards the person making it, a retracted confession may, even without any corroborative evidence, form the basis of a conviction.

In *Sheo Prasad Koeri* v. *Emperor* (14) Mullick and Atkinson, JJ., laid down that a conviction based on an uncorroborated confession is not bad, if the surrounding circumstances point to the confession having been the outcome of a voluntary act on the part of the confessor and in absence of coercion by the Police or others. The fact of the retraction would not deprive the confession of its voluntary character. It is for the Court to decide whether it believes the confession or not, [*Emperor* v. *Dhani* (15)].

In the present case, the Sessions Judge found the confession to be voluntary and believed it to be true. He noted certain other evidence which supported the likelihood of its being true. The two Assessors also found the confession to be true.

We see no good ground for finding that the lower Court and the Assessors were not right in the decision they came to, as to the truth of the confession.

We, therefore, dismiss the appeal and confirm the conviction and sentence passed upon the appellant. *Appeal dismissed.*

(1) (1894) 22 Cal. 164.
(2) (1893) 2 Q. B. 12=62 L. J. M. C. 93.
(3) (1866) 6 W. R. 81 Cr.
(4) (1869) 12 W. R. 49 Cr.
(5) (1867) 8 W. R. 40 Cr.
(6) (1894) 19 Bom. 728.
(7) (1897) 20 All. 133=1897 A. W. N. 224.
(8) (1897) 21 Mad. 83.
(9) (1898) 23 Bom. 316.
(10) (1920) 1 P. L. T. 241=58 I.C. 49=5 Pat. L. J. 430.
(11) (1917) 1 P. L. W. 471=39 I. C. 999.
(12) (1917) 2 P. L. J. 80=38 I.C. 1005.
(13) (1907) 29 All. 434=4 A. L. J. 310=1907 A. W. N. 140.
(14) (1919) 20 Cr. L. J. 562=52 I. C. 50.
(15) (1919) 20 Cr. L. J. 721=52 I. C. 881.

A. I. R. 1922 Patna 493.

COUTTS AND ADAMI, JJ.

Banwari Lal Chowdhury—Petitioner-Appellant

v.

Moti Lal Chowdhury—Respondent.

Misc. A. No. 79 of 1922 decided on 8th June 1922 from Sub-J., Bhagalpur.

Civil P. C., O. 40, R. 1—Receiver, appointment of—Applicant must show prima facie case.

In cases where appointment of a receiver is applied for, it is settled law that the applicant should at least present a *prima facie* case and should convince the court that there is a fair chance of his succeeding in the suit.

[P. 494, Col 1.]

Hasan Imam, C. C. Das and *Nirod Chandra Ray*—for Appellant.

Sultan Ahmad, P. N. Sinha, Jagannath Prasad, S. N. Rai and *Bindheshwar Prasad*—for Respondent.

Judgment:—The appeal arises out of an application for the appointment of a receiver which has been allowed in a partition suit. The main question for decision in the suit is said to be whether the parties are joint or separate. The learned Subordinate Judge has declined to consider this question at this stage because it is virtually deciding the whole suit: but in cases where a receiver is applied for, it is settled law that the applicant should at least present a *prima facie* case and should convince the court that there may be a fair chance of succeeding in the suit. The learned Subordinate Judge has come to no conclusion that the applicant has presented a *prima facie* case, or that he is convinced that there may be a fair chance of the plaintiff succeeding in the suit. In this position of affairs the learned Government Advocate, who appears for the opposite party, agrees with the learned Counsel for the petitioner, that the best course will be for the matter to be sent back to the Subordinate Judge for a decision of this point after considering the evidence of which there is said to be a considerable mass on the record.

It is agreed, however, that the receiver should remain for the present, until this matter has been decided by the learned Subordinate Judge in accordance with law. The receiver will accordingly remain for the present in possession, of such property as he has already taken possession of, and the learned Subordinate Judge will decide the question of whether a receiver should be appointed or not at as early a date as possible.

The records with the affidavits will be sent down as soon as possible.

Case sent back.

A. I. R. 1922 Patna 494.

COUTTS AND DAS JJ.

Mahadeo Singh—Petitioner

v.

Emperor—Opposite Party.

Cr. Misc. No. 37 of 1922 decided on 20th July 1922.

Criminal P. C., S. 526—Case against accused—Former request by Dt., Magistrate to withdraw certain illegal parwanas not acceded to accused—Ground for transfer is not made out.

Certain illegal *parwanas* were issued by the accused prior to his arrest for the offence for which he was being tried. The District Magistrate had written him to withdraw those *parwanas* but he refused to do so. Subsequently the case was started against him and he applied for a transfer of the case on the ground that the District Magistrate was prejudiced owing to his refusal to withdraw the *parwanas*.

Held that there was nothing improper on the part of the District Magistrate in requesting the accused to withdraw the illegal *parwanas* and that it was not a ground for a transfer of the case. [P. 495, C. 1, 2; P. 496, C. 2.]

G. C. Pal—for Petitioner.

The Government Advocate—for the Crown.

Coutts, J.—This is an application for transfer of a case from the district of Champaran. The petitioner, who is the Officiating Manager of the Ramnagar Raj, is being tried on a charge of wrongful confinement by the Sub-Divisional Magistrate of Bettiah.

It appears that the Bhasurari factory was the lessee and mortgagee of a certain property from the Ramnagar Raj. The proprietor Mr. Coffin had died and the factory was being, as it had been for several years, managed by Mr. Bond. Sometime in the beginning of this year the Manager of the Ramnagar Raj, Mr. Aldis, was dismissed by the Rani and the petitioner, who had been the Assistant Manager, was appointed to officiate as Manager. After his appointment he issued *parwanas* to the tenants of certain of the villages which had been leased to the factory telling them not to pay rent to Mr. Bond, the pretext being that the Raj was protecting the interests of the late Mr. Coffin's heirs. Mr. Bond brought the matter to the notice of Mr. Swanz, the Collector, who wrote to the petitioner requesting him to withdraw the *parwanas* which after consulting the Government Pleader he considered to be illegal. The petitioner refused to withdraw the *parwanas*. Subsequently the case for

which the petitioner is now being tried was started against him. He was arrested and he complains that he was badly treated while being taken to Bettiah and that there was delay on the part of the Sub-divisional Magistrate in granting him bail.

We are not concerned with the treatment of the petitioner after his arrest because this admittedly had nothing to do with the District Magistrate and Mr. Gour Chandra Pal, who has very strenuously pressed for a transfer of the case from the district, says that if he cannot have a transfer from the district, the petitioner prefers to be tried by the Sub-divisional Magistrate of Bettiah.

We are therefore only concerned with the question, whether the petitioner has reasonable grounds for believing that the District Magistrate is prejudiced against him. It appears that before Mr. Swanzy wrote to the petitioner to withdraw the *parwanas* his predecessor Mr Merriman wrote to the Rani and asked her under what circumstances Mr. Aldis had been dismissed and also who the new Manager was and what his qualifications were.

No reply was given to these questions and the first ground on which it is contended that the District Magistrate is prejudiced is that the fact, that Mr. Merriman asked for this information, shows that he was annoyed about the dismissal of Mr. Aldis and the appointment of the petitioner in his place. The second ground which is urged is that the refusal of the petitioner to withdraw the *parwanas* must also have annoyed the Collector; and the last ground is that Mr. Aldis informed the petitioner that the Magistrate was very angry with him.

So far as the first ground is concerned it is urged that the Collector had no right to ask the Rani why she had dismissed Mr. Aldis and what the qualifications of the new Manager were, and that this indicates that he must have been annoyed at the dismissal of Mr. Aldis and the appointment of the petitioner. I am unable to take this view.

In the first place the enquiry was made by Mr. Merriman who is not now the Magistrate and Collector of Champaran and in the second place, although it may be that the Collector has no right to demand a reply to the questions such as were asked, as Magistrate of the District, he was interested in the management of a property like the Ramnagar Raj from the point of view of the peace of the district alone.

The enquiry was couched in a perfectly courteous way and it indicates nothing more than a desire to have information which he thought he might probably require. It in no way suggests that he was annoyed with the dismissal of Mr. Aldis or that he desired to interfere in the appointment of his successor. This matter, therefore, could not, in my opinion create any reasonable apprehension of the bias.

In regard to the second ground: the parwanas certainly appear to have been illegal, the Magistrate foresaw that the direction to tenants not to pay rent would probably lead to some breach of the peace; so, after consulting the Government Pleader, instead of starting proceeding under Section 107 of the Criminal Procedure Code as he was entitled to do, he adopted milder and politer method and asked the petitioner to withdraw the parwanas. In so doing far from showing bias against the petitioner he showed considerable consideration and Mr. Swanzy himself says that he was not angry with the petitioner when he refused to withdraw the *parwanas*.

Nor was there any reason why he should be angry because he should always have recourse to Section 107 of the Criminal Procedure Code. The fact that he did not do so even after the refusal to withdraw the *parwanas* indicates that he was not actuated by anger but still desired to settle matters without a criminal proceeding.

The last ground has not been seriously pressed. The District Magistrate says he does not know Mr Aldis and has never seen him and that if Mr. Aldis did in fact assert that the Magistrate was angry with the petitioner, it is an assertion which is untrue. I am not prepared, however, to believe that in fact Mr. Aldis did make such an assertion.

In the result then I am unable to find that the petitioner has any reasonable ground for the application which has been made and I would dismiss it.

Das, J.—I entirely agree. It has been argued before us, and argued with some zeal and passion, that Mr. Merriman had no business to address the pro-

prietress of the Ramnagar Raj with reference to the dismissal of Mr. Aldis, and it has been suggested that the prosecution of the petitioner is the direct result of the refusal on the part of the Rani to reinstate Mr. Aldis. I quite agree that, as a general rule, the Collectors should not interfere in the internal management of a Zemindari; but I am not prepared to admit that the general rule is subject to no exception whatever, nor am I prepared to admit that, in this particular case. Mr. Merriman was guilty of a breach of the general rule.

The Zemindari system in this country is a complicated one, and where large and conflicting interests are concerned, it is impossible for the Magistrates charged with the duty of maintaining peace and order in the district not to intervene at times especially when as a result of some act on the part of any of the conflicting parties, the breach of the peace seems imminent. What are the facts in this particular case? The Raj had issued certain *Parwanas* to the tenants of some of the villages by which they were asked not to pay rent to the tenure holder, who undoubtedly was entitled to collect rent from the tenants. The *Parwanas* were wholly and palpably illegal and it was necessary for Mr. Merriman to know the name of persons to whom he could address his letters in reference to the illegal *Parwanas* that had been issued by the Raj.

The second part of the letter runs as follows: "There is another matter on which I should be glad to have an early information *viz.*, the stoppage of rents in Baswaris factory *dehat*. I have addressed a letter to the Manager on the subject. In the event of no regular manager being appointed, I would be obliged if you will favour me by having the matter dealt with". In my opinion there was nothing improper on the part of Mr. Merriman, in the circumstances of the case, to address a perfectly courteous letter to the proprietress of the Raj asking her whether it was true that Mr. Aldis had been dismissed; and, if so, on what ground. In the next place Mr. Merriman is not the Magistrate of the district and if Mr. Merriman had any grievance against the proprietress of the Ramnagar Raj for having dismissed Mr. Aldis, we cannot assume that that grievance is entertained by his successor. The present Magistrate and Collector of the district is Mr Swanzy and he certainly has taken no steps whatever against the Raj in reference to the dismissal of Mr. Aldis.

If I were satisfied that the Magistrate of the district has put any undue pressure on the Raj to remove the present Manager from his office and to reinstate Mr. Aldis, I would certainly accede to the argument which has been advanced before us. But there is nothing at all in the record to show that having addressed the latter of the 16th of March 1922, the Magistrate of the district put any pressure whatever upon the Rani to re-appoint Mr. Aldis.

The second ground which has been urged before us is, in my opinion, wholly untenable. It is urged that the Magistrate of the district should not have asked the petitioner to withdraw certain *Parwanas* which he had issued. I am wholly unable to accept this argument. These *Parwanas* were undoubtedly illegal in so far as they invited the tenants not to pay rent to the factory.

It is not suggested either in the petition or anywhere in the record that on the death of Mr. Coffin, the landlord was entitled to re-enter upon the land. That is not the argument before us. The argument is that upon the death of Mr. Coffin his heirs were entitled to recover rent from the tenants and that the Manager who was in charge of the estate had no business to collect the rent unless he satisfied the Raj that the power of attorney authorized him to collect rent on behalf of the heirs of Mr. Coffin. Whether the Manager was or was not entitled to collect rent is a matter between the heirs of Mr. Coffin and the tenants. With this question the Raj had nothing whatever to do.

In my opinion the attitude of the Magistrate was an entirely proper one, in so far as, instead of taking any action against the Raj, as he was entitled to do if there was any apprehension of the breach of the peace, he required the Raj to withdraw the illegal *Parwanas* that had been issued by the Raj; and I may point out that in addressing the letter of the 16th of March 1922 to the Raj, the learned Magistrate was armed with the opinion of the Government Pleader of the district. In my opinion there are no grounds for transfer in

this case.

Application rejected.

A. I. R. 1922 Patna 497.

DAWSON MILLER, C.J. AND BUCKNILL, J.

Bishun Pragash Narain Singh—Plaintiff-Appellant

v.

Sheosaran Teli—Defendant-Respondent.

L P. A. No. 13 of 1921, decided on 1st February 1922.

Record-of-Rights—Presumption as to entry is not rebutted by showing that it is contrary to law or general custom.

To set aside the presumption arising from the record-of-rights it is not sufficient to show that the entry is contrary to the general custom or law. The presumption arising from the entry in record-of-right, therefore, that the trees belong to the tenant, is not rebutted by the mere fact that ordinarily the landlord is owner of the timber, and the burden of proof is shifted on the shoulders of the landlord.

[P. 497, Col 2]

Sultan Ahmed and *H. Prasad*—for Appellant.

G. C. Pal—for Respondent.

Dawson Miller, C. J—In my opinion the decision of the learned Judge now under appeal was right The plaintiff, the landlord, brought this suit against his tenants for a declaration that the entire timber of the trees upon the disputed holding belonged to him and not to the tenants.

The learned Munsif decided in favour of the tenants.

The Additional District Judge before whom the case came on appeal reversed that decision and decided in favour of the landlord.

On appeal to this Court the matter came before a single Judge who came to the conclusion that the District Judge had wrongly placed the onus in the suit. What happened was that the record of-rights was in favour of the tenants and contained an entry to the effect that the trees belonged to the tenants. The Munsif came to the same conclusion and was no doubt influenced by the entry in the record-of rights. When the matter came before the District Judge he was of opinion that the record-of rights could not create any presumption against what he called the law of the land which gives to the landlord the full right in respect of the timber, and that in such circumstances the *onus* was upon the tenants to show some custom or circumstances curtailing that right. In my opinion there can be no doubt that the *onus* in the first instance in this case, were there nothing else, would be upon the tenants to establish that the trees belonged to them because, according to the ordinary law, the trees belong to the landlord. When they produced the record-of-rights I think that they discharged the burden of proof which was upon them and shifted that burden on to the shoulders of the landlord. Then the question arises whether the landlord has sufficiently discharged the *onus* thus cast upon him. He contends that he has sufficiently discharged that *onus* merely by proving that the general law of the land is that he is entitled to the trees That, however, is not, in my opinion, sufficient in the present case to entitle him to say that he has discharged the burden. It must be presumed that when the Assistant Settlement Officer heard the parties and arrived at the conclusion that the trees belonged to the tenants he had taken into consideration the question of whether there was or was not a custom whereby the right in the trees belonged to the tenants, or whether possibly they acquired that right in some other way, as by some agreement between the landlord and themselves. We do not know, because the evidence is not before us, what the reasons were which induced the Assistant Settlement Officer to form the opinion which he did, but one is entitled to assume that at all events he had good grounds for forming that opinion until the contrary is proved, and it does not seem to me that it is sufficient to set aside the presumption arising from the record-of-rights merely to show that in most cases the trees and the right to the trees would belong to the landlord and to deny that there are exceptional cases. It may well be that the Assistant Settlement Officer came to the conclusion that there was a custom proved and if that is so then it seems to me clearly that the onus is upon the landlord to show the contrary and it is not for the tenants again to come here and prove a custom. I think, therefore, that the learned Judge in sending this case back to the Judge of the D strict Court was perfectly right, because instead of considering whether that entry in the record-of-rights had been rebutted or not the learned District Judge assumed

that because by the general law the trees belonged to the landlord, therefore, there was nothing more to be said and that the *onus* was then upon the tenants to prove that this was an exceptional case. In my opinion that decision was wrong for the reasons I have already given and the decision of the learned Judge of this Court was right and I think that this appeal should be dismissed with costs.

Bucknill, J.—I agree.

Appeal dismissed.

A.I.R. 1922 Patna 498

ROSS AND JWALA PRASAD, JJ.

Ambika Singh—Appellant

v.

Emperor—Opposite Party.

Cr. App. No. 148 of 1921 decided on 2nd December 1921.

Penal Code, S. 147—Common object—Accused assembling after hearing a cry for help, to rescue one of two fighters—Assembly is not unlawful.

There was an altercation between A and B during which A assaulted B, & B cried out for help. The accused came out with a common object to rescue B. A received fatal injuries at the hands of some unknown persons. *Held* : the assembly did not constitute an unlawful assembly and the accused could not be convicted of rioting, though some of them used excessive force. [P. 498, C. 2].

Manuk and *S. P. Varma*—for Appellant.

Manohar Lal—for the Crown.

Ross, J.—The five appellants have been convicted under section 147 of the Indian Penal Code on a charge of rioting with the common object of assaulting one Balbhadra Singh. Three of them, Ragho Singh, Harihar Singh, and Mutru Singh, have also been convicted under section 323 in respect of hurt caused to certain persons. The sentences under section 147 are two years' rigorous imprisonment each and those under section 323 are 3 months' rigorous imprisonment each, the latter sentences running consecutively to the former.

The learned Counsel for the appellants does not contest the convictions under section 323, but argues that on the findings of the learned Sessions Judge, there ought not to have been any conviction under section 147.

The case for the prosecution was that the complainant's party are cultivators of a certain holding and the accused's party represent *ijaradars*. The complainant's party had applied for commutation of rent and this is said to have enraged the accused. On the evening of the 12th June last about 50 or 60 persons came to the house of Balbhadra and an altercation took place as a result of which Balbhadra was struck on the head a severe blow which caused his death. Certain other persons received slight injuries.

The finding of the learned Sessions Judge does not support the prosecution as regards the occasion of the assault. He finds that Kirpal Singh, one of the accused, who is an old man of 65, had gone to invite Balbhadra to dinner on some social occasion. There had been a question of outcasting and taking back into caste on which Balbhadra differed from Kirpal's view. Balbhadra therefore refused the invitation whereupon there was an altercation which led to Balbhadra's attacking Kirpal Singh and inflicting two injuries upon him with a stick. Kirpal cried out for help and a tumult of people came, and Balbhadra received a fatal injury.

The contention of the learned Counsel for the appellants is that on these facts there was no common object to assault Balbhadra; that the object of the accused was to rescue Kirpal Singh; and that if any of them in the course of effecting that object inflicted grievous injuries, he was answerable for the injuries he caused, but the assembly did not become thereby an unlawful assembly. In my opinion, this contention is sound. This was not a riot. The accused and others ran to rescue Kirpal Singh and it is impossible to say that if they had not come on hearing Kirpal's cries, he would not have been further assaulted. Excessive force was used by some persons in the course of this transaction and for that these persons have been made answerable. It has not been ascertained who caused the injury to Balbhadra, the prosecution having failed to prove its allegation on this point; but the fact that Balbhadra was fatally hurt by some unascertained person is no reason for convicting all the members of the assembly of rioting.

I would therefore uphold the convictions and sentences of the three persons, Harihar Singh, Ragho Singh, and Mutru Singh under section 323 and would set aside all the convictions of rioting and the sentences passed against all the ap-

pellants under section 147. The appellants, Ambika Singh and Jagnarain Singh will be released at once.

Jwala Prasad, J.—I agree.

Order modified.

A.I.R. 1922 Patna 499.

COUTTS AND DAS, JJ.

Sibanand Misra and others—Defts-Appellants

v.

Jagmohan Lal and others—Plaintiffs-Respondents.

Appeal No. 542 of 1921 decided on 7th July, 1922.

(a) *T P. Act, S. 74—Subrogation cannot be claimed by person who has assumed payment of debt without having interest to protect.*

The right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound, and that right cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage debt without having any interest to protect. A purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside. [P. 500, C. 1.]

(b) *Limitation Act, Art. 132—T P. Act, S. 74—Puisne mortgagee paying off prior mortgage—Suit to enforce security must be brought within 12 years of cause of action on mortgage paid off.—Simple action can be brought within 3 years of such payment—Contract Act, Ss. 69, 70.*

It cannot be argued that, though the right to enforce the security in the hands of the creditor may be barred by limitation still an assignee of the security may proceed to enforce it if he brings his suit within 12 years from the date of the assignment. It may be that the right to enforce the security in his own name arises on the date of the assignment; but the limitation has already commenced to run and will not cease to operate just because the creditor has assigned the security to another person For an action by a subsequent mortgagee to enforce the security of the prior mortgagee as against the original mortgagor, limitation starts from the date when the cause of action of the prior mortgagee arises against the mortgagor for the mortgage debt and not from the date when the subsequent mortgagee pays off the prior mortgagee. For a simple action however, for reimbursement of the amount paid off the time will run from the date of payment. 39 Cal. 527 P. C. Foll: A. I. R. 1922 All 153 doubted. [P. 501, C. 2, P. 502, C. 2.]

L. N. Singh, B. Saran and *Bhagwan Prasad*—for Appellants.

Shiveswar Dayal—for Respondents.

Das, J.—The material facts are these. On the 13th December 1904, the defendants 1 to 5 (who will be referred to as the defendants throughout this judgment borrowed a sum of money from Musammat Chandrabadan Koer and executed a mortgage bond in her favour, the due date of payment fixed in the mortgage bond being the 29th May 1905. Thereafter the defendants executed three successive mortgages in favour of the plaintiffs to cover the properties mortgaged to Musammat Chandrabadan Koer. The plaintiffs sued upon their mortgages and got a preliminary decree on the 28th August 1916, and a final decree on the 11th May 1917. Musammat Chandra Badan Koer also sued on her mortgage, and got a preliminary decree on the 2nd March 1917. In execution of the plaintiffs' decree the mortgaged properties were put up for sale and were purchased by the plaintiffs on the 3rd January 1918. The defendants then presented an application under Order 21, rule 90 for setting aside the sale. Musammat Chandrabadan Koer commenced her execution proceedings on the 16th November 1917, and the plaintiffs on the 17th April 1918 as puisne mortgagees and for their own protection paid off Musammat Chandrabadan Koer whose execution proceedings thereupon came to an end. It is important to remember that the discharge of the prior security by the plaintiffs took place at a time when the equity of redemption was in them, though an application for setting aside the sale was pending at the instance of the mortgagors. The application of the mortgagors for setting aside the sale in favour of the plaintiffs ended in a compromise, the mortgagors paying off the plaintiffs and the sale being set aside. On the 4th January 1919 the plaintiffs commenced this action to enforce Musammat Chandrabadan's security as against the defendants or, in the alternative for a personal decree as against the defendants.

Their case in the plaint is a simple one. They say that on paying off Musammat Chandrabadan which they were obliged to do for their own protection, they were subrogated to the securities held by Musammat Chandrabadan and were entitled to enforce these securities as against the defendants. The Courts below have allowed the plaintiffs' claim and the defendants appeal to this Court.

Two questions have been argued before us by Mr. Lachmi Narain Singh on behalf of the appellants: first, that in the circumstances of the case, the plaintiffs are not entitled to the benefit of the security held by Musammat Chandrabadan; and, secondly, that, in any event, the right to enforce the security is barred by limitation. The argument as to the extinction of the security rests on the settled view of equity, that a person who is primarily liable to discharge the debt and does discharge it, is not entitled to claim a cession or assignment of the security.

It was argued that, at the time when the plaintiffs discharged the debt of Chandrabadan, the equity of redemption was in them and that they were in fact in the position of the mortgagors primarily liable to discharge the debt due to Chandrabadan. In my opinion, the argument is not entitled to succeed. I accede to the argument that the right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound, and that the right cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage debt without having any interest to protect; but I am not prepared to agree with the view that the plaintiffs, after their purchase of the equity of redemption, were in the position of the mortgagor. It must be remembered that their purchase was not left unchallenged by the defendants and that an application for setting aside the sale was actually pending. That sale was ultimately set aside, and the moment it was set aside, equity will place the plaintiffs in the same position as that which they would have occupied but for the transaction which for the time being vested the equity of redemption in them. "A purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside". (See Ghose on Mortgage, 4th Edition, Volume I, page 349. See also *Moulvie Mohammad Shumsool Hooda* v. *Shewakram* (1), *Syamalarayudu* v. *Subbarayadu* (2), and the cases cited at page 349 of Ghose on Mortgage. I am of opinion that, on paying off Musammat Chandrabadan and on their own purchase being set aside, the plaintiffs became entitled to the securities held by Musammat Chandrabadan

On the question of limitation, however, I am of opinion that Mr. Lachmi Narain Singh's arguments ought to prevail. In order to understand the argument, it is necessary to remember three important dates in the history of these transactions. Musammat Chandrabadan was entitled to receive the mortgage money from the defendants on the 29th May, 1905, so that her cause of action to enforce the mortgage of the 13th December 1904 accrued to her on the 29th May 1905. The plaintiffs discharged the mortgage debts due to Chandrabadan on the 17th April 1918, and commenced the present action on the 4th January 1919. The argument of Mr. Lachmi Narain Singh is this: That, in so far as the plaintiffs are seeking to enforce the security of Chandrabadan, the suit is barred by limitation under Article 32 of the Limitation Act inasmuch as they can only do so, not in their own right, but in the right of Chandrabadan. The plaintiffs, on the other hand, maintain that on paying off Chandrabadan, they acquired a right as against the defendants to be reimbursed the money which they had paid for the benefit of the mortgagors, and, as a consequence, to a cession of the securities held by Chandrabadan, and that they acquired this right on the 17th April 1918 when they discharged the debt due to Chandrabadan.

This argument receives considerable support from the decision of Banerji, J, in the case of *Shiblal* v. *Munni Lal* (3), but with all respect I am unable to agre with the view expressed by that learned Judge in the case cited. The argument of Banerji, J. is this: That a puisne mortgagee in paying off the prior mortgagee is entitled, under Section 69 of the Indian Contract Act, to be reimbursed by the mortgagor, the money which he pays to the prior mortgagee. He also acquires a charge on the property which he relieves of liability on general principles and under Section 74 of the Transfer of Property Act. And the conclusion at which that learned Judge arrives may be stated in his own words. "This charge he acquires not when the

(1) (1874) 2 I. A. 7=14 B. L.R. 226=21 W.R. 409=3 Sar. 405 (P. C.)
(2) (1898) 21 Mad. 14.
(3) A. I. R. 1922 All. 158=44 All. 67.

prior mortgage was made nor when that prior mortgage could be enforced but the date on which he pays off the amount of the prior mortgage. The right also to be reimbursed accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which underthe decree exists on them."

Speaking with all respect, I quite agree with the view that the right to be reimbursed accrues to the person paying off the debt on the date on which he pays it off; but I wholly deny that a second mortgagee paying off a prior mortgagee "acquires" a charge on the property or that he acquires it on the date on which he pays off the prior mortgagee.

The charge, in my view, was already there; all that he acquires is a right to enforce the charge and to a cession in his favour of the securities held by the prior mortgagee. Section 74 of the Transfer of Property Act, to which Mr. Justice Banerji refers, does not provide that, on paying off a prior mortgage, the subsequent mortgagee acquires a charge on the property; but it does provide that he acquires "all the rights and powers of the prior mortgagee as such."

It is one thing to say that a person acquires a charge on the property; it is quite another thing to say that he acquires the rights and powers of the prior mortgagee, one of which is to enforce the charge already existing subject to the law of limitation.

In my opinion the right to reimbursement stands on one footing; the right to enforce a security by virtue of subrogation stands on another footing. The right to reimbursement arises on a contract, express or implied to reimburse; and the party who claims the right enforces it in his own right, and not in the right of another. Consequently the right does not arise until he has discharged the debt of another.

But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person who, not being primarily liable to discharge an obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor, and only because the person discharging the obligation becomes clothed with the rights and powers of the original creditor. The subrogee is an assignee in equity, and it is difficult to understand how an assignee in equity stands on a better footing than an assignee at law.

If, for instance, a creditor assigns his security for valuable consideration to a person who thereupon sues upon the security, it cannot be argued that, though the right to enforce the security in the hands of the creditor may be barred by limitation, the assignee may proceed to enforce it if he brings his suit within 12 years from the date of the assignment. It may be that the right to enforce the security in his own name arises on the date of the assignment, but the limitation has already commenced to run and will not cease to operate just because the creditor has assigned the security to another person. An equitable assignee, in my opinion, stands on no better footing and can only enforce the security in the right of the creditor and therefore subject to the law of limitation that would affect the creditor. As has been pointed out, subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security, to the right to a simple action for reimbursement, and the fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems often to be overlooked, to the confusion of both doctrines. (See Pomeroy's Equity Jurisprudence, 5th Vol., p. 513).

That, this is the right view, is completely borne out by the decision of the Judicial Committee in the case of *Mahomed Ibrahim Hossain Khan* v. *Ambika Prashad Singh* (4). The facts are somewhat complicated and it is unnecessary to set out all the different transactions which had to be considered by the Judicial Committee in order to enable them to decide points which do not arise here. But it is necessary to set out the following transactions.

On the 20th November 1874, certain persons who will be referred to as the mortgagors executed a Zurpeshgi deed in favour of Girwar Singh by which they borrowed Rs. 12,000 from Girwar Singh and gave as security for the loan eight items of properties. The loan was for a

(4) (1912, 39 Cal. 527=14 I.C. 496=39 I. A. 68 (P. C.)

period of 12 years from the date of the mortgage. On the 7th January 1888 the mortgagors executed a simple mortgage in favour of Gajadhar for Rs. 2,500 and gave one of the properties already mortgaged to Girwar Singh as a security for the loan. On the 17th February 1888 they obtained a loan of Rs. 12,000 from Musammat Alfan for the express purpose of liquidating the *Zarpeshgi*, and executed in her favour a simple mortgage of the properties mortgaged to Girwar Singh including the property mortgaged to Gajadhar. On the 22nd September 1900, the appellants as successors-in-interest of Musammat Alfan commenced their suit to enforce the mortgage of the 17th February 1888, and they sought to have the benefit of the mortgage covered by the *Zarpeshgi* deed of the 20th November 1874, and they claimed priority to the various mortgages executed by the mortgagors between the date of the *Zarpeshgi* and the mortgage of the 17th February 1888 including the mortgage in favour of Gajadhar. It was assumed that the plaintiffs by discharging the mortgage covered by the *Zarpeshgi* deed were subrogated to the securities held by Girwar Singh the first mortgagee; but the question still arose whether, having regard to the lapse of time, they were entitled to enforce these securities as against Gajadhar. If it be considered that their right to enforce the security of Girwar Singh arose on the 17th February 1888, that is to say the date on which they discharged the mortgage debt of Girwar Singh, their suit was well within time; but the Judicial Committee came to the conclusion that the suit, in so far as it sought to enforce the security of the 20th November 1874 as against Gajadhar, was barred by limitation. In rejecting the contention advanced on behalf of the plaintiffs the Judicial Committee said as follows: "But as the Rs. 12,000 were under the Zurpeshgi deed of the 20th of November 1874 repayable in *Jeth* 1294 *Fasli* (September 1887), and this suit was not brought until the 22nd of September 1900, the claim of the plaintiffs to priority is barred by Article 132 of the Second Schedule of the Indian Limitation Act, 1877." I regard the decision of the Judicial Committee as a complete answer to the arguments advanced before us on behalf of the respondents, I hold that the present suit in so far as it seeks to enforce the security of the 13th December 1904 is barred by Article 132 of the Limitation Act.

The question still remains whether the plaintiff's action can be regarded as a simple action for reimbursement and I am of opinion that it can be so regarded. All the necessary facts are stated in the plaint to enable us to give the appropriate relief to the plaintiffs and they expressly ask for a personal decree against the defendants. The Courts below have concurrently found that on the 17th April 1918, the plaintiffs paid Musammat Chandrabadan Kuer the sum of Rs. 1,546-14-5 and thereby discharged her mortgage. This money the defendants were bound by law to pay Musammat Chandrabadan Kuer and the plaintiffs were undoubtedly interested in the payment of the money. The plaintiffs are accordingly entitled to be reimbursed by the defendants, and the action regarded as an action for reimbursement is well within time. The plaintiffs are also entitled to interest at the rate of 2 per cent per month from the 17th April 1918 to the date of the decree, and are also entitled to interest on the amount decreed at the rate of six per cent. per year, from the date of the decree up to the date of realization.

I would allow this appeal, set aside the judgment and decrees of the Courts below and in lieu thereof give the plaintiffs a decree as against defendants 1 to 5 for Rs. 1,546-14-5 with interest as already stated There will be no order as to costs.

Coutts, J.—I agree.

Appeal Allowed.

A.I.R. 1922 Patna 502

DAS AND ADAMI, JJ.

Adhikanda Sahu and others—Defts-Appellants v.

Jogi Sahu and others—Plffs-Respdts.

Appeal No. 2 of 1921 decided on 2nd December 1921.

Contract Act, S. 23—Agreement—Promise not to prosecute is illegal—Consideration—But courts must scrutinise to see if such promise is the consideration—Distinction between motive and consideration for agreement should be borne in mind.

Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not enforceable by law, but this limitation to freedom of contract should only be enforced, where it is quite clear

that the consideration for the agreement was such an illegal promise. When on a mere threat to prosecute or on apprehension that prosecution would take place, an agreement has been come to this threat or apprehension is not sufficient to vitiate the agreement. The distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing which is discharged or remitted by the agreement" [P. 503, C. 1, 2.]

Bichitranand Das—for Appellants.

Subodh Chandra Chatterji—for Respondents.

Das, J.—I have arrived at the conclusion, though not without some hesitation, that the judgment of the lower appellate Court must be upheld. It was argued strenuously before us that the facts in this case are different from the facts that were present in the case reported as *Sukhdeo Das* v. *Mangal Chand* (1). In that case the defendant Muni Lal who was the *gomasta* of the defendants had misappropriated a certain sum of money. He happened to be a relation of the plaintiffs and the plaintiffs agreed to set off the sum of Rs. 600 due by Muni Lal to the defendants against the claim which the plaintiffs had against the defendants.

Subsequently, the plaintiffs sued to enforce their claim against the defendants and the defendants claimed that they were entitled to have the sum of Rs. 600 set off against the claim of the plaintiffs. The plaintiffs maintained that the set-off could not be allowed as the consideration for the agreement was not to prosecute Muni Lal for an offence which was not compoundable.

This contention did not find favour with the learned Judges who decided the case. Mr. Justice Chapman delivering the judgment in the case said as follows:—

"Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable the agreement is not enforceable by law, but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise. When on a mere threat to prosecute, or on apprehension that prosecution would take place, an agreement has been come to, this threat or apprehension is not sufficient to vitiate the agreement. The distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing which is discharged or remitted by the agreement."

Now even if we apply these considerations to the present case, then how does the case stand? There was undoubtedly a civil liability due, not, it is true on the part of defendant No. 1, but certainly on the part of defendant No. 2. In the case to which I have already referred, there was no liability on the part of the person who was sought to be made liable, and in my opinion no distinction can be drawn between the present case and the case of *Sukhdeo Das* v. *Mangal Chand* (1). The plaintiff was not primarily liable in the latter case and in the case before us Adhikanda was not primarily liable. Each of them made himself liable because there was undoubtedly a liability on the part of somebody else in whom they were interested. It may be that the motive for coming to the agreement was that prosecution may not be launched in the case but as Mr. Justice Chapman says "the distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view."

On a careful consideration of the matter, I am unable to distinguish this case from the case upon which the respondents rely.

I must dismiss this appeal with costs.

Adami, J.—I agree.

Appeal dismissed.

(1) (1917) 2 Pat. L.J. 630=41 I.C. 812=3 Pat. L.W. 140.

A. I. R. 1922 Patna 503.

COUTTS AND DAS, JJ.

Girja Prasad and others—Appellants

v.

Jugal Kishore and others—Respondents.

S. A. No. 446 of 1920 decided on 23rd June 1922.

(a) *Civil P. C. S. 100—Second Appeal—Finding of fact—Whole evidence not considered—Finding is not binding.*

A finding of fact which has been arrived at without the consideration of the entire evidence on record is not binding on the Court in second appeal. [P. 504, C. 2.]

(b) *Possession—Actual possession not possible—Possession follows title.*

If a land is such over which nobody can exercise possession, possession would ordinarily follow title [P. 504, C 2.]

Sashi Madhab Mullick and *S. N. Bose*—for Appellants.

Jagannath Prasad and *Sant Prasad*—for Respondents.

Coutts, J:—The plaintiffs in the suit out of which this appeal arises, sought for a declaration of their title to and for recovery of possession of 1 Katha and 5 Dhurs of land in Mauza Madhopur from which they allege they were dispossessed by the defendant No. 1. The plaintiffs based their title on a Kabala dated the 29th of February 1837.

The defendants on the other hand alleged that the land in suit belonged to one Kokai Teli, that on Kokai's death his heirs transferred it to one of their landlords, Babu Nand Kumar Lal, that Nand Kumar Lal after his purchase built a house on the land east of the suit land and made over the suit land to his nephew Jugal Kishor, defendant No. 1 and that the defendant No. 1 has been in possession ever since. The suit was contested by this defendant.

The Court of first instance found that the plaintiffs had failed to establish either their title or that they had been in possession within 12 years of the institution of the suit and consequently the suit was dismissed. On appeal to the Subordinate Judge although he says at the end of his judgment that the plaintiffs have failed to prove either their title to the disputed land or their possession over the same within the period of limitation, he has certainly found that the plaintiffs have established their title because, he has found that the land in dispute is included within the area of the land which the plaintiffs have purchased by the Kabala of 1837 (Ext. 7.)

What he has found is that the plaintiffs have not proved possession within 12 years; and, if this decision had been come to after a consideration of the evidence and if the judgment were one in accordance with law, the finding would have been a finding of fact which would be binding on us in second appeal, but the judgment is of a most unsatisfactory and perfunctory character. It is true that the learned Subordinate Judge has come to finding but it is equally clear that he has considered only a very small portion of the evidence of which there is a very considerable mass on the record. The rest of the evidence he has not considered at all.

Moreover it has been found by the Court of first instance that the land in dispute is *parti* land. If this is so, it would not ordinarily be land over which either the plaintiffs or the defendant could exercise possession; possession would then ordinarily be held to follow title; and the plaintiffs would be entitled to a decree.

This point, which is a very important one, has not been considered at all by the learned Subordinate Judge and, as I have already said, the judgment is of such a perfunctory character that it cannot possibly be considered to be in accordance with law.

I would set aside the decree of the learned Subordinate Judge and would remand the whole appeal to the lower appellate Court for rehearing and decision in accordance with law. Costs to abide the result.

Das, J.— I agree. *Case remanded.*

A.I.R. 1922 Patna 504.

JWALA PRASAD, J.

Kunj Behari Singh — Plaintiff-Petitioner

v.

Sheodahin Pandey and others—Defts.-Opposite-party.

Civ. Rev No. 332 of 1921 decided on 21st February, 1922 from Munsif, Arrah, dated 7th July 1921.

(a) *Practice and procedure—Calcutta High Court General Rules and Circular Orders, Ch. XI, Rule 46, Clause (f)—Vakalatnama containing name of pleader can be accepted by him after it is filed in Court—Legal Practitioner.*

A Vakalatnama once filed in Court may be subsequently accepted by a vakil or pleader whose name appears in the Vakalatnama. The Court has only to see whether the name of the pleader proposed to be appointed, appears in the Vakalatnama or not and if his name does appear, then the pleader is entitled to sign the Vakalatnama and appear and act in the case. [P. 507, C. 1]

(b) *Civil P. C., O 9, R. 3—Authorised Agent with witness present in Court—Dismissal for non-appearance of pleader is illegal.*

Where there is a duly authorised Agent, with a registered power of attorney present in Court with his witness, an order, dismissing the suit for default under O 9, R 3 on the ground that the pleader was not appearing and there was no one to examine the witness is illegal. [P. 507, C. 1.]

Sambhu Saran—for Petitioner.

Jwala Prasad, J.—The present petitioners have been substituted in place of the original petitioner who was the plaintiff in the Court below. The plaintiff instituted a rent suit out of which this application has arisen in the court of the Munsiff of Arrah, No. 72 of 1920. The defendants did not appear and the case was set down for an *ex parte* hearing on the 23rd May 1921. On that day the suit was dismissed for default.

On the 25th, the plaintiff filed a petition under Order IX, rule 4, of the Civil Procedure Code for setting aside the aforesaid order of dismissal of the suit and for its restoration. This application was rejected by the judgment of the Munsiff, dated the 7th July 1921. The plaintiff has, therefore, come to this Court in revision and asked to have the order of the Munsiff set aside.

The short ground urged in support of the application is that in fact there was no default in the appearance of the plaintiff, and the Munsiff had, therefore, absolutely no right to dismiss the suit for the non-appearance of the plaintiff under Order IX, rule 3. The contention appears to be sound and is borne out by the facts and circumstances of the case. On account of his old age the case of the plaintiff was looked after by his son, Ram Rachya Singh, and his *Am-mukhtear*, Lachmi Prasad, under a duly registered power-of-attorney.

The plaint was duly signed and verified by the *Am-mukhtear* Lachmi Prasad for the plaintiff. The *Vakalatnama* filed on behalf of the plaintiff was also executed by Lachmi Prasad. It contains the names of a number of pleaders of the Arrah Bar: but at the time of filing the plaint and the *Vakalatnama* the pleader Moulvi Abdul Aziz only accepted the *Vakalatnama* and made the necessary endorsement On the 23rd May, the date of the hearing of the suit, the *hazari* of the plaintiff's witnesses was filed under the signature of the said pleader Moulvi Abdul Aziz.

This gentleman is also very old being of about 80 years of age and was on those days observing the Ramzan fast. He left the Court at 10 or 10-30 A.M., and the case till then was not taken up. It was taken up at 11-26 A.M. as the order-sheet shows. Lachmi Prasad, the Mukhtear of the plaintiff, and Ram Rachya Singh, his [petitioner's] son were both present in the *Ijlas* room and were also the witnesses on behalf of the plaintiff. The plaintiff's witness went into the box. As pleader Moulvi Abdul Aziz had left the court, Lachmi Prasad and Ram Rachya Singh wanted Rai Jang Bahadur, pleader who happened to be present in Court, to appear and examine the witnesses in the case which was heard *ex parte*

No fresh *Vakalatnama* was filed, and on behalf of the plaintiff it was urged that the stamp vendor was not available so late in the day. This explanation has not been accepted by the Munsiff. The name of Rai Jang Bahadur however, happened to be in the body of the *Vakalatnama* along with the names of several other pleaders of the Bar. The plaintiff's *Am-mukhtear* asked Rai Jang Bahadur to act on his behalf as pleader and Rai Jang Bahadur did give his consent. He then wanted permission of the court to sign the *Vakalatnama* which had already been filed.

This prayer made on behalf of the plaintiff for Rai Jang Bahadur to sign the *Vakalatnama* was refused, and the learned Munsiff passed the following order:—

"Pleader of the plaintiff does not appear. The suit is dismissed for default. There is no one to examine the witness in chief. Time 11—27."

Now, on behalf of the plaintiff it is urged in this Court that the order of the Munsiff is wholly without jurisdiction, illegal and irregular. It is said that he had no power to refuse Rai Jang Bahadur to accept the *Vakalatnama* and sign the same.

This contention appears to me to be borne by the law and the authorities on the subject. Order III, rule 4 (1) of the Code of Civil Procedure requires:

"The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing and shall be signed by such person or by his recognized agent or by some other person duly authorised by power-of-attorney to act in this behalf."

This rule was complied with inasmuch as there was a written *Vakalatnama* filed on behalf of the plaintiff as executed by his *Am-mukhtear* under a registered power of attorney. This *Vakalatnama*

was accepted by Moulvi Abdul Aziz and was already filed in Court. Rai Jang Bahadur was also there on the *Ijlas*; the *Am-mukhtear* and the plaintiff's son engaged him as the pleader and he accepted the same. His name being already in the *Vakalatnama* he was competent to sign the same in accordance with the rules prescribed by the High Court.

Formerly, it was held in some cases that even the signature of the pleader is not essential provided his name is in the body of it. However, in 1914 the Calcutta High Court (which is followed by this Court) prescribed the rules on the subject: *vide* Chapter XI, rule 46 of the General Rules and Circular Orders.

Clause (b) of the rule requires that,

"A pleader accepting a *Vakalatnama* purporting to be executed by his client in person is bound to satisfy himself that it was so executed. When it purports to be executed by a third party on behalf of his client, he is bound to ascertain that such person has been duly empowered by the client to appoint a Vakil, and has himself executed the *Vakalatnama*."

Clause (c) requires that,

"No Vakil or pleader shall receive a *Vakalatnama* from any person other than the party himself, or his recognized agent, or a person duly authorised by power-of-attorney to act in this behalf or his servant or relation or a pleader or Vakil or *Mukhtear* specially authorised in writing in that behalf."

Clause (e) says that,

"When a *Vakalatnama* is filed by a Vakil or pleader, he shall endorse on the back of it, the date of acceptance, the name of the person from whom it is received, and if such person is neither the client himself nor a Vakil, pleader, or Mukhtear, shall state the precise nature of the authority with date of that person."

Clause (f) says:—

"A *Vakalatnama* which has been filed in Court may be subsequently accepted by a Vakil or pleader whose name appears in the *Vakalatnama* at the time when it was first filed; in the case of such subsequent acceptance, an endorsement shall be made as in the case of the first acceptance."

I have considered all the authorities cited by the Munsif on the subject, namely, *Shama Prasad Ghose* v. *Taki Mullik* (1), *Jogesh Chandra Gupta, In re* (2) and *Mohesh Addy* v. *Panchu Mudali* (3).

As to the recognised practice upon the subject, reference may be made to 19 C. W. N. 25, 26 Notes. This has been referred to in the case *Mohesh Chandra* v. *Panchu Mudali* (3). *In the matter of two Pleaders* (4) it is observed by a Special Bench of this Court that the Court can only object to a pleader appearing in a case when he does not comply with the aforesaid rule on the subject of the acceptance of *Vakalatnama*, that is to say, when the pleader does not sign the *Vakalatnama* and record the endorsement required by clause (e) and (f) of rule 46 of Chapter XI, of the General rules and Circular Orders.

The pleader in the present case Rai Jang Bahadur was ready to make the necessary endorsement The Munsif refused it only on the ground that a fresh *Vakalatnama* was not filed and the *Vakalatnama* already filed was not sufficient. The refusal was against the express provisions in rule (f) which says,

"A *Vakalatnama* which has been filed in Court may be subsequently accepted by a Vakil or pleader whose name appears in the *Vakalatnama* at the time when first filed; in the case of such subsequent acceptance an endorsement shall be made as in the case of the first acceptance."

The argument advanced by the learned Munsif appears to be very ingenious indeed. He says,

"He did not appoint him his Vakil from before. He appointed Rai Babu Jung Bahadur orally. He did not appoint him to be his Vakil by *Vakalatnama*. At the time he executed his *Vakalatnama* he intended to appoint as his Vakil only the person or persons of whom he took or he intended to take signatures. At the time of appointing Mr. Abdul Aziz as his Vakil he had no intention to appoint any other Vakil. He only gets signature of the Vakil whom he appoints at the time of executing *Vakalatnama*."

We are not here to investigate into the intentions of the parties. The fact is that names of various pleaders including

(1) (1901) 5 C.W.N. 816.

(2) (1913) 20 C.W.N. 283=33 I.C. 831.

(3) (1915) 43 Cal. 884=23 C.L.J. 297=32 I.C. 395=20 C.W.N. 287

(4) (1917) 2 P.L.J. 259.

that of Rai Jung Bahadur were in the *Vakalatnama*, and obviously it was with a view to get the acceptance of any of the pleaders whose names appeared in the *Vakalatnama* when an emergency would arise. The names of other pleaders than the one who was engaged and accepted at the time are only mentioned with a view to obviate the necessity of filing a fresh *Vakalatnama*; else there was no meaning in encumbering the *Vakalatnama* by putting down a number of pleaders' names if when subsequently in appointing the pleaders named in the *Vakalatnama* fresh *Vakalatnamas* were necessary. But we are relieved from going into the intention of the parties in the case when the rule expressly says that a *Vakalatnama* once filed in Court may be subsequently accepted by a Vakil or pleader whose name appears in the *Vakalatnama*. The Court has only to see whether the name of the pleader proposed to be appointed appears in the *Vakalatnama* or not, and if his name does appear then the pleader is entitled to sign the *Vakalatnama* and appear and act in the case. Again, apart from the question whether Rai Jung Bahadur could or could not be permitted to sign the *Vakalatnama* in question, there was no default on behalf of the plaintiff when there was a duly authorised agent with a registered power-of-attorney present in Court with his witness, and the order dismissing the suit was bad in law; Order III of the Code of Civil Procedure. This agent had signed and verified the plaint, had appointed Vakils and was looking after the case. The Munsif could have, with his assistance, examined the witness which would have taken only a few minutes, or should have adjourned the case as it was taken up so late in the day, instead of disposing of it at 11-27 A. M. particularly when the plaintiff's pleader had filed *Hazri* and left the Court at 10-30 A. M. The plaintiff only wanted to use the record of right and to examine only one witness. The zeal of the Munsif does not rest there. While hearing the application for setting aside the order of dismissal under Order IX, rule 4, two witnesses were examined on behalf of the plaintiff, namely, Lachmi Prasad, *Am-muktear*, and Moulvi Abdul Aziz, pleader, who was engaged originally to act in the case. Naturally the evidence-in-chief was very short but the cross-examination was by the Munsif himself, as nobody appeared to oppose the application, and that appears to be too searching and inordinate, and the judgment rejecting the rehearing petition also appears to be pretty long. The learned Munsif seems to have been carried away in this case from the beginning to the end more from vindicating his own view of the technical point as to the right of a pleader signing the *Vakalatnama* as filed in Court than from the justice of the case. He would have been well advised had he reserved this point for a more appropriate case. In any view the discretion used in this case by the Munsif both in dismissing the suit and not restoring it was not proper.

The result is that I set aside the order of the Munsif under Order IX, rule 4, and restore the case to its original file to be disposed of in accordance with law.

Order set aside.

A. I. R. 1922 Patna 507.

DAWSON MILLER, C. J., AND MULLICK, J.

Ramdhuri Chowdhuri—Appellant

v.

Deonandhan Prasad Singh—Respondent.

L. P. A. No. 94 of 1921, decided on 10th July 1923.

(a) *Limitation Act, Art. 166—Applications to set aside sale are all governed by Art. 166.*

An application for setting aside a sale in execution of a decree under the C. P. Code is governed by Art. 166, even though the ground for setting aside should be fraud or any other reason. All applications to set aside a sale in one sense come within section 47 of the Code as that Section provides that all questions arising between the parties and relating to the execution of the decree shall be determined by the execution Court. The effect, however, of Art. 166 of the Limitation Act cannot be evaded merely by stating in the application itself that it is brought under Section 47 as well as under Order 21, rule 90. [P. 509, Col. 2]

(b) *Civil P. C., O. 21, R. 90—Mis-statement in sale proclamation is not necessarily a fraudulent act.*

A wilful mis-statement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence, in particular cases, to justify an inference of fraud. The mis-statement of value in the sale proclamation is not necessarily a fraudulent act. [P. 510, Col. 2; P. 511, Col. 1.]

(c) *Civil P. C., S. 100—Fraud not inferred by first appellate Court from facts found—High Court will not interfere unless such inference necessarily follows from such facts.*

Where certain facts are found and an inference of fraud is drawn, based upon the facts so found, it is open to the Court in second appeal to consider whether as a matter of law, such an inference is justified by the facts found. If, however, the first appellate Court, which is the ultimate judge of fact refuses to draw an inference of fraud upon the facts so found by it,

that decision cannot be questioned in second appeal, unless the facts found necessarily amount to fraud; even if, upon a consideration of all the circumstances, High Court might have drawn a different inference and come to a different conclusion, unless that inference necessarily followed from the facts proved, the High Court would not be entitled to disturb the findings of the first appellate Court [P. 511, C. 1.]

S. Ahmed, K. Sahai and *S. Dayal*—for Appellant.

P. K. Sen and *S N. Bose*—for Respdt.

Dawson Miller, C. J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Ross, dated the 6th November 1921. The appellants as first mortgagees of certain property sued and obtained a decree in execution of which, on the 31st January 1918, they put up the property for sale and purchased it themselves About two years later, in February 1920, the respondent, one of the judgment-debtors, applied to set aside the sale under Order 21, rule 90 and Section 47 of the Civil Procedure Code.

At the hearing of the application, no point was made by the judgment-debtor, the present respondent, that notice of the application for execution required by Order 21, rule 22 of the Code was not issued or properly served and no evidence was taken before the Munsif who heard the application, on this point. It was contended, however, that the order of attachment was not properly proclaimed, nor a copy deposited in the Collectorate as required by Order 21, rule 54, and that the notice of the sale proclamation required by rule 66 of that Order was not properly served upon the respondent or a copy deposited at the Collectorate.

The respondent also alleged fraud on the part of the appellant in concealing from him the fact of sale and claimed that the limitation period for his application did not begin to run until he became aware of the sale which was less than a month before the application was made. The Munsif found that the notice required under Order 21, rule 66 was served on the karpardaz of the respondent and not on the respondent personally and that the sale proclamation was not sent to the Collector of the District for publication under Order 21, rules 67 and 54.

He also found that the property was purchased at a very low price by the appellant and from the way the processes were served and the inadequate price, he concluded that fraud had been practised on the respondent There was no evidence as to when the respondent first obtained knowledge of the sale but he accepted the statement in his petition that he obtained this knowledge for the first time on the 2nd February 1920 which was less than a month before the application was filed. He accordingly held that the application was not time barred and set aside the sale.

The Subordinate Judge on appeal found that the sale proclamation was duly made and published but that a copy was not sent to the Collector of the district as required by rules 54 and 67 of Order 21. He also found that the notice required under rule 66 was not served upon the respondent but upon his karpardaz. Tnese defects he considered to be irregularities but not sufficient to vitiate the sale. He further found that the price which the property fetched at the sale was lower than its fair price but did not consider that there was anyevidence proving anything done by the decree holder which had the effect of reducing the price.

It must be taken therefore, in my opinion, that he considered the respondent had suffered no substantial injury, within the meaning of Order 21, rule 90, by reason of such irregularities as existed. He also found that there was no evidence on the record to prove any fraud practised by the appellant, and that there was no proof that the respondent was kept from knowledge of the sale by any fraud of the decree-holder.

In considering the question of the inadequacy of price he stated that he could not agree with the learned Munsif in holding that fraud was practised simply because the property sold did not fetch its proper price at the sale. On the question of limitation he pointed out that there was no evidence to prove how and when the judgment debtor got knowledge of the sale and that the allegation made in the petition had not been substantiated and the respondent himself gave no evidence. He accordingly held that the application was barred by limitation and rejected it, allowing the appeal.

The respondent then moved this Court in revision to set aside the Subordinate Judge's order relying mainly upon the ground, which had not been urged either before the Munsiff or the Subordinate

Judge, that notice of the application for execution, which was made more than a year after the decree, had not been properly served upon him, and that the sale was accordingly made without jurisdiction and is void.

He also contended that upon the findings come to, fraud ought to have been presumed. The learned Judge considered that on the facts disclosed, a case of fraud had not been made out and agreed with the lower appellate Court that irregularity in the service of notice, in itself, did not amount to fraud. He stated, however, that in the absence of any findings of the actual value of the property, he would have remanded the case for a finding on this question had it been necessary to do so but as he set aside the sale upon the ground next mentioned, he did not take this course.

On the question of non-service of the application for execution, he was referred to the peon's return of service which had been accepted by the executing Court as a proper service when it was made and had not been put in evidence at the trial. From this it appeared that the notice had been tendered to the respondent's *karpardaz* who refused to accept it and that it was afterwards served by affixing it to the door of the respondent's house.

In certain circumstances such a service might be regular and effective but there was nothing to show on the fact of the return whether the respondent himself had refused to accept it or whether any attempt had been made to ascertain his whereabouts before affixing it to the door of his house and no evidence was before the Court to show the exact circumstances under which the service came to be made.

The learned Judge, however, considered himself justified in deciding this question upon the peon's return alone and came to the conclusion that no proper service had been made with the result that the sale was bad for want of jurisdiction. He appears to have treated the application, which was in fact an application to set aside the sale, as an application of some other nature. Although it seems clear that the limitation period for an application to set aside a sale under the Civil Procedure Code is 30 days under Art. 166 of the Limitation Act, the learned Judge thought that as the case was one coming under Section 47 of the Act it was not governed by Art. 166 but by Art. 181 for which the limitation period was 3 years and the application was therefore not barred by limitation. He considered, further, that the proper procedure was by way of appeal and not by way of revision and treating the application as an appeal he allowed it and ordered the sale to be set aside. From this decision the present appeal is brought.

The first observation which falls to be made upon this judgment is that the application now under consideration was both in form and substance an application for setting aside a sale in execution of a decree under the Civil Procedure Code. There was no contention from first to last either in the trial Court or before the Subordinate Judge that the sale was void *ab initio* and there was not a scrap of evidence to support such a contention. The fact that the application itself was headed as one under Order 21, rule 90 and Section 47 of the Code can make no difference in this respect.

Article 181 of the Limitation Act applies only to application for which no period of limitation is provided elsewhere in the Schedule, but all applications for setting aside a sale in execution of a decree under the Code are governed by Art 166, even though the ground for setting aside should be fraud or any other reason. All applications to set aside a sale in one sense come within section 47 of the Code as that Section provides that all questions arising between the parties and relating to the execution of the decree shall be determined by the executing Court. The effect, however, of Art, 166 of the Limitation Act cannot be evaded merely by stating in the application itself that it is brought under Section 47 as well as under Order 21, rule 90.

It would appear therefore that the present application is time barred unless it can be shown that the respondent's right to set aside the sale was concealed from him by the fraud of the appellant, In such a case under Section 18 of the Limitation Act the time would only begin to run when the respondent first became aware of the fraud. This he alleged in his petition was less than a month before he filed the application

although the property had been sold 2 years earlier. Fraud has been negatived by each of the Court before whom the case came and the respondent has therefore failed to lay the foundation necessary to support the application of section 18 of the Limitation Act. Unless the knowledge of his right to apply was fraudulently concealed from him the period of limitation runs from the date of the sale.

It is immaterial therefore when he first became aware of the sale, although in fact as the Subordinate Judge points out there is no evidence of the date when he first became aware of it. With respect to the learned Judge, whose decision is now under appeal, I do not think that he was entitled to treat the present application which, as I have already said, was in form and substance an application to set aside a sale, as a proceeding of a different nature and to hold that Art. 166 of the Limitation Act had no application.

The evidence was confined to such matters as would entitle the Court to set aside the sale on the assumption that it was valid until so set aside, and the only evidence before the Court was that which went to show that the sale was voidable and not void. It may be, when the facts are accurately ascertained, that the sale was void. I express no opinion upon that point, but I consider in the present case we are not in a position to decide it.

The evidence is not before us to enable us to arrive at a proper conclusion and it would, in my opinion, be a dangerous precedent to establish if we were to treat the application now under consideration as one of an entirely different nature from that which it purports to be, and without any evidence at all as to the exact circumstances under which the service of the application for execution was effected, to hold that the sale was a nullity merely because the peon's return, which was not put in evidence or relied upon at the trial, indicates that the service may not have been properly effected.

It may be assumed that if the service of this notice had been put in issue at the hearing, the proof of the peon's return would not have been sufficient to discharge the onus cast upon the appellant but for aught we know there may have been circumstances which, when known, would show that the service was regular and that the respondent although the notice was not delivered into his hand by the peon, had received it or had refused to accept it or could not be found. To justify us in declaring a sale made by the Court, in execution of its decree, to be null and void, I think we should require more cogent proof than anything which appears in the circumstances of the present case.

The respondent did not put the appellant to proof of the validity of the service of notice which is now impugned, and no evidence upon the question was gone into as the appellant had no case to meet in this respect. How then can we hold that the sale was a nullity merely because a document on the record, but not used at the trial or in any way questioned, fails to establish conclusively that the service was regular. In my opinion it would be improper to do so.

The learned Counsel for the respondent further argued that, upon the facts found, the learned Subordinate Judge ought to have come to a conclusion that there was fraud in publishing and proclaiming the sale, and that once fraud is proved which kept the sale from the knowledge of the person entitled to question it, the onus lies upon the person committing the fraud to show that the person injured thereby and suing to recover the property had clear and definite knowledge of the facts which constitute the fraud at a time which is too remote to allow him to bring the suit, as laid down by Lord Hobhouse in delivering the judgment of the Judicial Committee in *Rahimbhoy* v. *Turner* (1).

Before however, any question of *onus* of proof arises it must be established that a fraud was committed. The first appellate Court, which is the ultimate judge of fact in the present case, has come to the conclusion that the evidence of that which was done by the appellant does not amount to fraud. It is contended, however, that the value of the property mentioned in the proclamation was so much below its real value that fraud must necessarily be imputed.

I entirely agree that a wilful mis statement by a decree-holder in the sale proclamation of the value of the pro-

(1) (1893) 17 Bom. 341=20 I. A. 1=6 Sar. 256 (P. C.)

perty may be sufficient evidence, in particular cases, to justify an inference of fraud. I further agree that where certain facts are found and an inference of fraud is drawn, based upon the facts so found, it is open to the Court in second appeal to consider whether, as a matter of law, such an inference is justified by the facts found. If, however, the first appellate Court, which is the ultimate judge of fact, refuses to draw an inference of fraud upon the facts so found by it, that decision cannot be questioned in second appeal unless the facts found necessarily amount to fraud. The misstatement of value in the sale proclamation is not, in my opinion, necessarily a fraudulent act, nor do the other irregularities complained of at the hearing, of themselves necessarily constitute fraud.

Whether, upon the whole of the circumstances disclosed, it could be inferred that fraud had or had not been committed was, in my opinion, entirely a question for the Subordinate Judge to determine and even if, upon a consideration of all the circumstances, we might have drawn a different inference and come to a different conclusion unless that inference necessarily followed from the facts proved, we should not be entitled to disturb the finding of the first appellate Court.

In the present case I think we are bound by those findings and as there is no finding which will bring into operation the provisions of section 18 the application is, in my opinion, governed by Art. 166 of the Limitation Act and was time barred at the time when it was presented.

Whether the respondent is still in a position to treat the sale as a nullity or whether he still has any remedy open to him whereby he may obtain a declaration in favour of his title and possession on the ground that the sale was void are matters which I expressly leave open, but so far as the present application is concerned, in my opinion, it must be dismissed and the appeal allowed with costs here and before Mr. Justice Ross.

The judgment and decree appealed from will be set aside and the order of the learned Subordinate Judge restored.

Appeal allowed.

A. I. R. 1922 Patna 511.

DAWSON MILLER, C. J. AND COUTTS, J.

Mt. Janakbati Chaudhrain—Defendant-Appellant

v.

Rameshwar Singh Bahadur—Plaintiff-Respondent

Appeal No. 232 of 1920 decided on 20th December, 1921 from Original Order Sub.-J., Darbhanga dated 6th July 1920.

Civil P.C., O. 21, Rr. 72, 92 and 68 & S. 151—Execution sale—Permission to bid granted to decree-holder subject to certain conditions—Conditions not fulfilled—Court can refuse to confirm the sale.

Where appellants, in their application for leave to bid at an execution sale, alleged certain facts which were not true, the appellants were held not entitled to confirmation of sale till they had made good their representations. Where a Court grants permission to bid at an execution sale upon an inaccurate statement that certain conditions are fulfilled, the permission is conditional and the Court has power to refuse to confirm the sale apart altogether from rule 72 and from the provisions contained in R. 92 of O. XXI either under R. 86 or under its inherent powers, until the conditions are in fact fulfilled. [P. 514, C. 1, 2.]

B. N. Mitter—for Appellant.

S. N. Sinha and *M. Prasad*—for Respondent.

Dawson Miller, C. J.—This is an appeal on behalf of Janakbati Chaudhurain from an order of the Subordinate Judge of Darbhanga, dated the 6th July 1920, refusing to confirm a sale made at auction in execution of a decree.

The facts out of which the dispute arises go back to the year 1901 and even earlier but I think they may be stated shortly in so far they are necessary for determining the questions which arise in this case. It appears that the appellants had a decree before the year 1901 against Fateh Narain and others who are now represented by Nathuni Chowdhuri.

The Maharaja of Darbhanga who is the respondent in the appeal also had a decree against the appellants and by way of enforcing his decree he attached the decree of the appellants against Fateh Narain and he put up to sale the properties included in that decree on the 17th June, 1901. The properties were sold for the sum of, in round figures, Rs. 12,000, and were purchased by certain persons who were near relations and co-sharers of Fateh Narain.

The appellants although their decree had been attached, obviously had an interest in seeing that that sale was properly conduc-

ted because after payment of the sums due to their attaching creditor, the Maharaja they would be entitled to thebalance of the proceeds, if any, of the sale of the property attached. The appellants were not satisfied that that sale had been properly conducted, and they objected to the confirmation of the sale which, however, was confirmed some time in March 1904. Subsequently the Maharaja withdrew the purchase money in part satisfaction of his decree against the appellants. The appellants then appealed from the order confirming the sale to the High Court at Calcutta, alleging that the sale had been brought by fraud on the part of the purchasers. The High Court of Calcutta set aside the sale in the year 1907 and in the following year the Maharaja took out further execution proceedings against the same property not however, until the purchasers under the original sale had filed an application for leave to appeal from the decision of the High Court of April, 1907, to the Privy Council.

Although the sale was set aside there was an appeal to the Privy Council and therefore the Maharaja retained in his possession the sum of Rs. 12,000, the purchase money, pending the decision of the Privy Council. This, however, it was obvious he would have to restore with interest in the event of the Privy Council confirming the decision of the High Court, and after the renewed application for execution of the decree in the year 1908, it appears that some accounts were taken between the Maharaja and purchasers of the property at the original sale in which the Maharaja very properly gave credit for this sum of Rs. 12,000 odd which he still had in his possession although it might turn out in future that he might have to refund it.

The Privy Council decision was not delivered until the year 1917. By that decision the decree of the Calcutta High Court of April, 1907, was confirmed and the appeal dismissed. The result was that the Maharaja had to refund Rs. 12,000 together with interest at 6 per cent from the date when he withdrew it from Court in the year 1904 up to the date when he returned it to the persons entitled to it, the purchasers.

In 1918 the Maharaja again took out execution against the same properties and the sale proclamation and notices were issued, and, in pursuance of the proclamation, some of the property was sold in December 1919, and some was subsequently sold in March, 1920. At both these sales the appellants applied for and obtained leave to bid at the sale, and they have in fact purchased the greater portion of the properties sold. When the period arrived for confirming these sales, the respondent, the Maharaja applied, to the Court of the Subordinate Judge not to confirm the sale, and two questions were raised and relied upon by the appellants in support of their contention that these sales ought to be confirmed.

I have already stated that the property sold was under a decree obtained by the appellants against their judgment-debtors and that decree had been attached by the Maharaja of Darbhanga and put in execution by him. *Prima facie*, therefore, he was entitled to be paid first out of the proceeds of these sales what was due to him under his decree against the appellants, and after he was satisfied, any balance remaining would have to be paid to the appellants in satisfaction of the balance which they were entitled to recover against the judgment-debtors.

Now what happened was this. In the first place there was some dispute as to the exact amount that was due to the appellants from the Maharaja. The appellants contended that as the Maharaja had been in possession for something like 19 years of this sum of Rs. 12,000 odd which he took out of Court after the original sale of 1901, he ought not to be allowed any interest upon that part of the sum due to him which was equivalent to the amount he took out of Court, and it was even contended that he ought to give credit for the principal sum of Rs. 12,000 which he had in his possession for so long but had subsequently been compelled to restore to the purchasers.

I confess I am quite unable to see upon what principle of law the appellants rely in support of such a proposition. The appellants were under a legal obligation to pay to the Maharaja the decretal amount due under the Maharaja's decree against them with interest at six per cent per annum until payment. This

obligation they could have discharged at any moment by paying the decretal amount and interest and so have avoided the necessity of going on paying further interest as the years accumulated, and the mere fact that by reason of a sale which was subsequently set aside the Maharaja had taken out of Court the proceeds of that sale and kept them for a certain period, being afterwards compelled by process of law to restore the sum together with interest to the purchasers to whom it belonged, the sale having been set aside, can have no sort of bearing upon the obligation the appellants were under by reason of the decree against them. If the sale had been confirmed no doubt the Maharaja would have been entitled to retain the Rs. 12,000 and, *pro tanto*, the amount of the appellants' liability to him would have been extinguished on the date when the money was taken out of Court, and, therefore no interest on the part of the decretal amount would have been payable from the date, but as that sale was set aside and as the money had to be returned with interest the parties were afterwards in exactly the same position as if the sale had not taken place. I think, therefore, that the learned Judge from whose decision this appeal was brought was perfectly right in refusing to uphold the contention of the appellants upon that part of their case; that being so it is clear that the amount payable under the decree becomes really one of arithmetic, taking the decretal amount together with interest allowed by the decree and finding what the total is upon a certain date, deducting from that total the sums, if any, which have already been paid in part discharge of the decree. But certainly the sum of Rs. 12,000 which was for sometime in the pocket of the Maharaja cannot be deducted so as to minimise the liability under that decree.

The next point, and the only other point, arises in this way. When the property was about to be put up for sale, the appellants applied to the Court asking, in effect, that they should be allowed to bid at the sales, and that after satisfying the decree of the Maharaja of Darbhanga against them, they should be entitled to set off against the purchase price the sums due to them by the original judgment-debtors under the appellants decree and when the sales took place in December, as I have already said, the property was bid for and purchased by the appellants amounting to a considerable sum.

They did, apparently, from accounts which have been produced, pay into Court something, but in their calculation of what was due to the Maharaja they took into account the fact that he had Rs. 12,000 in the year 1904 together with interest up to within a short time before the sales took place. This of course as I have already stated, was not a sum which they were entitled to take into account. Therefore, the result was that they deposited in Court out of the purchase money a sum considerably less than that which was due in fact to the Maharaja under his decree. The sales however which took place in December were subsequently confirmed. Again in March further property was sold under the same execution proceeding and on that occasion the appellants petitioned the Court by a petition dated the 20th January, 1920, asking that they might be allowed to bid at the auction sale. They did not in terms in that petition ask that they might set off against the purchase price the sums due to them under their decree against the judgment-debtors. They merely asked that they might bid at the sales, but in that petition they definitely stated that the entire decretal money due to the Maharaja, that is, to the respondent " stands deposited in this Court as per sale proceeds and also as per deposits made on behalf of your petitioners, the decree-holders."

That statement I am not suggesting was deliberately false, but it was inaccurate. It was not true that the amount due from them to the Maharaja had been deposited in the previous sale. The Court, however, upon this application, which was an *ex parte* application, relying upon that statement made an order that they should be entitled to bid at the sales. They did bid and they purchased some of the property and now the question arises whether, having obtained leave to bid in accordance with the provisions of Order XXI, rule 72, of the Civil Procedure Code, they are entitled to set off against the purchase money due from them the amount still owing to them under the decree which

they held against the judgment-debtors, Rule 72 of Order XXI provides by clause (2) that—

"Where a decree-holder purchases with such permission, that is the permission of the Court, the purchase money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

It is contended that although they had not complied with the undertaking in their petition for leave to bid in the December sales and although in the petition for leave to bid at the subsequent sales they had stated inaccurately that the entire decretal money due from them to the Maharaja had been deposited in Court in the previous sale, they are nevertheless entitled to discharge their liability as purchasers merely by set off without in fact depositing sufficient money to pay what is justly due to the attaching creditor.

They contend that under rule 72 of Order XXI, once permission has been granted, the Court has no option but to allow them to set off. It is not necessary in my view to determine whether under clause (2) of rule 72 it is the purchaser or the Court which may determine whether the set off shall be allowed but I think that when the order was made by the Court on the application of the 10th January to bid at the subsequent sales, that order granting leave was only made upon the condition that the entire decretal money due to the Maharaja had in fact been deposited in Court. That was the allegation made in the petition and that must have been one of the conditions which the Court assumed to have been fulfilled before the Court granted the permission.

Then the question arises whether in these conditions there was an absolute power given to the appellants to bid at the sale or whether it was a power subject to a certain condition having been fulfilled. I think that the latter view is the proper view to take. That condition turns out not to have been fulfilled and therefore it seems to me perfectly clear that the Court has power, apart altogether from rule 72 and from the provisions contained in rule 92 of Order XXI, either under rule 86 or under its inherent powers to refuse to confirm a sale unless the conditions alleged to have been fulfilled by the appellants when they obtained the order are in fact fulfilled. That was the view taken by the learned Judge although he in fact based his decision upon the powers granted to the Court under rule 72. In the broad determination of the case I think the learned Judge was right.

The only real question for us to decide is whether in the particular circumstances of this case the undertaking given, or at least the representation made by the appellants in their application for leave to bid, ought to be fulfilled before the Court allows the sale to be confirmed. It seems to me that the Court never would have permitted the appellants by bidding at the sale to discharge their obligation as purchasers by setting off against the purchase money the amount due under their decree, without taking into account at all what was due from them to the attaching creditor. It is obvious that the attaching creditor had a first charge upon the properties sold and the order made by the Court was in my opinion an order made upon the assumption that that charge was satisfied out of the sale proceeds and the order was conditional upon that charge being satisfied. The condition was not fulfilled and I think the sale should not be confirmed until it is.

In my opinion the appeal should be dismissed with costs.

Coutts, J.—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 514.

DAWSON MILLER, C.J., AND MULLICK, J.

Baijnath Singh and others—Appellants

v.

Brijraj Kuar and another—Respondents.

F. A. No. 143 of 1919 decided on 7th July 1922.

(a) Pardanashin lady—Gift — Deed executed openly and registered—Everybody concerned having notice of the document and the lady herself admitting execution—Knowledge of contents was held proved.

A deed of gift by a Pardanashin Lady was brought into existence without any attempt at concealment, was registered and the names of the transferees were entered in the Registration Department. The

donor herself was constituted the guardian of the property of her minor grandsons-donees under the control of the District Judge. The lady (donor) admitted before one witness, a Commissioner sent by D. J. to report on the management of the estate, "*yeh logka (donees) chis hai.*" Apparently within a very short time everybody was well aware of how the property had been disposed of, and a few months after the transaction one of the *gotias* objected to the registration and endeavoured to obtain possession of the estate on the ground that he was an adopted son of the donor's husband. On that occasion the transfer in favour of the donees was produced and proved in open Court.

Held: when everybody else must have known about the contents of the document it is impossible to believe that the donor alone remained in ignorance. [P 522, C. 2; P. 523, C. 1]

(*b*) *Evidence Act, S. 58—Document—Proof of, may be waived by party affected by it, but validity of document is not affected thereby.*

Formal proof of a document, even when it is required to be proved in a certain way, may be waived by any of the parties whose interests it may affect, and this seems to be in accordance with S. 58 of the Evidence Act. But although proof of the document may be waived this does not affect the legal character of the document or its validity as a gift. (35 Mad. 607 ; A.I.R. 1918 P. C. 3 ref) [P. 523, C. 2, P. 524, C. 1.]

(*c*) *T. P. Act, S. 123—Gift—Registered document attested by two witnesses is necessary-Attestation must be of the execution and not of an acknowledgment or admission of execution—T. P. Act, S. 59.*

As in the case of mortgages under S. 59 so in the case of gifts of immoveable property, under S. 123 they can only be effected by a registered instrument signed by the mortgagor or the donor and attested at least by two witnesses. Their Lordships of the Privy Council have decided that under S. 59, which in this respect is couched in similar terms as S. 123, attestation to be valid, must be an attestation of the execution of the document seen by the attestor and not merely an attestation of the executant's acknowledgment or admission of its execution. 35 Mad. 607, ref. [P. 524, C. 1.]

(*d*) *C. P. Code, O. 14, R. 5 — Special issue framed after evidence taken and arguments concluded-Decision thereon, is not bad-C P.C. S.151.*

Where no direct issue upon a point was taken in the pleadings nor was the issue raised at the trial but the trial Judge after the evidence had been taken and after the arguments were concluded framed a special issue and decided the case upon it.

Held ; that this is permissible and even had there been no such express provision in the Code, every Court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject matter of controversy between the parties, A. I. R. 1918 P. C. 3. ref. [P. 524, Cs. 1, 2.]

(*e*) *Contract Act, Ss. 19 and 24 — Pardanashin lady—Deed of gift—No consent given by lady to transaction—Transaction is void and need not be set aside before she claims possession — T P. Act, S. 6.—Mere right to sue cannot be transferred.*

If the facts alleged by the respondents were that the gift of 1908 was made under undue influence and fraud and that, when the donor came to know that she was imposed upon she cancelled it, it should be made out by them before treating the gift as void. But if there was never any consent at all to the gift within the meaning of S. 19 the *document is void ab initio* and need not be set aside. If the contract were voidable and not void *ab initio*, it would have to be set aside before a suit for possession could be maintained and further the donor could not transfer the mere right to sue. [P. 525, C. 1.]

S.M. Mullick, M. Prasad, L. K. Jha and *S. Dayal*—for Appellants.

S. C. Mitter and *S. Saran*—for Respdts.

Dawson Miller, C. J.—This is an appeal by some of the defendants from a decree of the officiating Subordinate Judge of Shahbad pronouncing in favour of the plaintiffs' title under a deed dated the 14th March 1917, executed by their mother Musst. Bhagela Kuer, conveying a half share in her property to the plaintiffs and declaring an earlier gift by Bhagela Kuer, under an instrument dated the 7th January 1908, conveying the bulk of her property to her grandsons, null and void. The plaintiffs, who are the respondents in this appeal, are the two younger daughters of the late Babu Raghunath Charan Singh and his widow Bhagela Kuer. The principal defendants in the suit are Mt. Dharamraj Kuer and Mt. Chhabi Raj Kuer (defendants 1 and 2) who are sisters of the plaintiffs, Mahadeo Singh, Indardeo Sirgh, and Tilakdhari Singh (defendants 3 to 5) who are sons of Dharamraj Kuer, and Baijnath Singh (Defendant No 10) the husband of Dharamraj and Chhabi Raj. The defendants 6 to 9 are other sons of Baijnath Singh. The defendant No. 11 Mt. Kowla Kuer is the sister-in-law of the plaintiffs and the first two defendants, being the widow of their deceased brother Bachu Singh. The defendants 12 to 18 are transferees of some of the property in suit from the defendants 3 to 5 and the defendant No. 19 Mt. Bhagela Kuer is the mother of the plaintiffs and the first two defendants. The plaintiffs do not deny that the earlier gift of 1908 was executed by their mother Bhagela Kuer but contend that she signed the same under the impression that it was a gift of her property in favour of her four daughters in equal shares, and that her signature was obtained by the fraud of Baij Nath Singh the husband of their sister, Dharamraj, who falsely represented that the document was a gift in favour of her four daughters in equal shares in accordance

with her expressed intention, whereas in fact it was a gift of the bulk of the property to the three sons of Baijnath Singh and Dharamraj his wife, a small portion only being conveyed to the other three daughters and to the daughter-in-law, Kowla Kuer. They claim that the gift of January 1908 be declared void and inoperative and that they may be given possession over a half share of the property in accordance with the instrument of the 14th March 1917.

The appellants deny the alleged fraud and contend that the instrument of 1908 in fact carried out the expressed wishes of their mother and was read over to and understood by her before execution. They further contend that in any case the gift of 1908 was not void, even if it did not express the intentions of the donor, but voidable only, and that the plaintiffs cannot maintain an action on the later deed until the earlier one is set aside, and, as the donor Bhagela Kuer was not a plaintiff and had not sued to have it set aside, the suit should be dismissed.

They have raised a further point in this appeal which does not appear to have been specifically raised before the trial court, namely, that the instrument of the 14th March 1917, relied on by the plaintiffs, was a gift, requiring attestation by two witnesses, and is not admissible in evidence as none of the alleged attesting witnesses had been called to prove it as required by section 68 of the Evidence Act, and further that even if admitted as evidence, the document itself did not purport to be and was not properly attested. They further raised a question of estoppel.

The learned officiating Subordinate Judge before whom the case came for trial held that, if the facts alleged in the plaint were proved, the gift of 1908 would be void *ab initio* and that it would not be necessary in such circumstances to have it set aside before the plaintiffs could assert their title under the latter instrument. He further found that the signature of Bhagela Kuer was obtained by the fraud of her son-in-law, Baijnath Singh and did not express her intentions and that she never consented thereto. He further found that Mt. Bhagela Kuer between 1908 and 1917 had no knowledge of the real contents of the earlier document, and that no circumstances had been made out which would operate as a bar to the suit by way of estoppel arising from the conduct of Bhagela Kuer.

He accordingly found in favour of the plaintiffs and awarded them possession of a half share in the property under the deed of 1917 together with mesne profits subject to certain maintenance charges and subject to a conveyance of Mauza Ghanti to the defendants 12 to 18 under a deed of sale, dated the 29th March 1914 which was found to be for legal necessity.

From this decision Baijnath Singh, his wife Dharamraj his sons Inderdeo and Tilakdhari his grandson Rajeshwar Prasad the son of the defendant Mahadeo Singh deceased have appealed.

Babu Raghunath Charan Singh, the husband of Must. Bhagela Kuer died in the month of July 1907, leaving property in some 20 villages the income from which it is alleged to be about Rs. 8,000 per annum. He also left debts amounting to over Rs. 30,000. His only son Bachu Singh had died some 18 months before his father but, in addition to his widow, he left surviving him the four daughters already referred to. Raghunath Charan Singh was greatly afflicted and suffered much mental distress by the death of his only son and there can be no doubt that his death was hastened by, if not directly due to, his bereavement. His widow says that it was the cause of his death.

The deceased son left a widow Musammat Kowla Kuer who has been added as one of the defendants in the suit. Bhagela Kuer, as next heir to her husband, succeeded to his property taking a Hindu widow's estate. The eldest daughter Dharamraj was at the time of her father's death the only married daughter, her husband being Baijnath Singh, the defendant No. 10. She and Baijnath had at that time 3 sons Mahadeo Singh, deceased, Inderdeo and Tilakdhari, but other sons were born to them before the institution of this suit and were made defendants.

On the death of Raghunath Charan Singh, Baijnath Singh with his wife and 3 children left their home in the United Provinces and went to live with the widow Bhagela Kuer at Barauna, and at her request Baijnath took over the management of the estate and transacted all business on her behalf, she being a pardanashin lady. Before this however it appears that Dharamraj did from time to

time after her brother Bachi's death live with her children in her father's house at Barauna and her third son Tilakdhari was born there in 1907 during her father's lifetime.

It is the appellants' case that Raghunath Singh had a great affection for his grandsons and after his son's death frequently expressed a desire to make over his property to them after making some provision by way of maintenance for his 3 younger daughters and his daughter-in-law. He was anxious that his debts should be discharged before his death but was not in a fit condition to attend to business and the grandsons were to be charged with the liquidation of his debts out of the estate in their hands, and thus he would be relieved from the burden of debt which, unless discharged, would militate against his happiness in the next world.

It is also suggested that Ragunath was not on good terms with his *gotias* and was afraid that they might endeavour to obtain the property and involve the estate in litigation after his death if no settlement was made, which was another reason for wishing his property to be settled upon his male descendants. Raghunath himself had made this suggestion to Baijnath about three months after his son's death and had sent his nephew Bhuneshwar Singh to take him and his family to Barauna.

His wife and his two sons did in fact go to Barauna at that time and the third son Tilakdhari was, as stated, born there. Baijnath himself went there 3 or 4 months later. Ragunath made no secret of his desire that the property should be given to the 3 grandsons and according to the appellants he named the mauzas to be given to each daughter for her maintenance and expressed a desire also that something should be given to the daughter-in-law but no document was executed in his lifetime.

In January 1908, about six months after Raghunath's death, a draft deed was prepared by a pleader named Narsingh Sahai who went to Barauna to take instructions from the widow for that purpose. According to the appellant both the draft and the fair copy prepared by the scribe Shyam Charan Lal were read over and explained to Bhagela Kuer who approved them and the document was executed in the presence of 4 attesting witnesses on the 7th January 1908. The document recites that the disposition made therein was in accordance with the wishes of the donor's deceased husband who during his lifetime, had expressed a wish that property yielding an annual income of Rs. 360 should be given to his daughter-in-law Kowla Kuer for her maintenance during her life, and that property yielding an annual income of Rs. 600 should be given to each of his 3 unmarried daughters and the remainder to his 3 grandsons Mahadeo, Inderdeo and Tilakdhari and adds 'that as my husband Babu Raghunath Charan Singh died without executing any deed in the above terms as desired by him he at the time of his death instructed me to execute a deed in the terms desired by him".

It further recites that the donor is confident that her said grandsons and daughters will properly serve and maintain her and remain obedient to her during her lifetime and at her death will perform her funeral ceremony in a fitting manner. It then gives a life interest in mauza Ismailpore, Kalan II, to her daughter-in-law Musammat Kowla Kuer and to her daughter Chhabiraj a life interest in Mauza Parbatpur with remainder to her sons and grandsons if any; to her daughter Brij Raj a similar interest in mauza Ismailpur Kalan I, and to her daughter Giri Raj similar interest in mauzas Kota and Jagadishpur. The balance of the estate is given to her eldest daughter Dharamraj and her 3 sons Mahadeo, Inderdeo and Tilakdhari Singh.

The grandsons are charged with the obligation to pay up immediately all debts which are at present standing or which would be contracted hereafter, by sale or by any other transaction or by any other possible means so that the whole of the estate left by her husband may after liquidation of the debts remain free and unencumbered. They are also charged with the expenses connected with the marriages of the 3 younger daughters which are to be paid out of the income of all the elakas.

They are further charged with the maintenance of the widow and the expenses of funeral ceremony and performance of the Gaya *sradh* of her husband in a fitting manner. They are further charged with the completion of a temple which her husband had begun to build at Barauna and with the installation of the image of the deity Sri Sri Sheoji Maharaj and the performance of

the puja etc. Bhagela Kuer was illiterate but at her request her name was written by an old servant of the family, Pradhan Ajodhya Prasad, since deceased. It is witnessed by 4 witnesses, 3 of whom were called at the trial, and is certified by the scribe, who was also called as a witness, to have been read out and explained to the executant. It was registered at the residence of Bhagela Kuer on the 12th January in the presence of the Sub-Registrar before the executant who admitted execution and who was identified by her nephew Bhuneshwar Singh, her sister's son. On that occasion her signature was also made by the pen of Ajodhya Prasad and Bhagela Kuer made her thumb impression on the document.

On the 26th January an application was made to enter the names of the donees in Register D in the Land Registration Department. An objection was filed by one Rajinder Narain Singh, a *gotia* of Raghunath Charan Singh, on the 12th March 1908, claiming that he had been adopted by the deceased in January 1907 after the death of his only son and was entitled to have his name registered as the owner of the property. Witnesses were called both on behalf of the applicants and on behalf of the objector in those proceedings.

On that occasion the deed of gift was put in evidence and proved by two of the attesting witnesses and by Ajodhya Prasad and the execution of the deed in fact was admitted by the objector. His claim to have been adopted by Raghunath Charan Singh was not supported by any credible evidence and his objection was dismissed and the petitioners' names were entered in the Register. In August 1908 Mt. Bhagela Kuer executed a *mukhtarnama* constituting Baijnath Singh her general agent.

This document recites the gift previously made in January of that year to her grandsons and daughters. In September 1910 upon a petition to the District Judge of Arrah Mt. Bhagela Kuer was appointed guardian of her grandsons Mahadeo, Inderdeo and Tilakdhari, and the properties in the possession of the minors under the deed of gift are therein referred to and set out in detail in the schedule. In March 1913 Mauza Ghanti-Bargawan, one of the properties transferred to the grandsons under the deed of gift, was sold for a sum of Rs. 17,600 in order to pay off certain existing debts. This document was executed by Bhagela Kuer as guardian of her 3 minor grandsons, she having previously obtained sanction from the District Judge of Arrah to sell the property.

In May 1915 the District Judge not being satisfied with the manner in which the property was being managed by the guardian, deputed Mr. H. T. Christian, the Sub-Divisional Officer of Bhabua, to proceed to Barauna and make enquiries and report as to the appointment of another guardian of the minor's properties. Mr. Christian who has been called as a witness on behalf of the appellants proceeded to Barauna, his instructions being to enquire into the accounts and to recommend a manager in consultation with Bhagela Kuer.

He had an interview with that lady and also with Baijnath Singh. He discussed with Bhagela Kuer the question of appointing a manager of the minors' property and she expressed a desire to have Baijnath Singh appointed Manager adding "*Yih logka chiz hai*" from which I think it may reasonably be inferred if this evidence is accepted, and I see no reason for rejecting it, that Bhagela Kuer at that time considered the property as belonging to Baijnath's family. Mr. Christian made a report that the income of the estate was about Rs. 4,300 a year exclusive of the rents of villages already assigned to debtors under usufructuary mortgages, and made certain suggestions as to reducing expenses and providing for paying off the debts. He states that the late guardian Bhagela Kuer had given a very low estimate of the income from the lands and it seems obvious from this that she must have discussed the income of the property of her grandsons of whom she was the guardian.

It is quite obvious from the facts which I have just stated that if Baijnath Singh wilfully deceived his mother-in-law into making a gift of her property to the grandsons he, at all events, took no measures to conceal the fact. Everything was done openly, the document was registered, servants and members of the family were parties to it including the nephew of Bhagela Kuer. She herself was also appointed guardian of the minor grand-children, and, when some of the property was sold to pay off the debts, it was she who had to execute the conveyance in which a recital of the gift appears.

It is not disputed by Bhagela Kuer that she executed the documents

but she contends that she was entirely ignorant of the contents of any of them. The names of the grandsons were also entered in the register in the Land Registration Department, a fact which could not well be concealed from the *gotias* and the other members of her family, and indeed this registration was objected to by Rajinder Narain Singh who claimed to have been adopted by Bhagela Kuer's deceased husband and preferred his claim in open Court.

When a Hindu landowner dies without male issue and his widow makes a disposition of the property followed by a mutation of names in the Land Registration Department the fact very soon becomes known to the *gotias* and other kinsmen of the deceased, as in fact happened in the present case, and it would appear that if Bhagela Kuer's evidence is true she alone of all her kinsmen and servants was ignorant of the real nature of the transaction.

The learned Subordinate Judge however has come to the conclusion that a fraud was perpetrated upon her and that she was not aware until many years afterwards, in 1917, of the contents of the instrument executed by her in 1908 and it will be necessary to consider his reasons for arriving at this conclusion. Before doing so however it would be convenient to state how it was that Bhagela Kuer came to make a different disposition of her property in the year 1917.

In 1913 Baijnath Singh took as his second wife Chhabi Raj the sister of his first wife. The two younger girls were at that time unmarried but in 1916 they were married to two brothers the sons of Babu Raghuraj Singh residing at Narkhoria not far from Barauna where Bhagela Kuer lived. One would expect that before the marriage of his sons Raghuraj Singh would make enquiries as to the property or prospects of his future daughters-in-law whose father had died without male issue. Nothing of the sort, however, according to Raghuraj's evidence appears to have been done, and the marriage of his sons took place in July 1916. The negotiations for the marriage took 2 or 3 months before completion and he says that his elder brother conducted the negotiations on his behalf and he knew nothing about them. He further says that he knew no details about the property and its management and did not even know that *Mt.* Bhagela Kuer had any properties.

In February or March 1917 he went on a visit to Bhagela Kuer at her house and was informed by that lady that half the property belonged to her two younger daughters and the other half to the wives of Baijnath. He then asked Baijnath, under whose management the estate was, to partition the properties and explain the accounts, but he refused to do so. Bhagela Kuer also asked him to divide the properties, but, upon his refusal, a copy of the *hibanama* of 1908 was sent for, whereupon the Musammat learnt for the first time that the major portion had been given to the sons of Baijnath. She thereupon sent for a pleader and executed the *bainama* transferring one half of her property to her younger daughters Brij Raj and Giri Raj. This document is dated the 14th March 1917 and is the foundation of the plaintiffs' title in this suit.

It purports to sell and convey the half of the entire estate of her deceased husband in which she has a life interest and which is said to be worth Rs. 12,000 to her daughters Brij Raj Kuer and Giri Raj Kuer as well as the right of instituting a suit for the cancellation of the previous gift. It then states " whereas in consideration of service and of obedience of the aforesaid daughters as well as in view of their being the reversioners I gave up and remitted the consideration of it, and made them owners in my place and put them in possession of the vended property ". It is signed by Mt. Bhagela Kuer by the pen of Babu Rampati Singh and purports to be attested by 4 witnesses on admission by the executant. It was registered on the 29th March 1917.

The case for the plaintiffs (respondents) rests mainly upon the evidence of Raghuraj Singh, the father-in-law of the plaintiffs, and Bhagela Kuer, their mother, and I may say at once that the evidence on both sides is unsatisfactory and open to serious criticism. I have already referred shortly to the evidence of Raghuraj Singh and have pointed out how he professed to be completely ignorant as to the prospects of his daughters-in-law before their marriage.

He admits however that before he went to see Bhagela Kuer after their marriage, that lady had told him that she had made a gift of the property and he

states that he did not ask her anything about possession of it. He says he came to know after the *Bainama* in favour of his daughter-in-law was executed that the village Ganti, already referred to as having been sold to pay off some of the debts, had been disposed of, but he did not enquire from anybody who was in possession of it before filing the plaint which was verified by himself.

The plaint nevertheless impleads as defendants the purchasers of that village. Moreover, after obtaining a copy of the deed of gift of 1908, he says that, although he saw the names of the attesting witnesses thereon, he never made any enquiries from them or anybody else as to its execution, nor did he endeavour, as one might expect he would, to verify the story of Bhagela Kuer from those persons. He was asked in cross-examination as to the witnesses to the document of 1917 relied on by him, and on being asked whether they had come to give evidence replied that they had not.

Bhagela Kuer in her evidence states that her husband did not say anything to her during his life time in connection with the disposal of the property. After his death she wanted to give it to all her 4 daughters and asked Baijnath Singh to get a document prepared. She did not express her desire to anybody else. She states she did not have the document read out to her. She does not in terms say that Baijnath Singh or anybody else ever represented to her what was in the document or that it carried out her wishes, but signed it without having it read out and, apparently, without making any enquiries.

She denies all knowledge of Pradhan Ajodhya Prasad who wrote her name for her on the document or of the witnesses who signed it although it appears to be clear from the evidence of other witnesses that they were servants or members of her household. She says she does not recollect if the Sub-Registrar questioned her as to whether she had got the *hibanama* read out to her but she put her thumb impression on it. She admits that Bhuneswar Singh, her nephew, who identified her was present on the occasion and, although he lived in her house until his death in 1914 she never asked him or, apparently any body else as to what was written in the document.

She further says that she does not know she was appointed guardian of her minor grand-children by the District Judge and that Mr. Christian, the Sub-Divisional Officer, never came to her house or asked her anything in connection with the management of the estate. It is impossible to accept this last statement in the face of Mr. Christian's evidence and his report to the District Judge after his visit.

She further says that she does not recollect whether the pleader Narsing Sahai came to her house in connection with the drafting of the document After some pressing she admitted that she knew about the sale of Mauza Ghanti. There are so many improbabilities in the story of these two witnesses that I cannot but feel great hesitation in accepting the truth of their story. The evidence of the appellants' witnesses however is also in many respects open to serious criticism. One reason assigned for questioning the *bona fides* of Baijnath Singh is that in the management of the property he seems to have neglected the interest of the plaintiffs and given preference to those of his wives and children.

Although the mauzas transferred to the plaintiffs under the deed of gift were entered in their names, and suits, when necessary, were instituted in their names, no separate accounts were kept and some of the proceeds of the property sold were used in paying off the charge upon Parbetpur, the property of Chhabi Raj, whilst that of the plaintiffs was left encumbered. It also appears that in the list of debts due from the estate entered in the schedule, when the certificate of guardianship was applied for in 1910, there is an item of Rs. 1,600 due to Rajdhari Singh, one of the younger sons of Baijnath.

This is said to be due under an unregistered hand note dated the 22nd March 1906. Baijnath explains this by saying that it was a debt due to his wife Dharamraj but stood in the name of his son who could scarcely have been a year old in 1910 and was not born in 1906. It is difficult however to believe that Raghunath Charan Singh in 1906 would borrow money from his daughter Dharamraj on a hand-note. It is just possible that the money borrowed was really that of Baijnath, her husband, and that the transaction took place in her name. Unfortunately however the matter was not further enquired into in cross-

examination, and, although it may be capable of explanation, it is a matter of some suspicion. It also appears that the properties given to the plaintiffs under the *hibanama* were mortgaged before the document was executed and a further sum of Rs. 700 was subsequently raised under a *zurpeshgi* of mauza Jagdishpur belonging to Brij Raj, the money being used to pay the costs of survey not only of that village but of other villages, awarded by the deed of gift to the appellants.

I think it may fairly be assumed that the whole of the property was dealt with by Baijnath indiscriminately, as if the parties were a joint family and not entitled to separate possession. This in itself however would be no ground for treating the deed of gift as procured by deliberate fraud on the part of Baijnath; nor do I think it necessarily follows from the unsatisfactory state in which the evidence was left, that the debt of Rs. 1,600 said to be due to his wife was a fictitious transaction. These matters greatly influenced the learned Judge in coming to a conclusion in favour of the respondents.

Another matter and one about which the learned Judge appears to have been in error, also influenced him in arriving at his conclusions. It appears that a copy of Register D showing the transmutation of names in respect of all the villages of the estate was put in evidence at the trial. From this the learned Judge considered that the villages granted to the plaintiffs had been entered in the names of Baijnath's sons.

This does not appear to be the case however upon reference to the document in question. Another reason which influenced the learned Judge in arriving at his conclusion was that some of the appellants' witnesses in giving details of the wish expressed by Raghunath during his lifetime to divide his property amongst his grandsons had mentioned the name of Tilakdhari as one of them. The learned Judge appears to have been under the impression that Tilakdhari was not born until after Raghunath's death.

In this respect however the learned Judge was in error, as Tilakdhari was born in February 1907 some 5 months before his grandfather's death as appears from Exhibit 9, the petition for obtaining certificate of guardianship, and he was born in his grandfather's house. The learned Judge's mistake arises apparently from a passage in Baijnath's evidence in which he stated that he did not recollect the month or year of Tilakdhari's birth but that it was about a year after *Assar* (June) in which his wife and children came to Barauna. As a matter of fact it was about 8 months later, assuming that his wife and children went there in June.

Three of the attesting witnesses to the document of 1908 as well as the scribe were called. Lachman Lal, one of the witnesses, who was a *mutsaddi* in the family, deposed that the draft was prepared by the pleader Narsingh Sahai after consulting Bhagela Kuer and that the draft was read out to, and approved by her; that a fair copy was afterwards made by the scribe and was also read out and explained to Bhagela Kuer in his presence and that he and the other witnesses attested it at Bhagela Kuer's request.

This witness also gave some evidence as to what happened before the Sub-Registrar when the deed was executed. He also states that Bhagela Kuer told the pleader what her husband's wishes had been and that the draft was prepared accordingly. He deposed in detail to various facts to which I have referred earlier and upon which the appellants rely. He was confronted with an account book of his own from which it would appear that he was not at Barauna on the day the document was registered and in stating what took place before the Sub-Registrar he must have been drawing on his imagination.

The account book in question shows that certain fees were paid to Narsingh Sahai, the pleader who drafted the *hibanama* and to this extent it corroborates the appellant's story as to Narsingh Sahai's part in the matter. This witness like many others of his class appears to have been prepared to give evidence beyond that which his recollection justified.

Mahadeo Sahu a *deorhi* servant of the family and attesting witness also speaks to the execution of the document and the reading out and explanation of it to the executant. His impression was that no property had been given under the *hibanama* to Dharmraj Kuer and he says that, if she acquired anything, it would not be in accordance with the directions of Raghnuath, her father. He also says that at the time of

reading over the document, paragraph 6, which related to the gift to Dharamraj and her children, was not explained in his hearing but that both the draft and the fair copy were read out in his presence.

Deoki Tewari, another witness, says he became a witness to the document on the day it was registered and when the Sub-Registrar was present, and that the other witnesses were also present but he does not say that they signed it at that time. Sham Saran Lal, the scribe, says he read and explained the contents to the executant. He says he read out the document to her on two occasions once before copying it fair, and the second time at the time of registration, and that the witnesses put their signature on the document the day he copied it fair.

He further says that the *Mussammat's* name was written on it by Pradhan Adjodya Prasad on the day the document was registered and on being asked by the Court he stated positively that Pradhanji wrote the name of the *Musammat* on the margin inside the document on the day of registration before the Sub-Registrar; that he did not write the name anywhere else on that day before the Sub-Registrar.

From the document itself it appears that the name of Bhagela Kuer was written three times by the pen of Pradhan Adjodhya Prasad,once at the alleged time of execution on the 7th January where the name appears in the margin and twice on the back at the time of registration on the 12th January. The first of the latter signatures is apparently to show that it was presented by her at her residence for registration and the second one to show that execution was admitted by her after identification by Bhunesh war Singh. It also contains her thumb impression at the back. The fourth attesting witness was not called.

From this evidence it seems clear that Deoki Tewari, one of the witnesses, did not sign until the day of registration and it is not unlikely that Ambika Prasad Tewari who has not been called also signed the document on that day. It is obvious from the document itself that a good deal of the scribe's evidence cannot be accepted as the document appears to have been signed by Adjodhya Prasad twice at the time of registration on the back although the scribe himself says that on that day Adjodhya Prasad wrote the name of the *Musammat* on the margin inside the document and nowhere else.

The fact that one, at all events, and perhaps two, of the attesting witnesses did not sign it until the day of registration would account for his evidence where he says that the witnesses signed it on that day. From the evidence of Lachman Lal and Mahadeo Sahu, the other two attesting witnesses, it would appear that they did sign it before the *Mussammat* at the time of execution on the 7th January and this is the conclusion at which I have arrived after considering the evidence.

The learned Subordinate Judge does not appear to have dealt with this aspect of the case and probably it was not forcibly drawn to his attention but he rejected the evidence of these witnesses as to the document being read over and explained to Bhagela Kuer. His reasons for arriving at this conclusion and discarding the whole of the appellant's evidence were, as I have already pointed out, based to some extent upon a misapprehension of the effect of the evidence, and although the appellant's witnesses gave evidence which might not have commended itself to the learned Subordinate Judge the evidence on behalf of the respondents seems equally open to criticism.

There can be no doubt that witnesses of this class frequently attempt to bolster up their case even when it would appear unnecessary to do so, by deposing to facts which happened many years ago by drawing upon their imagination and what they have learnt from others. But having regard to all the probabilities of the case I feel utterly unable to believe that *Mussammat* Bhagela Kuer was unaware of the contents of the document which she executed in 1908. What was done by Baijnath Singh on that occasion was done without any attempt at concealment so far as the other persons were concerned. The document was registered and the names of the transferees were entered in the Registration Department, Bhagela Kuer herself was constituted the guardian of the property of her minor grandsons donees under the control of the District Judge.

Apparently within a very short time everybody, except the lady herself, was well aware of how the property had

been disposed of, and a few months after the transaction we find one of the *gotias* objecting to the registration and endeavouring to obtain possession of the estate on the ground that he was an adopted son of Raghunath.

On that occasion the transfer in favour of the appellants was produced and proved in open Court and when everybody else must have known about it, it is impossible to believe that Bhagela Kuer alone remained in ignorance. I am further satisfied by Mr. Christian's evidence that she was aware of her grandson's interest in the property, and if in fact the gift of 1908 was properly attested by two witnesses, and I think it was, it follows that the later disposition of the property in 1917 must fail.

There is another matter which is not without significance in assisting one to come to a conclusion as to the knowledge of Bhagela Kuer of the contents of the earlier gift. The pleader Narsingh Sahai who was alleged by the appellants to have prepared the draft on her instructions was briefed in the case on behalf of the respondents, although he was not the senior pleader and does not appear to have taken a leading part at the trial.

As he had been engaged on behalf of the respondents the appellants not unnaturally, refrained from calling him as a witness. His evidence as to the instructions he received from Bhagela Kuer and the preparation of the draft would have been of the greatest assistance to the Court and would practically have settled the dispute as to Bhagela Kuer's knowledge of the contents of the deed.

I cannot help regretting that the learned Subordinate Judge did not insist upon this witness being called to give evidence. There was perhaps some excuse for the appellant's failure to call him but I can see no reason why the respondents should not have put him in the witness box if his evidence could support their case. It is impossible to believe that they did not ask him about it and their failure to call him as a witness is not without significance.

There is however a further point taken by the appellants before us in this appeal which is fatal to the respondnets' case. The document of 1917 relied upon by them, although it purports to be a sale, is, in my opinion, undoubtedly a gift, as no consideration passed or was ever intended to. It therefore required to be attested by at least two witnesses under S. 123 of the Transfer of Property Act.

Such attestation can only be effectually performed by those who are actually present at the execution of the document, and an attestation made merely on the acknowledgment of the executant is not a compliance with the section. After some difference of opinion in the Courts in India upon this question it was finally set at rest by the decision of the Privy Council in (1) *Shamu Patter* v. *Abdul Kadir* (1) in the sense which I have just indicated. Again in *Ganga Prasad Singh* v. *Ishri Prasad Singh* (2) the actual witnessing of the signature of the executant was insisted on.

In the document relied on by the respondents the attestation by each of the attesting witnesses is said to be on admission by the executant and none of the attesting witnesses was called to prove the document as required by Section 68 of the Indian Evidence Act. It appears however that this document was admitted without objection at the trial. It was contended on behalf of the appellants that, even so, it could not be received in evidence unless one at least of the attesting witnesses was called to prove it, and the recent case of *Shibchandra Singh* v. *Gour Chandra Pal* (3) was relied on in support of this contention.

I am not prepared, however, to go to the length of that case. It seems to me that formal proof of a document even when it is required to be proved in a certain way may be waived by any of the parties whose interests it may affect, and this seems to me to be

(1) (1912) 35 Mad. 607=39 I. A. 218=16 C. W. N. 1009=23 M L. J, 321=12 M. L. T. 338 =(1912) M. W. N. 935=16 I. C. 250=10 A. L. J. 259=14 Bom. L. R. 1034=16 C. L. J. 596 (P. C.).

(2) A I. R. 1918 P. C. 3=45 Cal. 748=45 I. A. 94=4 P. L. W. 349=16 A. L. J. 409=34 M. L. J. 545=27 C. L. J. 548=22 C. W. N. 697=23 M. L. T. 388=20 Bom. L. R. 587= (1918) M. W. N. 382=8 L. W. 176 (P. C.).

(3) A. I. R. 1922 Cal. 160=35 C. L. J. 473.

in accordance with Section 58 of the Evidence Act. But, although proof of the document may be waived this does not affect the legal character of the document or its validity as a gift. As in the case of mortgages under Section 59 of the Transfer of Property Act, so in the case of gifts of immoveable property, under Section 123 of that Act they can only be effected by a registered instrument signed by the mortgagor or the donor and attested by at least two witnesses.

As already pointed out their Lordships of the Privy Council have decided that under Section 59, which in this respect is couched in similar terms to Section 123, attestation to be valid, must be an attestation of the execution of the document seen by the attestor and not merely an attestation of the executant's acknowledgment or admission of its execution. The attestation in the present case is merely of the executant's admission of its execution and there is no evidence on the record that any of the witnesses were present and saw the execution of the document.

It is true that no direct issue upon this point was specifically taken in the written statement or framed at the trial and no argument appears from the judgment of the learned Subordinate Judge to have been addressed to him upon this question. It was therefore urged that we should not allow the point to be taken at this late stage or at least that we should remand the case for a finding upon an issue specially framed giving leave to the parties to call evidence as to whether the witnesses were actually present and witnessed the execution.

In *Shamu Patter* v. *Abdul Kadir* (1) already referred to a somewhat similar situation arose. The question for decision there was under Section 59 of the Transfer of Property Act. No direct issue upon the point was taken in the pleadings nor was the issue raised at the trial but the trial Judge after the evidence had been taken and after the arguments were concluded framed a special issue and decided the case upon it. Their Lordships held that this was permissible under Section 149 of the Civil Procedure Code of 1882 corresponding to Order 14, Rule 5 of the present Code and further stated that even had there been no such express provision in the Code every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties.

In *Ganga Pershad Singh* v. *Ishri Pershad Singh* (2) again the precise point was not raised in the pleadings nor in the issues framed at the trial but arose incidentally in connection with an issue framed relating to limitation. In both those cases an application to remand the case for further evidence was rejected. In the present case both in the pleadings and in the issues framed before the trial the validity of the document of 1917 was challenged and it was for the respondents as plaintiffs, to satisfy the Court as to its validity. At an early stage of the trial during the cross-examination of the plaintiffs' father-in-law who was their first witness, questions were asked as to whether the attesting witnesses were present to give evidence.

It was admitted that they were not and no attempt was afterwards made to procure their attendance. After the evidence closed it would certainly have been open to the appellants' pleader to have argued that the document was not properly attested and therefore invalid. It is true there was no argument on the question before the trial Court but neither was there in Shamu Patter's case and the mere fact, that the trial Court did not itself decide this point, does not preclude us from doing so.

I had some doubt during the argument as to whether we should remand the case to the Court of the Subordinate Judge framing an issue for him to determine upon further evidence.

In my opinion it would be useless for us to do so. The attestation of the witnesses purports to be on the admission of the executant and even should one or more of the attesting witnesses be called and depose that the document was executed in their presence such evidence would be open to the gravest suspicion in face of the document itself.

The attestation of a witness on the acknowledgment or admission of the executant of the document is permissible in the case of wills and the expression is well understood in this country. It is hardly conceivable that those whose interest it is to get the document attested would take the signatures of witnesses upon the acknowledg-

ment of the executant only if the witnesses had in fact been present at its execution. The respondents, whose attention was called to the absence of the attesting witnesses, had every opportunity of proving, if they could have proved it, that the document which purported to be attested merely on the admission of the executant was in fact signed by the executant in the presence of the witnesses. They have refrained from giving evidence upon this essential point in the case and, in my opinion, should not now be allowed to endeavour to prove a case which is in conflict with the document itself.

A further point was taken on behalf of the appellants which, in view of the findings arrived at, it is not necessary to decide, *viz.*, that the deed of gift of 1908 was not void but voidable only and must be treated as valid until set aside in a suit properly framed for that purpose. If the gift were merely voidable it could only be set aside at the option of Bhagela Kuer and she could not transfer her right to sue for this purpose.

The point was argued before us and I may state my opinion upon it shortly. S. 19 of the Contract Act was relied on. That section provides that when consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is a contract voidable at the option of the party whose consent was so caused and by S. 126 of the Transfer of Property Act it is provided that a gift may also be revoked in any of the cases "save want or failure of consideration" in which, if it were a contract, it might be rescinded.

I agree that if this were a voidable contract and not void *ab initio* it would have to be set aside before a suit for possession could be maintained and further that Bhagela Kuer could not transfer the mere right to sue but the answer to the appellants' argument appears to me to be that, if the facts alleged by the respondents should be made out, there was never any consent at all to the gift within the meaning of S. 19 of the Indian Contract Act and although Bhagela Kuer may have permitted her signature to be written on the document in question she never in fact consented thereto. This I think is the effect of the well known rule laid down in *Foster* v. *Mackinnon* (4).

Although, in my opinion, this point should be decided against the appellants it follows on the earlier findings arrived at that the appeal should be allowed, the judgment and decree of the officiating Subordinate Judge should be set aside and the suit dismissed with costs, here and in the Court below.

Appeal allowed.

(4) (1869) 4 C. P. 704=38 L. J. C. P. 310=20 L. T. 887=17 W. R. 1105.

A. I. R. 1922 Patna 525.

JWALA PRASAD AND ROSS, JJ.

Ram Prasad Rai and others—Appellants

v.

Mahesh Kant Chaudhary—Respondent.

L. P. A. No. 69 of 1920, decided on 16th December, 1921, against the decision of Das, J.

(a) *Civil P. C., O. 23, R. 1 and O. 21, R. 11—Execution of decree—Application by decree-holder to withdraw execution proceedings rejected and sale held—Court's action is without jurisdiction.*

Where in execution of a decree, certain property was advertised for sale and on the date of sale, the decree-holder applied for dismissal of the execution case but the Court rejecting the application held the sale.

Held : O. 23 which relates to the withdrawal and abandonment of a claim, does not apply to execution proceedings ; but there is nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed, if he does not want to claim any relief in respect of the execution. The party which sets the Law Court in motion has a right to withdraw the proceedings from the Court. Therefore the order of the Munsif was wrong and he acted certainly without jurisdiction in persisting in selling the property in spite of the wishes of the decree-holder to the contrary. [P. 526, C 2.]

(b) *Civil P. C. S. 104—Order rejecting decree-holder's petition to withdraw execution case—Appeal does not lie.*

An appeal does not lie against an order of a Munsif rejecting the decree-holder's petition to withdraw his execution case. [P. 526, C. 1.]

(c) *Civil P. C., S. 115—Order of Subordinate Courts without jurisdiction—High Court has power to interfere.*

Under S. 115 of the C. P. C. the High Court has power to act *suo motu*, and there is no limitation for exercise of ist power to set aside orders without jurisdic-

tion passed by lower Courts. [P. 525, C. 2.]

L. K. Jha—for Appellants.

S. C. Mitter—for Respondent.

Judgment:—This is a Letters Patent Appeal against a decision of a Single Judge of this Court. By his order the learned Judge decreed the appeal presented to this Court.

The respondent obtained a decree against certain persons and in execution of that decree he caused the property of the appellant judgment-debtor to be advertised for sale. On the 17th of April, 1919, the date fixed for sale he applied to the Court to dismiss this execution case This application was rejected by the Munsif, with the result that the property was put up for sale and was purchased by the appellant. The decree-holder, being dissatisfied with the decision of the Munsif, preferred an appeal to the Court of the District Judge, of Darbhanga.

The District Judge, being of the opinion that the Court had no power to sell the property on its own account in disregard of the application of the decree-holder set aside the order of the Munsif and sale held in pursuance thereof. The purchaser, therefore, appealed to this Court. The appeal was heard by Mr. Justice Das. He held that the District Judge had no jurisdiction to deal with the matter in appeal and to set aside the order of the Munsif. He accordingly set aside the order of the District Judge and restored that of the Munsif.

The learned Judge of this Court was perfectly right in holding that no appeal lay from the order of the Munsif rejecting the application of the decree-holder and ordering the sale of the property in question. I, however, think that the learned Judge should have gone further and should have set aside the order of the Munsif in exercise of the powers vested in this Court under S. 115 of the Code of Civil Procedure. The Munsif's order was certainly without jurisdiction and not sanctioned by any provisions of the Civil Procedure Code.

Execution was taken by the decree-holder and the powers of the Court with respect to that execution were invoked by the decree-holder. The application was made under O. XXI, R. 11, and the nature of the relief and the mode for the enforcement of that relief were expressly stated by the decree-holder—*vide* Rr. 10 and 11 of O. XXI, Civil Procedure Code. The decree-holder expressly prayed for the execution of the decree and for the sale of the property of the judgment-debtor. He had the right to withdraw the execution petition at any moment he liked.

No doubt, O. XXIII, which relates to the withdrawal and abandonment of a claim, does not apply to execution proceedings, but there is nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed, if he does not want to claim any relief in respect of the execution. The party which sets the Law Court in motion has a right to withdraw the proceedings from the Court. Therefore the order of the Munsif was wrong and he acted certainly without jurisdiction in persisting in selling the property in spite of the wishes of the decree-holder to the contrary.

Now two broad orders were passed in this case—first by the Munsif and second by the lower appellate Court. None of these Courts had any jurisdiction to pass their respective orders. This, therefore, was a fit case to set right the wrong order of the Munsif. S. 115 of the Code of Civil Procedure empowers the Court to act *suo motu* on an application of the aggrieved person. Nor is there any limit of time prescribed for it. In fact the decree-holder need not have come to this Court if he had obtained an order of the District Judge, however wrong and without jurisdiction.

Therefore this Court, having been appraised of an order without jurisdiction passed by the Munsif, should have set aside that order under S. 115 of the Code. Authorities are not wanting where in such cases the High Court exercised their revisional jurisdiction under S. 115 of the Code. *Andrew Anthony* v. *Rev. J. M. Dupont* (1), *Zamiram* v. *Fateh Ali* (2), and *Debi Das* v. *Ejaz Husain* (3).

I, therefore, decree this appeal and set aside the order of the learned Judge as well as that of the Munsif, and consequently the sale in execution is set aside. In the circumstances I make no order as to costs. *Appeal allowed.*

(1) (1881) 4 Mad. 217.
(2) (1904) 32 Cal. 146.
(3) (1905) 28 All. 72=2 A. L. J. 749=(1905) A. W. N. 191.

A. I. R. 1922 Patna 527.

COUTTS AND DAS, JJ.

Kilby—Appellant

v.

Mt. Bahuria Sheoratan Kuar—Respondent.

Appeal No. 196 of 1921, decided on 21st March, 1922, from the District J., Darbhanga.

Guardians and Wards Act (1890), S. 7—Debuttar *properties—Minor* shebait—*No guardian can be appointed under* S. 7.

No guardian under S 7 can be appointed for the management of *Debuttar* property on behalf of minor *shebait* who cannot possibly have proprietary interest in it. (39 All. 196 Diss.) 33 M.L. J. 297. Foll. [P. 527, C. 2, P. 528, C. 1.]

Manohar Lal and *S. M. Tahir*—for Appellant.

Manuk with *Gangadhar Das*, *S. C. Mitter* and *S. N. Roy*—for Respondent.

Coutts, J.:—This is an appeal against an order of the District Judge of Darbhanga, rejecting an application made by the Collector for the appointment of Mr. Abbott, as guardian, for the management of the *debuttar* properties of a certain idol on behalf of an infant *shebait*.

The facts are shortly that one Ganesh Prasad Narain Sahi in 1914 executed a deed of trust by which he endowed the *Thakur* with considerable properties and appointed himself a *shebait*. On his death, if any son were living, the trust deed provided that the son should be the *shebait*, and there was further provision for the appointment of any other male descendant; failing male descendants he appointed one of his widows as the *shebait*.

Ganesh Prasad Narain Sahi had three wives, Sheoratan, Saraswati and Parbati. Parbati, in the lifetime of her husband, gave birth to a son named Birendra Kishore Prasad Narain Sahi, who, at the time of the present proceedings, was about two years old. The father died on the 11th October, 1920, and, as Birendra Kishore would succeed to certain properties of Saraswati Kuar, whose estate was under the management of the Court of Wards, the Court of Wards took over guardianship of the person of the minor.

On the 6th of March, 1921, the present application was filed by the Collector before the District Judge under S. 7 of the Guardians and Wards Act, that Mr. Abbott might be appointed guardian for the management of the *debuttar* properties of the idol on behalf of the infant *shebait*. The application was opposed on the ground that the properties being *debuttar* properties the minor had no proprietary interest in them and consequently no appointment could be made under the Guardians and Wards Act.

The learned District Judge allowed the objection and disallowed the Collector's application holding that the petition of the Collector showed that the properties were *debuttar* properties, that the minor had no interest except that he was the *shebait* and further he found that in the trust deed no proprietary interest had been given to the minor.

This appeal has been filed by the Collector and the question is whether the minor has a proprietary interest in the *debuttar* properti s. In support of the contention. that he has such an interest, the decisions in *Raghoo Pandey* v. *Kassy Parey* (1) and *Sukh Lal* v. *Bishambhar* (2), are chiefly relied on. The case of *Raghoo Pandey* v. *Kassy Parey* (1) however, referred to a right to officiate as a priest at funeral ceremonies. It was held that this right was in the nature of immoveable property.

In *Suka Lal* v. *Bishambhar* (2), it was hele that "there is nothing in law to prevent a *Maha Brahmin* mortgaging his right to offerings receivable by him in his professional capacity." These two cases are clearly distinguishable from the present case, because in each of them the priest had a beneficial interest. The present case, however, is entirely different; the minor is merely a trustee and whatever right he has is not a personal right but a right derived through the *Thakur*.

On the other hand the view which has been taken by the learned Judge is supported by the decision of the Madras High Court in the case of *Obla Venkatachalapathi Aiyar* v. *Thirugnana Sambanda Pandhara Sannadhi* (3). In that case the Court purporting to act under S. 7 of the Guardians and Wards Act, appointed a guardian of the person and property of the plaintiff who was a *mathadhipathi*.

The guardian sold some of the properties of the *mutt* with the sanction of the Court. It was held, however, that the properties having been given to the head of the *mutt* as trustee were trust properties and therefore no guardian in respect

(1) (1884) 10 Cal. 73=13 C.L.R. 263.
(2) (1917) 39 All. 196=37 I.C. 661=15 A. L. J. 41.
(3) (1917) 33 M. L. J. 297=42 I. C. 273=6 M. L.W. 637.

thereof could be appointed under S. 7 of the Guardians and Wards Act. This case is on all fours with the present case; and, in my opinion expresses the correct view of the law.

In my opinion the decision of the learned District Judge is correct and I would dismiss this appeal with costs.

Das, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 528.

DAS AND ADAMI, JJ.

Hiranandan Ojha and others—Plaintiffs Appellants

v.

Ramdhar Singh and others—Defendants-Respondents.

Appeal No. 33 of 1919, decided on 1st February 1922, from Sub. J., Palamau, dated 28th November, 1918.

(a) *Lease—Before T. P. Act—Forfeiture clause for non-payment of rent—Relief can be given—T P. Act*, S. 114.

A *Mukarrari* lease granted before the enactment of the T. P. Act provided that in default of three instalments of rent the lease should be null and void,

Held: the Court could relieve the lessee against forfeiture on the ground of non-payment of three instalments of rent. [P. 529, C. 2]

(b) *T. P. Act, Ss.* 114 *and* 111—*Condition of forfeiture and clause of nullity—Sections do not make any distinction between.*

Ss. 111 and 114 do not recognise the distinction which is made in English Law between a condition of forfeiture and a clause of nullity. (1877-78) 3 A. C. 115 referred to [P. 529, Cs. 1, 2]

N. C. Sinha and *L. K. Jha*—for Appellants.

Sambhu Saran—for Respondents.

Das, J.:—This appeal arises out of a suit instituted by the appellants against the respondents for possession of certain lands specified in the plaint. The plaintiffs are the landlords and the *mukarrari patta* executed by the predecessors-in-title of the plaintiffs in favour of the predecessors-in-title of the defendants provided that in default of payment of three instalments of rent the *mukarrari* shall be null and void. It is important to remember that the *mukarrari* was granted before the enactment of the Transfer of Property Act.

The judgment of the learned Subordinate Judge is not quite clear on the point whether there has been a default in the payment of three instalments of rent. In one portion of his judgment he recorded the finding that there was no agreement between the parties as to the instalments in which the rent was payable. But then he came to the conclusion that S. 114 of the Transfer of Property Act protected the defendants from ejectment inasmuch as they deposited the rent in Court for the years 1322-1325.

Reading the whole judgment, it appears to me that the learned Subordinate Judge decided that the plaintiffs had incurred forfeiture; but that the case was one in which the defendants should be relieved against the forfeiture. In the result he declined to grant a decree for ejectment as against the defendants.

In this Court it was argued by Mr. Naresh Chandra Sinha on behalf of the appellants that the case was not one of forfeiture under Section 114 of the Transfer of Property Act, but one of nullity putting an end to the subject-matter of the lease which no act of the Court could restore to the defendants. Mr. Sinha argued that the English Law has always recognized a distinction between a condition of forfeiture and a clause of nullity.

He admitted that where there is a proviso for re-entry on breach of a tenant's covenant to pay rent, then on the failure to pay such rent the tenant incurs forfeiture which the Court has a discretion to relieve against; but he contended that when the lease provides that on failure to pay rent the lease shall be null and void the clause is one of nullity and there is no power in the Court to restore to the tenant that which has come to an end by the express agreement between the parties. The English Law undoubtedly did recognize a distinction between a condition of forfeiture and a clause of nullity but whether it does still maintain that distinction is open to some doubt: *Bowser v. Colby* (1).

Now the distinction rested on this; the proviso for re-entry being a mere form of security to the landlord for that which the landlord has reserved to himself in the lease, the Court will always treat it as a security and allow redemption if the arrear of rent and the cost be brought into Court within a certain time, the Court acting on the analogy furnished by mortgage action and on the principle that, if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid

(1) (1841) 1 Hare. 109=11 L. J. Ch. 132.

upon the prescribed day. But where there is no proviso for re-entry and the p rties agree that on breach of a certain condition the lease shall absolutely cease and be void, then on the happening of the condition there is no longer any subject with which the Court can deal or which can be restored. That was undoubtedly the view which at one time prevailed in England.

But as has been pointed out in *George Henry Davenport* v. *The Queen* (2) in a long series of decisions the Court construed clauses declaring in terms, however clear and strong, that the lease shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors.

But whether void or voidable, the result ought to be the same so far as we are concerned in the present case, because it is conceded that the plaintiffs, so far as the present breach is concerned, have not elected to treat the lease as subsisting.

Now whether the distinction that obtains in England between a condition of forfeiture and a clause of nullity extends to this country is open to grave doubt. So far as the legislature is concerned, it has not recognized the distinction in Section 114 of the Transfer of Property Act. That section provides that:

"Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear together with interest thereon and his full costs of the suit, or give such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture: and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

It may be argued that there is nothing in Section 114 to imply that the Court can relieve the lessee even when the lease has become void under the terms of the lease and the lessor does not elect to treat it as subsisting. In my opinion there is, if we refer to the definition of forfeiture in Section 111 of the Act.

A forfeiture according to Section 111 of the Act is incurred in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void and Section 114 gives power to the Court to relieve against the forfeiture which must mean forfeiture as defined by Section 111 of the Act. No distinction has therefore been recognized in the Transfer of Property Act between a condition of forfeiture and a clause of nullity.

It was argued that this case ought not to be governed by the Transfer of Property Act. That may be so; but as the distinction has not been recognized in any of the cases which have been decided in this country, I am not prepared to say that it extended to this country.

That distinction rested in England on very technical rules of conveyancing, and it is open to us to take the view that the rule formulated in Section 114 of the Transfer of Property Act gave effect to the existing law in the country. The question is not free from difficulty; and I am not prepared to dissent from the view which has been taken by the learned Subordinate Judge.

I would dismiss the appeal; but, in the circumstances, without costs.

The cross-objection was not pressed and is dismissed.

Adami, J.:—I agree.

Appeal dismissed.

(2) (1878) 3 A. C. 115=47 L. J. P. C. 8=37 L. T. 727.

A. I. R. 1922 Patna 529.

DAS AND ADAMI, JJ.

Shiva Prasad Singh—Appellant

v.

Beni Madhab Chowdhury—Respondent.

Appeal No. 69 of 1919, decided on 16th February, 1922, from the Sub-Judge, Dhanbad, dated 20th January 1919.

(a) *Impartible Estate-Application for personal decree by successor—Succession certificate is not necessary—Succession certificate.*

An application for decree under O 34, R. 6 can be maintained by a person who succeeds to an impartible estate and it is not necessary for him to obtain succession certificate as a condition precedent inasmuch as the succession is one by way of survivorship.

[P .531, C. 2.]

(b) *Deed—Construction—Mortgage or charge—Right to have property sold for debt given but no express transfer of interest—Deed was held to be a mortgage—T P. Act, S. 58.*

A document ran as follows:—" This settled coal land, mines, etc., as well as all other

moveables shall ever be regarded as a security for the payment of the rent and cesses due together with interest thereon due to you. I shall not be competent to transfer the said property by sale, gift, or remove the same, so long as the rent, etc., due to you will remain unpaid."

Held: it created a mortgage and not merely a charge. 34 All. 446 followed. [P. 532, Cs. 1, 2.]

N. C. Sinha and *S. Bhattacharjee*—for Appellant.

S. M. Mullick and *N. N. Sen*—for Respondent.

Das, J.:—Two questions have been raised in this appeal; *first*, whether the appellant who applied for a decree as against the respondent under O. XXXIV, R. 6, of the Code could maintain the application without a succession certificate, and, *secondly*, whether the document upon which the appellant relies operated merely as a charge, and if so, whether the appellant was entitled to a decree under O. XXXIV, R. 6, of the Code.

The facts are these:—Raja Durga Prosad Singh of Jheria brought a suit for royalty in respect of certain coal lands. He obtained a decree and the properties were sold on the 17th September, 1915. The sale did not satisfy the claim of Raja Durga Prosad as against the respondent and there still remained a sum of Rs. 4,175 due to Raja Durga Prosad. Raja Durga Prosad, it appears, died after the sale of the properties and the present appellant has succeeded to the Raja by survivorship. On the 15th July, 1918, the appellant presented an application under O. XXXIV, R. 6, for recovery of the sum of Rs. 4,175 from the respondent. The learned Subordinate Judge being of opinion that the appellant could not maintain the application without a succession certificate, has dismissed the claim of the appellant.

I am of opinion that the decision of the learned Subordinate Judge on this point cannot be supported. Admittedly the appellant has succeeded to the Jheria Raj by right of survivorship; but it was urged on behalf of the appellant that the estate being impartible, the appellant could only have taken the estate by inheritance although he was selected as such successor by the application of the rule of survivorship. In support of his argument Mr. *S. M. Mullick* relied upon the decision of this Court in the case of *Shyam Lal Singh* v. *Raja Bijay N. Kunda Bahadur* (1).

I will consider this case in a moment; but it is necessary to point out that the law on the subject has been discussed very fully and elaborately by the Judicial Committee in the recent case of *Baijnath Prasad Singh* v. *Tej Bali Singh* (2). On the exhaustive review of all the decisions, starting with what is known as the *Katamanatchier* v. *Shivagunga* (3), their Lordships came to the conclusion that the question of how to select the head of the family in a joint family is part of the general law.

In the course of their judgment, their Lordships said as follows: "That the custom of impartibility does not touch it," that is to say, touch the question of how to select the head of the family in a joint family, "is shown by the long list of authorities above cited, and there is in their Lordships' view, no necessary logical deduction from the decisions in *Sartaj Kuari* v. *Deoraj Kuari* (4) and the second Pittapur case which forces them to an opposite conclusion."

Their Lordships quoted with approval the decision in the case of *Naraganti Achammagaru* v. *Nayanivaru* (5) where the proposition was laid down in the following words: "Where property is held in co-parcenary by a joint Hindu family there are ordinarily three rights vested in co-parceners—the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership the right of joint enjoyment, and the right of partition as the right of an undivided co-parcener, are from the nature of the property incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship it may be presumed that right re-

(1) (1917) 2 P.L.J. 136=1 P.L.W. 140=39 I.C. 36=1917 P.H.C.C. 121.
(2) A.I.R. 1921 P.C. 62=48 I.A. 195=43 All 228=23 Bom. L.R. 654=29 M.L.T. 358=40 M.L.J. 387=19 A.L.J. 317=2 P.L.T. 257=1921 M.W.N. 300=33 C.L.J. 388=25 C.W.N. 564 (P.C.).
(3) (1864) 9 M.I.A. 539=2 W.R. P.C. 31=1 Suth. 520=2 Sar. 25 (P.C.).
(4) (1888) 10 All. 272=15 I. A. 51=5 Sar. 139 (P.C.).
(5) (1882) 4 Mad. 250.

mains."

Reviewing all the decisions of the Judicial Committee up to Sartaj Kuari's case, their Lordships laid down three broad propositions:—

"1. The fact that a *raj* is impartible does not make it separate or self-acquired property.

2. A *raj* though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.

3. If it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, *i.e.*, the person will be designated by survivorship, although then, according to the custom of impartibility, he will hold the *raj* without the others sharing it."

Their Lordships thus discussed the case of *Sartaj Kuari* v. *Deo Raj Kuari*, (4) and said that what was actually decided in *Sartaj Kuari's* case(4) was that in an impartible *raj* there was no restriction on the power of alienation by the member of the family who was on the *gaddi* and was in possession, in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation.

Their Lordships reviewed the cases subsequent to *Sartaj Kuari* v. *Deoraj Kuari* (4) and came to the conclusion that the rules laid down by the earlier cases on the question of succession have not been touched by *Sartaj Kuari's* case (4). They thought that the key-note of the position was what was laid down in *Nil Kisto Deb* v. *Beer Chunder Thakur* (6) *viz.*, "when a custom is found to exist, it supersedes the general law, which however, still regulates all beyond the custom."

Basing their decision on the passage which has just been cited, they came to the conclusion that the selection of the person entitled to succeed is governed by the general law of the land but that when the selection is made he holds the *raj* by virtue of the custom which prevents the others sharing it.

In my opinion the latest decision of the Judicial Committee completely negatives the argument, which has been advanced before us. But it was urged that we are conclusively bound by the decision of the Full Bench of this Court in the case of *Shyam Lal Singh* v. *Raja Bijay N. Kunda Bahadur* (1).

In that case the late Chief Justice of this Court with the concurrence of Chapman and Roe, JJ. came to the conclusion that there was no right to succeed by survivorship in an impartible estate. Chamier, C. J., in delivering the leading judgment, said as follows: "all that their Lordships of the Privy Council have all along intended to lay down is that for the purposes of ascertaining the person entitled to succeed to an impartible estate you must have resort to the rule which would have governed the succession if the estate had remained partible."

In my opinion it is impossible to uphold this view having regard to the decision of the Judicial Committee in the case of *Baijnath Prashad Singh's* case (2). It is unnecessary to decide whether that case was rightly or wrongly decided inasmuch as the question of succession was not raised in that case and all that was involved was the question whether any portion of the property in the hands of a holder of an impartible *raj* could be regarded as assets which the creditor could seize in execution of a decree obtained against predecessor-in-title.

We are in this case not concerned with that question. If we were, we would be bound to follow the decision of the Judicial Committee which lays down in express terms that the question of selection of the successor is governed by the general law of the land and not by custom; but that when the selection is made he holds the property by custom which prevents others sharing in it.

In my opinion the appellant took the impartible estate by survivorship and it was not necessary for him to obtain a succession certificate as a condition for the maintainability of the application.

So far as the other question is concerned, the view of the learned Subordinate Judge was in favour of the appellant. But Mr. Susil Madhab Mullick on behalf of the respondent has urged before us that the appellant was not entitled to maintain an application under O. XXXIV, R. 6, inasmuch as the document upon which the appellant relies created a charge and not a mortgage within the meaning of the term as defined in S. 58 of the Transfer of

(6) (1867-69) 12 M.I.A. 523=12 W.R. 21=2 Suth. 243=2 Sar. 523 (P.C.)

Property Act. The clause in the document upon which reliance is placed runs as follows:—

"This settled coal land, mines, coal raised by me, machineries, tools, bungalow, edifices coolie-shed erected by me as well as all other moveables and immoveables shall ever be regarded as a security for the payment of the rent and cesses due together with interest thereon due to you. I shall not be competent to transfer the said property by the sale, gift, or remove the same, so long as the rents, etc., due to you will remain unpaid. If it is done so, it shall not be accepted."

Now the broad distinction between a mortgage and a charge is this: that whereas a charge only gives right to payment out of a particular fund or property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immoveable property. The line of division in England between a charge and a mortgage is a very clear one; but in this country the division is not so well-marked.

It has been pointed out that there is very little difference, if any, between a charge and a simple mortgage as defined in S. 58 of the Transfer of Property Act; and that, in a simple mortgage, the interest transferred is the right to have the property sold. If that be so, it becomes a question of some nicety to distinguish between a simple mortgage and a charge.

In the case of *Dalip Singh* v. *Bahadur Ram* (7) the late Chief Justice of this Court, then Mr. Justice Chamier, laid down the three essentials constituting a simple mortgage as follows: "In order that there may be a simple mortgage, there must be (*a*) a transfer of an interest in specific immoveable property, (*b*) a personal undertaking by the mortgagor to pay the mortgage-money, and (*c*) an agreement, express or implied, that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold."

This case was followed by this Court in the case of *Anand Ram Marwari* v. *Dhanput Singh* (8). Now in the present case the conditions (*b*) and (*c*) have been fulfilled; but there is no express transfer of an interest in the property. In the case already cited, Chamier, J. said as follows:—"In a simple mortgage the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used and where such an agreement can be inferred then the requirements of condition (*a*) are satisfied."

In my opinion the decision in *Dalip Singh* v. *Bahadur Ram* (7) followed as it has been by this Court in *Anand Ram Marwari* v. *Dhanpat Singh* (8) governs the present case. It may be pointed out that the word used in the Bengalee document is '*bandhak*' which undoubtedly implies a mortgage. I am of opinion that the contention of Mr. *S. M. Mullick* on this point must be overruled.

Adami, J.:—I agree.

Order set aside.

(7) (1912) 34 All. 446=15 I. C. 435=9 A. L. J. 550.

(8) (1916) 1 P. L. J. 563=38 I. C. 37=2 P. L. W. 341.

A. I. R. 1922 Patna 532.

DAWSON MILLER, C. J. AND ROSS, J.

Government Advocate, Bihar and Orissa—Appellant

v.

Ganga Prasad—Accused.

Govt. A. No. 2 of 1922, decided on 9th March, 1922, from the 2nd Class Hon. Mag., Sadikpur, dated 25th October, 1922.

(a) *Penal Code, S. 21—Municipal Tax-collector is a Public Servant.*

A person employed by a Municipality as a tax collector is public servant. [P. 534, C. 1.]

(b) *Criminal P. C., S. 195—Complainant himself public officer—Sanction is unnecessary.*

Sanction under S. 195 is not necessary when the complainant is himself the officer in question. [P. 534, C. 1.]

(c) *Bengal Municipal Act (1884), Sch. IV—Warrant—Date of return is not necessary to be mentioned.*

A distress warrant issued in the form provided in Schedule IV does not require that the date of return of warrant should be mentioned. [P. 533, C. 2.]

(d) *Bengal Municipal Act (1884), S. 356—Distress warrant—Brother of owner in possession and paying taxes on behalf of owner—Service of warrant on owner is sufficient.*

Where the house was not in the occupation of the recorded owner but his brother and, although the Municipal taxes were levied on the owner, they were collected from his brother.

Held, the service of the distress warrant on the brother of the owner was a proper service. [P. 533, C. 2.]

Sultan Ahmad—for the Crown.

Siveshwar Dayal—for Accused.

Dawson 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 Ss. 504 and 186 of the Indian Penal Code. S. 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. S. 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 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 by 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 Chotto, a toddy seller, by Ganga, a telegraph peon and by Lalloo Ram, a Collectorate 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 as was certainly very likely unless the complainant showed great restraint, to result in 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, S. 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 case was that the distress warrant was illegal inasmuch as there was no date of return mentioned in the said warrant. We are not informed 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 per-

son 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 S. 21 of the Indian Penal Code it is distinctly provided in the 10th clause that the words "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 S. 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 Tabarak Hosain, the complainant, stated in his cross-examination in one place that on the day of the occurrence he went to the 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 S. 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.

Order reversed.

A. I. R. 1922 Patna 535.

COUTTS AND ROSS, JJ.

Chandrika Ram Kahar — Accused-Appellant

v.

Emperor—Opposite Party

Cr. A. No. 16 of 1922, decided on 23rd Feb. 1922, from the S. J., Singhbhum, dated 1st February, 1922.

(a) *Criminal P. C., S. 154—First informant Failure to produce as witness makes prosecution case suspicious—Penal Code, S. 302.*

The failure to record the statement of the first informant and his non-production before the Sessions Judge has the serious consequence of depriving the accused of the right of cross-examination which will make the case of the prosecution suspicious. The recording of the statement of the second informant does not make him the first informant. [P. 539, C. 1.]

(b) *Evidence Act, S. 32—Gestures by the person murdered are relevant but not their interpretation by witnesses present.*

Gestures made before death by the person murdered are admissible in evidence, but the opinion of the witnesses as to the meaning of such gestures is not evidence, the interpretation of the gestures being for the Court alone. [P. 539, C. 1.]

Patel and *Hyder Imam*—for Appellant.

Sultan Ahmad—for the Crown.

Coutts, J. :—The appellant in this case, Chandrika Ram Kahar, has been convicted by the Sessions Judge of Manbhum-Sambalpur, under S. 302 of the Indian Penal Code for the murder of his wife Budhua Kaharin on the 9th October last and has been sentenced to death.

The case for the Crown is that Chandrika and his wife were not on good terms and that for this reason she lived almost entirely with her father Keshwar Ram. Before the date of her death she had been living with Keshwar for about six months, but on the evening of that day, at about 7 P. M. Chandrika came and said he wanted to take her to his house for the Dusserah festival. Keshwar lives in village Kasidih and Chandrika lives in Jugselai, a village about three miles south of Kasidih. Chandrika is said to have been accompanied by another man when he went to fetch his wife from her father's house but afterwards this man disappeared.

When Chandrika came to fetch his wife Keshwar told her to go and they started off together. They did not go

straight to Jugselai, however, but went to a *Ramlila* performance which was being held in a *shamiana* at Sakchi. There they stayed until about midnight when the performance ended and then went off together towards Jugselai.

They had gone only about 200 yards when Chandrika seized his wife's arm apparently because she was starting to go in a wrong direction. She asked him why he was doing this and he said it was because she must go to his house. She replied that she would go but he must not hold her arm. They then went on, she going ahead and he following.

Next morning at about 10 A. M. Sub-Inspector, Sukhdeo Sahay who was investigating a case in the neighbourhood, got certain information from one Ram Prasad in consequence of which he went with him and Mr. Rivett, Additional Superintendent of Public Safety at Jamshedpur, to a spot near the pathway which runs from Kasidih to Jugselai where they found the woman Budhua lying partly supported by a heap of stones with her throat cut and her clothes covered with blood. There was a pool of blood at a spot about 45 paces to the north. The woman was unable to speak but when asked who had wounded her she touched the *sindur* mark on her forehead which is placed on the forehead of married women by their husbands. The Sub-Inspector asked the woman if by indicating the *sindur* mark she meant that she had been murdered by her husband and she nodded her head in assent. Mr. Rivett was then asked by the Sub-Inspector to go on his motor bicycle to the hospital and get medical help. He did so and Dr Sen, who is the Deputy Chief Medical Officer, sent his assistant Dr. Roy in a car with necessary appliances. Dr. Roy took the woman to the hospital where they arrived about 11 A. M. and there an operation was performed which took about 1½ hours. Meanwhile a Muhammadan, who cannot be traced, had given information to Budhua's father Keshwar Ram and Keshwar went first to the *thana* and then to the hospital. The Sub-Inspector was there but apparently did nothing until after the operation when there seems to have been an interview with Budhua after which the Sub-Inspector recorded a statement of Keshwar which has been treated as the first information in the case.

The Sub-Inspector then went to Jugselai which is about a mile from the place of occurrence and arrested the accused who was at the time sleeping in his house. After arresting Chandrika the Sub-Inspector took him to the hospital. From there the Sub-Inspector went to the District Superintendent of Police and with him went to try and find a Magistrate, He failed to find either of two Honorary Magistrates at their houses; so he returned to the hospital. This was about 5-30 P. M. He then confronted Budhua with her husband Chandrika and asked her who had cut her throat whereupon she pointed to Chandrika. She was asked if any one assisted Chandrika and she held up her forefinger. This was taken to indicate that another man was assisting and when she was asked what the other man did she pressed back her head with both hands. Other questions were then asked and amongst them what she had been cut with ? In reply to this she measured off about 9 inches on her arm and also held up two fingers together. Soon after this an Honorary Magistrate, Mr. Brokenshire appeared, and after a consultation with Mr. Rivett they both went into the room where the woman was, taking with them Chandrika and a pick-pocket who had been arrested and who happened to be there. Questions similar to those asked by the Sub-Inspector were put to her and she is said to have made the same kind of gestures indicating Chandrika as having wounded her with a knife and as having been assisted by some other person. After some ten or twelve questions had been asked the examination was stopped by Dr. Sen on account of the condition of the woman who was by that time very exhausted. Budhua died on the 11th at about 5 P.M. and the evidence of the Sub-Assistant Surgeon who conducted the post-mortem examination shows that the larynx was completely divided through the thyroid cartilage and partly cut through the crico thyroid membranes, about 1/3rd inch of its diameter. The pharynx was cut, about 2/3rd inch of its diameter beneath the thyroid cartilage and he deposes that she died from the effects of these injuries.

There were other slight injuries which it is unnecessary to detail as they have no bearing on the case. The wounds could not have been self-inflicted and the medical evidence shows conclusively that the

woman Budhua has been murdered. The murder appears to have been of a peculiarly brutal character and there is no doubt that if Chandrika were guilty the only sentence which it would be possible to inflict would be the extreme penalty of the law. The question is whether the evidence is sufficient to establish Chandrika's guilt.

The learned Sessions Judge who has tried the case, which is a difficult one, with great care, has dealt with the different stages of the prosecution case separately, and for the sake of convenience I propose to deal with these stages in the order in which he has taken them.

First there are, what has been referred to as the unhappy relations which are said to have existed between Chandrika and his wife Budhua. There are three witnesses in regard to this stage of the case. Keshwar the girl's father and two neighbours, *Mussammat* Dhanmatia and Bhikari Lal. Bhikari Lal relates a curious incident which he says he witnessed when Chandrika beat his wife and threatened her with a sword stick.

The story is uncorroborated though other persons are said to have witnessed the occurrence and this evidence has very rightly been rejected by the learned Sessions Judge. There remains the evidence of Keshwar and *Mussammat* Dhanmatia. Dhanmatia says she knows nothing about the relations which existed between Chandrika and Budhua.

The learned Sessions Judge, however, seems to think that her evidence supports the view of unhappy relations because she deposes that Budhua did not live constantly at accused's house but often came to her father's house and was often fetched away by the accused's father. This however, is hardly a correct summary of her evidence on this point. What she says is:

"I have been living there for four years and Keshwar was living there before me. I have seen Budhua at this house for six months. Before that she was not there. I had never seen the accused at Keshwar's house before."

And again:—

"During the four years that Keshwar lived there Budhua used to come and go. Often the accused's father used to take her off to the accused's house."

This indicates nothing more than a very ordinary state of affairs; and certainly does not support the view of unhappy relations.

I now come to Keshwar's evidence.

Before the Sessions Judge he says that the accused:— "married my daughter Budhua, nine years ago. She lived with him for four years off and on but was always coming back to my house on the plea of ill-treatment.

She came last to my house in Kasidih in *Chait* and lived with me for six months."

And again:—

"During the six months she went away once for a week to the accused and complained about him on her return."

Before the Committing Magistrate however, what he said was:—

"On last *Chait* my daughter came to my house after the death of my wife and children .....My daughter told me when she was younger that her husband ill-treated her..... .....She has not told me this since she came to live with me last *Chait*."

This clearly indicates that although when they were first married there may have been some ill-treatment of Budhua by Chandrika there is no reason to suppose that in recent years they have been on bad terms and I am unable to accept the version which Keshwar has given in the Sessions Court and which is obviously an improvement introduced to suit the prosecution case.

It is true that Keshwar in his statement to the police which has been treated as the first information in the case said that his daughter did not want to live with her husband as he used to ill-treat her. But this statement, as will presently appear, is not really the first information at all and consequently not evidence. When the evidence regarding this stage of the case is examined then it is clear that no case of unhappy relations between Chandrika and Budhua is made out; and, if anything, the evidence is to the contrary for both Keshwar and Dhanmatia say that when her husband came on the evening of the 9th, Budhua went away with him without any remonstrance.

Dhanmatia further says that there was no quarrel or dispute at all and it seemed to her to be a case of an ordinary departure of the husband taking the wife. It is true that two witnesses, who say they saw Chandrika and Budhua at the *Ramlila*, said that when they left the *Ramlila* Chandrika seized Budhua's arm. But why he did so

is by no means clear from their evidence and even they depose that she said that she would go along with him if he let her hand go.

This hardly indicates unwillingness to go with him; moreover it is significant that before the Committing Magistrate neither of these witnesses say anything about the seizing of Budhua's hand by Chandrika and I am very much inclined to think that this part of the evidence is embroidery. The evidence then, in my opinion, does not disclose any unhappy relationship between Chandrika and his wife and with this the motive for the crime disappears.

I next come to the taking away of Budhua by her husband on the evening of the 9th. The evidence on this point consists of the statements of Keshwar and Dhanmatia. Both these witnesses say that Chandrika was accompanied by another man who, however, appears to have disappeared before Chandrika left with Budhua.

This evidence, and in particular the evidence of Dhanmatia, which is entirely disinterested, has been believed by the learned Sessions Judge. No reason why it should be disbelieved has been shown to us and I accept it as establishing that Chandrika went to Keshwar's house on the evening of the 9th and left with Budhua.

The next stage of the case is the *Ramlila* party and the subsequent scene between the husband and wife. The witnesses to this are Ramdas Kahar, carter, and Sukhdeo Kahar, a mechanic at Tata's Iron Works. They say that they saw Chandrika and his wife at the performance, that they stayed till the end. Ramdas and Sukhdeo were behind them as they went along the road after the performance and they saw the incident of the seizing of Budhua's hand.

For the reasons I have already given I disbelieve the story of the seizing of Budhua's hand and I am inclined to distrust the rest of their evidence. They do not give any reason for specially noticing Chandrika and Budhua at the *Ramlila* party. Ramdas says that there were separate places for men and women at the performance whereas Sukhdeo says there were not and they have certainly added to their story in the Sessions Court.

This they have done clearly in order to assist the prosecution case of unhappy relations between Chandrika and Budhua and it would be, in my opinion, very unsafe to accept their evidence which looks to me suspicious as if it had been introduced in order to show that Chandrika was with Budhua up till midnight because the prosecution case is that Chandrika cut Budhua's throat at about 1 A. M.

I now come to the most important part of case, namely, the direct evidence connecting Chandrika with the crime. The evidence is that alleged to have been furnished by Budhua herself. The first information we have that Budhua implicated her husband is a passage in the commitment order to the following effect:—

"The Sub Inspector proceeded towards the place where he met one Ram Prasad (P. W. 15) who told him that he had seen the woman, and that she was alive—also that on being questioned, she had pointed to the vermilion stain (*sindur*) on her forehead. Ram Prasad was of opinion that the woman meant to indicate that her husband had cut her throat."

Now, if this is so, Ram Prasad's statement to the Sub-Inspector was clearly the first information in the case for he also deposed that the woman had been recognized; yet not only was his statement not recorded as a first information by the Sub-Inspector but he was not examined in the Sessions Court and he was not even tendered as a witness.

The learned Government Advocate suggests that he was probably not examined or tendered because his statement before the Committing Magistrate was not in accordance with the statement which he had made to the Sub-Inspector and was an untrue statement made to bring his evidence into line with the prosecution case on this point. To satisfy ourselves on this point the learned Government Advocate has asked us to look into the police diary and we have done so.

It appears that Ram Prasad's statement was not recorded by the Sub-Inspector but the Sub-Inspector made a note to the effect that he got information from Ram Prasad Bania that he had seen a girl with her throat cut lying near the *nullah* of the new cooling tank:—

"The girl was saying that her husband had cut her throat."

Now it seems to me that this statement does not necessarily conflict with the statement made before the Committing

Magistrate but whether it does or not Ram Prasad was apparently the first person to see the woman Budhua and he was the first person to give information to the police. This being so, the Sub-Inspector should have recorded his statement as the first information and the Crown should certainly have either examined or tendered him in the Sessions Court.

The failure of the Sub-Inspector to record Ram Prasad's statement as the first information entails the discarding of the so-called first information, and the non-production of Ram Prasad in the Sessions Court has had the more serious consequence of depriving the accused of the right to cross-examine a witness who either heard the woman speak or whose interpretation of gestures made by the woman is clearly the origin of the prosecution case that she was wounded by her husband.

Whether he was a false witness or a witness of truth he was a material witness examined by the Committing Magistrate and it was clearly the duty of the Public Prosecutor either to examine or to tender him. There can, I think, be no doubt that the real reason he was withheld was because the Public Prosecutor was afraid of the cross-examination which might arise out of the note made by the Sub-Inspector in his diary. His action was clearly unjustified and cannot but throw a certain amount of suspicion on the prosecuion case.

I now come to the direct evidence, namely, the gestures made by Budhua in answer to questions; and in the first place I may remark that the learned Counsel for the appellant has not contended that thesegestures are not evidence. They are clearly evidence under S. 32 of the Evidence Act and if authority for the proposition were required I need only refer to the Full Fench decision of the Allahabad High Court in the case of *Queen Empress* v. *Abdulla* (1). The interpretation of the gestures, however, is for the Court alone and the opinion of the witnesses as to the meaning of such gestures is not evidence.

The first gestures made by Budhua to indicate her husband as having wounded her were, so far as the evidence on the record goes, made to the Sub-Inspector when he first saw the woman about 10 A.M. He says that when he first saw her he asked her who had wounded her and she lifted her right hand to the *sindur* mark on her forehead. Influenced clearly by what Ram Prasad had told him he asked if she meant her husband and she nodded her head as if assenting.

The next evidence as to the gestures is the evidence of Keshwar. Before the Sessions Judge, he deposes to asking exactly the same questions and getting the same gestures in response. This was at the hospital at about 1 P.M., and it is after this that the Sub-Inspector went and arrested the accused. I have no hesitation in saying that this evidence of Keshwar is false because in his statement to the Committing Magistrate he said that when he asked her who had cut her throat.

"She gesticulated by passing her hand to and fro near her throat."

This is almost certainly the true description of what happened and the story told in the Sessions Court is a subsequent improvement. So far as the evidence of the Sub-Inspector is concerned, it seems curious if in fact Budhua's gestures did indicate that the wounds had been caused by her husband that he did not go or send to arrest Chandrika at once and it appears to me that perhaps unconsciously he was influenced in interpreting some vague movements of the woman's hand by what had been told him by Ram Prasad. It is impossible, therefore, in my opinion, to place reliance on this witness.

I now come to the gestures made to the Sub-Inspector and Mr. Brokenshire on the evening of the 10th. The Sub-Inspector having already twice questioned the woman—once in the morning and again with Keshwar—it is somewhat difficult to understand why he questioned her again. He does not explain this but it may have been because he had then arrested Chandrika and had him at the hospital. In his evidence he suggests that when he questioned Budhua, a person who was accused in another case was present as well as Chandrika. He does not say so definitely and I am unable to accept the suggestion that this was so because in his record of what took place he notes

"One of the accused, Chandrika Kahar has been caught at Jugselai and produced before Budhua Kaharin."

(1) (1885) 7 All. 385=(1885) A. W. N. 78 (F.B.).

Moreover, Dr. Roy who was present at the time makes no mention of any one except Chandrika. What the Sub-Inspector's evidence then amounts to is this; producing Chandrika before Budhua he asked her who had cut her throat and she pointed to Chandrika. He then asked her if any one had assisted Chandrika and she lifted her forefinger : this was taken to indicate that there was another man, and asked what the other man did she pressed back her head with both hands. Asked with what she had been wounded she indicated about 9 inches on her arm and also held up two fingers together.

Very shortly afterwards she was questioned by Mr. Brokenshire in the presence of Chandrika and a man, an accused in another case who happened to be there. The questions he should ask were already indicated to him by Mr. Rivett who had been present in the morning when Ram Prasad spoke to the Sub-Inspector and who also had been present at the time when the Sub-Inspector questioned the woman in the evening. The questions were put by Mr. Brokenshire through Mr. Rivett and according to the evidence of these two gentlemen the gestures made by her were almost the same as those which had been made to the Sub-Inspector.

Now, when Mr. Brokenshire was questioning the woman through Mr. Rivett, Dr. Sen was present and when the Sub-Inspector was questioning her Dr. Roy was present and on two important points in connection with the gestures made they contradict Mr. Brokenshire, Mr. Rivett and the Sub Inspector. They say that when the woman was asked with what she had been wounded she held her hands apart.

Dr. Sen further says that when she was asked who had held her down she pointed to the other man who was in the room along with Chandrika. This statement of Dr. Sen, if we believe it, is very important because there is no suggestion that the other man who was in the room was the other accused in the case and it indicates that the woman was merely making vague movements without understanding what was being asked or what she was doing and that those movements were interpreted by the Sub Inspector, Mr. Rivett and Mr. Brokenshire to fit in with the preconceived idea which they all undoubtedly had.

I do not mean to suggest that any of these witnesses had intentionally given false evidence, but there is a very grave danger that they may have interpreted vague gestures in accordance with their preconceived idea. The woman was obviously in a very weak state and evidently hardly knew what she was doing. Keshwar says she was salaaming everyone that came in. This salaaming may very well have been interpreted as touching the *sindur* mark and Mr. Rivett says that.

> " The woman sometimes answered at once and sometimes turned her head to the wall and made no answer until it had been repeated. She did not seem to understand that a question was directed to her until she was touched."

The questioning of the woman finally had to be stopped by the doctor on account of her exhausted condition. In these circumstances it would, in my opinion, be in the highest degree unsafe to rely on gestures made to witnesses who as I have already said, had a strong preconceived idea that it was Chandrika who had wounded the woman.

The learned Sessions Judge has not accepted the evidence of the doctors where they contradict the Sub-Inspector, Mr. Rivett and Mr. Brokenshire ; but they are very emphatic in their contradiction, and I think it is just as probable that they are right as that the other witnesses are right.

There are two other reasons, why I think it would be dangerous to accept the evidence as to the gestures which has been given by Mr. Brokenshire and Mr. Rivett. One is that the record of the interview was made after it was over. This introduces a possible element of mistake increased by the preconceived idea, because the witnesses have deposed after referring to this record.

The other is that Mr. Brokenshire's knowledge of the vernacular is clearly not great. I do not know what Mr. Rivett's qualifications in this regard may be, but it is not at all impossible that the questions as put by these gentleman might not be understood. For all these reasons, it would, in my opinion, be very unsafe to rely on the direct evidence which is supposed to have been given by the woman Budhua.

The only evidence then which connects the accused with the crime is that at about 7 P. M. in the evening he went to

Keshwar's house and his wife left with him ostensibly to go to his house at Jugselai. This undoubtedly is a very suspicious circumstance and the accused, if he is in fact innocent, would have been well advised to explain his movements after that time. Accused persons, however, are very often badly advised in this country and the learned Government Advocate has admitted that this in itself is not a circumstance on which a conviction could be based.

Moreover there are circumstances in the case which are certainly favourable to the accused. The instrument with which the crime was committed has not been found nor have any blood stained clothes belonging to the accused been found although it is almost certain that the clothes of the person who wounded the woman must have been stained with blood. The accused's conduct too after the occurrence seems more consonant with innocence than with guilt for when the Sub-Inspector went to arrest him he found him asleep in his house.

Further the prosecution case does not by any means eliminate the possibility of the crime having been committed by some one other than the accused. The woman's father deposes that when she left him she was wearing more ornaments than were found on her person when she was first seen by the Sub-Inspector and Rs. 4 out of Rs. 5 which her father had given her when she left the house had disappeared. It is not suggested that either the ornaments or the money were taken by the accused so that some one must have robbed her and it is not impossible that the robber was the person who wounded her.

Further the prosecution case clearly indicates another person besides the accused being implicated for a second man is said to have gone to Keshwar's house with the accused when he went to fetch his wife and unless we accept, the gestures of the woman in pushing her head back as indicating the part taken by the second person, which we cannot do for the reasons I have given, this second man might very well be the person who committed the murder.

In the result then I am not satisfied that the case against the accused has been established and I would set aside the conviction and sentence and acquit him.

Ross, J. :—I agree. *Conviction set aside.*

A. I. R. 1922 Patna 541.

COUTTS AND ROSS, JJ.

Nand Lal Sahu — Defendant-Appellant

v.

Tikait Shrinivas Hukum Singh Deo— Plaintiff-Respondent.

Appeal No. 1130 of 1920, decided on 12th January, 1921, from Offg. J. C., Chota Nagpur, dated 19th August, 1920.

Adverse possession— Service tenure—Non-performance of service does not make possession of holder adverse.

Mere non-performance of service does not in itself make the holding adverse. To make the possession adverse, there must be a refusal to perform service or a claim to hold the lands free of service. [P. 542, C. 2.]

G. S. Prasad—for Appellant.

Kulwant Sahay—for Respondent.

Coutts, J. :—This appeal arises out of suit brought by Tikait Shrinivas Hukum Singh Deo through the Manager of the Encumbered Estates for resumption of *tola* Karamtoli of village Barpani on the ground that it is a service tenure, and that the present holder of the tenure has refused either to render services or to give up possession of the *tola*.

The suit was dismissed by the Court of first instance on two grounds : (1) that the tenure was not a service tenure and that no particular service attached to the tenure, and (2) that the suit was barred by limitation as the service, if any, ceased to be performed in 1905 and the right to resume accrued with the non-performance of service which was more than 12 years before the suit was instituted. On appeal to the learned Judicial Commissioner it was held that the tenure was a service tenure, and that although service for the tenure ceased to be rendered in 1905, the suit was not barred as there had been no claim or refusal of service until the year 1915. It appears that the tenure was granted in the year 1893 by the father of the plaintiff to two brothers Sonu Singh and Sukru Singh and the grant was by an *amalnama* which set forth that it was a hereditary grant on condition of service. The grant was to continue as long as the grantees or their heirs were present for service every day.

The finding that the tenure is a service tenure is a finding of fact with which we cannot interfere in second appeal ; and it has not been suggested by the learned Vakil for the appellant that we should interfere with this finding. But he contends that in the year 1905

the character of the tenure changed and that after that date it was no longer a service tenure; consequently the suit having been brought in 1918, it is barred by limitation.

The history of the tenure is that it remained in possession of Sonu Singh and Sukru Singh until the year 1905 when it was put up for sale by the manager of the estate for arrears of rent and was purchased by one Bulaki Singh. Bulaki Singh sold his right to Bala Padha Senapati who sold it to the defendant in the year 1915. These sales were in the form of *mukararri* leases, but it is admitted on both sides that the transactions were in fact sales.

Neither Bulaki nor Bala Padha Senapati obtained mutation of the tenure which continued to stand in the names of Sonu and Sukru. In 1915 the defendant applied for mutation and Sukru Singh and Sonu Singh's son filed a petition refusing to render service and relinquishing the tenure. On these facts it is contended, as I have already said, that in 1905 when the tenure was sold, it changed its character.

The service, it is alleged, continued to be rendered by Sonu and Sukru whereas the tenure itself, free from the service, was transferred. It appears that at the sale for arrears of rent the service was described as a service tenure and it is so described in the sale certificate. The character of the tenure was, therefore, not changed by the landlord, and not having been changed by him its service character must remain.

For the contention that the character did change reliance has been placed by the learned Vakil for the appellant on *Keval Kuber* v. *The Talukdari Settlement Officer and Gagubhai Abheangji Talukdar* (1). That is a case in which rent free land was granted for service to one Jiva Karshan. Jiva Karshan had nothing to do with the land after the year 1834, and it had been sold by him and dealt with by various persons: but so long as Jiva Karshan lived and the service was performed the Talukdar from whom the grant was held had no occasion to require any service from the transferees: Jiva Karshan died in 1853 and it was held that at that time the right to resume accrued: and as the suit was brought more than 12 years from that date it was barred by limitation.

This decision so far as it goes, far from assisting the appellant is against him, because it would seem to show that the period of limitation begins not with the date of sale by the original grantee but from the date of the death of the original grantee when service could no longer be performed by him. In the present case there is no suggestion that Sonu Sukru died more than 12 years before the institution of the suit, so that so far as this case is concerned, it does not assist the appellant.

The question, however, remains whether the suit is barred on account of the finding that service ceased to be rendered in 1905. The view of the learned Judicial Commissioner is that it is not barred because there was no refusal or claim of service between 1905 and 1915. In support of this view he has relied on *Komargowda* v. *Bhimji Keshav* (2) in which case it was held that the fact that no services were performed does not in itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service.

This would appear to be the correct view of the law, and in my opinion the appeal has been rightly decided by the learned Judicial Commissioner.

I would accordingly dismiss this appeal with costs.

Ross, J.:—I agree.

Appeal dismissed.

(1) (1876-77) 1 Bom. 586.

(2) (1899) 23 Bom. 602=1 Bom. L. R. 61.

A. I. R. 1922 Patna 542.

DAS AND ADAMI, JJ.

Mathura Prasad Sahu—Appellant

v.

Dasai Sahu and another—Respondents.

Appeal No. 64 of 1919, decided on 12th January, 1922, from Sub-J., Saran.

(a) *Transfer of Property Act, S. 52—Sale for revenue—Doctrine applies.*

The doctrine of *lis pendens* applies to involuntary as well as voluntary sales. It applies also to a sale for arrears of revenue [P. 543, C. 2.]

(b) *T. P. Act, S. 52—Mortgage-decree—*

Rent sale after mortgage-decree—Subsequent sale in execution of mortgage-decree—Latter purchaser is entitled to possession.

After the mortgage-decree in favour of plaintiff, the property was sold for arrears of rent and the defendant acquired by purchase the right, title and the interest of the judgment-debtor. The property was then sold in execution of the mortgage-decree. The mortgagee-purchaser, who obtained symbolical possession sued for actual possession.

Held:—He was entitled to succeed in this suit. [P. 543, C. 2; P. 544, C. 1.]

S. C. Mitter and *S. Saran*—for Appellant.

Kulwant Sahai and *Harnarain Prasad*—for Respondents.

Das, J. :—In my opinion the decision of the learned Subordinate Judge is right and ought to be affirmed. The facts shortly are as follows:—

In 1913 the present plaintiff instituted a suit, being suit No. 144 of 1913, against one Badri Narain on the foot of three mortgages executed by Badri Narain in favour of the plaintiff. These three mortgages were executed on the 24th February, 1905, 4th August, 1906 and 1st August, 1906, respectively.

By the first bond a 13 annas share in Manopur Gambhir was mortgaged; by the second bond 9-annas 4-pies share in Manopur Gram was mortgaged, and by the third bond both the properties were mortgaged. On the 26th March, 1914, the plaintiffs obtained a preliminary decree and on the 27th February, 1915, they obtained the final decree.

It appears that on the 4th June, 1915, the residuary share in Manopur Gambhir was sold for arrears of Government. It is conceded that by such purchase the defendant acquired the right, title and interest of the judgment-debtor, that is to say, Badri Narain. On the 10th February, 1916, Manopur Gambhir was sold in execution of the mortgage-decree and was purchased by the decree-holder.

The plaintiff obtained delivery of possession on the 28th May, 1917, through Court but failed to obtain actual possession from the defendant who claimed title to Manopur Gambhir by virtue of his purchase at the sale for arrears of Government revenue.

We are in this appeal concerned with the question whether the plaintiff as the auction-purchaser is entitled to recover possession of the property from the defendant who purchased the property at the sale for non-payment of Government revenue.

The first point that has been urged on behalf of the appellant is this. That the doctrine of *lis pendens* does not apply, and accordingly there is still a right of redemption in the defendant. The learned vakil relied for his argument on the express language of S. 52 of the Transfer of Property Act. That section runs as follows:—

'During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

The argument of the learned vakil is this. That S. 52 by the express language which has been adopted by the Legislature, only applies to a voluntary transfer and not to an involuntary transfer such as that which has taken place in this case and by which the defendant has acquired title to the property.

It may be conceded that so far as the language of S. 52 is concerned, it to some extent supports the contention of the learned vakil, but having regard to the numerous cases which have been decided on the point, it is plainly impossible for us to encourage this argument at the present day. The authorities are all collected in Dr. Ghose's book on the Transfer of Property Act under S. 52, and there is a case to which the learned Subordinate Judge refers, [the case of *Har Shankar Prasad Singh* v. *Shew Gobind Shaw* (1)] which is an express decision against the contention of Mr. Mitter. That case was argued on one side by Dr. Rash Behary Ghose and on the other by Mr. Saroda Ch. Mitter.

It may be assumed that whatever could be said was said and Mr. Justice Ghose, who delivered judgment in the case, assumed that the doctrine would apply to an involuntary

(1) (1899) 26 Cal. 966=4 C.W.N. 317.

sale. But the learned vakil says that there is a distinction between an execution sale and sale for non-payment of Government revenue. I am unable to appreciate the distinction. In my opinion the view of the learned Subordinate Judge on this point is right and must be affirmed.

The next argument is that the decree which was obtained by the plaintiff in the suit to which I have already referred was not a mortgage-decree and that there was a right of redemption in Badri Narain and there is still a right of redemption in the defendant. The decree, however, is passed as a mortgage-decree and it is impossible to hold now that the decree which was passed as a mortgage-decree was in fact not a mortgage decree, but the contention of the learned vakil is this: That the plaintiff brought one suit in respect of three mortgages and that it was incompetent to the learned Subordinate Judge to direct all the properties to be sold in default of payment by Badri Narain of the aggregate sum of money that was due to the plaintiff on all the mortgages.

Now if that was so, I think that the only remedy which was available to Badri Narain at that stage was to appeal from that decree to the High Court, but that course was not adopted by Badri Narain. The Court was the only Court that could deal with the matter; it did deal with the matter and in my opinion it cannot be suggested that the Court had no jurisdiction to pass the decree which in fact it did.

But the facts are not what they are stated to be by Mr. Mitter. We have looked into the decree which was passed by the learned Subordinate Judge and it seems to me that what the learned Subordinate Judge did in fact was to give the plaintiff three decrees on the foot of three mortgage bonds. The accounts were all directed to be taken separately the mortgaged properties under each bond were specifically mentioned in the decree, and the learned Subordinate Judge directed that on default of payment by the mortgagor of the money due to the mortgagee on the taking of accounts, the mortgaged properties or sufficient portion thereof should be sold.

I take the decree to mean that upon default on the part of the mortgagor to pay the money due in respect of each bond, the properties covered by that bond would be sold. That seems to me to be the plain meaning of the decree that was passed by the learned Subordinate Judge. If that be so, then the question is at an end and the decision of the learned Subordinate Judge must be correct.

The only other point is that the property did not belong to Badri Narain. According to the contention of the defendant, Badri Narain was one of three brothers, the other brothers being Thakur Prasad and Ram Nath and that the property was in fact purchased by Thakur Prasad. According to Mr. Mitter there was a separation between the three brothers and Babu Badri Narain had no title to mortgage the properties to the plaintiff.

The evidence has been dealt with by the learned Subordinate Judge and though it is quite true that upon the death of Thakur Prasad his widow Rajo Kuer was for the time being registered as the owner of the property in question, still we cannot altogether ignore the civil suit which was instituted by Badri Narain and Ram Nath against Rajo Kuer nor can we ignore the consent decree which was passed by which Rajo Kuer admitted three brothers to be joint and that the property belonged to the three brothers jointly. But it is urged that there was a subsequent suit by Rajo Kuer's daughter against Ram Nath and Badri Narain to recover possession of the property on the allegation that her father had purchased the property while he was separate from Ram Nath and Bunwari Lall.

This suit, however, was brought after the decree was in fact obtained by the plaintiffs in this suit against Badri Narain and the decree which was in fact obtained by Rajo Kuer's daughter is dated the 28th June, 1916. The learned Subordinate Judge holds, and I think rightly, that that was an entirely collusive suit in order to defeat the title of the plaintiff.

This appeal must be dismissed with costs.

Adami, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 544.

Ross, J.

Parsuram Rai—Petitioner

v.

Shivajatan Upadhaya and others—Opposite-Parties.

Criminal Revision No. 97 of 1922, decided on 23rd March,

1922, from Dy. Mag., Arrah.

Criminal P. C., S. 146—Some inquiry is necessary before passing order.

Before attaching the property, a Magistrate must make some enquiry in order to ascertain, if possible, who was in possession.

S. N. Roy—for Petitioner.

Manohar Lal—for Opposite Party.

Judgment :—In this case the learned Magistrate attached the land in dispute under S. 146, Criminal Procedure Code, holding that it was not possible to ascertain as to who was in possession because, on the date fixed for hearing, the parties did not appear.

The learned Counsel for the opposite party concedes that the order cannot be supported. It was the duty of the learned Magistrate, before attaching the property, to make some enquiry in order to ascertain, if possible, who was in possession. No enquiry was made and the order cannot stand.

The order is set aside and the case must be remanded to the Magistrate to take evidence and decide it according to law.

Order set aside.

Case remanded.

A. I. R. 1922 Patna 545.

JWALA PRASAD AND ADAMI, JJ.

Mahesh Shah—Appellant

v.

Darbari Hussain—Respondent.

Cr. Ref. No. 45 of 1921, decided on 3rd January, 1922, from S. J., Shahabad.

Bengal Local Self-Government Act (Bengal Act III of 1885), Ss. 139, 140 and 78—Bye-law prohibiting encroachment — Imposition of penalty—Validity.

The District Board has impliedly, if not expressly, power to provide for, by its bye-laws, the punishment for encroachments over its roads in order to carry out the provisions of S. 78 of the Act, namely, to provide for the repair and maintenance of its road. 11 C. W. N. 175 (notes) Diss. [P. 546, C. 1.]

Jwala Prasad, J. :—This is a reference by the Sessions Judge of Shahabad under S. 438 of the Code of Criminal Procedure, recommending that the conviction of and the sentence passed by the Magistrate upon the accused under the bye-law framed by the District Board of Shahabad under S. 139 of the Local Self-Government Act (Act III of 1885), B. C. be set aside, on the ground that the bye-law in question is *ultra vires*.

The bye-law in question runs as follows :—

" Whoever encroaches on any road by cultivating crops, or by ploughing it up for cultivation or by the construction of any building or structure thereon, except by the permission of the Chairman of the District Board shall be liable to a fine not exceeding Rs. 50 and to a further fine not exceeding Rs. 2 for every day on which the offence is continued."

S. 139 of the Act says :

" Every District Board or Local Board empowered in this behalf by the Lieutenant-Governor, may, subject to the control of the Lieutenant-Governor, make bye-laws for carrying out all or any of the purposes of this Act."

S. 140 empowers the Board to provide for the punishment of a breach of the bye-laws with a fine which may extend to Rs. 50, and in the case of continuing breach, with a further fine which may extend to Rs. 5 for every day during which the breach is continued. Thus a District Board is empowered to make a bye-law, for carrying out the purposes of the Act.

S. 78 of the Act enjoins upon the District Board the duty....to provide for the repair and maintenance of roads, etc., which have been taken charge of by the Board under the Act, or towards which it may have agreed to contribute.

The learned Sessions Judge holds that the words " repair and maintenance " in the section cannot possibly include encroachment on the roads and therefore the District Board has no right to make a bye-law for the purpose of punishing persons making encroachments upon the roads. He has relied upon the case of *Ramanath Ghosh* v. *Emperor* (1) which fully supports his views and is on all fours with the present case.

Now, the words " provide for " in the section mean to procure means in advance or to take measures in view of an expected or possible need, and the word maintenance of a road means the keeping it up. Maintenance of way has a technical meaning of maintaining in repairs all fixed property of a road, such as, tracks, bridges, etc., which are the necessary appurtenances. The above meanings of the words have been taken from

(1) (1906-07) 11 C. W. N. 175 (notes.)

Webster's and the Imperial Dictionaries.

Thus under the section, a duty is cast upon a District Board to keep the road in repair and to maintain it by keeping in repairs the bridges, tracks, etc., on the road by providing funds and taking necessary measures with respect thereto.

On the one hand, it is possible to contend that no duty is cast upon the District Board to provide by its bye-law for the punishment of persons encroaching upon their roads. On the other hand, it is difficult to see how a road can be maintained in its proper condition without preventing encroachments thereon and impliedly the District Board would be deemed to be authorised to make bye-laws making such encroachments penal in addition to the provisions made for dealing with encroachments on roads by the penal laws of the country, such as, the Indian Penal Code and the Code of Criminal Procedure (S. 133).

The point is not free from difficulty and in view of the decision of Stephen, J., in the case cited above, I was, at one time, inclined to refer this case for the consideration of a larger Bench so as to decide the point once for all, inasmuch as it is of great public importance. On further consideration I have come to the conclusion that the case should not be referred to a larger Bench but should be decided by us.

No decision of any Court, excepting that of Stephen, J., referred to above, has been shown to us. I have fully considered that decision in the light of the provisions of the Local Self-Government Act, and hold that the District Board has implied, if not express power to provide for, by its bye-laws, the punishment of encroachments over its roads, in order to carry out the provisions of S. 78 of the Act, namely, to provide for the repair and maintenance of its roads, etc., S. 139 empowers the District Board to make bye-laws and S. 140 empowers it to impose punishment for the breach of bye-laws.

I, therefore, differ from the view taken by the learned Sessions Judge of Shahabad as well as by the Calcutta High Court and hold that the bye-law is not *ultra vires* and the conviction of and the sentence passed upon the petitioner was not without jurisdiction.

I decline to accept the reference.

Adami, J.:—I agree.

Reference not accepted.

A. I. R. 1922 Patna 546.

COUTTS AND ROSS, JJ.

Beni Ray—Plaintiff-Appellant

v.

Babui Bacha Kuer—Defendant-Respondent.

Appeal No. 1080 of 1920, decided on 9th January, 1922, from Dist. J., Saran, dated 1st April, 1920.

(a) *Public Demands Recovery Act (Bengal Act 1 of 1895) S. 31—"And in some conspicuous part of the land"—Applies only to service by affixture in Certificate Officer's office.*

The words "and also in some conspicuous part of the land" in S. 31, refer only to cases in which the service is effected by fixing a copy in some conspicuous place in the office of the Certificate Officer and not to a case in which the notice is served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business. [P 547, C. 1, 2.]

(b) *Public Demands Recovery Act—(Bengal Act 1 of 1895), S. 10—Person absent from home—Service by affixture is sufficient—One co-sharer not served—Sale is void only in respect of his share.*

Where the person was temporarily away from home and service of notice could not be effected on any adult male member.

Held: that service by fixing a copy on the outer door of the house in which he ordinarily resided was sufficient service. 1 C. L. J. 550 distinguished. [P. 547, C. 2.]

Where a notice is issued regarding sale of property in which there are more than one co-sharers and it is not served on one of the co-sharers by reason of his death, the sale even if void is void only in respect of the share of the deceased co-sharer. [P. 547, C. 2.]

B. N. Mitter—for Appellant.

Coutts, J.:—The facts of this case are shortly as follows:—One Ramsugand Rai had a 7-annas share in village Chitrauli. His four sons Triloke, Mahadeo, Sirtaj and Sheobasant, on his death, each inherited one quarter share. In the year 1905, 5 annas 3 pies share which belonged to the branches of Triloke, Sirtaj, and Sheobasant was sold in a certificate sale for arrears of road cess and purchased by defendant No. 2, Ruder Prasad. Ruder Prasad sold to Ajgaibi Dube, defendant No. 3, and subsequently Ajgaibi sold to Babui Bacha Kuer the defendant No. 1. The heirs

of Triloke Sirtaj sued these defendants for recovery of their shares on the ground that the certificate sale was invalid because there were no arrears of road cess and because the notice under S. 10 of the Public Demands Recovery Act had not been properly served. There were also allegations that the sale proclamation was fraudulently served and that in spite of the various sales the plaintiffs had remained in possession.

The suit was decreed in the Court of first instance, but on appeal to the learned District Judge the suit was decreed in respect of 1 anna 9 pies, the share of Sirtaj who was dead before notices were served, and the plaintiffs who represented his share were declared to be entitled to recover possession on payment to the defendant No. 1 of the sum due to her on account of the payment of encumbrances. The suit was remanded for determination of the exact amount which was payable. The plaintiffs appeal.

The first point urged before us is that the sale was void and inoperative because the notice of demand had not been legally served on the plaintiffs, and the argument on this point is divided into two branches; *first*, that it had not been served on some conspicuous part of the land, and, *secondly*, that sufficient diligence had not been exercised in order to effect a personal service. The first branch of the argument is in my opinion based on a misreading of S. 31 of the Public Demands Recovery Act.

The portion of that section with which we are concerned runs as follows :—

"And, if no such adult male member of his family can be found, the notice may be served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business, or by fixing a copy thereof in some conspicuous place in the office of the Certificate Officer issuing the same, and also in some conspicuous part of the land, if any, affected by the service of the notice.

It seems clear from the wording of this section that the latter portion of the clause, "and also in some conspicuous part of the land" refers only to cases in which the service is effected by fixing a copy in some conspicuous place in the office of the Certificate Officer and not to cases in which the notice is served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business. If it had been otherwise, the words "by fixing a copy thereof" would not have been inserted between the words "or" and "in some conspicuous place."

The next branch of the argument is that due diligence was not exercised in order to have the notices personally served. This contention must also in my opinion fail. It appears that the judgment-debtor could not be found at home nor could service be effected on any adult male member ; and the only information which could be obtained was that the persons on whom notice was to be served were in Calcutta.

With meagre information of this kind it was impossible to have a notice served in Calcutta, and the only alternative left was to serve by fixing the copy on the outer door of the house, which was done. We have been referred by the learned Vakil for the appellants to the decision of *Ambica Prasad* v. *Gopal Buksh Das* (1).

That case, however, has no hearing on the present case because in that case there was a permanent change of residence, whereas in the case before us the persons to be served had only gone to Calcutta for a short time and were returning to their own homes.

The last point which has been urged before us is that as the sale has been found to be void in respect of the share of Sirtaj because he was dead before the notice was said to have been served, the sale being one and indivisible it is wholly void. No authority for this proposition has been shown to us and in any case on the facts of the present case it cannot succeed.

Each of the persons to be served had a one-third share in the property, so that even if the sale was void in respect of the share of one of them it would not be barred in respect of the shares of others whose shares were entirely separate.

In the result I see no reason to interfere with the decision of the learned Subordinate Judge and I would dismiss this appeal.

Ross, J. :—I agree.

Appeal dismissed.

(1) (1905) 1 C. L. J. 550.

A. I. R. 1922 Patna 548.

DAS AND ADAMI, JJ.

Raghunath Misra and others—Plaintiffs-Appellants

v.

Ram Behera and others—Defendants-Respondents.

Appeal No. 35 of 1921, decided on 2nd December, 1921, from Dist. J., Cuttack, dated 9th May, 1921.

(a) *Record-of-Rights—Provincial Settlement Record may rebut presumption of correctness arising from Revisional Settlement Record.*

If in fact the plaintiffs were *rafa-tankidars* at the time of the Provincial Settlement, there is no procedure by which they become *tankidars* at the time of the Revision of Settlement. The Provincial Settlement Records must be considered to be of very high value in determining the status of tenants and is sufficient to rebut the presumption of correctness that must attach to the Revisional Settlement Records where it is conceded that there is no evidence in the case on the point. 9 C.L.J. 284 Foll. [P. 548, C. 2.]

(b) *Orissa Tenancy Act, Ss. 57 and 237—Under-raiyat cannot acquire—Status of occupancy tenant by custom.*

An under-raiyat 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 S. 57. But he could not by custom acquire the status of occupancy tenant. (5 Pat L.J 373 Foll.). [P. 549, C. 1.]

J. N. Bose and *S. N. Roy*—for Appellants.

A. Manan and *B. Das*—for Respondents.

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 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 Prasad* 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 S. 103-B of the Bengal Tenancy Act, as amended has been rebutted or not.

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 *rafki* 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 decided that *rafa tankidars raiyats* 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

(1) (1909) 9 C.L.J. 284=4 I. C. 54.
(2) (1920) 5 P.L.J. 373=57 I.C. 225.

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 rights which are incidents 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 custon 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 plaintiff's 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 plaintiffs a decree for possession. The appellants are entitled to their costs of this appeal.

Adami, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 549.

COUTTS AND ADAMI, JJ.

B. & N. W. Railway Co.—Appellant

v.

Ramsarup Lal Chaudhury—Respondent.

Appeal No. 742 of 1921, decided on 9th June, 1922, from Sub-J., Cupra, dated 3rd September, 1920.

(a) *Limitation Act (IX of 1908), S. 15 (2)—Notice — Period of — Limitation extended against one defendant will operate as extension against other defendants.*

In a single suit which is properly brought against several defendants, if the plaintiff is entitled to deduct a certain period from the period of limitation in respect of one defendant, he is also entitled to the same period of limitation in the case of the other defendants.

[P. 550, C. 2.]

(b) *Railways Act, S. 77—Notice under—Time taken by, can be deducted from limitation period.*

Where plaintiff suing a Railway Company gave 15 days' notice under S. 77, Railways Act.

Held, he was entitled to deduct the time of notice from the period of limitation.

[P. 550, C. 2.]

Sivanarain Bose—for Appellant.

Kulwant Sahay and *B. B. Das*—for Respondent.

Coutts, J.:—The facts of the case out of which this appeal arises are shortly as follows: The plaintiff in the suit Ramsarup Lal Chaudhury, booked from Sonada Railway Station on the Darjeeling Himalayan Railway on the 17th of October, 1917, 62 bags of potatoes. The bags were booked to Marhowara Station on the Bengal and North-Western Railway. On the 20th or 21st of November out of the consignment of 62 bags, 26 bags only were delivered to the consignee, who was the same person as the consignor.

He was told that the other bags would be delivered later when they were received. They were never received so the plaintiff sued the Darjeeling Himalayan Railway, the Eastern Bengal State Railway and the Bengal North-Western Railway over whose lines the consignment should have passed, for recovery of a sum of Rs. 760 as the price of the potatoes lost and Rs. 9 as price of the bags. The whole amount claimed with interest came up to Rs. 862-12-0.

The suit was decreed in the Court of the first instance against the Darjeeling Himalayan Railway and the Bengal North-Western Railway and each of these Railways appealed. The appeal of the Darjeeling Himalayan Railway was successful but the appeal of the Bengal North Western Railway failed and this Railway has now appealed to this Court.

The first question for consideration is whether the Bengal North Western Railway can be held liable. Under Section 80 of the Railways Act (IX of 1890)

any Railway on which a loss or destruction or deterioration has occurred would be liable. In this case it has been found that the loss occurred on the East Indian Railway but the Bengal North-Western Railway has been made liable because for the portion of the journey during which the East Indian Railway were in charge of the goods they were acting as the agents of the Bengal North-Western Railway.

Ordinarily the goods would travel first over the Darjeeling Himalayan Railway, then over the Eastern Bengal State Railway and then be taken over by the Bengal North Western Railway. There was however a breach on the Bengal North-Western Railway line, and what actually occurred was that the goods after leaving the Eastern Bengal Section were handed over to the Bengal North-Western Railway Company. That Company on account of a breach on its line handed over the goods to the East Indian Railway with whom they made an arrangement that for the time being that Railway would be their agents. The goods were lost during this portion of the journey.

The Bengal North-Western Railway are admittedly liable for the loss on their agent's line and the finding that the East Indian Railway were their agents is a finding of fact which is apparently correct and with which in any case we cannot interfere in Second Appeal. The Bengal North Western Railway has therefore rightly been made liable.

It is contended, however, that the suit is barred by limitation, because delivery was made on the 14th of November, 1917, whereas the suit was not brought before the 3rd of December, 1918, and that the period of limitation is one year. It has been held, however, by the lower appellate Court that limitation is saved by the deduction of the period of two months' notice which was given to the Secretary of State and which under S. 15 (2) of the Limitation Act the plaintiff was entitled to have excluded from the period of limitation.

It is contended in appeal before us that the Secretary of State was not a necessary party to the suit and that therefore S. 15 (2) has no application. This argument is based on a misconception. The suit was brought against three Railway Companies, including the Eastern Bengal State Railway and in the case of a suit against that Railway a notice to the Secretary of State was necessary and this being so the plaintiff was undoubtedly entitled to the benefit of the period of notice to the Secretary of State.

It is suggested that because the Secretary of State was not a necessary party to the suit as against the other two Railway Companies the section does not apply, but this is clearly a fallacious argument in a single suit which is properly brought against several defendants if the plaintiff is entitled to deduct a certain period from the period of limitation in respect of one defendant he is also entitled to the same period of limitation in the case of the other defendants. The suit is, therefore, in my opinion, within time.

Even without the exclusion of this period of two months it would however still be within time. The learned Subordinate Judge has taken the 14th of November, 1917, as the date on which delivery of the 26 bags was made; he has taken this date as the starting point of limitation but this is a mistake because delivery, as he himself says in another portion of his judgment, was made on the 20th or 21st November, 1917.

The suit could not be brought against the Railway Companies without issue of a notice under S. 77 of the Railway Act. This notice was given and 15 days' time was given to the Railway Companies. Consequently under S. 15 (2) the plaintiff was entitled to exclude this period also and if this is excluded even without the two months allowed for notice to the Secretary of State the suit will be within time.

In my opinion the suit has been rightly decided by the Courts below and I would dismiss this appeal with costs.

Adami, J.:—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 550.

JWALA PRASAD AND ROSS, JJ.

Rajbans Sahay and others—Appellants

v.

Askaran Baid—Respondent.

Appeal No 144 of 1920, decided on 7th December, 1921.

Civil P. C., O. 21, Rr. 90, 66—Auction sale fetching less price than that mentioned in sale proclamation—Fraud cannot be inferred therefrom.

A very elaborate enquiry should be made

as to the true value of the property at the stage of issuing the sale proclamation but the valuation in the sale proclamation cannot necessarily be deemed to be the true value of the properties, so as to entitle the judgment-debtor to say if the property is knocked at a much less price, that there was fraud and material irregularity in issuing the proclamation. The burden is on him to prove it as well as substantial injury.

[P. 551, C. 2. ; P. 552, C. 1.]

L. N. Singh, *Sivanandan Ray* and *Nawal Kishore Prasad*—for Appellants.

Kulwant Sahay and *Kailas Pati*—for Respondent.

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.

On behalf of the judgment debtors it is contended that the 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. 56,200. 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 *mukarraridars* 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 the 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 under-valued 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 Mohon Tagore* v. *Hurruk 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. Conse-

(1) (1908) 12 C. W. N. 542.

quently 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. (His Lordship after dealing with matters which are not material for the report dismissed the appeal).

Ross, J. :—I agree.

Appeal dismissed.

A. I. R. 1922 Patna 552.

BUCKNILL, J.

Padarath Kurmi—Petitioner

v.

Emperor—Opposite Party.

Cr. Rev. No. 305 of 1922, decided on 6th June, 1922.

Criminal P. C., S. 421—Power under, should be exercised with caution—Judgment even in case of summary dismissal must give reasons.

The powers which are capable of being exercised under S. 421 should be exercised with considerable caution and where there has been a dispute as to facts and the credibility of witnesses for the prosecution impugned, though not very successfully, it is proper for the appellate Court to call for the records and look at the evidence. It is also desirable, as has been often pointed out by the High Courts in this country, that in dismissing appeal summarily although it is not necessary for the appellate tribunal which is thus acting, to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction.

[P. 552, C. 2.]

Ananda Prasad and *G. C. Pal*—for Petitioner.

Judgment:—This is an application in Criminal Revisional Jurisdiction made on behalf of one Padarath Kurmi under the following circumstances.

The applicant was charged with having assaulted an old woman who is said to be his mother-in-law. There is no doubt that there had been some dispute between the complainant and the accused. The accused was tried before the Deputy Magistrate of Arrah and was convicted of an offence against the provisions of S. 352, I. P. C., he was sentenced to one week's rigorous imprisonment and to a fine of Rs. 15. There is no doubt that the evidence for the prosecution as to the assault was believed by the Deputy Magistrate but at the same time there was also a certain amount of evidence which was adduced by witnesses for the defence to which however the Deputy Magistrate did not attach very much importance.

The accused appealed from this conviction to the District Magistrate of Shahabad who however summarily dismissed the appeal purporting to act presumably under the provisions of S. 421 of the Criminal Procedure Code. I think that it is not unimportant to observe that apparently the District Magistrate did not call for the records of the case; he heard the mokhtear for the appellant and after simply stating that there was no point of law and that the lower Court had discussed the facts of the case in reasonable detail he dismissed the appeal summarily.

I am not altogether satisfied that in acting in this way the District Magistrate was right. There is no doubt that the powers which are capable of being exercised under S. 421 of the Criminal Procedure Code should be exercised with considerable caution and where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been, even though it may be not very successfully, impugned, it is proper for the appellate Court to call for the records and look at the evidence.

It is also desirable, as has been pointed out by the High Court in this country, that in dismissing an appeal summarily although it is not necessary for the appellate tribunal which is thus acting to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction.

One assumes from what is written by the District Magistrate here that he thought that the matter was of so trifling a character that it was not necessary to send for the records and one may infer that on reading the decision of the Deputy Magistrate, he thought that the facts of the case had been set out sufficiently to justify the conclusion to which the Deputy Magistrate had come. I think that on the whole it would be more satisfactory in this case if appeal is referred back for rehearing.

The records should be sent for by the District Magistrate who should himself consider the incidents of the evidence and come to whatever decision he may think fit when he has addressed his mind thereto.

Case sent back.

A. I. R. 1922 Patna 553.

JWALA PRASAD AND ROSS, JJ.

Dhanukdhari Singh—Appellant

v.

Rambirich Singh—Respondent.

Appeal No. 831 of 1920, decided on 8th December, 1921, from Sub. J., Gaya, dated 26th February, 1920.

(a) *Hindu Law—Joint family—Debt for defending members in a criminal charge is a necessity and does not depend upon the result of the trial.*

The rule of Hindu law upon which the act of the *karta* and his dealing with the family property are binding upon the other members of the family does not restrict it to the *karta* alone. It is wide enough to authorise any member of the family to deal with the family property, such as to incur debts provided the act is done in times of distress and for family necessity. The defence of a member of a joint family in a criminal charge is regarded among the Hindus as a pious and necessary act in order to remove the stigma of disgrace upon the whole family consequent upon the conviction of one member. The question whether there existed legal necessity for raising the loan cannot be made to depend upon the result of the trial, [P. 553, C. 2.]

(b) *Hindu Law—Joint family—Manager is one who manages the family and he can incur debts for necessity.*

The managing member is one who manages the family business in a joint Hindu family and he has authority also to deal with the family property for the purpose of incurring debts for the family necessity. [P. 553, C. 2.]

Lachmi Narayan Singh—for Appellant.

K. Sahai and *Sivanandan Roy*—for Respondent.

Jwala Prasad, J.:—The only point raised in this appeal is that the bond in suit was executed by the junior member of the family, defendants Nos. 2 to 5, and not by the *karta* of the family, defendant No. 1, and consequently it cannot have the effect of creating any charge upon the family property.

Mr. Lachmi Narayan Singh contends that the *karta* alone is entitled to charge the family property for a debt incurred by him although the other members do not join in the transaction; they are deemed to have impliedly consented to it. He, however, concedes that in certain circumstances, such as when the *karta* of the family is abroad, the junior members of the family can incur a debt charging the family property which would be binding upon the other members of the family. In the present case the defendant No 1 was in jail in connection with some other case and, therefore, the business of the family had necessarily to be conducted by the remaining members of the family.

But the rule of Hindu law upon which the act of the *karta* and his dealing with the family property are binding upon the other members of the family does not restrict it to the *karta* alone. It is wide enough to authorise any member of the family to deal with the family property, such as to incur debts, provided the act is done in times of distress and for family necessity. The *Mitakshara* in Ch. 1, Sec. 1, para. 28 says:

"Even a single individual may conclude a donation, mortgage or sale of family immoveable property during a season of distress for the sake of the family and especially for pious purposes."

No doubt for convenience sake and generally the senior member of the family becomes the *karta* and in that position he deals with the family property. Instances, however, are not few in which the junior members deal with the family property during the lifetime of the *karta*. The managing member is one who manages the family business in a joint Hindu family and he has authority also to deal with the family property for the purpose of incurring debts for the family necessity. There is, therefore, no substance in the contention put forward by Mr. Lachmi Narain Singh.

It has also been urged by him that the family property cannot be charged for the debt incurred in the present case which was for the purpose of defending defendants 2 to 5 in a criminal case. The lower Court has held that the criminal offence charged against these defendants was in connection with some joint family property. If that is so the defence of the case was for the benefit of the entire family.

On the other hand, there are also authorities to the effect that the defence of a member of a joint family is regarded among the Hindus as a pious and necessary act in order to remove the stigma of disgrace upon the whole family

consequent upon the conviction of one member.

The solitary case *Nathu Rai* v. *Dindayal* (1) which may at first sight give support to the contention of *Mr. Lachmi Narain Singh* has been dealt with in the case of *Hanumant Mahton* v. *Sonadhari Singh* (2) which has reviewed all the authorities on the point. Apart from the authority of the Hindu law, Sir Edward Chamier, in case of *Beni Ram* v. *Man Singh* (3) clearly showed that the defence of a criminal is not at all sinful "and according to our system of jurisprudence and practice a man is presumed to be innocent until his guilt is established."

Therefore the question whether there existed legal necessity for raising the loan cannot be made to depend upon the result of the trial. This contention is also overruled.

It was faintly suggested as a last straw that the bond was not properly proved. The finding of the Court below on this point is conclusive. The appeal is accordingly dismissed with costs.

Das, J.:—I agree.

Appeal dismissed.

(1) (1917) 2 P. L. J. 166=39 I. C. 665.
(2) (1919) 4 P. L. J. 653=52 I. C. 734=1920 P. H. C. C. 13
(3) (1912) 34 All. 4=11 I. C. 663=8 A. L. J. 1015.

A. I. R. 1922 Patna 554.

ADAMI, J.

Ramkumar Lal—Petitioner

v.

Thakur Ojha—Opposite Party.

Cr. Rev. No. 251 of 1922, decided on 23rd May, 1922, from an order of Deputy C., Hazaribagh, dated 10th March, 1922.

Criminal P. C., Ss. 146 and 145—Attachment made—Dt. Magistrate cannot upset the order.

An order passed in a proceeding under S. 145 cannot be upset by the Magistrate of a district; the remedy is to move High Court in revision or to go to the Civil Court for a decision of the claims of the parties. The notice issued by the Deputy Commissioner stating that, unless a civil suit is brought within a certain period, the lands would be released from attachment and handed over to one of the parties cannot stand. He would not be able to review his order in the above manner. [P. 554, C. 2; P. 555, C. 1.]

B. C. De—for Applicant.

A. K. Roy—for Opposite Party.

Judgment:—This application is directed against an order of the learned Deputy Commissioner of Hazaribagh, stating that unless a civil suit has been instituted by a certain date the land which had been attached in proceedings under S. 145 would be released from attachment and made over to the Second Party in the proceedings.

There was a dispute between the proprietors of two neighbouring villages as to the possession of certain forest and jungle lands and, as a breach of the peace was likely, proceedings under S. 145 of the Criminal Procedure Code were drawn up. The result of those proceedings was that the disputed jungle and forest lands were attached: that was on the 13th June, 1921.

There is nothing on the record to show how the matter came to the notice of the Deputy Commissioner, but on the 27th January, 1922, he directed that notices should issue to the parties to the effect that the property would be released from attachment and made over to the Second Party in accordance with the entry in the settlement record.

It seems that the Deputy Commissioner found that neither party was going to the Civil Court for a determination of the dispute and he found that in the survey land settlement operations there was a dispute as to this same land under the provisions of S. 40 of the Bengal Survey Act in the form of a village boundary dispute, and the Assistant Superintendent of Surveys found that the land lay in the village of theISecond Party. This decision had not been appeared against and the orders were made final under S. 62 of the Survey Act. It is on the fact of that decision that the Deputy Commissioner proposes to release the property from attachment in favour of the Second Party.

Now I am afraid that the Deputy Commissioner has no jurisdiction to pass the order he contemplates passing. It may be that the application has been made a little too early to the Court but it might just as well be dealt with at once to save further trouble. An order passed in a proceeding under S. 145 cannot be upset by the Magistrate of a District; the remedy is to move this Court in revision or to go to the Civil Court for a decision of the parties. The proceedings under S. 145 were not

taken by the Deputy Commissioner and even if he himself had originally passed the order for attachment he would not be able to review his order in the manner in which he proposes to pass an order now. It is not necessary to say more than that.

The notice issued by the Deputy Commissioner stating that unless a Civil Suit be brought within a certain period the lands would be released from attachment cannot stand and should be cancelled. *Order set aside.*

A. I. R. 1922 Patna 555 (1).

COUTTS AND ROSS, JJ.

Murlidhar—Plaintiff-Appellant

v.

Surat Lal Chowdhury and others—Defendants-Respondents.

Appeal No. 556 of 1920, decided on 20th February, 1922, from a decision of Dist. J., Darbhanga.

Landlord and Tenant — Non-transferable holding—Purchaser in execution of rent decree after mortgage-decree and before its execution takes property free of incumbrance.

The plaintiff, being the purchaser of a non-transferable occupancy holding in execution of a decree on a mortgage executed by the original tenant, is not entitled to redeem the purchaser of the holding in execution of a decree for rent obtained by the landlord against the plaintiff's mortgagor after the mortgage-decree was passed and before it was executed [P. 555, Cs. 1, 2.]

Kulwant Sahay and *Shiveshwar Dayal*—for Appellant.

S. N. Bose for *S. C. Mitter*—for Respondents.

Ross, J. :—The plaintiff is the purchaser of a non-transferable occupancy holding in execution of a decree on a mortgage executed in his favour by the original tenant. The defendant is the purchaser of the holding in execution of a decree for rent obtained by the landlord against the plaintiff's mortgagor, after the mortgage-decree was passed and before it was executed. Plaintiff claims to redeem the defendant, and the question is whether he is entitled to do so. The learned District Judge on appeal decided against the plaintiff's claim and in my opinion rightly. The purchaser in execution of a rent decree purchases the holding itself and is entitled to say that he takes the holding free of encumbrance, if, in fact, there is no encumbrance valid in law outstanding against it which it is necessary for him to annul. This holding is non-transferable. The mortgage was a transfer and was therefore of no effect as against the holding or the person who purchases the holding in a rent execution. Such a mortgage cannot effectively create a lien in limitation of the interest of the original tenant. It would operate not by force of any title to the holding created thereby but by way of estoppel. In my opinion, therefore, the holding stands free of encumbrance and the plaintiff is not entitled to redeem.

The appeal must be dismissed with costs.

Coutts, J. :— I agree.

Appeal dismissed.

A. I. R. 1922 Patna 555 (2).

DAWSON MILLER, C. J. AND MULLICK, J.

Bishun Prasad Singh and others—Defendants-Petitioners v.

Narsingh Das — Plaintiff-Opposite Party.

P. C. A. No. 10 of 1921, decided on 5th July, 1922, against the decision of Das and Ross, JJ., in F. A. No. 4 of 1918, dated 4th January, 1921.

(a) *Civil P. C., S. 110—Lower Court finding no necessity for whole alienation—High Court finding no necessity only for portion—Decree varied—Decree is one of affirmance.*

As the High Court held that there was legal necessity for a portion, it varied the decree of the lower Court, allowing the whole claim in favour of the plaintiff reversioner on the ground that the sale was without legal necessity. The defendant-purchaser applied for leave to appeal to His Majesty in Council.

Held: no question of law arose and value of the appeal is value of the property as to which legal necessity was proved.

[P. 556, C. 1.]

(b) *Hindu Law—Widow—Alienation—No legal necessity for portion of consideration—Sale must be set aside on payment of binding portion.*

Wherever a portion of the purchase price is shown to have been justified by legal necessity, it has been the practice to set aside the sale upon payment by the reversioner of that portion.

[P. 556, C. 1.]

Sunder Lal for *B. C. Sinha*—for Petitioners.

L. N. Singh, Ragho Prasad and *Kailasapathi*—for Opposite Party.

Dawson Miller, C. J. :—This is an application for leave to appeal to His Majesty in Council from a decision of this Court, dated the 4th January last.

The applicants are the defendants in the suit. The defendants claimed the property under a sale made to their father by the grandmother of the present plaintiff. The plaintiff is the reversioner of the estate of the grandfather

after the life-interest of his grandmother and her daughter.

The lower Court awarded a decree in favour of the plaintiff on the ground that the transfer made by the grandmother was not justified by legal necessity. On appeal to this Court that decision was varied, the Court finding that out of a total sum of Rs. 3,800, the purchase price Rs. 1,412 was justified by legal necessity at the time of the transfer.

The Court accordingly varied the decree of the trial Court by ordering that the plaintiff's title to the property in question should be declared and that he should recover possession thereof upon condition that he first paid to the defendants Rs. 1,412 with interest from the date of the decree. From that decision the defendants seek leave to appeal to His Majesty in Council.

So far as the decision appealed from is concerned, it was one of affirmance and decided upon questions of fact and no question of law arises. It is contended however, by the defendants that the Court having come to the conclusion that the sale of the property was justified to the extent of Rs. 1,412 for which there was necessity on the part of the family at that time, the Court ought to have ordered that there was valid transfer of the property at all events to the extent of rather more than a third of the property, and therefore, instead of setting aside the sale ought to have confirmed the sale of a proportionate part of the property.

It appears that for many years it has been the practice in such cases where a portion of the purchase price is shown to have been justified by legal necessity, to set aside the sale upon payment by the plaintiff of that portion. Even if this question might possibly be considered a substantial question of law it is not necessary to decide it in the present case, for assuming that the defendants were entitled to that proportion of the property which Rs. 1,214 bears to Rs. 3,800, the value of their appeal would not come upto the statutory requirements. The value of the whole property is said to be Rs. 10,000.

Therefore, if the defendants should be successful on the point of law in their appeal to His Majesty in Council, the result would be that they would only recover property of the value of a slightly more than a third of Rs. 10,000 instead of its cash equivalent. For these reasons it does not appear to me that this is a proper case in which to grant leave to appeal to His Majesty in Council.

The respondent is entitled to costs; hearing fee five gold *mohurs*.

Mullick, J. :—I agree.

Leave refused.

A. I. R. 1922 Patna 556.

JWALA PRASAD AND BUCKNILL, JJ.

Lachman Lal Pathak—Decree-Holder —Appellant

v.

Baldeo Lal Thathwari—Judgment-debtor-Respondent.

Misc. Appeal No. 146 of 1921, decided on 2nd May, 1922, from an order of Dt. J., Gaya, dated 8th April, 1921.

Civil P. C., S. 60 (f)—Jatri bahi *of Gayawal judgment-debtor is not attachable.*

Jatri bahi of a Gayawal judgment-debtor containing merely entries as to the names and addresses of the pilgrims utilizing the services of the judgment-debtor while visiting Gaya on religious pilgrimage come well within Cl. (f) of S. 60 as property not capable of attachment or sale in execution of a decree, 2 P L J, 705. [P. 556, C. 2.]

Kailaspati—for Appellant.

Haribhusan Mukerjee—for Respondent.

Jwala Prasad, J. :—There does not seem to be any substance in this appeal. The *jatri bahis* of the judgment-debtor are evidently not saleable. They contain merely entries as to the names and addresses of the pilgrims who deal with the judgment-debtor and as such they can be used only by him in order to perform personal service to the pilgrims. The entries in the books also enable the judgment-debtor to claim that the pilgrims mentioned therein or their family members and relations should utilise the services of the judgment-debtor while visiting Gaya on religious pilgrimage. Therefore these books embody the right or claim of the judgment-debtor of personal service.

Beyond that the book is of no use, and as a record of the claims of personal service they seem to come well within Cl. (*f*) of S. 60 as property not capable of attachment or sale in execution of a decree. These books are, no doubt, as held in the case between the parties in

Lachman Lal v. *Baldeo Lal* (1), stock-in-trade and appertain to the *gaddi* of the Gayawal judgment-debtor who carries on the office or business of a Gayawal namely, priest to the pilgrims who visit Gaya on pilgrimage.

The contention of the learned Vakil on behalf of the appellant that, as these books have been held in the aforesaid case between the parties as valuable assets and as such heritable, they must be deemed to be attachable also. I do not think there is any force in this contention. The priestly office may be and is generally heritable, but is not saleable, or attachable for that reason.

Then it is contended that these particular books have got marketable price, and it is strongly urged that the fact that the decree-holder-appellant is willing to pay fancy price for them, they must be held to be saleable in the present case. That obviously is no criterion to determine whether a particular particle is saleable or not.

In the present case it is certainly not, for behind this anxiety to purchase the *bahis*, there is the previous litigation between the same parties in which these books along with the Gayawali *gaddi* in question were claimed by the decree-holder as well as by the judgment-debtor. The decree-holder was not given *bahis* and now he wants to seize the *bahis* in execution of his decree in order to deprive the judgment-debtor of his right of enjoying the benefit of the office by means of these books.

Agreeing with the views of the Courts below I dismiss the appeal with costs.

Bucknill, J. :—I agree.

Appeal dismissed.

(1) (1917) 2 P. L. J. 705=3 P. L. W. 136.

A. I. R. 1922 Patna 557.

JWALA PRASAD, J.

Nandkishore Sao and others—1st Party-Petitioners

v.

Bikan Singh and another—2nd Party-Opposite Party.

Cr. Rev. No. 35 of 1922, decided on 16th February, 1922, from an order of the Sub-Div. Mag. Madhupura, dated 18th January, 1922.

Criminal P. C., Ss. 144 and 145—Rent decree against 1st party on the basis of his being lessee—Court can rely on and pass order under S. 144—But order under S. 145 would be more appropriate—Evidence Act, S. 13.

The rent-decree is to some extent evidence under S 13 of Evidence Act as to the landlord having recognised the holding as being in possession of the 1st party (deft.) but that evidence is not conclusive as against the 2nd party in proceedings under S. 144 (who was not party to rent proceeding). The order of the Magistrate under S. 144 based on the rent-decree is good inasmuch as passed with a view to prevent a breach of the peace which is then imminent. The more appropriate action however would be for the Magistrate after hearing the parties to convert his order under S. 144 into a proceeding under S. 145 of the Code so as to, once for all, determine the right of the contending parties to the possession of the land in question, unless it has been already determined by a Civil Court. 1 P. L. T. 81 ; 1 P. L. T. 44 Ref. [P. 558, Cs. 1, 2.]

G. C. Pal—for Petitioners.

Jayaswal and *J. N. Sen Gupta*—for Opposite Party.

Jwala Prasad, J. :—The 2nd party has come to this Court as aggrieved by an order of the Magistrate passed under S. 144 of the Code of Criminal Procedure on the 2nd of January, 1922, which was made absolute on the 18th of January.

The Magistrate's order was passed upon a Police report, dated the 18th December, 1921, which showed that there was an imminent danger to a breach of the peace on account of the 2nd party claiming possession of the land in dispute which, according to the investigation of the Police, was found to be in possession of the 1st party. Both parties gave evidence with respect to their respective claims of possession over the land in dispute before the Police.

The Sub-Inspector accepted the evidence of the 1st party and rejected that of the 2nd party on two principal grounds: (1) that against the 1st party the landlord obtained a rent decree on the 14th of January, 1920, for the years 1324 to 1327, with respect to the land in question, and (2) that out of the witnesses examined on behalf of the 2nd party one of them, Babu Lall, gave out that the disputed land was cultivated by Bhikham Singh, the 1st party, and that he had planted *Kurthi* this year.

Accepting the report of the Police, the Magistrate issued an *ex parte* order under Cl. (2) of S. 144 of the Code of Criminal Procedure. The 2nd party objected to this order by means of a petition. It was alleged that the rent decree relied upon by the 1st

party was a collusive one and they not being party to it were not bound by it. At the hearing of the case on the 18th January both parties accused the landlord (the Darbhanga Raj) of having colluded with the other party. It was difficult for the Court to determine this point.

The Magistrate observed:

"It is quite possible that the collusion of the Raj advanced by both parties is now in favour of the 2nd party."

The Magistrate relies upon the rent decree as being a *prima facie* evidence of possession in favour of the 1st party. The rent decree is to some extent evidence under S. 13 of the Indian Evidence Act as to the landlord having recognized the holding as being in possession of the 1st party, but that evidence is not conclusive as against the 2nd party. It does not stand on the same footing as the delivery of possession given by a Civil Court or a decree awarding possession by a Civil Court.

These have been held to be sufficient to entitle a Magistrate to pass an order under S. 144 of the Code of Criminal Procedure, inasmuch as the Civil Court delivery of possession puts to an end any dispute as to possession of immoveable property which alone can be the subject-matter of an enquiry under S. 145 of the Code.

In such a case it has been held that action under S. 144 is appropriate and the Magistrate is not required to initiate proceedings under S. 145 of the Code: *Vide Sukan Singh* v. *Prayag Singh* (1). The possession delivered by a Civil Court may, under certain circumstances, also operate against the persons not parties to the Civil Court decree, as has been held in the case of *Gouri Dutt* v. *Gobind Singh* (2).

It is, however doubtful whether a mere rent decree obtained by a landlord will bind one who is not a party to it so as to hold that possession was either determined by a Civil Court or was undisputed. Therefore, the rent decree in the present case itself is not a conclusive proof of possession in favour of the 1st party. The possession was disputed before the Police and, as observed above, both parties adduced evidence in support of their respective claim to possession. The Sub-Inspector relied upon the evidence of a witness on behalf of the 2nd party, named Babu Lall, who proved that the land in question was cultivated by the 1st party and some crop was also grown. This was, therefore, an additional evidence and putting this alongside the rent decree, the Sub-Inspector was of opinion that the evidence of possession was conclusive.

Based upon that report the Magistrate thought that there was a *prima facie* case of actual possession in favour of the 1st party and consequently he issued an order under S. 144 of the Code of Criminal Procedure. In the circumstances of the case, it may be that the order of the Magistrate of the 2nd of January was good inasmuch as it was passed with a view to prevent a breach of the peace which was then imminent.

The more appropriate action, however would have been for the Magistrate, after hearing the parties on the 18th of January, to convert his order under S. 144 into a proceeding under S. 145 of the Code so as to once for all determine the right of the contending parties to the possession of the land in question. The order of the 2nd of January confirmed on the 18th January will expire in about two weeks, and one cannot be sure that the order of the Magistrate has been so effective as to safeguard the public peace and that the dispute between the parties will not recur.

The Magistrate may then be driven to the necessity of adopting successive proceedings under S. 144, which has been condemned by this Court. A proceeding at the initial stage on the 18th of January under S. 145 would have, as observed above, once for all settled the dispute between the parties and put to an end any danger to a breach of the peace. I therefore, do not go so far as to hold, in the circumstances of the present case, that the order of the Magistrate of the 2nd of January, 1922, was without jurisdiction.

Certainly, I think that the Magistrate will in case of any future danger to a breach of the peace, adopt the more effective measure by instituting a proceeding under S. 145 of the Code, treating the effect of his order of the 2nd of January upon the possession of the parties as not affecting the claim of the

(1) (1920) 1 P. L. T. 81=57 I. C. 95= 1920 P. H. C. C. 124.

(2) (1919) 1 P.L.T. 44=53 I.C. 829.

2nd party.

In other words, the enquiry as to possession, in case of the Magistrate's adopting a proceeding under Section 145 in future, will be of a date anterior to the 2nd January, 1922.

Application rejected.

A. I. R. 1922 Patna 559.

COUTTS AND DAS, JJ.

Ram Lal Singh and others—Plaintiffs-Appellants

v.

Mt. Bibi Shahrunnissa and others—Defendants-Respondents.

Appeal No. 138 of 1921, decided on 11th May, 1922, from Dist. J., Gaya.

Registration Act, S. 33 (2)—Pardanashin *Lady—Power-of-Attorney by—Attestation by Sub-Registrar—Presumption of voluntary execution arises—Power to sign bond does not imply power to enter into transaction but power to execute document does—Deed—Construction.*

A *pardanashin* lady is exempt by law from personal appearance in Court She cannot therefore execute the power of-attorney in the manner provided by paragraph (*a*) of S. 33 but by S 33 (2). Where the Sub-Registrar did attest the document, it will be presumed that he was satisfied that it had been voluntarily executed by the person purporting to be the principal But still a presumption is only a rule of evidence which throws the *onus* on the other side. A power to sign a bond does not carry with it a power to enter into a transaction, but the power to execute a document carries with it the necessary powers to enter into the transaction itself. All powers of-attorney have always to be construed very strictly. [P. 560, Cs. 1, 2.]

Manuk and *S. N. Roy*—for Appellants.

Sultan Ahmad and *B. C. Sinha*—for Respondents.

Das, J.:—This appeal comes before us from the judgment of the learned District Judge of Gaya and arises out of a suit instituted by the plaintiffs against the defendants to enforce two mortgage bonds executed by the defendant No. 1 through her attorney Abdul Hakim. The Court of first instance gave the plaintiffs a mortgage decree against the defendant No. 1 but on appeal the learned District Judge has reversed the decision of the Court of first instance.

The mortgage bonds, as I have mentioned, were executed by the lady through her attorney Abdul Hakim. The question which was debated before the Courts below was whether the lady had in fact executed the power of attorney in favour of her husband Abdul Hakim and whether the documents were read and explained to the lady.

The validity of the documents was also called into question and it was argued on behalf of the lady that there was a distinct violation of the provisions of Section 33 of the Registration Act. The learned District Judge differing from the Court of first instance came to the conclusion that there was such a violation and that it followed that the power-of-attorney was not executed and authenticated in accordance with law.

Section 33 of the Registration Act lays down that

"If the principal at the time of executing the power-of-attorney resides in any part of British India in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose District or Sub-district the principal resides shall alone be recognised in Courts of Law."

The learned District Judge came to the conclusion that the power of-attorney on which the plaintiffs rely was not executed in accordance with paragraph (*a*) of Section 33 of the Registration Act, but when he entirely ignored the provisions of the proviso to that section which provides that amongst other persons

"persons exempt by law from personal appearance in Court shall not be required to attend at any Registration Office or Court for the purpose of executing any such power-of-attorney as is mentioned in Clauses (*a*) and (*b*) of this section."

The defendant No. 1 is admittedly a *pardanashin* lady and accordingly is exempt by law from personal appearance in Court. She could not, therefore, execute the power-of-attorney in the manner provided by paragraph (*a*) of Section 33 of the Registration Act. Paragraph (2) of Section 33 gives the procedure which should be adopted by the Registrar in cases where persons exempt by law from personal appearance in Court are concerned.

The Paragraph provides that

"In every such case the Registrar or Sub-Registrar or Magistrate (as the case may be), if satisfied that the power of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requir-

ing his personal attendance at the office or Court aforesaid."

In my opinion, provided the plaintiffs have established that the Sub-Registrar did attest the document after being satisfied that the power-of-attorney was voluntarily executed by the defendant No. 1, the plaintiffs are entitled to succeed, so far as this point is concerned. Unfortunately the learned District Judge did not consider the question whether the Sub-Registrar was so satisfied and whether he attested the document after being so satisfied.

Mr. Manuk on behalf of the appellants urges that since the Sub-Registrar did attest a power-of-attorney it ought to be presumed that he was satisfied that it had been voluntarily executed by the person purporting to be the principal. There is great force in the argument, but still a presumption is only a rule of evidence which throws the *onus* on the other side, and there may be evidence on the record which would lead the Court below to the conclusion that there was not evidence sufficient to satisfy the Sub-Registrar that the power-of-attorney was voluntarily executed by the defendant No. 1 in favour of her husband.

While I hold that the decision of the learned District Judge is wrong on this point I am clearly of opinion that the case must go back in order to enable the learned District Judge to decide whether the Sub-Registrar attested the power-of-attorney after being satisfied that it had been voluntarily executed by the defendant No. 1 in favour of her husband.

There is another point on which the learned District Judge has decided this appeal in favour of the respondents ; *viz.*, the power-of-attorney gave authority to Abdul Hakim

" to execute and admit its execution before the registering officer all sorts of deeds as sale, mortgage, lease bonds, etc., etc., and do the needful in the registration office."

The learned District Judge is of opinion that such a power-of-attorney has to be construed strictly and I entirely agree with him that all powers-of-attorney have always to be construed very strictly. But when the learned District Judge says that a power to execute a mortgage does not carry with it the power to incur any loan I entirely differ from him.

Mr. Sultan Ahmed appearing on behalf of the respondents has relied upon the case of *Roy Radha Kissen* v. *Nauratan Lal* (1). That was a case where it was held that a power to sign a mortgage bond did not carry with it a power to enter into a mortgage transaction. I entirely agree with the view which was taken in that case. It is worthy of note that in that case a distinction was drawn between a power to sign a document and a power to execute a document.

In my opinion, the power to execute a document carries with it the necessary powers to enter into transaction itself.

The other points have all been decided by the learned District Judge in favour of the appellants; but there is another question which he did not decide. It was contended in the Court of first instance on behalf of the defendants that assuming it be held that the defendants No. 1 did execute the power-of-attorney, the document was not read over and explained to her and that she did not understand what the nature of the document was.

The learned Munsif dealt with this question at very great length and came to the conclusion that the power-of-attorney was in fact read out and explained to the defendant No. 1 and that she understood the nature of that document. The learned District Judge has, however, not dealt with the question. It is obvious that this question must be investigated by the Court below.

In the result then I would allow the appeal, set aside the judgment and decree passed by the Court below and remand the case to that Court for decision after a consideration of the two points which I have mentioned in my judgment. Costs to abide the result.

Coutts, J. :—I agree.

Appeal allowed.

(1) (1907) 6 C.L.J, 490.

A. I. R. 1922 Patna 560.

JWALA PRASAD AND BUCKNILL, JJ.

Masul Ahmed—Plaintiff-Appellant

v.

Jagan Singh and others—Defendants-Respondents.

S. A. Nos. 943 and 1041 to 1043 of 1920, decided on 27th May, 1922, from Dist. J., Gaya, dated 20th August, 1920.

B. T Act (1885), S. 148-A—Suit for share of rent being entire arrears due—Suit is in conformity with section and is maintainable.

The essential principles underlying the

S. 148-A are that the suit should in form be for whole rent and in substance for the separate share of rent in arrears. The whole body of landlords can be impleaded on the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the whole rent due must in the nature of things be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask that Court to decide on the accuracy of the belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves. The cause of action for rent in plaint alleging that plaintiff's share of rent collection is separate is not at all against the principle of Section 148-A. [P 561, C. 2.]

Sultan Ahmed and *Sultanuddin Hussain* —for Appellant.

Siva Nandan Ray and *Kailash Pati*—for Respondents.

Jwala Prasad, J.:—This appeal arises out of a suit for rent. The plaintiff who is the appellant is co-sharer landlord. He instituted a suit under S. 148-A of the Bengal Tenancy Act, (making his co-sharers as defendants in this suit) on the following allegations in the plaint:—

(1) The collection of rent in respect of the plaintiff's share is separate from those of his other co-sharers. (2) Although the collection of the plaintiff is separate from that of the defendants, the plaintiff in order to obtain the single rent decree enquired of the defendants Nos. 3—13 (the co-sharer landlords) regarding the arrears of rent payable to them by defendants, Nos. 1 and 2 (the tenants).

But neither they said what amount was due to them nor did they agree to join in this suit. The plaintiff believes that the proportionate arrears of rent payable to them has already been realized by them. Hence he institutes this suit treating the amount due to him as the entire arrears of rent.

The amount actually claimed happens to be what the plaintiff claims as his share of the entire area. The defendants raised all sorts of pleas such as plea of payment, etc., and also urged that the suit was not maintainable under S. 148-A of the Bengal Tenancy Act.

The Sub Judge who tried the suit, over-ruled all the pleas of the defendants except the last one. He held that the plaintiff's suit was defective and did not conform to the rules laid down under S. 148-A of the Bengal Tenancy Act.

The Dt. Judge on appeal by the plaintiff agreed with the view taken by the Munsif that the suit was not maintainable under S. 148-A of the Bengal Tenancy Act and dismissed the appeal. The plaintiff has come to this Court in second appeal. The learned District Judge does not seem to consider the provisions of S. 148-A. He found that there were conflicting rulings of the Calcutta High Court and of this Court and he was of opinion that the facts of this case agreed more with the facts covered by the Calcutta decision in the case of *Baikunth Nath Sen* v. *Ramapati Chatterji* (1).

On the other hand the appellant relies upon the case in *Brhmanand Nath Deb Sircar* v. *Hem Chandra Mitter* (2) decided by the same learned Judge, Mookerji, J., who decided the case of *Baikunth Nath Sen* v. *Ramapati Chatterji* (1). All these cases, however, seem to have been considered by this Court in the case of *Ram Dhyan Singh* v. *Pardip Singh* (3) Manuk, J., went elaborately into the genesis of the section.

The decision of their Lordships of the Judicial Committee in the case of *Pramada Nath Roy* v. *Ramani Kanta Roy* (4) lays down the principles which should guide the Courts in determining whether a suit really comes under S. 148-A or not. His Lordship Mr Justice Manuk held that the essential principles underlying the S. 148-A are that the suit should in form be for the whole rent and in substance for the separate share of rent in arrears. (2) That the whole body of landlords are impleaded with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former.

In such cases the whole rent due must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire due and ask the Court to decide on the accuracy of that belief,

(1) (1917) 27 C. L. J. 101=45 I. C. 767.
(2) (1914) 18 C. W. N. 1016=23 I. C. 981.
(3) (1919) 4 P. L. J. 500=53 I. C. 91.
(4) (1907) 35 Cal. 331=35 I.A. 73=7 C.L.J. 139 (P. C.).

if and when the impleaded co-sharers appear and claim any arrears as due to themselves. We entirely agree with the enunciation of the principles laid down by Manuk, J., and we think that the facts laid in the plaint and the relief sought conform to these principles.

It is, however, contended that the plaintiff in para. 5 alleged that his share of the collection is separate from those of the other co sharers, whereas the Courts below have held that the collections of the plaintiff, and of all the co-sharers were joint and, therefore, the plaintiff's allegation in the plaint upon which the suit is founded is false and the suit must be dismissed for want of cause of action. I fail to appreciate the force of this contention, for it is conceded that if the plaintiff had alleged what the Court has held that the collection of the plaintiff and his co-sharers was joint the plaint was entertainable and the cause of action for rent was not at all against the principles of S. 148-A. Upon the facts found by the Courts below and the plain meaning of S. 148 A, which is the result of great deliberations in order to meet conflicting authorities at that time, the plaintiff's suit comes well within that section; and it is, therefore, held that the Court below was wrong in dismissing the suit upon the ground that it was not maintainable under S. 148 A. I set aside the decision of the Court below and remand the case for disposal by that Court on its merits.

This order will govern the analogous appeals Nos. 1041—43 of 1920. The appeals are decreed with costs.

Bucknill, J:—I agree.

Appeals allowed.

A. I. R. 1922 Patna 562 (1).

COUTTS AND DAS, JJ.

Lachmi Singh and others—Accused-Petitioners

v.

Emperor—Opposite-Party.

Cr. Rev. No. 376 of 1922, decided on 12-7-1922, from the order of Magistrate, Arrah.

Criminal Trial—Police diary—Refreshing memory—Defence entitled to inspect only portion refreshed and not whole diary—Evidence Act, S. 159.

There is nothing in the law which entitles the defence to an inspection of anything more than that portion of the police diary from which the witness refreshed his memory and there is no illegality or irregularity in the procedure of the Magistrate who disallows the application for the inspection of the whole diary. [P. 562, C. 2.]

G. C. Pal and *Hareshwar Prasad Sinha*—for Petitioners.

Sultan Ahmed—for the Crown.

Coutts, J.:—The ground on which this application for revision was admitted was an allegation that the investigating Police Officer read over the whole of the Police diary for the purpose of refreshing his memory and that when an application for inspection of the diary was made it was refused. On reading the explanation of the Magistrate and the orders which were passed by the Magistrate on the application made at the time, it appears that what occurred was that the investigating officer when in the witness box was asked about a certain date and the names of certain persons and the Court directed him to give the date and the names from the Police diary. This the witness did. The defence thereupon asked for an inspection of the whole diary. This was not allowed; but the Magistrate offered an inspection of the date and the names in respect of which the witness had refreshed his memory from the diary. This, however, was refused. I can find nothing in the law which entitles the defence to an inspection of anything more than that portion of the diary from which the witness refreshed his memory and, in my opinion, there was no illegality or irregularity in the procedure of the Magistrate.

I see no reason to interfere and I would dismiss this application.

Das, J.:—I agree.

Application dismissed.

A.I.R. 1922 Patna 562 (2).

COUTTS AND DAS, JJ.

Mt. Sonekuar and others—Defts.-Applts.

v.

Baidyanath Sahay and others—Plaintiffs-Respondents.

S. A. No. 259 of 1921, decided on 13-6-1922, against the decision of Sub. J., Patna.

C. P. C, S. 100—Failure of the appellate Court to consider evidence relied on by the trial Court is an error of law.

Where the lower appellate Court failed to consider the report relied on by the trial Court in coming to its conclusion,

Held, there is an error of law. [P. 563, C. 1.]

Kulwant Sahay, B. C. Sinha, S. N. Rai and *Shiveshwar Dayal*—for Appellants.

Ray, Tribhuwan Nath Sahai—for Respondents.

Coutts, J.:—This appeal arises out of a suit for a declaration that certain trees and the lands of Survey plot No. 1751 belonged to the plaintiff and that *Rayat-khana* bearing plots Nos. 1733, 1734 and 1735 belonged to him as appertaining to villages Mirzapur *Onda Khurd* and *Buzrug* Tauzi No. 441-1106. The suit was decreed in respect of some of the trees but was dismissed altogether in regard to plots Nos. 1733, 1734 and 1735.

The plaintiff appealed and obtained a decree in full. Against this decree the defendants have appealed and the only point which is urged is that the lower appellate Court has not considered the report of the Commissioner who made a local investigation and whose report the first Court relied on in coming to its conclusion.

The report of the Commissioner in a case of this kind which is a boundary dispute is an important piece of evidence, it should certainly have been considered by the lower appellate Court and the appellants are entitled to have it considered by that Court.

In the result this appeal must, in my opinion, be decreed, the decree of the learned Subordinate Judge set aside and this suit remanded for re-hearing and decision according to law. Costs to abide the result. *Appeal allowed.*

A. I. R. 1922 Patna 563.

ADAMI AND BUCKNILL, JJ.

Thakuri Gope and others—Judgment-Debtors-Appellants v.

Mokhtar Ahmad and another—Decree-Holders-Respondents.

Appeal No. 240 of 1921, decided on 10-5-1922, against the order of District Judge, Gaya, dated 1st August, 1921.

C. P. C. O. 21, R. 16 with S. 146—Transfer by plaintiff pending suit—Transferee cannot execute decree in that suit unless he has got substituted in the suit for the plaintiff.

A transfer of property from a plaintiff during the pendency of a suit will not entitle the purchaser to apply for the execution of the decree, obtained by the plaintiff in the suit unless he has taken steps to have his name substituted in the suit in the place of his vendor. S. 146 is subject to any special provision there may be and R. 16 of O. 21, is clearly a provision to which Section 146, will be subject. [P. 564, Cs. 1 & 2.]

A. K. Ray and *N. K. Prasad*—for Appellants.

Kailas Pati—for Respondents.

Adami, J.:—It appears that one Debi Dutt, a co-sharer landlord brought a suit for his own share of the rent under S. 148-A of the Bengal Tenancy Act. During the pendency of the suit and before the decree he transferred all his rights in the land, rent of which was sued for, to the present respondent. That was on the 20-6-1918. In the *kobala* it was mentioned that he also transferred all arrears of rent and all his other interests. The respondent did not bring his name on to the record but allowed the suit to proceed with Debi Dutt as plaintiff, and Debi Dutt on 25-7-1918, obtained a decree in his own name. Subsequently the respondent applied for execution of that decree relying on the transfer by *kobala* on 20-6-1918. Objection was made in the execution Court on several grounds but the only ground with which we have to deal now is that the respondent had no right to make the application since the decree obtained by Debi Dutt had not been transferred to him. Both the lower Courts have held that the application could be made by the respondent as transferee of the decree. The Munsif held that the respondent purchaser must be considered in equity as the assignee of the decree and as such he was entitled to execute it. The learned Dt. Judge upheld this view of the case. It is now objected before us that there was no transfer of the decree and therefore the respondent could not make any application under O. 21, R. 16, C. P. C.

The question we have to decide is whether when the respondent made his purchase of the interest of Debi Dutt during the pendency of the rent suit and no mention was made in the deed of transfer of any decree, it could be held that the decree was transferred to the respondent; all that was transferred was an actionable claim. The Courts below as shown above have held that in equity it must be held that the transfer amounted to a transfer of the decree but such cases as have been decided on the subject are in favour of the appellant and against the respondent. The cases which the appellant has relied on and which seem to settle the law which has been followed in India on the point are *Dost Muhammad* v. *Altaf Hussain Khan* (1), *Basroor-Vittil Bhandari* v. *Ramachandra Kamthi* (2) and *Peer Mahommad Rowthen* v.

(1) (1912) 17 I. C. 512.
(2) (1907) 17 Mad. L. J. 391=2 M. L. T. 197.

Raruthan Ambalam (3).

In all these cases it has been held that a transfer of property during the pendency of a suit will not entitle the purchaser to apply for the execution of the decree unless he has taken steps to have his name substituted in the suit in the place of his vendor. It is argued on the side of the respondent that S. 146 of the Code of Civil Procedure gave a right to the respondent to make his application but it is to be noticed that that general section is subject to any special provision there may be in the Code of Civil Procedure.

The section begins with the words "save as otherwise provided by this Code" and R. 16 of O. 21 is clearly a provision to which S. 146 will be subject. R. 16 only applies where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred, and the words "interest of the decree-holder in the decree" do not mean an interest such as the respondent claims in the present case but relate to a case where there are several decree-holders and one of them applies to execute the decree. It seems quite clear that according to the law laid down in the Courts in India, the contention of the appellant must succeed and that the appeal must be allowed.

I would therefore allow the appeal with costs.

Bucknill, J.:—I must admit that I am not altogether very satisfied with the law as laid down by the three decisions which have been quoted by the learned Vakil for the appellant, but they are undoubtedly in his favour and no contrary authority of any cogency has been brought to our notice. It is quite explicitly laid down that the purchase of an interest in a future decree not yet granted cannot, when and if the decree is actually granted, place the assignee in a position to enable him to take any advantage of the provisions of O. XXI, R. 16 of the Civil Procedure Code.

The Dt. Judge of Gaya and the Munsif, both, and I think not unnaturally, thought that the out-and-out purchase made by the assignee hereof all the property and rights which the assignor had in the estate concerned constituted even in respect of an executory interest an equitable property in the future decrees which would enable him to come in under the provisions of O. XXI, R. 16 which I have mentioned above but unfortunately it does not seem that the cases to which I have referred were quoted to either of the Courts below or I think that otherwise they might have come to a contrary opinion.

I think that it is perhaps a pity that the law appears to be as it is and it may be that later decisions will amplify what has already been stated with regard to the position, but as it does not seem to me that it would be right for me to put myself in opposition to what has already been held by so many learned Judges, I therefore do not feel that I can disagree.

Appeal allowed.

(3) (1914) 30 I. C. 831.

A. I. R. 1922 Patna 564.

ADAMI, J.

Hira Mahton and others—Petitioners

v.

Rajkumar Mahton and others—Respondents.

Cr. Rev. No. 341 of 1922, decided on 20-6-1922, against the order of Sub-Div. Mag., Barh, Dated 10-4-1922.

Cr. P. C., S. 148 and S. 145—Costs awarded arbitrarily without any enquiry—Order is bad.

In awarding costs in proceedings under S. 145, the Magistrate did not mention how the sum of Rs. 100 awarded as costs was computed or that he had made any enquiry as to what the actual pleader's fees and the costs of the witnesses were.

Held; such an order is without jurisdiction and must be set aside. 1 P. L. T. 369, Foll.

[P. 565, C. 1.]

G. C. Pal—for Petitioners.

B. N. Mitter and *Shiveshwar Dayal*—for Respondents.

Adami, J.:—The only question which arises in this application is in regard to an order for payment of costs. The Magistrate in finding possession in favour of the opposite party in proceedings under S. 145, Cr. P. Code directed the petitioners to pay costs of Rs. 100.

It is urged that this order is without jurisdiction in as much as under S. 148, Cr. P. C. the Magistrate could only include in the costs awarded the pleader's fees and the costs for witnesses. The Magistrate has not mentioned how the sum of Rs. 100 was computed or that he has made any inquiry as to what the actual pleader's fees and the costs of the witnesses were.

It has been decided by a Judge of this

Court (Sultan Ahmad, J) in *Jhaman Mahton* v. *Thakuri Mahton* (1) that an order such as the present one is without jurisdiction and must be set aside, and he based his finding on the case of *Uday Narain Chakervarti* v. *Satish Chandra Chatterji* (2).

There is an unreported case of this Court (*Girdhari Singh* v. *Bhalu Gope* Criminal Revision No. 300 of 1922) in which Sir John Bucknill, J., has set aside an order similar to the present one and directed that the case should be remanded to the Magistrate for determination of the costs according to law.

It is quite clear, therefore, that the Magistrate could not in a case like this arbitrarily decided what the amount of costs to be paid should be. He must confine the costs to the pleader's fees and the cost of witnesses.

The order, therefore, directing Rs. 100 to be paid as costs must be set aside and the case must be remanded to the Magistrate for an assessment of costs according to law.

The application is, therefore, allowed to the extent mentioned above.

Application partly allowed.

(1) (1920) 1 P.L.T. 369=57 I.C. 449=21 Cr. L. J. 625.
(2) (1910) 14 C.W.N. 73 Notes.

A. I. R. 1922 Patna 565.

COUTTS AND DAS, JJ.

Ramlochan Misra and another—Defendants-Appellants

v.

Harinath Misra and others—Plaintiffs-Respondents.

S. A. No. 1128 of 1920, decided on 27th April, 1922, against the decision of Dist. J., Patna, dated 16th April, 1920.

Evidence Act, Ss. 65 and 58—Admission of a copy without objection—Objection cannot be raised in appeal—Appeal

When a copy of a document has been admitted in the Court of first instance without any objection, the appellate Court is not entitled to allow any objection to be taken to its admissibility at the appellate stage and it is not open to the Judge at the appellate stage to consider whether in fact the provisions of the Section 63 have been complied with or not, when it was admitted without objection. [P 566, C. 1.]

Kulwant Sahay and *S. Dayal*—for Appellants.

Ram Prasad, Janak Kishore and *B. K. Sinha*—for Respondents.

Coutts J. :—This is an appeal by the defendants against the decision of the District Judge of Patna. The plaintiffs and the defendants are admittedly agents of one Nathuni Missir.

The plaintiffs brought a suit for a declaration that the defendant No. 1 had renounced the world and had become a Sadhu and that thereby the plaintiffs had become entitled to a half share of the heritage, or, in the alternative if it was found that the defendant No. 1 had not renounced the world the plaintiffs claimed one-third of the property.

The suit was dismissed in the Court of first instance but on appeal to the District Judge the plaintiffs were declared to be entitled to joint possession of Nathuni's heritage along with the defendant No. 1. Against this decision the defendants have appealed.

The sole question for decision in the suit was whether the plaintiffs and the defendants were in fact agents of Nathuni Missir and the first question argued in appeal before us is whether a certain document on which the defendants relied was admissible in evidence or not. This document, which is *Exhibit* D. is a genealogy. It is admittedly a copy and part of it is probably a copy of a copy.

The document was admitted without objection by the plaintiffs in the Court of first instance and it was relied on by the learned Subordinate Judge who decreed the suit in favour of the defendants.

On appeal to the District Judge he has held that although this document was admitted without objection still the plaintiffs were not stopped from contesting the document subsequently. In this view I am unable to agree. It has been held in a number of cases *Chimnaji Govind Godbole* v. *Dinkar Dhondov Godbole* (1), *Lakshman Govind* v. *Amrit Gopal* (2) and *Kishori Lall Goswami* v. *Rakhal Das Banerjee* (3), that when a copy of a document has been admitted in the Court of first instance without any objection, the appellate Court is not entitled to allow any objection to be taken to its admissibility at the appellate stage. This is undoubtedly the correct view of the law.

It is, however, contended that

(1) (1887) 11 Bom. 320.
(2) (1900) 24 Bom. 591=2 Bom. L.R. 386.
(3) (1904) 31 Cal. 155.

the learned Dt. Judge has considered the question from another point of view and has held that even if the document is admissible it is not entitled to any value because the comparison of the copy with the original has been found by him to be unsatisfactory. Here again the learned Dt. Judge appears to have fallen into an error.

The document was admitted as secondary evidence, that is to say, it was admitted as being a true copy; and, in view of the decisions to which I have already referred, it was not open to the learned Dt. Judge, at the appellate stage, to consider whether in fact the provisions of the section had been complied with or not, when it was admitted without objection.

The learned Dt. Judge was therefore, not entitled to consider the evidence which was offered subsequent to the admission of the document in regard to comparison with the original.

There are other points in this appeal but we have not heard arguments on them because on this ground alone it is necessary to set aside the decree of the learned Dt. Judge and to remand this appeal for re-hearing. The whole appeal is to be re-heard. Costs will abide the result.

Das, J.:—I agree. *Case remanded.*

A. I. R. 1922 Patna 566 (1).

COUTTS AND DAS, JJ.

Mahamad Fazal—Plaintiff-Petitioner

v.

Mahkumar Mahton—Defendant-Opposite Party.

Civ. Rev. No. 7 of 1922, decided on 16-5-1922, against an order of Sub J., Patna.

C. P.C., S. 151—Court has power to consolidate suits—Jurisdiction—Consent cannot give.

The Court has inherent jurisdiction to consolidate suits and it is exercisable without the consent of parties. If it were not so it would not have inherent jurisdiction to consolidate at all, for consent of parties cannot confer jurisdiction that did not exist. 17 C. W. N. 526 Foll. [P. 566, C 1, 2.]

Kulwant Sahay and *S. Dayal*—for Petitioner.

S. M. Mullick and *B. C. Sinha*—for Opposite Party.

Coutts, J.:—This is an application in revision against an order of the Sub. Judge of Patna consolidating two suits. It is not contended that the learned Sub. Judge had no jurisdiction under S. 151, C. P. Code to consolidate the suits, and that he has such jurisdiction has been held not only by this Court but in other High Courts in India, and I may refer particularly to the case of *Kali Charan Dutt* v. *Manodabala Dasi* (1) where the matter was very fully considered.

It is contended, however, that the jurisdiction under S. 151, C. P. C. cannot be exercised without the consent of parties. No authority has been adduced in support of this contention and I am unable to accept it. It seems clear that if the Court has jurisdiction to consolidate under S. 151, C. P. C. it must have that jurisdiction without the consent of parties. If this were not so, it would not have inherent jurisdiction to consolidate at all, for consent of parties cannot confer a jurisdiction that does not exist.

It is not for us in revision to consider whether in this particular case consolidation should have been allowed or not, but I may remark that in my opinion, the Court has exercised the jurisdiction wisely.

I would accordingly dismiss this application with costs. Hearing fee three gold *mohurs*.

Das, J.:—I agree.

Application dismissed.

(1) (1912) 17 C W. N. 526=15 I. C. 897=16 C. L. J. 591.

A. I. R. 1922 Patna 566 (2).

COUTTS AND DAS, JJ.

Dargahi Mian and another—Objectors-Appellants

v.

Mt. Mango Kuer—Decree-holder-Respondent.

Appeal No. 66 of 1922, decided on 6-7-1922, against the decision of Dist. J., Gaya.

B. T. Act (1885), Sch. III, Art. 6—Suit for rent and declaration—Decree is not taken out of the scope of Art. 6.

An application for execution of rent decree is not taken out of the scope of Art. 6, Sch. III, only because the landlord had in the suit asked for an unnecessary declaration regarding share to certain *Bhaoli* rent in the suit. [P. 567, C. 1.]

S. S. Bose and *N. C. Ghosh*—for Appellants.

Nawal Kishore (II)—for Respondent.

Das, J.:—This appeal arises out of an order passed by the learned Dt. Judge of Gaya in an execution matter. The point taken by the judgment-debtor before us is that the execution of the rent decree is barred by the provisions of Sch. 3, Art. 6 of the Ben-

gal Tenancy Act. The decree-holder is the landlord and at the time of the rent suit was undoubtedly the landlord and the defendant was and is his tenant. The suit was for a declaration that the landlord was entitled to a *nakdi* rent and for a decree for rent.

The learned Judge in the Court below has come to the conclusion that as the plaintiff sued not only for arrears of rent but also for declaration regarding the share of the *bhaoli* rent, the suit was a title suit and the decree was not a rent decree, and consequently Art. 6 of Sch. 3 of the Bengal Tenancy Act was inapplicable. I am unable to take the same view.

The suit was between landlord and tenant and undoubtedly the provisions of the Act are applicable to them. Further the suit was a rent suit in the strictest meaning of the term, and I do not understand why Art. 6 of the third schedule should not apply to the execution of a decree obtained in such a suit just because the landlord asked for a wholly unnecessary declaration in the suit.

In my opinion, Art. 6 of the third schedule of the Bengal Tenancy Act did apply to the application for execution of the decree and the learned Dt. Judge should have dismissed the application for execution.

I would allow the appeal, set aside the orders passed by the Courts below and dismiss the execution petition of the respondents with costs.

Coutts, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 567.

COUTTS AND DAS, JJ.

Fazal Karim—Defendant-Appellant

v.

Mt. Bibi Fatmatul Kubra—Plaintiff-Respondent.

Appeal No. 307 of 1921, decided on 4th July 1922 against a decision of Sub-J., Patna.

Pre-emption—Custom in Delhi and Bihar similar—Still non-Muhammadan of Delhi owning property in Bihar is not amenable to latter custom.

The law of pre-emption has not been adopted as the personal law of non-Muhammadans in Bihar or in the other localities where the custom exists; it is merely a *lex loci*. If a non-Muhammadan who is by custom amenable to the law of pre-emption in a particular locality is the owner of a property in another locality where a similar custom exists he is not amenable to the custom in the new locality, for, although it is a similar custom it is not the same custom to which he has become amenable by reason of the fact that he is a native of or domiciled in a particular locality. A native of Delhi (owner) is not bound by the custom which exists in Bihar, even although there is similar custom in Delhi. [P. 569, C. 1.]

Sultan Ahmad and *Husain Jan*—for Appellant.

Kulwant Sahay and *S. Hussain*—for Respondent.

Coutts, J.:—This is an appeal against a decision of the Subordinate Judge of Patna in a suit for pre-emption. The property which it was sought to pre-empt is in Patna City, the vendor is a Hindu who is native of and resides in Delhi and the defendants are Muhammadans residing in Patna City.

The suit was originally brought by one Hakim Abdul Majid who died during the course of the litigation and his widow has been substituted for him and is continuing the litigation.

The suit was decreed in the Court of first instance and on appeal this decree has been confirmed by the Subordinate Judge. The defendant has appealed to this Court.

It is admitted that if the vendor had been a Hindu, who was a native of or domiciled in Bihar, the plaintiff would have been entitled to succeed, but it is contended by Mr. Sultan Ahmad for the appellant that the owner of the property being a Hindu, who is not either a native of or domiciled in Bihar, the law of pre-emption does not apply. He also contends that even if this were not so and even if the original plaintiff were entitled to succeed, his widow would not be entitled to carry on the litigation.

Two questions, therefore, arise in this appeal. (1) Is the plaintiff entitled to pre empt when the vendor is a Hindu who is neither a resident of nor domiciled in Bihar? and (2) is the widow of the original plaintiff entitled to carry on the suit after the death of her husband during the pendency of the suit?

In regard to the first point, the law as stated in Wilson's Anglo-Muhammadan Law, Fifth Edition, 1921, at paragraph 352 is as follows:—

"Where the custom is judicially noticed as prevailing among non-Muhammadans in a certain local area, it does not

govern non-Muhammadans who, though holding land therein for the time being, are neither natives of, nor domiciled in the district."

This was the view of the law as expressed in *Huree Charan Surmah* v. *Thomas Ackroyd* (1) and *Byjnath Preshad* v. *Kopilmon Singh* (2). These decisions have been followed in *Parsasth Nath Tewari* v. *Dhanai Ojha* (3) and there can be no doubt that this is the correct view of the law.

Ordinarily, therefore, in a case such as the one now before us the owner not being a native of or domiciled in Bihar the plaintiff would not be entitled to pre-empt. It is contended, however, by Mr. Kulwant Sahay for the respondent that, although this is so, the present case is different because the owner of the property which is the subject-matter of the suit is a native of Delhi, where a custom of pre-emption also exists among non-Muhammadans.

In these circumstances he contends and this is the view which has been taken by the learned Subordinate Judge, that the law of pre-emption applies. His contention is that in localities where the custom exists it has become a part of the personal law of those non-Muhammadans who are natives of or domiciled there, that when such non-Muhammadans leave such locality they carry with them the custom so that in a case such as the one now before us, where the owner is a native of Delhi, where the custom exists, the custom applies also to property in Patna City of which he is owner.

Mr. Kulwant Sahay relies in support of his contention on the following passage in Agarwala's Law of Pre-emption.

"It is respectfully submitted that the whole question turns upon whether the Hindus of a particular locality adopted the law of pre-emption as part of their personal law or not" (Agarwala's Law of Pre-emption, Third Edition, 1916, at paragraph 177 (6), page 218); he also relies on a certain passage in the judgment of Glover, J. in the case of *Byjnath Pershad* v. *Kopilmon Singh* (2) to which I shall presently refer.

With all respect to the opinion which has been expressed by Mr. Agarwala I am unable to accede to the suggestion that the Hindus of Bihar or other localities where the custom exists have adopted the law of pre-emption as part of their personal law and there is no judicial authority for such a proposition. As Mr. Ameer Ali had said:—

"The Sunni Hanafi Law of pre-emption was introduced in India with the Muhammadan Government, and in certain places it has become a part of the *lex loci*, for example in Bihar, parts of the Punjab and the United Provinces, both Hindus and Muhammadans are entitled to claim the right of pre-emption. And so well established is that right, that it is almost invariably recorded in greater or less detail in the village administration papers called the *Wajib-ul-Arz*."

(Ameer Ali's Muhammadan Law, Vol. I, Fourth Edition, Chapter XXVIII, page 712). The passage on which Mr. Kulwant Sahay relies in the judgment of Glover, J., in the case of *Byjnath Pershad* v. *Kopilmon Singh* (2) runs as follows:—

"And I think that in the present case the plaintiff was bound, in the first instance, to show that the vendor of the defendant, an inhabitant and native of Lower Bengal where no custom of pre-emption amongst Hindus existed, was subject to the rule of law prevailing amongst Hindus of Bihar, by reason of his being domiciled within that province."

Mr. Kulwant Sahay contends that by this the learned Judge meant that if the vendor in the case had been an inhabitant and a native of a locality where the custom of pre-emption amongst Hindus existed then he would have been subject to that rule of law in respect of the property owned by him in Bihar. This is an ingenious interpretation of the passage but I am unable to accept it as correct. The question was not before the learned Judges and they neither considered nor decided it; and it appears to me that unless it be that the custom has been adopted as part of the personal law the contention must fail.

If the view were correct, a Hindu, who was a native of Bihar and who owned property in Calcutta, would be bound in respect of that property by

(1) (1872) 18 W.R. 441.
(2) (1875) 24 W.R. 95.
(3) (1905) 32 Cal 988=9 C.W.N. 874.

the law of pre-emption, but I know of no case in which this has been held nor have I ever heard it suggested that this is so.

It seems to me clear that the law of pre-emption has not been adopted as the personal law of non-Muhammadans in Bihar or in the other localities where the custom exists, it is merely a *lex loci* as Mr. Ameer Ali has said.

If this view then be correct it disposes of the whole question, because if the law of pre-emption is not part of the personal law of non-Muhammadans it is not carried outside the locality in which the custom prevails; and if a non-Muhammadan who is by custom amenable to the law of pre-emption in a particular locality is the owner of a property in another locality where a similar custom exists, he is not amenable to the custom in the new locality for although it is a *similar* custom it is not the *same* custom to which he has become amenable by reason of the fact that he is a native of or domiciled in a particular locality.

In the present case, the owner being a native of Delhi he is not bound by the custom which exists in Bihar even although there is a similar custom in Delhi.

The appeal therefore succeeds on the first point which has been urged by Mr. Sultan Ahmad and it is unnecessary to discuss the other point. I would accordingly set aside the decision of the lower appellate Courts.

The appeal is decreed and the suit is dismissed with costs throughout.

Das, J.:—I agree.

Appeal allowed.

A. I. R. 1922 Patna 569.

DAWSON-MILLER, C. J. AND MULLICK, J.

Manbodh Missir—Plaintiff-Appellant

v.

Bhairo Missir and others—Defendants-Respondents.

S. A. No. 232 of 1921, decided on 18th July, 1922, against the decision of Sub. Judge, Shahabad, dated 19th August, 1920.

Civil P. C. O 7, R. 14 and 18 (2), O. 13, R. 1—Scope—Documents referred to in O. 13, R. 1 refer to documents mentioned in O. 7, R. 14—These do not apply to documents under O. 7, R. 18 (2) produced in answer to defendants' claim.

By Clause (2) of Rule 18 of Order 7 nothing in Rule 14 applies to documents produced in answer to any case set up by the defendants. The plaintiff is not under any obligation to enter such documents in a list and add the list to his plaint and it would be wrong in excluding the documents merely because they had not been entered in the list attached to the plaint originally. Documents referred to in Order 13, Rule 1 refer back to Order 7, Rule 14, Clause (2), which refers to the case where the plaintiff relies upon other documents than those mentioned in the first clause as evidence in support of his claim. Those documents which are already put in the list must be produced at the first hearing, if they have not already been filed in Court and in addition all the documents must also be produced which the Court has ordered the parties to produce at that time. [P. 571, C. 2.]

P. Lal, B. C. Sinha and *Sundar Lal*—for Appellant.

P. C. Rai and *B. N. Mitter*—for Respondents.

Dawson-Miller, C. J.:—This is an appeal on behalf of the plaintiff from a decision of the Subordinate Judge of Shahabad, dated the 19th August, 1920. The suit was instituted by the plaintiff against four defendants claiming that, as the next reversioner of the deceased husband of the defendant No. 4 he was entitled to a declaration that certain dispositions of the property of her husband made by the 4th defendant of which she was entitled to possession taking the interest of a Hindu widow, were not binding upon him as the reversioner, and were valid only during the life-time of the 4th defendant.

The plaint was filed on the 17th September, 1917. No documents were filed with the plaint and no list of documents relied upon by the plaintiff in support of his case was attached to the plaint. On the 18th January, 1918, the written statement of the defendants was filed and from that it appeared that the defendants were setting up a case that the plaintiff was not the nearest reversioner to the deceased husband of Sahodra, the defendant No. 4.

To the plaint the plaintiff as part thereof had attached a genealogical tree showing that Mahesh, the husband of the 4th defendant was the son of Tirloke and the grandson of Juthan, Juthan being the great grandfather of the plaintiff. In the written statement it was admitted that Mahesh was the son of Tirloke but it was alleged that Tirloke was not the son of Juthan, the plaintiff's great grandfather, but the son of Basti, the brother of Juthan and if that case could be made out, it would appear that

the plaintiff was not the next reversioner to Mahesh after the death of Sahodra, his widow.

On the day when the written statement was filed an order was made by the Munsif to put up the case on the 29-1-1918, for settlement of issues and on that day the issues were settled and the hearing was fixed for the 6th March following. An order was also made at the same time that the parties were to file documents within two weeks.

It is clear therefore that the learned Munsif treated the day fixed for the hearing of issues as the first hearing of the suit and gave the parties two weeks' further time to file their documents. One point has been raised before us in this appeal as to whether where a day has been fixed for the settlement of issues only, and the issues are settled upon that day and nothing further done, that day can be considered as the first hearing of the suit.

In the view we take of this case, however, it is unnecessary to decide that point. On 6-3-1918, the day which had been fixed for hearing, certain documents were filed by the plaintiff. The hearing, however, did not take place on that day, it was adjourned from time to time, and in fact the case came on on the 12th May, 1919.

At the trial the plaintiff's pleader tendered for the purposes of having them proved the documents which he had filed on 6-3-1918. These documents were rent receipts over 30 years old granted by the Court of Wards to Tirloke, the person whose parentage was called in question in the suit by the defendants. The rent receipts which bear the seal of the Court of Wards and purport to bear the signature of the Manager at that time described Tirloke as the son of Juthan, as the plaintiff contends, and not as the son of Basti which is the defendants' case.

The learned Munsif refused to allow these receipts to be proved on the ground that the parties were directed to file their evidence within two weeks of 29-1-1918 when the issues were framed and the documents had not in fact been filed until the 6th March, the day fixed for the further hearing after the issues were settled.

He did not consider at all what grounds there might have been for not having filed these documents earlier nor did he consider whether the documents were of such a nature that they might be forgeries, nor did he take into consideration any other question except the fact that they had been filed late and therefore on the defendants' objection they were not allowed to be proved in evidence.

The learned Munsif having decided the case against the plaintiffs an appeal went to the Sub. Judge. The Sub-Judge who only had oral evidence before him on the question of Tirloke's parentage said that on going through the oral evidence on both sides he did not find much to choose between them but in the end he agreed with the Munsif and he dismissed the appeal.

The only question which has been argued before us in this appeal is that the Munsif and the Subordinate Judge were wrong in refusing to admit this evidence. It is contended on behalf of the respondents that the documents in question were documents which, under the provisions of O. 7, R. 14 of the C. P. C. the plaintiff intended to rely upon as evidence in support of his claim, and, as such, ought to have been entered in a list annexed to the plaint and, unless that was done, they could not, under the provisions of Rule 18 of the same order, be afterwards received in evidence without the leave of the Court.

It is contended on behalf of the appellant, on the other hand, that by Cl. (2) of R. 18 of O. 7 nothing in the rule applies to documents produced for cross-examination of the defendants' witnesses or in answer to any case set up by the defendants or handed to a witness merely to refresh his memory.

It is not contended that the documents came within the last category, *viz.*, those which might be handed to a witness merely to refresh his memory but it is contended that they were documents of such a character that they might be used for cross examination of the defendants' witnesses or, if not, that certainly they were documents which were to be used in answer to a case set up by the defendants. If in fact they were documents of that description then it follows that the plaintiff was not under any obligation to enter such documents in a list and add the list to his plaint.

In such a case the learned Munsif would be wrong in excluding the documents merely because they had not

been entered in the list attached to the plaint originally. It is further contended that however that may be under Order 13, Rule 1 whether the documents were of the nature described or not, they ought to have been produced at the first hearing of the suit and not having been produced on that occasion the Court was perfectly justified in refusing them subsequently.

As I have already said they were in fact produced on the 6th March, the issues having been settled in the previous January, and if the 6th March, can be properly described as the first hearing then they were produced in time. It is unnecessary, however, as I have already said, to determine that question because, in my opinion, the documents in the present case were documents of the description mentioned in the 2nd clause of Rule 18 of Order 7, that is, documents produced in answer to a case set up by the defendants.

When the plaint was filed the plaintiff no doubt was setting up a case that he and Mahesh were respectively the great grandson and grandson of the same person and therefore he, in the circumstances, was the next reversioner and entitled to sue, but he did not know at that time, at all events there is nothing to suggest that he knew, that the defendants would dispute the parentage of Tirloke, the father of Mahesh and until that case was set up there appears to have been no reason why the plaintiff should rely upon the particular documents in question in support of his case.

He did not know the point at which the defendants would attack or which link in the chain of the genealogical tree the defendants might consider the weakest and up to that time it was not necessary for the plaintiff to produce any documents in support of the accuracy of the genealogical table upon which he was relying and therefore it appears to me that there was no necessity at the date of the plaint for him to enter the particular documents in the list and file them with the plaint. Once, however, the written statement was filed the case became different.

A case was then set up by the defendants attacking the genealogical tree, which so far as we know, up to that time he had no reason to suspect was going to be attacked and it was then and then only that the necessity for producing these rent receipts, which went to show that the point taken by the defendants was not accurate, arose.

It seems to me, in these circumstances, that the documents were clearly documents produced in answer to a case set up by the defendants within the second clause of Rule 18 of Order 7 and therefore it was not necessary to obtain the leave of the Court in order that they might be received in evidence.

With regard to Order 13, Rule 1, here again the documents which must be produced at the first hearing, assuming in this case that the first hearing was the date upon which the issues were settled, are described as all documentary evidence of every description in their possession and power on which they intend to rely and which has not already been filed in Court and all documents which the Court has ordered to be produced.

The documents upon which they intend to rely must, I think, so far as the plaintiff is concerned, refer back to Order 7, Rule 14, Clause (2) which refers to the case where the plaintiff relies upon other documents than those mentioned in the first clause as evidence in support of his claim. Those documents which are already put in the list must be produced at the first hearing if they have not already been filed in Court and in addition all the documents must also be produced which the Court has ordered the parties to produce at that time.

In my opinion, therefore, the learned Munsif was wrong in the circumstances of this case in not allowing the plaintiff an opportunity of proving the documents at the trial. The judgment and decree of the Munsif and of the Subordinate Judge will be set aside, the case will be remanded to the trial Court to determine the issues after admitting the evidence if properly proved and considering it along with the other evidence in the case. The defendants will be allowed at the hearing to give any rebutting evidence that they may have to disprove the facts stated in the documents now in question. The costs of this appeal will abide the final result of the trial.

Mullick, J.:—I agree.

Case remanded.

A. I. R. 1922 Patna 572.

COUTTS AND DAS, JJ.

Nauratan Lal—Appellant

v.

Mrs. Margaret Anne Stephen and others-Respondents.

Appeal No. 103 of 1921, decided on 28th July, 1922, against the decision of 1st Class Sub-J., Muzaffarpur, dated 14th March, 1921.

(a) *C. P. C., S. 47, O. 21, R. 58—Legal representative of judgment-debtor—Claim to property in his own right dismissed—No suit can be brought to challenge order but must be decided under S. 47.*

An objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative is a matter cognizable only under S. 47, C. P. C. and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed. Where *qua* the execution proceedings a person happens to be the representative of the judgment-debtor any question raised by him can only be decided under S. 47. But objections to attachment raised by a third party come under O. 21, R. 58. 17 Cal. 711 ; 19 C W. N 517 Foll. [P. 573, C. 1.]

(b) *T. P. Act, S. 53—Deed of settlement of whole property within 1 month of decree against settlor—Deed was held fraudulent—Solvency of transferor at time of transfer must be considered.*

Where a trust deed was executed within one month of the decree passed for the ascertainment of mesne profits payable by judgment-debtor to the decree-holder ; and the deed of settlement had in fact put out of the reach of the decree-holder every item of immoveable property to which the judgment-debtor was entitled or of which he was in possession.

Held: the transfer was fraudulent. The solvency of the transferor at the time of the transfer and not at a later date is to be taken into consideration. [P. 573, C. 2 ; P. 574, C. 2.]

C. C. Das, G. D. Das, Ray, Guru Sharan Prasad and *Anand Prasad*—for Appellant.

W. H. Akbari and *C. S. Banerji*—for Respondents.

Das, J.:—This appeal arises out of an order passed by the learned Subordinate Judge, 1st Court, Muzaffarpur, dated 14-3-1921, and the first question which we have to consider is whether the order passed by the learned Sub. Judge was one under S. 47 of the Code of Civil Procedure or one under O. 21, R. 60 of the Code.

On 30-6-1909, the appellant recovered a decree against one Stephen for recovery of possession of certain properties and for ascertainment of mesne profits. In July, 1909, Mr. Stephen executed a deed of trust by which he transferred all the immoveable properties, of which he was then possessed, to his wife, Mrs. Margaret Anne Stephen, as trustee on her own behalf and on behalf of her minor children. The deed recited that the settlor was desirous of making a settlement of his share in the properties conveyed for the benefit of his wife and children.

It is admitted that the deed of settlement of the 23-7-1909, covered all the properties to which Mr. Stephen was entitled or of which he was in possession. Mr. Stephen died on the 15-1-1915, and the applicants-respondents were substituted in the record of the suit as legal representatives of Mr. Stephen on the 26-6-1916. The Court which passed the decree proceeded to ascertain the amount of mesne profits payable to the decree-holder and on the 3-3-1917, it found that about Rs. 15,000 was due to the decree-holder in respect of such mesne profits. It is to recover the sum awarded to him for and by way of mesne profits that the present execution proceedings were commenced by the decree-holder.

On 5-7-1920, Mrs. Stephen for herself and on behalf of her minor children presented a petition which purported to be a petition under S. 47 and O. 21, R. 58 of the Code by which they insisted that the properties attached in execution of the decree for mesne profits were their properties and not the properties of the judgment-debtor and prayed that those properties be released from attachment. At the time when the petition was presented to the Court by Mr. Stephen and her minor children they were in the record of the proceedings as the legal representatives of Mr. Stephen.

The learned Sub. Judge has come to the conclusion that the transaction which resulted in the deed of settlement was a *bona fide* transaction and has directed the properties to be released from attachment. If the order passed by the learned Sub. Judge was an order under O. 21, R. 60 of the Code, then no appeal lies from that order ; but if, on the other hand, the order was one under Section 47 of the Code, the order is appealable as a decree.

S. 47 of the Code provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. It has been held in cases far too numerous to mention that this section should receive the

widest interpretation.

It is not open to doubt that at the time when the execution proceedings were taken the respondents had been substituted in the record of the suit as the representatives of the judgment-debtor. The question raised in this application is a question that arises between the parties to the suit in which the decree was passed or their representatives and it undoubtedly relates to the execution, discharge or satisfaction of the decree. It is no doubt claimed on behalf of the respondents that they have raised the question not as parties to the suit or as representatives of one of the parties to the suit, but as claiming in their own right and by a title paramount to that of the judgment-debtor.

It has, however, been held that an objection taken by a person, who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under S. 47 of the Code of Civil Procedure and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed. See *Panchanan Bundopadhya* v. *Rabia Bibi* (1). This view of the law has been affirmed by the Calcutta High Court in the later case of *Ajo Koer* v. *Gorak Nath* (2).

It appears to me that where *qua* the execution proceedings a person happens to be the representative of the judgment-debtor, any question raised by him can only be decided under S. 47 of the Code. The distinction between a proceeding under S. 47 and a proceeding under O. 21, R. 58 is this: that all objections to attachment raised by a party to the suit in which the decree was passed or his representative come under S. 47; but objections to attachment raised by a third party come under O. 21, R. 58.

In this case the objection was raised not by a third party but by the representatives of a party to the suit. In my opinion, then, the order passed by the learned Sub. Judge was an order under S. 47 and is, therefore, appealable as a decree.

I now come to the merits. Section 53 of the Transfer of Property Act provides as follows:—

"Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration, or co owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed. Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration the transfer may be presumed to have been made with such intent as aforesaid. Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration."

Now in order to determine the question which has been raised in this appeal it is necessary to remember first that the trust deed was executed within one month of the decree passed against Mr. Stephen for the ascertainment of mesne profits payable by him to the decree-holder; and secondly, the deed of settlement has in fact put out of the reach of the decree-holder every item of immoveable property to which the judgment-debtor was entitled or of which he was in possession.

The learned Sub. Judge has, however, come to the conclusion that the judgment-debtor was at the time of the decree in a solvent position and that he was able to pay off any debts that he might have contracted. I regard this finding as a finding that the effect of the transfer was not to defraud, defeat, or delay any creditor. It is, therefore, necessary to see whether his finding can be supported by the evidence on the record.

The learned Sub. Judge has relied upon the evidence of Mrs. Stephen and on the following circumstances, first, upon the letter, Ex. 2, dated the 29th January, 1910, which constitutes an admission by one Knowles to Mr. Stephen to the effect that he owed Mr. Stephen Rs. 26,109-11-3, secondly, upon the pass book of Allahabad Bank which shows that in June, 1912, two separate sums consisting of Rs. 1,040 and Rs. 17,450 were transferred to the account of Mrs. Stephen from the account of Mr. Stephen; thirdly, upon the fact that Mr. Stephen had several accounts with

(1) (1890) 17 Cal. 711 (F B).
(2) (1914) 19 C. W. N. 517=27 I.C. 321=20 C.L.J 481.

several banks.

I shall come to the evidence of Mrs. Stephen presently ; but so far as the other circumstances relied upon by the learned Subordinate Judge are concerned, they do not, in my opinion, establish that on the 23rd July, 1909, he was in solvent circumstances.

The letter of Mr. Knowles Exhibit 2 is dated the 29th January, 1910, and it appears to me that for the purpose of disposing of the point, which has been raised in the case, it is not material to consider what the circumstances of Mr. Stephen were in 1910. Apart from this, all that the letter establishes is that there was a sum of money due to Mr. Stephen from Mr. Knowles ; Mrs. Stephen's evidence establishes that this sum of money was due to Mr. Stephen on account of a share which he had in the business which was being managed by Mr. Knowles.

Although Mrs. Stephen does not admit that the business has failed, she admits that the business never at any time paid anything substantial to Mr. Stephen. I regard the letter of the 29th January, 1910, as entirely irrelevant.

The extracts from the pass book of the Allahabad Bank, Exhibit 3, upon which the learned Subordinate Judge relies show that a certain sum of money was transferred to the account of Mrs. Stephen from 4½ per cent. fixed deposit account. The learned Subordinate Judge has assumed without any evidence whatever that this sum of money was transferred to her account from the account of her husband.

Mrs. Stephen did indeed make an attempt to establish that those sums of monies were transferred to her account from the account of Mr. Stephen ; but she had to admit in cross-examination that the fixed deposit account were her own account and that there was no transfer to her account from the account of her husband. This was, therefore, not a circumstance on which the learned Subordinate Judge should have relied for coming to the conclusion that Mr. Stephen had funds out of which the demands of his creditors could have been met.

The learned Subordinate Judge then says that Mr. Stephen had accounts with several banks which presumably means that he had a large sum of money standing to his credit in several banks. There is, however, no evidence on this point. All that Mrs. Stephen does say in her evidence is that she thinks that Mr. Stephen had a banking account in 1909, but that she does not know in what bank he had an account.

The learned Subordinate Judge has completely misunderstood the evidence on the point. Mrs. Stephen's evidence shows that she had several accounts in several banks. She admits that she had no money of her own and that she started these accounts with monies given to her by her husband. Her evidence also shows that her husband was speculating in stocks and shares. Her husband's pass books have not been produced in the case. It was possible for Mrs. Stephen to produce the pass books of her husband if it be her case that he had several banking accounts. The evidence of Mrs. Stephen leaves no doubt in my mind that Mr. Stephen put all his money in the name of his wife and that at no time did Mr. Stephen have a banking account of his own.

In my opinion, the learned Subordinate Judge was not justified in coming to the conclusion that Mr. Stephen was in a solvent condition in 1909. The trust deed effectively put out of the reach of the decree-holder of all immoveable properties that Mr. Stephen had. So far as actual money is concerned, he put it all in the name of his wife while he was gambling in stocks and shares. Mrs. Stephen has not shown that there was any fund against which the decree-holder could have proceeded for the realization of the money found due to him by the decree for mesne profits. The effect of the transfer of the 23rd July, 1909, has undoubtedly been to defraud, defeat or delay the decreeholder.

We must accordingly presume that the transfer was made with the intent to defraud, defeat or delay the creditors. The transfer was, as I have said before, made within one month of the decree, and I have no doubt whatever in my mind that it was made with intent to defeat the decree-holder. Mrs. Stephen herself says in her evidence that when they heard that her husband had lost the suit which the decree-holder had instituted against him she and other people advised her husband to execute a deed to safeguard the interest of herself and her children. There is no apparent reason why he should have executed the trust deed. Mrs. Stephen

in her evidence says that her husband anticipated trouble with his step mother and step-sister ; but why he should have anticipated the trouble has not been made clear in the evidence.

Mrs. Stephen does say that after the execution of the trust deed she was in possession of the properties ; but she admits that she has lost all the accounts dealing with the trust estate and that she has no counterfoils of the receipts granted by her to the tenants. She admits that she executed a power-of-attorney in favour of her husband to enter into all business transactions on her behalf. I have no doubt whatever that possession remained with Mr. Stephen notwithstanding the execution of the trust deed.

I hold that the trust deed of the 23rd July, 1909, was a fraudulent device to defeat the appellant and that he is entitled to proceed with his execution proceedings nothwithstanding that document. The transaction resulting in the execution of the trust deed is, therefore, voidable at his option, and the fact that he has instituted execution proceedings in respect of those properties establishes that he has exercised the option to avoid the transaction.

I would allow this appeal, set aside the order passed by the learned Subordinate Judge and direct that execution proceedings do proceed. The appellant is entitled to his costs throughout.

Coutts, J. :—I agree.

Appeal allowed.

A. I. R. 1922 Patna 575.

DAWSON-MILLER, C. J., AND MULLICK, J.

Ganpat Rao Banka Puri—Plaintiff-Appellant

v.

Raj Kumar Singh—Defendant-Respondent.

Letters Patent Appeals Nos. 73 and 76 of 1921, decided on 10th May, 1922.

Civil P.C., S. 100—Issue raised and decided in lower Courts—High Court cannot order re-hearing on that very issue.

Where an issue has been raised and determined, it is not within the competence of High Court in second appeal to remand the case for a re-hearing upon that very issue. [P. 577, C. 1.]

S. C. Mitter—for Appellant.

N. N. Sen—for Respondent.

Dawson-Miller, C. J. :—The question for decision in these appeals is whether the learned Judge of this Court in second appeal was justified in remanding the case to the trial Court for the hearing and determination of an isssue which he considered had not been properly raised or tried in the first instance.

The facts of the case shortly are that the defendant No. 4 Musammat Sareba Kuar, in the years 1908 and 1910 obtained a mortgage interest under a *rehan* deed of certain property which constitutes part of the property in suit. She was recorded in the Record-of Rights as being the usufructuary mortgagee and Tulsi Singh, her husband's brother's son was recorded as being an under-*raiyat* of the property. In the year 1911 a further holding was purchased in the name of Sareba Kuar and she was recorded as holding the *raiyat* interest in that property with Tulasi Singh as under-*raiyat*. In 1916, Sareba Kuar transferred both these properties, that is, her mortgage interest and her *raiyat* holding, to the plaintiff.

Subsequently the plaintiff being under the impression that Tulsi Singh was the under-*raiyat* sued him for rent. In that suit Tulsi Singh contended that he was not an under-*raiyat* of the property at all, that in fact he was a co-sharer with the other members of his family and that the property had only been purchased in the name of Sareba Kuar as *benamidar* for the family.

The rent suit which was brought in 1917 was decided in favour of Tulsi Singh and against the present plaintiff and in so far as that decision acts as *res judicata* the decision is not disputed in the present case.

The present suits were instituted in May 1908, claiming recovery of possession of the holding and of the *rehan* property. In the plaint the plaintiff set up a case that the property in suit in fact belonged to Sareba Kuar and was purchased by her as her own property but as an alternative case he pleaded that the defendants Nos. 1 and 2 who were Raj Kumar Singh, the brother-in-law of Sareba Kuar and Tulsi Singh his son had given the plaintiff to understand by their words, deeds and acts that the Musammat was the real *rehandar* and that it was upon the strength of these proceedings and evidence that the plaintiff purchased the *rehan* property and the other property from Mussammat Sareba Kuar.

When the case came for trial various issues were raised for determination which are not material for present purposes but issue No. 4 was whether Sareba Kuar was owner of the disputed property or a *farzidar* of the other defendants. The case all along made by the defendants was that Sareba Kuar was really their *farzidar* and that the property never belonged to her from start to finish.

Issue No. 6 which is the important issue to be considered in the appeal was to this effect :—

" Whether the deed of transfer by Sareba Kuar in favour of the plaintiff is valid and binding on the other defendants "

The case put forward at the trial on behalf of the plaintiff which arose upon that portion of the pleadings which I have referred to and upon the sixth issue which I have just set out was that under Section 41 of the Transfer of Property Act even if the defendants 1 and 2 were the real owners of the property in suit they had in fact, by their representations and their acts, induced the plaintiff to believe that Sareba Kuar was the real owner of the property, and they had thereby impliedly consented that she, who was undoubtedly the ostensible owner, should transfer the property to the plaintiff.

Her name was entered in the Record-of-rights as the owner and she in fact was allowed to keep possession of the title deeds and these facts were known to the plaintiff, but in order to show that he had complied with the provisions of S. 41 of the Transfer of Property Act he called evidence to show that he had taken reasonable care to ascertain that the transferor had power to make the transfer.

That evidence consisted of that of a *patwari* of the village, and his evidence was to the effect that he had made enquiries and he had informed the plaintiff as to the nature of the enquiries he had made. In considering the issue No. 6 the only question which the learned Munsif dealt with was the question of whether the provisions of S. 41 of the Transfer of Property Act had been complied with, and having considered the evidence put forward on behalf of the plaintiff, *viz.*, that of the *patwari*, he was not satisfied that the plaintiff had taken proper care to ascertain whether Sareba was really in possession of the property or not and therefore having found that the property in fact belonged to the other defendants 1 and 2 he dismissed the suit. It is important to bear in mind that that was the only question which was discussed in deciding the sixth issue.

The matter then went on appeal to the District Judge and the learned District Judge took a different view on the facts from that arrived at by the Munsif. He pointed out that the *patwari*, Lalji Lal stated that he had made enquiries on behalf of the purchaser and that he had learnt that Sareba Kuar was the real *rehandar* and that witness was not in fact cross-examined by the defendants. He was the *patwari* of the village and after the transfer was completed he was engaged as a servant of the plaintiff.

The Munsif had considered that his evidence was not trustworthy because he was not at the time he was alleged to have made the enquiries a servant of the plaintiff but only became so afterwards. The learned District Judge did not consider that this was sufficient ground for rejecting his evidence and he thought that the village *patwari* was a man very likely to have been employed to make enquiries of this sort, and, accepting his evidence as he did, the learned Dt. Judge came to the conclusion that the case under S. 41 of the Transfer of Property Act had been made out.

I may mention that apart from this question of enquiries there were many other circumstances in the case which led the Court to come to the conclusion that Sareba Kuar had been holding it as the ostensible owner.

From that decision the defendants appealed to the learned Judge of this Court. The learned Judge came to the conclusion that as there had been no direct issue raised as to whether S. 41 of the Transfer of Property Act applied or not he doubted whether the attention of the parties had been properly drawn to it or whether they had called the evidence upon that point which they would have done if the issue had been more distinctly raised, and therefore, he remanded the case back to the trial Court to re-hear the issue No. 6 with special reference to the question arising under Section 41 and gave the parties leave to adduce further evidence.

He further ordered that the District Judge on receiving the decision upon this issue of the Munsif should

give his opinion upon it and remit it to the High Court. The only question which has been argued in appeal before us to-day is whether or not upon the facts which I have stated, the learned Judge was justified in remanding the case. That must depend in the first instance upon whether the plea arising under Section 41 of the Transfer of Property Act was sufficiently raised by the issues settled before the trial.

In my opinion there can be no doubt that in the paragraph of the plaint which I have referred to this issue, although perhaps not very scientifically put, was clearly raised, *viz.*, that it was with the consent express or implied of the defendants that Sareba Kuar was the ostensible owner of the property and that in these circumstances they cannot complain if she had transferred the property to a *bona fide* purchaser. Again when the case came for trial as I have pointed out although the sixth issue did not in terms mention S. 41 of the Transfer of Property Act it could hardly have had reference to any other question than that which I have just referred to, and which alone is dealt with by the learned Munsif in determining the issue. The issue no doubt was a little wider than was necessary merely to include a point arising under S. 41 but the issue as framed clearly admitted of the question being decided in the case and I can see myself no other reason at all why this issue should have been raised except for the fact that it was foreshadowed in the pleadings, and the parties had notice of it. In these circumstances it seems to me that the matter having been raised and determined by the first appellate Court, it was not within the competence of this Court in second appeal to remand the case for a re hearing upon this very issue. Had the issue not been determined then obviously it would have been within the competency of this Court to remand the case for that purpose. But where you have an issue raised which is quite sufficient for the purpose, and you have evidence upon that issue and you have a distinct finding both by the trial Court and the first appellate Court, I do not think, with great respect to the learned Judge, that it is any longer open to him to refer the case back for re-hearing upon that very point. In my opinion these appeals should be allowed, the decrees appealed from should be set aside and the decrees of the learned District Judge on first appeal should be restored. The appellant is entitled to his costs throughout.

Mullick, J. :—I agree.

Appeals allowed.

A.I.R. 1922 Patna 577.

JWALA PRASAD AND BUCKNILL, JJ.

Gobind Ram and others—Defendants-Appellants v.

Ganesh Ram and others—Plaintiffs-Respondents.

Appeal No. 2 of 1922, decided on 2-5-1922, from S. J., Bhagalpur, dated 15-12-1921.

C. P.C. (1908), O. 40, R. 1 and O. XLIII, R. 1—Receiver—Order that Receiver should be appointed without actual appointment—Appeal lies.

An order of a Court that a Receiver should be appointed in a case (without appointing anybody by name as Receiver) and adjourning the case to later date for so appointing one is an order under O XL, R 1, and can be appealed from under O. XLIII, R. 1. 40 Mad 18 F.B. Foll. [P. 579, C 1.]

S. N. Mullick and *Haribhusan Mukerjee*—for Appellants.

C. C. Das, A. B. Mukerjee and *H. P. Singh*—for Respondents.

Bucknill, J. :—This is a miscellaneous Appeal No. 2 of 1922 preferred by certain persons who were defendants in an action brought against them in connection with the proposed partition of certain properties. The properties purported to be situate partially in the Kingdom of Nepal and partially in the neighbourhood of Muzaffarpur and Bhagalpur. On 26-9-1921, the plaintiffs filed an application supported, it is said, by an affidavit asking for the appointment of a Receiver for the reaping of certain standing crops and for the raising of future crops. They also asked for the issue of an injunction upon the defendants restraining the defendants from reaping or appropriating paddy crops on certain lands. From the actual wording of this application it does not seem clear that any particular portions of the lands, except those which were under cultivation, were referred to. Now, on the 19th of November, a further application was made by the plaintiffs. In this application the petitioners applied for the appointment of a Receiver to take charge of the properties and to get the crops cut and gathered or to depute some officer of the Court to have the paddy crops reaped and gathered. Here

again from the actual wording of the petition it is not abundantly clear as to whether the whole or a portion of the properties really were referred to.

To these petitions the defendants replied in a counter-petition, and, on the matter coming before the Subordinate Judge on the 15th of December, 1921, that officer dealt with it at considerable length. He says, that, under circumstances to which I shall presently refer, he thought that it was right that a Receiver should be appointed.

Now, before I go into the circumstances to which the Subordinate Judge refers it is necessary that I should deal very shortly with a preliminary point which was raised by the plaintiffs respondents here which certainly gives rise to a legal question of procedure which is of some interest.

The Subordinate Judge in what I may call the words of power in his order says:—

> " It is therefore ordered that a Receiver of the properties in suit shall be appointed. A person nominated by both parties should be appointed, failing which a pleader of this Court or any other person will be appointed after hearing both parties."

Now, in Order XL is found that part of the Code of Civil Procedure which deals with the appointment of Receivers by the Court and it is common ground that there is, from an order made under the provisions of sub-Section (1) of Rule 1 of Order XL of the Code of Civil Procedure, an appeal.

So far as is material here the phrasing of the above quoted order runs as follows:—" Where it appears to the Court to be just and convenient, the Court may by order (*a*) appoint a Receiver of any property, whether before or after decree."

Now, it is argued for the respondents here that where an order is made simply declaring that a Receiver *shall* be appointed, such order is not legally of the same effect as an order appointing a person individually as the Receiver, and, that until some definite person is appointed *by name* and, going even further that until the conditions upon which he is appointed have been settled (such as, with regard to security and so forth), there is no order from which an appeal can be maintained or is capable of admission or has in fact actually been made within the meaning of Order XLI, Rule 1 (1).

This proposition, the foundation of which, I do not think that I clearly understand, is undoubtedly supported by some authority. In the case of *Upendra Nath* v. *Bhupendra Nath* (1) it was held by Mookerjee and Teunon, JJ., that it was only from a final and not from any interlocutory order appointing a Receiver that an appeal lay under Order XLIII, Rule 1 of the Civil Procedure Code. In that case the Subordinate Judge was invited by certain plaintiffs to appoint a Receiver having, upon the materials placed before him, come to the conclusion that a Receiver ought to be appointed, he made an order to this effect, "I think the whole of the property in suit will be better managed and the interest of all the parties will be better served if the property in suit be placed in the hands of a competent Receiver."

The appellants (that is to say, the defendants there) appealed but their Lordships came to the conclusion that the appeal would manifestly be incompetent and premature. Again in the case of *Srinivas Prasad* v. *Kesho Prasad* (2) decided by Mookerjee and Carnduff, JJ., it was held that no appeal lay till the final order for the appointment of a Receiver had been made and it was further laid down there that no effective appointment of a Receiver had been made within the provisions of Order XL, Rule 1, until the furnishing of security had been effected.

Again it was held by Heaton and Shah, JJ., in the case of *Narabidashankar Mugatram Vyas* v. *Kewaldas Raghunathdas* (3) that an appeal under Order XLIII, Rule 1, Clause (*s*) of the Code of Civil Procedure did not lie from an order providing that " a proper person should be appointed Receiver."

In the course of his judgment in that case Heaton, J., states that the Subordinate Judge had given his directions in the following manner: " I therefore hold that a proper person should be appointed a Receiver. The parties will be further heard on the point as to *who should* be appointed a Receiver." Against this order the defendant appealed and in the course of his judgment Heaton, J., remarked: "It seems to me that the Court

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(1) (1910) 13 C. L. J. 157=9 I. C. 582.
(2) (1911) 14 C. L. J. 489=12 I. C. 745.
(3) (1915) 17 Bom. L. R. 510=29 I. C. 504.

has not appointed a Receiver. It has only decided that at some future date it will appoint a Receiver. But the actual order to appoint a Receiver, it seems to me, will be made only when the Judge actually nominates a person or an official and specifically appoints him to be the Receiver in the case."

In the case of *Mohammad Askari* v. *Nisar Husain* (4), it was held by Tudball and Ryves, JJ., that no appeal lay from an order by which the Court expresses an intention to appoint a Receiver and calls upon the plaintiff to suggest names with particulars regarding security, remuneration, etc.

Tudball, J., in his judgment says: " In the suit in question an application was made by the plaintiffs for the appointment of a Receiver." The defendants objected and after hearing arguments, the Court passed an order to the following effect, " I would, therefore, allow the application for appointment of a Receiver. Plaintiffs to suggest names for selection with particulars regarding security, remuneration and property to be taken possession of within a month."

This order was not regarded by their Lordships as constituting an appointment of a Receiver within the meaning of the order of the Code of Civil Procedure.

This is certainly a body of opinion which it is somewhat difficult to reconcile with the Full Bench case of *Palaniappa Chetty* v. *Palaniappa Chetty* (5). In that case it was held by Abdur Rahim and Srinivasa Ayyangar, JJ., (Spencer, J., dissenting) that an order of Court that a Receiver should be appointed in a case without appointing anybody *by name* as Receiver and adjourning the case to a later date for so appointing one is an order under Order XL, Rule 1, and can be appealed from under Order XLIII, Rule 1, of the Civil Procedure Code. There is thus a conflict of opinion.

I must confess that, so far as I myself am concerned, I am inclined to think that the logic of the matter rests better upon the Madras decision than upon the other decisions. To my mind the objection which has been suggested that there might be a series of appeals is not really very material. One cannot but contemplate the marked distinction which exists between the fact of a necessity for the appointment of a Receiver and the circumstances relating to the qualifications and the conditions upon which *the* Receiver is appointed. Why it is necessary that there should be present before an appeal can be preferred, a combination of those two factors which in themselves are disconnected, I do not know ; and I do not see why there should not be an appeal from the decision that the appointment of a Receiver is necessary nor why there should not be another appeal against the status or personality of any individual who is actually appointed the Receiver in a case.

For these reasons I think it would be wise here to regard the decision of the Madras Full Bench (in which I may add, most of the other cases, which I have quoted above, were referred to and which is also of quite a recent date) as at present a better authority than that as laid down in the earlier cases to which I have referred.

I now turn to deal with the question of the necessity for the appointment of a Receiver, that is to say, with the main appeal. Now, the learned Judge has dealt with this question very clearly. He has pointed out that the plaintiffs have produced certain evidence to show that so far as part of the Bhagalpur lands are concerned he is registered, that is to say, recorded, in a certain *khatians* relative to certain *jote* lands in that area.

He recites that the plaintiff's claim is based upon an assertion that the plaintiff and the defendants are brothers and members of a joint Hindu family ; he also indicates that, in disputing the plaintiff's claim the defendants appear to allege that in so far as the lands in Nepal are concerned, they, the defendants, do not lay any claim thereto and also that of the lands in the Muzaffarpur District no one is in possession.

He relates that there have been in the past, (and it is admitted that it is so) ill-feeling and disputes between the parties and he thinks that there is, indeed, a likely apprehension that in the future these conflicts may, unless there is some safeguarding of the property, be continued and probably lead to great difficulties in the proper management and lucra-

(4) (1919) 42 All. 227=54 I. C. 520=18 A. L. J. 212.

(5) (1917) 40 Mad. 18=5 L. W. 776=32 M. L. J. 304=40 I. C. 185=1917 M. W. N. 393 (F. B.)

tive cultivation of the lands in question.

He comes to the conclusion, therefore, (and in this I am bound to think that he has acted in his discretion quite rightly) that it was desirable that a Receiver should be appointed. Now, I do not see how, under circumstances such as these, it is possible for the appellants successfully to contend that the principles upon which Receivers should properly be appointed have been violated by the Subordinate Judge in any way, or that it would be possible for this Court under such circumstances as are disclosed in this case, to interfere with the well thought out decision of the Subordinate Judge.

It is suggested that there is some doubt whether or not in the Subordinate Judge's decision he has really ordered an appointment of a Receiver over the whole of the properties. I think myself that he has guarded himself carefully in dealing with this matter. He says that "It is true that I cannot appoint a Receiver with respect to any property situate in Nepal but the defendant disclaims all title to it and the Receiver when appointed may receive directions accordingly."

I suppose that what he means here is that he does not think that he can appoint a Receiver for properties situate outside British India; at any rate not in Nepal; but it may be that the matter of the nomination of the individual to be the Receiver and of the conditions upon which he is nominated may occasion before the Subordinate Judge some necessity for some arrangement which will result in the desirability of directions being given to the Receiver as to what in fact he can or should do or can be arranged to be done in connection with the property in Nepal.

Secondly with regard to the Muzaffarpur property, the Subordinate Judge has safeguarded, his order by pointing out that the defendants state that nobody is in possession of the Muzaffarpur properties and therefore that no Receiver can be appointed there because neither of the parties is in possession of the property or rather that part of the property in suit; and the Subordinate Judge adds, that, if the property situate in the Muzaffarpur District are discovered by the Receiver to be in the possession of neither party, the Receiver should submit a report to the Subordinate Judge and thereafter will receive the necessary directions thereon. With regard to the Bhagalpur properties, that of course presents no difficulty provided that he has, as I think is the case, applied the principle rightly.

Under those circumstances I think that this appeal should be dismissed with costs

Jwala Prasad, J.:—I agree.

Appeal dismissed.

A.I.R. 1922 Patna 580

DAWSON-MILLER, C. J. AND COUTTS, J.

Rijan Thakur—Applicant

v.

Charitar Thakur—Opposite-Party.

Civ. Review No. 3 of 1922, decided on 19th May, 1922.

(a) *Civil P. C., O. 41, R. 1—Several appeals from one judgment by different appellants—Copies of judgment are necessary with each memo—Patna High Court Rules, Ch. VII, R. 4.*

Where there are several appeals from one judgment by different appellants, the High Court will insist under the rules to have copies of judgment filed with each memo of appeal though where there are several appeals from the same judgment by the same appellant, he should be permitted to file one copy only of the judgment with the memorandum in one of his appeals.

[P. 581, C. 1.]

(b) *Limitation Act, Art. 156—Memo. without copy of judgment—Time is not saved until judgment is filed.*

It being required by rules of Patna High Court that where several appellants appeal from the same judgment, each memo of appeal must be accompanied by a copy of the judgment appealed from, the mere presentation of memo. of appeal does not save time though one of the memos. is accompanied by a copy of judgment and there is a request that in other cases the copy of judgment be dispensed with. [P. 581, C. 1; P. 582, C. 1].

N. N. Sinha—for Applicant.

Dawson Miller, C. J.:—This is an application asking us to review an order made on the 1st December last rejecting the petitioner's memorandum of appeal. It appears that there were four appeals presented to this Court from the same decision. The appellants in each case were different. The memoranda of appeal were presented in each case on the same day, *viz.*, the 26th October, 1921, but in one case only was a copy of the judgment appealed against filed together with the memorandum of appeal. At the same

time in the other three cases a petition was presented asking that the copy of the judgment might be dispensed with in those three cases. Under the rules of the Civil Procedure Code it is provided by O. XLI, R. 1, that the memorandum of appeal shall be accompanied by a copy of the decree appealed from and, unless the appellate Court dispenses therewith, of the judgment on which it is founded.

It is therefore quite clear that before the memorandum can be properly presented it must be accompanied by a copy of the decree in any event and a copy of the judgment appealed against unless for some reason or other the appellate Court dispenses with the necessity of filing the judgment.

So far as this Court is concerned it has always been the practice that where there are several appeals from the same judgment by the same appellant he should be permitted to file one copy only of the judgment with the memorandum in one of his appeals and that there need be no further copy accompanying the memorandum in the other cases, but where there are different appellants we have always insisted upon the rules being complied with in their entirety, there being no obvious reason why the Court should dispense with the necessity of filing a copy of the judgment with the memorandum of appeal in each case.

By the rules of this Court it is provided in Ch. VII, R. 4, that when the same appellant wishes to prefer more than one appeal against a judgment governing more than one case the Registrar may dispense with the production of more than one copy of the judgment, and it has been the practice of the Registrar in such cases to pass an order dispensing with a copy of the judgment except in one of the appeals where there are more than one presented by the same appellant.

That rule, I cannot help thinking, is well known to practitioners in this Court. On 27-6-1921, an application was made and came before a Bench asking the Courts to dispense with a copy of the judgment in one or more of several appeals arising out of the same judgment where the appellants were different and on that occasion we distinctly said, in reply to an argument on behalf of the applicant, that even in cases where there were more than one appellant appealing from the same judgment it was not necessary for more than one copy of the judgment to be presented in respect of all the appeals, that there is not and never has been any practice to this effect in this Court. The learned Vakil applying on behalf of the petitioner to-day states that in certain cases in this Court he has been granted the indulgence even where the appellants were not the same.

No cases however have been brought to our notice in which that has been done and even assuming that he may on one or possibly more than one occasion have obtained that indulgence which clearly he was not entitled to, unless there were some special circumstances of which we know nothing, that does not mean that there ever has been any such practice in this Court. The practice is clearly indicated in our own rules and it arises out of the rules laid down in the Civil Procedure Code and so far as my experience goes it has been invariably followed. What happened in the present case is this, in one of the appeals as already stated the decree and judgment accompanied the memorandum of appeal. The memorandum of appeal in each of the other cases was dated the 29-10-1921, the last day of the limitation period and no steps were taken before 29-11-1921, to file a copy of the judgment.

When the matter came before the Registrar, on application made to him, he referred to the practice and the rulings of this Court and said that the separate copies of the judgment ought to have been filed. He considered that the memorandum of appeal was out of time and he referred the matter to the Bench for orders. That was on the 29th November. On the 1st December the matter came before the Bench and even then no steps had been taken to obtain the judgment and to file it with the memorandum. I quite agree that under the Civil Procedure Code the appellate Court has power to dispense with the filing of the judgment. But the ground upon which this Court will dispense with the judgment has been clearly laid down and is, I cannot help thinking, fully understood and appreciated by the practitioners of this Court.

Accordingly when the matter came before us on the 1st December we

rejected the appellant's memorandum of appeal. We are asked to review that order and to restore the case. It appears to me that, in view of the practice which has continued, the appellant is not entitled to any indulgence merely because at the time of presenting his memorandum of appeal he has also filed a petition asking that he may be allowed to dispense with the filing of a copy of the judgment.

He knows, or he ought to know, perfectly well that in a case, such as the present, that is a request which the Court will not grant, and, although his memorandum of appeal may not necessarily be time-barred because the Court has the power subsequently to enable him to attach a copy of the judgment to the memorandum of appeal nevertheless, if the Court does not make such an order, then he takes the risk and his appeal is not presented in accordance with the rules laid down either in the Civil Procedure Code or by the rules of this Court.

It is urged before us to-day that the learned Registrar did not on the 29th November consider the application for an extension of time which it is said was put before him verbally. However that may be the learned Registrar referred the matter to the Bench and when the matter came to the Bench it is said that a further verbal application, although there was no written application in the form of a petition was made to the Bench to give further time to file the copies of the judgments.

If that is so, and speaking for myself I have no recollection of what actually took place on that occasion, it is obvious that at that time the Bench considered that the application to file copies of the judgment out of time was not a *bona fide* one, or one which, if made, entitled the applicant to have any further time in the circumstances.

The circumstances which are put forward to-day show absolutely nothing new which was not before the Court or which may not have been put before the Court on the previous occasion, and on this ground I think we ought not to entertain this application for review, and, however unfortunate it may be for the petitioner, we ought to reject his application. He has only himself to blame if he deliberately refuses to comply with the rules laid down.

Coutts, J. :—I agree.

Application rejected.

A. I. R. 1922 Patna 582.

COUTTS AND ADAMI, JJ.

Niru Bhagat—Appellant

v.

Emperor—Respondent.

Death Ref. No. 10 of 1922 and Cr. A. No. 65 of 1922, decided on 9th May, 1922, from the order of J. C. of Chota Nagpur, dated 12th April, 1922.

(a) Cr. P. C., S. 164—Examination like cross-examination—Statement is inadmissible.

Statement made during examination of the accused which amounts to cross-examination cannot be used against him. [P. 584, C. 1.]

(b) Criminal Trial—Leading question in chief examination cannot be allowed.

A leading question to the prosecution witness by the prosecution cannot be allowed nor can the reply be used. [P. 584, C. 1.]

(c) Criminal Trial—Confession—Witness mentioning it after great delay—Evidence is unreliable—Evidence—Appreciation.

When the story of confession was not told by the witness until after a fortnight of the occurrence, the evidence is unreliable. [P. 584, C. 1.]

(d) Criminal Trial—Non-production of material witnesses is suspicious.

The non-production of material witnesses like the investigation officers is a serious omission which cannot but throw suspicion on the whole prosecution case. [P. 584, C. 2; P. 585, C. 1.]

S. A. Sami—for Appellant.

Sultan Ahmed—for the Crown.

Coutts, J.:—The appellant in this case, Niru Bhagat, has been convicted by the Judicial Commissioner of Chota Nagpur of the murder of his mistress named Mt. Lalo, on the 1st of January of this year and he has been sentenced to undergo the extreme penalty of the law.

The case for the prosecution is that about six months before the date of the occurrence, Mt. Lalo deserted her husband and went to live with the appellant. The appellant was a follower of Kabir one of whose tenets was abstention from the eating of meat. Lalo refused to adopt the rules of Kabir and the result was that quarrels arose between her and Niru. On the Thursday before the death of Lalo there was a particularly bitter quarrel and Niru turned her and her things out of his house. She, however, put her things back into the house and refused to go and we next hear of the two having supper together amicably on the evening of Sunday the 1st of January. What happened afterwards at the house we do not know, but according to the prosecution during the night sometime towards morning, Niru went to the house of a fellow villager, Gansu Rautia woke him up and told him that as he was going to Barwe, he was returning him an axe which he had borrowed from him before

He actually left two axes with Gansu and went off.

Barwe, I may mention is a *pargana*, the boundary of which is a short distance from Niru's village. Before going away Niru told Gansu that he had killed Lalo. Niru then went to another co-villager, Chhedan Rautia, woke him up and demanded from him Rs. 9 which he had left with him to be kept in safe custody, and having got his money he told Chhedan that he had killed Lalo and then went away. Neither Gansu nor Chhedan did anything that night; but in the morning Lalo's father, who had been living with Niru and who had been away on a visit returned. He found the *angan* untidy and the door chained; he undid the chain and on opening the door he found Lalo's dead body lying on the ground.

Meanwhile Chhedan had for some unexplained reason gone to Gansu and told him that Niru had killed Lalo, whereupon Gansu went and fetched the *chaukidar* of the village named Thirpa. Thirpa on arriving at the house unhooked the chain which Lalo's father had apparently refastened and after he had seen the dead body of Lalo, he with Gansu and another villager, Gurlu Rautia, went to Raidih Thana and laid the first information. Raidih Thana is only ten miles from Niru's village; but the first information was not recorded till 6 o'clock in the evening and it was not until the next day at about 2 P.M. that the writer Head-Constable who had recorded the first information, went to the spot.

I may note here that after the Sub-Inspector of Raidih began to record the first information, he was seized with a fit and became "senseless," so the recording was continued by the writer Head-Constable, and this accounts for it being the writer Head-Constable who first went to the place of occurrence. On arrival at the place he began the investigation and sent the body of Lalo for *post mortem* examination. On the following day (the 4th) he handed over the investigation to the Sub-Inspector of Chainpur, who later, on the 13th, handed it over to the Sub-Inspector of Raidih.

On the morning of the 2nd when Lalo's father, Shibtahal Rautia, went to the house and when the *chaukidar* was taken there Niru was not at home, and for this reason apparently it was stated in the first information that he was suspected of having committed the murder. There was no trace of Niru until the 4th when a Sub-Inspector of Police who had been at Gumla to give evidence and was returning to his own Police station, saw a man at Lohardagga Railway Station behaving in what he considered to be a suspicious manner and when the man got into the train he followed him into the same carriage and got into conversation with him.

On account of what he told him he arrested him and took him to the Subdivisional Officer's office in Ranchi. The accused has in the Session Court denied all knowledge of the occurrence. In the Committing Magistrate's Court he was subjected to an examination which was really a cross-examination and in the course of it he stated that he had seen Lalo being killed by her husband, Budhu Rautia.

Some reliance appears to have been placed on portions of this statement not only by the Committing Magistrate but also by the Sessions Judge. It is clear, however, that the statement must be left out of consideration in this case, for it is not an examination of the accused such as is contemplated by the Code of Criminal Procedure. What we have then is a denial of all knowledge of the occurrence by the accused who also says that he was away from home at the time.

The result of the *post mortem* examination shows that Lalo had five very severe wounds on her head each of which had cut through the skull into the brain. The medical evidence shows that death was due to shock and haemorrhage caused by these injuries. The injuries were probably caused by an axe, and it is clear from this evidence that the woman Lalo was killed by some one who had made a brutal attack on her.

The question is whether it was the appellant who inflicted the injuries. The evidence against the appellant is (1) that he quarrelled with the woman after she went to live with him because she would not accept his mode of living; (2) that he was seen with her after supper on the evening before her dead body was found; (3) that he made confessions to Gansu and Chhedan; and (4) that he was seen at Lohardagga by the Sub-Inspector and was arrested by him in the train.

The most important evidence against the appellant is his alleged confessions to Gansu and Chhedan, the former of which

is said to have been overheard by Gansu's wife, Budhani (P. W. 3). As this is the most important evidence, it is necessary to examine it carefully, but I may say at the outset that the learned Government Advocate has admitted that it is open to very grave criticism. Gansu's statement is that Niru woke him up in the night. He said he was going to Barwe and handed over two axes one of which he had previously borrowed from Gansu. There his evidence stopped, but a leading question was put to him by the prosecution :

"Did he say anything about Musst. Lalo" to which the reply is :

"Yes, he said he had killed her."

I need hardly say that it was most improper of the prosecution to put a leading question of this kind and it is surprising that the learned Judicial Commissioner should have allowed it or that he should have recorded and used the reply. It is impossible to attach any value to evidence elicited by the prosecution in this way.

Apart from this, however, I fail to see how it would be possible to rely on this evidence. In the first place the story is an improbable one. That a man who had just committed a brutal murder and was escaping should go to a neighbour merely to return a borrowed axe and thus to create evidence against himself is a story it would be very difficult to believe

It becomes still more incredible when we find that it was never told to any one until the 12th or 13th when it was told to the Sub-Inspector of Raidih. The improbability of this story and the fact that it was not told until nearly a fortnight after the occurrence is sufficient to damn it, but in addition to this there are certain discrepancies between the evidence of Gansu and Budhani his wife, which of themselves would go far to discredit the evidence. Gansu says that Niru did not speak loudly and that he could not distinctly hear whether he said he had killed his wife or what he said.

Budhani, on the other hand, says that he spoke loudly when he said he killed his wife. Again Gansu says that Niru gave him the axes, whereas his wife says that Niru had fled before her husband got into the verandah. It is unnecessary to go further into these discrepancies. It is impossible in my opinion to credit this story and the story of the axes would appear to have been introduced for the purpose of getting some material exhibit in the case.

The evidence of the witness Chhedan is of very much the same character, except that he is the only person who tells the story and consequently there can be no corroboration or discrepancies. His story is that Niru woke him up to get Rs. 9 which he was keeping in safe custody.

Here again we have the inherent improbability of the story of a man having just committed a brutal murder creating evidence against himself and the fact that Chhedan did not tell the story of this so-called confession until nearly a fortnight after the occurrence. It is an improbable story which is uncorroborated, and under the circumstances I am unable to accept it.

The evidence of the so-called confession then goes and without this there is really nothing even if we accept the rest of the evidence to connect the accused with the murder except the quarrel, and the fact that Niru was the last person seen with the deceased before her death. The last quarrel, however, took place three days before the day of the occurrence and the evidence is that the appellant and the deceased when last seen were apparently sitting amicably together, so that the motive for the crime, so far as the accused is concerned, has disappeared.

As a matter of fact, however, it is difficult to say whether the evidence of the quarrel and of eating supper together can be believed or not. The examination-in-chief and the cross examination of all the witnesses indicate that both the prosecution and the defence have been conducted in a most perfunctory manner, and the learned Judicial Commissioner does not appear to have exerted himself to get at the real truth of the case. Not only does this appear from a perusal of the evidence itself but it is also apparent from the fact that material witnesses have not been examined and no explanation is offered for their non-examination.

With the exception of the writer Head-Constable no investigating officer has been examined though apparently there were other two such officers. We, therefore, do not know when the witnesses Nos. 5 and 6 who deposed to the quarrel and the eating together of the supper, were examined by

the police. It was important to know this and the non-production of such material witnesses as the investigation officers, is a serious omission which cannot but throw suspicion on the whole prosecution case.

Other points, which no attempt has been made to explain, are the delay in laying the first information and the delay in the writer Head-Constable going to the spot after the first information was laid. In this connection also I may mention that Shibtahal Rautia in his evidence has referred several times to his wife and his evidence as it stands shows that he was expecting to find her at the house when he returned on the morning after the occurrence.

I am not certain that the word "wife" has not been wrongly recorded by the learned Judicial Commissioner for the word "daughter" and I think that this is probably what has occurred; but it is a matter which should have been cleared up, and if there is no mistake in recording the evidence Shibtahal's wife was the most important witness in the case.

It is hardly necessary to refer to the evidence regarding the arrest of the appellant in the train, because as the learned Government Advocate has said it does not really affect the case. Niru's travelling by train from Lohardagga is quite as consistent with his story told to the Judicial Commissioner that he was away from home at the time of the occurrence as with his guilt.

In the result then in my opinion no case has been established against the appellant. I would accordingly set aside the conviction and sentence and acquit the appellant.

Adami, J.:—I agree with the decision arrived at by my learned brother. There is only circumstantial evidence to connect the accused with the crime, and in cases of this nature, especially in cases of a charge of murder, it is most necessary that every link of the chain of evidence should be carefully tested; no link should be missing and every link should be fully proved.

In the present case there are links which will not stand the test. In my opinion the test applied by the prosecution and the Court was not sufficient. The examination of the witnesses has been somewhat perfunctory, and insufficient attempt has been made to verify the details of the case which was one in which caution was most necessary.

I am of opinion that the appellant should be acquitted. *Conviction set aside.*

A. I. R. 1922 Patna 585.

COUTTS AND DAS, JJ.

Mt. Dulhin Sona Koer—Applicant

v.

Shah Mahmuddul Haque—Opp. Party.

Civ. Rev. No. 22 of 1922, decided on 16th May, 1922, against an order of Dist. J., Patna, dated 27th September, 1917.

Administration—Receiver appointed—District Judge can direct share of one heir to be made over to him on terms.

Pending the administration of the estate the D. J has jurisdiction to direct the share of one of the heirs, who gives an undertaking to be responsible for his share of debts to be made over to him. Such an order of the District Judge merely operates as an order of discharge of the Receiver so far as that share is concerned.

[P 586, C 1,]

Kulwant Sahay, Gurusaran Prasad and *R. C. Bhaduri*—for Applicant.

Hasan Jan and *Md. Ishaq*—for Opposite party.

Das, J.:—This application is directed against an order passed by the learned District Judge of Patna, on the 29th of September, 1921. That order was made in an administration action which was pending in his Court.

It appears that one Mt. Bibi Fasihan died some time ago leaving amongst others Bibi Saira as one of her heirs. The opposite party Mahmudul Haque is the heir of Bibi Saira. On the death of Mt. Fasihan certain persons, whose names it is unnecessary to mention in this judgment, set up certain deeds of gift in their favour. Some of the heirs of Mt. Bibi Fasihan thereupon brought a suit to set aside those deeds of gift. This Court on appeal came to the conclusion that the deeds of gift were not genuine and that in the circumstances of the case a decree for administration of the estate should be passed. It appears that the learned District Judge, under the direction of this Court, passed a preliminary decree for administration of the estate. A Receiver was appointed to take charge of the estate pending the administration of the estate.

An application was made before the learned District Judge on behalf of Mahmudul Haque for release of his share in the estate. The learned District Judge has made an order in his favour and it is against this order that the present appli-

cation has been presented to this Court.

Mr. Kulwant Sahay, on behalf of the petitioner, contends that there was no jurisdiction in the learned Dt. Judge to release the share of Mahmudul Haque until the administration of the estate was completed. I am of opinion that the learned Dt. Judge had complete jurisdiction to pass the order which he did. It is unnecessary to determine the question whether in the circumstances the learned Dt. Judge should have passed the order which he did. All that we are concerned in this application is the jurisdiction of the Court. No authority has been shown to us to establish that pending the administration of the estate the Court has no power to direct the share of one of the heirs to be made over to him. As a matter of fact the learned Dt. Judge in passing the order has completely safeguarded the interests of the estate. He found that there were no claims against Mahmudul Haque except for his share in the outstanding debt of Rs. 4,000 and the possible claims under litigation by Girdhar Das and Dulhin Sona Koer and for any sums that may be due on account of funeral expenses of Bibi Fasihan and on account of advances made by the Receiver. But then Mahmudul Haque gave an undertaking to be responsible for his share in those debts.

In my opinion, the order of the learned Dt. Judge merely operates as an order of discharge of the Receiver so far as the share of Mahmudul Haque is concerned. It may be convenient to have a Receiver in the matter of the working out of an administration decree, but it cannot be suggested that that is the only possible way of working out the administration decree; for the decree which has been passed by the Court can well be carried into execution although the learned Dt. Judge has directed the share of Mahmudul Haque to be made over to him.

I can see nothing wrong in the order passed by the learned Dt. Judge and would dismiss this application with costs.

Coutts, J.:—I agree.

Application dismissed.

A. I. R. 1922 Patna 586.

MULLICK AND COUTTS, JJ.

Hiranand Ojha—Petitioner

v.

Emperor—Opposite-Party.

Cr. Rev. No. 216 of 1922, decided on 2—5—1922 against an order of J. C., Chota Nagpur, dated 26—1—1922.

(a) *Criminal P C S 192 with 110—Proceeding under S. 110 is a case and S. 192 applies.*

Section 192 applies to a proceeding under Section 110 the proceeding being a case. [P. 587, C. 1.]

(b) *Criminal P. C. S. 110—Power of the Magistrate—Receipt of information not limited to any particular method.*

The law in no way limits the method in which the Magistrate, who is empowered by the Local Government, is to receive the information and even if the information is addressed to the Judicial Commissioner or to another Magistrate and is then received by the Magistrate, there is nothing in the section which would preclude him from acting on the information so received.

[P. 587, C. 2.]

K. N. Choudhury and *Devaki Pd. Sinha*—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Coutts, J.:—This is an application made in revision against an order of the J. Commissioner of Chota Nagpur on the ground that the Magistrate who passed the order under S. 110, Cr. P. C. acted without jurisdiction. The facts of the case, so far as they are necessary for the disposal of this application, are that certain tenants of the petitioner, Hiranand Ojha, filed an application before the Commissioner of the Chota Nagpur Division while he was on a visit to Palamau, complaining about extortion and oppression alleged to have been committed by Hiranand Ojha. The Commissioner forwarded the application to the Dy. Commissioner of Palamau, who, in his turn, forwarded it to the Supdt. of Police for enquiry. Under the orders of the Supdt. of Police, the Inspector made an enquiry and submitted a report on 2—6—1921, in which he stated that there was sufficient evidence against Hiranand Ojha and some of his servants for a proceeding under S. 110, Cr. P. C. This report was received by Mr. Chatterji, Senior Dy. Magistrate in charge, who forwarded it to another Dy. Magistrate, Babu Bishundeo Narain Sinha, with the following order:—

"To Babu Bishundeo Narain Sinha for disposal. He will please draw up proceedings and summon the accused for a date convenient for him."

On receipt of this order Babu Bishundeo Narain Sinha directed that the case be put up on the following day. After going through the Inspector's report on the following day (14th June) he passed an order to the effect that he had read the report of the Inspector of Police, and from the report it appeared that Hiranand Ojha and others were in the habit of com-

mitting mischief, extortion and other offences involving a breach of the peace. He finally passed an order directing that Hiranand Ojha, Dharam Dayal Missir and Maheswar Dubey should give security to be of good behaviour.

On a reference made to the Judicial Commissioner under Section 123, Criminal Procedure Code, Dharam Dayal Missir was released altogether and the security which was demanded from the other two accused, who are the petitioners now before us, was reduced.

The contention of the petitioners now is that the order is without jurisdiction because the Senior Deputy Magistrate having taken cognizance of the case, he could not transfer it to Babu Bishundeo Narain Sinha. There are two points of view, either Mr. Chatterji took cognizance of the case or he did not. If he did take cognizance of the case he was empowered to transfer it under Section 192 (2), Criminal Procedure Code, to Babu Bishundeo Narain Sinha, who was also empowered under Section 110, to dispose of the case.

It has been contended by the learned Counsel for the petitioners that Section 192 (2) does not apply to proceedings under Section 110, but he seems to be under some misapprehension as to the scope of Section 192. Section 192 deals with the transfer of cases. A proceeding under Section 110 is undoubtedly a case although the section does not deal with particular offences and the cognizance that is there taken is not cognizance of an offence but cognizance of a case.

To say that Section 192 does not apply to proceedings under Section 110, is taking a very narrow view of the section which in my view is not authorized by the wording of that section. It has been held that Section 192 applies to proceedings under Section 145 and there is no reason why it should not also apply to proceedings under Section 110.

The other view is that Mr. Chatterji had not taken cognizance and it is suggested that he is the only Magistrate who could have done so under Section 110. I am unable to accept this contention. Section 110, runs as follows :—

"Whenever a Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate or a Magistrate of the First Class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction is by.....such Magistrate may, in manner hereinafter provided require such person to show cause why he should not be ordered to execute a bond with sureties, for his good behaviour for such period not exceeding three years, as the Magistrate thinks fit to fix"

Now it is not denied that Babu Bishundeo Narain Sinha is a First Class Magistrate specially empowered by the Local Government and it is also not denied that he in fact received the information ; but it is contended that the information was sent to him through Mr. Chatterji, Senior Deputy Magistrate, and that, therefore, he could not take cognizance.

The law in no way limits the method in which the Magistrate who is empowered by the Local Government is to receive the information, and even if the information is addressed to the Judicial Commissioner or to another Magistrate and is received by Babu Bishundeo Narain Sinha, there is nothing in the section which would preclude him from acting on the information so received.

It may be that there are executive orders preventing any Magistrate, except the Deputy Commissioner from acting on information, but the section makes no such restriction, and this being so the action taken by the Deputy Magistrate in this particular case is certainly not without jurisdiction.

In the result then I see no reason to interfere and I would dismiss this applition.

Mullick, J. :—I agree. In the absence of evidence to the contrary it must be assumed that Mr. Chatterji had power under Section 192 to transfer the case to Babu Bishundeo Narain Sinha.

Application dismissed.

A. I. R. 1922 Patna 587.

JWALA PRASAD AND COUTTS, JJ.

Olayat Khan—Accused

v.

Emperor—Opposite Party.

Cr. Rev. No. 85 of 1922, decided on 4th April 1922 against an order of S. J., Manbhum, dated 10th February, 1922.

Criminal P. C. Ss. 439 and 423—Appeal disposed of on merits—Pleader not heard—High Court cannot interfere under S. 439.

Where the appeal is disposed of on the merits under Section 423, there is no power in High Court under Section 439 to set aside the judgment of the Court below, merely upon the ground that the pleader

or the Counsel on behalf of the petitioner was not heard in the Court below.

Hasan Imam—for Petitioner.

H. L. Nandkeolyar—for the Crown.

Judgment:—This application appears to be incompetent. The appeal in the Court below was disposed of under Section 423 of the Code of Criminal Procedure after "perusing the record" and considering the grounds of appeal. The appellant's Counsel could not be heard inasmuch as he was prevented from being present in Court in time on account of the railway strike. The appeal was, therefore, disposed of on the merits, and in revision we can deal with it only under Section 439 of the Code of Criminal Procedure, under which the petition before us has to be disposed of under Section 423 of the Code.

There is, therefore, no power in this Court to set aside the judgment of the Court below, merely upon the ground that the Pleader or the Counsel on behalf of the petitioner was not heard in the Court below.

The application is, therefore rejected.

Application rejected.

A.I.R. 1922 Patna 588.

FULL BENCH.

DAWSON MILLER, C. J., MULLICK AND JWALA PRASAD, JJ.

Khubi Mahton and others—Appellants

v.

Lachmi Das and others—Respondent

S. A. Nos. 433-437 and 509 of 1919, decided on 19th June, 1922, against the decision, 1st Class Sub. J., Monghyr, dated 29th January, 1919.

Bengal Regulation (XI of 1825), S. 4 (1)—Accretion to holding out of riverbed which is the property of landlord—S. 4 (1) applies—Section not confined to lands which are the property of the state.

The first clause of the fourth section of the Regulation applies clearly both to the case of a superior landlord who holds from the Crown, and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown and to be limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and none else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise and permit a landlord to acquire in this manner a proprietary right in the land of his neighbour with whom he has no relationship such as that of a tenant to his landlord would be going outside the scope of the section and permitting what in effect would be confiscation of another man's land. This consideration however does not apply where the claim is by a tenant against land of his landlord, a claim which by the proviso to the first clause of the section is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed and which by the same proviso carries with it the liability to pay an increase of rent The section applies in all cases where the tenant claims as an increment to his tenure, land gained by gradual acquisition from the bed of the river which is the property of his landlord and, except in the case of a claim by the superior landlord, the section is not confined to lands which are the property of the State. 1 P. L. J. 536; 1 P. L. T. 229; 13 M. I. A. 467 Ref.

[P. 591, C. 2; P. 593, C. 1]

Per Mullick, J.—The Regulation does not provide for islands in a large and navigable river, the bed of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual. While Clauses 3 and 4 determine the right of proprietorship they are subject to the provisions of Clause (1) in respect of the assessment of revenue and the rights of tenants. With regard to the rights of tenure-holders and *raiyats*. Clause (1) deals with rivers of all classes and is subject to no words of limitation or restriction. The Regulation is not exhaustive. It is subject to the rules of equity and justice. Therefore land gained from the river bed by reformation *in situ* or otherwise will, if it can be identified, belong to the owner of the bed except when otherwise expressly prescribed by the Regulation. This rule will preclude a tenant from acquiring a right of tenancy in an accretion from a riverbed which was not the property of his landlord before emergence.

[P. 593, C. 1, 2; P. 595, C. 1]

Sultan Ahmed and *Md. Tahir*—for Appellants.

Hasan Imam, C. C. Das and *S. N. Ray*—for Respondents.

ORDER OF REFERENCE.

Das, J.:—The plaintiffs who are the respondents before us are the landlords and the defendants the tenants. The suits out of which these appeals arise were suits for recovery of possession of certain lands. These lands formed the bed of the river Gandak and came out of the water only recently. The plaintiff's case is that the lands which are the subject-matter of the dispute belong to them and that though they could not exercise any proprietary title over them

while they were covered with water, they are now entitled as the water has receded. The defendants did not dispute the proprietary title of the plaintiffs, but they based their claim upon Section 4 of Regulation XI of 1825. Their case is that they are entitled to hold these land as an accretion to their holdings.

The lower appellate Court pointed out that the defendants did not dispute the case of the plaintiffs that the bed of the river belonged to them and being of opinion that the lands were not formed by slow and gradual accretion of the river within the meaning of Clause 1, Section 4 of Regulation XI of 1825 decreed the plaintiffs' claim. On appeal to this Court it was argued that the lower appellate Court was under the impression that in order to bring a case within Clause 1 of Section 4 of the Regulation it was necessary to establish that the accretion was imperceptible; and that as that view can no longer be maintained in view of the decision of the Judicial Committee in the case of *Srinath Ray* v. *Dinobundhu Sen* (1) the decree passed by the lower appellate Court could not be sustained. We acceded to the argument urged on behalf of the appellant and we remanded the case to the lower appellate Court to return its finding to this Court on issue No. 2: "Have the lands in suit been gained to the holdings of the defendants by gradual accession from the recess of the river Gandak as contemplated by Regulation XI of 1825."

The lower appellate Court has answered the question in affirmative. On the finding arrived at by the lower appellate Court which, it may be pointed out, is a finding of fact and, therefore, binding on us in second appeal the appellants are entitled to succeed.

It was, however, argued by Mr. Hasan Imam that as the bed of the river belongs to the respondents, there is in fact no case to be tried under Clause 1, Section 4 of the Regulation. He relies upon the decision of the Judicial Committee in *Lopez* v. *Maddun Mohan Thakoor* (2) and on the decision of this Court in *Brahmanand Singh* v. *Dund Bahadur* (3). The appellants on the other hand rely upon the decision of this Court in *Puri Das* v. *Kanhu Behera* (4).

There is clearly a conflict between the decisions of this Court. It was laid down in *Puri Das* v. *Kanhu Behera* (4) that Section 4 of the Regulation was not limited in its application to a river the bed of which is the property of the Crown. That was a case where the plaintiffs claimed to be in possession of the land in dispute as an accretion to their *raiyati* holdings. The landlords who were the defendants maintained that the river, out of the bed of which the accretions were alleged to have formed, being their private property, Section 4 of the Regulation did not apply. Their argument was that Section 4 of the Regulation applied only to a case where the bed of the river was the property of the Crown. The learned Judges took the view that there was no authority in support of the contention put forward on behalf of the landlord and they came to the conclusion that notwithstanding the fact that the bed of the river was the property of the landlord the tenants could still claim title to the lands which formed the bed of the river as an accretion to their *raiyati* holdings. This view was not accepted in *Brahmanand Singh* v. *Dund Bahadur Singh* (3). It was pointed out in the latter case that the decision of the Judicial Committee in *Lopez's case* (2) was an authority for the proposition that Section 4, Clause 1 of the Regulation applied to cases of gradual accession from public domain or territory, *e. g.*, river or sea belonging to the State and did not refer to land confiscated from another's private property, and that Section 4 had no application where the accreted land in dispute was shown to have reformed on its identifiable site. It was, however, not necessary to decide the exact point in *Brahmanand Singh* v. *Dund Bahadur Singh* (3). I was a party to the decision in *Brahmanand Singh* v. *Dund Bahadur Singh* (3) and I adhere to the view which I expressed in

(1) A.I.R. 1914 P. C. 48=42 Cal. 489=41 I. A. 221=18 C. W. N 1217=(1914) M W. N. 654=1 L. W. 733=16 M. L T. 319 =12 A L. J. 1193=20. C. L. J. 385= 16 Bom L. R. 901 (P. C.).

(2) (1870) 13 M. I. A. 467=14 W. R. P. C. 11=5 B. L. R. 521=2 Sar. 594 (P. C)

(3) (1920) 1 P. L. T. 229=56 I. C. 344= 1920 P. H. C. C. 245.

(4) (1916) 1 P. L. J. 536=38 I. C. 135.

the case. There being a clear conflict between the two decisions the point which I desire to refer to the Full Bench is this, "Does Clause 1, Section 4 of Regulation XI of 1825 apply to a case where the river out of the bed of which the accretions have formed is the private property of an individual and not the property of the Crown."

Jwala Prasad, J.:—I agree.

[Opinion.]

Dawson Miller, C. J.:—The only question for determination in these appeals is whether the appellants, who are the tenants of *raiyati* holdings abutting on the river Gandak, are entitled to possession, as an increment to their holdings, of certain lands adjacent thereto which have been gained by gradual accession from the bed of the river, or whether the respondents, their landlords, who have the proprietary interest in the bed of the river as well as in the appellants' holdings, are entitled to *khas* possession.

The determination of the question must depend upon the construction to be placed upon the first clause of Section 4 of Bengal Regulation, XI of 1825, known as the Bengal Alluvion and Diluvion Regulation. It is the appellants' case that the Regulation entitles them to a *raiyati* interest in the lands of their landlords, acquired in the manner stated, upon payment of additional rent.

The respondents, on the other hand, contend that the Regulation has no application except in cases where the bed of the river out of which the lands have emerged is the property of the State.

The first clause of Section 4 of the Regulation reads as follows:—

"4. *First.*—When land may be gained by gradual accession, whether from the races of the river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a *Zamindar* or other superior landholder, or as a subordinate tenure by any description of under-tenant whatever."

There is a proviso to the clause to the effect that the interest so acquired in the accreted land shall not be greater than that held by the person in possession of the estate or tenure to which it may become annexed, and that the holder shall not be exempt in respect of the accreted land from assessment of revenue payable to Government, nor, in the case of a subordinate tenure under a superior landlord, shall be under-tenant of whatever description be exempt from payment of any increase of rent to which he may be justly liable.

The suits out of which the appeals arise were instituted by the respondents, as landlords, claiming to recover possession from their tonants of the lands in question. The tenants relied upon the Regulation and claimed to retain possession, subject to the payment of an additional rent.

The Munsif before whom the suits were tried passed a decree in favour of the landlords on the ground that there had been no gradual accretion within the meaning of the Regulation. He was of opinion that to bring it within the section the accession must be by gradual, slow and imperceptible means, and, further, that to permit the tenants to acquire an interest in the lands of their landlords would be destructive of the rights of private property and contrary to the decision of the Judicial Committee in *Lopez* v. *Muddun Mohan* (2).

On appeal to the Subordinate Judge the Munsif's decision was affirmed and the appeal dismissed.

On second appeal to this Court the learned Judges before whom it was heard held that the view that the accretion should be imperceptible in order to bring it within the Regulation could no longer be maintained in face of the decision of the Judicial Committee in *Srinath Roy* v. *Dinabandhu Sen* (1) a ruling which has been followed by this Court in *Lala Lachmi Narayan* v. *Kesho Prasad Singh* (5).

They accordingly remanded the case to the lower appellate Court, with certain directions as to the principle to be applied, for a finding on the issue. "Have the lands in suit been gained to the holdings of the defendants by gradual accession from the recess of the river Gandak as contemplated by Regulation XI of 1825."

That issue was answered by the lower appellate Court in the affirmative and when the case came back to this Court for final disposal the only question which remained for decision in the appeal was that which I have stated at the begin-

(5) (1919) 5 P. L. J. 1=52 I. C. 147= 1920 P. H. C. C. 102.

ning of this judgment. The learned Judges who heard the appeal considered that there was a conflict of opinion on the point in the decisions of this Court in *Puri Dass* v. *Kanhu Behera* (4) and the more recent case of *Babu Brahmanand Singh* v. *Dund Bahadur Singh* (3).

In my opinion both these cases were rightly decided. In the former the dispute was between *raiyats*, who claimed the land as an accretion to their holdings, and the transferees of their landlords in whom the bed of river was vested and, it was held that, in such a case, Section 4, Clause (1) of the Regulation was not limited in its application to a river the bed of which is the property of the Crown.

In the latter case the dispute was between neighbouring proprietors. The lands which originally belonged to the plaintiffs had become diluviated, and had subsequently, by a further change in the river's course, reformed *in situ* on the boundary of the defendants' land. It was there held, following the decision in *Lopez's* case (2), that the defendants could acquire no interest under the Regulation to lands belonging to a private individual and not to the Crown.

There are, however, certain observations in the judgment of Mr. Justice Das in that case which might lead to the inference that in no case could the section have any application unless the bed of the river was Crown property. The proposition thus broadly stated was not necessary for the determination of the question then before the Court. The dispute there was not between a landlord and his tenant as in the earlier case of *Puri Dass* v. *Kanhu Behera* (4) and as here, but between neighbouring proprietors, one of whom claimed the accreted land as an increment to his *Zamindary* although the proprietary rights in the bed of the river from which the land emerged belonged to the other. The facs in that case were similar to those in *Lopez* v. *Muddan Mohan* (2) and the principal laid down in *Lopez's* case applied with equal force to the facts in that case.

In both cases the dispute was between neighouring proprietors neither of whom held his interest through or under the other, and in both cases it was found that the ownership of the accreted lands had all along been, not in the party to whose land the accretions had become attached, nor in the Crown from whom he held, but in the other proprietor.

On a perusal of the first clause of the fourth section of the Regulation it appears to me to apply clearly both to the case of a superior landlord, who holds from the Crown, and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown, and to be limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and no one else.

In such a case it is only, where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise and permit a landlord to acquire in this manner a proprietary right in the land of his neighbour, with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what, in effect, would be confiscation of another man's land.

This consideration, however, does not apply where the claim is by a tenant against land of his landlord a claim which by the proviso to the first clause of the section is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed, and which by the same proviso, carries with it the liability to pay an increase of rent.

In *Lopez* v. *Maddun Mohan* (2), as already indicated, the claim was by a superior landlord holding immediately under the Crown and claiming as an increment to his estate a portion of the former bed of the river which belonged not to the Government from whom he held, but to a neighbouring *zamindar* from whom he held nothing.

We, therefore, find in the judgment in that case an emphatic repudiation of the suggestion that the Regulation authorised the confiscation or destruction of any private person's property, and a declaration that the gain which an individual proprietor might acquire under the Regulation could only occur in

> "that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the state, a public river belonging to the State."

It must be borne in mind that in thus limiting the operation of the Regulation

their Lordships were considering only the claim of a superior landlord to the lands of his neighbour through whom his title was not derived, and not the case of a subordinate tenure-holder claiming against his immediate landlord.

It is contended, however, on behalf of the respondents that the interpretation placed upon the Regulation in *Lopez's* case (2) clearly lays down the broad proposition that it applies only to the sea or public rivers belonging to the State. I agree that this is so in cases where the claimant is a superior landlord holding under the Crown, but I cannot believe that it was the intention of their Lordships in that case to lay down a broad general proposition applying to a state of affairs which was not then under consideration, nor can I find anything in the section itself which would limit the rights of subordinate tenure-holders, or under-tenants, to cases in which the accreted lands formed part of the public domain.

Other cases were referred to on behalf of the respondents in support of their contention, and in which language similar to that used in *Lopez's* case (2), appears, and where it is stated that the right by accretion is limited to gains from that which was not previously private property. See *Ramanath Thakoor* v. *Chunder Narain* (6). *Mohini Mohan Dass* v. *Juggobundoo Bose* (7), *Dwarkanath Roy* v. *Dinobundhoo Singh* (8), *Jugdish Chunder* v. *Chowdhury Zuhoor-ul-Huq* (9).

It is sufficient to say that in each of those cases the dispute was between rival proprietors and in none of them was the right of a tenant against his landlord under consideration.

On the other hand in *Attimoollah* v. *Saheboolah* (10) it was held that a *mouroosi Jotedar* with a right of occupancy has a right to lands which accrete to his *jote* and *Zamindar* cannot take them away and settle them with other parties. In *Bhuggobut Pershad* v. *Doorg Bijoy* (11) it was held that as between himself and the *Zamindar* a *raiyat* is entitled to any accretion of his holding formed by the recession of the river, and the fact of his being a mere tenant-at-will does not entitle the *Zamindar* to turn him out of the accretion whilst he retains, as tenant, the original holding.

In *Gourhari Kaiburto* v. *Bhola Kaiburto* (12), decided in 1894, by a Full Bench of the Calcutta High Court it was also held that a *raiyat* who had a right of occupancy was entitled to the benefit of Section 4, Clause (1) of the Regulation as against the defendant who claimed to be in possession by virtue of a settlement from the landlord; and in *Mahadeo Pershad* v. *Mathura Tanti* (13), decided in 1909, it was again held that the fourth section of the Regulation applied in favour of a tenant against his landlord.

In none of those cases does it appear that the ownership in the bed of the river was in the Crown. Certainly no argument was urged in any of them based upon a distinction between public and private rivers. Finally in 1918 in *Gobinda Hota* v. *Kristapada Singh* (14) it was held by a Bench of the Calcutta High Court that the lands which have gradually accreted to a *mukarrari* holding forming a *chur* in a small shallow river, cannot be claimed by a *zamindar*, the proprietor of the bed of the river, as a portion of his *khas patti* but belong to the tenant subject to the payment of additional rent in respect thereof.

The proprietary right to the *chur* no doubt existed, and by Clause (4) of the section continued in the *zamindar* but the tenant's right also accrued under the first clause of the section to which the fourth clause is subject.

It is contended by the learned Counsel for the respondents that where the superior landlord acquires, by gradual accession, a proprietary interest, as against the Government, in a portion of the bed of the river as an increment to his estate, his tenant, to whose tenure or holding the land is annexed, also acquires, as against his landlord, the same interest in the accreted lands as he possessed in his tenure or holding.

The landlord acquires against the Crown, the tenant acquires against his landlord and the under-tenant, if there be one, also acquires against the intermediate proprietor from whom he

(6) (1862) 14 W.R P.C. 12.
(7) (1868) 9 W.R. 312.
(8) (1871) 15 W.R. 461.
(9) (1875) 24 W R. 317.
(10) (1871) 15 W. R. 149.
(11) (1871) 16 W. R. 95=8 B.L.R. 73.
(12) (1894) 21 Cal. 233 (F. B.)
(13) (1909) 11 C.L.J. 148=5 I. C. 723.
(14) (1918) 45 I. C. 929.

holds. If there is no confiscation by the tenant of his landlord's property in such a case, it is difficult to appreciate how there can be confiscation or destruction of his property merely because at some earlier period the landlord had acquired from the Crown a proprietary interest in the river bed from which the land subsequently emerged.

In my opinion, the section applies in all cases where the tenant claims, as an increment to his tenure, land gained by gradual accession from the recess of the river, the property of his landlord, and, except in the case of a claim by the superior landlord, the section is not confined to lands which are the property of the State.

I would allow the appeals in each case with costs to the appellants here and in the Courts below.

Mullick, J.:—In my opinion the appellants are entitled to hold the lands in suit as accretions to their ancient occupancy holding and I am still of opinion that the case of *Puri Dass* v. *Kanhu Behera* (4) was correctly decided. Indeed nothing was decided in that case which could possibly have affected the decision in *Brahmanand* v. *Dund Bahadur* (3) and I have been unable to discover why it was at all cited; for in this latter case, the contest was between two rival proprietors and the judgment proceeded on the ground of the reformation *in situ* though if the river was small and shallow the same result might have been arrived at by an application of Clause (4), Section 4 of Regulation XI of 1825.

But in the present case the question of the correctness of the decision in *Puri Dass's* case (4) does arise directly and it is necessary to determine whether Clause 1 of Section 4 enables an occupancy *raiyat* to claim a *raiyati* interest in an accretion formed out of a river bed which is the property of his landlord.

Now, the law of increment gained by the formation of islands is contained in Clause 3 of Section 4 as regards a large and navigable river the bed of which is not the property of an individual, and in Clause 4 as regards a small and shallow river (as distinguished from a large and navigable river) the bed of which is the property of an individual.

It will be observed that the Regulation does not provide for islands in a large and navigable river the bed of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual.

It will also be observed that while Clauses 3 and 4 determine the right of proprietorship, they are subject to the provisions of Clause 1 in respect of the assessment of revenue and the rights of tenants.

As for proprietary rights in accretions, Clause 4 read with Clause 1 provides for a small and shallow river the bed of which belongs to an individual, and Clause 1, for a large and navigable river the bed of which does not belong to an individual. There is no provision for a large and navigable river of which the bed is private property.

With regard to the rights of tenure-holders and *raiyats*, Clause 1 deals with rivers of all classes and is subject to no words of limitation or restriction. Therefore, in my view, an accretion thrown up along the frontage of a *raiyati* holding on the bank of any river the bed of which belongs to his landlord, would be an increase to the holding and would be held as such.

Under the concluding proviso of Clause 1 of the Regulation as originally enacted the *raiyat* was liable to pay increased rent but since its repeal that liability has been re-imposed by Section 52 of the Bengal Tenancy Act.

It is necessary to add that the Regulation is not exhaustive. It is subject to the rules of equity and justice. Therefore, land gained from the river bed by reformation *in situ* or otherwise will, if it can be identified, belong to the owner of the bed, except when otherwise expressly prescribed by the Regulation. This rule will preclude a tenant from acquiring a right of tenancy in an accretion from a river bed which was not the property of his landlord before emergence.

In the present case it is not known whether the land is reformation of land which was formerly in the direct possession of the landlord. All that is known is that the bed was the property of the landlord before it emerged and the question is whether the appellant can claim a right of tenancy in the accretions either under Clause 1 or under some general principle of equity and good conscience.

Now the main argument against the appellants is that there are certain observations in *Lopez* v. *Madan Mohan* (2) which indicate that in the opinion of their

Lordships of the Privy Council Cl. 1 of S. 4 of Reg. XI of 1825 applies to rivers the beds of which are the public domain and to no other.

I am altogether unable to accept this argument. Their Lordships in that case were dealing with a dispute between two rival proprietors of estates, one claiming a sand-bank as an accretion to his permanently settled estate and the other as a reformation *in situ*, there was no question of the rights of the *raiyats*; the river was the Ganges; and it is clear that the observations of their Lordships were intended to apply only to the special facts before them.

The judgment pointed out with emphasis that the Statute was subject to the general principles of alluvion and diluvion and it settled the law in one important point upon which there was at the time great conflict of opinion, by ruling that Reg. XI of 1825 could not be used to confiscate the land of another who could show by means of signs or boundaries that it was the reformation of his land.

And although, in observing that there were no judicial decisions determining what could be the rule in England if there were existing certain means of identifying the original boundaries of the property, their Lordships seem to have overlooked the decision of Lord Chelmsford, L. C., in *Attorney General* v. *Chambers* (15) which had been passed 11 years earlier, it seems to me that their Lordships assumed that the law of accretion was the same then in India as in England.

The decision in *Foster* v. *Wright* (16) did not come till 1878 and though it dissented from *Attorney General* v. *Chambers* (15) and rejected the doctrine of reformation *in situ*, subsequent decisions seem to show a tendency to support the earlier view.

But whatever may be the position in England at the present day, it seems to me that in 1870 their Lordships intended to hold that the law was the same in both countries and if that was so it follows that their observations were applicable to every class of river. Their Lordships made no reservations or restrictions in respect of rivers the beds of which were not the public domain and they, in my opinion, accepted the undisputed proposition that the law of accretion in England was the same for all rivers, namely, the tidal and the non-tidal and the navigable and the non-navigable.

The judgment of the Privy Council in *Thakurain Ritraj Koer* v. *Thakurain Sarfaraj Koer* (17) and of the Calcutta High Court in *Data Ram* v. *Eshan Chandra Law* (18) seems to show that no difference has been effected in this respect by the statute law of India.

I do not think, therefore, that in this case *Lopez* v. *Madan Mohan* (2) is an authority which assists the proprietor. Moreover on general principles, that is to say, the principles of equity and justice, assuming that Cl. 1 of Reg. XI does not apply to the case, I think the appellants are entitled to a decree. In India the presumption is that the bed of a large and navigable river belongs to Government, which occupies here a position which is fundamentally different to that which it occupies in England. Here Government is the owner of the soil of the country and has all rights of a proprietor. The bed of a navigable river is not the public domain in the same full sense as in a country where all land which is not private property vests in the public and is held by Government as a mere trustee. If in these circumstances it is not inequitable to give the adjacent proprietor and *raiyat* land which has accreted out of the river bed and is the property of another, why should it be inequitable to give a *raiyat* an interest in a river bed belonging to his landlord which has accreted to his holding and for which he will pay rent. In both classes of rivers the proprietor will pay Government, revenue for the accretion, and compensate himself by taking rent from his tenants. There is no question of any confiscation or taking away. There is another rule also which applies to this case and which, I think, is based on equity and justice. The ordinary rule of conveyancing is that a grant or lease of land abutting on a river by a person who is in a position to part with the soil is presumed to pass half the adjacent bed of the river without any refer-

(15) (1859) 4 De. G. and J. 55.
(16) (1878) 4 C. P. D. 438=44 J. P. 7=49 L. J. C. P. 97.
(17) (1905) 27 All. 655=33 I. A. 165=2 A.L.J. 623=8 O. C. 293=2 C. L. J. 185=7 Bom. L.R. 872=15 M.L.J. 349=8 Sar. 873 (P.C.).
(18) (1869) 11 W.R. 116.

ence to the instrument of grant; even where there is no grant the lessee or tenant is entitled to claim the benefit of the presumption.

I take it that in the absence of contract or proof of reformation *in situ*, an occupancy *raiyat* in India would also be entitled to claim the benefit of this presumption. Therefore, in this case the *raiyats* would be entitled to claim the accretions at least up to the limit of the middle line.

But as, in my opinion, Cl. 1 of S. 4 of the Regulation is applicable they will be entitled to the whole of the accretion up to the opposite bank of the river as the whole river bed which has been marked as plot No. 759 in the Cadastral Survey map has been entered as the property of the landlord.

It remains to observe that in addition to the authorities cited in *Puri Dass's* case (4) we have had the advantage of referring to *Gobind Hota* v. *Kristapada Singh* (14). Their Lordships of the Calcutta High Court in unmistakable terms disagreed with the view expressed in a previous décision of that Court and held that in a small and shallow river the landlord was entitled to the benefit of Cl. 1, S. 4 of Reg. XI of 1825.

In the present case it has not been clearly found whether the river is small and shallow or large and navigable. But, in my opinion, in either case the appellants are entitled to claim the lands as accretions to their occupancy holdings.

I agree, therefore, that the appeal should be decreed with costs.

Jwala Prasad, J.:—I agree with the judgment delivered by my Lord, the Chief Justice. The question involved in this case is not free from difficulty. The Court below has held that the "lands in suit have been gained to the holding of the defendants by gradual accretion from the recess of river Gandak as contemplated by Reg. XI of 1825."

The plaintiffs are the proprietors of the defendants' holdings. They are also the proprietors of the bed of the river and consequently of the lands in dispute which have gradually come out of the river in front of the defendants' holdings by gradual recess of the river and have become fit for cultivation. If Gandak was a small and shallow river, as contemplated by Cl. (4) of S. 4 of Reg. XI of 1825, the bed of which belongs to the plaintiffs, the lands in question would belong to the plaintiffs as proprietors thereof "subject to the provisions stated in the first clause" of the present section (Section 4).

In *Gobind Hota* v. *Kristopada Singh* (14) their Lordships of the Calcutta High Court interpreted the words in Cl. (4) quoted above within inverted commas, as preserving the rights of the tenant to whose holding the lands were gained by gradual accretion from the recess of the river.

Their Lordships held that although the proprietor of the bed of the river will continue to be the proprietor of the lands thus gained from the recess of the river those lands shall be considered, "an increment to the tenure of the tenant" he being liable to pay additional rent to the proprietor. In this view the lands in question would be an increment of the holdings of the defendants; but the river in question according to the finding of the Court below, is not a small and shallow river.

Says the learned Subordinate Judge:—

"In the present case we are concerned with the accretion reformed from river Gandak, which is more or less a navigable river and in which boats ply, as is admitted on behalf of both the parties. Of course, it is not like the river Ganges, yet it is large and deep enough for plying boats. It is also subject to annual floods only varying in degree in their severity in each year."

The river in question is therefore a large and navigable one. Cl. (3) of S. 1 deals with Churs or islands "thrown up in a large and navigable river, the bed of which is not the property of an individual."

But here the bed of the river Gandak belongs to the plaintiffs. Therefore this clause does not apply. Cl. (2) deals with cases in which a river by a sudden change of its course may break through and intersect an estate without any gradual encroachment, which is not the case here. Therefore this clause also does not apply.

Cl. (1) of the section deals with lands gained by gradual accretion whether from the recess of "a river or of the sea." This clause is a general one and applies to all kinds of rivers, and lays down the principle upon which the rights to the lands thus gained should be determined. Under this clause the

land gained "shall be considered an increment to the tenure of the person to whose land or estate it is thus gained, whether such lands or estate be held immediately from Government by a *Zamindar* or other superior landlord, or as a subordinate tenure by any description of under-tenant whatever."

The defendants under this section will, therefore, be entitled to claim the lands as an increment to the holding.

It has, however, been contended that the regulation does not apply to lands which come out of a river whether gradually or by a sudden change of its course where the bed of the river belongs to an individual. It is contended that the Regulation, particularly Clause (1) of Section 4, applies only to the lands gained from rivers which are the property of the public or the Crown. A reference has been made to the preamble to the Regulation.

The preamble, however, gives the reason for the rules "for the general information of individuals as well as for the guidance of the Courts of Justice" being enacted " in consequence of the frequent changes which take place in the channel of the principal rivers that intersect the provinces immediately subject to the Presidency of Fort William and the shifting of the sands which lie in the beds of those rivers " whereby "*churs* or small islands are often thrown up by alluvion in the midst of the stream or near one of the banks, etc. and the lands gained by the means from the rivers or the sea above-mentioned are a frequent source of contention and affray."

This may be the initial reason of enacting the rule: but the rules seem to deal with all kinds of rivers navigable or non-navigable, large or small, deep or shallow. Clauses (1) and (2) of Section 4 deal with lands gained by gradual accretion from the recess of all kinds of rivers or the sea. Clause (3) deals with large and navigable rivers, the bed of which is not the property of an individual, Clause (4) deals with small and shallow rivers, the beds of which belong to an individual.

It is then said that the Regulation deals with the rights of riparian proprietors. No doubt, Section 2 declares that the rights of the riparian proprietors of contiguous estates divided by a river shall be determined by such a clear and definite usage as may be established, Section 3 seeks to provide rules in the subsequent sections for determining the claims and disputes relative to lands gained by alluvion or by dereliction of a river or the sea when no local usage referred to in Section 2 is established.

From this it is argued that the rules in Section 4 are meant to apply to disputes between the riparian proprietors, and not to the case in hand where no riparian proprietor is concerned and the dispute is between the proprietor and his tenant on the same side of the river.

The contention does not seem to be sound, for, though the primary object of the Regulation was to provide rules for determining disputes between the riparian proprietors, yet it has, as a matter of fact, dealt with the rights not only of proprietors but also of subordinate tenures.

In fact, the Regulation seems to deal with disputes of all kinds, as is expressly declared by Clause 5 of Section 4, which says that—

"In all claims and disputes respecting land gained by alluvion or dereliction of a river or the sea which are specifically provided for by the rules contained in this Regulation, the Courts of Justice in deciding upon claims and disputes shall be guided by the best evidence they may be able to obtain of established local usage, if there be any, applicable to the case, or if not by general principles of equity and justice."

Thus, cases which have not directly come under the express rules of the Regulation have been decided on the principles of equity and justice; for instance *Bhagirathi Debya* v. *Girish Chunder Chaudhri* (19) and *Sheo Ghulam Tevari* v. *Fakira Misser* (20). Even if none of the rules in Section 4 applies to the present case, it has to be determined on the principles of equity and justice, as was done by their Lordships of the Judicial Committee in the case of *Nogendra Chunder* v. *Mahomed Eusuff* (21).

The plaintiffs, no doubt, can claim the lands which come out of river Gandak as their own, inasmuch as there is nothing in principle or in the Regulations which would take away or destroy their rights in such lands, whether

(19) (1863) Hay's Reports 541.
(20) 5 N W. P. R. 400.
(21) (1872) 10 B. L. R. 406=18 W. R. 113= 3 Sar. 151 (P. C.).

the lands be formed in the midst of the river as an island or be formed on the banks of it by gradually silting up or recession of the river; but, if the lands have been gained by gradual accretion from the recess of the river to the holding of the plaintiffs' tenants, there is, on the other hand, nothing in the Regulation or in the principles of equity and justice, in the absence of any custom or contract to the contrary, to prevent the plaintiff's tenants, (the defendants in the case), from claiming the land as an increment to their holding. The proprietorship of the lands in question, no doubt, will continue with the plaintiffs who are the owners of the bed of the river.

For these reasons I agree with the view taken by the learned Chief Justice, though as already observed, I confess that the point is not free from difficulty.

Answer in the affirmative.

A.I.R. 1922 Patna 597.

COUTTS AND DAS, JJ.

Gobardhan Das Dwarka Prasad—Decree-holder-Appellant v.

Satis Chandra Rai—Judgment-debtor-Respondent.

Appeal No. 212 of 1921, decided on 28th April, 1922.

Civil P. C., O. 21, Rr. 15 (1), 22—Limitation Act, Art. 182 (5)—Defective application under R. 15 and notice thereon under R. 22, will both save limitation.

An application under Rule 15 (1), Order 21, though defective saves limitation. A notice under Rule 22, Order 21 issued on a defective application saves limitation.

[P. 597, C. 2; P. 598, C. 1.]

C. C. Das and *Bindeswari Prasad*—for Appellant.

S. C. Mitter, S. M. Mullick and *N. C. Roy*—for Respondent.

Coutts, J.:—This appeal arises out of an execution proceeding. It appears that a firm of the name of Gobardhan Das Dwarka Prasad obtained a decree against one Babu Satish Chandra Rai. The decree was obtained in 1917. An appeal was preferred and the appeal was dismissed on 5-1-1918. On 14-5-1920, one of the members of the firm of Bansidhar Dhundhunia made an application for execution under O. 21, R. 15 and on 12-6-1920, notice under O. 21, R. 22, was issued by the executing Court. On 31-7-1920, this application for execution was struck off as being defective.

On 12-3-1921, the application out of which the present appeal has arisen was filed. An objection was taken by the judgment-debtor that the application was barred by limitation as the application which was preferred on 14-5-1920, was no application at all, but this objection was disallowed.

On appeal to the Dt. Judge the decision of the first Court was set aside and the application for execution was rejected apparently on the ground that the application which had been preferred on 14-5-1920, was not an application in accordance with the law, and that consequently the notice under O. XXI, R. 22, did not save limitation. The decree-holder has appealed. In my opinion the appeal must succeed. The application which was made on 14-5-1920, was no doubt a defective application but it was nevertheless, as has been admitted by the learned Vakil for the respondent, an application made in accordance with the provisions of O. 21, R. 15, Cl. (1). This being so, limitation is saved under Art. 182, Cl. (5) of the Limitation Act. It is contended, however, by the learned Vakil for the respondent, that the application was not a valid application inasmuch as the Court, when that application was filed, did not comply with the provisions of R.15, Cl. (2). With this proposition, I am unable to agree and the learned Vakil appears to have confused the validity of the application with the discretion of the Court to reject or allow the application.

The Court has discretion under Clause (2), unless it sees sufficient cause for allowing the application, to disallow it; but the mere fact that Court does not allow the application does not make it any the less an application in accordance with law. The learned Vakil further suggests that possibly the application, was not a valid application because it did not comply with the provisions of R. 11.

Rule 11, is the ordinary rule which governs applications for execution; but R. 15 is an exception to the general rule; and there is no doubt that in fact the application which was made on 14-5-1920, was an application made in accordance with the provisions of R. 15, sub-Cl. (1), and consequently limitation is saved by sub-Cl. (5) of Art. 182. Apart from that more-

over, limitation is also saved under sub-Clause (6) of Article 182 of Limitation Act, because of the issue of notice under O. XXI, Rule 22, on the 12th June, 1920.

Under sub-Clause (6) of Article 182 it is not necessary that the notice should be issued in respect of an application made in accordance with law, and it is now settled that a notice issued on a defective application saves limitation. In the present case the application was at most nothing more than a defective application and consequently the notice which was issued in accordance with it saves limitation.

The order of the learned District Judge in appeal is clearly wrong and must be set aside. I would accordingly set it aside and decree this appeal with costs in all Courts.

Das, J.:—I agree. *Appeal allowed.*

A. I. R. 1922 Patna 598.

DAWSON MILLER, C.J. AND MULLICK, J.

Harihar Prasad Singh and another—Defendants-Petitioners v.

Kesho Prasad Singh—Opposite Party.

Civ. Rev. Nos. 203 and 221 of 1922, decided on 1st August, 1922, against the order of Dist. J., Shahabad, dated 30th March, 1922.

(a) *Civil P. C., S. 115—Government of India Act, S. 107—Suit for accounts of income of property—Interlocutory order—Ultimate decision appealable—Order not to be revised unless directions given for taking accounts are improper.*

Where the parties have a right of appeal from the ultimate decision after the accounts are taken the High Court should not interfere in revision or superintendence, unless it were proved to its satisfaction that the Judge had given improper directions in his interlocutory order as to the mode of taking accounts to the commissioner which unless varied or set aside would result in irreparable loss to the parties.

[P. 599, C. 1 ; P. 600, C. 2.]

(b) *Trusts Act, Ss. 23, 51—Property held in trust for plaintiff—Produce rents received by defendant—Value of rent must be that prevailing on date and place of receipt.*

In ordinary circumstances, there can be little doubt that the value of produce rents at the time and place of the receipt is the measure of liability and not the price fetched by sales at a later date. If the person liable to account for produce rent to his employer should without fraud convert it to his own use his liability cannot be measured by the price at which the produce was subsequently sold. [P. 599, C. 2.]

Hasan Imam, C. C. Das, A. Sen, B. B. Lal, Parmeshwar Dayal, P. C. Roy, Shiveshwar Dayal and *Mahabir Prasad*—for Petitioners.

Kulwant Sahay, S. M. Mullick and *Roy Guru Sharan Prasad*—for Opposite Party.

Dawson Miller, C. J.:—These two applications arise out of a suit instituted by the Maharaja of Dumraon against the defendants, Rai Bahadur Harihara Prasad Singh and his minor son. The suit was instituted for the recovery of an estate in Burma in the possession of the 1st defendant and for an account of the income and disbursements of the property which, it was contended, was held by the 1st defendant and his father before him in trust for the plaintiff. The defendant's father, Rai Bahadur Jai Prakash Lal, was deputed by the late Maharaja, the predecessor of the plaintiff, to proceed to Burma in the year 1889 to apply for and secure, if he thought fit, a lease of land for the Raj in pursuance of a scheme promoted by the Government for relieving the congested areas in Bihar by immigration and settlement of *raiyats* on land in Burma which was offered upon favourable terms. Jai Prakash Lal had power to apply for the land if he thought fit in his own name. After inspection he applied in April, 1889, for the lease of 15,000 acres, but it was not until 1896 that a formal settlement was made by the Government of Burma in the name of Jai Prakash Lal. The preliminary expenses and the cost of survey, demarcation, and clearance of the land were paid by the late Maharaja who advanced altogether up to the year 1893 Rs. 25,000 for this purpose. In 1894 the late Maharaja died and was succeeded by his widow and afterwards by the plaintiff. From the date of the late Maharaja's death no further advances were made in connection with this scheme. The defendant's father, however, continued to develop the land paying the expenses out of his own pocket, and in 1896 he acquired a lease from the Government in his own name. He died in 1897 from which date his son, Rai Bahadur Harihar Prasad Singh, continued in possession of the property in Burma treating it as his own. The present suit was instituted in 1919 before the District Judge of Shahabad and the plaintiff obtained a decree in his favour for possession of the property and an account of the income and disbursements. An appeal is pending to the High Court from that decision. An application to stay the taking of the account was unsuccessful and a Commissioner has been appointed to take the account. The parties applied to the District Judge for certain directions to

the Commissioner as to the method of taking accounts, and on the 30th March last the District Judge passed orders giving certain directions on various points.

The defendants have preferred an application asking us to set aside or modify these orders under our powers of superintendence or revision. The plaintiff opposes the application, but at the same time, in the event of our holding that we have power to interfere, which he denies, he has himself preferred an application asking us to modify the orders of the District Judge in certain other respects.

As the parties will have an appeal from the ultimate decision of the District Judge after the accounts are taken, we should not interfere in revision or superintendence, unless it were proved to our satisfaction that the learned Judge had given improper directions which, unless varied or set aside, would result in irrepairable loss to the parties. It was contended that the learned Judge had no jurisdiction to make the orders, but we are satisfied that this contention cannot prevail.

The main ground urged, for our interference on behalf of the defendants is that the learned District Judge has given wrong directions as to the mode of ascertaining the value of the produce rents paid to the defendant and his father by the tenants on the estate. It appears that the rents received from the tenants were paid largely, if not entirely, in grain and sugarcane. When these were received they were not immediately converted into money but were stored in granaries and warehouses and sales took place as opportunity offered.

The defendant claims that he and his father before him carried on a business in grain and molasses coming not only from the rents of the estate but from other sources. The *jamabandi* accounts show the amount of grain and sugar-cane received during particular harvests from the tenants with an estimate of the cash value at the date of receipt, whilst the cash books shew the price fetched by the sale of the produce rent and other grain and molasses at later periods. There is apparently nothing in the cash books to identify any particular sale with any particular portion of the produce received.

The defendant contends that the amount recoverable from him in respect of the produce rents was the actual value of the produce at the date it was received and that the best evidence of this was the *jamabandis* or the Burma Gazettes showing the market value on the day of receipt. The plaintiff, on the other hand, contended that the actual sales at a later period according to the rate shown in the cash books should be taken as the measure of the defendant's liability for the value of the produce received.

In ordinary circumstances, I think, there can be little doubt that the value of the produce rents at the time and place of the receipt is the measure of liability and not the price fetched by sales at a later date. The fluctuations of the market are ordinarily matters too remote to be taken into consideration in estimating liability in such cases. If the person liable to account for produce rent to his employer should, without fraud, which is not alleged here, convert it to his own use, his liability cannot be measured by the price at which the produce was subsequently sold. If the market should fall it would not diminish his liability. If it should rise, there is no reason why his liability should be increased. The rise or fall of the market are circumstances too remote to be taken into consideration.

The learned Judge, however, has ordered that to obtain the cash equivalent of the produce the Commissioner shall take the sales in the cash book beginning with the quantity sold at the lowest price and working upwards until he has accounted for the amount of produce which is shown to have been received from the *jamabandi*. For the years 1905 up to 1909 for which no cash books are in existence he has ordered that the value shall be taken according to the prices given in the Burma Gazettes at the time of harvest in those years. To this latter method the defendants do not object in so far as the Burma Gazettes show the market value at the date of receipt of the produce, but they contend that for other years too the produce should be valued upon the same basis, that is to say, upon the evidence of actual market value at the date and place of receipt. It is contended that if the account, which is a long one extending over some 20 years, is allowed to be taken, as the learned Judge has directed, for the years other than 1905 to 1909 it will not show the real liability of the

defendant but in fact something very much greater and that if the method of accounting is set aside on appeal, as it ought to be in such a case, then the whole expenses of taking the account will be fruitless and a long delay incurred which will be an irreparable loss to the parties.

The plaintiff, on the other hand, contends that even if, in ordinary circumstances, the liability of the defendant is to be based upon the market value of the produce at the date of its receipt, in the present case there are circumstances to show that the transactions carried on in grain and other produce in connection with the estate by the defendant were merely part and parcel of his duties to his employer under the arrangement between them and that any profit so made was for the benefit of the Raj and not for the benefit of the defendant or his father.

It does not appear from the learned Judge's order whether he considered this aspect of the case; if he did, he has not mentioned it. We are not in a position to deal with it ourselves, as there is no evidence before us upon which we can come to a decision and we have not been referred to anything in the judgment in the suit upon which the decree is based which determines this question. The learned Judge is of course at liberty, if he sees fit, to modify any instructions he may have given in his order to the Commissioner which, I understand, have not hitherto been carried out, but I am not prepared to say upon the materials before us that his instructions may not have been justified. It has been suggested that in order to save possible future expenses and delay an alternative account should be prepared showing the value of the produce rents assessed in the manner ordered by the learned Judge and according to the actual value on the date of receipt shown by the evidence available for that purpose or that the defendant should, at all events, not be precluded at the hearing before the Commissioner from putting such evidence before him and having it placed on the record for the consideration of the learned Judge, when the matter comes back to him with the Commissioner's report for final determination.

I am not sure that the learned Judge meant definitely to exclude evidence of this nature and it is still open to the parties to apply to him for instructions upon this point. At the same time, I am not prepared to entertain applications of this nature which are in fact asking us to overrule the orders of the learned District Judge in matters which are at least controversial and must ultimately depend upon the nature of the evidence produced.

If it should turn out that the method of taking the accounts is in some respects questionable, it will be open to either party to appeal from the ultimate decision, and I do not think we should interfere either under our powers of superintendence or revision in such a case, unless it is manifest that a refusal to do so would result in some irreparable loss to the parties which does not appear to me to have been shown in the present case. It is, however, clearly desirable that the extent of the defendant's liability should be definitely decided before the account is taken. For example, it should be made clear whether the defendant is liable to account for the profits of the business in grain and molasses to the plaintiff; we are unable to decide this point as we have not the materials before us. The same remarks apply to a further point which was raised before us. When the tenants failed to pay the full produce rent at the time it was due they were treated as having paid, but were debited with a loan fron the trustee on which interest was payable and each party claims the benefit of the loan account. I gather from the learned District Judge's order that he treats it as a separate transaction carried on by the trustee on his own account and, that he is not accountable for it to the plaintiff. It may be that he decided rightly but we have no evidence from which we can judge.

The other matters urged on behalf of the defendants were entirely matters which, if the learned Judge's directions were wrong, could easily be set right in appeal without any further accounts being taken. They related to certain items which one side or the other claimed ought to be increased or reduced, or were matters relating to the payment of interest or the rate thereof, and I need not deal with them further.

I have already indicated the course which may be open to either party who feels aggrieved, but I do not think that at the present stage we should be justified in modifying the orders passed by the

learned Dt. Judge. I think both applications should be dismissed, and in the circumstances I would order that each party bear his own costs of the applications.

Mullick, J.—I agree that these motions should be discharged, but I think it necessary to observe that the learned Dt. Judge must arrive at a clear conclusion as to the scope of the proceeding in which accounts are now being taken. He must find what is the precise liability arising out of the trust. Was it a liability (1) to merely deliver to the *cestui que* trust the rents in cash and kind; or (2) to deliver the cash and to sell the paddy and the molasses received by way of produce rent, at the *cestui que* trust's risk at such time as the trustee should think most prudent or (3) to deliver the cash and to engage in a trading business for the sale of the produce for the *cestui que* trust's benefit.

In the first case the measure of the trustee's liability will be the price of the produce on the date of receipt, in the second case the price on the date of actual sale and in the third case the profits if any arising out of the business. There is no dispute that the *jamabandis* give the correct quantities of the produce collected, but as to the price of the produce on the date of receipt, the learned Dt. Judge must proceed on the best evidence available.

It is contended that for that purpose the Burma Gazettes will be much more valuable than the entries in the cash book. *Prima facie* this would seem to be so, and it is not understood why the learned Dt. Judge has preferred the cash books for the years other than 1904 to 1909.

The defendants further contended that still more accurate results will be obtained from the loan accounts of the tenants. There is nothing to show that it was the intention of the Dt. Judge to reject this evidence and I have no doubt that unless good grounds are shown he will not shut out evidence, which is on the record, if such evidence is likely to be relevant to the inquiry.

It is urged by the plaintiff that the learned Dt. Judge was satisfied that any calculation based upon the loan books would indefinitely prolong the inquiry. Of the correctness of this allegation we have again no proof. It is open to the Dt. Judge to modify or add to the instructions already given by him to the Commissioner, and I decline to believe that he will reject material evidence without adequate grounds.

I have also no doubt that if he is satisfied that the sale prices shown in the cash books will be the best evidence for assessing the trustee's liability, but that an alternative account based upon the prices shown in the Burma Gazette or the loan accounts or other evidence, which is now on the record will be useful for the purpose of avoiding great expense in the event of an appeal being preferred and the Court of appeal taking a different view of the matter, then the Dt. Judge will use his discretion as to directing the Commissioner to place an alternative account upon the record.

But any direction to this effect must be left entirely to his discretion. Possibly the uncertainty with regard to the various matters of which the parties now complain before us might have been avoided if the learned Dt. Judge had adopted in the first instance the procedure of calling upon the defendant to file his accounts. The omission, however, is no longer of any material consequence. *Applications dismissed.*

A. I. R. 1922 Patna 601.

COUTTS AND BUCKNILL, JJ.

Achutananda Parsait—Defendant No. 1, Appellant v.

Biki Bibi—Plaintiff-Respondent.

App. No. 71 of 1921, decided on 7-3-1922, from a decision of Dt. J., Cuttack, dated 13-8-1921.

(a) *Pre-emption—Vendee a Hindu—Mahomedan pre-emptor is entitled to pre-empt under Mahomedan Law.*

A Mahomedan pre-emptor is entitled to pre-emption under the Mahomedan law of pre-emption even though the vendee is a Hindu.

[P. 602, C. 1.]

(b) *Limitation Act, Art. 10—Starting point is date of physical possession of purchaser.*

Limitation against the pre-emptor begins from the date of the physical possession of the purchaser and not symbolical possession.

Coutts, J.—The facts of this case have been fully stated in the judgment of the Courts below. The plaintiffs are the widow, daughter and representatives of other daughters of one Rahimullah. It appears that defendant No. 2, the son of Rahimullah, mortgaged certain property to defendant No. 1, who obtained a

decree upon that mortgage and in execution thereof put the property to sale and purchased it himself.

The plaintiffs in this suit sought for a declaration that they have a 2-annas share in one portion of the property and an 8-annas share in another portion of the property and that the defendant No. 2 had no right to mortgage the plaintiff's share. They also asserted a right of pre-emption in respect of a certain portion of the land. The suit was contested by the defendant No. 1 who denied the title of Rahimullah.

The suit was dismissed in the Court of first instance but on appeal to the District Judge this decision has been reversed and the plaintiffs have been given a decree. So far as the plaintiffs' title through Rahimullah is concerned the finding of the District Judge is a finding of fact with which we cannot interfere in second appeal.

But the defendant No. 1 is a Hindu and the principal question for decision in this appeal is whether the plaintiff has a right of pre-emption in respect of property which has been sold to a Hindu. The learned Vakil for the appellant relies for the proposition which he puts forward, namely, that the Mahomedan law of pre-emption does not apply where the vendee is a Hindu, on the case of *Koodrutoolah* v. *Mohinee Mohan* (1).

This decision is a Full Bench decision of the Calcutta High Court and ordinarily we would follow such a decision in this Court but the whole law on the point was subsequently elaborately discussed by Mahmood, J. in the Full Bench case of *Gobind Dayal* v. *Inayatullah* (2) where the decision in *Shaikh Koodrutoollah* v. *Mohinee Mohun* (1) was considered, and it was held by him, four other Judges of the Court concurring, that in such a case the Muhammadan law of pre-emption did apply.

I have very carefully considered these decisions and, in my opinion, the view which has been taken by the Allahabad Court is the correct view of the law.

The only other point which arises is the question of limitation. Under Article 10 of the Limitation Act, the period of limitation in cases of pre-emption is one year from the date when the purchaser takes physical possession of the property sold. Now in the present case it has been found by the learned District Judge that the defendant, although symbolical possession was given to him, has never obtained physical possession. This being so, no question of limitation can arise.

In the result then I would dismiss this appeal with costs.

Bucknill, J.—I agree.

Appeal dismissed.

(1) (1870) 13 W. R. 21=4 B. L. R. 134 (F.B.).
(2) (1885) 7 All. 775=(1885) A. W. N. 228 (F.B.).

A. I. R. 1922 Patna 602.

COUTTS AND DAS, JJ.

Raghunath Sahay and others—Decree-holders-Appellants v.

Chowa Mahton and another—Objectors-Respondents.

Appeal No. 65 of 1922, decided on 6th July, 1922, against an order of District J., Gaya, dated 3-12-1921.

(a) *B. T. Act (1885), Sch. III, Art. 6—Applicability—Essentials—No relationship of landlord and tenant—Art. 6 does not apply*

The essential conditions which must be satisfied in order to attract the operation of Article 6, Schedule 3 of the Bengal Tenancy Act are these: First, the decree must be obtained in a suit between the landlord and tenant and secondly, the provisions of the Bengal Tenancy Act must be applicable to them.

The plaintiffs were the fractional landlords; but at the time when they instituted the suit there was no relationship of landlord and tenant as between the plaintiffs and the defendants. They attempted to execute a money-decree against the defendant.

Held: Article 6, Schedule 3 of the Bengal Tenancy Act did not apply. [P. 603, C.1.]

(b) *Landlord and tenant—Non-transferable occupancy holding—Money-decree by person not the landlord—Holding can be sold in execution.*

The decree-holder not being the landlord of the holding can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree where there is no local custom of transferability. [P. 603, C. 1.]

Das, J.—This appeal is directed against an order of the learned District Judge of Gaya, dated the 3rd December, 1921. The decree-holders are the appellants before us and they attempted to execute a decree which they had obtained as against the respondents. The learned District Judge has come to the conclusion that the application is barred by Article VI of the third Schedule of the Bengal Tenancy Act and that the

decree-holders are not entitled to sell a portion of the occupancy holdings of the defendants.

In my opinion, the view taken by the learned District Judge is an erroneous one. The plaintiffs were the fractional landlords; but at the time when they instituted the suit there was no relationship of landlord and tenant as between the plaintiffs and the defendants.

The essential conditions which must be satisfied in order to attract the operation of Article 6, Schedule III of the Bengal Tenancy Act are these: First, the decree must be obtained in a suit between the landlord and tenant; and, secondly, the provisions of the Bengal Tenancy Act must be applicable to them. Here neither of these conditions is satisfied; and, in my opinion, Article 6, Schedule III of the Bengal Tenancy Act did not apply.

So far as the other point is concerned, the matter is concluded by a decision of the Full Bench of this Court in *Jugeshwar Misra* v. *Nath Koeri* (1). The Full Bench of this Court came to the conclusion in that case that the decree-holder not being the landlord of the holding can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree where there is no local custom of transferability. The decree-holder in this case is not the landlord of the holding and he is proceeding as against a portion of the occupancy holding of the judgment-debtor.

I would allow this appeal, set aside the decree of the Court below, and direct that the execution do proceed.

Coutts, J.:—I agree.

Appeal allowed.

(1) A. I. R. 1922 Pat. 114=1 Pat. 317 (F. B.).

A. I. R. 1922 Patna 603.

DAWSON MILLER, C. J. AND ADAMI, J.

Sudhanşu Bala Hazra, In Re—Applicant.

Privy Council Appeal No. 6 of 1922, decided on 11th April, 1922.

(a) *Civil P. C., S. 109—Legal Practitioners Act, S. 13—Order refusing to enrol person as legal practitioner—Leave cannot be granted.*

An order of High Court refusing to enrol a person as legal practitioner comes under its disciplinary or administrative powers and no leave to appeal to His Majesty can be granted 4 Pat. L. J. 423 Foll.

(b) *Letters Patent (Patna), Cl. 31—Disciplinary jurisdiction—Right of appeal to P. C. does not extend to administrative or disciplinary orders of High Court.*

Under the Letters Patent the right of appeal to His Majesty in Council conferred by the Letters Patent is confined to the different classes of jurisdiction named in the Letters Patent and not to the administrative or disciplinary powers conferred upon the Court thereby. It may always be necessary in performing administrative acts for the Court or the Judge or the person whose duty it is to carry out these acts to consider and come to a conclusion as to what his powers may be under a particular Act of Council and the mere fact that such a consideration arises does not take the case out of the ordinary course. [P. 604, Cs. 1, 2.]

Manuk, S. P. Sen, S. M. Mullick and *D. P. Sinha*—for Applicant.

Dawson Miller, C. J.—This is an application for leave to appeal from an order made by this Court upon an application by Miss Sudhansu Bala Hazra for enrolment as a pleader in the District Court of Patna. The question whether she was a proper person to be enrolled as a pleader was one which would have to be decided before a decision could be come to as to whether she should be enrolled or not.

The application was made in the ordinary way to the District Judge who forwarded it to the High Court in accordance with the practice. The question whether she ought to be enrolled or not was one which gave rise to considerable difficulty. Miss Hazra was qualified in every way for enrolment as a pleader except by the disability arising by reason of her sex. Before making any order in the matter, in order to give her an opportunity of urging before us any points that she might like to argue before a decision was come to, we agreed that she might appear by Counsel before three Judges of this Court and put before them her contentions based upon the Legal Practitioners Act and other enactments in support of her application to be enrolled as a pleader.

Having heard her through learned Counsel we came to the conclusion that under the law as it then existed Miss Hazra was not entitled under the Legal Practitioners Act and the rules made in accordance therewith to be enrolled as a pleader. The result was that her application was refused. [*See In re Sudhansu Bala Hazra* (1).]

(1) A. I. R. 1922 Pat. 269=1 Pat. 104=3 Pat. L. T. 69 (F.B.).

It is from that order that she now asks for a certificate that the case is a fit one for appeal to His Majesty in Council under the provisions of the Civil Procedure Code. In the case of *Bir Kishore Roy* v. *Emperor* (2) the same class of question arose and it was there decided that the Court had no power to grant leave in that case.

That case was one also arising under the Legal Practitioners Act and it raised the question whether an order made by a Court under its disciplinary power conferred under Section 13 of the Legal Practitioners Act was one in which any appeal lay. Having considered the powers given to this Court under the Letters Patent we came to the conclusion that the right of appeal to His Majesty in Council conferred by the Letters Patent was confined to the different classes of jurisdiction named in the Letters Patent and not to the administrative or disciplinary powers conferred upon the Court thereby.

I am unable to distinguish the present case from that to which I have just referred in which after considering the powers of the Court and considering the cases upon the subject we arrived at the conclusion that in all cases, where the only question for the Court is one of its disciplinary powers under the Legal Practitioners Act or its administrative powers under the same Act, if the party aggrieved wished to appeal to the Privy Council, the proper practice was for him to make an application to their Lordships in the Privy Council. In Safford and Wheeler's *Privy Council Practice*, at page 789, as was pointed out in the case I have just referred to, the practice in cases of this sort is referred to and is treated as the subject of special leave.

It has been contended in this case that the decision from which it is sought to appeal is not really entirely one coming under the administrative powers of the Court but that it is in fact a judicial act in so far as we had to interpret the Legal Practitioners Act relating to the subject. I do not think that this contention can be supported.

It may always be necessary in performing administrative acts for the Court or the Judge or the person whose duty it is to carry out these acts to consider and come to a conclusion as to what his powers may be under a particular Act of Council and the mere fact that such a consideration arises does not seem to me to take the case out of the ordinary course. The decision we arrived at was one which it was necessary to come to before we could determine whether or not Miss Hazra could be admitted as a pleader.

It was all part and parcel of an administrative act and that being so I cannot see how we can grant leave in this case because it is a matter which lies solely within the jurisdiction of their Lordships of the Privy Council and this Court has no power to make the order.

I regret that this should be so but I think Miss Hazra would have been better advised had she proceeded immediately to their Lordships of the Judicial Committee to ask for special leave.

Adami, J.—I agree. *Leave refused.*

(2) (1919) 4 P. L. J. 423=52 I. C. 599=20 Cr. L. J. 679.

A. I. R. 1922 Patna 604.

DAWSON MILLER, C. J. AND MULLICK, J.

Mathura Prasad—In Re.

Reference under the Legal Practitioners Act, decided on 31st May, 1922.

Legal Practitioners Act, S. 13—Re-admission—High Court can re-admit dismissed legal practitioner if he has reformed his character—He should apply for rule to the Bench presided over by Chief Justice.

The High Court has power to reinstate a legal practitioner who had been dismissed for misconduct of any description. Before the Court should exercise such powers it should be clearly convinced not by mere protestations of repentance or regret but by actual facts that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of an honourable profession. The proper course is for the petitioner to apply to a Bench presided over by the Chief Justice and ask for a rule in the matter.

Manohar Lal—for Petitioner.

Dawson Miller, C. J.—The petitioner Mathura Prosad Sinha, formerly practised as a mukhtar in the criminal Courts of this province, but was debarred from further practice by an order of the Court, dated the 12th March, 1917. He now presents a petition asking that he may be reinstated and allowed to resume his practice as a mukhtar. The first question which arises is whether the Court which debarred him from further practice has any jurisdiction to rescind the order made

under the provisions of the Legal Practitioners Act and reinstate him. No provision is made either in the Legal Practitioners Act or in the rules of the Court giving the Court power to exercise such jurisdiction, and, if it can be done at all, it must be either under the inherent powers of the Court or under the powers given by the Legal Practitioners Act to enrol mukhtars. Two cases have been referred to in support of the contention that the Court has jurisdiction in such cases.

The first is *In re Abiruddin Ahmed* (1), in which the High Court at Calcutta, on the petition of a mukhtar who had been dismissed from practice for an offence under Section 363 of the Indian Penal Code, reviewed at length the English authorities on the subject and held that the Court had power to reinstate a legal practitioner who had been dismissed for misconduct of any description.

The test applied in that case was whether by his conduct in the interval between his dismissal and his application for reinstatement the petitioner had satisfied the Court that he had conducted himself honourably and that no objection remained as to his character and capacity. In the particular case the Court was not satisfied that the case came within the requirements laid down and dismissed the petition. The other case was that of a pleader, *Hara Kumar Chatterji, In re* (2).

There the offence for which the petitioner was dismissed was that of misstating his age in an application for enrolment as a candidate for the Provincial Judicial Service. The offence was less serious than in the previous case cited and the petitioner appears to have satisfied the Court that since his dismissal he had been employed in positions of responsibility and had conducted himself honourably. His good character was vouched by *zamindars* and others of respectability and position, and the Court, following the principle laid down in the previous case, restored the petitioner to the rolls taking the view that his punishment had awakened in him a higher sense of honour and duty and that his subsequent conduct had been so irreproachable that notwithstanding his delinquency in early life, he might safely be admitted to an honourable profession without degradation to that profession.

In so far as those cases recognised the Court's jurisdiction to reinstate legal practitioners who have been dismissed from their profession, I have no doubt that they were right and that in proper cases the Court should exercise that power. I agree also that before any Court should exercise such powers it should be clearly convinced not by mere protestations of repentance or regret, but by actual facts, that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of an honourable profession.

The next question which arises is as to the procedure which should be adopted in cases of this nature. No procedure has been laid down in this Court for dealing with such cases, but, as it is within the power of the Chief Justice to direct which Judges shall deal with particular cases and the constitution of the Bench which should deal with such cases, I think the proper course is for the petitioner to apply to a Bench presided over by the Chief Justice and ask for a rule in the matter.

The Bench over which he presides, can then, if a *prima facie* case is made out, direct that a rule be issued and call upon the Government Advocate to show cause why the petitioner should not be reinstated. The matter would then come up before a Bench specially constituted and the case would be determined by that Bench.

The petitioner in the present case was dismissed from practice five years ago by a Bench of three Judges for an offence of so grave a character by one of his profession that no less a punishment than that of dismissal would have been adequate. It consisted in tampering with a petition of complaint filed in the Magistrate's Court and conspiring with the *peshkar* of the Court and another mukhtar, to the detriment of his own client, to substitute a spurious document in its place after transferring the stamp thereto from the original.

Anyone who could take part in such a fraud, when acting in a position of trust and responsibilty towards his client and the Court

(1) (1910) 38 Cal. 309=12 C. L. J. 625=15 C. W. N. 357=8 I. C. 1108=12 Cr. L. J. 22.

(2) (1911) 16 C. W. N. 237=14 C. L. J. 113=11 I. C. 997=12 Cr. L. J. 461.

is manifestly unfitted to be entrusted with the duties of a mukhtar.

The petitioner now produces a number of certificates which, with two exceptions are from pleaders or mukhtars practising at Muzaffarpur and Motihari where he formerly practised. They are all to the effect that they have known him for the last few years or the last three or four years and that his conduct and behaviour have been in every way satisfactory. They are all couched in more or less the same terms. Some are rather more positive and say they have known him as man of exemplary character. Others are less positive and are to the effect that they have heard no complaints against him.

But in none of them are any particulars given as to the opportunities they have had of associating with him or the capacity in which they have had any dealings with him. Nor does it appear whether the petitioner was residing either in Motihari or Muzaffarpur during the last few years. It appears, however, by a certificate given by the proprietors of the Dulichand Prabhudayal Coal Company carrying on business at Jheria in Manbhum that he has been in their employment for two years before January, 1922 and his petition states that he is still engaged there.

This certificate does not say in what capacity he is engaged but states he has all the responsibility of their business, including cash and contract transactions, and they have a very good opinion of his morality, truthfulness and loyalty and that they find him trustworthy and straightforward.

It would appear therefore that for two years at least he has given satisfaction to his employers in some capacity or other and that they consider him honest and straightforward.

The only other certificate is that of Mr. Ambica Prosad Upadhyay, a vakil of this Court who states that the petitioner worked in his *zamindari* for about a year—but which year is not stated—and during that time he proved very diligent, honest and trustworthy in the discharge of his duties. I have no doubt that this conveys Mr. Upadhyay's honest opinion but it does not give the Court much information as to the nature of the petitioner's duties or whether he was employed in a position of trust or what opportunities the petitioner had for acting otherwise than honestly.

I am willing to believe that the petitioner is endeavouring to rehabilitate his character but I cannot ignore the fact that the offence for which he was dismissed was one which it is the duty of the Court jealously to guard against by every means in its power. I think we should be failing in our duty if upon the material before us we were to accede to this petition merely because the petitioner can produce satisfactory reports of his conduct from his employers for the last $2\frac{1}{2}$ or possibly $7\frac{1}{2}$ years. A mukhtar exercises an office of trust towards his clients and towards the Court. He has many opportunities of betraying that trust and he may frequently abuse his trust without being discovered.

It is therefore essential that flagrant abuses such as the petitioner was guilty of, should not be lightly passed over or regarded as capable of expiation by a short probationary period during which they have not been repeated. If we considered that the case was at all doubtful or that a larger tribunal might properly take a more lenient view we might issue a rule and call upon the Government Advocate to appear and show cause against the application before a Special Bench, but I am satisfied that no *prima facie* case has been established and I have no doubt that the course we should adopt is to reject the application.

Mullick, J.—I agree.

Application rejected.

A. I. R. 1922 Patna 606.

COUTTS AND DAS, JJ.

Tej Narain Sahu—Defendant-Appellant

v.

Dal Ram Sahu—Plaintiff-Respondent.

Appeal No. 133 of 1919, decided on 13th June, 1922, from a decision of Sub-J., Bhagalpur, dated 29th May, 1919.

Appeal—Decree for joint possession—One of the plaintiffs not made respondent—Bringing him on record after the death of another respondent after limitation—Appeal is barred and cannot be heard—C. P. C. Order 1, Rr. 3, 10 (5).

The defendants appealed against a decree for joint possession in favour of 5 plaintiffs to the High Court but only four plaintiffs had been made respondents.

Held: the appeal could not be heard because the decree was one for joint possession so that even if the appeal

were successful it would be infructuous because the plaintiff who was not made a respondent would still be able to execute the decree.

Where after the death of one of other respondents, the plaintiff, who had been omitted from the category of respondents was, after the period of limitation, substituted in his place.

Held: the appeal could not be maintained, 19 Cal. W. N. 290 foll. [P. 607, C. 1.]

S. P. Sen—for Appellant.

N. Sen and *Shivnarain Bose*—for Respondent.

Coutts, J.—This appeal arises out of a suit brought by five persons for possession of certain land. They obtained a decree for joint possession in favour of all. The defendants have appealed to this Court but only four plaintiffs have been made respondents and a preliminary objection has been taken that the appeal cannot be heard because the decree was one for joint possession so that even if the appeal were successful it would be infructuous because the plaintiff who was not made a respondent would still be able to execute the decree. In my opinion this contention must succeed and if authority be needed in support of this, I would refer to the case of *Baser Seikh* v. *Fazle Karim* (1) which followed the previous decisions on the point.

It has been urged, however, by the learned Counsel for the appellants that in the case before us one of the other respondents has died and the plaintiff who was omitted from the category of respondents has been substituted in his place, and consequently the objection which has been urged has no force. I am unable to accept this contention. In the first place, although this plaintiff is now on the record, he is only on the record as representing the respondent who has died, he is not on the record in his own capacity, and, secondly, he has been brought on the record long after the period of limitation for filing this appeal had expired.

Next we have been asked to extend the period of limitation under Section 5 of the Limitation Act, but in the first place no application for extension of the period of limitation has been filed although the learned Counsel for the appellants was warned some considerable time ago that if he wishes to ask for an extension of the period of limitation an application should be filed, and, in the second place there are no grounds for extending the period in this particular case.

In these circumstances it is unnecessary to go into the merits of this case and I would dismiss this appeal with costs.

Das, J.—I agree. *Appeal dismissed.*

(1) (1914) 19 C. W. N. 290=28 I. C. 703.

A. I. R. 1922 Patna 607.

COUTTS AND DAS, JJ.

Mt. Adayabati—Plaintiff-Appellant

v.

Janardan Thakur—Defendant-Respondent.

Appeal No. 872 of 1920, decided on 1st August, 1922, from a decision of Dist. J., Darbhanga, dated 28th August, 1920.

Bengal Tenancy Act, Ss. 60 and 72—Rent suit—Registered proprietor—Defendant cannot plead payment to third party though he is transferee from proprietor.

Although the plaintiff was the registered proprietor, her rights had been transferred to one M and the defendant executed a *kabuliyat* in favour of transferee and had since then been paying rent to him.

Held by Section 60 where rent is due to the proprietor, the receipt of the person registered under the Land Registration Act shall be a sufficient discharge for the rent, and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered, that the rent is due to any third person. Section 72 applies to a case in which a transferee claims rent and it protects the tenant to whom the transferee has given notice of the transfer and has nothing to do with a case like the present. [P. 608, C. 1.]

Ray, T. N. Sahay and *Ray Guru Saran Pd.*—for Appellant.

P. Dayal for *L. K. Jha*—for Respondent.

Coutts, J.—This appeal arises out of a suit for rent which was brought by the registered proprietor. The defendant pleaded payment to the transferee from the proprietor. The suit was dismissed in the Court of first instance and on appeal this decision has been upheld, it having been found by the learned District Judge that although the plaintiff is the registered proprietor her rights have been transferred to one Madho Sahu and that the defendant executed a *kabuliyat* in favour of Madho Sahu in 1895 and has since then been paying rent to him. In these circumstances the learned District Judge has found that Section 60 of the Bengal Tenancy Act has no application.

I am unable to understand how this could be so. By Section 60 it is enacted that, where rent is due to the proprietor

the receipt of the person registered under the Land Registration Act shall be a sufficient discharge for the rent and that the person liable for the rent shall not be entitled to plead, in defence to a claim by the person so registered, that the rent is due to any third person.

In the present instance the plaintiff is the person registered under the Land Registration Act, so that the case comes completely within Section 60 of the Bengal Tenancy Act. It is hardly necessary to quote decisions in support of this view, but I may refer to the cases of *Hardayal Mahton* v. *Wazir Mahton* (1) and *Hira Singh* v. *Lal Keshwar Lal* (2).

It has been argued that Section 72 of the Act modifies Section 60 and protects the defendant. Section 72, however, applies to a case in which a transferee claims rent and it protects the tenant to whom the transferee has given notice of the transfer and has nothing to do with the case now before us.

Moreover, there is nothing to show that the transferee has given notice to the tenant of the transfer. In my opinion, the decision of the Courts below is wrong and must be set aside. I would accordingly set aside the decision and decree the plaintiff's suit. In the circumstances of the case, I would pass no order as to costs.

Das, J.—I agree.

Appeal allowed.

(1) (1917) 3 P. L. W. 351=41 I. C. 97.
(2) (1919) 52 I. C. 523.

A. I. R. 1922 Patna 608 (1).

COUTTS AND DAS, JJ.

Keshava Prasad Singh Bahadur of Damraon—Plaintiff-Appellant

v.

Mathura Kuar and others—Defendants-Respondents.

Appeal Nos. 886 to 893 of 1921, decided on 30th June, 1922, against the decision of Sub.-J., Shahabad, dated 24th January, 1922.

Landlord and Tenant—Suit for the rent of a portion of holding does not lie.

A suit by a landlord for the rent of a portion of a holding cannot be decreed in his favour taking the rent claimed as the rent for the whole holding. To decree such a suit would be in effect to allow a splitting up of the tenancy without any ascertainment of the portion of the rent which is due from the particular portion of the holding for which the rent is claimed. [P. 608, C. 2.]

Kulwant Sahai and *Nirsu Narain Singh*—for Appellant.

Sivnarain Rai and *Parmeshwar Dayal*—for Respondents.

Coutts, J.—These appeals arise out of rent suits which have been dismissed because the suits were brought in respect of only a portion of the holdings.

The plaintiffs have appealed and the ground taken by the learned Vakil for the appellant is that the plaintiff is, at all events, entitled to the rent which he claimed for a portion of the holdings as rent for the whole of the holdings because it is less than the amount which the defendants alleged to be the rent for the whole of the holdings.

I am unable to accept this contention. The suits were for rent of the holdings of the defendants, the holdings being described by certain survey numbers. These survey numbers, however, do not represent the whole of the holdings and it is clear therefore that the plaintiff cannot get the rent which he has claimed. To decree such suits would be in effect to allow a splitting up of the tenancy without any ascertainment of the portion of the rent which is due from the particular portion of the holdings for which the rent is claimed.

The suits have, in my opinion, been rightly dismissed and I would dismiss these appeals with costs.

Das, J.—I agree. *Appeals dismissed.*

A. I. R. 1922 Patna 608 (2).

DAWSON MILLER, C. J. AND MULLICK AND JWALA PRASAD, JJ.

Banmali Das—In re.

Civ. Ref. No. 1 of 1922, decided on 7th June, 1922.

(a) *Legal Practitioners Act, Ss. 14 and 13—Appellate Court cannot make reference but High Court may exercise its jurisdiction on such reference—It should make some inquiry.*

The High Court would exercise its disciplinary jurisdiction even though the reference under S. 14 with regard to the alleged misconduct of a pleader is not made by the trial Court in whose Court the occurrence has taken place but by the appellate Court which has no power to refer it. It would be necessary however that the High Court should make an enquiry. What the nature of that enquiry ought to be is clearly a matter for the discretion of the Court. [P. 610, C. 2.]

(b) *Patna High Court Rules—R. 45-E, Ch. XI, Vol. I—Vakalatnama—Mere signing by pleader with the word 'received' without anything further is irregular.*

The mere signing by the pleader of the

Vakalatnama with the word 'received' without date, without any indication as to the party from whom he received or without any certificate that he was satisfied that the person from whom he received it was the party himself or a servant or relation or agent is irregular.

K. N. Chaudhuri, Parameshwar Dayal, G. Prasad and *B. C. De.* —for Pleader.

Dawson Miller, C. J.:—This matter comes before us upon what purports to be a report of the District Judge of Cuttack under S. 14 of the Legal Practitioners Act, although, from the wording of the report itself, it would appear that the learned District Judge considered that it was a case in which it was necessary or desirable for the High Court to take action under S. 13 of that Act. Upon receipt of the learned District Judge's report this Court issued notice to the pleader in question. Babu Banamali Das, a pleader practising in the Courts at Puri, to show cause why he should not be dealt with under the Legal Practitioners Act.

The charge which is made against the pleader is in effect that he signed and filed in Court a written statement on behalf of a defendant for whom he was not authorized to appear at all. It is unnecessary to go in detail through the various stages of the litigation in which this alleged offence was committed or the processes by which the matter eventually came before this Court.

It may be stated shortly that the pleader was briefed in a suit instituted before the Munsif at Puri on behalf of some of the defendants in that suit. There were five defendants altogether and the *vakalatnama* which was accepted by the pleader was on behalf of four only of the defendants.

The suit against the five defendants was brought by the Superintendent of a *math* claiming damages and other relief against the defendants for having wrongfully collected tolls from the shop-keepers in the *mela* at the end of the month of *Magh* when the plaintiff alone as the Superintendent of the *math* was entitled to collect those tolls. The defendant No. 4 in the suit, who was a servant of some of the other defendants, did not join in the *vakalatnama* and consequently the pleader was not instructed by him.

A written statement, however, was prepared, not by the pleader whose conduct is now in question before us, but by his senior who had also been briefed by the other defendants. This written statement, when it was brought to the pleader for signature, contained what purported to be the signatures not only of the four defendants who had briefed him but also the signature of Balabadra the other defendant who had not briefed him, and the pleader without apparently considering or making any enquiries as to whether his *vakalatnama* had really been signed on behalf of Balabadra, signed the written statement and presented it in the Munsif's Court purporting to be a written statement on behalf of all the defendants.

Subsequently about a little more than a week later, the 4th defendant himself presented a written statement on his own behalf and, at the same time, put in a petition repudiating the authority of the pleader or anybody else to act on his behalf and to file a written statement purporting to be with his authority before the Court. In so far as the written statement put in by Balabadra is concerned it was not very materially different from that already put in by the other defendants purporting to be on his behalf as well as the others. The only difference is that whereas in the original written statement the defendants deny having collected any tolls at all and further deny that the defendant No. 4 and the defendant No. 5 had collected any tolls legally payable to the plaintiff, the written statement put in subsequently by Balabadra admitted that certain tolls amounting to a small sum of something like Rs. 6 had in fact been collected by the defendant No. 5 apparently with the assistance and connivance of Balabadra himself. It is clear that the difference between these two statements, although not very vast in extent, was a material difference in this way, that, one admitted the collection of tolls to a small extent at all events, whereas the other put the plaintiff to proof of his statement by denying that any tolls had been collected. During the conduct of the case an application was made to the Munsif to take criminal proceedings against the defendants other than Balabadra and against the pleader upon charges of forgery and a further application was made to take proceedings against the pleader under S. 14 of the Legal Practitioners Act in that he had appeared for a party by whom he was not instructed. The learned Munsif did not immediately hold an enquiry but at the trial he examined the pleader himself and various other parties in connection with the alleged misconduct, the subject of the charge

made by the defendant No. 4 Balabadra, and in the course of his decision he made some adverse comments upon the conduct of the pleader and came to the conclusion that in giving his explanation of what had happened he had certainly not been very frank and fair. He did not however take any steps with regard to a criminal prosecution or granting sanction, and the case subsequently went on appeal to the District Judge.

The District Judge dismissed the appeal, the finding originally having been in favour of the plaintiff. Subsequently a further application was placed before the Munsif again asking that criminal proceedings might be instituted and that an enquiry might be held against the pleader under Section 14 of the Legal Practitioners Act. This application came before the successor of the Munsif who originally tried the case and both the application for sanction to prosecute and the application under Section 476 of the Criminal Procedure Code were rejected as well as the application to proceed against the pleader under the Legal Practitioners Act.

Subsequently it appears that the matter was re-agitated before the District Judge and the District Judge after hearing the pleaders on behalf of the parties came to the conclusion that a serious offence had been committed by the pleader and referred the matter to this Court in a letter, dated the 23rd February this year.

The learned District Judge says that he refers the case under Section 14 of the Legal Practitioners Act and then he sets out a short account of the case with certain findings arrived at by him and ends his letter by saying

"Accordingly I think that necessary action ought to be taken against him under Section 13 of the Legal Practitioners Act."

It is contended before us to-day that the reference to this Court under Section 14 of the Legal Practitioners Act by the District Judge is *ultra vires* and ought not to be entertained because under that section it is only the presiding officer of the Court in which the offence is committed who has power to deal with the matter and make the reference to the High Court. In so far as this objection to the reference is concerned I think that there is no answer to it.

The section provides that the proper person to make the enquiry and refer the matter and make the report to the High Court is the presiding officer of the Court in which the offence or misconduct is committed. That Court in the present instance clearly was not the Court of the District Judge and therefore the District Judge had no power under Section 14 to make a reference to this Court in the present case.

But at the same time I have no doubt that under Section 13 of the Act the High Court has absolute power in any case, after such enquiry as it thinks fit, to suspend or dismiss a pleader or mukhtar from practice, and if we thought that this was a case in which suspension or dismissal would be a proper punishment to be inflicted we could in the circumstances, in my opinion, take action under that section.

Nor does it matter that the case has come before us merely upon a reference by the District Judge who had no power to refer the matter to the Court under Section 14. It would be necessary, however, that this Court should make an enquiry. What the nature of that enquiry ought to be is clearly a matter for the discretion of the Court. We have before us in this case, I think, all the materials necessary to enquire and come to a decision, upon the case, and we could without any further notice, as the pleader has already appeared, assuming he did not wish to put before us any further evidence which is already before us.

A petition has been filed by the pleader and he sets out in detail the facts of the case, and his case is that when he signed the written statement he was under the impression that he had been briefed, not merely by four of the defendants in the case, but by them all, and further that when he did sign the written statement the signature of Balabadra, the other defendant, was in fact upon the written statement so signed by him, and in these circumstances it never occurred to him that he was not authorized to sign the written statement on behalf of Balabadra.

After considering the case I have come to the conclusion that no actual intention on behalf of the pleader to commit a fraud or to mislead the Court has been made out and the only doubt or difficulty that I have had, arises purely and simply from the manner in which the pleader himself gave evidence about this matter when he was examined before the Munsif. There can be no doubt that the attitude he took up on that occasion, which was

an attitude of forgetfulness as to all the important things which had happened, was probably intended to shield as far as possible the other defendants or their servants who had also given evidence about how the signature of Balabadra came to be upon the written statement.

In adopting that attitude, I think, he was certainly not frank and straightforward. He was also extremely foolish because it led the Munsif to treat his whole conduct with great suspicion and it has also created a doubt in my mind as to his *bona fides* in the matter. At the same time I am not satisfied from the evidence which is at our disposal that he had any real intention at the time he signed the written statement of committing a fraud or lending himself to any fraud which had already been committed.

Before finishing this judgment I think that one ought to draw attention to a practice which appears in some parts of this province to have grown up of disregarding entirely the rules which have been laid down under the Legal Practitioners Act in relation to the accepting of *vakalatnamas*. If these rules were properly carried out then it would be almost impossible for mistakes, such as that which has happened in the present case, to take place.

One of the rules provides (it is numbered 45-E in Chapter XI of the General Rules and Circular Orders, Appellate Civil, Volume I) that a pleader accepting a *vakalatnama* shall note on it the name of the person from whom it has been received with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself or his servant or relation or one who has been authorized by the party to deliver it to him as the case may be. He should also note the date of his receipt of the *vakalatnama*. In the present case the *vakalatnama* was merely signed by the pleader with the word "received" above.

There is no date nor is there anything to indicate on whose behalf it was received or any certificate that he was satisfied that the person from whom he received it was the party himself or a servant or relation or agent. If that had been done I think it would have been impossible for the pleader in this case when he came to sign the written statement and file it in Court to have had any doubt as to whether or not he had been instructed on behalf of Balabadra, the defendant No. 4. It was simply through neglect to obey these rules that when the time came he apparently got the impression that he had authority to act for a party who had in fact not instructed him. Although I do not think that this is a case which merits either dismissal or suspension from practice I think that the pleader has been careless and very remiss in the exercise of his duties.

He is a young man at the beginning of his career and I think it ought to be pointed out to him that he cannot be too careful, exercising as he does a position of responsibility and trust both towards his clients and towards the Court, in seeing that his conduct is in all matters in connection with his profession absolutely above suspicion.

Although it is not a case to be dealt with severely, I think it is a case in which the pleader through his neglect to carry out the rules, has brought himself into a precarious position and it is a case in which I think he ought to be reprimanded and warned to be more careful in the future.

Mullick, J.:—I agree.

Jwala Prasad, J.:—I agree.

Reference answered.

A. I. R. 1922 Patna 611.

DAWSON MILLER, C. J. AND MULLICK, J.

Prakash Chandra Sarkar—Appellant

v.

Brindaban Chandra Sarkar— Respondent.

P. C. Appeal No. 9 of 1922, decided on 5th July, 1922, from an order of D.v. Bench, dated 8th December, 1921.

(a) Civil P. C., S. 109—Execution—Order to join other joint decree-holders in execution case—High Court confirming order—Order is not final and leave should not be granted.

Where an execution case was started by one of several decree-holders, and the others thereupon applied to be added as parties and the execution Court made an order that they should be added as executing decree-holders in the case together with the Appellant and the High

Court upheld the decision in revision.

Held: the order sought to be appealed from was not a final order determining the rights of the parties in any matter in controversy in the suit. The right of the parties in so far as their claim to share in the benefit of the decree itself was in their favour jointly. The order was one which related to procedure only No leave could be granted to appeal to His Majesty in Council

[P. 613, C. 1.]

(b) *Civil P. C., S. 110—Execution—Sum in dispute realised in execution Rs. 1,300—Further applications time barred—Leave cannot be granted.*

Where further applications for execution were time-barred and the sum realised in execution as to which there was dispute between joint decree-holders was only 1,300 though the unsatisfied balance under the decree executed was Rs. 10,000.

Held: leave could not be granted to appeal to His Majesty. [P. 613, C. 2]

S. C. Mitter, N. C. Sinha and *D. N. Sarkar*—for Appellant

A. K. Ray—for Respondent.

Dawson Miller, C. J.:—This is an application for leave to appeal to His Majesty in Council filed on behalf of Prakash Chandra Sarkar from an order of a Division Bench of this Court made in its revisional jurisdiction on the 8th December last. The Petitioner was one of three brothers who obtained a mortgage decree against Pande Baldeo Ram and others which they executed against the mortgaged property which was situated in Gaya.

The decree was executed against the mortgaged property which proved insufficient to satisfy the decree. A decree for the unsatisfied balance was then obtained against the defendants in that suit under S. 90 of the T. P. Act, 1882 (now O. 34, R. 6 of the C. P. C.) from the Sub-Judge of Gaya in the year 1909. The decree was passed in favour of the petitioner and his brothers jointly.

The petitioner subsequently, on the 9th October 1909, applied to the Court at Gaya to transfer the decree to the Subordinate Judge at Ranchi for execution against certain property of the judgment-debtors in that district. He stated in his application that the other decree-holders were unwilling or unable to join in the application and asked that the decree should be transferred as regards his third share only of what remained due to the decree-holders. The other decree holders were served with notice of the application. One of them, who, we are told, was a lunatic, offered no objection and did not appear; the other objected only on the ground that one of the judgment-debtors was dead and proceedings ought to be taken against his representatives.

This defect was cured and on the 13th June 1910, it was ordered that the decree be sent to the Court of the Subordinate Judge at Ranchi for execution. In the course of execution proceedings sometime later a certificate of non-satisfaction was sent from the Court at Gaya to that at Ranchi which showed the total amount due which was over Rs 67,000 of which Rs. 22,371, *viz.*, one-third, together with some interest and costs, it was sought to satisfy in the execution. On execution being taken out the judgment-debtors objected that the procedure was irregular and the executing Court ordered that the sum realised in execution should not be paid to the applicant without the consent of the other decree-holders. The petitioner appealed from this order to the High Court. The appeal was heard on the 15th August 1917 by the late Chief Justice and Mr. Justice Sharfuddin who considered that the transfer of one-third of the decree was irregular and that the order of transfer could not be held binding upon the respondents, the judgment-debtors, upon whom no notice had been served. They further expressed the opinion that the executing Court was right in treating the transfer as if it was a transfer of the whole decree, and in not allowing the appellant to proceed as if he were the sole decree-holder. They thought, however, that the Court below had gone too far and varied the order by directing that no sum should be paid out of Court to the appellant except on his giving security to the satisfaction of the lower Court to refund the same if required. By O. 21, R. 15, where a decree has been passed jointly in favour of more persons than one, any one or more of them may apply for execution of the whole decree for the benefit of them all but in such a case the Court is bound to make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. There is no other provision in the Code for enabling one of several joint decree-holders to apply for execution. In that execution it appears that a sum of Rs. 3,000 was realised, the attached property being sold to the decree-holder who was allowed to set off the purchase price against the decretal amount, and the case was dismissed on part satisfac-

tion.

A fresh execution case was started in November 1918 in which Brindaban Chandra Sarkar, one of the other decree-holders and the respondent in the present appeal, applied to be added as a party. The appellant objected but the learned Subordinate Judge made an order that Brindaban Chandra Sarkar be added as an executing decree-holder in the case together with the appellant Prakash Chandra Sarkar. The property under attachment was subsequently sold for Rs. 1,300.

The appellant moved the High Court in revision contending that the order of the learned Subordinate Judge was without jurisdiction. The High Court rejected the application in revision on the ground that the Subordinate Judge had jurisdiction to make the order and further that after the decision of this Court, dated the 15th August 1917, which directed that the transfer should be treated as a transfer of the whole decree and that the interests of the other decree-holders should be protected, there was no substance in the appellant's application in revision.

It is from this order that the appellant now seeks to appeal to His Majesty in Council. In my opinion the application should be rejected. The order now sought to be appealed from is not, in my opinion, a final order determining the rights of the parties in any matter in controversy in the suit. The rights of the parties, in so far as their claim to share in the benefit of the decree was concerned, were settled by the decree itself which was in their favour jointly. If there should be any doubt about that, these rights were further declared by the decision of the Chief Justice and Mr. Justice Sharfuddin on the 15th August 1917, and the present order is one which relates to procedure only.

I may add that the decision of the 15th August 1917, is not now under appeal and cannot therefore be questioned. The order now sought to be appealed from is merely a natural corollary of the previous judgment and directs the manner in which the rights of the parties shall be given effect to. Moreover, it appears that it is more than 12 years since the decree was passed and any further application to execute it is time-barred.

We are not informed definitely whether the execution case has terminated but as the property has been sold it would appear that this is probably the case. If it is so, it would follow that as the total amount in dispute under the present proceedings is only Rs. 1,300 which is below the statutory limit necessary to enable the appellant to appeal, no further execution proceedings can be taken and it is difficult to see how the present appeal can involve any claim or question to or respecting property of Rs. 10,000 or upwards even though the unsatisfied balance of the decree should exceed that sum. Whether the execution has terminated, it is not necessary to determine as on the other points the application should in my opinion fail. In any case the only appeal permissible from the present decision which is an order in revision would be confined to the question whether or not the Subordinate Court had jurisdiction in the matter. That it had jurisdiction in such a case to protect the interests of the joint decree-holders other than those actually making the application for execution can hardly be doubted in face of the clear provisions of O. 21, R. 15 and there is not in my opinion, any substantial question of law to be determined. As the appeal which it is sought to prefer to His Majesty in Council is from a decision of affirmance it seems to me that the application must fail also on this ground. I would therefore dismiss the application with costs to the respondent. Hearing fee, 5 gold mohurs.

Mullick, J.:—This application arises out of a joint mortgage decree obtained in 1891 by the petitioner Prakash Chandra Sarkar and two others.

The decree-holders first of all brought the mortgaged properties to sale in the District of Gaya; next they took out execution against the properties other than the mortgaged properties and in 1915 Prakash obtained an order from the District Judge of Gaya transferring one-third of the decree to the Judicial Commissioner of Chota Nagpur for execution. The proceedings finally came before the Subordinate Judge of Palamau and on the 9th December 1916, that learned Judge passed an order that Prakash Chandra Sarkar might proceed with the execution of the decree but would not be permitted to take out any of the proceeds unless the other decree holders joined with him in applying for payment.

It was Prakash Chandra Sarkar's contention before the Subordinate Judge that the District Judge of

Gaya had transferred only his separate one-third share in the decree amounting to Rs. 30,516-14-7 and that he alone was competent to prosecute the execution proceedings. He denied that the other two decree-holders were entitled to any share in the proceeds of the execution. Against that order an appeal was preferred to the High Court at Patna and on the 15th August 1917 a Division Bench held that the objection of the judgment-debtors would be sufficiently met if the Subordinate Judge's order were modified and if it were directed that no sum should be paid out to the appellant except on his giving security to the satisfaction of the Court below for the refund of the sum if required.

Meanwhile the execution before the Subordinate Judge of Palamau was proceeding and on the 17th February, 1917, certain properties belonging to the judgment-debtors worth Rs. 3,000 were purchased with the permission of the Court by the decree-holder, Prakash Chandra Sarkar, he being allowed to set off the purchase money against the decretal amount. On the 7th March, 1918, the execution case was finally dismissed on part satisfaction.

The next application for execution was made by Prakash Chandra Sarkar on the 28th November, 1918, and in the proceedings that followed certain properties belonging to the judgment-debtors were attached; but the sale could not be held because on the 18th November, 1919 Brindaban Chandra Sarkar, one of the co-sharer decree-holders, filed a petition claiming that he was entitled to share in the execution to the extent of his one-third share in the decree.

Prakash Chandra Sarkar repeated the objections which he had urged in his appeal in the High Court but on the 8th January, 1920, the Subordinate Judge decided against him and directed that Brindaban Chandra Sarkar should be added as an executing decree-holder and that a fresh sale proclamation should be issued for the sale of the attached properties by inserting his name along with that of Prakash Chandra Sarkar. On the 15th March, 1920, the sale was held realising a sum of Rs. 1,300.

In the meantime, on the 5th February, 1920, Prakash Chandra Sarkar preferred an appeal to the High Court against the Subordinate Judge's order of the 8th January; he also filed an application for revision by way of greater precaution in regard to the same matter. The application for revision but not the appeal was pressed and on the 8th December, 1921, Jwala Prasad and Ross, JJ., affirmed the order of the Subordinate Judge and held that Prakash Chandra Sarkar would only execute the decree on behalf of all the decree-holders and that Brindaban Chandra Sarkar was properly added as a party to the execution proceedings.

Leave is now sought to appeal to His Majesty in Council against this order made by the Division Bench.

The substantial questions of law involved are put as follows :—

(1) Although the original mortgage-decree was a joint decree, the share of Prakash Chandra Sarkar being a defined and ascertained share and admitted to be one-third, there is no bar in law to his prosecuting an application exclusively in respect of his share.

(2) Before the transfer order of the 17th August, 1914, was made by the District Judge of Gaya a notice was issued upon the other two decree-holders at the instance of Prakash Chandra Sarkar asking whether they had any objection to his taking out execution in respect of his one-third share. No objection was made and it is contended that the District Judge having ordered execution to proceed only in respect of the amount due to Prakash Chandra Sarkar. Brindaban Chandra Sarkar is now estopped from objecting to the execution of that order.

(3) The order of the District Judge of Gaya transferring the decree is final as regards the right of Prakash Chandra Sarkar to prosecute the proceedings for his own benefit and to the exclusion of his co-sharers and that the execution Court in Palamau has no jurisdiction to go behind the District Judge's order by adding Brindaban Chandra Sarkar and by giving him an interest in the proceeds of the execution.

Now, whatever may be their merits, it appears to me that in the present circumstances these contentions are no longer material. The judgment of the Division Bench of this Court passed on the 15th August, 1917, which was not challenged by proceedings in the Privy Council has become final and by it the learned Judges affirmed the order of the Subordinate Judge made on the 9th December 1916,

holding that the order of the Dt. Judge of Gaya was irregular and that the execution proceedings could only be prosecuted by Prakash Chandra Sarkar for the benefit of his co-decree-holders.

The learned Judges of the High Court expressed this opinion in clear terms but instead of affirming the Subordinate Judge's order which required all the decree-holders to join in an application for withdrawing the sale proceeds they thought it would be sufficient for the protection of the co-sharers if Prakash were allowed to withdraw the money realised after giving security for the satisfaction of the claims of his co-sharers should they subsequently come forward with a claim. That being so it was no longer open to Prakash Chandra Sarkar to contend that the execution proceedings in Palamau must be conducted for his sole benefit and there was no defect of jurisdiction or material irregularity in the exercise of jurisdiction on the part of the Subordinate Judge, when on 8-1-1920, he ordered Brindaban Chandra Sarkar to be added as an executing decree-holder. I presume that in conformity with the orders of 15-8-1917, the Subordinate Judge before paying out the money to Prakash and Brindaban took or will take security for protecting the interest of the remaining decree-holder. But that matter is not before us at the present moment.

A point was made on behalf of the Opposite Party that the original decree being more than 12 years old is now barred and that no fresh application for execution can be entertained in consequence of the provisions of S. 48 of the C.P.C. In the absence of any information as to whether the execution case which was started by the application of 21-11-1918; namely, case No. 61 of 1918, has been finally disposed of or is still pending, it is impossible for us to give a decision on this point.

But apart from this point there is sufficient material before us for holding that no leave should be given in this case.

Leave refused.

A. I. R. 1922 Patna 615.

(SPECIAL BENCH.)

DAWSON MILLER, C. J., MULLICK, JWALA PRASAD, COUTTS AND DAS, JJ.

Ram Sumran Prasad and others—Plaintiffs-Appellants v.

Gobind Das—Defendant-Respondent.

F. A. No. 189 of 1922, decided on 1st August, 1922, on reference.

(a) *Court Fees Act, S. 7 V, IV (c)—Hindu reversioner claiming possession from donee of the widow—Declaration neither necessary nor asked for—Suit does not come under Cl. IV (c).*

Where the real relief which the plaintiff seeks is delivery of possession of the property by dispossession of the defendant and he is not bound first to ask for a declaration before such relief can be granted, there is no reason to 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 a declaratory decree with consequential relief. There is no reason why the wording of the prayer portion of the claim which asks the Court to consider and adjudicate upon the matters alleged in the plaint and then grant a decree for possession, should be interpreted as asking for a declaratory decree. Where a declaration is neither necessary nor in terms asked for, the suit should not be treated as one coming under Cl. IV (c) but under Cl. V of S. 7. A. I. R. 1921 Pat. 57, F. A 242 of 1917 Ref. [P. 617, C. 1.]

Per Coutts, J. :—The Court Fees Act is a purely fiscal Act, and in deciding what Court-fee is payable on a plaint the question, whether any relief asked for is necessary or not, does not arise. [P 618, C. 1.]

(b) *Hindu Law—Reversioner—Suit for possession—Donee of the widow in possession—Reversioner might treat it as nullity and need not sue for a declaration.*

In a suit for recovery of possession from the donee of the widow, the reversioner is not bound to ask for declaration. The reversioner might at his option affirm the alienation or treat it as a nullity without the intervention of any Court leaving it to the defendants to plead and prove the circumstances which they relied on for showing that the gift, lease, or any derivative dealings were not in fact voidable but were binding on the reversionary heirs. That the Deputy Collector has refused to enter plaintiff's name in the register is no ground to seek declaration of his title.

[P 617, C. 2; P. 618, C. 1.]

Sushil Madhab Mullick, N. N. Sen, L. K. Jha, L. N Singh and *N. N. Singh*—for Appellants.

Sultan Ahmad—for Respondent.

Dawson Miller, C. J. :—This matter came before a Division Bench on a question of Court-fees in an appeal preferred to this Court on behalf of the plaintiffs. The plaintiffs as the reversionary heirs of Banarsi Pershad instituted the suit to recover possession of a portion of his estate to which they were entitled as reversionary heirs on the death of his widow, Jainti Kumari. The defendant claims to be in possession of the property in suit under a deed of gift executed by Jainti Kumari during her life-time. She died in 1916 and the plaintiffs on endeavouring to obtain possession and

to have their names entered in register D in the Land Registration Department were opposed by the defendant who set up the deed of gift executed by the widow.

The plaint alleges that the plaintiffs are the next reversionary heirs of Banarsi Pershad and that the property in suit formed part of his estate, that his widow *Musammat* Jainti Kumari, after his death, came into possession by right of inheritance as a Hindu widow and that on her death the plaintiffs became entitled to possession, but that their possession was opposed by the defendant who set up a deed of gift executed by Jainti Kumari. They further pleaded that the deed of gift made by the widow is not legally binding on the plaintiffs and that the defendant is not entitled to retain possession. There are other allegations which it is unnecessary to refer to in detail.

In the prayer portion of their plaint they claim the following reliefs;—

(1) That on consideration of the above facts the Court may be pleased to hold that the properties in dispute constitute the estate of Babu Banarsi Pershad, that the plaintiffs, as reversionary heirs of the said Babu, are entitled to get possession of the properties in dispute since the death of *Musammat* Jainti Kumari, that it is illegal on the part of the defendant not to give up possession of the properties, and that the defendant's possession is quite illegal and wrongful.

(2) That on adjudication of the above points a decree may be passed in favour of the plaintiff in respect of the properties in dispute by dispossessing the defendant or such person as may be found in possession at the time of delivery of possession.

With their plaint the plaintiffs deposited a Court-fee upon a valuation of ten times the Government Revenue treating it as a suit for possession of land under S. 7 (V) of the Indian Court Fees Act. On appeal to this Court they again paid the fee calculated on the same basis with their memorandum of appeal The Stamp Reporter, whose duty it is to see that the proper fee is attached to the memorandum of appeal, reported that the fee payable in such a case was that provided by S. 7 IV (*c*) of the Court Fees Act, which provides for suits to obtain a declaratory decree or order where consequential relief is prayed, in which case the stamp payable is an *ad valorem* fee according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

If the fee is payable under Cl. IV and not under Cl. V of the section, the plaint and the memorandum of appeal were both insufficiently stamped by a sum of Rs. 1,025. The question came up before the Taxing Officer who referred it to the Taxing Judge, who held that the case fell within S. 7, Cl. IV (*c*) of the Court Fees Act and that on the memorandum of appeal the deficit Court-fee should be paid. Upon this question his decision as to the fee payable on the memorandum of appeal is final and the deficit has been paid.

The question whether the deficit payable on the plaint should be deposited before the appeal should proceed was placed before the Bench for determination. As there appeared to be some conflict of opinion between the decision in the case of *Kshetra Mohan Mahapatra* v *Ganesh Lal* (1) and the case of *Ram Sanehi Tewari* v. *Mahadeo Upadhyay* decided by the Taxing Judge Mr. Justice Roe in August, 1917 (F. A. 242 of 1917), the Division Bench thought that the question should be heard by a Special Bench and it now comes before us for determination.

The question is whether the present suit is one to obtain a declaratory decree where consequential relief is prayed under Cl. IV(*c*) of S. 7 in which case the fee paid on the plaint is deficient by Rs. 1,025, or whether it is a suit for the possession of land under Cl. V of that section. A practice appears to have sprung up in the Subordinate Courts of this province, and possibly in other provinces, of claiming declarations in cases where such relief is altogether unnecessary.

This practice frequently gives rise to questions of some nicety as to what is the proper fee payable in such cases. In cases where such a declaration has been claimed, although it is not necessary in the particular case to enable the plaintiff to obtain possession of property or other relief for which the suit is really brought, it has sometimes been held that if he frames the suit in that way he must pay a Court-fee upon a suit so framed. Further, where the plaintiff claims relief to which he is

(1) A.I.R. 1921 Patna. 57=2 P.L.T. 607.

not entitled until some decree or alienation of property which stands in his way has been avoided, or until his legal character or title, which has been called in question, has been declared by a decree of the Court, it has generally been held that such a suit comes under Cl. IV (*c*) of the section, even though the declaration which it is necessary for him to obtain before the further relief can be granted has not been in terms asked for in the plaint.

In the present case the plaintiff asks for an adjudication upon certain points and for a decree in his favour for delivery of possession by dispossessing the defendant. He does not in terms ask the Court for any declaration either as to his legal character or title or as to the invalidity of the gift in favour of the defendant. The Court is in all cases bound to adjudicate upon the matters in issue between the parties and it is unnecessary for the plaintiffs to pray that this should be done.

The real relief which the plaintiff seeks is delivery of possession of the property by dispossession of the defendant, and if he 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 a declaratory decree with consequential relief. The real question for determination appears to me to be whether or not the plaintiff can obtain in the present suit a decree for possession without first seeking a declaration that the gift to the defendant by Jainti Kumari is not binding. If a gift in such circumstances is binding as against the reversioner until it is set aside by the decree of the Court, then it is, in my opinion, essential that he should first ask for a declaration setting it aside.

This question appears to me to be governed by the decision of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2) where it was decided in a suit by a reversioner on the death of a Hindu widow to recover immovable property of her husband, of which the widow had granted a lease for a term extending beyond her own life, that the reversioner might at his option affirm the alienation or treat it as a nullity without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to the heir's right to recover the property. In that case the plaintiffs had in fact by their plaint prayed for a declaration that the lease was inoperative as against them and further asked for delivery of possession.

It was held, however, that it was not necessary for them to claim a declaration and that they might merely have claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on for showing that the lease or any derivative dealings with the property were not in fact voidable but were binding on the reversionary heirs.

Their Lordships accordingly held that Art. 91 of the Limitation Act which limits to three years the period for bringing a suit to cancel or set aside an instrument was no bar to a suit for possession after the three years had expired.

It follows, therefore, that in the present case there was no necessity for the plaintiff to seek a declaration that the gift was not binding as a necessary preliminary to his right to recover possession, nor did he in fact do so. I can see no reason why the wording of the prayer portion of the claim which asks the Court to consider and adjudicate upon the matters alleged in the plaint and then grant a decree for possession should be interpreted as asking for a declaratory decree.

The Court was bound to determine the question in issue and the plaintiff was not bound to seek a declaration in the form of a decree. The only decree asked for was one for possession after dispossessing the defendant and the rest of the prayer was merely unnecessary surplusage, which, I regret to say, if so often a distinctive feature of the pleadings which come before us.

The cases of *Ugramohan Chaudhry* v. *Lachmi Prasad Chaudhry* (3) and *Kshetra Mohan Mahapatra* v. *Ganesh Lal Pande* (1) were relied upon by the learned Government Advocate who appeared on behalf of the Board of Revenue. In the former case the plaintiff's claim to

(2) (1907) 34 Cal. 329=34 I A. 87=11 C.W.N. 424=5 C. L. J 334=9 Bom, L. R. 602=2 M L. T. 133=17 M.L.J 154=4 A L.J. 329 (P. C.).

(3) (1920) 5 P. L. J. 339=56 I.C. 422.

recover a large estate depended upon the validity of his adoption which had been distinctly challenged and he brought the suit to establish his status as an adopted son as well as to recover the estate. It was, therefore, held that the suit was one for a declaratory decree with consequential relief.

In the second case the plaintiff asked in terms for a declaration that she was the sole heir of her father and that the defendants who claimed under a transfer from her mother when in possession of the estate as a Hindu widow had no right to the properties in suit. Even if such a declaration was not necessary the plaintiff asked for it and it was competent to her to do so. The fee in both cases was held to fall under Section 7 (IV) (*c*) of the Act.

Those cases, however, do not afford any authority for the proposition that where a declaration is neither necessary nor in terms asked for, the suit should be treated as one coming under Cl. IV (*c*) of the section.

It was further argued that as the Deputy Collector had refused to enter the plaintiff's name in the register he was bound to seek a declaration of his title. I am unable to follow this argument. The title of the plaintiff in no way depended upon the act of the Deputy Collector nor was anything done by that officer an obstacle which required to be removed before the plaintiff could assert his title and claim possession.

In my opinion, the fee paid on the plaint was the proper fee and the case came within Cl. V and not Cl. IV (*c*) of the 7th section of the Court Fees Act. The plaint was properly stamped and the appeal should be allowed to proceed.

Mullick, J. :—I agree.

Jwala Prasad, J. :—I agree with the order proposed by my Lord the Chief Justice.

Coutts, J :—I regret I am unable to agree with my Lord the Chief Justice and my learned brothers.

As I read the plaint, the suit is one for a declaratory decree with a consequential relief, and this being so, the Court-fee is payable under Section 7 (*IV*) (*c*) of the Court Fees Act. The Court Fees Act is a purely fiscal Act, and in deciding what Court-fee is payable on a plaint, the question whether any relief asked for is necessary or not, does not, in my opinion, arise.

Das, J. :—I agree with the order proposed by my Lord the Chief Justice.

A. I. R. 1922 Patna 618.

JWALA PRASAD, J.

Lalji Singh—Petitioner

v.

Naurangi Lal and others—Opposite Party.

Cr. Rev. No. 395 of 1922, decided on 1st August, 1922 against the order of Sub-Div. Magistrate, Monghyr.

Criminal P C., Ss. 202, 203, 204—Counter-complaints—Order staying one—High Court declined to interfere in revision.

Where two counter-petitions were filed before a Sub Divisional Magistrate which he referred to a Sub-Magistrate for report and enquiry under Section 202, and on receipt of the report issued process in one case and directed in the other case that it be put up after the disposal of the first.

Held : that at that stage in revision, High Court could not interfere with the discretion exercised by the Magistrate as the Magistrate had not contravened any rule of procedure.

G. C. Pal—for Petitioner.

Yunus—for Opposite Party.

Jwala Prasad, J. :—The application seems to be premature. Two counter-complaints were filed before the Sub-Divisional Officer of Monghyr. In one of them the petitioner Lalji Singh was the complainant and in the other Naurangi Lal. Both the complaints were referred to a probationary Sub-Deputy Collector for "enquiry and report" under Section 202 of the Code of Criminal Procedure. On receipt of the report the Magistrate issued process in the case of Naurangi Lal and that case is being tried. In the case of the petitioner, Lalji Singh, the Magistrate recorded the following order :

"Read Sub Deputy Magistrate's report. Put up after the disposal of the case of Naurangi Lal against No 751."

Mr. G.C. Pal on behalf of the petitioner contends that his complaint should have been immediately disposed of either by dismissing it under Section 203 or by summoning the accused under Section 204 of the Code. The learned Vakil has, however, failed to point out to me any rule of procedure which the Magistrate has contravened.

I do not, therefore, think, that I can, at this stage in revision, interfere with the discretion exercised by the Magistrate. I do not think it permissible to enter into the relative merits of the two complaints placed before me when the matter is *sub judice* before a competent tribunal.

The application is, therefore, rejected.

Application rejected.

A.I.R. 1922 Patna 619.

DAWSON MILLER, C. J., DAS AND ADAMI, JJ.

Bhonu Lal Chowdhury—Plaintiff-Appellant

v.

W. A. Vincent and others—Defendants-Respondents.

L. P. A. No. 126 of 1920, decided on 15th February, 1922.

(a) *Deed—Construction—Ambiguity in the operative part may be cleared up by reference to recitals.*

Per *Dawson Miller, C J.*—Where there is ambiguity in the operative part of the deed, one should look back to the recitals and be guided by what is therein contained in interpreting the ambiguity. This canon of construction, however, cannot apply in all cases where there is a doubt or difficulty in the construction of the document. If one is satisfied upon the natural construction of the operative part of the deed that certain property passes, notwithstanding that the construction may be difficult, the recitals have no binding force. [P. 622, C. 2.]

Per *Das, J.*—The recitals in a conveyance are subordinate to the operative part and that consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals ; but it is well established that where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers, then the recitals can and ought to be used to explain its meaning, and that while, for the purpose of construing the operative part the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its true construction than the subordinate clauses of the deed. For instance, parcels of a deed described with certainty are not cut down by recitals showing that something less was intended to pass; but the recitals assist the construction of the operative part where there is an ambiguity in the operative part as to the property affected. (*Walsh v. Trevanion* (1850) 15 Q B. 733 Foll.)

[P 633, Cs. 1, 2.]

(b) *Landlord and Tenant—Acceptance of rent from transferee—Holding not transferable by custom — Rent collected by* gomasta—*Landlord will not be taken to have recognised transfer, in absence of knowledge.*

Per *Dawson Miller, C J.*—It is well established that the receipt of rent by the landlord from the transferee of a holding, not transferable by custom, will validate the transfer. But the *gomasta* or patwari of the landlord, although authorised to collect rents on his behalf, has no authority, by taking rent from a transferee to create the relationship of landlord and tenant between his master and the transferee. In such cases the landlord would not be generally bound unless he accepted the rent knowing the source from which it came. It does not follow that because the rent collector received rent from the transferee of tenant therefore, the landlord recognised him as a tenant. It must be shown that the landlord had knowledge of the transaction and ratified it either expressly or by implication.

[P. 622, C. 2 P 624, C. 1.]

(c) *Penal Code, S. 465—Test—Characteristic peculiarities of individualities should be taken into consideration—Mere comparison of writing is not enough.*

Per *Das, J.*:—It is dangerous to come to any conclusion as to forgery on a mere comparison of handwriting. [P 631, C. 1,]

One of the most useful tests in construing a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formulation of an idea or in the mode of spelling particular words. [P. 631, C. 2.]

(d) *Transfer of Property Act, S. 8—Corporeal and incorporeal hereditaments.*

Per *Das, J.*—The old modes of conveyancing under which an estate accompanied by possession passed by livery, while future estates and other rights in land passed by grant, gave a practical rule for distinguishing between corporeal and incorporeal hereditaments. The old conveyancing test is now obsolete ; but the distinction is still maintained, and such rights as are not accompanied by exclusive possession are classed amongst incorporeal hereditaments whereas those rights which entitle the owner to the present possession of the land or to receipt of rent and profit are classed as corporeal hereditaments. It is quite true that a right of occupancy, looked at from the point of view of property and not subject of property, is incorporeal in its nature but the actual possession of the land to which a person having a right of occupancy is entitled, attracts it to the class of corporeal hereditaments.

[P. 632, C. 2 ; P. 633, C 1.]

(e) *B. T, Act—Occupancy holding—The* raiyat *has property in the holding distinct and apart from the parent estate.*

Per *Das, J.*—An occupancy holding forms a property by itself and is capable of being held and is in fact held distinct and apart from the estate, within the ambit of which it may happen to lie. An occupancy holding is heritable ; it is transferable with the consent of the landlord. The *raiyat* is entitled to cut down trees provided there is no local custom to the contrary. S 65 protects the tenant from ejectment for non-payment of rent, but allows the landlord to bring the holding to sale with the result that the surplus sale proceeds are available to the tenant. This is a clear recognition of property in the *raiyat* distinct and apart from the parent estate.

[P. 635, C. 1.]

(f) *Acquiescence—Person said to acquiesce must be aware of the matter he acquiesced in and of the effect of such acquiescence.*

Per *Das, J* —The doctrine of recognition is merely the application of the rules of acquiescence or waiver, preventing a party who has acquiesced in a state of things from turning round and alleging a different state of things. It is established that parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them, and that, where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. Recognition, like waiver, must be

an intentional act with knowledge. 34 Cal. 902, Foll. [P. 635, C 2; P. 636 C. 2.]

(g) *Evidence Act, S. 114—Non-production of account books creates adverse presumption.*

Per *Das, J.*:—The inference drawn from the non-production of the books is that, if produced, they would support the other side.

[P. 639, C. 1.]

(h) *Landlord and Tenant—Tenancy is not created by payment of rent to agent for collection.*

The authority to collect rent does not carry with it the authority to grant rent receipts. The question is not of technicality, but of substance. "An authorised agent" for the purpose of granting rent-receipts differs widely from a collecting peon. It is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager. Landlords would be in a very difficult position if it were held that Patwaris and other underlings should be presumed till the contrary is shown, to have the power to sign away their master's rights. A person who has conveyed his proprietary interest to another person but whose name is still borne on the Collector's register, by giving a rent-receipt cannot recognize a person as having a right of occupancy in the land who otherwise had no such right.

[P, 639, C. 2; P. 640, C. 2]

Per *Adami, J.*:—A recognition by a landlord to be effective in favour of a tenant must be clear and certain 1 P. L. J. 414, 2 P. L J 231, *Russo-Chinese Bank* v. *Li Yau Sum*, (1910) A. C. 174 Foll. [P. 649, C. 2.]

(i) *Deed—Plea—Stranger to deed cannot plead condition precedent—Evidence Act, S. 92.*

Per *Das, J.*:—A separate oral agreement constituting a condition precedent to the attaching of any obligation under the document could be proved only by the vendor or his representative-in-interest 27 All, 271 Foll. [P. 641, C. 1.]

(j) *T. P. Act, S. 54—Non-payment of consideration.*

Per *Das, J.*:—Non-payment of consideration does not by itself show that title did not pass, 2 Bom. 547, 23 Bom 525, 11 All. 244, 30 All 125, 4 C L. J. 334 and 17 C. W. N. 1161, Foll.

Hasan Imam, S.C. Milter, S. A. Hussain, S. N. Bose and *S. S. Bose*—for Appellant.

P. C. Manuk, C. S. Bannerji and *A. N. Das*—for Respondents.

Dawson Miller, C. J.:—The appellant instituted this suit on the 5th December, 1914, claiming to recover possession from the defendants of an area of 36 *bighas* 7 *cottas* 11 *dhurs* of land in *Mauza* Etwarpur Jainti in the District of Muzaffarpur. It is admitted that the plaintiff is the proprietor of the Collectorate estate bearing *Touzi* No. 9507 which originally formed an 8 annas share in the *Mauza* and that the lands in suit form part of his estate.

Mr. W. A. Vincent, the principal defendant, claims *khas* possession of the land as sub-lessee of Mrs. Hudson, the defendant No. 12 who claims to be the occupancy *raiyat* at an annual *jama* of Rs. 197-14-0 including road cess. These two defendants alone contest the suit. The suit was originally tried before the Subordinate Judge of Mozaffarpur who by his judgment, dated the 17th February, 1917, found in favour of the defendants and dismissed the suit.

The plaintiff preferred an appeal to the High Court which was heard by Mullick and Jwala Prasad, JJ., who by their judgments, dated the 18th August, 1920, took different views, the former being of opinion that the appeal should be dismissed and the latter, that it should be allowed. Consequently, the present appeal is brought before this Bench by the plaintiff under Clause 10 of the Letters Patent.

The facts out of which the dispute arises are fully set out in the judgments of the Courts below but the points which have been urged before us on behalf of the respective parties make it necessary to bear in mind certain dates in the chain of transactions under which the parties acquired the respective interests claimed by them.

Up to the year 1868 Mauza Etwarpur Jainti formed part of a permanently settled estate held by a number of joint proprietors. In that year Sunder Sahay, one of the proprietors, by a Collectorate partition, obtained an 8 annas share in Etwarpur Jainti, as a separate estate bearing *Touzi* No. 9507, and there is some evidence to show that, even before that date he was in possession under a private partition.

The lands in suit formed part of that estate. Sunder Sahay died in about 1874 and his estate passed into the hands of Matuk Lal and Sheo Prasad. Sometime between 1888 and 1890, Matuk Lal acquired Sheo Prasad's share and became the sole proprietor of the estate. On the 15th July, 1895, Matuk Lal, by an instrument in writing of that date, conveyed his proprietary interest to the plaintiff Bhonu Lal Choudhury and his three brothers. Matuk Lal, however, retained possession until the 29th August, 1896, when the purchase money was paid and possession transferred to the purchasers. On the 23rd June, 1909, by a partition between the plaintiff and his brothers the estate in question was allotted to the plaintiff who is now the sole proprietor.

The defendants' claim to the occupancy interest in the disputed holding rests on a series of transactions which began in the year 1854 (1271 F.) when Sunder Sahay was either sole or joint proprietor of the *Mauza*. In that year Nathu Lal Choudhury who owned an Indigo Factory, now known as the Pirakpur Factory, purchased from five tenants of Sunder Sahay the whole or portions of their respective occupancy holdings measuring altogether 36 *bighas* 7 *cottas* 11 *dhurs* of land which constitutes the subject of this suit.

It is not disputed that the land formed part of the occupancy holding of Nathu Lal's vendors or that Nathu Lal took possession, but it is contended that the holding was not transferable and that the purchaser was never recognised by the landlord. It is said that from 1864 to 1876 Nathu Lal remained in possession of this holding ostensibly as an occupancy tenant and growing indigo thereon for his factory, but no rent receipts are forthcoming for that period.

After Sunder Sahay's death, Sheo Prasad and Matuk Lal being the proprietors, Nathu Lal on the 30th June 1876 took an *ijara* lease from Sheo Prasad of his interest in the *Mauza* for a term of seven years. In 1881 he also took from Matuk Lal an *ijara* of the latter's interest in the *Mauza* and thus became the *ijardar* of the whole estate comprised in *Touzi* No. 9507. It is conceded that the *raiyati* interest, if it existed, over the 36 *bighas* would not become merged in the *ijara* interest. These leases were renewed from time to time and were still in existence on the 23rd July 1890 when Nathu Lal sold his whole interest in the Factory to Mr. H. W. Hudson, the father-in-law and predecessor-in title of the defendant No. 12.

The appellant contends that Nathu Lal's *raiyati* interest, if any, did not pass by that sale and that, in any case, Hudson was never recognised as an occupancy tenant by the landlord. Mr. Hudson who was admittedly the *ijardar* thereafter remained in possession until the *ijara* leases expired on the 4th September 1895. It will be remembered that about two months earlier on the 13th July 1895, Matuk Lal, then the sole proprietor, had executed a conveyance of his proprietary interest in favour of the plaintiff and his brothers but possession was not made over to the purchasers until the 9th August of the following year.

About eight months later, in April 1897, the new landlords granted a new *ticca* lease to Mr. Hudson for a period of seven years. It is the appellant's case that on the expiration of the old *ijara* the right of possession to the whole estate including the disputed land reverted to the landlord.

The defendants contend that the right of possession remained in Mr. Hudson as the occupancy tenant by purchase from Matuk Lal Choudhury, and that he was recognised as occupier by Matuk Lal, the outgoing landlord, and further, that his interest as an occupancy *raiyat* was also recognised by the appellant who about that time acquired Matuk's proprietary interest.

In 1904, the lease of 1897 having expired, a new *ticca* lease was granted to Mr. Hudson of Etwarpur Jainti, together with other property not previously included, for a term of nine years which expired in 1913 and was not renewed. In the meantime, Mr. H. W. Hudson died and his estate devolved upon his two sons, Harry Hudson and Percy Hudson. In 1909 the former died and Percy Hudson became the sole owner of the Factory and of the occupancy tenancy, if it existed.

In the same year Mr. Vincent, the then Manager of the Factory, acquired a 4 annas share of the Factory from Percy Hudson, and in 1912, Percy Hudson having died, he acquired the remaining interest from Percy's widow, the defendant No. 12. The transfer to Mr. Vincent did not include the *raiyati* interest which, if it existed, had passed to Percy Hudson and afterwards to his widow, but Mrs. Hudson, when she transferred her interest in the Factory to Mr. Vincent, had agreed to grant him also a sub-lease of the occupancy holding and on the 13th January 1914 she executed a sub-lease of the holding in favour of Vincent who claims to be an under-raiyat of Mrs. Hudson.

It was contended that Mrs. Hudson had relinquished her *raiyati* interest, if any, by going to England before 1914 but her agent was always on the spot and no question was raised in the pleadings or by the issues upon this point and the matter was not gone into in the evidence. Mullick, J., in the Court below declined, in the circumstances, to go into this matter which was one of mixed law and fact and we consider that he was right in so doing.

(His Lordship after discussing the evidenc came to the conclusion that Nathu Lal acquired an occupancy holding in 1861 and proceeded as follows):—

The next question is whether Nathu Lal, by the conveyance of the 23rd July 1890, transferred his occupancy right to Mr. Hudson. I confess that this question is one of some difficulty. It depends upon the construction of the document. Mr. Hudson, the transferee, is dead and cannot be called as a witness and there is nothing to show whether at the time when he purchased the Factory he was even aware that his vendor had an occupancy holding in the disputed land.

It seems fairly clear, however, from the document that it was the intention of the parties that all the interests of the existing proprietor in the property held by him in connection with the Factory's business should pass. The deed recites that the vendor has contracted for the sale of the Pirakpur Indigo Concern together with all the *Taluks*, *Mauzas* villages, lands, hereditaments and premises, of which particulars are set forth in the schedules. The schedule, a very long document, refers to the *ticeadari* interest in *Mauza* Etwarpur Jainti but does not specially include the occupancy right in the 36 *bighas*.

The operative part of the deed

purports to grant, transfer, assign, etc., unto the purchaser all and every one of the said Taluks, *Mauzas* and lands or parts or shares therein of which particulars are contained in the schedule. "and also all other, if any, the hereditaments and property belonging to or forming a part of or held with the said *Taluks*, *Mauzas*, and lands .....and all manner of rights, liberties, easements, privileges, profits, commodities, emoluments, advantages and appurtenances whatsoever to the said *Taluks*, *Mauzas*, land, Indigo Concern, and hereditaments belonging or in any wise appertaining."

The construction of these words is not free from difficulty but in my opinion they were intended to pass to the purchaser all rights which the vendor possessed in the *mauzas*, lands, etc., referred to, whether such rights were expressly set out in the schedule or not. The occupancy right in the disputed land in *mauza* Etwarpur Jainti was certainly a right of property held with the *ticcadari* rights in that *mauza* although it did not belong to or form part of the interest of the *ticcadar* as such.

It was also a right belonging in a sense to the Indigo Concern. The Indigo Concern, it is true, was not a legal entity and, therefore, in law was not capable of exercising rights of property but the term Indigo Concern as there used seems to me to have been used as synonymous with the proprietor of the Factory as such. And even the recitals refer to an agreement to transfer the Indigo Concern. For these reasons, I am of opinion that the occupancy right of Nathu Lal Choudhury did pass to Mr. Hudson by the conveyance.

It is said that where there is ambiguity in the operative part of the deed one should look back to the recitals and be guided by what is therein contained in interpreting the ambiguity. This canon of construction, however, cannot in my opinion, apply in all cases where there is a doubt or difficulty in the construction of a document. If one is satisfied upon the natural construction of the operative part of the deed that certain property passes, notwithstanding that the construction may be difficult I do not think that the recitals have any binding force. The same difficulty, to some extent, arises in construing the recitals.

In the present case, although the construction is not free from difficulty, I think it was the intention of the parties that all interests of the vendor in the Factory and in the land referred to should pass, and that the words of conveyance are wide enough to include the disputed land.

It next becomes necessary to determine whether Mr. Hudson was recognised as tenant of the occupancy holding by the landlord. It is well established that the receipt of rent by the landlord from the transferee of a holding, not transferable by custom, will validate the transfer. But the *gumastha* or Patwari of the landlord although authorised to collect rents on his behalf has no authority by taking rent from a transferee to create the relationship of landlord and tenant between his master and the transferee.

In such cases the landlord would not generally be bound unless he accepted the rent knowing the source from which it came. The absence of rent-receipts from which any inference can be drawn in the present instance arises from the fact that from the year 1876 upto 1913, except for a short

period between September 1895 and April 1897, the occupier had also a *ticca patta* over the *Mauza* including the disputed land and no separate rent-receipts for the 36 *bighas* in question would be necessary.

There are, however, two receipts for the *ticca* rent for the Falgun *kist* of 1298 F. and for the Aghan *kist* of 1300 F. dated, respectively, the 20th April 1891, and the 18th December 1892, and marked Exhibits N. 1 and N. These were granted by Matuk Lal when he was proprietor and which, if accepted, purport to show that the Factory had *kasht* lands in the *Mauza*.

I shall refer to these presently. There was also a receipt (Exhibit I) for Rs. 138, dated the 18th Bysack 1303, corresponding to the 16th April 1896, signed by Khub Lal, a nephew of Dwarka Lal, the Patwari which if brought to the notice of the landlord clearly shows that he recognised the Pirakpur Factory then owned by Mr. Hudson as the tenant of a holding in Etwarpur Jainti at a rental of Rs. 197-14-0 which could only be the holding in dispute in this suit. This document is important as it relates to the short period when there was no *ticca* lease in existence and when the defendants claim that Mr. Hudson was in possession and paying rent as an occupancy tenant. It is necessary to consider with some care the acts of the parties and the nature of the transactions which took place between the expiry of the old *ijara* lease of the 4th September 1895, when Mr. Hudson was in possession, and the 19th April 1897, when a new *ticca patta* was granted to him by the new proprietors, whose interests are now represented by the appellant. The situation which existed at that time was as follows Matuk Lal had executed a conveyance of his proprietary interest to the plaintiff and his brothers on the 13th July 1895 but the vendor remained in possession as the purchase-money was not paid. Mr. Hudson was at that time the *ijardar* of the *Mauza* but his lease was about to expire and did expire on the 4th September of that year.

His lease was not renewed until 1897 but, in the meantime, he remained in possession of the Factory and of the disputed land pending the completion of the transfer of the proprietary interest to the new purchasers. The only sum which was paid for rent during that time by anybody was admittedly the sum of Rs. 138. The defendant's case is that Mr. Hudson paid this sum on the 16th April 1896 to Khub Lal who was authorised to collect rents on behalf of Matuk Lal who was still in possession as proprietor.

It is further their case that this sum was paid on account of rent due by him as occupancy tenant, and was accepted by Khub Lal as such. There was, during this period, a sort of *inter regnum* in the proprietorship of the estate and in the *ticcadari* interest. The instrument conveying the proprietary interest had been executed but possession was withheld pending the payment of the consideration money. The *ticcadari* lease of Mr. Hudson had come to an end and no new lease had been granted. The position was, therefore, somewhat unusual and the rights of the parties were not clearly defined. Mr. Hudson being no longer *ticcadar* was no longer entitled to collect rents from the tenants. The only person entitled to receive rents would be the registered proprietor Matuk Lal, and Mr. Hudson as occupier of the 36 *bighas* which he claimed, would be liable to the proprietor for the rent of that holding. In support of the defendant's contention that Mr. Hudson paid rent on account of his holding, the defendants have produced the rent-receipt above-mentioned on the 18th Bysack 1303 (16th April 1896) signed by Khub Lal. This shows that the total annual rental including road-cess was Rs. 197-14-0 and it shows that Rs. 138 on account of that rental were paid by the Treasurer of the Pirakpur Factory.

Its authenticity has been disputed but I see no reason to doubt the genuineness of the receipt. The payment of this sum is proved by the witness Bhutan Misser, a servant of the Factory of 25 years standing. He says that the money was paid to Khub Lal who was Patwari under Matuk Lal and that the receipt was signed by Khub Lal in his presence. He further says that the money was paid on behalf of the Factory by Jogendra Babu, as the receipt shows, and that Jogendra was dismissed by the Factory some 15 years ago, which would be about 1902.

He further says that the disputed lands were the *kasht* lands of the Factory and not the *malik* lands. That Khub Lal had authority to collect rents on behalf of the *malik* is proved to my satisfaction beyond all reasonable doubt. His son Baldeo Lal was called

and from his evidence as well as that of other witnesses, it appears that Dwarka Lal, his grand uncle and uncle of his father Khub Lal, both of whom were dead, was the Patwari of the *malik* Matuk Lal and that a few years before Dwarka's death which occurred in 1306 F. (1889 A. D.), Khub Lal who was Dwarka's Naib performed the duties of Patwari on behalf of his uncle.

I am satisfied on the evidence that this sum was paid to Khub Lal by the Factory as rent of the holding to the person who at that time was authorised to receive rents. The appellant contends that this sum of Rs. 138 was not paid by the Factory at all but was collected from a number of other tenants and has produced two documents in support of his contention.

I shall deal with these presently. It does not follow, however, because Khub Lal received rent from Mr. Hudson, that, therefore, the landlord recognised him as a tenant. It must be shown that the landlord had knowledge of the transaction and ratified it either expressly or by implication. The only other receipts of any importance are the Exhibits N 1 and N above referred to. These were of earlier dates and granted when the *Mauza* was held under the *ticca* lease, and are for the *ticcadari* rent after Hudson became *ticcadar*. They purport to show that the proprietor of the Factory had some *kasht* lands in the village. They are dated the 20th April 1891 and the 18th December 1892 respectively. Their authenticity as rent receipts is not impugned but it is said that the important words showing that the Factory had a *jote* in the village have been interpolated. The scribe of the later in date, Exhibit N, was called by the defendants and said they were signed by Matuk Lal and in cross-examination said the word "*mai*" before "*kasht*" was not in his handwriting and he doubted if the word "*kasht*" was. It is, therefore, clear that Exhibit N cannot be relied upon as showing that Mr. Hudson was recognised as an occupancy tenant. It does show, however, that Khub Lal was a person through whom the landlord was receiving rents.

The other document is a receipt also signed by Matuk Lal and there is nothing to show that it is tampered with except a suggestion that the important words "with *jote*" have been interpolated. No expert evidence was called about it and I am not prepared to hold that it has been tampered with. By itself, it does not amount to much. If it were the only evidence in the case, I should certainly hold that it was not sufficient to prove that Mr. Hudson was recognised as an occupancy tenant of the disputed land.

The defendants contend, however, that the events which took place after September, 1895, and which culminated in the grant of a new *ticca* lease in April, 1897, prove that both Matuk Lal and his transferee recognised Mr. Hudson as the occupancy tenant. During this period, presumably, the Factory's business was going on as usual but the situation was, as already stated, somewhat peculiar. Mr. Hudson could not collect any rents as he was no longer *ticcadar*, and for the same reason he was not liable for *ticcadari* rent, and the only sum in fact paid was the Rs. 138 which, I have already held, was, in my opinion, paid by Mr. Hudson as tenant of the holding.

But if and when a new *ticca* lease of the *Mauza* should be granted the question would arise as to how much should be paid and by whom, to the landlords for the intervening period. Before the old *ticca* expired, negotiations had been going on between Mr. Richardson on behalf of the Factory and Matuk Lal for a renewal as appears from the former's letter of the 19th June, 1895. These negotiations appear to have been renewed when the new owners took over from Matuk Lal. I may mention here that this letter is relied on by the appellants as showing that Mr. Richardson at all events did not consider that the Factory had an occupancy interest.

Mr. Richardson was the proprietor of the Bikhampore Indigo Factory in the same District. He appears to have had some sort of partnership agreement with Mr. Hudson and used to supervise the management of the Pirakpur Factory which at that time was being managed by Mr Harry Hudson, the son of the proprietor, then a young man without much experience. From the letter in question it appears that Matuk Lal wished to exclude from the new lease in addition to some *kasht* land of one of the tenants, a plot of two *bighas* of the indigo *zerait*.

Mr. Richardson replied that the land of the tenant named might be excluded but added

"I cannot allow you to deduct from the *patta* the other two *bighas* of *zerait* land."

This, no doubt, refers to a part of the disputed land and it is argued that if Mr. Richardson knew that the Factory had occupancy rights over it, he would have replied that the landlord could not deprive him of it even if it were excluded from the *ticca*. This is not a necessary inference as Mr. Richardson firmly declined to exclude the land and his reasons for so doing may have been presumed by him to have been within the landlord's knowledge. Mr. Richardson was unfortunately not asked about it. But even Mr. Richardson's ignorance would not disprove the defendants' title.

I may mention here that the term indigo *zerait* or even *zerait* is common in Factory parlance to denote land in the home cultivation of the Factory as distinguished from land held by other tenants and would include land over which the Factory had occupancy rights. This is proved by several witnesses and is supported by a passage in Amir Ali's Bengal Tenancy Act (2nd Edition, page 538) which states that in Bihar the term *zerait* is used to denote all lands in direct cultivation of indigo planters for cultivation of indigo as distinguished from cultivation of indigo by *raiyats*.

The factory may hold the land as proprietor, tenure holder *raiyat*, or under *raiyat* and whatever the interest may be, the land is still called *zerait*. The word used in this sense has no connection with the term *zerait* as used in the Bengal Tenancy Act and meaning proprietor's private lands. Indeed, the appellant does not contend that the disputed land was landlord's *zerait* over which occupancy rights could not be acquired but merely *bakasht*.

Nor is it contended that the term *zerait* when used in the documents in the case signifies landlords' *zerait*. The negotiations appear to have been renewed later on and the question was then gone into as to the payment of rent to the proprietors for the period when there was no *ticca*. According to the defendants' evidence a *jama wasilbaki* was prepared on the 8th April 1897 by Biseswar Lal, the *muharrir* of the Factory, in the presence of the tenants and Matuk Lal's agent Haji Gowsan Mian. Biseswar is dead but the document then prepared was proved by Gopal Lal who was present on the occasion.

This document shows the amount of rent due to the landlords from the respective tenants including profit from trees and other sources for the two years in question and the sums paid on account for that period. It gives the area of the holdings and the annual *jama* and includes the Pirakpur Factory as the *kashtkar* of 36 *bighas* 7 *cottas* 11 *dhurs* at the annual *jama* of Rs. 197-14-0. The total amount due is shown to be Rs. 1,150 for the two years less Rs. 138 paid by the Factory, none of the other tenants having paid anything.

The document is endorsed by Mr. E. H. Hudson, who was then the manager, the endorsement showing the balance due to be Rs. 1,012. Mr. Hudson says the document was made preparatory to the new lease being executed. The new lease was executed 11 days later by the new proprietors and shows that Rs. 1,012 was the balance due from the tenants for the two years in question after crediting the Rs. 138.

It is the defendants' case that the arrangement made between the parties when the new lease of the 19th April 1897 was granted was, that for the two years corresponding to 1303 and 1304 F. when there was no *ticca* lease, the *ticcadar* should pay not at the *jama* of Rs. 600 per annum payable under the new lease nor at Rs. 500 per annum payable under the old lease but Rs. 1,150 for the two years being the actual amount of rent as stated in Exhibit K, payable by the tenants for those two years including the Rs. 197-14-0 the rent of the disputed holding less the sum of Rs. 138 already paid to Matuk Lal and that the *ticcadar* should collect the arrears, *viz.* Rs. 1,012, from the tenants himself with a stipulation that if he should fail to collect the rents from the tenants for the year 1303 F. the landlords should reimburse him.

The suggested reason for this arrangement is, that in the absence of a lease the landlord is entitled to collect the actual rent payable by the tenants including that of the disputed holding, but that, as a matter of convenience, Mr. Hudson should advance to the landlords the balance still due for the period and reimburse himself from the tenants.

This was obviously a convenient course and would ensure continuity in the mode of payment by the tenants, but as Matuk Lal had been in possession during 1303 F. and might have collected some further rents, there

was an express stipulation that the new landlords should be responsible if any of these rents could not be collected.

We, therefore, find in the *kabuliyat* executed on behalf of Mr. Hudson in respect of the lease for 1897 a clause relating to the arrangement mentioned for the rents of the two previous years. The *kabuliyat* was put in evidence by the appellant himself and admittedly represents the terms of the *patta* which was not produced. The clause in question reads as follows :—

" There was Rs. 1,150 on account of rent for 1303 and 1304 F. due by the tenants, out of this Rs. 138 had already been received by the former proprietors, and the remaining sum of Rs. 1,012 was found justly payable to the landlords by the tenants and by me the *ticcadar* which I the *ticcadar* have paid to them in cash and in one lump on getting receipts, and the landlords have brought it to their possession and appropriation, and I the *ticcadar* will get the same from the tenants of the village and from my own *tahsil*, and as regards the arrears due by the tenants, and by me the *ticcadar* for 1304 F. which I have paid to the landlords, I shall have no objection. If, as regards the arrears of 1303 F. I the *ticcadar* suffer any loss, then the landlords will be responsible therefor."

This clause clearly indicates to my mind that the landlord—that is, the appellant and his co-sharers knew that the rental payable by tenants for the two years was Rs. 1,150 and that Rs. 138 had been paid to their vendor and that the balance of Rs. 1,012 was payable to the landlords from the tenants including in that category the *ticcadar*. It further shows that the *ticcadar* having paid this balance by arrangement to the new landlords, should collect it from the various tenants including himself or as the *kabuliyat* puts it " from the tenants of the village and from my own *tahsil*."

These figures correspond exactly with the *jama wasilbaki* papers made up by Biseswar Lal in the presence of the tenants and the old landlords' agent. The inference is, to my mind, irresistible that the appellant recognised the *ticcadar* as the tenant of a holding in the village and it is not contended that he had any other holding. It is necessary, therefore, to see how the appellant explains the clause in the *kabuliyat*. He says that when the old *ticca* lease expired, he permitted the Factory to remain in possession as *ticcadar* by an oral agreement, with Mr. Hamilton Hudson, at that time the manager, and that the annual rent was to be Rs. 575 for the years 1303 and 1304 F.

This, he says, was done without going into any accounts and presumably was not based upon the actual amount due or which would become due from the tenants and which as appears from the *wasilbaki* papers was a varying quantity each year. It is significant that the sum so arrived at should be the exact figure which at the end of the period turned out to be the actual rent recoverable.

It is also significant that Mr. Hamilton Hudson whose evidence was taken in January 1917 about a month before the appellant himself, was not asked a word in cross-examination as to any such oral agreement although the appellant was present in Court at the time. I confess that this latter consideration should not be given too much weight, as in the present case it is a regrettable fact that the Vakils on either side, either through lack of instruction or for some other reason, failed to elicit from the witnesses both in examination and cross-examination evidence on many matters which it was manifestly desirable to elucidate.

It is the more regrettable as Mr. H.W. Hudson who was then the proprietor of the Factory was dead and unable to give evidence. The appellant further says that Matuk Lal did realise 138 from the tenants for the year 1303 F. and that he paid him a balance of Rs. 382 making Rs. 520 altogether as the rent for that year. He presumably treated Matuk Lal his vendor, as entitled to the income for that year, the consideration-money not having been paid until about the end of 1303 F.

This story is quite inconsistent with the clause just cited from the *kabuliyat*. The Rs. 1,150 is there stated to be the rent due from the tenants and payable to the landlords, whereas, if the Factory was in fact the *ticcadar* for those years under an agreement oral or otherwise, the *ticcadar* alone

would be responsible to the landlords and would take his chance of collecting the *raiyati* rents. It would not concern the landlord as long as he was paid the *ticca* rent whether the *ticcadar* could recover from the tenants or not.

Further, as this risk would be on the *ticcadar*, it is difficult to suppose that he would have made no attempt to collect any rents from the tenants during the intervening period and again we find that such rents as were paid, *viz.*, Rs. 138 were paid not to the *ticcadar* but to the landlord Matuk Lal and this is not disputed. This sum the appellant says was collected in small sums from various tenants not including Mr. Hudson and produces a document in support of this, which I shall refer to in a moment.

The appellant's story cannot be reconciled with the stipulation as to the landlord's responsibility if the *ticcadar* should fail to collect the rents for 1303 F. If the oral agreement existed, these rents were the *ticcadar's* affair and if he failed to collect them he alone would suffer the loss. The appellant in cross-examination contradicted the story he first told as to an oral lease for the two years in question and said that there was no oral lease for the second year.

This however, would not explain why he should assume any responsibility for the failure to collect rents for the first year. He further says that neither Dwarka Lal nor Khub Lal were ever Patwaris for his predecessor.

The only object that I can see for this manifest untruth is to cast discredit on some of the documents relied on by the respondents. I am quite unable to accept his story and think that the Subordinate judge and Mullick, J., were amply justified in rejecting it. It is admitted that the sum of Rs. 138, was paid to Matuk Lal and that the appellant was so informed by him. I am satisfied that this sum was paid by the Factory on account of rent for the holding.

Now having regard to the fact that Matuk Lal was aware of the payment of Rs. 138, as he communicated this fact to the purchasers, can it for a moment be doubted that he at least well knew the source from which it came? Matuk Lal is dead and Mr. Hudson, the proprietor of the Factory in 1897, is dead and direct evidence as to Matuk Lal's information is not before us. But it must be remembered that this rent was accepted by Matuk Lal and credited in account between himself and his purchaser.

It was important for him to know at that time exactly which, if any, of his tenants had made any payment. In my opinion the proper inference to draw is that Matuk Lal knew that the Factory had paid this sum as a tenant at a time when they had no *ticca* lease. In any case, I think the *onus* would rest upon him and upon his successors to rebut the inference and this they have failed to do.

In fact, the document Exhibit K made in the presence of Matuk Lal's agent corroborates the inference that Matuk Lal had knowledge. When the payment of Rs. 138 was made in April 1896 Matuk Lal was still in possession and the ownership in the property had not in my opinion, passed from him. The sale under the deed of the 13th July 1895, to the plaintiffs was to be in consideration of the purchase price and in respect of the consideration money in cash, but the consideration never passed until the following August and I can see no reason why, if Matuk Lal who still remained the owner, recognised the Factory as tenant, this should not bind his transferee if and when the latter should ultimately complete the sale.

Unless Matuk Lal deliberately deceived the purchasers, they also must have known the source from which the rent was derived. Moreover, the *kabuliyat*, in my opinion, establishes the fact that the appellant knew that Mr. Hudson had a holding in the village. A receipt, Exhibit 7, given by Matuk Lal to the appellant for Rs. 382 on the 29th August 1896, when the balance of the purchase-money was paid, was relied on by the appellant. It shows the total rent due for the year 1303 F. as Rs. 520 of which Rs. 138 had already been received.

There is nothing to show how the Rs. 520 was arrived at. The document came into existence before the *wasilbaki* paper (Exhibit K) was made up and the sum of Rs. 520 may have been a rough estimate made by Matuk Lal. Exhibit K shows that the rent for that year, including Rs. 194-14-0 payable for the disputed holding was in round figures Rs. 557. This sum inclu-

des the profits of the mango trees, salt and other items which varied from year to year, and it may well be that the Rs. 520 was an estimate based upon insufficient material.

It may, on the other hand, be as suggested by the learned Counsel for the appellants, the *ticca* rent of Rs. 500 with the added sum of Rs. 20 for rental of the holding of Haji Gowsan Mian not included in the *ticca*. There is nothing in this document which contradicts the respondents' story and it shows at least that Rs. 138 had been collected by Matuk Lal from tenants, etc.

The appellant also produced a document, Exhibit 8, which he says he received at the same time from Matuk Lal and which he shows details of collection from 36 tenants amounting to Rs. 126-7-3 for the year 1303, F. which, together with a verbal loan made to Haji Gowsan Mian, the *gomasta* of Matuk Lal, of Rs. 12-2-3, makes Rs. 138 9-6. It also shows how this sum has been spent in payment of Government revenue and cesses.

This is relied upon as indicating that Rs. 138 had been collected from tenants other than the *ticcadar*. How it came into existence is not explained and the writer was not called; nor were any of the tenants called to say that they had paid the sums attributed to them, although one of them at least was present in Court at the trial.

No one takes any responsibility for it and it is not signed by any one. Moreover, the sum stated therein as collected from tenants is not Rs. 138, the admitted amount but Rs. 126-7-3. In the circumstances, I think it would be very dangerous and indeed impossible to rely upon this document as proving anything at all.

There are, however, certain other features appearing in the *kabuliyat* of 1897 which have been urged upon our attention by the learned Counsel for the appellant and which he contends are inconsistent with the conclusion that his client recognised Mr. Hudson as his tenant. The second paragraph of the *kabuliyat* reads:

"I have obtained *ticca patta* of the whole and entire 8 annas of the Collectorate partitioned *patti* including 36 *bighas* 7 *cottas* 11 *dhurs* of *zerait* land lying as per boundaries given below in *mouza* Etwarpur Jainti"

"and towards the end of the document there is a covenant in these words:

"In Assin 1312 F. S. I will cut down the indigo crops that may be standing on the *zerait* lands on payment of 10 annas instalment of rent, and without waiting for any notice I will relinquish possession of the leasehold property and in that circumstance I shall have no right to interfere in the leasehold property nor shall I have any right to occupancy to the *zerait* lands, etc."

As already stated, the use of the words '*zerait land*' in the earlier part of the document is quite consistent with the same, having been the Factory's indigo *zerait* over which they had a right of occupancy, and if this land were excluded from the *patta*, the *raiyati* rent for the same, if the *ticcadar* was occupier, would be payable in addition to the *ticca* rent. There had been some negotiation as to exclusion of a portion of these lands and it was, therefore, natural to find their inclusion expressly mentioned although perhaps it was not strictly necessary as they would be included unless excluded.

It is not contended, however, that the expression *zerait* means landlords' private land and the suggestion that the land in suit was ever landlords' *zerait* within the meaning of the Bengal Tenancy Act was abandoned in argument before us. It had never in fact been in the landlords' cultivation. It might, on the other hand, be argued with much greater plausibility that, as the disputed land was never landlords' *zerait*, the use of the terms is an admission that the land was indigo *zerait* in the private cultivation of the Factory as a tenant, there being no suggestion that it was cultivated by any one else. The use of the term is certainly not, in my opinion, any admission by the *ticcadar* that the land in suit was landlords' *zerait*.

The point made, however, is that the covenant to relinquish possession of the lease-hold property and claim no right of occupancy in the *zerait* lands at the termination of the tenancy as well as to pay 10 annas instalment of rent for cutting the crops on the *zerait* land in Assin 1312 F. S., is quite inconsistent with the claim of an occupancy right on such land and negatives the suggestion of recognition. If the covenant could be interpreted as referring only to the 36 *bighas* mentioned at the

beginning of the document and to nothing else, even though such an undertaking would in law not bind the *ticcadar* to relinquish his occupancy holding, if he had one, it might indicate that Mr. Hudson was not at the time putting forward any claim to an occupancy holding at all, and that his attitude was inconsistent with that of a person asserting such a claim. It is not, however, necessary to interpret his undertaking as having reference to the *zerait* land mentioned in the beginning of the document.

And, having regard to the context, the undertaking may equally well be satisfied by reference to what immediately precedes it. It is immediately before provided that if the *ticcadar* should have to sue the tenants for arrears of rent and sell their lands in execution of decrees and purchase them or if he should acquire occupancy rights in any way, then, after the expiry of the *ticca* he will give up possession without objection, that the *ticcadar* will not obtain from any tenant *kurtaola patta* or any deed for any term beyond the terms of this deed, and, if he should do so, it will be deemed invalid and infructuous after the expiry of the term of this *patta*; that within the *mahal* he will not purchase the entire occupancy holding or any portion of it and if he does so, it will pass into the possession of the landlords as their *zerait* land. Then follows the passage quoted above.

Now, stipulations of this nature are extremely common in such leases and are meant to protect the landlord from the acquisition by the *ticcadar* of occupancy rights during the currency of the lease which would bind the landlord on its termination. They merely express what the law implies but they are, nevertheless, in common use. One finds in the *ticca patta* of 1881 and 1883 granted by Matuk Lal and Sheo Prasad to Nathu Lal Choudhury a stipulation as payment of a proportionate amount of 10 annas instalment of rent for cutting the crops on the *khudkasht* land after the termination of the lease, at a time when it is clearly proved that Nathu Lal had admittedly an occupancy right in the disputed holding of at least eight *bighas*.

As these leases were renewed, no question could arise as to whether the undertaking covered crops on the *ticcadar's* occupancy holding. There is no express covenant in those leases for relinquishing the lands at the termination of the lease but although such a covenant is usual it is unnecessary. It is not contended that the covenant to give up possession is legally enforceable in respect of any lands over which the *ticcadar* had an occupancy right, and, therefore, it seems to me that it was intended to apply and apply only to the land that might be acquired during the currency of the lease in any of the ways mentioned immediately above and which land is referred to as *zerait*.

This applies equally to the covenant to pay the 10 annas instalment of rent. Whether the covenant could be enforced in respect of the disputed land depends entirely upon whether the *ticcadar's* right of occupancy existed or not, and the covenant itself cannot, in my opinion, legitimately be read as an acknowledgment of the absence of such a right.

The appellant further relies upon the presumption in his favour arising from the Record-of-Rights which was finally published in April 1896 and which described the disputed land as *bahasht* of the *ticcadar* but not *zerait*. If we are satisfied that there was an acknowledgment of the occupancy interest by the landlord in 1897, the Record of-Rights becomes immaterial. It is relied on, however, to show that, during the preparation of the record and up to 1896, there was apparently no claim by the Factory or Mr. Hudson to have the lands, recorded as the Factory's occupancy holding.

The reason for this, I think, is not far to seek. From 1894 up to 1897 there were repeated changes in the management of the Factory. In 1894 Harry Hudson, a young man of 24, without much experience was manager. At the end of 1896 or beginning of 1897 Mr. Hamilton Hudson (E. H. Hudson) took over charge. It was the first occasion on which he had independent charge of a Factory and he was quite new to the work.

He was followed sixteen months later by Percy Hudson, also a young man without previous experience. The Survey and Record-of-Rights was the first in Bihar and it can hardly be a matter of surprise if these inexperienced Factory managers failed to attach to such proceedings the same importance as one would now, after 25 years experience of the utility and value of Survey

Records. It is, therefore, not suprising to find that the entry in the record was allowed to go unchallenged at the time."

One other document was also much relied on by the appellant, *viz.*, the Road Cess Return dated the 27th October, 1902. This document was prepared by Beni Prasad Singh the Am-Mukhtar of Mr. Hudson. It consists of two parts. The first part should contain details of lands in the actual occupation and cultivation of the person submitting the return, whilst the second part should contain details of land held by cultivating *raiyat*.

At first sight, therefore, part I ought to contain details of the disputed land in the actual occupation and cultivation of the *ticcadar* on whose behalf the Return is made, whereas it seems, at all events, doubtful whether it could properly be entered under part II. The disputed land was in fact entered in part II as well as 2 *bighas* 9 *cottas* of another tenant which was apparently under the direct cultivation of the *ticcadar*.

There is a note, however, in small print at the bottom of part I to this effect—

"In the body of the statement should be entered only *nij jote* land and such uncultivated lands in the use and occupation of the makers of the Return as are capable of assessment on their annual value."

It is contended that by making this Return the *ticcadar* acknowledged that the land in suit was *nij jote* land or, at all events, that it is evidence indicating that he considered it as such. According to S. 116 of the Bengal Tenancy Act, proprietor's private lands are known in Bengal as *kamat*, *nij* or *nij jote* and in Bihar as *zeraiti*, *nij sir*, or *kamat*. It is argued from this that the inclusion of the disputed land in part I of the Road Cess Return must be taken as having been made after due deliberation and with full knowledge of the exact phraseology of the sections of the Bengal Tenancy Act.

I am quite unable to attach any importance to the entry. The land had to be entered in one or other of the schedules and even if it was placed in the wrong schedule according to the instructions at the bottom of the page, it was a very natural mistake to make. It is a mistake also, if it be such, which applied to the 2 *bighas* 9 *cottas* of the other tenants land and it is not suggested that this was landlords' zerait. The document was put in on behalf of the plaintiff and it was not drawn to the attention of any of the defendant's witnesses nor were they asked to explain it. It may well be that just as the word "*zerait*" in Bihar is an apt term to designate indigo *zerait*, so the *ticcadar*, if he thought about it at all, considered that *nij jote*, which is a synonym for *zerait*, had the same significance.

It is moreover, nobody's case that the land is *nij jote* in the sense in which it is used in the Bengal Tenancy Act and this document, in my opinion, affords no evidence from which any inference can be drawn. In the Road Cess Return, dated the 19th November, 1912, also put in by the appellant, under the heading of "area of the *zerait* and *bakasht* lands" is entered 36 *bighas* 7 *cottas* 11 *dhurs zerait* which negatives the suggestion that the disputed land was *bakasht*. That Return was made before the last *ticca* lease expired and indicates that at that time, at all events, the *ticcadar* considered the disputed land as such.

In the view I take as to the recognition of Mr. Hudson as an occupancy tenant in 1897 it is not strictly necessary to determine whether Nathu Lal's occupancy right was included in the conveyance of the 23rd July, 1890 although I have already expressed my opinion upon this point. It is clear that Nathu Lal after 1890 made no attempt to exercise any rights of occupancy over the land or to dispute his transferee's claim thereto.

It is equally clear that in 1897 the Factory was in possession and asserting a right of occupancy and if my conclusion is accurate that the occupancy right in the Factory was then recognised, it is immaterial whether it passed by the conveyance from Nathu Lal.

In my opinion the appeal should be dismissed with costs.

Das, J.:—I regret that I am unable to agree with my Lord the Chief Justice. The important events connected with this litigation have all been stated by my Lord, and I do not propose to recapitulate them.

On the arguments that have been advanced before us, three important questions arise for consideration; 1st did Nathu Lal purchase 34 *bighas* 7 *cottas* 11 *dhurs* of occupancy holding and was his purchase recognised by Sunder Sahay the then landlord? Secondly, did Nathu

Lal convey these lands to Mr. Hudson by the Indenture dated the 23rd July 1890; and thirdly, was Mr. Hudson recognised as an occupancy tenant in respect of these lands by the plaintiff, who had purchased the interest of Matuk Lal, the successor-in-title of Sunder Sahay?

[The judgment then discusses the evidence concerning the tenancy in favour of Nathu Lal and continues as follows:—]

I now come to the letter, Exhibit E, which is strongly relied upon by the defendants. It is in my opinion, always dangerous to come to any conclusion on the question of forgery on a mere comparison of the writing in a disputed document with the writings in admitted documents.

The plaintiff relies upon the admitted signature of Sunder Sahay in Exhibits 4, 14 and 14-A and contends that a mere comparison of the signature of Sunder Sahay in Exhibit E with his admitted signatures in Exhibit 4, 14 and 14-A will demonstrate that his signature in Exhibit E has been forged. That the style of the signature in Exhibit E is different from the style in Exhibits 4, 14 and 14-A can admit of no doubt whatever.

The learned Subordinate Judge concedes that the signature in Exhibit E is much larger than the signatures in the admitted documents; but he thinks that there is no essential difference. Mr. Justice Jwala Prasad, with his knowledge of the Persian script, has recorded an unhesitating finding to the effect that

"the signature in Exhibit E is widely different from his admitted signature in the other documents."

I attach very great importance to the view which has been expressed in the Court by Mr. Justice Jwala Prasad, but I prefer to rest my decision on the unimpeachable evidence furnished by the letter itself.

The letter runs as follows:—

"I have on your application recognized you as cultivator of 36 *bighas* 7 *cottas* 11 *dhurs* of occupancy holding having annual *jama* of Rs. 197-14-0 including rent and the road cess to be levied by the Government in future lying in *Mauza* Etwarpur Jainti constituting my proprietary interest, that you have purchased from the tenants of the village. Yours sincerely, Sundar Sahay, *bakalam khud* (by my own pen).

Mr. Hasan Imam has argued that the inclusion of road-cess to be levied by the Government in future in the *jama* of Rs. 197-14-0 is highly suspicious because admittedly the first of the Road Cess Acts was not introduced till the 3rd June 1871. That may be so, but it may well be that legislation as to the imposition of a road-cess was in the contemplation of the Government for many years prior to the actual introduction of the Bill in the Council and I would not be prepared to hold that the letter has been forged merely on the ground that there is a reference in it to the road cess to be levied by the Government in future.

But it is impossible to rely upon the letter in so far as it asserts, first, that the *Mauza* was his proprietary interest, and, secondly, he had recognised Nathu Lal as his occupancy tenant in respect of 36 *bighas* 7 *cottas* 11 *dhurs* of land purchased by Nathu Lal from the tenants. I have shown from the *batwara khasra* that the *Mauza* did not constitute the proprietary interest of Sunder Sahay in 1864 and I have also shown that Nathu Lal had only 8 *bighas* 6 *cottas* 9½ *dhurs* of occupancy holding in 1868.

There is an other point in connection with this letter which is worthy of our consideration, the use of the expression "*bakalam khud*" to convey the idea that the signature in the letter was made by his own pen. Now, there are two expressions which may be used to convey the same idea; "*bakalam khud*," and *bakalam khas*. In the documents which bear the admitted signatures of Sunder Sahay the expression used is *bakalam khas*. This is the only document in which the other expression is used.

The view of the learned Subordinate Judge is that "*bakalam khas*" which is an idiomatic expression may have been written at the suggestion of better scholars than himself and "*bakalam khud*" of his own motion. I am wholly unconvinced by the argument which has been employed by the learned Subordinate Judge. One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being

most commonly manifested in the formation of an idea or in the mode of spelling particular words.

The test is a useful one and there is no reason why we should not apply it here. Having anxiously considered the internal evidence furnished by the letter itself in the light of admitted facts and circumstances as to which there can be no dispute whatever, and giving due weight to the opinion of Mr. Justice Jwala Prasad, I have come to the conclusion that Exhibit E is not genuine and ought not to be relied upon. Exhibit D stands on no better footing. It purports to be a list of documents kept by Nathu Lal and is dated the 14th January 1869.

If, as I hold, Exhibit E is not a genuine document, I cannot rely upon Exhibit D at all. The important questions which arise in connection both with Exhibit D and E are these, first, whether Sunder Sahay was the sole proprietor of an estate in 1864; And, secondly, whether in 1864 Nathu Lal did have 36 *bighas* 7 *cottas* 11 *dhurs* as his occupancy holding?

The admitted Collectorate partition in 1868 and the *batwara khasra*, Exhibit 22, clearly establishes that Sunder Sahay was not the sole proprietor of the estate in 1864 and that in 1864 Nathu Lal could not have had 36 *bighas* 7 *cottas* 11 *dhurs* of occupancy holdings. The *batwara khasra* not being open to any suspicion whatever, it must follow that any document which contradicts the *batwara khasra* cannot stand. I hold that Nathu Lal did not have 36 *bighas* 7 *cottas* 11 *dhurs* of occupancy holding.

The next question is, assuming Nathu Lal acquired occupancy rights in these lands, did he convey these rights to Hudson by the indenture, dated the 23rd July 1890. The operative words here are,

'all and every one of the said Talooks *Mauzas* and lands or parts or shares therein of which the particulars are contained in the said schedule hereto and also all others, if any, the hereditaments and property belonging to or forming part of or held with the said Talooks, *Mauzas* and lands.....and all manner of rights, liberties, easements, privileges, profits and commodities, emoluments, advantages and appurtenances whatsoever to the said Talooks, *Mauza* land, Indigo Concern and hereditaments belonging to or in anywise appertaining or therewith usually held, used, occupied, possessed or enjoyed....."

It is conceded that the particulars of the disputed lands are not to be found in the schedule of the "Talooks *Mauzas* and lands" annexed to the deed of conveyance; but it is argued first, that they fall within the description,

"and also all other, if any the hereditaments and property belonging to or forming part of or held with the said Talooks *Mauzas* and lands"

and secondly, that they are covered by the conveyance of

"all manner of rights, liberties, easements, privileges, profits, commodities, emoluments, advantages and appurtenances whatsoever to the said Talooks, *Mauzas*, land, Indigo Concern and hereditaments belonging to or in anywise appertaining or therewith usually held used, occupied possessed or enjoyed."

The latter argument is a short one and may be disposed of at once. I think it is well understood that the words upon which reliance is placed were intended to pass and in fact did pass only those rights which are known as incorporeal hereditaments, that is to say, such rights as are not accompanied by actual possession.

But it was argued that a right of occupancy such as is claimed in the disputed lands is an incorporeal hereditament and must be deemed to have passed by the words employed. From one point of view Mr. Manuk is correct for a right in the land is, in strictness, like any other right, incorporeal. The truth is that there always has been some confusion between the right of property and subject of property, a confusion which it was necessary for the conveyancers to avoid.

It is, therefore, more relevant to enquire whether in conveyancing there is any distinction between corporeal and incorporeal hereditaments than whether logically there ought to be any distinction between them. Now, the old modes of conveyancing under which an estate accompanied by possession passed by livery while future estates and other rights in land passed by grant, gave a practical rule for distinguishing between corporeal and incorporeal hereditaments. The old conveyancing test is now obsolete; but the distinction is still maintained, and such rights as are not accompanied by exclusive possession are classed amongst incorporeal hereditaments whereas those

rights which entitle the owner to the present possession of the land or to receipt of rent and profit are classed as corporeal hereditaments.

It is quite true that a right of occupancy, looked at from the point of view of right of property and not subject of property, is incorporeal in its nature but the actual possession of the land to which a person having right of occupancy is entitled, attracts it to the class of corporeal hereditaments. I am of opinion that the disputed lands are not covered by the words upon which reliance has been placed by Mr. Manuk.

I have now to consider whether the disputed lands are covered by the words,

"and also all other lands if any the hereditaments and property belonging to or forming part of or held with the said *talooks, mauzas* and lands."

Now it will be noticed that the recital is far more specific and certain, in that it confines the operation of the deed to

"the *talooks, mauzas*, villages, lands, hereditaments and premises of which the particulars are set forth in the schedule."

Prima facie, the operative part not only covers the *talooks, mauzas* and lands or parts or shares therein of which the particulars are contained in the schedule but extends the operation of the deed to

"also all other lands, if any, the hereditaments and property belonging to or forming part of or held with the said *talooks, mauzas* and lands."

The critical question is whether the operative part is so clear that it must prevail over the recital. It is quite true that the recitals in a conveyance are subordinate to the operative part and that, consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals; but it is well established that where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers, then the recitals can and ought to be used to explain its meaning, and that while, for the purpose of construing the operative part, the whole of the instrument may be referred to, yet the recitals leading upto it are more likely to furnish the key to its true construction than the subsidiary clauses of the deed.

For instance parcels of a deed described with certainty are not cut down by recitals showing that something less was intended to pass; but the recitals assist the construction of the operative part where there is an ambiguity in the operative part as to the property affected.

The case of *Walsh* v. *Trevanion* (1) may be usefully considered in this connection. The deed, which was a marriage settlement, recited a mortgage to the Bank of England of certain of the lands belonging to the Trevanions and then it recited the intended marriage of Trevanion with Miss Trelawney, and it recited further that, "upon the treaty of the said intended marriage," it was

"agreed that such of the hereditaments .....as are comprised in the said recited indentures of mortgage should be settled; to certain uses, etc."

"The deed then went on:

"Now, therefore, for carrying into execution the said agreement.....they, the said.....Trevanions"

direct, limit and appoint that

"the messuages or tenements, lands and other hereditaments, hereinafter granted, released and confirmed, or expressed as intended so to be,"

"shall be and remain (but subject and charged as herein before mentioned) to the uses, etc."

It was agreed that, so far as the recitals went, only those properties belonging to the Trevanions (father and son) which were subject to the mortgage in favour of the Bank of England were intended to be conveyed; but then the operative words were these:

"All and singular the messuages, lands, tenements and other hereditaments of them the said.....Trevanion and..... situate, lying and being within the manor of Carhais, and also within the several parishes of St. Michael. Carhais, Ouby, Goran Probus Veryan, St. Teath and St. Denis, in the said Country of Cornwall, and which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description herein before expressed and contained."

The schedule annexed to the deed specified and contained such of the messuages, lands and heredit aments lying in the manor of Carhais and the several parishes

(1) (1850) 15 Q. B. 733=19 L.J.Q.B. 458= 117 E. R. 636=14 Jur. 1134.

mentioned in the deed as were specified and contained in the schedule to the mortgage in favour of the Bank of England. The plaintiffs relied upon the recitals and the schedule and contended that such messuages, lands and hereditaments only as were mortgaged to the Bank of England, and no others, passed by the deed.

The defendants, on the other hand, relied upon the operative part and especially upon the statement that the schedule was not intended to abridge or affect the generality of the expression used in the operative part, and contended that all the messuages, lands and tenements situate lying and being within the manor of Carhais and several parishes mentioned passed, and not only such of them as were mortgaged to the Bank of England.

Stopping here for a moment, I may ask myself the question whether the words employed in the deed upon which reliance is placed by Mr. Manuk have any larger operation than the words upon which the defendants relied in the case cited. In the case before us, certain properties are conveyed by a schedule, and there is no conflict whatever between the recitals and the schedule but then the deed conveys

"also all other lands if any, the hereditaments and property belonging to or forming part of or held with."

the properties described in the schedule.

In the case cited, the conveyance was also by a schedule which also agreed with the recitals; but then the deed provided that the schedule was not intended to abridge or affect the generality of the expressions used in the operative part. In my opinion, no distinction on principle can be drawn between the words on which the defendants in the case cited relied and the words upon which Mr. Manuk relies.

Patteson, J., delivering the judgment in the case thought that the rule of construction was this that, when the words in the operative part of a deed were clear and unambiguous, they could not be controlled by the recitals or by the other parts of the deed; but that when these words were of a doubtful meaning the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words. Taking, then, the words upon which the defendants relied, namely,

"but which schedule is not intended to abridge or affect the generality of the expression herein before expressed and contained"

the learned Judge said as follows:

"These words are not clear and unambiguous, they may either include all the lands of the parties situate in the manor and parishes mentioned, whether these lands be specified and described in the schedule or not, or they may include only such lands in the same manor and parishes as are virtually and in substance specified and described in the schedule, though they may be imperfectly and inaccurately so specified and described. The latter meaning is the more sensible and probable one to be collected from the words used, independently of any supposed intention of the parties, or any other parts of the deed. At any rate, the former meaning is not clear and unambiguous.

"We must, therefore, look to the recitals and other parts of the deed; and when we do so, it is utterly impossible to doubt but that the parties intended to confine the operation of the deed to the lands which were in mortgage to the Bank of England"

Are the words on which Mr. Manuk relies any more clear and unambiguous than the words upon which the defendants relied in the case cited? They may include, on one interpretation, every bit of land lying within the ambit of the Talooks, Mauzas and lands conveyed; but then the conveyance would include much that did not belong to the grantor, for instance, the occupancy holdings of tenants other than the grantor; or they may include only such lands in the properties conveyed as are virtually and in substance specified and described in the schedule though they may be imperfectly so specified and described.

For instance, such tenancy lands as were purchased by the grantor during the subsistence of the *ticca* and which became an accretion to the *ticca* would pass under these words—though they may not have been specified in the schedule, if the *ticca* itself was so specified. I am of opinion that the latter interpretation is correct, and that the words relied on were added for greater safety, in order to guard against any possible misapprehension as to the true position. But, if the latter interpretation is not correct, there is at least some ambiguity in the words employed. We are then entitled to look to the

recital and other parts of the deed and when we do so, it is impossible to doubt but that the parties intended to confine the operation of the deed to the properties specified in the schedule.

Apart from any other consideration, I do not see how the occupancy holdings of a tenant can be said to belong to or form part of or be held with a *ticcadari* village. It is only on the hypothesis that occupancy holdings purchased by a *ticcadar* prior to the commencement of the *ticca* do not belong to or form part of the *ticca* village that the *ticcadar* is entitled to retain the occupancy holdings on the expiry of the *ticca*. If they do belong to or form part of or are held with the *ticcadari* village, then there is no escape from the conclusion that they should be made over to the landlord on the expiry of the *ticca* lease.

But in truth an occupancy holding forms a property by itself and is capable of being held and is in fact held distinct and apart from the estate, within the ambit of which it may happen to lie. Even a cursory examination of the Bengal Tenancy Act will establish this point. An occupancy holding is heritable, it is transferable with the consent of the landlord. The *raiyat* is entitled to cut down trees, provided there is no local custom to the contrary. Section 65 protects the tenant from ejectment for non-payment of rent, but allows the landlord to bring the holding to sale with the result that the surplus sale proceeds are available to the tenant. This is a clear recognition of property in the *raiyat* distinct and apart from the parent estate.

Section 76 and Section 77 entitle the *raiyat* to effect substantial improvements including the erection of a suitable dwelling house for himself and his family. Section 85 authorizes sub-letting subject to certain restrictions. Section 160 treats a right of occupancy as a protected interest not liable to be annulled by a purchaser of the superior tenure at a sale in execution of a decree for arrears of rent. The last mentioned section is itself a conclusive answer to the contention of Mr. Manuk; for, if an occupancy holding belonged to or formed part of or was held with a superior tenure, it is difficult to understand how it could exist as a separate property after the purchase of his superior tenure at a sale in execution of a decree for arrears of rent.

I am of opinion that the words relied upon by Mr. Manuk did not pass the occupancy holdings in question and that Mr. Hudson did not acquire the disputed lands by the conveyance of the 23rd July, 1890.

The last question is—Was Mr. Hudson recognized by the plaintiff as an occupancy tenant. Now, before dealing with the evidence on the point, it is well to examine the principles upon which the doctrine of recognition rests. When all the cases are analysed it will be found that the doctrine is merely the application of the rules of acquiescence or waiver, preventing a party who has acquiesced in a state of things from turning round and alleging a different state of things.

It is not an artificial rule entitling a person to the status of an occupancy tenant on mere proof that money paid by him has found its way to the landlord's pocket; but, as the rule is founded on reason and good sense, it must be shown as a condition precedent for the applicability of the rule, that the landlord accepted the money as the rent of the holding and the person paying it as the occupier of the holding and as paying on his own account. [See the decision of the Judicial Committee in *Naba Kumari Debi* v. *Behari Lal Sen* (2).]

It is well established that parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them, and that, where acquiescence is relied on, it must be shown that the person acquiescing was aware of the matter in which he acquiesced, and of the effect of such acquiescence. Recognition, like waiver, must be an intentional act with knowledge.

In the case of *Mritunjoy* v. *Gopal Chunder* (3) the facts were these: the holding stood in the name of Joheeruddin and the landlord brought a rent suit against Joheeruddin and caused the holding to be sold in execution of the decree which he obtained for arrears of rent. The plaintiff thereupon brought a suit for recovery of the holding on the allegation that he and Kalee Kumar had purchased the holding before the rent suit in which the holding was sold and had been recognized

(2) (1907) 34 Cal. 902=11 C. W. N. 865=6 C. L. J. 122=4 A. L. J. 570=9 Bom. L. R. 846=17 M. L. J. 397 (P. C.).

(3) (1868) 10 W. R. 466=2 B. L. R. A. C. 131.

1896; and the plaintiff's case is that it was arranged between him and the outgoing proprietor Matuk Lal that, in lieu of interest due on the purchase-money which remained unpaid, he would pay Matuk Lal such income as he did receive from the conveyed property, namely, Rs. 500 as *ticca* rent, and Rs. 20 as rent of the occupancy holding of Cowsan Mian which had always been excluded from the *ticca*, Rs. 520 in all. Exhibit 7, according to the plaintiff sets out the arrangement between him and Matuk Lal, and shows that, after giving a deduction for Rs. 138 which, according to Exhibit 7, Matuk Lal had received from the tenants there was a sum of Rs. 382 due by the plaintiff to Matuk Lal which the plaintiff paid to Matuk Lal and for which he received the receipt Exhibit 7. Exhibit 8 purports to give a list of the *raiyats* from whom Rs. 138 was collected.

Now, as is usual in these cases, each side challenges the documents on which the other side relies. The plaintiff says that Exhibits I and K have been fabricated by the defendants in order to make it appear that Rs. 138 was paid by Mr. Hudson as rent of the occupancy holdings, and the defendants retort that Exhibits 7 and 8 have been fabricated by the plaintiff in order to make it appear that that sum of money was collected by Matuk Lal from the raiyats, of whom Mr. Hudson was not one.

Now the common case of the parties is that Rs. 138 was in fact collected by Matuk Lal at a time when he was in actual possession of the Zemindari, though he had executed a sale-deed in favour of the plaintiff. They differ as to the source from which the collection was made, the plaintiff asserting that it was made from tenants of whom Mr. Hudson was not one, the defendants insisting that it was made from Mr. Hudson himself.

Now the genuineness of Exhibit 7 has been proved beyond dispute by one of the witnesses examined on behalf of the defendants. Exhibit 8, however, stands on a different footing. It is a document which could be prepared at any time by any enterprising Zemindar and I agree with Mr. Manuk that we ought not to attach any importance to it. Now Exhibit 7 establishes that Matuk Lal had received Rs. 138 from the tenants. The word is used in the plural, *reyayanan gayaraya*, and certainly throws suspicion on the defendants' case that that sum of money was collected from Mr. Hudson himself. It conclusively establishes, in my opinion, that so far as Matuk Lal is concerned, he was not aware of the fact that the collection had been made from Mr. Hudson, though, it does not establish that Mr. Hudson in fact did not pay it.

I now come to Exhibit I, which after the exclusion Exhibits N and N-1 constitutes the only documentary evidence of receipt of rent by Matuk Lal from Mr. Hudson. It purports to be a rent receipt, dated the 18th Baisakh 1303 granted on behalf of Matuk Lal to Mr. Hudson in respect of *raiyati* lands. The receipt is for Rs. 138, and was actually signed by Khub Lal Patwari, nephew of Dwarka Lal Patwari.

The plaintiff asserts that this rent receipt has been fabricated by the defendants, and he relies upon Exhibit 7 containing the statement of Matuk Lal himself that he had collected Rs. 138 from the tenants. Now the defendants have undoubtedly put forward forged and fabricated documents in support of their case, Exhibit E, Exhibit D, Exhibits H, H-1, H 2 and H-3 and Exhibit N. I am bound, therefore, to look upon any document produced by the defendants with suspicion and require the strictest proof of its genuineness.

Now there are three points that at once arise in connection with this rent receipt. In the first place, according to what calculation and on what basis was Rs. 138 paid on the 18th Baisakh 1303? The defendants' own case is as shown by Exhibit R that the rent was payable in two kists of Rs. 98-15-0. Now every rent receipt ought to show in respect of which kist the rent is paid. The form of receipt as given in the Bengal Tenancy Act, Schedule II, requires the kist in respect of which the rent is paid to be stated.

So far as the form is concerned, Exhibit 1 complies with the provisions of the Bengal Tenancy Act, but it is remarkable that only the year is mentioned in that portion of the receipt where the kist in respect of which the rent was paid ought to have been stated. The reason is not far to seek; for, if the rent was payable in two kists, then the payment of Rs. 138 on the 18th Baisakh 1303 was certainly an over-

payment. Now, in making this point, I must make it clear that no portion of the rent alleged to have been paid on the 18th Baisakh was appropriated towards arrears of rent. The receipt, Exhibit I, shows that the whole of Rs. 138 was appropriated towards current rent. But then, there is this difficulty that the current rent could never exceed Rs. 98-15-0, if as Exhibit R shows, the rent was payable in two kists.

If it be argued that the statement as to the kists in Exhibit R was a mistake on the part of the pleader of the respondents, then the respondents are in a worse position; for if there be no agreement between the parties or established usage to the contrary, a money rent is payable, under Sec. 53 of the Bengal Tenancy Act, in four equal instalments falling due on the last day of each quarter of the agricultural year, and the current rent, in the present case, could never exceed Rs. 49-7-6. Now the only argument of Mr. Manuk is that, if he were forging a document, he would have forged it so as to make it consistent with the agreement between the parties as to the instalments in which the rent was payable. But there is an obvious weakness in the argument.

The one fact established beyond all reasonable doubt is that Matuk Lal did collect Rs. 138. The plaintiff was in possession of Exhibit 7, the receipt granted by Matuk Lal to him and of the lease Exhibit I in which it was recited that Rs. 138 had been collected by Matuk Lal. That being so, it was obviously impossible for him to make any other case but this that that Rs. 138 had been collected by Matuk Lal from him.

Secondly, the non-production of the books of account by the defendants ought to have an important bearing on the question. The defendants must have known that the genuineness of Exhibit I would be the critical question in the case, and it was possible for them to establish the payment of rent by them beyond all reasonable doubt by the production of their account-books. I wholly disbelieve the explanation which has been offered, namely, that the books of account are not in existence; and the inference which I draw from the non-production of the books is that, if produced, they would not support Exhibit I.

Lastly, I am suspicious of the person who actually signed the rent-receipt on behalf of Matuk Lal. Now the Bengal Tenancy Act requires a rent-receipt to be signed either by the landlord or his authorised agent. Exhibit I was in fact signed by Khub Lal, who described himself as "Patwari, nephew of Dwarka Lal Patwari."

Now it is admitted that Dwarka Lal was the only registered Patwari of Matuk Lal; but it is contended by Mr. Manuk that Khub Lal had authority from Matuk Lal to grant rent-receipts, and he relies upon the evidence of Prayag Dutt, Baldeo Lal and Bhootan Misser. Now all that Prayag Dutt says is that Khub Lal was the nephew of Dwarka Lal and that "he used to work with Dwarka Lal."

This does not establish that he was the authorised agent of Matuk Lal. It is one thing to work with a Patwari, and quite another thing to have the same power as a Patwari in relation to the landlord. Baldeo Lal is the son of Khub Lal and he says that his father collected rent for Matuk Lal up to 1304. That may be so; but the authority to collect rent does not carry with it the authority to grant rent receipts.

'The question is not one of technicality, but of substance; for it may well be that Khub Lal, as the nephew of Dwarka Lal, used to help Dwarka Lal in the matter of collection of rent just as many other persons must have helped Dwarka Lal. But an authorised agent for the purpose of granting rent-receipts differs widely from a collecting peon such as Khub Lal might have been. The last witness on this point is Bhootan Misser, who asserts that Khub Lal was the Patwari of the *putti* under Matuk Lal, but in cross-examination he admits that he has seen no Parwana authorising Khub Lal to collect rent for Matuk Lal.

In view of the admitted fact that Dwarka Lal was the registered Patwari of Matuk Lal, I altogether disbelieve this witness. Mr. Manuk also relied upon Exhibit N as showing that Khub Lal used to collect rent on behalf of Matuk Lal. I have no doubt that he did; but the important fact to remember is that Exhibit N was signed as a rent-receipt, not by Khub Lal, but by Matuk Lal himself. That document makes it quite clear that Khub Lal was in the position of a collecting peon, and I have no doubt on the evidence of Prayag Dutt and Baldeo Lal that that was his position. I have exa-

mined the entire evidence connected with Exhibit I with great anxiety and I have come to the conclusion that it is not a genuine document and ought not to be relied upon. I have no doubt whatever that it has been fabricated in order that the defendants may take advantage of the admitted fact that Matuk Lal had collected Rs. 138 from the tenants. I have also no doubt that they induced Khub Lal to make over the rent-receipt to them, just as later on they induced his son Baldeo Lal to produce the *jamabandis* Exhibits H, H-1, H-2 and H-3 in Court.

I have next to consider the effect of Exhibit I on the fortunes of the case, assuming it to be a genuine document. All that this document establishes is that Mr. Hudson paid Rs. 138 to Khub Lal and received a rent-receipt from Khub Lal. But the question is not whether Mr. Hudson paid Rs. 138 as the rent of the disputed lands, but whether a landlord having the right to recognize a trespasser as the tenant did recognize him as such. Exhibit 7 is very important from this point of view, for Matuk Lal's statement in Exhibit 7 is that he had realised Rs. 138 from the tenants.

Now with reference to Exhibit I two questions arise, first, whether Khub Lal had any authority to bind Matuk Lal by recognizing Mr. Hudson as a *raiyat*, assuming Khub Lal was the Patwari of Matuk Lal; and, secondly, whether Matuk Lal himself could have recognized Mr. Hudson as a *raiyat*. On the first qustion, the decisions of this Court are conclusive.

The late Chief Justice of this Court discussed the identical point in the case of *Wyatt* v. *Sheo Gobind Sahu* (6). In the course of his judgment, he said as follows:

"The position and duties of a Patwari are well-known. He is a poorly paid underling employed only to collect rents due to his master and to grant receipts for the same. His implied authority would extend to all subordinate acts which are necessary or incidental to his express authority.....In my opinion it is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager. I cannot accept the suggestion which has been made that it lay on the landlord in this case to prove that the Patwari had not authority to consent to the transfer. Landlords would be in a very difficult position if it were held that Patwaris and other underlings should be presumed till the contrary is shown to have the power to sign away their master's rights."

The same view was taken in the case of *Janki Sahu* v. *Thakur Run Bahadur Singh* (7). There is no injustice in the rule propounded in these cases, or, as was pointed out in *Russo-Chinese Bank* v. *Li Yau Sam*(8), "the authority being thus represented to be limited, the party prejudiced as notice, and should ascertain whether or not the act is authorised."

I am of opinion that Exhibit I did not bind Matuk Lal and does not bind the plaintiff.

But even if it be assumed that the receipt granted by Khub Lal bound Matuk Lal, I do not see how it can be argued that it also bound the plaintiff. It will be convenient, at this stage, to consider an argument which was suggested rather than formulated by Mr. Manuk, namely, that the title in the *tauzi* passed to the plaintiff, not on the 13th July 1895, the date of the conveyance, but on the 29th August 1896, the date on which the plaintiff paid the purchase-money to Matuk Lal, and that consequently the recognition of the transfer of the tenancy by Matuk Lal on the 16th April 1896, the date on which the rent-receipt was granted by Khub Lal to Mr. Hudson, completely bound the plaintiff.

The argument, in my opinion, proceeded upon a complete disregard of the essential distinction between a sale and a contract for sale, a distinction which it was the object of Section 54 of the Transfer of Property Act to recognize and preserve. Now it will be noticed that it is not an essential condition for a sale that the purchase-money should be paid; all that is necessary is that there should be a transfer of ownership in exchange

(6) (1916) 1 P. L. J. 414=36 I.C. 777=8 Pat. L. W. 88.

(7) (1917) 2 P. L. J. 231=39 I.C. 398=1 P.L.W. 658.

(8) (1910) A. C. 174=79 L. J. P. C. 60=26 T. L. R. 203.

for a price paid or promised or part paid and part promised and that the transaction, in the case of tangible immovable property of the value of one hundred rupees and upwards, should be evidenced by a registered instrument. Here the document of the 13th July 1895, purports on the face of it to create a transfer. It is a conveyance and not an agreement to convey, and it was executed, delivered and duly registered in accordance with law. What, then, is the position?"

I cannot do better than quote the weighty observation of Farran, C. J., in *Tatia* v. *Babaji* (9). "I am not, however," said the distinguished Chief Justice, "as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the Mofussil, perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to have been sufficiently borne in mind throughout the judgment."

In my opinion, the document operated as a conveyance on the date of its execution, unless indeed it could be shown by the vendor that there was a separate oral agreement constituting a condition precedent to the attaching of any obligation under the document. But such a separate oral agreement could be proved only by the vendor or his representative-in-interest.

For this proposition, the decision of the Judicial Committee in the case of *Achal Ram* v. *Kazim Hussain Khan* (10) is conclusive. The defendants are not the representatives-in-interest of Matuk Lal, and consequently it is not open to them to contend that, though the document was executed on the 13th July, 1895, and though it purported, on the face of it, to be a conveyance and not an agreement to convey, title, nevertheless, did not pass until the payment of the purchase-money by the plaintiff to Matuk Lal.

(9) (1896) 22 Bom. 176.

(10) (1905) 27 All. 271=32 I. A. 113=15 M. L. J. 197=9 C. W. N. 477=8 O. C. 155=8 Sar. 772 (P. C.).

But even if it be open to the defendants to raise the contention, I am of opinion that they have not shown that the intention of the parties was that title should not pass until the payment of the purchase-money. The only circumstance upon which the defendants rely is that the purchase-money was not paid till the 29th August 1896. But it has been held in a series of cases that that circumstance is wholly immaterial; see *Umedmal Motiram* v. *Davu* (11), *Sayaji* v. *Namdeo* (12), *Shib Lal* v. *Bhagwan Das* (13), *Baijnath Singh* v. *Paltu* (14), *Manogi Singh* v. *Sarat Lal Mahto* (15), *Nilmadhab Parhi* v. *Haram Prasad Parhi* (16).

On the other hand, Mr. Hudson certainly accepted the position that the plaintiff had a good and valid title to the *touzi* from the beginning of 1303 (8th September 1895). By the *kabuliyat* which Mr. Hudson executed in favour of the plaintiff, he agreed to be responsible to the plaintiff for the rent due to him by the tenants for the years 1303 and 1304; he could only have agreed to be so responsible on the hypothesis that the title had passed to the plaintiff on the execution of the conveyance.

It must follow, then, in the view which I take, that the alleged act of Matuk Lal in recognising Mr. Hudson as an occupancy tenant cannot operate to the prejudice of the plaintiff. Mr. Manuk, then, relies upon Section 60 of the Bengal Tenancy Act and argues that the only person who could give a valid receipt for the rent was Matuk Lal as he was admittedly the registered proprietor on the date when the rent receipt was granted. That may be so, but it is one thing to give a valid receipt for rent and quite another to recognize a person as having a right of occupancy in the disputed land.

The question only arises on the hypothesis that the defendant apart from the recognition has no title

(11) (1878) 2 Bom. 547.

(12) (1899) 23 Bom. 525=1 Bom. L. R. 5.

(13) (1888) 11 All. 244=(1889) A. W. N. 96.

(14) (1908) 30 All. 125=5 A. L. J 96=(1908) A. W. N. 38.

(15) (1901) 4 C. L. J. 334.

(16) (1913) 17 C. W. N. 1161=20 I. C. 325=19 C. L. J. 146.

to the lands in dispute. If he has, the question of recognition does not arise. The question is—can a person who has conveyed his proprietary interest to another person but whose name is still borne on the Collector's register by giving a rent receipt recognize a person as having a right of occupancy in the land who otherwise has no such right. I am of opinion that it is impossible to uphold the contention of Mr. Manuk. I must, therefore, hold that Exhibit I does not establish any recognition of the defendants' status by the plaintiff.

I now come to Exhibit K. This document purports to evidence an adjustment of account between Mr. Hudson and the *raiyats* to which the plaintiff is not a party. It describes the proprietor of the Factory as a cultivator and discloses the fact that Rs. 395-12-0 was the rent due by him to the landlord in respect of the years 1303 and 1304 out of which Rs. 138 had been paid by him. It is an *ex parte* statement by Mr. Hudson and stands on the same footing as Exhibit 8 which I have refused to take into consideration.

This document, in my opinion, must stand or fall with Exhibit I; and as I have come to the conclusion that Exhibit I is not a genuine document, I can place no reliance whatever on Exhibit K. But, apart from any other consideration, I do not see how this document establishes a case of recognition, since the statement made in Exhibit K is that of Mr. Hudson and not that of the plaintiff. It is elementary that an assertion by a tenant does not establish a case of recognition. It must be established that such an assertion was made to the knowledge of the landlord and that the landlord acquiesced in the assertion deliberately and with knowledge as to its effect.

Now, is there any proof that the plaintiff or his authorised agent was present at the transaction which resulted in Exhibit K, or that Exhibit K, was brought to the notice of the plaintiff or his authorised agent? The defendants have examined two witnesses in order to prove Exhibit K; Mr. E. H. Hudson whose writing appears on Exhibit K, and Gopal Lal, witness No. 11, who is alleged to have been present at the transaction. Now neither of them says that the plaintiff or his authorised agent was present when Exhibit K was drawn up and prepared and there is no evidence at all to suggest that Exhibit K was ever brought to the notice of the plaintiff or his authorised agent.

Now if in fact the plaintiff or his authorised agent was present at the transaction of Exhibit K or that Exhibit K had at any time been brought to the notice of the plaintiff, we would expect to have evidence on this point, since two witnesses, one of them being Mr. Hudson, have given evidence in connection with Exhibit K. It is, in my opinion, an inevitable inference from the failure on the part of the defendants to give any evidence on the point that the plaintiff was not present at the transaction which resulted in Exhibit K and that it was never brought to his notice.

It has been suggested, however, that Haji Gowsan was present at the transaction and that is sufficient to affect the plaintiff with notice of the contents of Exhibit K; but Haji Gowsan, as Exhibit 8 shows, was the *gomasta* of Matuk Lal, the outgoing proprietor and not the *gomasta* of the plaintiff. That being so, it is impossible to affect the plaintiff with notice of the contents of Exhibit K by the mere proof that Haji Gowsan was present at the transaction.

I now come to the lease. The opening words are very important and run as follows:—

"I have obtained *ticca patta* of the whole and entire 8 annas of the Collectorate partitioned *patti* including 36 *bighas* 7 *cottas* 11 *dhurs* of *zerait* land lying as per boundaries given below..... at a consolidated uniform annual *jama* of Rs. 600."

It is conceded that the 36 *bighas* 7 *cottas* 11 *dhurs* mentioned in the lease are the disputed lands in the suit; but it is contended by Mr. Manuk that the description of these lands as *zerait* lands does not conclude the defendants. I quite agree that the description does not conclude the defendants; but still it is evidence in the case and cannot be wholly ignored. *Bhugtu Singh* v. *Raghu Nath Sahai* (17).

But quite apart from any other consideration, it is difficult to see why these lands should be specially included in the *ticca* to be held by

(17) (1908) 13 C. W. N. 135=1 I. C. 571= 9 C. L. J. 15.

the *ticcadar* along with other lands at a *jama* of Rs. 600 per annum, if in fact the Factory had a pre-existing title to these lands which gave it the right to hold these lands as its *kasht* lands at a *jama* of Rs. 197-14-0 per year.

Now the reason for not concluding a tenant by his description of land as *zerait* land is this: that if in fact it were *raiyati* land, such a description, if it were conclusive on the point, might have the effect of barring in perpetuity the acquisition of an occupancy right in the land.

But the reason does not operate where the case of the tenant is, as it is here, that by the lease itself the landlord recognised the tenant, as a tenant having rights of occupancy in the land.

I think, therefore, that when we are considering, not whether the tenant can by lapse of time acquire a right of occupancy in the land but whether his status as an occupancy tenant has been recognised by the landlord by a series of transactions culminating in the lease itself, it is important to consider how the land has been described in the lease itself and whether there is a demise in respect of that land within the *jama* mentioned in the lease.

The next important passage in the lease runs as follows :—

"There was Rs. 1,150 on account of rent for 1303 and 1304 F. due by the tenants. Out of this Rs. 138 had already been received by the former proprietors, and the remaining sum of Rs. 1,012 was found justly payable to the landlords by the tenants and by me the *ticcadar* which I, the *ticcadar* have paid to them in cash and in one lump on getting receipts, and the landlords have brought it to their possession and appropriation, and I, the *ticcadar*, will get the same from the tenants of the village and from my own *tahsil*."

The passage is so important that it is necessary to consider it line by line to see if it establishes a case of recognition by the plaintiff. To start with, it certainly does not establish the case of the plaintiff that the Factory was in possession of the *Touzi* as *ticcadar* under the oral lease during the years 1303 and 1304; but I am not prepared to dismiss the evidence on this point of the plaintiff, Bhonnu Lal Chowdhury, as deliberately false. The Factory was in possession under a lease which expired in 1302. Meanwhile, Matuk Lal had sold his proprietary interest to the plaintiff. Documentary evidence conclusively establishes that negotiations were proceeding with the Factory for a fresh lease.

The position of the Factory as *ticcadar* for 1303 and 1304 was clearly recognised by the lease Exhibit I; for on no other hypothesis could the Factory make itself liable for the entire rent due to the landlord for 1303 and 1304 and recover those rents from the tenants. If their status as *ticcadars* for 1303 and 1304 has not been recognised by the plaintiff, then it would have been impossible for the Factory to realise the rents from the tenant in respect of those years.

The question, in my opinion, is not really one of fact, but an inference from certain admitted facts, and, though I agree that there was no definite oral lease in favour of the Factory in 1303, which entitled the Factory to retain their *ticcadari* interest for the years 1303 and 1304, I cannot ignore the arrangement that was arrived at between the plaintiff and the Factory by which the status of the Factory as *ticcadar* for the years 1303 and 1304 was clearly recognised by the plaintiff. Mr. Manuk, I think, is right in saying that when the Factory wanted to take a lease the plaintiff made this condition with the Factory:

"You make yourself liable to me for the rents due from the tenants for the years 1303 and 1304."

Such a condition was necessary, as the plaintiff was a new landlord and was not acquainted with the local conditions; whereas the Factory, having been the *ticcadar*, knew exactly what the position was. As a result of the arrangement between them, the Factory made itself primarily liable to the plaintiff for Rs. 1,012, irrespective of the question whether it could or could not collect it from the tenants, subject only to this that if the Factory suffered any loss in respect of the arrears for 1303, the plaintiff would be responsible therefor.

Now, is there anything in the passage cited which proves that the plaintiff accepted the position that the Factory was an occupancy tenant having succeeded to the interest of Nathu Lal in his occupancy holdings? For nothing short of that will do, as the cases to which I have referred establish. The document

recites that

"there was Rs. 1,150 on account of rent for 1303 and 1304 due by the tenants."

There is no suggestion here that Mr. Hudson was one of the tenants or that any portion of Rs. 1,150 was due from him. It was argued that it is this recital in the lease which establishes that Exhibit K was brought to the notice of the plaintiff. I am unable to accede to this argument. I quite agree that if it is a necessary inference from the recital that Rs. 1,150 on account of rent for 1303 and 1304 was due by the tenants to the plaintiff, that the plaintiff must have seen the contents of Exhibit K, then we must make that inference; but, in my opinion, the inference is not a necessary or an inevitable one.

It was possible for the defendants to establish by evidence that Exhibit K was brought to the notice of the plaintiff. They have examined two witnesses to prove Exhibit K, one of them being Mr. Hudson himself. It is in my opinion, very significant that neither of these two witnesses says that Exhibit K was ever brought to the notice of the plaintiff. It was argued before us that it was impossible for the plaintiff to assert that Rs. 1,150 was due from the tenants unless he had seen Exhibit K.

This, in my opinion, assumes the genuineness of Exhibit K. The argument of the plaintiff is that Exhibit K has been fabricated on the basis of this very recital in order to lend support to their case that a portion of Rs. 1,150 was due from them in respect of their occupancy holdings. Even if we accept the genuineness of Exhibit K, there is nothing in the recital to which I have referred to establish that Exhibit K must have been brought to the notice of the plaintiff.

The utmost that can be argued is that the recital is consistent with the case of the defendants on whom, it must be remembered, the *onus* lies; but then it is equally consistent with the case of the plaintiff.

Three different theories may be advanced as to how the plaintiff came to accept the position that Rs. 1,150 was due to him on account of rent for 1303 and 1304.

One of the theories undoubtedly is that he accepted the correctness of Exhibit K. Another theory may be that he accepted the statement made by Mr. Hudson on the point; and as the sum of Rs. 1,150, the rent said to be due to him from the tenants of 1303 and 1304, exceeded the *ticca* rent that was hitherto paid by the *ticcadar* to the landlord, which *ticca* rent was Rs. 500 per year, he accepted the statement without further question. Another theory may be that he accepted the figure from Matuk Lal who was the outgoing proprietor and who, as Exhibit 7 shows, gave the information that Rs. 138 had already been received by him as rent from the tenants.

The question, in my opinion, is one of entire speculation as to how the plaintiff accepted the position that Rs. 1,150 was due to him from the tenants for 1303 and 1304; and I must respectfully decline to be drawn into a speculation on this point. There is no direct proof that the plaintiff was aware of the contents of Exhibit K. The circumstances in connection with the recital, to which I have already referred, are equally consistent both with the case of the plaintiff as with the case of the defendants. In such circumstances, the defendants, on whom the *onus* of proof, as to recognition lies, must fail. The following passage from the judgment of Lord Halsbury, L. C., in the case of *Wakelin* v. *L. and S. W. Railway* (18), may be usefully cited in this connection:

"My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails. If in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; *Ei qu: affirmat non ei qui negat incumbit probatio.*"

In my opinion, therefore, it is not a necessary or an inevitable inference from the recital to which I have referred that the plaintiff was aware of the contents of Exhibit K. Then the lease recites that

"Rs. 138 had already been received by

(18) (1887) 12 A. C. 41=51 J. P. 404=56 L. J. Q. B. 229.

the former proprietors."

Here, again, there is no suggestion that the sum of money had been paid by Mr. Hudson and not by the tenants other than Mr. Hudson. In fact, Exhibit 7 shows that Matuk Lal had received that sum of money from *rayanana gharaya*, that is to say, from tenants (in the plural).

Then comes the critical passage on which Mr. Manuk strongly relies:

"and the remaining sum of Rs. 1,012 was found justly payable to the landlord by the tenants and by me the *ticcadar* which I, the *ticcadar*, have paid to them in cash and in one lump on getting receipts and I, the *ticcadar*, will get the same from the tenants of the village and from my own *tahvil*."

I confess that when the arrangement between the plaintiff and Mr. Hudson is remembered there is no difficulty in understanding what the passage means. Mr. Hudson was primarily liable to the plaintiff for Rs. 1,012, though he was entitled to recoup himself from the tenant; and the statement that the sum of Rs. 1,012 was found payable by the tenants and by him, the *ticcadar*, does not, in my opinion, carry with it an assertion that he was an occupancy tenant having a distinct liability for rent to the plaintiff in respect of the occupancy holdings.

Nor does the recital that Mr. Hudson would recover the sum paid by him to the plaintiff from the tenants of the village and from his own "*tahvil*" carry the case any further, for admittedly the loss would fall on his "*tahvil*" if he failed to recover any portion of the rent from the tenants. If I may appropriate the language of the learned Judges in the cases to which I have referred, there is nothing to shew in this passage what was the particular interest belonging to the defendant for he does not distinctly state what is the interest he distinctly claims.

Nor does it amount to more than this, that he paid the money or undertook to pay it in the names of the admitted *raiyats* along with his own. Recognition, as I have said before, is a deliberate act with knowledge of its effect; and there is, in my opinion, no injustice in declining to found recognition on the recitals, if they are consistent with the case made by the plaintiff. The passage, which I have already cited from the judgment of Lord Halsbury, L. C. supports this proposition, and the cases to which I have referred recognise the principle.

In my judgment, there is no assertion in these recitals that Mr. Hudson was an occupancy tenant having succeeded to the interest that belonged to Nathu Lal. In the second place, even if there was such an assertion and the plaintiff took away Rs. 1,012 paid by Mr. Hudson, there was no acceptance by the plaintiff of the position of Mr. Hudson as an occupancy tenant, since the plaintiff was entitled to that sum from Mr. Hudson and he had a right to take the money, to quote the language employed in *Robert Wilson* v. *Radha Dulari Kuer* (4):

"without regard to the manner in which or the source from which" Mr. Hudson had procured it.

The plaintiff had the right to assume that Mr. Hudson's admission of liability arose out of the agreement between him and Mr. Hudson preliminary to the lease, by which Mr. Hudson made himself liable for the entire rent due from the *raiyats* in respect of the years 1303 and 1304; and if he was entitled to the entire rent from Mr. Hudson, it clearly made no difference to him whether Mr. Hudson recouped himself from the tenants or paid it out of his own "*tahvil*."

In my opinion, the principles laid down in the cases to which I have referred, are equally applicable here, and I must hold that there is nothing in the recitals from which it can be legitimately inferred that the plaintiff recognised Mr. Hudson as an occupancy tenant.

But if there is nothing in the recitale to establish a case of recognition by ths plaintiff, there is in the concluding portion of the lease, a statement which, in my opinion, directly negatives the defendants' case. But as an ingenious attempt has been made to give an explanation to that passage by reference to those passages which precede it, it will be necessary for me to consider all these passages as a whole.

These passages are as follows:—

"If for the arrears due by the tenant I have to institute suits and if I obtain decrees and by enforcing them I put to sale their occupancy holdings and purchase them or if I acquire occupancy rights in any way, then, after the expiry of the term of *ticca* in my favour, I will on receipt of the sale-proceeds make over to the landlords the possession thereof without any objection whatever on my

part. I will give up possession of the lands as regards which I may acquire the right of occupancy and to this I will not raise any objection or contention whatever and if I do so, it will be deemed null and void and improper. Within the *mahal* I will not purchase the entire occupancy holding or any portion of it. If I do purchase, then, on the termination of the term hereof, it will pass into the possession of the landlords as their *zerait* land and to this I, the *ticcadar*, have not and shall not have any objection or contention whatever."

Now, stopping here for a moment, there can be no doubt whatever that the passages which I have cited refer to the acquisition of occupancy rights by Mr. Hudson either by private contract or in execution of rent-decrees that may be obtained by him as *ticcadar* against the tenants and the agreement between the parties expressly provides, what the law implies, that such occupancy rights belong to the landlord, and must be made over to the landlord on the expiry of the *ticca* lease.

Then occurred the passage on which reliance is placed by Mr. Hassan Imam on behalf of the plaintiff.

"In Assin 1312 F. S. I will cut down the indigo crops that may be standing on the *zerait* lands on payment of 10 annas instalment of rent, and without waiting for any notice, I will relinquish possession of the leasehold property, and in that circumstance I shall have no right to interfere in the leasehold property nor shall I have any right of occupancy in the *zerait* lands, etc."

Now, it will be remembered that the lease was for seven years and that it expired on the last day of 1311. But, in order to secure to Mr. Hudson the indigo crops grown on the disputed land, the lease provided that Mr. Hudson would have the right to retain possession of the disputed land up to Assin 1312 on the payment of ten annas instalment of the rent. Now, if this passage is referring to the lands in dispute, the condition is utterly inconsistent with the case set up by the defendants.

Now I quite understand that any condition in a cultivating lease which bars in perpetuity the acquisition of an occupancy right by the *raiyat* is wholly void and does not operate to prevent the accrual of such right. If the fact of the tenancy had been established independently of the lease, then I agree with Mr. Manuk that we ought to wholly ignore the covenant of surrender contained in the lease. But the whole argument of Mr. Manuk is I am quoting the exact words used by Mr. Manuk :—

"By this lease, the plaintiff adopted and ratified the transactions as evidenced by Exhibits I and K."

In other words, the lease itself amounts to a recognition of the occupancy rights of the defendants in the disputed lands. Now, if Mr. Manuk is relying upon the lease itself in support of his case as to recognition, it is surely relevant to ask, how is it that by the same lease the landlord is providing for the extension of the term up to Assin 1312 and stipulating for relinquishment of possession by Mr. Hudson on the expiry of the month of Assin 1312?

It is, in my opinion, open to the defendants to argue that the covenant as to relinquishment of possession is wholly void and inoperative, but then they must be prepared to establish their tenancy rights by independent evidence and without reference to the terms of the lease containing the covenant.

But it is not open to them to say, "we rely upon the lease to establish recognition of our tenancy rights by the landlord, and we ask you to hold that the covenant as to relinquishment of possession is wholly void and inoperative."

The same document cannot, in my opinion, constitute both recognition and non-recognition. In my opinion, in order to see whether there was a recognition by the lease itself, I ought to look at the whole lease, and when I do so, I find it impossible to hold that the plaintiff deliberately recognised,—for the act of recognition must be a deliberate one,—Mr. Hudson as an occupancy tenant, when I find in the same lease conditions which are incapable of explanation on the hypothesis that there was a recognition of the status of Mr. Hudson as an occupancy tenant by the plaintiff.

But then an ingenious argument was advanced by Mr. Manuk. The argument was that the clause containing the covenant for relinquishment of possession of the *zerait* lands was intended to apply and apply only to the lands that might be acquired during the subsistence of the lease either by private contract or in execution of rent decrees that might be

obtained by the *ticcadar* against the tenants.

With all respect, the argument is wholly inadmissible. In the first place the clauses as to acquisition of occupancy rights during the currency of the lease contain their own covenants for relinquishment of possession. In the second place, it is impossible to ignore the clear distinction made in the lease between occupancy rights and *zerait* lands. Occupancy rights are such rights as may be purchased by Mr. Hudson during the currency of the lease, and these Mr. Hudson agrees to surrender on the expiry of the lease. *Zerait* lands are also defined with sufficient clearness in the lease, and they comprise, and comprise only the 36 *bighas* 7 *cottas* 11 *dhurs* of land which are in dispute in this suit.

The opening lines of the lease make this clear and the Survey numbers and the area of the *zerait* lands are given in the schedule to comprise an area of 36 *bighas* 7 *cottas* 11 *dhurs* of land. In my opinion, the lease contains its own interpretation as to the term *zerait* lands, and by no possible construction of the lease can it be held that the term "*zerait* lands" used in the clause on which Mr. Hassan Imam relies means occupancy rights purchased from the tenants during the currency of the lease.

In my opinion, the lease Exhibit I, far from establishing the defendants' case, entirely destroys it; and I hold that there is no evidence in the record from which it can be legitimately inferred that the plaintiff recognized Mr. Hudson as an occupancy tenant in relation to the lands in dispute. It must follow that the defendant was bound to make over the disputed lands to the plaintiff on the expiry of the lease

I would allow the appeal, set aside the decree passed by the learned Subordinate Judge and give the plaintiff a decree for possession of the properties claimed in the suit with mesne profits and costs throughout.

Adami, J.:—It is not necessary for me to set out in detail either the facts of the case or the points for consideration for they have been most clearly explained in the judgments of my Lord the Chief Justice and Das, J.

Firstly, with regard to the acquisition of occupancy holdings by Nathu Lal the defence case was that Nathu Lal acquired the occupancy holdings, 36 *bighas* 7 *cottas* 11 *dhurs* in area, between 1863 and 1865 and obtained an express recognition of the transfer from the landlord at the end of 1865 by a letter, dated the 19th December, 1865 (Exhibit D). To support this case the letter and certain *jamabandis* are produced.

It is not proved that in the locality occupancy holdings are transferable without the consent of the landlord, and, in the first place, the question arises whether Sunder Sahay, the landlord, had authority to recognise the transfer. He was an eight annas sharer in the estates, but it is the defendants' case that previous to 1865 there had been a private partition of the estate and under it Sunder Sahay became sole landlord of the *Mauza* within which the 36 *bighas* 7 *cottas* 11 *dhurs* are situated, and thus had authority to sanction a transfer.

To support this case the defence rely on the headings of the *jamabandhis* (Exhibits H and H-1) for 1271 (1863—64) and 1273 (1865-1866) which described the *patti* as the private partitioned *patti* of Sunder Sahay. In 1868 there was a Collectorate partition of the estate on the application of all the share-holders and the *jamabandis* produced for the years 1869—1870 and 1873—1874 show that the *patti* had been partitioned off by Collectorate partition.

In any case it would be very surprising that, after all the co-sharers had agreed on a private partition, they should all apply for a Collectorate partition and be ready to undergo the trouble and expense it would entail, but when we find that there is reason to suspect the genuineness of the *jamabandis* whose headings are used to support the case of private partition, great doubt must arise whether there ever was a private partition, and, therefore whether Sunder Sahay in 1865 had authority to recognise a transfer of occupancy holdings.

The *jamabandis* are depended upon to support the case that Nathu Lal purchased occupancy holdings of an area of 35 *bighas* odd. A comparison of these papers with the *batwara khasra* (Exhibit 22) of 1868 throws the greatest doubt on their genuineness, and the *batwara khasra* is an admittedly genuine and authoritative document. My learned brother Das, J., has just dealt exhaustively with this point and it is not necessary to repeat the ground he sets forth; the conclusion must be that the *jamabandis*

cannot be relied on.

The *khasra* shows that the *jamabandis* do not contain correct entries of the amount of land held in occupancy right by Nathu Lal as proprietor of the Pirakpur Indigo Factory. Nathu Lal, according to the *khasra*, held 8 *bighas* 6 *cottas* 9½ *dhurs* only in occupancy right and Sunder Sahay held 30 *bighas* 12 *cottas* 13½ *dhurs* of *zerait* or *bakasht* lands. After the partition Nathu Lal took *ticca* lease of the village and most probably amalgamated the remaining *bakasht* land of Sunder Sahay, out of which 2 *bighas* 11 *cottas* 11½ *dhurs* had been let out to a tenant with his 8 *bighas* 6 *cottas* 9½ *dhurs* and treated the whole 36 *bighas* 7 *cottas* 11 *dhurs* as his tenancy lands.

There are other points in connection with the letter of recognition (Exhibit D) which gave rise to some suspicion and these taken with the clear untrustworthiness of the *jamabandis* make it impossible to decide either that Nathu Lal acquired occupancy rights in the 36 *bighas* 7 *cottas* 11 *dhurs* or that Sunder Sahay recognised the transfer of the rights.

It is next necessary to consider whether by the deed, dated the 23rd July 1890 (Exhibit 12) Nathu Lal conveyed to Mr. Henry William Hudson any occupancy rights held by him in connection with the lands in the village of Etwarpur Jainti.

Now it is quite plain that the deed was intended to convey and did convey the Pirakpur Indigo Concern and the schedules to the deed contained a list of all the villages and lands held by the Concern either in proprietary or *ticcadari* right, but there is no entry in the schedules of occupancy right in the 36 *bighas* now in dispute.

The deed states that the vendors

"have contracted with the purchaser for the sale to him of the Pirakpur Indigo Concern together with all the *Taluks*, *Mauzas*, villages, lands, hereditaments and premises of which the particulars are set forth in the schedule,"

and proceeds to

"grant, convey, transfer, assign, assure and confirm unto the purchaser, his heirs, executors, administrators and assigns all and every, the said *Taluks*, *Mauzas* and lands or parts or shares therein of which the particulars are contained in the schedule hereto and also all other, if any, the hereditaments and property belonging to or forming part of or held with the said *taluks*, *mauzas* and lands..... and all manner of rights, liberties, easements, privileges, profits, commodities, emoluments, advantages and appurtenances whatsoever to the said *Taluks*, *Mauzas*, land, Indigo Concern and hereditaments belonging to or in anywise appertaining or therewith usually held, used, occupied, possessed or enjoyed."

Now even if it be held that the words from "and all manner of rights" onwards refer to incorporeal hereditaments and a right of occupancy is a corporeal hereditament still the right of occupancy is a hereditament of the Indigo Concern held with or belonging to the *Mauza* or lands mentioned in the schedule.

As I have said, it is clear that the words of the deed show that the intention was to convey the Indigo Concern and every interest it possessed in the lands mentioned in the schedule, and I am of opinion that any right of occupancy possessed by the Concern in the scheduled lands passed to the purchasers under the deed.

But, as found above, there is no reliable evidence that at most anything more than about 8 *bighas* would pass, for though Nathu Lal may have claimed tenancy over 36 *bighas*, the evidence to show that his tenancy had been ever recognised is untrustworthy.

It may be that Nathu Lal gave Mr. Henry William Hudson to understand that 36 *bighas* odd were held in tenancy right, and Mr. Hudson may well have believed that he had that right in the said area but until 1897 there is no good evidence of any recognition of the right by the landlord and in fact when the Settlement operations were going on, no claim was put forward by the Factory to be recorded as occupancy *raiyat* of the 36 *bighas*.

The Settlement Record was finally published on the 22nd June 1896 and shows the 36 *bighas* to be *bakasht* of the Factory but not *zerait*." The rent-receipts, Exhibits N and N-1 purporting to have been granted in 1891 and 1892 and to show acceptance of rent in respect of a tenancy of the 36 *bighas* bear such evident signs of their having been tampered with that it would be unsafe to rely on them.

In 1895 the lease under which the Indigo Concern held the lands expired. Matuk Lal was then the proprietor of

the estate and was negotiating for its sale to the plaintiff. Mr. Richardson who seems to have been looking after the affairs of the Indigo Concern, seems to have sought for a renewal of the lease but Matuk Lal proposed that 2 *bighas* of the *zeriat* land should be excluded from the new *patta*: in his letter of the 19th June 1895 (Exhibit 3) Mr. Richardson protested that if the 2 *bighas* were excluded he would be a great loser.

It is significant that Mr. Richardson did not resist the exclusion on the ground that the Factory held the lands in occupancy right. This he would surely have done if he had been conscious of the existence of any such right.

The plaintiff purchased the estate from Matuk Lal on the 13th of July, 1895 and obtained title by virtue of the purchase but, as he did not pay the purchase-money till the 29th August 1896, he did not get possession till then. Meanwhile, Mr. Hudson was still in possession of the leasehold property though the lease had expired. During this period Rs. 138 was received by Matuk Lal in respect of rent of the property which was held by the Factory, and it appears that Matuk Lal, in agreement with the plaintiff, appropriated this in part payment of the consideration for the purchase by the plaintiff with interest.

The plaintiff's case, as shown in his own evidence, is that Matuk Lal himself collected the sum of Rs. 138 from the tenants, and that the Factory was, during the period from 1895 to 1897, holding under an oral lease from him. That the plaintiff's evidence is unreliable there can be no doubt for he has contradicted himself gravely. I can find no reason for distrusting the defendants' case that in order to find out how much rent was due from tenants of the lands covered by the expired lease. Mr. Hudson called the tenants together and in their presence and that of the *gomasta* of Matuk Lal drew up a *wasilbaki* account on the 5th April, 1897.

This account (Exhibit K) showed that the total rents due for the years 1303 and 1304 amounted to Rs. 1,150. The Pirakpur Factory was in that account shown to be a cultivating tenant of 36 *bighas* 7 *cottas* 11 *dhurs* at a rent of Rs. 197 a year or Rs. 395-12-0 for the two years out of which Rs. 138 had been paid. On the back of the document Mr. Hudson on 8th April, 1897 endorsed the fact that the total account amounted to Rs. 1,150 and that Rs. 1,012 was payable making allowance for the Rs. 138 already paid. The rent-receipt (Exhibit I) signed by Khub Lal Patwari shows that Rs. 138 were paid on the 18th Baisak 1303. I can see no reason to doubt the genuineness of Exhibit K and the receipt Exhibit I. In Exhibit K, Mr. Hudson claimed to be a *raiyat* in respect of the 36 *bighas*.

On the 19th April 1897, the plaintiff granted Mr. Hudson a lease,

"of the whole and entire 8 annas of the Collectorate partition *patti* including 36 *bighas* 7 *cottas* 11 *dhurs* of *zerait* land."

In the *Kabuliyat* (Exhibit I) the passage,

"there was Rs. 1,150 on account of rent for 1303 and 1304 F. S. due by the tenants, out of this Rs. 138 had already been received by the former proprietors, and the remaining sum of Rs. 1,012 was found justly payable to the landlord by the tenants and by me the *ticcadar*, which I the *ticcadar* have paid to them in cash and in one lump on getting receipts and the landlords have brought it to their possession, and appropriation, and I the *ticcadar* will get the same from the tenants and from my own *tahvil*, and as regards the arrear due by the tenants and by me the *ticcadar* for 1304 F. S. which I have paid to the landlords I shall have no objection. If as regards the arrears of 1303 F. S. I, the *ticcadar*, suffer any loss then the landlords will be responsible therefor."

is relied on by the defendants to show that the plaintiff was cognisant of Mr. Hudson's claim of *raiyati* right in the 36 *bighas* and recognised him as tenant. If this contention were to succeed, the plaintiff's case must fail. Stress is laid on the fact that the *kabuliyat* mentions that the sum of Rs. 1,150 is due by tenants and the amount still owing after the deduction of Rs. 138 is to be obtained from the tenants and from Mr. Hudson's own *tahvil*.

A recognition by a landlord to be effective in favour of a tenant must be clear and certain, but in the present instance it is difficult to reconcile the last portion of the *kabuliyat* with a recognition of occupancy rights. Mr. Hudson agreed that if, during the period of the lease, he acquired any occupancy holding, he would give it up on expiry of the lease and it would pass into the possession of the landlord as his

zerait.

The concluding passage of the lease runs:—

"I will cut down the indigo crops that may be standing on the *zerait* lands on payment of 10 annas instalment of rent and without waiting for any notice I will relinquish possession, of the leasehold property and in that circumstance I shall have no right to interfere in the leasehold property nor shall I have any right of occupancy in the *zerait* lands, etc."

On the face of it this concluding portion of the *kabuliyat* would seem to negative any recognition of an occupancy right but the undertaking is one which is commonly entered in *kabuliyat* and which, where occupancy rights exist, has no binding force under the law. At the same time if Mr. Hudson has been cognisant of any such right and was claiming it we would have expected express exception of the occupancy right he claimed.

It might well be that the *zerait* lands on which he was to be allowed to cut the indigo in Assar 1302 were understood by him to mean occupancy holding which he might acquire during the term of the lease and which were to revert to the landlord as *zerait* on its expiry, but it has to be remembered that the 36 *bighas* 7 *cottas* 11 *dhurs* had been described at the beginning of the *kabuliyat* as *zerait*. The general tenor of the document seems to be that all the leased lands were to be returned to the landlord and no occupancy right was to be retained or claimed.

How then can the passage relating to the Rs. 1,150 due by the tenants which I have cited above be explained, for it seems to show that the *wasilbaki*, Exhibit K, in which tenancy right was claimed was known and recognised by the plaintiff? The explanation seems to be this —the arrangement as to ascertaining the amount due from the tenants would appear to have been made between Mr. Hudson and Matuk Lal, and it was the latter's *gomasta* who attended to watch the landlord's interest; the payment of the Rs. 138 had been made to Matuk Lal, and it was from Matuk Lal that the plaintiff came to know that the Rs. 138 had been paid by "tenants, etc.," the receipt (Exhibit 7) dated the 29th August, 1896, shows this and it is signed by Matuk Lal.

There is every probability that at the time of the lease, the plaintiff merely inquired what sum had been found to be due from tenants and took Mr. Hudson's word for the Rs. 1,012 stated to be still due. It might be that the plaintiff understood the passage in the *kabuliyat* describing Mr. Hudson as one of the tenants to refer only to the period after expiry of the previous lease during which the Factory was cultivating the lands and paying direct to Matuk Lal.

There is no witness to show that the plaintiff ever saw Exhibit K, and neither Mr. Hudson nor Gopal Lal who depose as to the drawing up of Exhibit K say that either the plaintiff or any agent of his was present when Exhibit K was drawn up. It might be argued that any business man would have required fuller information as to what he was demising, but it has to be remembered that reference to the Record-of-Rights, which the plaintiff would probably make, would show him that Mr. Hudson was not recorded as having any occupancy holding in the leased property.

I am not satisfied, for the above reasons, that it can be held that it is proved that the plaintiff had notice of the contents of Exhibit K; or that, considering the rest of the document, a case of recognition by the plaintiff of Mr. Hudson's tenancy is made out.

Any recognition by Matuk Lal which may be inferred from the receipt of rent from Mr. Hudson and the attendance of his *gomasta* at the time when Exhibit K was prepared will be of no avail to the defendant for at that time Matuk Lal had sold the property and the title had passed from him. There is no suggestion or entry of any kind in Exhibit K to show that either the plaintiff or any one on his behalf had seen and examined the document.

The omission of any entry in the Record-of-Rights finally published in 1896 showing that the Factory had any occupancy right in the 36 *bighas* odd is a most important feature of the case, showing that during the settlement operations Mr. Hudson was laying no claim to occupancy right. It is almost impossible to believe that if he had been aware of any such right he would have neglected to press his claim before the Settlement Authorities.

It is urged that during the settlement operations Mr. Hudson was unable to look after his interests properly, but surely if the occupancy right was believed to exist some of the Factory *amla* would have brought the matter to the notice of the Settlement Officer or asked Mr. Hudson to press the claim.

I must hold, therefore, that the defendant has failed to prove that he holds occupancy rights in the 36 *bighas* 7 *cottas* 11 *dhurs* or that he has been recognised as a *raiyat* by the landlord; the appeal should accordingly succeed.

Appeal allowed.

A. I. R. 1922 Patna 651.

DAWSON MILLER, C. J. AND MULLICK, J.

Sital Prasad Ray and another—Plaintiffs-Appellants

v.

Asho Singh and another—Defendants-Respondents.

S. A. No. 524 of 1921, decided on 26th July, 1922, from the decision of Dist. J., Santhal Pergannas, dated 25th September, 1920.

(a) *Civil P.C., O. 34, R. 1 and O. 1, R. 9—Suit by prior mortgagee—Non-impleadment of puisne mortgagee is not fatal.*

In a suit by a prior mortgagee the puisne mortgagee is a proper but not a necessary party and the Court is competent to try the suit in his absence because his absence would in no case prejudice him nor is the suit liable to be dismissed because he is brought on record after the prescribed time.

(b) *Civil P.C., O. 1, R. 9 controls O. 34, R. 1.*

Provisions of O. 1, R. 9, are not subject to O. 34, R. 1. On the contrary O. 34, R. 1, is expressly declared to be subject to the provisions of the Code of which O. 1, R. 9 forms a part. All persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties but failure to add one or more such persons should not have the effect of defeating the suit if the Court in their absence can deal with the matters in controversy, so far as regards the rights and interests of the parties actually before it. Whether a person is a necessary party to the suit in the sense that it cannot proceed in his absence must depend upon whether the decision would necessarily affect the interests of that party. Two conditions must be satisfied in order that a defendant may be considered a necessary party namely, first, there must be a right to some relief against him in respect of the matter involved in the suit and, secondly, his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Necessary parties, defendants are those without whom no decree at all can be rendered: proper parties, defendants are those whose presence renders the decree more effectual; and all the proper parties are those in whose presence the decree becomes a complete determination of all the questions which can arise and of all the rights which are connected with the subject-matter of the controversy. A necessary party is a proper party but a proper party is not always a necessary party.

[P. 652, Cs. 1, 2; P. 653, C. 1.]

N. C. Sinha and *N. C. Ghosh*—for Appellants.

S. M. Mullick, Satya S. Bose and *N. N. Sen*—for Respondents.

Dawson Miller, C. J.:—The question for decision in this appeal is whether the suit is bad for non-joinder of parties. The appellants on the 12th April, 1919, instituted the suit to enforce a mortgage executed in favour of their father in 1906 by the father of the first two defendants. The mortgage-debt was repayable on the 13th April, 1907 and the limitation period for bringing a suit on the bond expired on the day the suit was instituted. The first two defendants as legal representatives of the deceased mortgagor were alone impleaded as defendants.

It subsequently transpired after the issues were framed that one Lachman Jha Narone held a subsequent mortgage on the same property executed in 1910 on which a sum of about Rs. 2,600 was due at the date of the suit. Lachman Jha Narone was subsequently added as a party but too late to save limitation and he pleads that the whole suit is bad for non-joinder of parties under O. 34, R. 1 of the Civil Procedure Code and should be dismissed.

[The judgment then stated that the trial Court dismissed the suit and the Court of appeal also confirmed the decree following 1 Pat. L. J. 468 and continued as follows:—]

The case of *Girwar Narain Mahton* v. *Mt. Makbunessa* (1) was a case in which the original mortgagees had died and the suit was instituted by 21 plaintiffs describing themselves as heirs and successors of the original mortgagees. It turned out, however, that there were other descendants of the original mortgagees who were jointly interested with the plaintiff in the mortgage and who had not been joined as parties up to the time when the case came up for trial, by which time their right to sue was barred by limitation. It was held that, as the mortgage was indivisible, if all the parties entitled to share in the money due on the mortgage were not upon the record, the suit must be dismissed in its entirety.

In the course of the judgment it was stated that O. 1, R. 9, of the Civil Procedure Code was subordinate to O. 34, R. 1, which makes it imperative that all persons interested in the mortgage security shall be joined as plaintiffs. As the absent plaintiffs in that case were undoubtedly necessary parties to enable the Court to pronounce a decree in the suit I have no doubt the

(1) (1916) 1 P.L.J. 468=36 I C. 542.

decision was right but the *dictum* that O. 1, R. 9 is subordinate to O. 34, R. 1, was not necessary for the determination of the suit and, in my opinion, this *dictum* is not justified upon a reference to the wording of those rules.

[O. 34, R. 1 was here quoted and the judgment proceeded as follows.]

The explanation appended to the rule provides that a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgagee. It is to be observed that the rule just quoted is subject to the provisions of the Code, and O. 1, R. 9, of the Code provides that " No suit shall be defeated by reason of the mis-joinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

The Court also has power under R. 10 of the same Order to add parties subject to the provisions of the Limitation Act. It would hardly seem accurate therefore to describe the provisions of O. 1, R. 9, as being subject to O. 34, R. 1. On the contrary, O. 34, R. 1, is expressly declared to be subject to the provisions of the Code of which O. 1, R. 9, forms a part. It seems to me that the combined effect of these rules in so far as mortgages are concerned is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties but that failure to add one or more such persons should not have the effect of defeating the suit if the Court in their absence can deal with the matters in controversy, so far as regards the rights and interests of the parties actually before it.

Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. It is a fundamental rule of procedure that the Court cannot, by its decree, affect the rights of those who are not parties to the suit. If therefore no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed.

If, however, the rights of the parties actually before it can be determined in the suit leaving the rights and interests of others unaffected, I can see no reason why, even if other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present.

The opinion which has sometimes been expressed that the provisions of O. 1, R. 9, are subject to O. 34, R. 1, has no doubt been to some extent induced by the fact that the proviso relating to notice in the repealed S. 85 of the Transfer of Property Act has not been re-enacted in O. 34, R. 1, of the Code of 1908 which now supersedes S. 85 of the earlier Act. The proviso appears to have created an impression, which in some cases has been given effect to, that where a plaintiff had no notice of the interest of puisne mortgagees or others interested in the mortgaged property and has not joined them they might nevertheless be bound by a decree obtained against the mortgagor in their absence.

To obviate the possibility of such an error the words of the old section have not been re-enacted as, presumably, they were considered unnecessary. This does not, however, in my opinion, lead to the conclusion that a suit is necessarily bad if certain persons who ought to be joined in order to enable the Court to dispose of all questions affecting the rights of the persons interested in the property are not joined.

Whether a person is a necessary party to the suit in the sense that it cannot proceed in his absence must depend upon whether the decision would necessarily affect the interests of that party. An instance of such a case arises under S. 45 of the Contract Act where the interests of joint promisees are involved. In that case a claim cannot be enforced by one alone of the promisees, all of whom are jointly interested.

So also in the case of joint mortgagees one alone cannot ordinarily maintain a suit on the mortgage which is one and indivisible. The suit must be brought to enforce the mortgage as a whole or not at all. It cannot be enforced piecemeal. The whole interest must therefore be represented as the Court cannot, by its decree, bind those who are not parties. Similarly a suit to recover property against co-sharers all of whom are jointly interested cannot proceed in the absence of one or more of them. This principle is of course subject to the rule that a person may, in certain cases, sue,